

June 5, 2020

VIA U.S. MAIL AND EMAIL

Mayor Mary-Ann Baldwin
Raleigh City Council
Raleigh Municipal Building
2nd Floor
222 W. Hargett St.
Raleigh, NC 27601



Re: Raleigh Curfew

Dear Mayor Baldwin and Raleigh City Councilmembers:

P.O. Box 28004
Raleigh, NC 27611
(919) 834-3466
acluofnc.org

Leah Hamilton
President

Chantal Stevens
Interim Executive Director

We write to raise legal concerns about Raleigh's curfew, already in effect for four days and currently set to be extended through Sunday, June 7, 2020. This curfew, which covers the entire city for seven hours each night, is an overbroad restraint on speech and the right to petition, and invites arbitrary and discriminatory enforcement against communities of color, in violation of the U.S. and North Carolina Constitutions.

I. The Curfew Violates the First Amendment and Article I, Sec. 12 of the North Carolina Constitution.

The Raleigh curfew suppressing all political protest after 10 p.m. violates the First Amendment and Art. I, Sec. 12 of the North Carolina Constitution. Its blanket restriction on all movement within the city limits

during those hours is not narrowly tailored and also violates the Constitution's protection for freedom of movement. Overly broad curfews imposed by local leaders indefinitely suspend free speech at a time when people are taking to the streets to exercise their constitutional rights to protest racially-discriminatory police violence. Notwithstanding the exemptions, the curfew forbids expressive activity at the core of the First Amendment. It is well established that, as a general rule, the Government 'may not suppress lawful speech as the means to suppress unlawful speech.'" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017). Put simply, the curfew's suppression of protests and demonstrations occurring after 10 p.m. anywhere within city limits in the name of preventing potential crimes that have yet to take place, violates the First Amendment.

Such a proclamation is overbroad under the First Amendment if "'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010). In order to represent the least restrictive means to advance the city's compelling interests, a curfew must have a "narrow scope and comprehensive list of exceptions", *Schleifer by Schleifer v. City of Charlottesville*, 159 F. 3d 843, 852 (4th. Cir. 1998). This curfew's exemptions are not narrowly tailored to further the city's legitimate interest in maintaining public safety and do not allow for ample alternative channels of communication. Instead, a curfew that covers the entire city during a substantial portion of time has the effect of prohibiting a vast array of lawful speech and constitutionally protected conduct completely unrelated to the planning or commission of crimes. This curfew is not narrowly tailored to the government's legitimate interest, and is unconstitutionally overbroad under the First Amendment.

The right to assembly and petition under Art. I, Sec. 12 of the North Carolina Constitution, which duplicates "the right to freedom of association embodied within our federal Constitution",

Feltman v. City of Wilson, 767 S.E.2d 615, 620 (N.C. Ct. App. 2014), is also being violated by this curfew.

II. The Curfew Violates Due Process and Equal Protections under both the U.S. and North Carolina Constitutions.

Both the Fifth and Fourteenth Amendments prohibit deprivations of liberty without “due process.” Due process requires that its most essential element, 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). “A statute is unconstitutionally vague under the Due Process Clause if it ‘fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.’” *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012).

By covering a large swath of lawful conduct, this curfew is overbroad, and also violates the fundamental rights to free movement and access to public spaces. The Due Process Clause of the Fourteenth Amendment protects the “freedom to loiter for innocent purposes” and to “remove from one place to another according to inclination.” *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (plurality opinion). “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). *See also Smith v. Hill*, 285 F.Supp. 556, 558 (E.D.N.C. 1968) (finding that vagrancy ordinance unconstitutionally restrained freedom of movement as well as being unconstitutionally vague and overly broad). This overbroad curfew applies to all sorts of innocuous, basic conduct such as shopping or taking a walk, and effectively

places all residents, with extremely limited exceptions, under house arrest conditions for seven hours a day. While the government may impose restrictions on this right, any restrictions must both serve a compelling state interest and be narrowly tailored to accomplish that objective.

The Raleigh curfew also violates the right of individuals to equal protection and due process under the law safeguarded under Art. I, Sec. 19 of the North Carolina Constitution. *See White v. Pate*, 308 N.C. 759, 765, 757 S.E.2d 302, 304 (1983); *Patmore v. Chapel Hill*, 233 N.C. App. 133, 137, 757 S.E.2d 302, 304 (2014) (noting parallel nature of state and federal equal protection guarantees and applicable legal frameworks). However, whereas the federal constitution provides only the “floor[,]” of minimum protections, the North Carolina Constitution goes beyond to “frequently give citizens . . . basic rights in addition to those guaranteed by the United States Constitution.” *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998); *see also Corum v. Univ. of N. Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (“We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.”). Therefore, the curfew also violates protections safeguarded under the North Carolina Constitution.

This curfew, ridden by ambiguity, including regarding a number of changing exemptions and its temporal scope, which has been updated mere hours before going into effect, fails to provide people with fair notice of its requirements and thus violates due process protections. By making it unlawful to be present on public streets anywhere in the city, with limited exceptions, the curfew gives police too much discretion over whom to arrest and will likely lead to selective enforcement against communities of color and harassment of people who are experiencing homelessness. Combined with the aggressive show of military force and the troubling accounts of police using

tear gas, batons, and rubber bullets against peaceful protesters we are witnessing around the country and in North Carolina, this curfew enables Raleigh police to reenact the violence and brutality that are at the root of the protests. At a time when we need protest, discussion and debate more than ever, Raleigh should be taking steps to facilitate this constitutionally protected and most fundamental of American values rather than curtailing it.

We call on you to rescind the second amended emergency proclamation declaring a city-wide curfew and restore to city residents the full protections secured by the Constitution and other laws. Should you wish to discuss this matter further, please contact us at the email addresses listed below.

Sincerely,

/s/ Kristi Graunke

Kristi Graunke
Legal Director
(kgraunke@acluofnc.org)

/s/ Irena Como

Irena Como
Senior Staff Attorney
(icom@acluofnc.org)

cc: Robin Tatum, Raleigh City Attorney