



**Delaware**

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VIA EMAIL ONLY

March 3, 2026

**Kathleen Jennings**  
**Delaware Department of Justice**  
**Carvel State Building**  
**820 N. French St.**  
**Wilmington, DE 19801**

Dear Attorney General Jennings:

It has come to our attention that the Delaware Department of Justice has drafted revisions to the Delaware loitering and solicitation statutes. Although we understand the goal in drafting these laws, the revisions do not remedy the numerous constitutional infirmities in the laws, which we set forth in detail in this letter.

### **Relevant Facts**

On July 7, 2023, The ACLU of Delaware filed a complaint against you and the City of Wilmington for the unconstitutional enforcement of Delaware's Loitering Statute (11 *Del. C.* §1321) and Solicitation Statute (21 *Del. C.* §4147). *Wilmington Food Not Bombs v. Jennings*, U.S. Dist. Ct. D. Del. Case No. 1:23-cv-736-MN. The lawsuit detailed numerous constitutional violations stemming from the State's enforcement of the statutes, and requested an injunction to prevent their enforcement.

On October 18, 2024, you responded to the ACLU-DE's concerns with a promise to discontinue enforcement of the statutes until they were amended to address their unconstitutionality. You also instructed every municipality not to enforce the state statutes.

Although the DOJ clearly intends the language of the new bill to address some of the constitutional concerns raised in the lawsuit, the new bill is still constitutionally problematic.

### **The State has Not Shown the Necessity for Banning People from Traffic Medians**

First and foremost, the definitions in the traffic medians portion of the bill are ambiguous and opaque. The bill does not define what it means by “highway,” and appears to use that word interchangeably with “roadway.” The definition of “traffic median” in the bill is also not what people ordinarily think of as medians. Merriam-Webster defines it as “a paved or planted strip dividing a highway into lanes according to direction of travel.” *Median Strip, Merriam-Webster* <https://www.merriam-webster.com/dictionary/median%20strip> (last visited Mar. 2, 2026). But the bill instead defines the median as any area that’s in between two lanes of traffic, which is far broader than the traditional definition.

Regardless, the State has not shown a significant government interest in prohibiting people from sitting, standing, or remaining on a median. Although the Third Circuit has not yet addressed this issue, other federal circuit courts have. The Tenth Circuit considered a city ordinance that prohibited virtually the exact same conduct at issue here. *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1211 (10th Cir. 2021). Although initially contested, the parties ultimately agreed and the Court recognized that 1) the ordinance impacted conduct protected by the First Amendment, 2) traffic medians are traditional public fora, and 3) the restrictions were content-neutral time, place, and manner restrictions. *Id.* at 1217-20. As such, under intermediate scrutiny, the city had the burden to prove that the ordinance was narrowly tailored to achieve a significant government interest and left open ample alternative channels of communication. *Id.* at 1220.

The Court then recognized that, although the city had a strong interest in pedestrian safety, it could not use that amorphous interest to justify the specific ordinance at issue. *Id.* at 1226. Instead, the city was required to specifically define the harms as something along the lines of “accidents caused by people standing on medians” and then needed to show that the ordinance would alleviate that harm in a direct and material way. *Id.* at 1227. To satisfy this narrow tailoring requirement, the city was required to show on-the-ground data, not theoretical opinions based on roadway designs. *Id.* at 1229. The evidence showed that only 4 out of 900 total accidents involved people standing on medians, which was wholly insufficient to

justify the ordinance as narrowly tailored. *Id.* at 1233. Generalized national statistics and local anecdotes do not meet the burden. *Id.* at 1235.

To our knowledge, the State has not presented any evidence that satisfies intermediate scrutiny, and we seriously doubt that the State will ever be able to provide such evidence. Delaware certainly has an interest in protecting both pedestrian and driver safety. But prohibiting people from standing on all medians in the State will not achieve that goal. If the state has any evidence showing that a serious number of accidents and injuries in Delaware have been caused by people standing on medians, please forward it to us and we'll be happy to review it. Without such evidence, though, the proposed law is unconstitutional on its face.

### **The Loitering Bill is Unconstitutionally Vague**

In order to pass constitutional muster, the loitering bill must provide the public with fair notice of precisely which conduct is prohibited. It does not do so. Although the new bill improves upon the former statute, the new bill is still unconstitutionally vague.

Primarily, the bill prohibits sitting, standing, or remaining, “in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant a reasonable apprehension or immediate concern for the safety of persons or property in the vicinity.” § 1321(a)(3). There is no definition or indication of any kind about what would constitute standing, sitting, or remaining, “in a place at a time or in a manner unusual for law-abiding citizens.” Nor is there any definition (or indication of any kind) about what, “warrant[s] a reasonable apprehension or immediate concern for the safety of persons or property in the vicinity.” Under a plain reading of the bill, a person having a medical emergency could be prosecuted for loitering if they exhibit any behavior a police officer finds unusual—somebody experiencing serious hypoglycemia, a stroke, etc. That situation could easily involve an individual behaving in an unusual manner, and if the person cannot provide identification or explanation (perhaps because of the medical emergency), they would be subject to prosecution under the bill. Given ample social science research on implicit bias, people with disabilities, people of color, immigrants, and LGBTQ+ people are all disproportionately more likely to be perceived as acting in an “unusual” manner, which results in problematic profiling and discrimination practices.

The bill provides a defense only when the individual offers a “reasonable explanation” for their conduct, but there is no indication of what might be

reasonable or unreasonable, leaving unfettered discretion to police officers, and inviting the precise sort of arbitrary enforcement that the Supreme Court of the United States has found clearly unconstitutional. *See, e.g., Chicago v. Morales*, 527 U.S. 41, 56-64. There is also a defense that can apply if the officer did not believe the explanation at the time, but that does not save law-abiding people from facing the embarrassment and expense of being arrested for a crime that they did not commit.

The Supreme Court has stated in no uncertain terms that, “the freedom to loiter for innocent purposes” is part of the liberty interest protected by the due process clause of the Fifth and Fourteenth Amendments. *Morales*, 527 U.S. at 42. Innocent behavior cannot be criminalized. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163-64 (1972). Our concern is that the bill does exactly that.

### **The Bill Violates State and Federal Constitutional Prohibitions on Excessive Fines and Fees**

The bill includes fines and fees associated with the act of “loitering,” and therefore implicates the prohibition against excessive fines and fees included in the Eighth Amendment to the U.S. Constitution, as well as the corresponding protection in the Delaware State Constitution. U.S. const., Amend. VIII; Del. Const. Art. I § 11. When fees and fines are grossly disproportionate to the gravity of the offense, they run afoul of the excessive fines clause of the Constitution. *United States v. Bajakajian*, 524 U.S. 321, 324 (1998) (holding that the Eighth Amendment prohibits criminal prosecution of the imposition of fines and fees that are grossly disproportionate to the gravity of the offense).

The bill deems loitering to be a “violation.” § 1321(b). A fine for a violation can be up to \$345 for a first offense, \$690 for a second offense, and \$1150 for all future offenses within five years. 11 *Del. C.* § 4207(a). Plus, Level 1 probation for up to one year can be imposed. *Id.* at § 4207(b). These fines are likely unconstitutionally excessive, particularly if such fines are disproportionately or discriminatorily levied against homeless individuals who cannot obtain shelter in the State or otherwise have an inability to pay.

### **The Bill Interferes with the Constitutionally Protected Right to Travel**

The Supreme Court has held that the right to travel is “fundamental” and “elementary.” *U.S. v. Guest*, 383 U.S. 745, 757-58 (1966). Any ordinance that restricts this fundamental right is “presumptively invidious” and will be invalid

unless the government can prove the restriction “has been precisely tailored to serve a compelling governmental interest.” *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *see also Toomer v. Witsell*, 334 U.S. 385, 395 (1948). The bill fails to acknowledge and protect this fundamental right.

In *Pottinger v. Miami*, the Court held a city ordinance violated the right to travel by (1) allowing people to be arrested for sleeping, standing, or congregating in public places, (2) having “the effect of preventing homeless people from coming into the city,” (3) expelling those already present, and (4) “significantly burdening their freedom of movement within the state.” 810 F.Supp. 1551, 1580 (S.D. Fla. 1992) (citing *Memorial Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 257 (1974)).

The bill does not have any carve outs for these constitutionally protected activities. It prohibits people from doing the very same things that courts have held are protected by the constitutional right to travel, such as sitting, standing and congregating in public. But the bill is marred by a more pernicious constitutional problem: it essentially prohibits people facing homelessness from existing in the state. No doubt such people will need to sit, stand, and sleep in public spaces, not least because most shelters are closed during daytime hours due to budgetary and staffing constraints. Under this bill, they can be arrested any time an officer subjectively decides that they are acting “in a manner not usual for law abiding citizens.” The constitution does not permit the state to prohibit people from existing in public.

### **The Bill Violates the Fourth Amendment’s Prohibition Against Warrantless Searches and Seizures**

Warrantless searches and seizures are prohibited by the U.S. and Delaware constitutions. U.S. const. amend. IV; Del. Const., Art. I, § 6.

The Supreme Court of Delaware has explained:

While the police may properly employ hunches to investigate, more is required to detain a citizen in a public place. Put another way, standing alone, an officer’s subjective impressions or hunches are insufficient for a stop. Similarly, activity such as leaving the scene upon the approach, or the sighting, of a police officer or the refusal to cooperate with an officer who initiates an encounter cannot be the sole grounds constituting reasonable suspicion.

*Lopez-Vazquez v. State*, 956 A.2d 1280, 1288-89 (Del. 2008).

The bill informs officers that they can detain a person who flees, without asking for a reasonable explanation of their behavior. § 1321(a)(3). This action clearly violates *Lopez-Vazquez*, because it allows officers to rely on subjective impressions or hunches to stop a person who is “loitering.”

### **Conclusion**

For all of the reasons explained in this letter, the bill is unconstitutional under both the U.S. and the Delaware constitutions. We strongly urge you not to introduce this bill in the General Assembly.

Please don't hesitate to contact me if you wish to discuss this matter.

Sincerely,



Jason H. Beehler  
Attorney, Interim Legal Director

**CC: Members of the Delaware General Assembly (email only)**  
**Kristine Iannelli (email only)**