ACLU Delaware

VIA ELECTRONIC MAIL

June 12, 2020

Mayor Robin Christiansen
City of Dover
P.O. Box 475
Dover, DE 19903-0475
rchristiansen@dover.de.us

Re: Dover Curfew

Dear Mr. Christiansen:

I understand the City of Dover adopted a curfew on May 31, 2020, which is in effect "until further notice," despite the lack of any ongoing imminent danger in Dover that is not otherwise addressable through more narrowly tailored means. I write to urge the City not to continue or renew such a curfew.

In the absence of a genuine "imminent danger of suffering civil disturbance, disorder, riot, or other occurrence which shall endanger the lives, safety, health, or property of the public," a curfew is unauthorized by City code. Dover Municipal Code § 38-81. No such threat is imminent in Dover. The City's curfew announcement acknowledged no justification for finding "imminent danger" in Dover.

The curfew also violates the First Amendment, if not other constitutional rights. Now more than ever, 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).

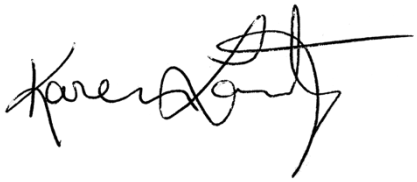
The city's generalized concern for violence is not properly addressed by this curfew. "The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct. *Collins v. Jordan*, 110 F.3d 1363, 1371–72 (9th Cir. 1996). If 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), the same is true for a curfew, which can only be authorized, if at all, when no other means are available to prevent actual or imminent mass violence.

As traditional public forums, public streets and "sidewalks are uniquely suitable for public gatherings and the expression of political or social opinion," and "the government must bear an extraordinarily heavy burden to regulate speech in such locales," especially "core First Amendment speech." *Long Beach Area Peace Network v. City of Long Beach,* 574 F.3d 1011, 1022 (9th Cir. 2009) (citation and quotation marks omitted). "Consistent with the traditionally open character of public streets and sidewalks," the Supreme Court has "held that the government's ability to restrict speech in such locations is very limited." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (citation and quotation marks omitted). The City may "enforce reasonable time, place, and manner regulations" only if they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 177 (1983).

Though apparently content neutral on its face, the curfew is not narrowly tailored to any significant interests in public safety, and thus it violates the First Amendment regardless of whether alternative times for protest are available. A curfew may be "easy to enforce," but "the prime objective of the First Amendment is not efficiency." *McCullen*, 573 U.S. at 495. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* If needed, the City may enforce "other laws at its disposal that would allow it to achieve its stated interests" without a curfew unjustified by actual or imminent mass violence. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011). Therefore, absent actual or imminent mass violence, "[o]bvious, less burdensome means for achieving the City'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 City's interests, the curfew "is not narrowly tailored" to serve those interests. *Comite de Jornaleros*, 657 F.3d at 950.

Thank you for your time and consideration of these issues. Please let me know if you have any questions.

Sincerely,



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