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Sent via email: Robert.Tracy@cj.state.de.us

February 24, 2021

RE: Protesters, Policing, and the First Amendment

Chief Tracy:

It has come to our attention that the Wilmington Police Department has engaged in a practice of blocking protesters from accessing Market Street. Our hope is that this letter will better enable you and your department to prepare for any protests within our community without unconstitutionally limiting protected speech in public spaces.



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Background

The News Journal reported on November 30, 2020, that “Wilmington police officers have denied protesters access to Market Street” and that “*The News Journal* has been present for at least five protests where Wilmington’s officers have blocked Market Street between Rodney Square and Fourth Street.”¹ *The News Journal* further reported that “no specific [police department] policy is in place to protect that area of Market Street,” and that the Mayor’s office “has not directed the deployment or management of police officers to that stretch of roadway or elsewhere.”

The First Amendment

Organizing a protest on a public sidewalk is political speech that is guaranteed the highest level of protection.² Even when a protest is viewed by some as disruptive or makes people uncomfortable, the free

¹ <https://www.delawareonline.com/story/news/2020/11/30/protesters-wilmington-say-their-rights-violated-when-police-block-market-street-delaware-protests/5926086002/>

² See, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011); *Buckley v. American Const. Law Found.*, 525 U.S. 182, 186-87 (1999); *Carey v. Brown*, 447 U.S. 455, 467 (1980).



speech is still protected. Indeed, this protected speech may “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.”³ Because sidewalks constitute a “traditional public fora” that are used for assembly and general communication, the burden is on the government to justify a restriction on speech that occurs on sidewalks.⁴ The Supreme Court has held that “the government’s ability to restrict speech in such locations is very limited.”⁵

While the City may enforce reasonable time, place, and manner regulations for protests that occur on sidewalks, such restrictions must be content-neutral,⁶ narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.⁷

Whether a restriction is sufficiently narrowly tailored depends on the form the restriction takes. A police directive, which represents an exercise of executive authority in the absence of democratic involvement, requires more vigilant judicial oversight.⁸ Such restrictions are subjected to heightened scrutiny and must “burden no more speech than necessary”—that is, the police directive must be the least restrictive means of protecting a specific government interest.⁹ Any plausible alternative to protect the government interest that would limit less speech demonstrates that the police directive is too burdensome. To be clear, an ad-hoc practice of limiting all protester activities on several blocks of Market Street by blocking access to protestors using public sidewalks burdens protected speech far more than is necessary to advance any conceivable government interest.

³ *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (citation and quotation marks omitted).

⁴ *United States v. Marcavage*, 609 F.3d 264, 275, 279 (3d Cir. 2010).

⁵ *McCullen v. Coakley*, 573 U.S. 464, 465 (2014) (citation and quotation marks omitted).

⁶ For purposes of this letter, we do not address whether the City’s restrictions on protesters carrying a “Black Lives Matter” flag was content-neutral. “As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks and citation omitted).

⁷ *United States v. Grace*, 461 U.S. 171, 177 (1983).

⁸ *See, e.g., McTernan v. City of York, PA*, 564 F.3d 636, 655 (3d Cir. 2009) (holding that a police directive limiting speech was subject to heightened scrutiny).

⁹ *Id.*

Instead, when the government engages in speech suppression, there must be “a close fit between ends and means” in order to prevent the government from too readily sacrificing speech for efficiency.¹⁰ That is, there must be an identifiable government interest and that interest must be protected by a method designed specifically to protect that interest. To the extent there may be valid complaints and safety concerns about the protests, the City has readily available alternatives to forcing the protest to relocate. If individuals act unlawfully by obstructing traffic or otherwise, they may be warned or cited for violating applicable laws. Therefore, “there were other ways the government could have attained its objectives that would have been at least as effective.”¹¹ The availability of multiple obvious alternatives destroys any claim that the WPD’s decision to block access to Market Street was the least restrictive means of ensuring public safety.¹²

Likewise, it is no answer to suggest that individuals suffer no First Amendment violation because they may protest on other streets. Market Street holds a cultural and political significance for many Wilmington residents, making it an important landmark for advocates wishing to engage in protected speech activities. The Supreme Court long ago rejected any contention that “liberty of expression” in a public forum may necessarily be “abridged on the plea that it may be exercised in some other place.”¹³ The First Amendment protects the right of speakers—not the government—to decide where and how to speak on a

¹⁰ *Id.* at 486. (citation and quotation marks omitted). *McCullen* is instructive. There, the Supreme Court struck down restrictions effectively banning speech on the sidewalk because they were not “narrowly tailored to serve a significant governmental interest.” *Id.* Although the Court recognized legitimate interests in “ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, [and] protecting property rights,” it held the restrictions “burden substantially more speech than necessary to achieve the [government’s] asserted interests.” *Id.* Any “public safety risk created when protestors obstruct driveways” or trespass on private property can “readily be addressed through existing local ordinances” or “generic criminal statutes” forbidding obstruction or trespass. *Id.* at 466. If protestors inadvertently block access “simply by gathering in large numbers,” the government “could address that problem through more targeted means” than banning speech. *Id.* at 493. Those principles apply here and demonstrate that the City “has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.” *Id.* at 494.

¹¹ *Marcavage*, 609 F.3d at 290.

¹² *Id.*

¹³ *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).



public sidewalk, unless the government meets the strict test for restricting speech in a public forum, which is not the case here.¹⁴ The Supreme Court applied that test to strike down a rule against protesting on the Supreme Court’s sidewalks, even though an officer told one of the plaintiffs she could protest “across the street.”¹⁵ For similar reasons, it is unconstitutional to require protests to move away from Market Street.

Conclusion

Please confirm that protests may resume on Market Street.

Thank you for your attention to these matters. As always, please do not hesitate to contact the ACLU if we may be of assistance with this, or any other matter. We would be happy to speak to you, or to give a presentation to your department, about these matters, if you believe that would be helpful.

Sincerely,

/s/ Karen Lantz

Karen Lantz
Legal & Policy Director, ACLU of Delaware

cc: Michael S. Purzycki, Mayor, mspurzycki@WilmingtonDE.gov
Robert M. Goff, Jr., City Solicitor, rmgoff@wilmingtonde.gov

¹⁴ *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790-91 (1988).

¹⁵ *Grace*, 461 U.S. at 174.