



November 12, 2013

*Via Electronic Mail only*

Public Safety Committee  
Oakland City Council  
1 Frank Ogawa Plaza, Second Floor  
Oakland, CA 94612

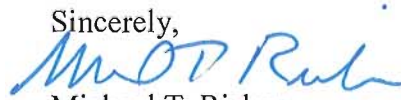
**Re: Juvenile Protection Curfew Ordinance, Item 10, File # 13-0071,  
November 12, 2013 Agenda**

Dear Councilmembers:

I am writing on behalf of the American Civil Liberties Union of Northern California. It has come to our attention that your Committee is considering a new youth-curfew law modeled on the City Council's October, 2011 draft ordinance. The ACLU-NC opposed the 2011 proposal on the grounds that it would be counterproductive, that it would result in arbitrary and discriminatory enforcement, and that it would infringe on constitutional rights. These concerns are discussed in the attached October 3, 2011 letter from our Legal Director, Alan L. Schlosser, to the City Council.

To the extent that any new proposal is modeled after the earlier one, we will have the same concerns. We hope that the Committee will take them, and the other issues that Mr. Schlosser's letter raises, into account as it decides whether to draft a new curfew law.

A copy of the October 3, 2011 letter is attached.

Sincerely,  
  
Michael T. Risher  
Staff Attorney

Encl.

Cc: Oakland Mayor, Oakland City Attorney, City Clerk

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October 3, 2011

**VIA E-MAIL AND FACSIMILE**

Oakland City Council  
1 Frank H. Ogawa Plaza, 3<sup>rd</sup> Floor  
Oakland, CA 94612

Re: Juvenile Protection Curfew

Dear City Council Member:

I am writing on behalf of the American Civil Liberties Union of Northern California in opposition to the proposed Juvenile Protection Curfew (Oakland Municipal Code Chapter 9.12, Article II) which is being considered by the City Council on October 4, 2011.

The ACLU understands that a juvenile curfew law is being introduced now as a result of great and legitimate concern by Oakland residents and city officials about serious crime, and particularly criminal violence, in the city. This concern is heightened by budget shortfalls which have led to a reduction in the police force and in its ability to respond quickly and effectively to serious criminal activity which threatens lives and property. While imposing a curfew on juveniles does respond to the public's wish for governmental action, the ACLU believes the proposed Curfew is an ineffective and problematic response, one that will divert scarce city and police resources away from dealing with serious criminal activity, exacerbate tensions between the police and communities, undermine efforts to build trust between the police and young people, and deprive minors and their parents of fundamental constitutional rights.

The Ninth Circuit Court of Appeals has recognized that juvenile curfew laws directly infringe on minors' constitutional rights of freedom of movement, right to travel, privacy, and expression. *Nunez v. City of San Diego*, 114 F.3d 935, 944, n. 6 (1997). Furthermore, curfew laws abridge the constitutionally protected right of parents to make decisions about their children's upbringing by taking curfew decisions away from parents and giving them to the government. *Nunez*, 114 F.3d at 952. Because of this direct and sweeping impact on constitutional rights, curfew laws are strictly scrutinized by the courts to determine whether they are narrowly tailored to promote a compelling governmental interest. *Id.* at 946.

The police already have the power to detain and question any minor on the streets during curfew hours who is suspected of being involved in unlawful activity. Furthermore, the police

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have the power to approach and take into custody any minor who appears to be in danger. (Welfare & Institutions Code sec. 305). The effect - **and the purpose** - of a curfew law is to give police expanded power and discretion to detain and question young persons who are **not** suspected of any unlawful activity, but who are merely present in a public place or business establishment during curfew hours.

This significant expansion of police powers will not just be felt by minors under 18 and their parents. Under this curfew law, the police will be given the authority to approach and question anyone who **appears to be under 18**, thereby subjecting a much broader segment of the population to what are essentially suspicionless stops, requests for ID and detentive questioning. If the curfew were to be enforced seriously and uniformly, then it would constitute a major diversion of police resources away from responding to serious criminal activity. Given the problems of reduced police staffing in Oakland, it is plain that the curfew is going to be enforced very selectively, and it is predictable that its impact will be felt in poor neighborhoods, and by youth of color.

Police Chief Anthony Batts recently commented on the 10.7 million dollar federal grant to hire Oakland police officers, emphasizing the need to change youth perceptions of officers “so police officers are seen in a positive way.” (*Oakland Wins Justice Dept. Grant for 25 Officers*, San Francisco Chronicle, Sept. 29, 2011, at A-1). Enacting a juvenile curfew will thwart these very goals. Granting law enforcement officers unbridled discretion to detain and question youth for no reason except their presence will only increase tensions and distrust. While curfew laws are defended as giving the police another “tool for their tool kit,” the young people who are targeted to be stopped and detained will see it as a club.

The proposed Curfew imposes a form of house arrest on minors, regardless of the wishes of their parents, for significant portions of the day and night.<sup>1</sup> To narrow and justify such a massive curtailment of liberty, the ordinance includes a number of “defenses” that carve out conduct that not will not be criminalized. However, these “defenses” only highlight and exacerbate the inherent problem with curfew laws – **that they inevitably result in arbitrary and discriminatory enforcement.**

Persons who appear to be under 18 and are in public places or private business establishments during the 12-1/2 hours covered by the proposed Curfew are subject to a police stop and questioning. Whether they are violating the Curfew depends not just on a determination of their age, but on a police determination of whether one of the “defenses” applies. (Juvenile Protection Curfew, § 9.12.110.D). The police are directed to make this determination based on the minor’s “responses and other circumstances.” (§ 9.12.110.E). But what constitutes an “errand” and is the minor on an errand “without any detour or stop”? Is the minor returning home from employment “without any detour or stop”? Is the minor “going to or coming from a

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<sup>1</sup> Compare with San Francisco’s curfew, which applies to children under 14, barring them from being in public places from 12:00 am to 5:00 am without express parental permission or in connection with legitimate employment or First Amendment activities. (San Francisco Municipal Police Code 539). The San Francisco curfew allows law enforcement officers to protect vulnerable younger children. Children who violate the curfew are subject to a civil, rather than criminal, penalty. Parents and business owners are not penalized.

medical appointment”? Is the student not required to be in school by his school because of his “school track or curriculum schedule.” Which minors will have their “responses” believed by a police officer and which will not? Does the officer have the discretion to decide when the “suspect” will be allowed to make calls to a parent or a teacher or an employer to verify the story? Or is the City telling young people who appear to be under 18 that, from 8:30 am to 2:00 pm and 10:00 pm (11:30 on weekends) to 5:00 am, they need to carry not only proof of their age, but written notes from their parents or their school or their employers whenever they may be out of the house or school during curfew hours. And even if they do, how will such a writing be verified? **Does Oakland really want to adopt such a “pass law” that requires young people to carry papers to move about freely?**

It is hard to believe that the City wants its police officers to spend the time needed to make a fair determination of whether the curfew law (with its myriad of exceptions) is being violated. Thus, it is predictable that its enforcement will be very selective and based on subjective gut reactions of police officers on which young people should be targeted, and which young people should be believed. Of course, the curfew law is not unique when it comes to being enforced by police officers who must make decisions based on stopping and questioning suspects on the street. But the curfew law discards the traditional limit on police power of requiring reasonable suspicion of unlawful activity, and gives officers the unfettered discretion to stop any youthful-looking person who is on the street or in a private establishment during curfew hours. A police department that has been under federal court supervision for eight years as a result of allegations of racially biased and unlawful enforcement practices should not be asked to enforce a law which by its very nature must be selectively enforced and will inevitably result in perceptions of unfair and discriminatory treatment among youth of color.

The possibilities of arbitrary and discriminatory enforcement are compounded by the ordinance’s sweep of business owners into its enforcement authority. Business owners face criminal liability if they knowingly allow minors to be on their premises during curfew hours. Should a prudent restaurant owner eject high school or middle school students at lunchtime or at least question them whether they are being home schooled or have a “school-issued off-campus permit”? Should a movie theater stop selling tickets to persons who appear to be under 18 for any show that ends after 10:00p.m.? And, one can expect that the private enforcement and targeting of such young people for questioning or ejection by business owners will also be highly selective based on neighborhood, appearance and, inevitably, race.

Finally, enforcement of the curfew is likely to have severe consequences for the most marginalized youth who may have no place to go other than a public space. For some young people, home is not necessarily a safe place to be for 12 hours a day. Young people who are homeless may have no way of establishing their age as well as no choice but to be in public places. Certainly these situations may call out for some intervention or assistance by social service agencies, but imposing a curfew law making their presence a criminal offense is not a responsible or effective response to such difficult social problems.

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*Oakland City Council Member*  
*October 3, 2011*  
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Keeping young people off the streets for significant portions of the day and the night is one way to try and reduce crime rates. Of course, keeping adults off the street would also probably reduce crime rates. But neither solution would be effective nor worth its price in liberty and in undermining police-community relations. Juveniles who are involved in serious criminal activity in spite of the severe penalties will not be deterred by a curfew ordinance. Curfew laws, like some other tough sounding anti-crime strategies, mask the underlying causes of crime by diverting the public's attention away from real crime prevention, like enriched educational programs, or meaningful job opportunities. They also divert the police's attention from more serious crime problems. Ultimately, these curfew laws do not make us any more safe. They only make us less free.

Sincerely,



Alan L. Schlosser  
Legal Director

cc: All Members of the City Council  
Barbara Parker, City Attorney  
Jean Quan, Mayor  
LaTonda Simmons, City Clerk