



April 20, 2020

**Via Email**

**Re: Enforcement of COVID-19 Related Restrictions**

Dear California Police Chiefs:

As COVID-19 continues to spread across California and law enforcement aims to increase enforcement to combat this pandemic,<sup>1</sup> the ACLU of California strongly urges California law enforcement agencies to approach enforcement of COVID-19 related restrictions judiciously, consistent with the broader public health goals. The purpose of COVID-19 related orders, including the shelter-in-place Executive Order and local orders to stay at home or wear masks, is to promote public health and welfare by preventing spread of the virus. Criminal enforcement, including arrest and incarceration, increases the likelihood of contagion, which contradicts the purpose of most restrictions. Accordingly, law enforcement should only resort to criminal enforcement when there are no other reasonable alternatives to protect public health. Instead, officer should refer or allow direct contact from other agencies, programs and resources that can help people who may have trouble following stay-at-home directives because of financial need, the availability of a safe place to shelter, or other obstacles address those underlying issues and come into compliance. COVID-19 is fundamentally an issue of public health, not law enforcement, and should be treated as such.

Law enforcement agencies should not only publicly embrace such an approach, but importantly, should provide guidance to officers. COVID-19 restrictions and enforcement give rise to constitutional concerns, including, but not limited to, disparate and disproportionate enforcement invoking equal protection concerns. Increased police presence to enforce COVID-19-related restrictions could result in significant public backlash and further erosion of public trust, especially from communities of color and others that have historically been disparately policed. Approaching a public health crisis with a punitive, traditional law enforcement method will both intensify this backlash and harm the people and communities whom the public health restrictions are intended to help. Law enforcement should be proactive about these concerns in their

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<sup>1</sup> See, e.g., Winton R and H Fry, "Coronavirus scofflaws arrested, criminally charged as California cracks down," *Los Angeles Times*, April 4, 2020, at: <https://www.latimes.com/california/story/2020-04-04/coronavirus-violators-arrested-criminally-charged-california-cracks-down>; "Santa Cruz Police to Focus on Violators of Shelter Order," *Bay City News*, Mar 29, 2020, at: <https://www.nbcbayarea.com/news/local/santa-cruz-police-to-focus-on-violators-of-shelter-order/2263853/>; Kerman D, "San Francisco police to enforce shelter-in-place orders this weekend," *KRON4*, Mar 27, 2020, at: <https://www.kron4.com/news/bay-area/san-francisco-police-to-enforce-shelter-in-place-orders-this-weekend/>.

directives during COVID-19 and instruct officers to perform their duties with compassion, patience, and in a non-punitive manner.

Accordingly, the ACLU of California encourages each agency to enforce COVID-19-related restrictions according to the following principles:

- 1) **Presence on Public Streets, Alone, Does Not Justify a Stop:** The mere fact that someone is walking, driving, taking public transportation, or waiting in a public place does not give police reasonable suspicion to detain and question them about why they are out and what they are doing.<sup>2</sup> There are many exceptions to the shelter-in-place orders that allow people to be out in public for essential activities. For example, people can go to gas stations, pharmacies, banks, laundromats, essential jobs, and to get food.<sup>3</sup> Reasonable suspicion requires “specific, articulable facts which, together with objective and reasonable inferences, form a basis for suspecting that a particular person is engaged in criminal conduct.” *See, e.g., People v. White*, 107 Cal. App. 4th 636, 641 (2003). Given the wide variety of reasons people may legally be out in public, the mere fact that a person is out does not provide “an objective and reasonable basis for suspecting” that a person is out in violation of the stay-at-home order, rather than consistent with the orders exceptions.
- 2) **Prohibitions on Identity Profiling Still Apply:** Police enforcement of COVID-19 restrictions must respect legal and constitutional limits, just like other police action, and must not target individuals or communities based on race, age, or other identity. These limitations apply to both individual enforcement actions and decisions to target particular neighborhoods or communities with “saturation” or increased patrols. California’s law enforcement has a history of disparate policing and racial profiling,<sup>4</sup> but COVID-19 enforcement raises new issues. Asian Americans have widely reported being identified as risks by other members of the public for no reason other than race, and the pandemic has brought a rise in hate crimes against Asian Americans.<sup>5</sup> Additionally, while the

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<sup>2</sup>The initiation of such police contact with the public in any circumstances increases the risk of contagion and should be limited to addressing present dangers to public safety. For example, Tucson Police Department has instructed officers that they “should not initiate onsite activity unless there is an ongoing hazard” (such as extreme reckless driving). *See* Questions and Answers for Tucson Police Department Personnel regarding COVID-19 (March 18, 2020), at <https://www.policeforum.org/assets/Department%20Update%20031820.pdf>.

<sup>3</sup> Stay Home Order, California Coronavirus (COVID-19) Response, State of California (last updated April 7, 2020), at <https://covid19.ca.gov/stay-home-except-for-essential-needs/>

<sup>4</sup> For example, new statistics from eight large law enforcement agencies in the state revealed Black people in California were stopped by police officers much more frequently than other racial groups in 2018, and police were more likely to use force against them. Darwin Bond Graham, *Black people in California are stopped far more often by police, major study proves*, The Guardian (Jan. 3, 2020), at <https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force>.

<sup>5</sup> *See, e.g.,* Russell Jeung, Manjusha P. Kulkarni and Cynthia Choi, *Op-Ed: Trump’s racist comments are fueling hate crimes against Asian Americans. Time for state leaders to step in*, Los Angeles Times (April 1, 2020), at <https://www.latimes.com/opinion/story/2020-04-01/coronavirus-anti-asian-discrimination-threats>; Lauren Aratani, *‘Coughing while Asian’: living in fear as racism feeds off coronavirus panic*, The Guardian (March 24, 2020), at <https://www.theguardian.com/world/2020/mar/24/coronavirus-us-asian-americans-racism>.

Center for Disease Control has recommended wearing cloth or even homemade face coverings to stem the spread of coronavirus,<sup>6</sup> and the Mayor of Los Angeles has required that even nonmedical essential workers wear masks while in public,<sup>7</sup> many Black Americans have expressed reluctance to do so on grounds that, like so many other activities, wearing cloth masks by Black Americans will be misidentified as suspicious even in the height of the pandemic – a concern underscored by at least one incident in which a police officer in Illinois accosted two Black men who were wearing surgical masks while shopping at Wal-Mart and ordered them to leave the store.<sup>8</sup>

- 3) **Enforcement Against People Experiencing Homelessness Is Unsafe and Unfair:** Law enforcement should avoid enforcement against unhoused people. Crowding people experiencing homelessness into temporary shelters subverts the goal of social distancing and many localities do not have enough shelter beds for all houseless residents. People living on the streets or in vehicles should be allowed to shelter in place as they can to mitigate public health risks without being subject to criminal law enforcement.<sup>9</sup>
- 4) **Avoid Criminal Enforcement Where Possible:** Law enforcement should recognize that the shelter-in-place orders exist to protect public health and help stop the spread of coronavirus, and that the pandemic that has made them necessary has taken an extraordinary toll on the lives of many Californians – not only through the direct effects of illness and death of many Californians and their friends and family, but the economic impacts that have cost many their jobs and the effect of forcing people into close quarters for extended periods. Criminal and even administrative enforcement can exacerbate these problems. To avoid this, law enforcement should minimize use of criminal enforcement such as arrest and even citations, which may still require close contact with the individual that puts both them and the officer at risk.

When encountering individuals who apparently are not complying with COVID-19-related restrictions, officers should take into account rational reasons for non-compliance. Examples could include: A) People who are unhoused and therefore do not have a fixed location where they can shelter in place; B) People who are experiencing domestic violence or other dangerous living situations; C) Minors who lack a stable home environment to return to while school is canceled; and D) People who are experiencing medical or mental health conditions that make it challenging for them to comply (including, by way of example, anxiety, claustrophobia, and depression). In such

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<sup>6</sup> Use of Cloth Face Coverings to Help Slow the Spread of COVID-19, Centers for Disease Control (last visited April 8, 2020), at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>.

<sup>7</sup> See Worker Protection Order, Office of Mayor Eric Garcetti, City of Los Angeles (April 7, 2020), at <https://www.lamayor.org/sites/g/files/wph446/f/page/file/WorkerProtection.pdf>.

<sup>8</sup> Fernando Alfonso III, *Why some people of color say they won't wear homemade masks*, CNN (April 7, 2020), at <https://www.cnn.com/2020/04/07/us/face-masks-ethnicity-coronavirus-cdc-trnd/index.html>; Joe Jurado, *Black Men Kicked Out of Walmart for Wearing Masks During Pandemic*, The Root (April 6, 2020), at <https://www.theroot.com/black-men-kicked-out-of-walmart-for-wearing-masks-durin-1842710492>

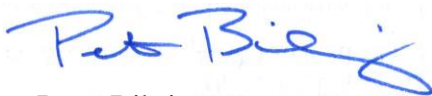
<sup>9</sup> Responding to Coronavirus Disease 2019 (COVID-19) among People Experiencing Unsheltered Homelessness, Centers for Disease Control (last visited April 16, 2020), at <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>.

circumstances and where intervention appears necessary to protect public health, officers should refer the person to a public health or social services agency or organization to address the obstacles to compliance and achieve the public health goals of the COVID-19-related restrictions rather than mechanically enforcing the restrictions in a punitive manner.

- 5) **If Criminal Enforcement is Used, Minimize Aggravation of COVID-19 Issues:** If law enforcement officers do take criminal or administrative action, they should try to avoid further aggravating the public health and economic impacts of COVID-19 and the closures. Because of the grave risks of COVID-19 exposure for people in custodial settings, even with intentional violations, arrest and detention should remain a last resort as doing so will increase the likelihood of individuals contracting coronavirus and places officers at risk as well. Such arrests should be prohibited unless necessary to prevent imminent and serious bodily harm to another person and all non-incarceration alternatives have been exhausted. Officers have broad discretion to cite and release, and to warn or give an explanation of the rules rather than cite. Officers should be mindful that the widespread economic disruption caused by the pandemic has plunged many Californians into grave financial distress, and expensive tickets and fines issued during this time can only worsen Californians' economic problems, and that future court appearances may also lead to spread of the virus.
- 6) **Data Collection and Reporting:** In the interest of accountability and public trust, law enforcement agencies must continue or begin to collect, track, and publish data including but not limited to COVID-19-related enforcement demographics of stops, arrest, and citations.

The ACLU of California strongly urges California police agencies to avoid criminal enforcement of COVID-19-related restrictions, and instead coordinate with other agencies and services to allow a response that focuses on public health, and reminds law enforcement that any criminal enforcement that does take place is subject to the same legal and constitutional limitations as any other police action.

Sincerely,



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