



Northern  
California

**VIA ELECTRONIC MAIL**

June 3, 2020

Honorable London Breed, Mayor  
City Hall, Room 200  
1 Dr Carlton B Goodlett Place  
San Francisco, CA 94102  
Email: MayorLondonBreed@sfgov.org  
Fax: (415) 554-6160

**Re: San Francisco City and County Order**

Dear Mayor Breed:

We write to request that you, in your capacity as Mayor of the City of and County of San Francisco, rescind or substantially restrict the Curfew Order declared on May 31, 2020. The Order in its present form imposes a sweeping general ban on the public assembly, free expression in all public forums, and movement of nearly all 900,000 San Francisco City and County residents from 8pm to 5am and is neither authorized by state statutory law nor consistent with the freedoms guaranteed by the United States and California Constitutions—including the constitutional rights to freedom of speech, assembly, press and movement, and the most basic notice requirements.

Since the collective police killings of Black people such as Breonna Taylor, Tony McDade, and recently George Floyd, community members, collectively and individually, have expressed their opposition to the systemic use of unreasonable and unnecessary police violence against Black people and have called for police accountability. The ACLU of Northern California equally condemns and has long advocated against police brutality, racial profiling, and selective enforcement of laws against Black people that results in the disproportionate impact of the criminal justice system on Black lives. The public demonstrations and protests constitute an exercise of rights squarely protected by the First Amendment. Their lawful efforts to stop excessive force by law enforcement have been met, at times, with excessive force and now a curfew that improperly curtails their constitutional rights.

If anything, the imposition of a curfew—a signature measure of a police state—in direct response to protests regarding police accountability demonstrates the importance of these protests. We therefore urge you as strongly as possible to take immediate action to uphold the U.S. and California Constitutions.

**American Civil Liberties Union Foundation of Northern California**

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## **The Curfew Order Exceeds the State’s Authority Under Govt. Code § 8634**

The Order exceeds state statutory authority because it extends far beyond any emergency it seeks to address. Cal Gov’t Code §§ 8558, 8634. Conditions posing ongoing “extreme peril” to persons or property *throughout* the territorial limits of San Francisco City and County do not exist. While the order states that it responds to unrest and violence in San Francisco and *other* cities in the Bay Area, damage to property has only occurred in commercial districts in a few isolated regions. Indeed, the order itself acknowledges that *thousands* of people have protested peacefully and lawfully, far outnumbering any instances of property damage or violence. Nonetheless, the Order applies throughout the entirety of the County’s 230 square miles, and to nearly all of its 900,000 residents. It therefore applies in numerous regions where no protests of any kind have occurred, let alone protests threatening life or property. While it is conceivable that a “local emergency” could encompass all of San Francisco City and County—such as perhaps after a severe earthquake—protests, isolated incidents, or damage to property in a few isolated locales do not give rise to an emergency in the entire County.

## **The Curfew Order Violates the First Amendment**

The Order prohibits the speech and assembly—core First Amendment rights—for a significant portion of each day it remains in effect and while community members continue to demand racial justice and accountability for the murder of George Floyd, Ahmaud Arbery, Breonna Taylor, Oscar Grant, Stephon Clark, Mario Woods, Jessica Williams, Stephen Taylor, Eric Garner, Tamir Rice, Trayvon Martin, Sandra Bland, Amadou Diallo, Tony McDade, and the many other Black lives taken by law enforcement. 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 Order is not narrowly tailored to the purported concerns such as alleged illegal conduct or particular geographic areas where property damage or violence is imminently likely to occur. “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.” *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). 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.”<sup>1</sup> *United States v. Grace*, 461 U.S. 171, 177 (1983).

This Order imposes a sweeping general ban on the public assembly, free expression in all public forums, and movement of nearly all San Francisco residents from 8pm to 5am throughout the City and County. Put another way, for 9 hours of each day, the Order prohibits residents

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<sup>1</sup> Even if the curfew is viewed as a regulation of conduct with an incidental impact on speech, it is evaluated by the same “standard applied to time, place, or manner restrictions” on speech in a public forum. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

seeking to express rights guaranteed by the First Amendment from doing so in any public forums, whether individually or in a peaceful assembly. The Curfew Order does not narrowly focus its restrictions on those engaged in illegal activity, the enforcement of property-related laws, nor geographically. Instead, it preventively suppresses lawful First Amendment protest activity, such as congregating for protest or individually displaying signs or speaking on public streets. Though apparently content neutral on its face, the curfew is not narrowly tailored to public safety interests, and thus it violates the First Amendment regardless of whether alternative times for protest are available.<sup>2</sup>

If needed, San Francisco could enforce “other laws at its disposal that would allow it to achieve its stated interests” without a curfew that is 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.<sup>3</sup>

The community’s right to protest day or night may not be infringed merely because some people act unlawfully in certain, limited areas of San Francisco. The Order suggests its restrictions are lawful because the “unrestricted presence of persons on City streets and sidewalks after 8:00 p.m. [is] dangerous to both them and public safety.” See Curfew Order cl. 4. Not only does the curfew extend beyond the hours of darkness, the Constitution rejects this speculative approach to public safety restrictions on speech. “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.... The law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence.... Banning or postponing legitimate expressive activity because other First Amendment activity regarding the same subject has resulted in violence deprives citizens of their right to demonstrate in a timely and effective fashion.” *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

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<sup>2</sup> Perhaps San Francisco believes the Order is lawful because it preserves alternative means of protest during daylight hours. However, particularly during weekdays, the ability to protest during daylight hours cannot constitute an adequate substitute for the right to protest after work. Moreover, to satisfy First Amendment requirements a curfew must both be narrowly tailored and allow for ample alternative channels of communication. “[A] restriction that meets the ample alternative requirement can fail the narrow tailoring requirement.” *iMatter Utah v. Njord*, 774 F.3d 1258, 1267–68 (10th Cir. 2014) (citing *United States v. Grace*, 461 U.S. 171 (1983)).

<sup>3</sup> San Francisco may not rely on *In re Juan C.*, 28 Cal. App. 4th 1093 (1994). In that case, the respondent did “not dispute that a state of emergency existed when the curfew went into effect.” *Id.* at 1098. The court’s holding was thus premised on the existence of a “bona fide emergency” presenting a serious threat of “imminent destruction of life and property.” *Id.* at 1100–01. As explained above, no such emergency exists here, and certainly not throughout the entirety of San Francisco.

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.

### **The Curfew Order Violates the Freedom of Movement**

The Order also violates the Constitution's protection for the freedom of movement. "Citizens have a fundamental right of free movement, 'historically part of the amenities of life as we have known them.'" *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (citations omitted). Freedom of movement "is simply elementary in a free society." *In re White*, 97 Cal. App. 3d 141, 148–49 (Ct. App. 1979) ("Such a right is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law."). "In all the states, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom. . . ." *United States v. Wheeler*, 254 U.S. 281, 293 (1920). While the state may impose restrictions on this right, any restrictions must both serve a compelling state interest and be narrowly tailored to accomplish that objective. *Nunez*, 114 F.3d at 946 (applying strict scrutiny to curfew order even though it only applied to minors); see also *In re White*, 97 Cal. App. 3d at 150 ("If available alternative means exist which are less violative of the constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used[.]").

The Order's restrictions on movement are not narrowly tailored. Apart from the geographic breadth noted above, the Order applies to all kinds of movement, including many that obviously could not be mistaken for unlawful protest activity. To give but a few examples, the Order bans people from walking their dogs, jogging or riding bicycles for exercise, walking with their children, going to the grocery store, traveling for family caregiving obligations, visiting their sick relatives, and various other forms of entirely innocuous movement. Indeed, given that the Order's only generally-applicable travel exemptions permit travel to work or home and for medical care, in practice the Order essentially places nearly everyone in San Francisco under house arrest for 9 hours a day, including after work hours before dark.

The Constitution does not permit such a draconian deprivation of liberty under these circumstances. *Cf. Nunez*, 114 F.3d at 948 (striking down curfew order because "it does not provide exceptions for many legitimate activities"). Moreover, the imposition of the curfew at 8 p.m., during after work hours and before darkness, needlessly makes it difficult for many working people to take care of basic necessities like shopping for essential goods or checking in on loved ones.

### **The Curfew Order Contains Insufficient Notice**

Finally, even if narrowed to deal with the various problems described above, the Order would remain unconstitutional because it provides for insufficient notice in two respects: it contains no provision requiring authorities to notify individuals prior to enforcing the Order, and it has been imposed without sufficient advance notice for all those subject to its restrictions.

Both the Fifth and Fourteenth Amendments prohibit deprivations of liberty without “due process.” The most essential element of due process is, of course, notice. Due process requires that notice “must be of such nature as reasonably to convey the required information[.]” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The California Government Code itself recognizes the important need for notice, requiring orders and regulations during a local emergency to “be given widespread publicity and notice.” Cal. Gov’t Code § 8634.

Given the breadth of the Order’s prohibition, due process therefore requires that officers seeking to enforce it first provide notice to the general population of their intent to do so. The few cases upholding curfews comparable (albeit lesser in scope) than this one have contained such a requirement. *See e.g., In re Juan C.* 28 Cal. App. 4th 1093, 1097 (1994) (order permitted arrest only of “such persons as do not obey this curfew *after due notice, oral or written, has been given to said persons*”) (emphasis added).

### **The Curfew Order Creates Vague Standards for Enforcement**

The Order—through ostensibly banning all individuals from public areas in San Francisco—vests law enforcement officers with unfettered discretion to take any individual into custody. Such discretion will result in selective and biased enforcement against the very groups whose targeting by police are the subject of protest.

Though the Order contains exemptions for certain groups, these exemptions are vague and incomplete. Individuals must “establish to the satisfaction of a peace officer” that their presence during curfew hours is for the “sole purpose” of traveling to their home or work or to receive medical attention. Curfew Order ¶ 6. Such vague standards create a high likelihood of disparate application and enforcement. Individuals “experiencing homelessness” are also exempt from the Order, but this will require individuals to prove that they are permitted to be outside. Officers must rely on discretion and bias to perceive who may be unhoused. Finally, the exemption for “authorized representatives” of media organizations requires officers to make on-the-spot calls that exclude citizen journalists and other reporters.

Finally, in light of news reports of U.S. Immigration and Customs Enforcement and Customs and Border Protection providing assistance to law enforcement agencies in their response to protests, we remind you of your obligations under the California Values Act (S.B. 54). County and city law enforcement shall not provide assistance for the purpose of immigration enforcement, including inquiring about immigration status, providing interpretation services, or facilitating arrests or transfers to the custody of immigration authorities in the field.

### **Demand for Rescission, Review and Records**

The emergency proclamation and curfew order issued on May 31<sup>st</sup> should be rescinded without delay given its serious infirmities under state law and the Constitution. Even if the curfew is substantially restricted in an attempt to satisfy statutory and constitutional muster, it is incumbent on you and the Board of Supervisors to review the emergency proclamation and

curfew order on a **day-to-day basis**. Though you may contend that conditions exist to justify the issuance of an emergency proclamation and curfew, the curfew must be lifted as soon as those conditions dissipate.

Further, we request pursuant to the California Public Records Act (Government Code §§ 6250, et. seq.) and Article I § 3(b) of the California Constitution<sup>4</sup> the following records:

- (1) Complaints received by the City and County of San Francisco regarding protests, demonstrations, or other activity in response to the police killings of people, from May 25, 2020 until the date that the curfew is terminated;
- (2) Any memoranda or records dated January 1, 2018 to the present regarding the need for or issuance of an emergency order and/or curfew;
- (3) Correspondence between the City and County of San Francisco and any federal agency regarding protests, demonstrations, or other activity in response to the police killings of people, from May 25, 2020 until the date that the curfew is terminated;
- (4) Correspondence between the City and County of San Francisco and the National Guard regarding protests, demonstrations, or other activity in response to the police killings of people, from May 25, 2020 until the date that the curfew is terminated;
- (5) Correspondence between the City and County of San Francisco and any California law enforcement agency, including Sheriff's Offices or police departments, regarding protests, demonstrations, or other activity in response to the police killings of people, from May 25, 2020 until the date that the curfew is terminated;
- (6) The number of people that the City and County of San Francisco has transferred into the custody of ICE or CBP, whether or not it was in response to an ICE or CBP transfer request, and the basis for that transfer, from May 25, 2020 until the date that the curfew is terminated;
- (7) Records related to the City and County of San Francisco's use of surveillance technology, including location surveillance (such as automated license plate readers) and social media surveillance, from May 25, 2020 until the date that the curfew is terminated.

Please send copies of the requested records to me at the address shown above, or email them to me at [sagarwal@aclunc.org](mailto:sagarwal@aclunc.org). We request that you waive any fees that would be normally applicable to a Public Records Act request. In addition, if you have the records in electronic form you can simply email them to me without incurring any copying costs. *See* Gov't. Code § 6253.9.

Thank you for your prompt consideration of these issues. We respectfully ask that you provide a response to the issues we have raised in this letter within 24 hours.

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<sup>4</sup> "Records" covered by this request include but are not limited to: internal and external correspondence (including email), memoranda, drafts, notes, outlines, policies, procedures, regulations, directives, instructions, orders, bulletins, pamphlets or brochures, scripts, handouts, analyses, evaluations, reports, summaries, writings, logs and other written records or records by any other means, including but not limited to records kept on computers, computer source and object code, electronic communications, computer disks, CD-ROM, video tapes or digital video disks.

Mayor Breed  
June 3, 2020  
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Sincerely,

A handwritten signature in blue ink, appearing to read "Shilpi Agarwal". The signature is fluid and cursive, with a large loop at the end.

Shilpi Agarwal, Interim Legal & Policy Director and Senior Staff Attorney  
Vasudha Talla, Senior Staff Attorney

cc:  
Police Chief William Scott  
Members, San Francisco Board of Supervisors