



January 4, 2021

Testimony of ACLU of Wisconsin

Comment on Agenda Item 1.3: *Resolution by the Mayor - Declaration of Emergency Regarding Potential Civil Unrest Following the Kenosha County District Attorney Releasing His Charging Decision to the Public in Regard to an Officer Involved Shooting of Mr. Jacob Blake.*

Council President Badgala and Members of the Kenosha Common Council:

Thank you for the opportunity to provide testimony on behalf of the American Civil Liberties Union of Wisconsin, a non-partisan, non-profit organization working to protect civil liberties—including the right to free speech. Last summer, there were many documented instances of violations of the civil rights of protesters and the press by law enforcement in Kenosha, including many that arose from an overbroad and potentially illegally-adopted curfew, as well as other 'emergency' restrictions on First Amendment rights. It is up to you to protect the rights of demonstrators in your community by making sure that any emergency powers granted to the mayor or law enforcement agencies are carefully tailored to balance First Amendment rights with public safety.

Last summer, Kenosha's potentially illegally adopted curfew¹ appears to have been enforced in a discriminatory and arbitrary manner. There were at least 94 citations issued for curfew violations between August 23 and September 2. From our own observation and other reports, it appears that the vast majority, if not all, citations, were issued to people advocating for racial justice or protesting police bias and brutality.

Conversely, countless white militia members carrying semi-automatic weapons after curfew were not cited. As you know, this included local law enforcement not arresting Kyle Rittenhouse as he walked past them after just shooting and killing two people on the streets of Kenosha.

This apparent discriminatory enforcement of the curfew, related to whether the police agreed or disagreed with the message of the person arrested, suggests retaliation for exercising First Amendment rights of expression and assembly. Such retaliation resulted in arrested persons spending hours, and in some cases more than a day, in police lock-ups, in violation of their rights. This history suggests that again granting such broad powers to police officers to indiscriminately shut down all protected speech and assembly after a certain hour is dangerous, ineffective, and costly. It will result not in ensuring safety, as the resolution suggests, but the silencing of dissent and violation of constitutional rights.

¹ The initial curfew was declared by the County Sheriff. But under Wisconsin law, the Sheriff does not have independent authority to impose such an emergency measure. Wis. Stat. § 323.14(4) requires that such measures be authorized by the "governing bodies" of local governments, such as the county board or city council, or the chief executives, if the governing bodies cannot meet. It does not appear that the curfews that were enforced against protesters satisfied these requirements.

The militarized response to protests used excessive force. As part of the deployment of 1,500 National Guard troops from Wisconsin and three other states, military armored vehicles, and hundreds of personnel from at least 40 law enforcement agencies, authorities resorted to excessive force against the demonstrators in Kenosha. Law enforcement agents used militarized tools and tactics, including tear gas, pepper spray, rubber bullets, sonic weapons, and pepper balls indiscriminately against demonstrators. (Notably, the use of such militarized strategies and tactics to respond to protests is, as the U.S. Department of Justice found six years ago in its after-action assessment of the police response to the Ferguson protests, something that has the effect of “escalating rather than diminishing tensions” between police and protesters.²)

There is ample video footage by traditional and independent media of the excessive force deployed against people exercising their constitutional right to assemble and demonstrate in front of the Kenosha County Courthouse. At a location that should be a source of justice, law enforcement systematically violated the First and Fourth Amendment rights of demonstrators.

Procautionarily restricting the times and locations of protest is constitutionally unsound.

An entire community’s right to protest in traditional public forums like streets and sidewalks may not be infringed merely because some people have acted unlawfully previously or in some other place. This holds true whether the infringement takes the form of restricting protest to a designated space, while taking other streets, sidewalks, and parks out of commission; the form of limiting access to sites of protest by limiting bus routes and closing roads; or the form of imposing a curfew that indiscriminately shuts down all mass gatherings after a certain time. “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). Past violence, “if relevant at all,” is only relevant if it is “extremely closely related in time and character” to the anticipated event. *Collin v. Chicago Park Dist.*, 460 F.2d 746, 754 (7th Cir. 1972). “The law does not permit us to infer because a person has resorted to violence on some past occasions that he will necessarily do so in the future.” *Id.*

Nor can protest be restricted because it pushes vehemently for change. Indeed, 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). This high purpose cannot serve as the justification for restrictions on constitutional rights.

² Inst. for Intergovernmental Research, Office of Community Oriented Policing Services, U.S. Dep’t of Justice, After-action Assessment of the Police Response to the August 2014 Demonstrations In Ferguson, Missouri xiv(2015).

Curfews and designated protest zones are blanket prohibitions on protest, and so are more than time, place, and manner restrictions. But even if they can be characterized as a time, place and manner restriction, such restrictions are permissible 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). A curfew may be “easy to enforce,” but “the prime objective of the First Amendment is not efficiency.” *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). “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 a curfew is enacted, the media and ACLU legal observers should be exempt from that curfew. Other jurisdictions have exempted our legal observers from recent curfews, because their work at demonstrations is to document interactions between the police and demonstrators and they do not interfere in the proceedings. These are people who are easily identifiable - they wear bright blue vests with clear marking on them that identifies them as legal observers. They are there solely to document what is happening.

Giving the law enforcement agencies additional authority is deeply problematic. They have shown that they do not use this authority in a fair and just manner. We should not be meeting demonstrations against police brutality with more violence from law enforcement. It is critical that media, legal observers, and government officials be able to witness the demonstrations and the law enforcement response. The common council must exercise oversight on behalf of their constituents, and make sure that any emergency powers granted to the mayor or law enforcement agencies are carefully tailored to balance First Amendment rights with public safety.