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September 25, 2020

SENT VIA EMAIL

Mike O'Connell
Jefferson County Attorney
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Eric Graninger
First Assistant County Attorney
Jefferson County Attorney's Office
Eric.Graninger@louisvilleky.gov

RE: Unconstitutional Curfew Enforcement

Dear Mr. O'Connell and Mr. Graninger:

We, along with the rest of Louisville, watched in horror last night as the Louisville Metro Police Department ("LMPD") besieged the First Unitarian Church and refused to allow Kentuckians into or out of church grounds for hours. Many of these Kentuckians sought refuge at First Unitarian to escape violent repression of their protected political speech by LMPD as it has enforced a curfew designed to silence them. Both the curfew itself and the blockade of First Unitarian to enforce it against the protesters who sought refuge there violate the Constitution. As so many in the Louisville community grapple with the deep pain of centuries of racial injustice and oppression, the decision of Louisville Metro Government ("LMG") and LMPD to double down on a policy of enforced silence and repression of protests is deeply concerning. These unconstitutional practices must end.

The United States Constitution guarantees that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST., amend. I. The Kentucky Constitution similarly guarantees and protects freedom of speech, assembly, press, and worship. *See* KY. CONST. §§ 1, 5, 8. Nevertheless, the curfew announced by Mayor Fischer on September 23, 2020, extended on September 24, and enforced by LMPD violates these fundamental liberties.



The curfew requires that individuals “remain off of all common areas . . . between 9:00 pm and 6:30 am the following morning.”¹ The order does not apply to “individuals who are commuting to a place of work, house of worship for services or seeking medical attention for themselves or others.”² Upon this clear language, the curfew order prohibits many protected First Amendment activities: protesters may not legally gather anywhere in Jefferson County; journalists may not legally attend any protests that do occur to report on their message or the response of government officials; curious neighbors may not legally leave their homes to stand in support of the message carried by marchers on nearby sidewalks. Only one type of constitutionally protected activity—religious speech—is allowed in the public space.

This preference for a particular type of protected speech over other types of protected speech constitutes illegal content-based discrimination. *See Reed v. Town of Gilbert*, 576 U.S. 155, 162–64 (2015). Courts analyze content-based restrictions of speech using the exacting standard of strict scrutiny review, which requires the government to prove that the restriction is narrowly tailored to serve compelling state interests. *See id.* In light of the huge swathes of expressive behavior outlawed across a wide geographic area by the curfew, Louisville Metro Government (“LMG”) likely cannot meet this burden. Indeed, under this standard both the United States Supreme Court and the Kentucky Supreme Court have struck down regulations that sought to permit only certain types of speech while restricting others. *See, e.g., Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 94–96 (1972); *Champion v. Commonwealth*, 520 S.W.3d 331, 338–39 (Ky. 2017). The curfew order restricts protected First Amendment activity based upon LMG’s assertion that religious speech is valuable and other kinds of speech are not. This valuation of some protected speech over other protected speech flagrantly violates the Constitution, and it must cease immediately.

Furthermore, LMPD’s enforcement of the curfew order has itself likely violated First Amendment protections. Even assuming that this curfew order was a proper exercise of mayoral power—a conclusion with which we strenuously disagree—once the government permits travel to engage in religious speech, the police cannot decide to restrict travel to some places of worship based upon

¹ Mayor Greg Fischer, Exec. Order No. 2020-016 (Sept. 23, 2020), https://louisvilleky.gov/sites/default/files/mayors_office/news_images/eo_2020-016_-_protest_curfew_1.pdf.

² *Id.*



the views of those religious institutions or some individuals based on their political or religious views or activities. Nevertheless, that is precisely what happened last night. LMPD ostensibly permitted people to travel to events at places of worship throughout Louisville, with the exception of one church: First Unitarian. And with the exception of one group of people: those who had previously been protesting. Only First Unitarian was placed under a blockade, with people neither allowed to enter nor leave despite the explicit provisions of the curfew order allowing travel to houses of worship. And only individuals who had previously been protesting against police violence were prohibited from traveling to or from a house of worship. The reason for this blockade was evident: First Unitarian, consistent with its understanding of its religious mission, threw open its doors as a place of refuge for protesters, “in the service of justice.”³ LMPD disagreed with this exercise of religious belief and disagreed with the members of the public who sought to take up the church’s offer of sanctuary, and so LMPD put First Unitarian under siege.⁴

This action likely constitutes unlawful viewpoint discrimination. Longstanding precedent from the United States Supreme Court makes abundantly clear that the government cannot target people based upon their views: “The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger & Rector v. Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). The law does not allow LMPD to target specific religious speech for curfew enforcement, which is precisely what occurred last night. The curfew order clearly allows travel to houses of worship, and so any person peacefully traveling for religious speech—even a protester seeking refuge and respite in the sanctuary of First Unitarian—must be allowed to do so, and to then continue safely home.

Finally, we ask that you move, in the interests of justice, the free exchange of ideas, and the free exercise of religious and free speech rights, to dismiss all the criminal charges, misdemeanor and felony alike, brought against the 24 individuals who were arrested at First Unitarian last night.

³ Ryan Van Velzer (@RyanVanVelzer), TWITTER (Sept. 24, 2020, 10:40 PM), <https://twitter.com/RyanVanVelzer/status/1309321864926375942?s=20>.

⁴ Ryan Van Velzer, *LMPD Surrounds Louisville Church Offering Refuge, Arrests Protesters*, WFPL (Sept. 24, 2020), <https://wfpl.org/protesters-arrested-outside-downtown-church-offering-refuge-to-protesters/>.



Please respond **by 3:30 PM** to confirm what changes the city will make in either the curfew order itself or the enforcement of said curfew order, in order to avoid the unconstitutional government action described above. I may be reached at **corey@aclu-ky.org** and look forward to your quick reply.

Sincerely,

A handwritten signature in black ink, appearing to read "Corey Shapiro", written over a horizontal line.

Corey Shapiro
Legal Director

A handwritten signature in black ink, appearing to read "Aaron M. Tucek", written over a horizontal line.

Aaron Tucek
Legal Fellow