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June 3, 2015

Detroit City Council
1340 Coleman A. Young Municipal Center
Detroit, MI

Re: Constitutional Concerns with Proposed Emergency Ordinance to Impose 6 p.m. Curfew on Minors Throughout the City during Detroit River Days and Annual Fireworks Display¹

Honorable City Council:

We write to raise the significant constitutional concerns created by the proposed emergency curfew ordinance that will be discussed in a closed meeting of the council today. This ordinance, if enacted, would make it unlawful for Detroit youth to leave their homes and engage in innocent activity after 6 p.m. on *four* evenings this summer. Unprecedented in its scale and potential impact, the ordinance would also leave the city of Detroit vulnerable to constitutional challenges under the First Amendment and the Equal Protection and Due Process clauses of the Fourteenth Amendment.

We certainly acknowledge the city of Detroit's interest in promoting safety at the Annual Detroit Fireworks Display and Detroit River Days. However, this interest does not justify effectively turning the entire city into a police state for four evenings for a segment of our population that is vote-less and relatively voice-less in the political process. The overbroad and unconstitutional "emergency" ordinances enacted in 2012, 2013, and 2014 stereotyped and criminalized innocent Detroit youth, contrary to the values of a free society. While the promotion of safety at the Detroit Fireworks Display and River Days is a compelling state interest, the Constitution of the United States requires that any such ordinance be narrowly tailored to meeting that interest—a constitutional test that this version of the ordinance fails to pass.

Background

The emergency curfew ordinances the city of Detroit passed in 2012, 2013, and 2014 were used to seize, detain, and issue citations to hundreds of young people and their parents and guardians simply because the youth were present outside their homes in the evening without supervision.²

¹ Proposed Emergency Ordinance to Amend Chapter 33 of the 1984 Detroit City Code, *Minors*, Article III, *Regulation of Minors in Public Places and Adult Responsibility for Violation*, for Expanded Curfew for the Detroit River Days and the Detroit Annual Fireworks Display

² See Gus Burns, *Detroit Police Detain 282 Juveniles, Cite 150 Parents at Detroit Target Fireworks*, MLive.com, June 26, 2012, available at http://www.mlive.com/news/detroit/index.ssf/2012/06/detroit_police_detain_282_juve.html; David Jesse and Marlon A. Walker, *Fireworks Spectacular Ends with Thrilling Finale*, Detroit Free Press, June 25, 2013, available at <http://archive.freep.com/article/20130624/NEWS01/306240137/Ford-fireworks>; and Gus Burns, *Detroit Police*

In 2012, 282 youth were detained and carted away, some in makeshift zip-tie handcuffs; and 150 parents were issued citations.³ In 2013, minors were rounded up, corralled in holding pens, and hauled off by the busload as police enforced the curfew, often doing so an hour before the curfew took effect, in clear violation of the ordinance.⁴ In some cases, even police officers didn't know where juveniles were being sent and at least one parent was unable to locate her child in the immediate aftermath of the round-ups due to the haphazard manner in which the curfew was enforced.⁵ In 2014, the ordinance continued to chill the exercise of First Amendment rights.⁶

Our 17-year-old client, Michael Reynolds, then-president of Youth Voice, a youth organization dedicated to developing leadership skills among young Detroiters and creating positive social change, remained a prisoner in his own home from 6 p.m. on June 23, 2014 to 6 a.m. on June 24, 2014.⁷ He was unable to associate with members of his family or community who lived outside his own home or to attend meetings of the youth organization he led.⁸ If he attempted to exercise his First Amendment rights, such as by organizing a meeting of Youth Voice, he might have been detained and held overnight in police custody, as were dozens of other innocent Detroit youth.⁹



Gus Burns/MLive Detroit (2012)



Tanya Moutzalias/Detroit News (2014)

Detain 148 Juvenile Curfew Violators at 2014 Fireworks, Say No 'Knockout Game' Incidents Reported, MLive.com, June 24, 2014, available at <http://detroit.cbslocal.com/2014/06/24/more-than-100-minors-detained-for-breaking-controversial-curfew-during-detroit-fireworks/> (three adults arrested for firearm-related crimes).

³ Gus Burns, *Detroit Police Detain 282 Juveniles, Cite 150 Parents at Detroit Target Fireworks*, MLive.com, June 26, 2012, available at http://www.mlive.com/news/detroit/index.ssf/2012/06/detroit_police_detain_282_juve.html; and *Detroit Police: 282 Juveniles Cited at Fireworks*, CBS Detroit, June 26, 2012.

⁴ See David Jesse and Marlon A. Walker, *Fireworks Spectacular Ends with Thrilling Finale*, Detroit Free Press, available at <http://archive.freep.com/article/20130624/NEWS01/306240137/Ford-fireworks>; and Steve Neavling, *Tensions Flare as Cops Haul Off Teens Before Fireworks Curfew*, Motor City Muckraker, June 24, 2013, available at <http://motorcitymuckraker.com/2013/06/24/tensions-flare-as-cops-haul-off-juveniles-before-fireworks-curfew/>.

⁵ Steve Neavling, *Tensions Flare as Cops Haul Off Teens Before Fireworks Curfew*, Motor City Muckraker, June 24, 2013, available at <http://motorcitymuckraker.com/2013/06/24/tensions-flare-as-cops-haul-off-juveniles-before-fireworks-curfew/>.

⁶ Interview with Michael Reynolds, Detroit youth, in Detroit, Mich. (May 29, 2015) (on file with author).

⁷ *Id.*

⁸ *Id.*

⁹ *More Than 100 Minors Detained for Breaking 'Controversial' Curfew During Detroit Fireworks*, CBS Detroit, June 24, 2014, available at <http://detroit.cbslocal.com/2014/06/24/more-than-100-minors-detained-for-breaking-controversial-curfew-during-detroit-fireworks/>.

Constitutional and Practical Concerns Raised by Proposed Ordinance

Overbroad safety measures like this proposed ordinance are unconstitutional because they are not *narrowly tailored* to meet a compelling state interest (here, that of promoting safety on River Days and at the Fireworks Display). Despite its listed exemptions, this proposed ordinance would allow the government to infringe upon the rights of its citizens to engage in expressive, religious, or associational activities and would effectively revoke the First Amendment rights of minors and their fundamental right to intrastate travel.¹⁰ It would also infringe on the substantive due process rights of parents to direct and control the upbringing of their children.¹¹ Parents and guardians, not the City, retain the fundamental right to decide which activities their children may participate in, what kind of supervision they require, and what time they must return home. A governmental regulation that infringes on such fundamental rights is unconstitutional unless narrowly tailored to serve a compelling governmental interest.¹² There are many less drastic means of addressing the problem at hand without turning the city into a police state for young people when the rest of the city is celebrating the freedoms associated with Independence Day in this country and Canada.

First, the city of Detroit has not shown that it is necessary to essentially put the youth throughout the entire city on lockdown for four evenings during the daylight hours of 6 p.m. to 9 p.m. due to concerns about safety in Hart Plaza and along the riverfront. Indeed, logistics and policing concerns may make it more *convenient* to subject every unaccompanied young man and woman in the city to arrest and detention. But convenience does not justify depriving the rights of innocent young people across the city – in the same way that concerns about crime by individuals of a certain race, ethnicity, or religion would not justify restricting all members of that group of their freedoms. A choice between safety and democratic rights is a false choice. If the police have sufficient cause to detain individuals they should do so without criminalizing the innocent activities of an entire segment of our city. Under the suggested amendments to the ordinance that we outline below, law enforcement could still do their job because they would retain the right to detain individuals if they meet the ordinary reasonable suspicion standard.

Second, this “emergency” which predictably comes up year after year does not create the compelling safety interest of curbing citywide violent rioting or looting cited by the cities of Ferguson, Missouri and Baltimore, Maryland to justify their constitutionally problematic curfews.¹³

¹⁰ Letter from Michael J. Steinberg, Legal Director, ACLU of Michigan, to Michael Duggan, Detroit Mayor, Kevyn Orr, Emergency Manager, and James Craig, Chief of Police Detroit Police Department (June 19, 2014) (on file with author and attached).

¹¹ *Id.*

¹² *Washington v. Glucksberg*, 521 U.S. 702 (1997).

¹³ See Lauren Gambino, *Outrage Follows Baltimore’s ‘Deeply Flawed’ Youth Curfew Decision*, The Guardian, Aug. 12, 2014, available at <http://www.theguardian.com/world/2014/aug/12/-sp-baltimore-city-council-youth-curfew>; Ben Kesling and Matthew Dolan, *Missouri Gov. Declares State of Emergency, Curfew for Ferguson*, Wall St. J., Aug. 16, 2014, available at <http://www.wsj.com/articles/missouri-governor-declares-state-of-emergency-curfew-in-ferguson-1408177192>; and *Baltimore Under State of Emergency, Curfew Following Riots*, NBC Washington, Apr. 28, 2015, available at <http://www.nbcwashington.com/news/local/Officers-in-Riot-Gear-Respond-to-Baltimore-Mall-301461551.html>.

Third, while we applaud the Law Department’s efforts to carve out some innocent activities, the curfew exemptions are insufficient to allow the ordinance to withstand constitutional challenge. Some exemptions are nonsensical, leaving the ordinance vulnerable to constitutional challenge on the ground of failure to narrowly tailor the measure to the need. Why, for example, is a minor who is supervised by his responsible aunt or a friend’s parent at a neighborhood barbeque or at the Fireworks Display still subject to arrest and detention even though he poses no security threat? Why is a youth exempt from the ordinance if he is on the sidewalk in front of his own house but not if he is on the sidewalk in front of his neighbor’s house with the express permission and presence of that neighbor? Why 6 p.m. on the night of the Fireworks Display, *four* hours before the show commences?

Other exemptions miss the point. Even though the Law Department provides an exemption for participation in First Amendment protected activities, this does not mean that a minor is safe from harassment, arrest, and detention for engaging in First Amendment protected activities. Under the proposed ordinance, a youth walking home from church still has to prove to the satisfaction of the interrogating law enforcement officer that he was indeed at church. If he fails to convince the officer of the veracity of his religious commitment, the ordinance’s “protection” of First Amendment activities is no protection at all.

Under this version of the ordinance, there remain countless innocent activities that the curfew would restrict on an evening when the sun sets well past 9 p.m. For example:

- An innocent minor won’t be able to lawfully go to the grocery store for his working mother unless he complies with the “show-me-your-papers” provision of the proposed ordinance by carrying a detailed permission slip.
- An innocent minor won’t be able to play in a pick-up basketball or soccer game in broad daylight even if he is supervised by his uncle or a friend’s parent.
- An innocent minor, while able to remain on the sidewalk in front of his own home, may be detained for remaining on his aunt’s or his neighbor’s sidewalk—even if that aunt or neighbor has assumed delegated supervisory authority from the minor’s parent and is standing on the sidewalk herself.
- A hungry minor walking home from work may be arrested for stopping to get a slice of pizza at the pizzeria around the corner from his home.
- It is unclear whether public libraries and museums are considered “educational institutions” under the proposed ordinance. If not, a minor may be arrested and detained for doing his homework at public libraries, many of which are slated to remain open until 6 or 8 p.m.¹⁴

We regret that the Police and Law Departments have put the City Council in a constitutional bind by waiting until the last minute to push through an ill-considered and slipshod proposal while asking the Council to take the heat for it. The Police and Law Departments have raised a proposal of this nature every year for the last three years. They knew better than to raise it at the last minute this year. By doing so, they effectively precluded broad public comment and the Council’s ability to closely scrutinize the unprecedented scope of the ordinance and the legal liability it creates.

¹⁴ Detroit Public Library, *Branch Locator* (last visited May 30, 2015, 8:24 PM), <http://www.detroitpubliclibrary.org/branch-locator>.

We have outlined below suggested amendments to the proposed curfew to make it less vulnerable to constitutional challenge. We have also suggested questions that City Council members should ask the City Police and Law Departments in order to determine whether the ordinance is indeed narrowly tailored to withstand constitutional challenges.

Suggested Amendments to Proposed Curfew Ordinance

These suggested amendments are grounded in case law. In considering constitutionality, courts around the country are willing to uphold measures that include the provisions detailed below and to strike down measures that fail to include them. Please consult the footnotes in order to find the case law support for these suggested amendments.

1. Courts require that a curfew's geographical scope be narrowly tailored to meet the compelling safety interest articulated by the government.¹⁵ We are not convinced that any curfew is required, but if a curfew is to be adopted, it should, at a minimum, be limited to the downtown fireworks display areas and the areas immediately proximate to them.
2. If the council insists that there be a curfew, there should be an exception for all minors traveling with adults in public places with the permission of parents or guardians.
3. Minors should not be required to produce parental permission slips, signed statements from employers, proof of enrollment in educational institutions or participation in sponsored activities at risk of arrest or detention. "Show-me-your-papers" demands such as these suggest that youth are immediately suspect even if engaging in innocent activities like buying medicine for a working or otherwise indisposed parent or guardian. Moreover, such demands are constitutionally invalid if used as a cover for immigration enforcement.¹⁶ Courts have held that the burden should remain on law enforcement to demonstrate reasonable suspicion that minors do not meet a qualified exemption to a juvenile curfew.¹⁷
4. Restricted hours: the curfew start time should be delayed to 9 p.m., allowing minors to return home from public libraries open until 8 p.m. and to freely enjoy expressive and associational activities during daylight hours without fear of being arrested or detained. Courts have upheld juvenile curfews starting at 10 p.m. and 11 p.m.¹⁸

¹⁵ *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 571 (6th Cir. 2012) ("A governmental entity may impose reasonable, content-neutral restrictions on the time, place, or manner of protected speech, provided that such restrictions (1) prescribe adequate standards for administrating officials to apply; (2) are narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternatives for communication."). Narrow tailoring requires that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that [state] interest." *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). See also *Nunez by Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997).

¹⁶ *Arizona v. United States*, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012)

¹⁷ *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1062 (7th Cir. 2004) (striking down a juvenile curfew "because the defense imposes no duty of investigation on the arresting officer, [and] as a practical matter it protects only those minors whom the officer has actually seen participating in protected activity."). See also *Nunez by Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997) (striking down a juvenile curfew even though it exempted travel to and from educational, recreational, or employment activities; the ordinance did not require juveniles to carry documentation evidencing their participation in such activities).

¹⁸ *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993) (upholding a juvenile curfew starting after 11 p.m.); and *Bykofsky v. Borough of Middletown*, 535 F.2d 1245 (3d Cir. 1976) (upholding a juvenile curfew starting after 10 p.m.); *But see Nunez by Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997) (striking down a juvenile curfew that took effect

5. Exempt minors remaining on the sidewalk in front of the minor's neighbor's house,¹⁹ and in nearby neighborhood parks, playgrounds, and recreational centers.
6. Expand the exemption for educational activities to allow minors to remain at or travel to or from informal educational institutions, such as public libraries and museums.
7. Exempt minors in motor vehicles and engaged in interstate or intrastate travel with the permission of parents or guardians.²⁰

Although not ideal, provisions like these would address many constitutional concerns raised by the proposed ordinance without undermining the City's interest in promoting and maintaining safety at the Fireworks Display and River Days. Youth engaged in such constructive and constitutionally protected activities as attending informal youth group meetings and neighborhood barbecues pose no threat to the City's ability to maintain security at the fireworks display. Under our suggested amendments, law enforcement would retain the power, subject to the Fourth Amendment, to stop and question those individuals they reasonably suspect of committing a crime and to arrest those individuals for whom there exists probable cause to believe they have committed a crime. We therefore urge the Council to (1) refrain from enacting the current version of the curfew ordinance; (2) ensure that any enacted ordinance is narrowly tailored to further a compelling state interest; and (3) create exemptions sufficient to safeguard constitutional rights.

The City Council should take note that a court may still find the ordinance to be unconstitutional even if it includes the amendments we have suggested above.²¹ For example, even though an ordinance like the one posed by the City Law Department does not *prohibit* participation in First Amendment protected activities, it still *discourages* youth from engaging in them. As a federal appellate court in our sister circuit put it:

“[a]ny juvenile who chooses to participate in a late-night religious or political activity . . . runs the risk that he will be arrested if a police officer stops him en route to or from that activity and he cannot prove to the officer's satisfaction that he is out after hours in order to exercise his First Amendment rights . . . The First Amendment defense will shield a minor from conviction, assuming that she can prove to the satisfaction of a judge that she was exercising her First Amendment rights, but, as discussed, it will not shield her from arrest if the officer who stops her has not actually seen

at 10 p.m.); and *Waters v. Barry*, 711 F. Supp. 1125, 1127 (D.D.C. 1989) (striking down a juvenile curfew starting at 11 p.m.).

¹⁹ See *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 535 (D.C. Cir. 1999) (upholding a juvenile curfew exempting minors “on the sidewalk that abuts the minor’s or the next-door neighbor’s residence”); *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993) (upholding a juvenile curfew where it exempted minors remaining on a sidewalk in front of the minor’s home or a neighbor’s home); and *Bykofsky v. Borough of Middletown*, 535 F.2d 1245, 1247 (3d Cir. 1976) (upholding a juvenile curfew exempting minors remaining “on the sidewalk of his residence, or on the sidewalk of either next-door neighbor”).

²⁰ *Bykofsky v. Borough of Middletown*, 535 F.2d 1245, 1247 (3d Cir. 1976) (upholding a juvenile curfew that exempted minors “in a motor vehicle with parental consent for normal travel”).

²¹ *Ramos v. Town of Vernon*, 353 F.3d 171 (2d Cir. 2003); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997); and *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981).

her participating in a religious service, political rally, or other First Amendment event.”²²

Suggested Questions to Pose to the Police and Law Departments to Ascertain Whether the Ordinance is Indeed Narrowly Tailored to Withstand Constitutional Challenges

1. What basis do you have to target minors and not adults for heightened policing? What is the evidence that youth and not adults created many of the major problems at previous years’ Fireworks Displays and River Days?²³
2. Why must the curfew extend throughout the entirety of the city of Detroit? If there is information about planned illicit activity emanating from or being coordinated at particular locations, why not focus our limited law enforcement resources on targeting those locations?
3. If the curfew is limited to Hart Plaza and the riverfront area, why can’t officers simply pick up unaccompanied minors when they reach the restricted area rather than conducting youth sweeps citywide?
4. If you have information about planned illicit activity, why not devote our limited law enforcement resources to following those leads rather than making all the youth in the city suspect?
5. Why is a minor who is supervised by his responsible aunt or a friend’s parent at a neighborhood barbeque still subject to arrest and detention even though he poses no security threat?
6. I understand that courts around the country that have considered juvenile curfews have held that the burden should remain on law enforcement to demonstrate reasonable suspicion that minors do not meet a qualified exemption.²⁴ Why should we depart from that view at risk of legal liability? Why must a minor produce parental permission slips, signed statements from employers, proof of enrollment in educational institutions or participation in sponsored activities at risk of arrest or detention?
7. How will the City ensure that the tens of thousands of minors and parents targeted by this ordinance will learn in time that minors must carry detailed permission slips to buy milk for their working mother or secure signed statements from minors’ employers?
8. How will the City guard against law enforcement using their discretion under this ordinance in a discriminatory, arbitrary, or unprincipled manner? For example, how is a

²² *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1062-63 (7th Cir. 2004).

²³ Gus Burns, *Detroit Police Detain 148 Juvenile Curfew Violators at 2014 Fireworks, Say No ‘Knockout Game’ Incidents Reported*, MLive.com, June 24, 2014, available at http://www.mlive.com/news/detroit/index.ssf/2014/06/detroit_police_detain_148_juve.html (one juvenile and three adults arrested for firearm-related crimes). See also *Ramos v. Town of Vernon*, 353 F.3d 171, 186 (2d Cir. 2003) (striking down a juvenile curfew where the town made no effort to demonstrate “that part of the population causing trouble or that was being victimized (or that was even in particular danger of being victimized). For all we know, gang members and intimidating idlers might have been mostly over 18 years old.”).

²⁴ *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1062 (7th Cir. 2004) (striking down a juvenile curfew “because the defense imposes no duty of investigation on the arresting officer, [and] as a practical matter it protects only those minors whom the officer has actually seen participating in protected activity.”). See also *Nunez by Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997) (striking down a juvenile curfew even though it exempted travel to and from educational, recreational, or employment activities; the ordinance did not require juveniles to carry documentation evidencing their participation in such activities).

religiously devout minor protected by the First Amendment exemption if a particular police officer arbitrarily decides that he doesn't believe the minor's claim that he was walking to or from church?

9. Why must the curfew start at 6 p.m. when the fireworks show won't start until after 10 p.m.?
10. Why is a minor exempt from the ordinance if he is on the sidewalk in front of his own house but not if he is on the sidewalk in front of his neighbor's house with the express permission and presence of that neighbor?
11. The proposed ordinance requires that a minor travel to and from work, an educational or training program, or an organized recreational activity without detour or stop. Why is a hungry teenager walking home from work subject to arrest and detention for stopping to get a slice of pizza at the pizzeria around the corner from his house?
12. How will the City ensure that this doesn't become a "show-me-your-papers" law, allowing law enforcement to inquire into the immigration status of Detroit youth under cover of enforcing the curfew ordinance?
13. Why not, as some jurisdictions have, exempt minors in motor vehicles and engaged in both interstate *and* intrastate travel?²⁵
14. Is a public library or museum considered an "educational institution" under the ordinance?

We thank you for your attention to these issues and welcome any further questions you may have.

Sincerely,

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²⁵ *Bykofsky v. Borough of Middletown*, 535 F.2d 1245, 1247 (3d Cir. 1976) (upholding a juvenile curfew that exempted minors "in a motor vehicle with parental consent for normal travel").