

DAVID ♦ R. ♦ HASSEL

ATTORNEY ♦ AT ♦ LAW

520 SOUTH WEBSTER AVE., GREEN BAY, WI 54301 ♦ david@hassel-law.com ♦ 920.606.2479

September 2, 2020

Hon. Mayor Eric Genrich
Mayor of the City of Green Bay
100 N. Jefferson Street
Green Bay City Hall
Green Bay, WI 54301

Vanessa Chavez
City Attorney, City of Green Bay
100 N. Jefferson Street
Green Bay City Hall
Green Bay, WI 54301

Re: Arrests and Citations under the City's Emergency Curfew of June 1-6, 2020

Hon. Mayor Genrich and City Attorney Chavez:

I represent nine individuals arrested and cited under the emergency curfew enacted June 1, 2020 and extended by the city council on June 2, 2020 ("the curfew" or "the resolution"). I am aware of at least fourteen such arrests under the curfew. The curfew was nothing but an excuse to stop people from voicing their support for #BlackLivesMatter and calling attention to systemic racism. It targeted specific speech content, with the foreseeable, if not intended, consequence that law enforcement disproportionately used it to arrest people of color. It was thus unconstitutional as designed and as enforced.

The City over-reacted to a situation it was perhaps not prepared to accommodate. It used law enforcement to silence people whose sole complaint was that law enforcement valued neither their voices nor their very lives. In the spirit of reconciliation and healing, we have made several invitations to the City to right these wrongs.

These arrests were illegal, humiliating and in some instances traumatizing. They are on CCAP and are public record for any future employer, school or commercial or financial application. The City's actions were a clear violation of their civil rights and are actionable under the civil enforcement provision of the Civil Rights Act of 1964, 42

U.S.C. § 1983.¹ These citations must be dismissed and all records of these arrests expunged. We hope the City of Green Bay will take this last opportunity to do the right thing without resort to litigation.

BACKGROUND

On May 25th, George Floyd was senselessly and publicly killed by police officers in Minnesota. This came not long after police in Louisville shot and killed Breonna Taylor in her own living room after executing a “no-knock” warrant. In response, people across the country and here in Green Bay expressed their outrage over these killings and the deaths of countless other people of color at the hands of police. These protests became associated with the Black Lives Matter movement (“BLM”).² Although emotionally charged, the protests in Green Bay were entirely peaceful.

As more people realized what happened to George Floyd and the extent of systemic racism in law enforcement, the movement grew. On the night of May 31st, as a day and night of peaceful protesting concluded, certain actors unrelated to the peaceful protesters committed crimes of vandalism and theft in the same vicinity of the protests. These crimes were immediately and unfairly attributed to BLM.

THE CITY BANNED BLM UNDER THE GUISE OF A “CURFEW”

In direct response to these crimes, the Mayor invoked a state of emergency and issued a curfew, following the lead of cities like Minneapolis and Milwaukee that were trying to stop rampant violence and rioting erupting in their cities.³ Unlike Minneapolis and Milwaukee, however, the streets of Green Bay were safe at night, except for the threat the City unfortunately tied to BLM protesters. This threat alone was both the justification and the purpose of the curfew.

The “curfew” that emerged was not a curfew at all. The purpose of a curfew is to contain crime by requiring everyone to stay inside after a set time. It is a drastic

¹ See *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978)(holding a municipal government can be held liable under Section 1983 if a plaintiff can demonstrate that a deprivation of a federal right occurred as a result of a “policy” of the local government’s legislative body or of those local officials whose acts may fairly be said to be those of the municipality)

² BLM is actually an organization founded in 2013 by three activist women in response to the acquittal of George Zimmerman for the murder of Trayvon Martin in Florida. Because the phrase “Black Lives Matter” became a defining chant of these protests, we will use the term loosely here to refer to the movement and its protests.

³ For these purposes, we do not challenge the finding of a “state of emergency” under Wis. Stat. § 323.11, but note the council’s decision that one existed was based on unverified and clearly erroneous information put forth by council members and Chief of Police Smith. See Minutes of the Common Council: Verbatim Minutes, June 2, 2020 at 50-60 (hereinafter, “Verbatim Minutes”).

measure that makes the mere act of being in public illegal. It makes policing crime simple – police can control the streets because they can arrest anyone in them. A curfew inherently restricts the most basic constitutional rights of movement and assembly, and such a drastic measure must be justified under the highest of standards.⁴

A. The Mayor's Initial June 1st Curfew Order

On June 1st, the Mayor announced a curfew for all persons in Green Bay from 9 p.m. until 6 a.m. on June 3. It initially applied to any person on any street, sidewalk or other public property during this time. Presented this way, the curfew was never put forth as a restriction on the time, place and manner of political speech, but a “true curfew” such as those in place in Minneapolis and Milwaukee. As people complained of the restrictions, however, the curfew was relaxed to allow businesses to stay open and people to leave their homes to go there. It was later “clarified” that although it applied to all, the police would only use it on groups of people or people “engaged in illegal activity.”⁵ The police used this discretion in line with the original purpose of the curfew—the only people selected for enforcement of the curfew on June 1st were non-violent BLM protesters critical of the police.

B. The Council Passes a Curfew that Avoided Criminalizing BLM Protests

The City Council met on June 2nd to ratify and extend the emergency curfew. The Council specifically disavowed any intention to focus on BLM speech. It applied to:

all persons from 9:00 p.m. until 06:00 a.m. beginning on June 1st, 2020, and ending on June 8th, 2020, unless earlier terminated if the Mayor and Emergency Operations Manager determine that the conditions giving rise to the emergency no longer exist. **All persons shall cease** vehicular and pedestrian travel on the public way, streets, sidewalks and highways and return to their homes, places of work or other convenient place.

(Resolution of June 2, 2020) (emphasis supplied).

⁴ The Supreme Court has long recognized that curfews directed at adults touch upon fundamental constitutional rights and thus are subject to strict judicial scrutiny. “The right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all—and to do so whenever one pleases—is an integral component of life in a free and ordered society.” *Waters v. Barry*, 711 F.Supp. 1125, 1134 (D.C. Cir. 1989), citing *Papachristou v. City of Jacksonville*, 405 US 156, 164, 31 L. Ed. 2d 110, 92 S. Ct 839 (1972).

⁵ <<https://www.wbay.com/content/news/Green-Bay-extends-curfew-through-Monday-morning-570972211.html>> (June 2, 2020)

Everyone understood the curfew was a response to BLM protests and the violence and illegal activity Chief Smith erroneously attributed to the protest itself.⁶ The Council invited two BLM activists and organizers to speak at the meeting against a curfew that would restrict how and when they could get their message to the public. In fact, the entire discussion at the meeting was limited to BLM.

Banning BLM outright would be unconstitutional. The Council instead adopted a curfew that had nothing to do with speech. Activist Abby Ringel, one of the BLM activists was skeptical:

[Ms. Ringel] So is it my understanding that then [sic] this curfew is strictly to prohibit protesters from protesting after 9 p.m.?

[City Attorney Chavez] No, it is to prohibit anybody from being out in public streets after that time.⁷

On its face anyway, the City adopted a curfew ordinance that had nothing to do with speech.⁸

C. The True Intent of the Curfew Quickly Emerged: Stop BLM

When the City announced the curfew, residents balked at being told they had to stay home because of public safety. In response, the City immediately started announcing exceptions to the curfew. When people found out they would not be able to go for a walk or jog,⁹ for example, the City backed off and ensured

⁶ See Verbatim Minutes, at 50-60.

⁷ Verbatim Minutes, at 51 (emphasis supplied).

⁸ The actual curfew law was not published or made readily available to the public while it was in effect. Under the City Charter Section 40.03, any ordinance is not effective until ratified by the Council and published. Notice of other ordinances passed at the June 2, 2020 meeting were published in the Press Gazette the following day, but nothing concerning the curfew. See Green Bay Press-Gazette, June 5, 2020 at 8B. With City Hall closed to the public, I requested the actual ordinance by email to the City Clerk, who is required to make these available for public inspection. The same request was sent to your office and the office of the Mayor. I did not receive the actual text of the curfew until June 5, shortly before it was rescinded. There is great doubt whether the curfew was ever in effect at all. Despite being styled a "resolution," it was clearly a city ordinance prescribing a punishment for certain conduct within the City.

⁹ As reported by the Green Bay Press-Gazette, the City originally advised: "Residents are prohibited from using public sidewalks and streets between 9 p.m. and 6 a.m., which includes going for a walk or jog." <<https://www.greenbaypressgazette.com/story/news/2020/06/03/green-bay-george-floyd-protest-windows-broken-shots-reported/3138320001/>> (June 3, 2020).

people police would only focus on mass gatherings and illegal activities.¹⁰ “After the initial curfew was implemented, the city clarified that businesses would be allowed to operate after 9 p.m.,” and the public was free to patronize them.¹¹

Eventually, the curfew was relaxed so much it was meaningless. The City simply assured people the curfew did not apply to anyone “engaged in lawful activity.” Under the City’s pronouncements, the curfew itself did not make anything illegal. And so the curfew became a powerful tool to rid the streets of anyone the police deemed undesirable. Fourteen people were charged and arrested for violating the curfew, but not for any “unlawful” conduct. All were people engaged in lawful speech critical of the police in general.¹²

What the City ultimately did was both simple and shocking: The City told the Police Department it could arrest anyone it wanted. The Police wanted to arrest BLM protesters. And they did. Exclusively.¹³

D. The Police Abused Their Unfettered Discretion

The police did not even follow their own guidance to focus on “groups” and “unlawful activity.” Instead, they exercised their authority based on race and the content of the protected speech:

They did not focus on groups of people posing a threat. An Hispanic man was arrested on June 4, 2020 for sitting—alone—in front of the police station where he did nothing but pray the rosary in contemplation of lives lost. He was taken to an outpost near Bay Beach and processed. The officers left him

¹⁰ *Id.*

¹¹ *Id.*

¹² Chief Smith all but told the Council that a) he considered BLM protests and criminality to be inseparable and b) that BLM protests were going to be the sole target of his enforcement. See Verbatim Minutes, at 56 (“really a protest at that point is people meandering around looking for trouble.”).

¹³ I believe previous communications from myself, my clients and the petitions seeking this relief and the grounds therefore have already presented the requisite anticipation of litigation that a litigation hold should already be in place for all documents relating to the curfew and its enforcement. If not, this letter does.

there rather than returning him to his car. Of course, by stranding him there on the road, he was violating the curfew just as much as when they arrested him.¹⁴

They did not break up groups of white people. On Thursday evening, June 4, for example, I personally went to the Riverwalk to see if any protesters needed assistance. There were throngs of people out on a warm, June night just before 9:00 p.m., many of them in groups. I observed an officer walk from the north end of the river walk to the south ignoring every group. At the south end, a small group of six or eight young Black and Latinx people were boxing up candles from a small vigil. Even though they were obviously preparing to leave, the officer nonetheless stopped to make sure.¹⁵

They did target “unlawful” activity after 9 p.m. – they were following BLM protesters and getting personnel in place. Another group of protesters continued up until the supposed nine o’clock curfew. When officers instructed them to stop and they did not immediately leave, vans already staged nearby pulled up to several of the protesters. A squad of officers jumped out of the vans, quickly using teams of three to arrest individual protesters and put them in the vans. This was done with personnel and physicality that was not needed for two young women and a man holding signs. As a further show of intimidation, an officer stood with his long rifle at the ready.

These examples are indicative of every arrest under the curfew of which I am aware and demonstrate that the sole purpose of the “curfew” was to stop all BLM speech and nothing else. This also demonstrates a coordinated top-down policy by the Green Bay Police Department to carry this out. The fact that officers and vehicles followed protesters until the moment of 9 p.m. shows the officers had been instructed that it was the BLM protest itself that was illegal.

¹⁴ This arrest makes no sense on any level. It is clearly inconsistent with Chief Smith’s stated need for “a tool to clear people out of the kind of mayhem or the kind of pandemonium that the [M]ayor and I witnessed on Sunday night [June 1st].” Verbatim Minutes, at 57.

¹⁵ Here it does not matter whether the officer stopped at this group based on their race or because they were boxing up candles. The result is the same under a Fifth Amendment due process analysis or a First Amendment content analysis.

I personally walked the area around Washington and Walnut Streets and the Riverwalk from Walnut to Main several times each night the curfew was in effect beginning just before 9:00 pm. While I saw many officers on patrol, I did not witness a single one approach a group of white people, regardless of size or the amount of noise it made.

Sadly, it was people voicing their outrage that people of color are not treated the same as white people that were singled out and arrested—while white people were allowed to go about their business. Any irony here is destroyed by the intentionality.

THE ARRESTS WERE UNCONSTITUTIONAL AND A PLAIN VIOLATION OF CIVIL RIGHTS

The curfew and its enforcement suffer numerous Constitutional defects.

A. Unconstitutional Selective Enforcement

Laws must be enforced equally and can neither be motivated by discriminatory intent or have an unfair discriminatory effect.¹⁶ The curfew was not upheld according to its terms. It was applied only to BLM advocates who were predictably more likely to belong to a protected racial class than the many other groups of people allowed to walk freely. Because the selected target of the enforcement was a group called Black Lives Matter, the lines between unconstitutional targeting of race and content are impossible to identify.¹⁷

B. The “Curfew” Unconstitutionally Barred Certain Speech and Assembly Based Solely on Content

Apart from apparent racial discrimination, the curfew targeted BLM precisely because of the content of their message. There is no doubt the curfew was a reaction to sporadic violence the City blamed on BLM. The Mayor and the Council wisely recognized it could not openly criminalize BLM speech.¹⁸ But a government cannot instruct its police to do through enforcement what they could not do by legislation or emergency power.¹⁹

¹⁶ See, generally, *United States v. Armstrong*, 517 U.S. 456 (1996) (race); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) (speech); see also *Chavez v. Illinois State Police*, 251 F.3d 612, 638 (7th Cir. 2001) (noting “the crucial question [is] whether one class is being treated differently from another class that is otherwise similarly situated.”).

¹⁷ On this point, see Part D, *infra*.

¹⁸ See *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977)(even when there is unlawful activity by some participants in demonstration, the police may not act against the assembly as a whole, unless it is “substantially infected with violence or obstruction.”); *Barham v. Ramsey*, 434 F.3d 565, 573 (D.C. Cir. 2006) (finding mass arrests invalid where there were only isolated acts of violence and vandalism).

¹⁹ Even if there were some link between BLM protests and the crimes the City associated with it, the City’s actions were still illegal. See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 58 (finding that any prior

**C. The “Curfew,” as Disclosed to the Public,
was Unconstitutionally Vague**

During the imposition of the curfew, the public was not aware of its actual requirements. The thousands of people strolling through public spaces as part of their usual nightlife surely did not think they were violating the law. This is because the only thing they knew of the curfew was contained in a series of statements and press releases that eventually resulted in a curfew that only prevented already illegal activities. An unnecessary reminder that doing something unlawful is, in fact, unlawful.

If we are to understand the curfew, not as enacted, but by the City’s pronouncements, then no one except the police could know in advance what activities could cause their arrest. Such laws violate due process and are void.²⁰ A City cannot leave absolute discretion to police decide what is legal or not.²¹

Particularly offensive here, is the use of deliberately vague ordinances against people complaining about the history of injustice towards black people.²² The laws struck down in developing the “void for vagueness” doctrine were primarily the “vagrancy” statutes used in the Jim Crow South (and elsewhere) to intimidate and subjugate black people. It is precisely this history and the lack of change people are protesting.²³

restraint requires at a minimum sufficient safeguards to “obviate the dangers of a censorship system”); *Wayte v. United States*, 470 U.S. 598, 608 (1985) (noting the decision to prosecute “may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights”) (internal quotations and citations omitted).

²⁰ See, e.g., *Winters v. New York*, 333 U.S. 507, 515-16 (holding people “cannot be required to guess at the meaning of [a statute.]”)

²¹ This is especially true of laws carrying punishment – these statutes, at a minimum, must describe the offensive conduct with “sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

²² In fact, courts are even more likely to hold an ordinance facially invalid where it touches upon fundamental First Amendment rights of speech and assembly. *Papachristou*, 405 U.S. at 156 & n.1.

²³ The horribly slow pace of eradicating these anti-black vagrancy statutes are seen most vividly in the dissents. See, e.g., *Winters v. New York*, 333 U.S. 507, 540 (1948) (Justice Frankfurter dissenting); *Edelman v. California*, 344 U.S. 357, 362 (1953) (Justice Black dissenting); *Hicks v. District of Columbia*, 383 U.S. 252 (1966) (Justice Douglas dissenting).

**D. The Only Way the Curfew Survives “Vagueness”
is if People Understood that the Only Thing
Prohibited by the Curfew was BLM Speech**

And this brings us back to the true purpose of the “curfew.” Contrary to the assurances given to Ms. Ringel at the June 2nd Council meeting that the curfew in no way was aimed at BLM protests, this was always intended to stop only them. Chief Smith, speaking in support of the curfew at the Council meeting, stated his opinion that BLM activity and criminality became indistinguishable “at some point.”²⁴ The most cursory review of the transcript of that meeting show that protecting the City from further BLM protests was the sole agenda item.

RELIEF

Ultimately, the City got what it wanted but could not require—BLM protests almost completely stopped in response to the curfew. That cannot end the story, however, because at least fourteen people were arrested, face fines and the prospect of an arrest record.

The City had ample time to do the right thing and expunge these arrests and drop the charges. Letters to both of your offices had no result. A broadly supported petition urging the City to drop the charges was not enough. We are now nearing the court dates for those arrested.²⁵

Declaring racial injustice as a City-wide health crisis is a nice symbolic gesture. It is time for the City to show its commitment to *action* in moving toward racial equality and due process. We do not mean to ignore entirely this City’s expense and inconvenience in supporting First Amendment rights and recognizing the moment, as well as the movement. Correcting the mistake and

²⁴ See generally, June 2, 2020 Verbatim Meeting Minutes, at 50-60

²⁵ It bears noting that the arrests were made under the state of emergency enabling act and are thus governed by the State rules of discovery, rather than the limited discovery available for regular ordinance violations. Thus we will be seeking, *inter alia*, all communications between the Council, the Mayor and the Police Department regarding the need for the curfew, its content and its enforcement; all communications, including instructions, policies, guidelines, discussed at any time among any members of law enforcement; and full arrest documentation for each arrested person including all notes and debriefing material. From the consistency of discriminatory enforcement of the curfew, there is little doubt that individual officers’ behavior was directed at a department level.

consequences of the curfew will show action towards racial justice and go a long way to further the race dialogue that is sure to continue.²⁶

On behalf of those I represent and others similarly situated, we therefore suggest the following as an appropriate resolution to this matter:

1. Immediate dismissal of all citations for violation of the curfew;
2. Expungement of all records relating to any arrest under the curfew, including any charges where the curfew formed the basis for probable cause;
3. An apology from the City and acknowledgment that its response to the events of May 31st was imprudent.
4. Reasonable compensation for the time each of my clients devoted to addressing these charges;
5. Reasonable compensation for the actual arrests; and
6. Some compensation on a reduced-fee basis for the legal work required to get this relief.

I very much look forward to discussing these issues with you.

Respectfully Submitted,



David R. Hassel

cc: David Lasee, Brown County District Attorney

²⁶ It is with regret that I note Alder Wery's recent Facebook posting calling for "patriots" to protect Green Bay just hours *after* such a "patriot" gunned down three unarmed people in the presence of Kenosha police officers. Such rhetoric is not even dog-whistle politics, but a blatant pandering to racial bigotry. The City's response was swift, but we hope some public sanction is made denouncing this behavior.