



PO Box 87131  
San Diego, CA 92138-7131  
T/ 619-232-2121  
F/ 619-232-0036  
[www.aclusandiego.org](http://www.aclusandiego.org)

October 3, 2016

Jeff Davis  
Chief of Police  
El Cajon Police Department  
100 Civic Center Way  
El Cajon, CA 92020

Dear Chief Davis:

I am writing to discuss the arrests of several people who were participating in a peaceful vigil over the weekend. The events were recorded on a publicly available video.<sup>1</sup> I understand no video necessarily tells the complete story, but the available information raises serious questions that the arrests were unlawful.

I understand the vigil was taking place in a private parking lot that the participants had permission to use. The participants appeared peaceful and were not apparently breaking any law. Nonetheless, the El Cajon Police Department, apparently supported by the San Diego County Sheriff's Department, declared the vigil an unlawful assembly, ordered participants to disperse, and arrested individuals who did not.

Based on that information, I have serious concerns that the arrests were unlawful. According to relevant statutes:

- An “unlawful assembly” occurs “[w]henver two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner.” Penal Code § 407.
- “Every person who participates in any ... unlawful assembly is guilty of a misdemeanor.” Penal Code § 408.

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<sup>1</sup> [https://m.facebook.com/story.php?story\\_fbid=1082871891768671&id=100001376116381](https://m.facebook.com/story.php?story_fbid=1082871891768671&id=100001376116381)

- “Every person remaining present at the place of any ... unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.” Penal Code § 409.
- “If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor.” Penal Code § 416(a).

Courts have narrowly construed these terms to ensure they comply with the Constitution. The term “unlawful act” means “criminal conduct prohibited by state law,” in other words, “conduct which the state may legitimately suppress—i.e., actual violations of the law, or commission of overt acts leading toward a violation of the law.” *Chambers v. Municipal Court*, 65 Cal. App. 3d 904, 910 (1977). The term “lawful act in a violent, boisterous, or tumultuous manner” reaches only “assemblies which are violent or which pose a clear and present danger of imminent violence.” *In re Brown*, 9 Cal. 3d 612, 623 (1973). The term “disturbing the peace” requires “clear and present danger that violence will imminently ensue” and “proof of intention to commit overt acts that are themselves violent or that tend to incite others to violence.” *Chambers*, 65 Cal. App. 3d at 909.

The available information does not show the vigil itself presented a clear and present danger of imminent violence. If there was no such danger, the declaration of unlawful assembly was proper only if the participants were committing or intending to commit an unlawful act by “violating some other law in the process” of holding the vigil. *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996). It is not evident what law the participants were violating by holding their peaceful vigil.

According to an update posted on the City of El Cajon’s website yesterday, “a small group of protesters gathered near 800 Broadway” following a traffic stop on Saturday night, after which “[a] fight broke out between a few of the protesters and it was reported that someone was leaving to get a gun. Sensing this shift in the demeanor of the crowd and out of concern for community safety, officers declared an unlawful assembly and ordered the group to disperse.”

It is not clear whether this is the declaration of unlawful assembly that was applied to the peaceful vigil in the parking lot. If it was and if it was justified, it is not clear that it was lawful to arrest the participants in the peaceful vigil. The law requires “a clear and present danger of imminent violence before bystanders can be arrested along with participants in an unlawful assembly,” and otherwise, “the police are at least required to differentiate between the participants and innocent bystanders.” *Dubner v. City & County of San Francisco*, 266 F.3d 959, 967-68 (9th Cir. 2001).

This letter is based on the information currently available. I would be glad to learn any other relevant information about the incident. The ACLU calls on the City of El Cajon to clarify immediately what if any law it claims the participants were violating that justified the arrests and why it was necessary to arrest participants in a peaceful vigil.

Apart from whether the declaration of unlawful assembly was justified, there are serious questions whether the law enforcement response to this peaceful vigil was excessive, with two lines

Chief Jeff Davis  
October 3, 2016  
Page 3

of officers in helmets with batons, accompanied by a police dog and apparently a police helicopter hovering overhead. The ACLU calls on the City of El Cajon to explain why an apparently peaceful vigil warranted this level of confrontation, if any, which only deepens public distrust of law enforcement in the wake of Alfred Olango's tragic killing.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Loy', with a stylized flourish extending to the right.

David Loy  
Legal Director

cc: Mayor, City of El Cajon  
City Attorney, City of El Cajon  
San Diego County District Attorney  
San Diego County Sheriff  
U.S. Department of Justice