SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 07-02672

PRESENT: HURLBUTT, J.P., MARTOCHE, LUNN, GREEN, AND GORSKI, JJ.

JIOVON ANONYMOUS, A MINOR BY AND THROUGH HIS FATHER AND LEGAL GUARDIAN, THOMAS ANONYMOUS, AND THOMAS ANONYMOUS, INDIVIDUALLY, PLAINTIFFS-APPELLANTS,

V OPINION AND ORDER

CITY OF ROCHESTER, ROBERT DUFFY, IN HIS OFFICIAL CAPACITY AS MAYOR OF CITY OF ROCHESTER, AND DAVID MOORE, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF CITY OF ROCHESTER, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

DAVIDSON FINK LLP, ROCHESTER (MICHAEL BURGER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (JEFFREY EICHNER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.
DANIEL J. FREEMAN, NEW YORK CITY, FOR NEW YORK CIVIL LIBERTIES UNION FOUNDATION, AMICUS CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered February 20, 2007 in a declaratory judgment action. The judgment denied plaintiffs' motion for judgment declaring that certain sections of chapter 45 of the Code of the City of Rochester are unconstitutional and for an injunction enjoining defendants from enforcing that chapter and granted defendants' motion to dismiss the complaint.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, defendants' motion is denied, the complaint is reinstated, plaintiffs' motion is granted, judgment is granted in favor of plaintiffs as follows:

> It is ADJUDGED and DECLARED that chapter 45 of the Code of the City of Rochester is unconstitutional under the United States and New York Constitutions,

and defendants are enjoined from enforcing chapter 45 of the Code of the City of Rochester.

Opinion by GREEN, J.: In 2006 the Rochester City Council (City Council) adopted an ordinance codified as chapter 45 of the Code of defendant City of Rochester (Code) establishing a nighttime curfew for juveniles (Ord. No. 2006-246) (hereafter, ordinance). The ordinance took effect on September 5, 2006.[1] With certain exceptions (*see* § 45-4), the ordinance makes it unlawful for minors, defined as persons under the age of 17 pursuant to section 45-2, to be in a public place between the hours of 11:00 P.M. and 5:00 A.M. Sunday through Thursday and between midnight and 5:00 A.M. on Friday and Saturday (*see* § 45-3).

Plaintiff Thomas Anonymous (plaintiff father) resides in defendant City of Rochester (City) with his son, plaintiff Jiovon Anonymous (plaintiff son), who was born on January 25, 1992. Plaintiffs commenced this action seeking a declaration that certain sections of the ordinance are unconstitutional, and seeking to enjoin defendants from enforcing the ordinance,[2] and plaintiffs thereafter moved for judgment granting that relief. Plaintiffs allege that the ordinance is inconsistent with several state statutes and violates a number of rights guaranteed to plaintiffs under the New York and United States Constitutions. Supreme Court denied plaintiffs' motion and granted defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (7). For the reasons that follow, we conclude that plaintiffs are entitled to the relief sought.

I

In section 45-1 of the Code, the City Council sets forth its "Findings and purpose" with respect to the ordinance as follows:

> "A. A significant number of minors are victims of crime and are suspects in crimes committed during the nighttime hours, hours during which minors should generally be off the streets and getting the sleep necessary for their overall health and quality of life. Many of these victimizations and criminal acts have occurred on the streets at night and have involved violent crimes, including the murders

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[1]The ordinance was initially enacted as a temporary measure, and was set to expire on December 4, 2006. It has been extended several times (Ord. Nos. 2006-370, 2007-27, 2007-332, 2008-316), most recently to December 31, 2009 (Ord. No. 2008-345).

[2]We note that plaintiffs label their pleading a "Petition and Complaint" and purport to seek relief "under 42 U.S.C. § 1983 and CPLR Articles 78 and section 3001." We note that plaintiffs in fact seek no relief available in a CPLR article 78 proceeding, and we therefore ignore the erroneous designation of plaintiffs as petitioners-plaintiffs (*see generally Matter of Vezza v Bauman*, 192 AD2d 712, 713).

of teens and preteens.

B. While parents have the primary responsibility to provide for the safety and welfare of minors, the City also has a substantial interest in the safety and welfare of minors. Moreover, the City has an interest in preventing crime by minors, promoting parental supervision through the establishment of reasonable standards, and in providing for the well-being of the general public.

C. A curfew will help reduce youth victimization and crime and will advance the public safety, health and general welfare of the citizens of the City."

The record indicates that the City Council and other City officials determined to address the problem of youth victimization and crime by means of a curfew following the violent deaths of three boys between June 2001 and October 2005. First, a 10-year-old boy was shot to death in front of 185 Whitney Street as he watched a dispute over a drug deal. Second, in an unrelated incident involving a drug house, a 12-year-old boy was shot and killed at 18 Langham Street. Third, a 14-year-old boy was stabbed to death during an altercation with adult bar patrons on Meigs Street. Following those tragic incidents, the City Council held community meetings and began to consider enacting a juvenile curfew ordinance. The Chair of the City Council's Public Safety Committee, along with representatives from the City's Police Department (Police Department) and the community, traveled to Minneapolis, Minnesota to review the operation of that city's curfew ordinance. Upon his return, the Chair of the Public Safety Committee began advocating the adoption of an ordinance modeled on the Minneapolis ordinance. In addition, one of the police officers drafted a report for defendant Chief of Police setting forth statistical information concerning juvenile crime and victimization in the City, which was distributed to defendant Mayor and the City Council. Enactment of a juvenile curfew ordinance thereafter garnered the support of the Chief of Police, the Mayor and the City Council President. After conducting public hearings, the City Council adopted the ordinance.

The ordinance provides that, during the designated hours (*see* Code § 45-3), it is unlawful for a minor to be in a public place unless "the minor can prove that" one of the six enumerated exceptions applies (§ 45-4). The first exception is for minors accompanied by a parent, guardian or "other responsible adult" (§ 45-3 [A]). The term "responsible adult" is defined as "[a] person 18 years of age or older specifically authorized by law or by a parent or guardian to have custody and control of a minor" (§ 45-2). Second, a minor may be in a public place during curfew hours if he or she is engaged in lawful

employment or is en route to or from such employment (*see* § 45-4 [B]). The third exception is for a minor "involved in an emergency situation" (§ 45-4 [C]), and the term "emergency" is defined as "[a] circumstance or combination of circumstances requiring immediate action to prevent property damage, serious bodily injury or loss of life" (§ 45-2). The fourth exception is for a minor "going to, attending, or returning home from an official school, religious or other recreational activity sponsored and/or supervised by a public entity or a civic organization" (§ 45-4 [D]). Pursuant to the fifth exception, a minor may be in a public place during curfew hours "for the specific purpose of exercising fundamental rights such as freedom of speech or religion or the right of assembly protected by the First Amendment of the United States Constitution or Article I of the Constitution of the State of New York, as opposed to generalized social association with others" (§ 45-4 [E]). Finally, the sixth exception is for minors "engaged in interstate travel" (§ 45-4 [F]).

A violation of the ordinance constitutes a "violation" as defined in Penal Law (*see* Code § 45-5), and a police officer may detain a minor or take a minor into custody for a curfew violation "if the police officer, after speaking with the minor and considering the facts and surrounding circumstances . . . [r]easonably believes that the minor has violated" the ordinance and that none of the six exceptions set forth in the ordinance applies (§ 45-6 [B]). If the minor is taken into custody, the officer "shall take the minor to a location designated by the Chief of Police" (§ 45-6 [C]).

Police Department General Order 425, "Curfew Ordinance Enforcement," provides that the Police Department's policy is "to handle curfew violations in the least coercive reasonable alternative manner based on the [officer's] discretion taking into consideration the needs and best interests of the Minor, as well as the need for protection of the community." General Order 425 further provides that an officer who believes that a minor is in violation of the curfew ordinance may direct the minor to proceed directly home with a warning, take the minor into protective custody, transport the minor to a parent, guardian or other responsible adult, or transport the minor to a curfew facility, i.e., the Curfew Center at Hillside Children's Center. In addition, General Order 425 sets forth the procedures for searching, transporting and handcuffing minors taken into custody for a violation of the curfew ordinance.

II

Our analysis of the ordinance begins with our recognition that the City has broad power to enact local legislation for "[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein" (Municipal Home Rule Law § 10 [1] [ii] [a] [12]; *see* NY Const, art IX, § 2 [c] [ii] [10]; *New York State Club Assn. v City of New York*, 69 NY2d 211, 217, *affd* 487 US 1). Despite its broad police power, however, the City "cannot adopt laws that are

inconsistent with the Constitution or with any general law of the State" (*Incorporated Vil. of Nyack v Daytop Vil.*, 78 NY2d 500, 505; *see Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 96). Thus, while a juvenile curfew ordinance may generally be a permissible exercise of a municipality's police power (*see Ramos v Town of Vernon*, 353 F3d 171, 172; *Matter of Michael G.*, 99 Misc 2d 699, 700; 2005 Ops Atty Gen No. 13), we are concerned here with the specific terms of the ordinance challenged by plaintiffs. We hold that the ordinance is inconsistent with general laws of the State and with the New York and United States Constitutions.

III

We conclude first that the penal provisions of chapter 45 are inconsistent with Family Court Act § 305.2 and Penal Law § 30.00. Section 45-5 of the Code, entitled "Penalty," provides that a curfew violation under section 45-3 "shall constitute a 'violation' as that term is defined in the New York State Penal Law," i.e., (a criminal offense punishable by a term of imprisonment up to 15 days (*see* Penal Law § 10.00 [3]). Section 45-6 (B) authorizes a police officer to "detain a minor or take a minor into custody based on a violation of § 45-3." Pursuant to Family Court Act § 305.2 (2), however, a police officer is authorized to take a child under the age of 16 into custody without a warrant only in cases where an adult could be arrested for a crime, and a violation does not fall within the definition of a crime (*see* Penal Law § 10.00 [6]; *see also Matter of Victor M.*, 9 NY3d 84, 87). Defendants contend that a police officer detaining or taking a juvenile into custody for a curfew violation is akin to an officer returning a truant to school pursuant to Education Law § 3213 or taking a runaway home or to a facility for runaway children pursuant to Family Court Act § 718. Those statutes, like the ordinance, authorize police officers to detain and take juveniles into custody for conduct that does not constitute a crime. Unlike the ordinance, however, those statutes are entirely noncriminal in nature and do not authorize a criminal arrest (*see Matter of Shannon B.*, 70 NY2d 458, 462-463; *Matter of Bernard G.*, 247 AD2d 91, 93-94). Thus, "[r]egardless of what euphemistic term the police wish to employ to describe [the act of detaining or taking curfew violators into custody], its legal consequence is indistinguishable from a formal arrest" (*Matter of Martin S.*, 104 Misc 2d 1036, 1038). By authorizing the arrest of minors under the age of 16 for a curfew violation, the ordinance is inconsistent with Family Court Act § 305.2 (2) (*see generally Michael G.*, 99 Misc 2d at 701).

In addition, insofar as the ordinance provides that a minor under the age of 16 who violates the curfew ordinance commits a "violation," the ordinance is inconsistent with Penal Law § 30.00. With the exception of certain designated felonies, that statute establishes that the age of 16 is the minimum age for criminal responsibility under the Penal Law (*see* § 30.00 [1]). The City may not, consistent with the legitimate exercise of its police power, supersede that general law of

the State.

IV

If the ordinance applied only to minors under the age of 16, there would be no need to address the constitutional issues raised by plaintiffs inasmuch as the conflicts between the ordinance and the pertinent provisions of the Family Court Act and the Penal Law exist only with respect to minors under the age of 16. "We are bound by principles of judicial restraint not to decide constitutional questions 'unless their disposition is necessary to the appeal' " (*Matter of Clara C. v William L.*, 96 NY2d 244, 250). Here, however, the ordinance also applies to persons such as plaintiff son, who is now between the ages of 16 and 17 years old, and thus we address certain of plaintiffs' constitutional challenges.

Plaintiffs challenge the ordinance, inter alia, under the Equal Protection Clauses of the United States Constitution (*see* US Const, 14th Amend, § 1) and the New York Constitution (*see* NY Const, art I, § 11). Our analysis of that challenge is the same under both provisions inasmuch as "our State Constitution's equal protection guarantee is as broad in its coverage as that of the Fourteenth Amendment" (*Golden v Clark*, 76 NY2d 618, 624; *see Matter of Esler v Walters*, 56 NY2d 306, 313-314). With respect to each provision, our analysis begins with determining the appropriate level of judicial scrutiny (*see Matter of Rosenstock v Scaringe*, 40 NY2d 563, 564; *Ramos*, 353 F3d at 174). Generally, a party challenging a municipal ordinance must overcome "[t]he exceedingly strong presumption of constitutionality" applicable to legislative enactments (*Lighthouse Shores v Town of Islip*, 41 NY2d 7, 11). Here, the court applied the rational basis standard, pursuant to which an ordinance will be sustained provided that it is rationally related to a legitimate government interest (*see City of Cleburne v Cleburne Living Ctr.*, 473 US 432, 439-440). The court, quoting *Lighthouse Shores* (41 NY2d at 12), concluded that plaintiffs had the burden of demonstrating "that 'no reasonable basis at all' existed for the curfew ordinance to be passed."

We conclude that the court erred in applying that standard, and that a higher level of scrutiny applies to plaintiffs' equal protection challenges. A heightened level of scrutiny is appropriate where a legislative classification disadvantages a suspect class or burdens the exercise of a fundamental right (*see Plyler v Doe*, 457 US 202, 216-217). Although age is not a suspect class (*see Gregory v Ashcroft*, 501 US 452, 470), we agree with plaintiffs that the ordinance infringes on plaintiff son's fundamental right of free movement because it affects the right of plaintiff son

> "with parental consent to walk the streets, move about at will, meet in public with friends, and leave his house[] when [he] pleases. This right to movement is a vital

> component of life in an open society, both for juveniles and adults"

(*Ramos*, 353 F3d at 172; *see Johnson v City of Opelousas*, 658 F2d 1065, 1072; *Waters v Berry*, 711 F Supp 1125, 1134).

Because juvenile curfew ordinances implicate the fundamental right of free movement, several courts have applied strict scrutiny in reviewing equal protection challenges to those ordinances (*see e.g. Nunez v City of San Diego*, 114 F3d 935, 946; *State v J.P.*, 907 So2d 1101, 1109 [Fla]; *City of Wadsworth v Owens*, 42 Ohio Misc 2d 1, 2-3, 536 NE2d 67, 69; *Allen v City of Bordentown*, 216 NJ Super 557, 571-572, 524 A2d 478, 485-486). Other courts, most notably the Second Circuit in *Ramos*, have concluded that "the inherent differences between children and adults, both mental and physical," warrant an intermediate level of scrutiny (353 F3d at 179; *see Hutchins v District of Columbia*, 188 F3d 531, 541; *Schleifer v City of Charlottesville*, 159 F3d 843, 847, *cert denied* 526 US 1018). We recognize that the rights of minors are not coextensive with those of adults (*see generally Ginsberg v New York*, 390 US 629, 649-650 [Stewart, J., concurring], *reh denied* 391 US 971), and that the City has broader authority over the actions of minors than the actions of adults (*see Prince v Massachusetts,* 321 US 158, 168, *reh denied* 321 US 804). Given the fundamental nature of the right of free movement, however, we do not believe that an intermediate degree of scrutiny is appropriate to review the burdens imposed by the ordinance on a minor's exercise of that right (*see Nunez*, 114 F3d at 946). Rather, we conclude that "the legislative differentiation here in treatment between youths and adults is to be examined under strict scrutiny and may be justified only by the existence of a compelling [governmental] interest to be served by the differentiation, and even then only if no less restrictive means are available to satisfy that compelling [governmental] interest" (*People ex rel. Wayburn v Schupf*, 39 NY2d 682, 687).

V

Although we conclude that strict scrutiny is the appropriate standard of review, we conclude in any event that the ordinance does not withstand even intermediate scrutiny. To satisfy that standard, the City "must show that the challenged classification serves 'important governmental objectives and that the discriminatory means employed [are] substantially related to the achievement of those objectives' " (*Ramos*, 353 F3d at 180, quoting *Wengler v Druggists Mut. Ins. Co.*, 446 US 142, 150). The stated goals of the ordinance include reducing youth victimization and crime, and advancing "the public safety, health and general welfare of the citizens of the City" (§ 45-1 [C]).[3] Plaintiffs do not deny that the City's interest in preventing crime and victimization by persons of any age is compelling (*see*

[3]A third stated goal of the ordinance, "promoting parental supervision" (§ 45-1 [B]), is discussed below.

generally United States v Scott, 450 F3d 863, 870), or that the City has an important interest in the safety, health and welfare of all its citizens (*see generally Hodgson v Minnesota*, 497 US 417, 444). Rather, plaintiffs contend, and we agree, that the City has not shown a substantial relationship between the burdens imposed on juveniles by the curfew and the achievement of the City's objectives.

We acknowledge that the City "need not produce evidence to a scientific certainty of a substantial relationship" (*Ramos*, 353 F3d at 183), and that the "dispute about the desirability or ultimate efficacy of a curfew is a political debate, not a judicial one" (*Schleifer*, 159 F3d at 850). At the same time, however, the City must show a substantial relationship between the curfew and its goals in order "to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions" (*Mississippi Univ. for Women v Hogan*, 458 US 718, 725-726).

The submissions by defendants in support of their motion to dismiss principally consist of: (1) affidavits of political officials involved in the adoption of the ordinance; (2) affidavits and reports of police officials responsible for enforcement of the ordinance; (3) crime statistics for the City; and (4) information concerning the implementation of juvenile curfews in other municipalities. A common theme of the first two groups of submissions is that City officials perceived a pressing need to respond to the problem of juvenile victimization and crime as a result of the aforementioned tragic deaths of three minors. The record establishes, however, that the 10-year-old and 12-year old boys were killed during hours outside the curfew, and that the 14-year-old boy was already subject to an individualized curfew as the result of an adjudication that he was a person in need of supervision. Thus, there is no connection between the ordinance and the tragic events that spurred its enactment.

In addition, and importantly, the crime statistics prepared for the Chief of Police and reviewed by the City Council establish that minors are substantially more likely to be involved in crime or to be victims of crime during hours outside the curfew. Thus, "[a]lthough the [City's] curfew aims to reduce juvenile crime and victimization *at night*, defendants produced nothing to show that any consideration was given to the nocturnal aspect of the ordinance" (*Ramos*, 353 F3d at 186; *see Nunez*, 114 F3d at 948). Further, "the curfew, by its terms, keeps the under-[17] set off the streets at night, but no effort seems to have been made by the [City] to ensure that the population targeted by the ordinance represented that part of the population causing trouble or that was being victimized (or that was even in particular danger of being victimized)" (*Ramos*, 353 F3d at 186). Indeed, the crime statistics for the City demonstrate that the vast majority of violent crime during curfew hours is committed by persons over 18, and that adults are far more likely to be victims of such crime during those hours. The Mayor and the Chief of Police expressed their opinions and

beliefs concerning the particular vulnerability of juveniles during nighttime hours, but those opinions and beliefs are insufficient to demonstrate a substantial relationship between the ordinance and its goals. "Although assumptions about children may suffice to establish the significance of the government's interests and may even sustain the validity of a legislative enactment under a lower level of scrutiny, assumptions will not carry the government's burden of showing the presence of the 'requisite direct, substantial relationship[]' . . . between the factual premises that motivated the enactment of the curfew and its terms" (*id.*, quoting *Mississippi Univ. for Women*, 458 US at 725). Finally, the information concerning the results of the implementation of juvenile curfews in other municipalities is equivocal at best and does not establish the necessary relationship between the ordinance and the goals of reducing juvenile crime and victimization. Thus, because the City has failed to demonstrate that the ordinance is substantially related to an important governmental interest, we hold that it is unconstitutional under the Equal Protection Clauses of the New York and United States Constitutions.

We further hold that the ordinance imposes an unconstitutional burden on the First Amendment rights of juveniles. The ordinance prohibits the presence of minors in any "public place" for five or six hours each day (Code § 45-3), and thereby restricts expression in all public forums for approximately one fourth of each day (*see generally Nunez*, 114 F3d at 950). "Being out in public is a necessary precursor to almost all public forums for speech, expression, and political activity . . . [The] relationship [of governmental regulation of nonspeech, i.e., the nocturnal activity of minors,] to expressive conduct is intimate and profound" (*Hodgkins v Peterson*, 355 F3d 1048, 1059). By subjecting juveniles to arrest merely for being in a public place during curfew hours, the ordinance forcefully and significantly discourages protected expression.

Defendants contend that the exceptions provided in section 45-4 of the Code, particularly the exception for First Amendment activity, adequately protect the rights of minors to engage in such protected activity. We reject that contention. Pursuant to section 45-4 (E), the minor must prove to the satisfaction of the police officer that he or she is "in the public place for the specific purpose of exercising fundamental rights such as freedom of speech or religion or the right of assembly protected by the First Amendment of the United States Constitution or Article I of the Constitution of the State of New York . . . ." The exception thus permits an officer to arrest a minor based solely upon the officer's judgment whether the minor was engaged in constitutionally protected activity "as opposed to generalized social association with others" (*id.*). Further, even with the exception, the ordinance "leaves minors on their way to or from protected First Amendment activity vulnerable to arrest and thus creates a chill that unconstitutionally imposes on their First Amendment rights" (*Hodgkins*, 355 F3d 1048, 1051). Nor does the exception "significantly reduce the chance that a minor might be arrested for exercising his [or her] First

Amendment rights" (*id*. at 1064).

VI

Finally, we agree with plaintiffs that the ordinance interferes with plaintiff father's right to direct and control the upbringing of plaintiff son. "[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder" (*Prince*, 321 US at 166). Among the stated goals of the ordinance is "promoting parental supervision through the establishment of reasonable standards" (Code § 45-1 [B]). We conclude, however, that the ordinance interferes with parental supervision and supplants plaintiff father's reasonable standards by preventing plaintiff son from exercising his fundamental constitutional rights with plaintiff father's permission, approval and encouragement (*see Nunez*, 114 F3d at 952; *Johnson v City of Opelousas*, 658 F2d 1065, 1073-1074; *Allen*, 216 NJ Super at 574, 524 A2d at 487). As the court noted in *Ramos*, "we agree that the goal of encouraging parental responsibility is an admirable one, [but] we cannot help but observe the irony of the supposition that responsible parental decision making may be promoted by the government removing decisionmaking authority from responsible parents and exercising that authority itself" (353 F3d at 182). We therefore conclude that the ordinance is unconstitutional on the ground that it violates the fundamental substantive due process right of plaintiff father to rear his child without undue governmental interference (*see Nunez*, 114 F3d at 951; *see generally Ginsberg*, 390 US at 639).

VII

In view of our holding that the ordinance is inconsistent with State law insofar as it applies to minors under the age of 16 and imposes an unconstitutional restriction upon the rights of parents and all persons defined as minors under the ordinance, we do not address plaintiffs' further challenges to the ordinance. Accordingly, we conclude that the judgment should be reversed, defendants' motion denied, the complaint reinstated, plaintiffs' motion granted, judgment granted in favor of plaintiffs declaring the ordinance unconstitutional, and defendants enjoined from enforcing the ordinance.

MARTOCHE and GORSKI, JJ., concur with GREEN, J.; LUNN, J., dissents and votes to affirm in the following Opinion, in which HURLBUTT, J.P., concurs: We respectfully dissent because we cannot agree with the majority that the juvenile curfew ordinance (hereafter ordinance) enacted by defendant City of Rochester (City) and codified as chapter 45 of the City Code (Code) imposes an unconstitutional restriction upon the rights of parents and persons defined as minors under the ordinance or that the ordinance is inconsistent with New York State law as it applies to minors under the age of 16. We therefore conclude that the judgment should be affirmed.

I

We first address the majority's conclusion that the ordinance is unconstitutional. Initially, although we note that the majority correctly acknowledges that we should apply a higher level of scrutiny than the rational basis standard to plaintiffs' equal protection challenge, we disagree with the majority that the strict scrutiny standard is appropriate. Strict scrutiny "reflects the notion that some rights are so important that they should be afforded to individuals in a manner blind to all group classifications, absent the most compelling reasons to do otherwise" (*Ramos v Town of Vernon*, 353 F3d 171, 179). That notion "embodies a constitutional preference for 'blindness' " to group classifications (*id.*). As the Second Circuit noted in *Ramos*, however, "blindness to a classification is not [always] the desired end" (*id.*). We agree with the majority that a minor's right to free movement is fundamental, but we note that "[y]outh-blindness is not a constitutional goal because, even with regard to fundamental rights, failing to take children's particular attributes into account in many contexts . . . would be irresponsible" (*id.* at 180). Although the majority acknowledges "the inherent differences between children and adults, both mental and physical" (*id.* at 179), its application of the strict scrutiny standard ignores those differences. We therefore choose to "adopt[] the more flexible, yet still searching, intermediate form of review" (*id.*; *see Hutchins v District of Columbia*, 188 F3d 531, 541; *Schleifer v City of Charlottesville*, 159 F3d 843, 847, *cert denied* 526 US 1018).

II

Despite its conclusion that strict scrutiny is the appropriate standard of review in the instant case, the majority proceeds to analyze defendants' submissions through the lens of intermediate scrutiny and concludes that the ordinance would not pass muster even under that standard. In our view, however, defendants' submissions demonstrate that there is a substantial relationship between the problems of violent juvenile crime and juvenile victimization and the means chosen to address those problems, i.e., the juvenile curfew. Thus, we conclude that the ordinance survives intermediate scrutiny (*cf. Ramos*, 353 F3d at 183-186). Although the majority correctly acknowledges that some of the statistics submitted by defendants indicate that most juvenile crime occurs outside the hours of the curfew, defendant Mayor averred that those statistics reflect the fact that most minors are at home in bed during the curfew hours. Contrary to the majority's conclusion, the affidavit of the Mayor did not merely express his "opinions and beliefs concerning the particular vulnerability of juveniles during nighttime hours . . . ." Admittedly, such unsupported opinions and beliefs would be insufficient to demonstrate the requisite substantial relationship between the ordinance and its goals (*see id.* at 186). Here, however, the Mayor's affidavit was supported by the City's crime statistics demonstrating that, between the years 2000 and 2005, 10.4% of the victims of violent

crimes occurring between 11:30 P.M. and 5:00 A.M. in the City were under 18 years old. Furthermore, 9 of the 13 juvenile murder victims between the years 2000 and 2005 would have been in violation of the ordinance at the time of the murders. Other statistics submitted by defendants indicate that 10.9% of the suspects of the most serious violent crimes occurring between 11:30 P.M. and 5:00 A.M. were under the age of 18. Moreover, defendants' submissions establish that 45% of all homicides in the City occurred during the curfew hours, as well as 40% of all calls for "shots fired." Finally, defendants provided statistics from the City of Dallas indicating that, after the enactment of its juvenile curfew, there was a substantial decline in the number of juvenile arrests over a 10-year period.

"[E]qual protection demands that the municipality 'carefully stud[y] the contours of the problem it [is] seeking to address and legislate[] in accordance with its findings' " (*id.*). Defendants, however, "need not produce evidence to a scientific certainty of a substantial relationship" (*id.* at 183), and they are "not obligated to prove a precise fit between the nature of the problem and the legislative remedy-just a substantial relation[ship]" (*Hutchins*, 188 F3d at 543). Intermediate scrutiny does not require the imposition of such a heavy burden and, in our view, defendants met their burden of demonstrating a substantial relationship between the City's objectives in enacting the ordinance and the means chosen to achieve those objectives (*see id.* at 542-544; *Schleifer*, 159 F3d at 849-851).

III

We further disagree with the majority that the ordinance imposes an unconstitutional burden on the First Amendment rights of juveniles. We conclude that the exceptions provided in section 45-4 of the Code[4]

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[4]Section 45-4 provides that:

"The prohibition contained in § 45-3 shall not apply if the minor can prove that:

A. The minor was accompanied by his or her parent, guardian, or other responsible adult;

B. The minor was engaged in a lawful employment activity or was going to or returning home from his or her place of employment;

C. The minor was involved in an emergency situation;

D. The minor was going to, attending, or returning home from an official school, religious, or other recreational activity sponsored and/or supervised by a public entity or a civic organization;

adequately protect the rights of minors to engage in constitutionally protected activities. We perceive no material distinction between the exceptions found in the ordinance at issue here and those in other municipalities that have withstood First Amendment challenges (*see e.g. Hutchins*, 188 F3d at 535, 548; *Qutb v Strauss*, 11 F3d 488, 490, 495 n 9; *see also Schleifer*, 159 F3d at 846, 853-854; *Treacy v Municipality of Anchorage*, 91 P3d 252, 257 n 2, 263-264 [Alaska]). The majority makes much of the fact that the ordinance leaves the City's police officers with discretion to determine whether a minor is engaged in constitutionally protected activities. The majority, however, cannot escape the reality that "[e]very criminal law . . . reposes some discretion in those who must enforce it. The mere possibility that such discretion might be abused hardly entitles courts to strike a law down" (*Schleifer*, 159 F3d at 854). Further, "[t]he basic protections of the First Amendment are ones that ordinary citizens know and comprehend" (*Ramos v Town of Vernon*, 48 F Supp 2d 176, 182, *revd on other grounds* 353 F3d 171). Surely, officers charged with the duty to enforce the ordinance may be included in the class of ordinary citizens that know and comprehend the basic protections afforded by the First Amendment. Essentially, the majority concludes that the exceptions provided in section 45-4 are unconstitutionally vague. In so concluding, the majority "place[s] city councils between a rock and hard place. If councils draft an ordinance with exceptions, those exceptions are subject to a vagueness challenge. If they neglect to provide exceptions, then the ordinance is attacked for not adequately protecting First Amendment freedoms" (*Schleifer*, 159 F3d at 853). In our view, the "ordinance is constitutionally stronger" with the exceptions than it would be without them (*id.*).

IV

We also cannot agree with the majority that the ordinance interferes with the right of plaintiff Thomas Anonymous (plaintiff father) to direct and control the upbringing of his son, plaintiff Jiovon Anonymous. It is well settled that parents have a fundamental due process right to raise their children with limited government interference (*see generally Pierce v Society of Sisters*, 268 US 510, 534-535; *Meyer v Nebraska*, 262 US 390, 399-400). Parental rights, however, are not absolute. Where a juvenile curfew ordinance is narrowly tailored to serve a compelling government interest and only minimally intrudes on parents' rights, such an ordinance will not be struck down as unconstitutional (*see Qutb*, 11 F3d at 495-496; *Treacy*,

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> E. The minor was in the public place for the specific purpose of exercising fundamental rights such as freedom of speech or religion or the right of assembly protected by the First Amendment of the United States Constitution or Article I of the Constitution of the State of New York, as opposed to generalized social association with others; or
>
> F. The minor was engaged in interstate travel."

91 P3d at 268-269; *cf. Nunez v City of San Diego*, 114 F3d 935, 952). As previously discussed in section III, minors will not be in violation of the ordinance if they are engaged in the activities enumerated in section 45-4 of the Code. We thus conclude that the ordinance is narrowly tailored and does not violate plaintiff father's fundamental right to due process (*see Qutb*, 11 F3d at 495-496; *Treacy*, 91 P3d at 269).

V

We now address the majority's conclusion that the consequences faced by curfew violators under the ordinance are inconsistent with Family Court Act § 305.2 and Penal Law § 30.00 as they apply to minors under the age of 16.[5] Pursuant to section 45-5 of the Code, a violation of section 45-3 "shall constitute a 'violation' as that term is defined in the New York State Penal Law." Penal Law § 30.00 (1), however, provides that "a person less than sixteen years old is not criminally responsible for conduct," except as provided in section 30.00 (2). Family Court Act § 305.2 (2) provides that "[a]n officer may take a child under the age of sixteen into custody without a warrant in cases in which he may arrest a person for a crime under [CPL art 140]." Inasmuch as "violations are not included in the definition of a 'crime', there is no authority to arrest" for a violation (Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 305.2, at 409).

We agree with the majority that Family Court Act § 305.3 and Penal Law § 30.00 establish that police officers are prohibited from arresting curfew violators under the age of 16. We part with the majority, however, insofar as we do not construe the ordinance as authorizing the arrest of any curfew violators. Instead, in our view, the procedures outlined in section 45-6[6] of the Code provide for only

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[5]We agree with the majority inasmuch as it concedes that the curfew ordinance is consistent with Family Court Act § 305.2 and Penal Law § 30.00 as it applies to 16- and 17-year-old minors.

[6]Section 45-6 provides that:

"A. A police officer may approach a person who appears to be a minor in a public place during prohibited hours to request information, including the person's name and age and reason for being in the public place.

B. A police officer may detain a minor or take a minor into custody based on a violation of § 45-3 if the police officer, after speaking with the minor and considering the facts and surrounding circumstances:

(1) Reasonably believes that the minor has violated § 45-3; and

the temporary detention of curfew violators by police officers pursuant to their noncriminal protective capacities and under New York State's parens patriae interest (*see generally Matter of Shannon B.*, 70 NY2d 458, 462-463; *Matter of Terrence G.*, 109 AD2d 440, 443). We note that the detention of minors pursuant to the State's parens patriae interest is generally noncriminal in nature (*see generally Shannon B.*, 70 NY2d at 462; *Terrence G.*, 109 AD2d at 443; *Matter of De Crosta*, 111 Misc 2d 716, 720), and the ordinance does not distinguish between the authority of the police to enforce the ordinance with respect to 16-year-old minors and the lack of authority to enforce the ordinance with respect to minors under the age of 16. The City's Police Department (Police Department), however, acknowledges that distinction in its General Orders. Specifically, Police Department General Order 435 provides that juveniles cannot be arrested for status offenses, such as family problem violations, truancy and traffic offenses, but may nevertheless be taken into custody "to stop their actions." That authority is conferred upon police officers by the Charter of the City of Rochester (Charter), which provides that "[t]he Chief of Police shall be responsible for the enforcement of penal laws and ordinances, the *maintenance of order* and the prevention of crime in the City of Rochester" (Charter § 8A-1 [C] [emphasis added]). That framework is consistent with the view of the Court of Appeals espoused in *Shannon B.* that:

> "the role of the police is not limited to the enforcement of the criminal law. Instead, their role is 'a multifaceted one . . . Among other functions, the police in a democratic society are charged with the protection of constitutional rights, the maintenance of order, the control of pedestrian and vehicular traffic, the mediation of domestic and other noncriminal conflicts and supplying emergency help and assistance' " (70 NY2d at 462).

We also disagree with the majority that the "legal consequence [of detaining curfew violators or taking them into custody] is indistinguishable from a formal arrest" (*Matter of Martin S.*, 104 Misc 2d 1036, 1038). In reality, curfew violators are not left to sit in the police station, but are instead transported to the Hillside Children's Center, where the minor's guardian is immediately contacted and arrangements are made to have the minor returned home.

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(2) Reasonably believes that none of the exceptions in § 45-4 apply.

C. A police officer who takes a minor into custody based on a violation of § 45-3 shall take the minor to a location designated by the Chief of Police. The parent, guardian or other responsible adult shall be notified to come and take charge of the minor, unless the minor requires further intervention in accordance with law."

VI

In sum, we conclude that the ordinance does not unconstitutionally restrict the rights of parents and all persons defined as minors under the ordinance and that it is consistent with New York State law as it applies to minors under the age of 16. Accordingly, we conclude that the judgment should be affirmed.

Entered: October 10, 2008

JoAnn M. Wahl
Clerk of the Court