STATE OF NEW YORK COUNTY OF MONROE
SUPREME COURT

JIOVON ANONYMOUS AND THOMAS ANONYMOUS,

Plaintiffs,

-vs-

CITY OF ROCHESTER, NEW YORK, HON. ROBERT DUFFY, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF ROCHESTER, DAVID MOORE, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE CITY OF ROCHESTER,

Defendants.

INDEX NO. 2006-12869

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF AN ATTORNEY'S FEE AWARD PURSUANT TO 42 USC § 1988

Dated: June ___, 2009
Rochester, New York

Respectfully submitted,
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BY:_____
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PRELIMINARY STATEMENT

This memorandum of law is submitted in support of an attorney fee award for counsel to the prevailing plaintiffs pursuant to 42 USC § 1983 & 1988.

STATEMENT OF FACTS

The relevant facts are contained in the affirmation of Michael A. Burger dated June 26, 2009 and the exhibits and accompanying affidavits submitted therewith.

In short, Plaintiffs Jiovon and Thomas Anonymous successfully pursued this action through an appeal to the Court of Appeals. They achieved precisely the relief they sought from the beginning: a declaration that Rochester's curfew is illegal and unconstitutional, and an injunction prohibiting the City from enforcing it. On the day the Court of Appeals ruled, the City of Rochester ceased enforcement of the curfew. Jiovon is once again and finally subject to his father's curfews, not those imposed by the local government.

DISCUSSION

Plaintiffs sued for declaratory and injunctive relief barring the City from enforcing its youth curfew ("curfew"), pursuant to 42 USC § 1983, civil action for deprivation of rights, with provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ….

42 USCS § 1983.

Plaintiffs prevailed: on June 9, 2009, the Court of Appeals held Rochester's curfew illegal and unconstitutional and affirmed the Appellate Division, Fourth Department's injunction, barring the City from enforcing it. *Anonymous v. City of Rochester*, 2009 NY Slip Op 4697, 1 (N.Y. June 9, 2009), *aff'g*, 56 A.D.3d 139, 140 (4th Dep't 2008).

Congress has provided that a party prevailing in a law suit brought pursuant to 42 USC § 1983 is entitled to seek an award of attorney's fees pursuant to 42 USC § 1988(b), which provides, in pertinent part:

> (b) Attorney's fees. In any action or proceeding to enforce a provision of section [. . . 1983] . . ., the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

42 USC § 1988(b). "Attorney's fees are authorized under 42 U.S.C. § 1988(b) for parties prevailing on claims under 42 U.S.C. § 1983 in order 'to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.'" *Farbotko v. Clinton County*, 433 F.3d 204, 208 (2d Cir. 2005), citing *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982); "[A] reasonable fee should [also] be awarded for time reasonably spent in preparing and defending an application for § 1988 fees." *Weyant v. Okst*, 198 F.3d 311, 316 (2d Cir. 1999).

POINT ONE:

PLAINTIFFS ARE PREVAILING PARTIES

"A plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff". *McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421, 431 (2004) (quoting *Farrar v. Hobby*, 506 U.S. 103, 114 (1992)) (citation omitted). "The prevailing party in an action or proceeding brought pursuant to 42 USC § 1983 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust'". *Matter of Johnson v. Blum*, 58 N.Y.2d 454 (1983); *Giarrusso v. Albany*, 174 A.D.2d 840, (3d Dep't 1991) (citing *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 [1968]).

In *McGrath, supra*, the New York Court of Appeals described the standard for lodestar fee awards in state and federal courts:

> [C]ourts employ a two-step process for determining whether a discretionary attorney's fee award is appropriate. First, in order to be eligible to apply for an award, plaintiff must be a "prevailing party" in the litigation. . . . The determination is relatively straightforward when a plaintiff obtains what amounts to complete relief--plaintiff is usually entitled to an award that compensates counsel for the time reasonably expended in the lawsuit.

McGrath, 3 N.Y.3d at 429-30 (citing *Hensley v Eckerhart*, 461 U.S. 424, 433-436 [1983]) (citations omitted); *accord Farrar v. Hobby*, 506 U.S. 103, 114 (1992); *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 152 (2d Cir. 2008); *Kassim v. City of Schenectady*, 415 F.3d 246, 254 (2d Cir. 2005); *Pino v. Locascio*, 101 F.3d 235, 237-38 (2d Cir. 1996).

Plaintiffs sought a declaration that the curfew was illegal and unconstitutional and an injunction barring the City from enforcing it. The majority of the Court granted this relief in full, without reservation. Plaintiffs' victory is complete.

POINT TWO:

PLAINTIFFS ARE ENTITLED TO ATTORNEY'S FEES

The *McGrath* Court held that "[i]f this threshold requirement [of plaintiff being a prevailing party] is met, the court must then determine what constitutes a reasonable award, a discretionary inquiry that takes into account a multitude of factors, although "the most critical factor is the degree of success obtained."' *McGrath,* 3 N.Y.3d at 429-30; *Farrar v. Hobby*, 506 U.S. 103, 114, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992); *accord Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 152 (2d Cir. 2008); *Kassim v. City of Schenectady*, 415 F.3d 246, 254 (2d Cir. 2005); *Pino v. Locascio*, 101 F.3d 235, 237-38 (2d Cir. 1996).

Plaintiffs' "degree of success" in the case at bar was 100%. As such, a fully compensatory fee award is warranted. Fees in civil rights cases are calculated using the lodestar method: "the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Farbotko v. Clinton County*, 433 F.3d 204, 208 (2d Cir. 2005); *McGrath*, 3 NY3d. at 434 n.9; *Edmonds v. Seavey*, 2009 U.S. Dist. LEXIS 47560 (S.D.N.Y. June 5, 2009); *Cole v. Truelogic Fin. Corp.*, 2009 U.S. Dist. LEXIS

8128, 8-9 (W.D.N.Y. Jan. 31, 2009) (paralegal hours included).

"[A] reasonable hourly rate is not itself a matter of binding precedent. Rather, under established caselaw, a reasonable hourly rate is the 'prevailing market rate,' i.e., the rate 'prevailing in the [relevant] community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Farbotko v. Clinton County*, 433 F.3d 204, 208 (2d Cir. 2005) (citing *Blum v. Stenson*, 465 U.S. 886, 896 (1984)); *see also Cohen v. W. Haven Bd. of Police Comm'rs*, 638 F.2d 496, 506 (2d Cir. 1980) ("Fees that would be charged for similar work by attorneys of like skill in the area" are the "*starting point* for determination of a reasonable award." [emphasis added]). "'[A] reasonable hourly rate' is not ordinarily ascertained simply by reference to rates awarded in prior cases." *Farbotko*, 433 F.3d at 208. "Generally speaking, the rates an attorney routinely charges are those that the market will bear . . ." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 188, 190 n.4 (2d Cir. 2007), *sua sponte* amending prior opinion, 493 F.3d 110.

"Of course, the actual rate that applicant's counsel can command on the market is itself highly relevant proof of the prevailing community rate." *Bebchick v. Wash. Area Metro. Transit Comm'n*, 256 U.S. App. D.C. 296, 805 F.2d 396, 404 (D.C. Cir. 1986); *see also Lake v. Schoharie County Comm'r of Soc. Servs.*, 2006 U.S. Dist. LEXIS 49168 (N.D.N.Y May 16, 2006) ("an attorney's normal billing rate may provide a suitable starting point, since it is generally indicative of his or her legal reputation and status"). The rate requested here is counsel's normal billing rate for complex litigation.

"Further, in order to provide adequate compensation where the services were performed many years before the award is made, the rates used by the court to calculate the lodestar should be 'current rather than historic hourly rates'". *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (citation omitted); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d at 764 (2d Cir. 1998) (instructing district court on remand to apply "current rates, rather than historical rates" in order to "compensate for the delay

in payment").

In 2007, the three-judge *Arbor Hill* panel at the Second Circuit described the process of arriving at a reasonable fee by defining the reasonable hourly rate as "the rate a paying client would be willing to pay." *Arbor Hill*, 522 F.3d at 190 (JACOBS, C.C.J., WALKER, C.J., O'CONNOR, A.J. RET. [sitting by designation]). The *Arbor Hill* panel urged fee-setting courts to "consider, among others, the *Johnson* factors [and to] bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively." *Id.*

The "*Johnson*" factors to be considered in arriving at a reasonable hourly rate are:

(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the level of skill required to perform the legal service properly;
(4) the preclusion of employment by the attorney due to acceptance of the case;
(5) the attorney's customary hourly rate;
(6) whether the fee is fixed or contingent;
(7) the time limitations imposed by the client or the circumstances;
(8) the amount involved in the case and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974); *Arbor Hill*, 522 F.3d at 185; *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)*; see McGrath*, 3 N.Y.3d at 430 (citing *Hensley v Eckerhart*, 461 U.S. at 430 n.3 [1983]); *Pasternak v. Baines*, 2008 U.S. Dist. LEXIS 37845 (W.D.N.Y. 2008); *Rahmey v. Blum*, 95 A.D.2d 294, 303-04 (2d Dep't 1983); *see also Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)).

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Labor and Time Required

The actual hours expended in this matter are delineated in the accompanying application by contemporaneous records. This case involved multiple novel questions of law in New York, was hotly contested by the municipal defendants throughout, and was appealed all the way to the Court of Appeals. To date, the City has not even ruled out an additional appeal to the United States Supreme Court.

Time spent prosecuting and defending appeals is compensable under 42 USC § 1988. *Giarrusso v. City of Albany*, 174 A.D.2d 840 (3rd Dep't 1991). This Court may compare the hours expended in this matter with other civil rights cases involving an award of attorney's fees. *See* e.g. *Fitzgerald v. City of Los Angeles*, 2009 U.S. Dist. LEXIS 34803 (C.D. Cal. Apr. 7, 2009) (court allowed 894.7 hours a case that settled in the district court and involved no appeals); *Blum v. Stenson*, 465 U.S. 886 (1984) ("the full 809.75 hours billed were reasonable" in a case decided on a motion for summary judgment, where the Second Circuit "affirmed in an unpublished oral opinion from the bench"); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984) (allowing 728.7 hours in a case that involved an appeal to the 1st Circuit and the Supreme Court by a team of Harvard lawyers and law professors).

Significantly, despite the fact that the City was represented at all times by two attorneys, and backed by the full force and resources of the office of the Corporation Counsel for the City of Rochester, the Plaintiffs were represented by only one attorney. *Cf. Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984). The hours expended are clearly reasonable.

The Court may also consider the defendants' conduct in awarding an attorney's fee. *Matter of Gordon v. Village of Monticello*, 87 N.Y.2d 124 (1995). According to Mayor Duffy's 2009 State of the City Booklet, the Rochester police stopped at least 935 children under the curfew and arrested at

least "661 offenders".[1] The City even continued to arrest children after the Appellate Division, Fourth Department declared the curfew unconstitutional and enjoined the City from enforcing it. Rather than heed the appellate court's ruling, the City opposed the Plaintiffs' attempts to enforce the injunction in the Fourth Department by not only opposing Plaintiffs' motion at the Court of Appeals to vacate the statutory stay but also cross-moving for a discretionary stay to block Plaintiffs' ability to file a contempt motion. Both motions were denied and the City continued to take children into custody under an invalid law.

The Second Circuit has recognized that "in litigating a matter, an attorney is in part reacting to forces beyond the attorney's control, particularly the conduct of opposing counsel and the court." *Kassim v. City of Schenectady*, 415 F.3d 246 (2d Cir. 2005). The municipal defendants fought assiduously to prevent discovery in this action, to omit the parties' briefs in this court from the record on appeal, and even to prevent a motion to punish the City's open contempt of the Fourth Department's injunction.

The Defendants created a record of over 700 pages, including extensive statistical data regarding crime rates in Rochester. The defendants then selectively cited that data to imply that juvenile crime had reached epidemic proportions in Rochester. Plaintiffs' counsel was required to spend many hours dissecting this misleading data in order to demonstrate to the appellate courts that the data in reality showed that children are far less likely than adults to commit or fall victim to crime, and that crime – both involving juveniles and not – is far more prevalent outside of curfew hours. The decisions of both appellate courts relied heavily on the truth and accuracy of this statistical analysis.

Given such tactics on the part of the municipal defendants, "the time to litigate even a simple matter can expand enormously." *Kassim v. City of Schenectady*, 415 F.3d 246 (2d Cir. 2005). A

[1] Available at http://www.cityofrochester.gov/article.aspx?id=8589938931

full award of fees, including the time necessary to counter these tactics of the defendants, is necessary to achieve the objective of § 1988 – "to secure legal representation for plaintiffs whose constitutional injury was too small, in terms of expected monetary recovery, to create an incentive for attorneys to take the case under conventional fee arrangements." *Id.* Further, "[a] plaintiff's lack of success on some of his claims does not require the court to reduce the lodestar amount where the successful and the unsuccessful claims were interrelated and required essentially the same proof." *Murphy v. Lynn*, 118 F.3d 938 (2d Cir. 1997); *Deep v. Clinton Central School Dist.*, 57 A.D.3d 828 (4th Dep't 2008); *Trustees of the Buffalo Laborers' Pension Fund v. Accent Stripe, Inc.*, No. 01-CV-76C (W.D.N.Y. 2007).

The Plaintiffs' challenge to Rochester's curfew involved multiple novel statutory and constitutional arguments, many of which were adopted by the judges of the Appellate Division and the Court of Appeals. In such cases,

> Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. (Citation omitted). Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

Thus, the Second circuit has held that

> a § 1983 plaintiff's eligibility for an award of fees under § 1988 does not depend on her success at interim stages of the litigation, but rather depends on the ultimate outcome of the litigation. A plaintiff is a prevailing party in the litigation within the meaning of § 1988 if she has received actual relief on the merits of her claim, and she should not necessarily be denied fees for hours expended on interim stages of the

> case in which a ruling was made in favor of the party against whom she ultimately prevailed.

Gierlinger v. Gleason, 160 F.3d 858, 880 (2d Cir. 1998) (internal citations omitted). "[A] prevailing plaintiff should be compensated even for work done in connection with an unsuccessful claim if that claim was intertwined with the claim on which she succeeded." *Id.* at 877; *Rahmey v. Blum*, 95 A.D.2d 294, 304 (2d Dep't 1983) ("Where a lawsuit consists of related claims, a [prevailing party] who has won substantial relief should not have his attorney's fee reduced simply because the . . . court did not adopt each contention raised.").

The municipal defendants repeatedly challenged the Plaintiffs' standing to prosecute this action, and even objected to the Plaintiffs' efforts to include their briefs in the record on appeal, at the plaintiffs' own expense. It is difficult to imagine any other explanation for these obstructionist tactics than as a cynical attempt to allow a later contention that the Plaintiff's arguments were unpreserved. The necessity for the hours expended by the Plaintiff's second appeal – an appeal necessary to place evidence of the Plaintiffs' preservation of their arguments before the appellate court - was due solely to the Defendants' actions. Under *Hensley, Murphy* and *Gierlinger,* the fact that the Defendants nominally prevailed on that second appeal is irrelevant.

When evaluating the enormous amount of work performed by Plaintiffs' attorney in this case, "[t]he relevant issue . . . is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992). Having chosen to vigorously litigate this case, defendants cannot "now be heard to complain because [their] own tactics . . . forced plaintiffs' counsel to expend additional time on the case." *Catanzano v. Doar*, 378 F.Supp.2d 309, 322-23 (W.D.N.Y. 2005). "'The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.'" *Riverside v. Rivera*, 477 U.S.

561, 581 n.11 (1986) (citation omitted). The City "'mounted a Stalingrad defense …, battling from rock to rock and tree to tree. After setting such a militant tone and forcing the plaintiffs to respond in kind, it seems disingenuous for the [[City]] to castigate the plaintiffs for" exerting the proportionate effort necessary to vindicate their rights. *Catanzano v. Doar*, 378 F. Supp. 2d 309, 322 (W.D.N.Y. 2005) (Larimer, J.) (citation omitted).

Furthermore, the quality of representation is one of the factors that can justify an enhanced, multiplied or augmented fee award. *See Geier v. Sundquist*, 372 F.3d 784, 794-95 (6th Dir. 2004); *Wing v. Asarco, Inc.*, 114 F.3d 986, 989 (9th Cir. 1997); *Duckworth v. Whisenant*, 97 F.3d 1393, 1396 (11th Cir. 1996); *Rode v. Dellarciprete*, 892 F.2d 1177, 1184 (3d Cir. 1990); *Cohen v. West Haven Board of Police, Commissioners*, 638 F.2d 496, 505 (2d Cir. 1980).

In determining a fee, "the result is what matters." *Hensley*, 461 U.S. at 435. Here, the result – a holding that Rochester's curfew is unconstitutional, and an injunction prohibiting the defendants from enforcing it, compels a fully compensatory *enhanced* fee award.

Novelty and Difficulty of the Questions and the Level of Skill required to Perform the Legal Service Properly

As the numerous briefs of the parties amply demonstrate, the statutory and constitutional questions involved in determining the invalidity of Rochester's curfew were substantial. No appellate court in New York had ever before determined the validity of a youth curfew, and the municipal Defendants left no stone unturned in their attempts to justify and defend this law. Precedent, both federal and from states across the nation, was mixed in its results.

The difficulty of the questions is amply demonstrated by the fact that the Defendants prevailed before this Court, and garnered the support of two dissenting justices at both the Fourth Department and the Court of Appeals. The appellate courts' bases for striking down the law involved multiple issues of New York statutory law, including the Family Court Act and the Penal

Law, and the severability of the curfew's application to children under 16 years of age from its application to 16 year olds. *See*, opinion of Graffeo, J., concurring. The decisions also involved numerous constitutional issues, including the violation of Jiovon's rights to Equal Protection of the Law, the invalidity of the curfew under the First Amendment, the effect of the curfew on the Due Process rights of both parents and minors, and its effect on the rights on minors to freedom of movement.

Notably, this case marks the first time that a New York appellate court has held that New Yorkers, young and old, have a fundamental right to freedom of movement within New York. These multiple issues of first impression militate in favor of a full award of attorney's fees. "Courts have held that '[c]ases of first impression generally require more time and effort on the attorneys' part. . . . [attorneys] should be appropriately compensated for accepting the challenge.'" *Leyse v. Corporate Collection Servs.*, 545 F. Supp. 2d 334, 338 (S.D.N.Y. 2008) (citing *Johnson*, 488 F.2d at 719).

These novel questions were appropriately addressed by a partner in a respected and established twenty-attorney Rochester law firm, experienced in civil rights law and litigation. They were not questions to be left to an associate with lesser experience. *Cf. Rich Products Corp. v. Impress Industries, Inc.*, No. 05-CV-187S (W.D.N.Y. 2008).

The Fee Was Contingent

Rochester's curfew disproportionately affected people of color, and disproportionately targeted children in the poorest areas of the City. Like most children arrested under the curfew, Jiovon is African-American. Thomas, like most parents of children arrested under the curfew, lacked the financial resources to finance a legal challenge to the law that had imprisoned his son without cause. Counsel's fee was therefore contingent on success on these novel constitutional claims.

While the contingent nature of the attorney's compensation alone may not be sufficient to enhance a fee beyond the lodestar amount, *Burlington v. Dague*, 505 U.S. 557 (1992), the fact that the

fee was contingent is an additional justification for an award of the full lodestar amount.

The Amount Involved In the Case and the Results Obtained

No claim for actual damages was asserted in this action. Counsel's sole possibility of compensation for the time spent on this action – and taken away from other clients with deeper pockets – was fees under 42 U.S.C. § 1988.

Jiovon and Thomas achieved the full relief they sought – a declaration that the curfew is illegal and unconstitutional, and an injunction prohibiting the City from enforcing it. This was impact litigation.

By pursuing this case all the way to Albany, Jiovon has assured his rights, and those of millions of other innocent children throughout New York, to freedom of movement, freedom of speech and assembly, and freedom from unreasonable seizure on the sole basis of their age. Thomas similarly has achieved the official recognition that he and millions of other parents have the right to set the curfews they believe appropriate for their children on an individual basis, free from concern that their children will be arrested because the local City Council disagrees with parental choice.

The Undesirability of the Case

Plaintiffs in this matter were faced with overwhelming popular support of the challenged law – support that is understandable in light of the fact that 75% of the population of Rochester was unaffected by the law, including 100% of those of voting age. Plaintiff's counsel was discouraged from accepting this case by the partners in his own firm, and even by members of the New York Civil Liberties Union, which found the probability of success too remote, even given the experience and reputation of counsel. "Congress recognized that attorney's fees are an integral part of the remedies to obtain compliance" with civil rights laws such as 42 USC § 1983." *Thomasel v. Perales*, 78 N.Y.2d 561 (1991); *Maine v. Thiboutot*, 448 U.S. 1 (1980). A full award of those fees is essential to

accomplish the objectives of § 1983 in this case.

To be reasonable, an hourly rate must be consonant with section "1988(b)'s central purpose of attracting competent counsel to public interest litigation." *Farbotko v. Clinton County*, 433 F.3d 204, 209 (2d Cir. 2005). To achieve this goal, attorneys who prevail in unpopular cases must receive the full compensation that a paying client would otherwise have paid to induce the attorney's participation. A substantial inducement is necessary to attract counsel to years' worth of complex and speculative civil rights litigation, fighting City Hall to overturn a highly popular, if legally infirm, law.

Awards in Similar Cases

In the Western District of New York, an attorney's fee of $280 per hour is reasonable for a partner an established law firm with 15 years of experience in the area of constitutional law for complex litigation when there is contemporaneous payment. While this curfew challenge litigation was atypical, awards in less complex cases are instructive as points of departure. *Shasgus v. Janssen, L.P.*, 2009 U.S. Dist. LEXIS 36185 (W.D.N.Y. Apr. 29, 2009) ($265 per hour reasonable for a discovery motion in personal injury litigation); *McPhatter v. Cribb*, 2000 U.S. Dist. LEXIS 7914 (W.D.N.Y. 2000) ($240 for a partner); *Haungs v. Runyon*, 2000 U.S. Dist. LEXIS 12396, No. 96- CV-650, 2000 WL 1209381 *1 (W.D.N.Y. 2000) ($110 and $205 for associates in 2000); *Alnutt v. Cleary*, 27 F. Supp. 2d 395, 399-401 (W.D.N.Y. 1998) ($160, $180 and $205 per hour for *associates* in 1998); *Greenway v. Buffalo Hilton Hotel*, 951 F. Supp. 1039, 1070 (W.D.N.Y. 1997) ($200 for partner in 1997), *aff'd*, 143 F.3d 47 (1998); *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 190 F. Supp. 2d 509, 516 (W.D.N.Y. 2001); *Sheehy v. Wehlage*, 02-CV-592, 2007 WL 148750 (W.D.N.Y. Jan. 11, 2007) (finding $210 per hour to be reasonable for a partner with nine years experience and noting that the Court has previously awarded reasonable attorney's fees to the same firm ranging from $130-145 per hour

for a second-year associate to $290 per hour for a partner with twenty-five years experience). "A fee of $250.00 per hour for partners, $180.00 per hour for associates, and $100.00 per hour for paralegal time is consistent with the local market." *Trustees of the Buffalo Laborers' Pension Fund v. Accent Stripe, Inc.*, No. 01-CV-76C (W.D.N.Y. 2007); citing *Klimbach v. Spherion Corp.*, 467 F.Supp.2d 323, 332 (W.D.N.Y. 2006).

While out-of district, in *Fitzgerald v. City of Los Angeles*, 2009 U.S. Dist. LEXIS 34803 (C.D. Cal. Apr. 7, 2009) (the "skid row" case), the court recently awarded $322,723.16 in fees - in a case that settled in the district court - based upon rates of up to $740 per hour. There were no appeals in *Fitzgerald* and the case did not involve the number or complexity of issues raised in the matter at bar. Yet the *Fitzgerald* attorneys billed 894.7 hours. *See* also *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 961 F.2d 1048 (2d Cir. 1992) (award of attorney's fees of $377,276.73); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984).

The Remaining Johnson *Factors*

The other *Johnson* factors similarly militate in favor of a full award of attorney's fees. The experience, reputation, and ability of the attorney in the case, an experienced civil rights litigator, a former chair of the NYCLU, Genesee Valley Chapter and a current and former member of the chapter legal committee, is clearly appropriate and necessary to adequately handle the difficult questions raised in this challenge.

The time occupied by this matter clearly precluded counsel from work for other clients with greater ability to pay. The case required rapid adjudication as Jiovon reached the age of 16, the age at which arrest was permissible under family Court Act § 305.2, and then to avoid a finding of mootness as Jiovon reached 17. The fee requested is the attorney's normal billing rate for complex litigation. And this was not a case in which a long relationship with a paying client might have

justified a lower hourly fee.

Finally, the risk associated with this case is additional justification for the Court to apply a multiplier or an enhancement, augmenting the fee. "A district court, in its discretion, may award fees higher than the lodestar by applying a multiplier based on factors such as the riskiness of the litigation." *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 n.4 (2d Cir. 2008) (2.04 multiplier). If a monetary value were to be ascribed to the significant public policy and fundamental liberty interests safeguarded by Plaintiffs' efforts and resolve, the dollar amount would no doubt be substantial. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 120-21 (2d Cir. 2005) (considering value of injunctive relief in the context of fee application) (3.5 multiplier). *Nortel* and *Wal-Mart* also involved the promise of massive payouts that were likely evident at the inception of both cases.

Rare and Exceptional Results

The case at bar was brought and intended as impact litigation to vindicate the rights of parents and children throughout the City of Rochester. However, Plaintiffs' efforts resulted in a a rare and exceptional decision vindicating the rights of parents and children throughout *the State of New York*. *Anonymous v. City of Rochester*, 2009 NY Slip Op 4697 (Court of Appeals June 9, 2009).

The legal questions addressed were novel in New York State, requiring exhaustive canvassing and briefing of the law. The issues raised were numerous, resulting in a rare and exceptionally nuanced decision that broadly addressed not only the statutes governing Rochester's curfew but also the constitutional implications of curfews in general throughout New York State. The appellate courts' rulings were covered by media across the State from Rochester's own THE DAILY RECORD to New York City's NEW YORK LAW JOURNAL.

The Court of Appeals ruling in Plaintiffs' favor also has application beyond the context of

youth curfews, and beyond even curfews in general. *Anonymous v. City of Rochester* will be cited for the legal precept that people have a constitutional right to movement and travel within the New York State generally. The Court further signaled that, in New York, individual rights of the many may not be abrogated based upon abuse by the few. *Anonymous v. City of Rochester*, 2009 NY Slip Op 4697 at 9 ("The . . . notion that governmental power should supersede the parental authority in all cases because some parents abuse and neglect children is repugnant to the American tradition.") (internal quotes and citations omitted). Cases awarding large cash awards are a dime a dozen; a constitutional ruling that strikes down a law and vindicates the liberty interests of millions of New Yorkers is both rare and exceptional.

Enhancement is Warranted

"Courts have continually recognized that, in instances where a lodestar analysis is employed to calculate attorneys' fees . . . counsel may be entitled to a 'multiplier' of their lodestar rate to compensate them for the risk they assumed, the quality of their work and the result achieved . . . ." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008); *Green v. Torres*, 361 F.3d 96, 99 (2d Cir. 2004) ("in some cases of exceptional success an enhanced award may be justified") (internal quotes and citation omitted). "A multiplier, when it is found warranted, is typically used to increase an award based on factors such as the risk of litigation, the complexity of the case, the quality of the representation, whether the litigation was novel, and whether the case was brought in furtherance of public policy." *Ousmane v. City of New York*, 2009 NY Slip Op 50468U, 13 (N.Y. Sup. Ct. 2009). "[T]he loadstar multiplier may be necessary in some class actions to entice private law firms to undertake difficult and uncertain cases . . . ." *Id.* at 14; *Green*, 361 F.3d at 100.

An enhancement is available for a combination of factors. *See Lipsett v. Blanco*, 975 F.2d 934, 942 (1st Cir. 1992) (enhancement available for "a combination of sterling performance and

exceptional results"); *Hyatt v. Apfel*, 195 F.3d 188, 192 (4th Cir. 1999) (affirming enhancement "on account of the exceptional results obtained"); *Shipes v. Trinity Industries*, 987 F.2d 311, 320 (5th Cir.1993) (upward adjustments based on quality of representation and results obtained are proper); *Geier v. Sundquist*, 372 F.3d 784, 794-95 (6th Cir. 2004) (enhancements to lodestar permitted for quality of representation and results obtained under Section 1988); *Forshee v. Waterloo Ind. Inc.*, 178 F.3d 527, 532 (8th Cir. 1999) (applicant must establish "quality of service rendered" and superior results obtained to obtain enhancement); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1046 (9th Cir. 2000) (upward adjustment justified when success was exceptional); *Roe v. Cheyenne Mountain Conf. Resort, Inc.*, 124 F.3d 1221, 1233 n.8 (10th Cir. 1997) (lodestar figure may be adjusted "especially where the degree of success achieved is exceptional"); *Kenny A. ex rel. Winn v. Perdue*, 532 F.3d 1209 (11th Cir. 2008) (quality of representation and results obtained are permissible basis for fee enhancement). Accordingly, this Court has the authority to grant an attorney fees enhancement under 42 USC § 1988.

CONCLUSION

The Court should evaluate the fee requested as a whole when compared to the work performed and the results achieved in this impact litigation. Civil rights cases of this nature are rare in Rochester and therefore the pool of attorneys who accept and prosecute them on a contingent basis is small. The requested enhanced fees are reasonable given the prevailing market rates for counsel in this area, the availability of counsel to accept such cases and the complexity of this litigation. For the foregoing reasons, the requested rate of $280 per partner hour, $225 per mid-level associate hour, $125 per paralegal hour, and an overall multiplier of 1.2, or an enhancement of the lodestar figure by twenty percent (20%), is warranted. Alternatively, Plaintiffs ask the Court to find that the fee requested represents a fully compensatory and reasonable marketplace fee for counsel's efforts in this matter.