Submitted by:
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Supreme Court of the State of New York Appellate Division—Fourth Department

JIOVON ANONYMOUS and THOMAS ANONYMOUS,

Plaintiffs-Appellants,

v.

CITY OF ROCHESTER, NEW YORK, ROBERT DUFFY, Mayor of Rochester, and DAVID MOORE, Chief of Police of Rochester,

Defendants-Respondents.

Brief for Amicus Curiae, New York Civil Liberties Union

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INTRODUCTION AND INTEREST OF THE AMICUS

Curfews necessarily impose limitations upon freedom of movement—a freedom that is a back element of a free society. In this case, the City of Rochester has enacted an ordinance that, in a variety of ways, fails adequately to protect that basic interest in free movement. Appellants have identified a broad range of failings in this regard. Among the many failings identified by Appellants, two are of particular concern to the New York Civil Liberties Union as *amicus curiae*.

The first concern involves the failure of the ordinance, in restricting the movement of juveniles, to respect the decision making authority of parents over the behavior and conduct of their children. Indeed the Rochester curfew trammels on "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). By failing to include an exemption to curfew enforcement for activities undertaken with parental permission, the Rochester City Counsel has supplanted parental views concerning the best interests of children. This impedes on parents' rights under the Fourteenth Amendment; this Court must therefore declare the curfew unconstitutional.

The second concern involves the failure of the ordinance to address properly the First Amendment rights of young people and, in particular, to protect the right of anonymous expression. Since the publication of the Federalist Papers, it has been recognized "the most effective advocates have sometimes opted for anonymity." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995). Thus the First Amendment protects the right to speak and assemble without informing government of views and associations. Nevertheless, the Rochester curfew impermissibly forces minors

to choose between arrest and revelation of their First Amendment activities. Moreover, by failing to define its exception for activities protected by "fundamental rights" with a reasonable degree of specificity, the curfew fails both to inform minors of the range of permissible conduct and to guide police enforcement. The curfew is not narrowly tailored to minimize the chill on First Amendment rights, providing an additional rationale under which this court must reverse the court below.

The New York Civil Liberties Union ("NYCLU") is a non-profit organization that is deeply devoted to the protection and enhancement of fundamental liberties. Among the most fundamental liberties are the presumptive rights of parents to control the upbringing of their children and the presumptive rights of individuals of all ages to speak and associate without fear that they will be interrogated concerning their expressive activities or face arrest. Those rights, which are very much implicated in this case, are discussed in more detail in the argument below. In advancing arguments with respect to these matters, *amicus* does not seek to diminish the other claims advanced by Appellants. We simply address these matters as of special concern to the NYCLU.

FACTUAL BACKGROUND

On September 5, 2006 the City of Rochester enacted a curfew prohibiting minors under the age of 17 to be in any public place after 11:00 P.M. and before 5:00 A.M. Sunday through Thursday and after 12:00 A.M. and before 5:00 A.M. Friday and Saturday. Rochester City Code § 45-3. The curfew exempts activities if the minor can prove they were:

> [A]ccompanied by his or her parent, guardian, or other responsible adult; . . . engaged in a lawful employment activity or was going to or returning home from his or her place of employment; . . . involved in an emergency situation; . . . 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 civil organization; . . . in a public place for the specific purpose of exercising fundamental rights such as freedom of speech or religion or the right to 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 . . . engaged in interstate travel.

Id. § 45-4. Police may approach individuals who are out during curfew hours if they appear to be minors, *id.* § 45-6(A), and they may detain and take minors into custody if none of the statutory exceptions apply. *Id.* § 45-6(B)(2).

Prior to the curfew's enactment, the Rochester community suffered a series of homicides that stunned the community. In particular, the deaths of three minors, Tyshaun Caldwell, Frederick Lewis and Devon Scott, galvanized politicians and prompted them to take action to prevent further crime. R. at 83. Mayor Duffy responded by proposing a curfew in July 2006 relying on the City's "interest in the safety and welfare of minors[,] . . . in preventing crime by minors, promoting parental supervision . . . and in providing for the well being of the general public." Rochester City Code § 45-1(B). In his letter introducing the curfew to the City Council, the Mayor stated that "[t]he recent string of homicides and violent crimes in the City requires us to take every possible step to reduce crime and victimization. While a curfew cannot solve all of the city's crime problems, it will provide the police with an additional tool to help prevent youth from being involved in crimes and from being victims of crimes." R. at 61.

Despite these laudable goals, since the curfew's enactment the City has recognized that the curfew disproportionately affects youth of color and that most curfew violators have been arrested while engaged in "fairly innocuous behavior." Charles Reaves, *First Report: Curfew Extension*, at 8, 15 (2006). Moreover, the City Curfew

Pilot Report found no data to support the proposition that the curfew advanced public safety. Charles Reaves, *City Curfew Pilot Report*, at 24, 28-29 (2006); *see also* Brian Sharp, *Youth Curfew's Impact Muddled*, Rochester Democrat & Chron., Aug. 15, 2007, at B1 (describing an increase in youth victimization after the enactment of the curfew). Two hundred twenty-four minors were stopped for violating the curfew in its first 180 days, Reaves, *First Report*, *supra*, at 1, and minors undoubtedly remain confused about the activities they may engage in without fear of arrest and how they can prove to an officer that they were exercising fundamental rights. Moreover, a substantial majority of parents have rejected referrals for support services after their children have been arrested, demonstrating the disjunction between parents' and the city's views of proper parenting. Sharp, *Youth Curfew's Impact Muddled*, *supra*. With the Rochester police now implementing a zero tolerance policy towards curfew violators and arresting all suspected curfew violators rather than issuing warnings, *see* Brian Sharp, *Police Step Up Curfew Efforts*, Rochester Democrat & Chron., Oct. 15, 2007, at A1, this Court must aim a critical eye at the curfew's constitutionality.

ARGUMENT

I. THE ROCHESTER CURFEW VIOLATES PARENTS' FUNDAMENTAL RIGHT TO DIRECT THE UPBRINGING OF THEIR CHILDREN

The Supreme Court has long recognized and protected the right of parents to direct the upbringing of their children. Heralded by the Court as "an enduring American tradition," this right has been "established beyond debate," *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), in cases ranging from *Meyer v. Nebraska*, 262 U.S. 390 (1923), to the recent decision in *Troxel v. Granville*, 530 U.S. 57 (2000). *Troxel* recognized that "the interest of parents in the care, custody, and control of their children . . . is perhaps the

oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65; *see also, e.g.*, *Yoder*, 406 U.S at 232; *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

"[P]arent's claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. State of New York*, 390 U.S. 629, 639 (1968). Consequently, the Court articulates a robust right that has substantial power to pushback against State interference, even against the State's most important functions. As the Court explained in *Yoder*, "[p]roviding public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in Pierce, made to yield to the right of parents . . . ." 406 U.S. at 213. Drawing on this, the Court concluded that the State's interest was not absolute, no matter how vital, in the face of parents' fundamental right and the free exercise of religion. *Id.* at 234.

Rochester's curfew directly implicates parents' right to direct the upbringing of their children. The curfew's lack of an exception allowing unaccompanied minors to engage in activities with the consent of their parents unconstitutionally intrudes on this right. It neglects the presumption that fit parents act in the best interest of their children and it burdens parental decision making by means not narrowly tailored to the City's interest, creating an undue burden parents' rights. For these reasons, Rochester's curfew deprives parents' the liberty to direct the upbringing of their children in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

A. Parents' Right to Direct the Upbringing of Their Children Encompasses the Right To Control a Child's Exposure to Ideas, Experiences, and People

Parents' fundamental right to direct the upbringing of their children guarantees a prerogative to control several facets of a child's rearing. The U.S. Supreme Court

suggests an inclusive right, including determining the influences to which a child will be exposed and the individuals with whom they may associate. *See, e.g.*, *Troxel*, 530 U.S. at 63; *Yoder*, 406 U.S. at 207; *Meyer*, 262 U.S. at 403. *But see Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (limiting the right to control of the home and education). In *Yoder*, for example, the Court defended Amish parents' right to withdraw their children from public school after eighth grade in contravention of Wisconsin's mandatory education law. While typically cast as a case protecting parents' right to educational decisions, the driving concern for the Court was the need for parents to control the ideas to which their children are exposed. The Court concluded:

> [The Amish] view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs. . . . Amish society emphasizes . . . a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society . . . . Indeed it seems clear that if the State is empowered, as *parens patriae*, to 'save' a child from himself or his Amish parents by requiring an additional two years of formal high school education, the State will in large measure influence, if not determine, the religious future of the child.

406 U.S at 210-11, 232.

This same concern for parents' ability to manage the ideas reaching their children animated the Court's decision in *Troxel*, which recognized the deference that must be accorded to a parent's management of their child's associations. In overturning a grant of visitation rights to a grandmother, the Court declared that "the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance." 530 U.S. at 70. Likewise, the Court guarded this right in *Meyer* by striking down a state statue prohibiting teachers from teaching a modern foreign language. Recognizing the strong cultural affiliation language cultivates

and the legislature's intent to inhibit this, the Court held, "The desire of the Legislature to foster a homogenous people with American ideals . . . is easy to appreciate . . . . But the means adopted, we think, exceed the limitations upon the power of the state . . . ." 262 U.S. at 403. Like *Yoder*, the case is often cast as one permitting control over educational decisions. Nevertheless, a deeper reading of the Court's logic reveals a fundamental right of parents to instill cultural awareness and to control exposure to ideas, experiences, and associative relationships. *See also Hutchins*, 188 F.3d at 549 (Edwards, C.J., concurring) ("[A] parent's stake in the rearing of his or her child surely extends beyond the front door of the family residence and even beyond the school residence.").

Rochester's curfew threatens precisely this right. Under the curfew, a parent's right to select experiences or associations that would benefit a child is entirely controlled by the State when the parent, guardian or responsible adult does not accompany the child: the child can either undertake the limited activities approved in the exceptions or stay at home. There is no exception permitting a parent to give their child permission to engage in an activity without the parent's presence. Thus, the State's judgment about what activities are appropriate for an unaccompanied child overrides the parent's judgment. While the exceptions include important activities, their rigidity omits an enormous swath of experiences that impact a child's upbringing. Parents cannot permit their child to attend cultural, artistic and civic activities that are not official school or religious activities, or sponsored or supervised by public entities or civic organizations. Parents cannot even direct their child to run a simple errand without violating the curfew.

The curfew's restrictions eliminate more than just late night activities. Even though the curfew begins at 11 P.M. or midnight (depending on the day), activities that

start earlier but end during curfew hours become inaccessible to a child without their parent's presence. For instance, a child cannot not attend a Rochester Red Wings baseball game with friends if it ends near 11 P.M., even with a parent's consent. Thus a parent's choice to allow a child to participate in the quintessential American pastime with a friend would be denied. Opportunities to attend evening cultural events and artistic performances, to perfect a school presentation or cram for a final, to discuss a movie or play after it ends, all are curtailed by the curfew unless a parent chaperones their child. The loss of a parent's ability to choose these activities for his child must not be trivialized—these activities enrich a person's life as much as a formal education does and affect the family unit as much as intimate matters do. Parents have a constitutional right to determine whether and with whom their child can experience them. Rochester's curfew actively denies parents this right.

B. The Curfew Impermissibly Ignores the Presumption of Fit Parenting By Failing to Include a Parental Consent Exception

A parent's right to control their child's upbringing occasionally gives way to the State, but only in limited instances and not without deference to the judgment of a fit parent. The State's interest in the wellbeing of its children permits it to interfere with the rights of parents in situations endangering the child's physical and mental well-being. *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("We have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical and mental health is jeopardized.") (citing *Yoder*, 406 U.S. at 230, and *Prince*, 321 U.S. at 166). However, because of the affection inherent in the parent-child relationship, it is presumed that a parent will act in the best interests of the child and protect them from harm.

> The law's concept of the family rests on a presumption that parents posses what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham, 442 U.S. at 602. This presumption must be the starting point every time the State reaches into this intimate sphere.

Only in instances where a parent fails to or cannot protect their child from this harm can the State intervene. In the absence of such a determination, the State must respect this presumption and defer to a parent's decision regarding what is best for his child. "So long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69; *see also Hutchins*, 188 F.3d at 550 (Edwards, C.J. concurring) ("[W]hen the government does intervene in the rearing of children without regard to parents' preferences, 'it is usually in response to some significant breakdown within the family unit or in the complete absence of parental caretaking . . . or to enforce a norm that is critical to the health, safety, or welfare of minors.'") (quoting *Action for Children's Television v. FCC*, 58 F.3d 654, 679 (D.C. Cir. 1995)). The New York Court of Appeals recently underscored the importance of adhering to this presumption when it cautioned, "Courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one." *E.S. v. P.D.*, 8 N.Y.3d 150, 157 (2007). Hence, a state cannot disregard a parent's decision about the upbringing of his child without violating the Constitution.

The City of Rochester ignores this presumption by not including an exception that permits a child to participate in an activity unaccompanied by his parent but with the parent's consent. The City justifies its curfew on a desire to shield children from nighttime crime. While this reason might validate municipal intervention in the abstract, the curfew does not provide a way for parents to voice a contrary opinion. As a result, the City's determination concerning a child's best interest effectively displaces fit parents' presumptive prerogative, irrespective of whether they are capable of making those decisions.

The court below concluded that the curfew exemptions rectify this problem. "Because of the broad exemptions included in the curfew ordinance, the parent retains the right to make decisions regarding his or her child in all other areas" except "remaining in public places, unaccompanied by a parent." *Anonymous v. City of Rochester*, Index No. 2006/12869, slip op. at 6 (N.Y. Sup. Ct. Monroe County Feb. 16, 2007) (citing *Qutb v. Strauss*, 11 F.3d 488, 495-496 (5th Cir. 1993)). The Court below provided no reason why that particular decision—to allow a child to be in public without their parent—is outside the range of choices a fit parent might make. Parents know the maturity level of individual children far better than the state, as well as children's capacity for independent judgment and the types of experiences that will help them grow as productive citizens. Thus when a fit parent decides that an unsupervised activity is in the best interest of his child, this determination must be heeded by the State. The fact that some parents might misuse this discretion does not warrant depriving all parents of it. *Parham*, 442 U.S. at 603 ("The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to the American

tradition."). The Rochester curfew denies all parents the presumptive deference that should be accorded to them and infringes on their right to direct their children's upbringing.

Moreover, Rochester's concern about children's safety during non-exempt activities does not automatically trump the presumption of fit parenting. The reasoning of the ordinance misunderstands the strength of the parental presumption and the fact that the State must tolerate various parenting styles. The strength of this presumption led the U.S. Supreme Court to insist on its application even in the face of risk. "Simply because a decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham*, 442 U.S. at 603. Thus Rochester cannot assume that a single model of parenting is necessary in the face of risk. *See Bellotti v. Baird*, 443 U.S. 622, 638 (1979) ("Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. . . . [C]entral to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children.").

The Second Circuit arrived at a similar conclusion concerning parental rights in *Ramos v. Vernon*, 353 F.3d 171 (2d Cir. 2003). The curfew at issue in that case was less restrictive than Rochester's because it included an exception for activities permitted by a parent. Yet, even with this provision, the court found the ordinance improper. It noted that "absent adjudication of parental unfitness, we cannot sit in judgment of a parental

philosophy allowing late night activity." *Id.* at 183. Rochester's curfew, by comparison, intrudes on parents' rights even more heavily and should be pronounced unconstitutional.

C. The Curfew Unconstitutionally Burdens Parents' Rights Because Its Means Are Not Narrowly Tailored To The City's Asserted Interests

Rochester's curfew inhibits parents from making decisions about the experiences their children should enjoy and the people with whom they can associate. This directly implicates parents' fundamental liberty interest in rearing their children as they deem appropriate. As a result, the ordinance must withstand strict scrutiny to be upheld. *Reno v. Flores*, 507 U.S. 292, 302 (1993). Assuming *arguendo* that the City's interests in the preventing youth criminality and victimization are compelling, the curfew still does not withstand searching analysis because the means it employs are not narrowly tailored and it burdens parents' rights to an unnecessary degree.

The curfew would be equally as effective in achieving the city's objectives and far less invasive of parents' rights if an exception for activities done with parental consent were included. The curfew aims to "prevent[] crime by minors, promot[e] parental supervision . . . and . . . provid[e] for the well being of the general public" by prohibiting minors from being outside their house at night. Rochester City Code §§ 45-1(B), 45-3. However, by carving out exceptions the City recognizes that, in some circumstances, its goal can still be met even when it allows minors to assume a certain level of risk by being outside the house. A curfew with a parental consent exception would meet the city's objectives because a minor's exposure to risk would still be controlled. Given a parent's intimate knowledge of their child, a fit parent would consent only to those activities they deem appropriate and safe for their child based on their knowledge of their child's maturity level and capacity for independent judgment. Indeed, this parental knowledge

controls the risk of harm to a child much more effectively than the City does because the City's enactment rests upon generalized information. Consequently, providing an exception for parents to utilize this information does not increase a minor's risk of harm, it actually minimizes it and achieves the City's stated purpose.

Moreover, an exception for activities with parental consent permits parents to exercise more freely their rights to direct the upbringing of their children. The lower court recognized that the curfew implicates a constitutionally protected right but incorrectly concluded that the burden it creates does not rise to the level of unconstitutionality. Rather, it concluded that the curfew does "not unreasonably interfere with Jiovon's father's rights." *Anonymous v. City of Rochester*, slip op. at 8. The lower court noted: "While [the ordinance] does limit Thomas' ability to give his son a blanket pass to be out during the stated curfew hours, the limitation is a minimal intrusion on those rights." *Id.* The lower court, however, misunderstood the extent to which the right is burdened. A fit parent exercises discretion wisely and prudently. The lower court did not recognize this and, as a result, failed to appreciate the gravity of the burden the curfew places on parents. This burden is not narrowly tailored to the city's objectives. As a result, the curfew is unconstitutional.

II. THE ROCHESTER CURFEW VIOLATES MINORS' FIRST AMENDMENT RIGHTS

Given a superficial reading, the Rochester curfew appears to heed the First Amendment rights of minors. As noted above, the curfew does not apply

> if the minor can prove that 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.

Rochester City Code § 45-4 (E). Despite this attempt to shield the curfew from First Amendment scrutiny, the law raises serious constitutional concerns. First, by defining involvement in the exercise of fundamental rights as an affirmative defense, minors are required to come forward with an explanation of their expressive and associational conduct and are, perforce, deprived of their ability to engage in private or anonymous association. Moreover, by defining the range of protected activity solely by invocation of the vague and fluctuating bounds of "fundamental rights," the ordinance impermissibly chills protected speech. The Rochester City Counsel could remedy these constitutional infirmities by redrafting the reach of the ordinance more narrowly to fulfill its stated goals. The constitutions of the United States and the State of New York require no less.

Nearly forty years ago, the United States Supreme Court established that minors "are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect . . . ." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969); *see also Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975). Chief among those guarantees are the freedom of speech, the right to assemble peaceably, and the right to petition government. U.S. Const. amend I; N.Y. Const. art. I, § 8. Moreover, minors enjoy plenary First Amendment protection outside the supervised school environment, *see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (noting while schools need not permit disruptive speech, "the government could not censor similar speech outside the school"), beyond the special category of sexual expression. *Ginsberg*, 390 U.S. at 638. *See generally Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (Posner, J.) ("[I]t is obvious that [minors] must be allowed the freedom to

form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise."). Therefore, the Rochester Curfew must be analyzed under the full panoply of rights provided by the First Amendment.

A. The First Amendment Bars Government From Demanding That An Individual Identify Their First Amendment Activity

In order to be effective advocates, minors must engage in a great deal of private association and anonymous speech. Denied the vote until majority, those subject to the Rochester curfew who wish to organize or advocate against school board policies, aggressive principals, or even youth curfews may choose to do so under the shields of privacy and anonymity, in order avoid retaliation from authorities to whom they have no democratic link. Moreover, during school hours or during school-sponsored activities, student speech rights are dramatically cabined. *See Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007); *Hazelwood*, 484 U.S. at 266; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Therefore, students may only speak with true freedom after all school activities have ended, drawing them toward the restricted curfew period.

Despite this limited period during which minors may discuss controversial subjects, if a minor returning home from a meeting or protest runs out of time before the curfew, the ordinance places them between Scylla and Charybdis. On one hand, minors may protect their First Amendment interests by refusing to reveal the nature of the expressive activity that has brought them to a public place after hours. This will subject them to arrest and detention. On the other, minors may reveal the nature of their First Amendment activity, in order to prove to the arresting officer's satisfaction that they are in a public place for the purpose of exercising fundamental rights. This will deny them

the right to express their views without revealing them to government authorities. Rochester may not impose this choice upon teens. *See Tinker*, 393 U.S. at 513 ("Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact."); *see also, e.g., City of Houston v. Hill*, 482 U.S. 451, 459 n.7 (1987) (noting that the fear of arrest alone is sufficient to chill speech); *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (same).

The First Amendment specifically protects individuals' rights to associate, to organize, and to advocate for unpopular causes, all without having to explain the nature of their expressive activity. The U.S. Supreme Court long ago "recognized the vital relationship between freedom to associate and privacy in one's association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Specifically, in *NAACP v. Alabama*, the Court held that government could not mandate the disclosure of membership lists of an organization engaged in politically unpopular advocacy. *Id.* at 462. The Court recognized that

> compelled disclosure . . . is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

Id. at 462-63. Although not subject to similar animus, minors are also a disenfranchised and politically vulnerable group; therefore Courts should pay particular heed to protection of their ability to maintain private association. *See generally* John Hart Ely, *Democracy and Distrust* (1980).

More recently, in *McIntyre v. Ohio Elections Commission*, the Court reaffirmed the importance of anonymous political speech and imposed the standard of strict scrutiny

on any limitation thereupon. 514 U.S. 334 (1995). Reviewing the imposition of a $100 fine for the distribution of unsigned leaflets, the Court noted, "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *Id.* at 341-42; *see also Talley v. California*, 362 U.S. 60, 65 (1960) ("[I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."). Therefore, forced disclosure of anonymous political speech "burdens core political speech . . . and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978)).

The curfew's requirement that individuals sacrifice this fundamental right to anonymous speech to avoid punishment is strikingly similar to a California taxation scheme struck down by the Supreme Court in *Speiser v. Randall*, 357 U.S. 513 (1958). In that case, the Court asked whether a state may place the burden of proof on individuals to establish that they were "not persons who advocate the overthrow of the government of the United States or the State by force or violence" in order to qualify for a tax exemption. *Id.* at 521. Specifically, the Court held that government could not "allocate[e] the burden of proof, on an issue concerning freedom of speech" on the speaker. *Id.* at 523; *see also McClendon v. Rosetti*, 460 F.2d 111, 116 (2d Cir. 1972) (noting that a statutory presumption may not impose on a fundamental right). As a result, California could not force citizens to establish the lawfulness of their speech in order to avoid the denial of a tax exemption for which they otherwise qualified. *Id.* at 518.

In this case, Rochester requires that minors subject to the curfew must establish that they were engaging in speech protected by the First Amendment in order to avoid the penalty of arrest and detention. Particularly given the express limitation on the "fundamental rights" exception to exclude "generalized social association," Rochester City Code § 45-4(E), a minor seeking its protection must describe the size and nature of any political gathering to an arresting officer. The burden of proof rests on the minor to demonstrate that his or her speech was legally protected, for if it occurred in a public place and was deemed "generalized social association," their speech will be just as criminal as support for violent revolution targeted by the statute struck down in *Speiser*.

Recently, the United States Court of Appeals for the Seventh Circuit struck down a curfew ordinance precisely because an affirmative defense was insufficient to protect minors' First Amendment rights. *Hodgkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004). First the *Hodgkins* Court noted that, under the ordinance at issue in that case, "a police officer [would have] probable cause to arrest when 'the facts and circumstances *within the officer's knowledge* . . . are sufficient to warrant a prudent person . . . in believing . . . that the suspect has committed, is committing, or is about to commit an offense.'" *Id.* at 1060 (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)). But the Court observed, since police officers do not have a constitutional obligation to conduct any further investigation in hope of discovering exculpatory evidence, nor need officers take a teenager at their word absent first-hand knowledge, "as a practical matter [the defense] protects only those minors whom the officer has actually seen participating in protected activity." *Id.* at 1061-62. Along the same lines,, the Rochester curfew will continue to

curtail "a substantial amount of protected conduct," *id.* at 1062, despite its textual exception for constitutionally protected conduct.

The Rochester curfew's constitutional infirmity does not mean that youth curfews always violate the First Amendment. *See Ramos*, 353 F.3d at 172 ("Juvenile curfews have existed throughout our Nation's history, and we do not question the Town of Vernon's authority to have such an ordinance under some circumstances."). Nevertheless, *McIntyre* requires that strict scrutiny must be applied to laws burdening anonymous speech, and both *Spieser* and *Hodgkins* demonstrate that a curfew that includes First Amendment exceptions solely as an affirmative defense is not narrowly tailored to reach the city's otherwise laudable objectives of reducing youth violence and youth victimization. More narrowly tailored alternatives will be discussed below. *See* Section I.C, *infra*.

B. A Crime Defined By An Indeterminate Exception for First Amendment Activities Impermissibly Chills Free Speech

Few minors are scholars of constitutional law. Nevertheless, by fashioning the ordinance's protection for the exercise of constitutionally protected activities as an affirmative defense for those "in the public place for the specific purpose of exercising fundamental rights such as freedom of speech or religion or the right of assembly," the Rochester City Council has placed the burden on teens to understand the contours of the First Amendment and to prove to a police officer—under the threat of arrest—that their evening activities were protected. Undoubtedly some minors will choose not to exercise their constitutional rights at night when they must pass a legal examination or face arrest on the way home. Thus the Rochester curfew, by defining the crime as any presence in

public and then defining the exemption via vague language, impermissibly chills First Amendment rights.

Speaking broadly, the U.S. Supreme Court has long held under the Due Process Clause of the Fourteenth Amendment that "the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law." *Connally v. Gen. Constr. Corp.*, 269 U.S. 385, 391 (1926); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). More directly applicable here, "[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights."). *Cf. United States v. Soltero*, 506 F.3d 718, 727 n.11 (9th Cir. 2007) ("A probationer must be put on clear notice of what conduct will (and will not) constitute a supervised release violation, a rule that is of particular importance when the condition seems to reach constitutionally protected conduct.").

When fundamental rights are at stake, a law may be challenged on its face as impermissibly vague. *Kolender v. Lawson*, 461 U.S. 352, 358 & n.8 (1983); *see also Hoffman Estates*, 455 U.S. at 494-95 (recognizing that the general rule against facial

vagueness challenges applies only to statutes that "implicate[] no constitutionally protected conduct"). As the Supreme Court has recognized

> The objectionable quality of vagueness . . . does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.

NAACP v. Button, 371 U.S. 415, 432-33 (1963) (internal citations omitted); *see also Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) ("The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [enforcing officials] what is being proscribed.").

In *Kolender v. Lawson*, the Supreme Court struck down a California loitering statute as unconstitutionally vague and therefore burdensome on First Amendment rights. 461 U.S. at 358. The statute required that individuals found loitering or walking on the streets "without apparent reason or business" were required to provide a "credible and reliable" identification and "account for his presence." *Id.* at 354 n.1, 359. The court found that those requirements provided neither sufficient guidelines to prevent unconstrained police conduct nor sufficient assurances against arbitrary suppression of First Amendment liberties. *Id.* at 358 (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965).

The standard required by the Rochester Curfew—proof that the minor was present in public for the "specific purpose of exercising fundamental rights"—is equally subject to abuse and even more unacceptably vague than the language in *Kolender*. Although the exclusion is explained slightly by reference to "freedom of speech or religion or the

right of assembly" and express disavowal of a right to "generalized social association," Rochester City Code § 45-4(E), these terms are no more definite to layman or lawyer than the broader guarantee of fundamental rights. As a result, the exception will cast a substantial chill on the exercise of First Amendment rights of those unsure of the scope of their rights or afraid that police will not properly enforce the statute.

On three occasions, the U.S. Supreme Court has dealt with statutes that define conduct as criminal or not by reference to broad, ill-defined constitutionally protected activity. *See United States v. Lanier*, 520 U.S. 259 (1997); *United States v. Guest*, 383 U.S. 745 (1966); *Screws v. United States*, 325 U.S. 91 (1945). While the Court did not strike down the applicable statutes, it has imposed limiting constructions in order to preserve their constitutionality. In *Screws*, for example, the Court upheld 18 U.S.C. § 20—which criminalized "deprivation of any rights, privileges, or immunities"—solely because the statute could be interpreted to include a strict scienter requirement. 325 U.S. at 105 (imposing a requirement of willfulness "to avoid grave constitutional questions"). As the Court later noted, *Screws* "recognized that the expansive language of due process that provides a basis for judicial review is, when incorporated by reference into [a penal law], generally ill-suited to the far different task of giving fair warning about the scope of criminal liability." *Lanier*, 520 U.S. at 267.

In *National People's Action v. City of Blue Island*, one U.S. district court specifically addressed the difficulty of excepting constitutionally protected activities from broad criminal prohibitions. 594 F. Supp. 72 (N.D. Ill. 1984). That decision struck down a city ordinance requiring permits for all "peddlers, solicitors and canvassers," despite an express exclusion for "persons, firms or corporations engaged in [any] activity which is

exempt by any constitutional or statutory provisions . . . ." *Id.* at 75. While the Court found that this "savings clause" cured "overbreadth and other admitted constitutional defects" that would exist in its absence, it held that the language of the exemption "in turn renders the ordinance unconstitutionally vague." *Id.* at 80. Drawing on *Screws*, the Court held that most First Amendment "doctrines are not so categorically applicable and clear" and that "the Constitution does not, in and of itself, provide a bright enough line to guide primary conduct." *Id.* at 79 (quoting Lawrence Tribe, *American Constitutional Law* § 12-26, at 715 (1978))

In an identical manner, the Rochester ordinance fails to provide sufficient clarity to prevent impermissible chill of First Amendment activities, as it defines its exceptions according to the vague contours of constitutional law.

C. More Narrowly Tailored Alternatives Exist to Fulfill Rochester's Asserted Interests

Given the chilling effect that the Rochester Curfew imposes on constitutionally protected speech, the ordinance may be upheld "only if it is narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347. While it is not the Petitioner-Appellant's burden to demonstrate that a less restrictive alternative exists, *see Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004), the NYCLU as *amicus curiae* wishes to demonstrate to the court that alternative arrangements would fulfill the city's laudable interest in reducing juvenile crime and juvenile victimization without lessening the harm to the fundamental rights of Rochester's youth.

Currently, the statute imposes a blanket prohibition on public presence during restricted hours, with six exceptions to enforcement. Rochester Code §§ 45-3 to -4. The text of the ordinance plainly provides that exceptions apply only "if the minor can prove"

that their conduct falls into one of the excepted categories. *Id.* § 45-4. The arresting officer need only "reasonably believe" that "none of the exceptions . . . apply." *Id.* § 45-6(B)(2). Since the burden rests on the minor, and the arresting officer need only maintain a reasonable belief that the minor is subject to arrest, a minor attempting to establish that he or she is "was in the public place for the specific purpose of exercising fundamental rights" must demonstrate that their conduct is protected to the extent that that the arresting officer cannot reasonably believe that the exception does *not* apply.

There are three distinct means by which the City of Rochester could reduce the burden that the curfew imposes on youth. The simplest would be to integrate the curfew's exceptions into the definition of the crime itself. Theoretically, the curfew could prohibit minors sixteen or younger from remaining in or upon any public place within the City during specified hours when not engaged in any of the currently excepted activities. *Cf.* Rochester City Code §§ 45-3 to -4 (defining "prohibited acts" and "exceptions" independently and casting the exceptions as an affirmative defense. This would place the burden on police officers to know that the minor was *not* engaged in protected activities *before* arrest. *See, e.g.*, *Draper v. United States*, 358 U.S. 307, 313 (1959).

Another means to achieve the same end would be to place a strict responsibility onto the police to investigate the applicability of the exceptions found in Rochester Code § 45-4 prior to arrest. While presently the police have no duty to investigate a claim of innocence, *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 128 (2d Cir. 1997), a statutory requirement to investigate would reduce the likelihood arrest based on police simply not believing a teen's asserted defense.

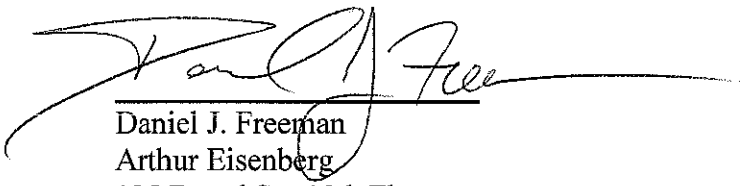
The availability of other, more narrowly tailored measures renders the current ordinance violative of the First Amendment

CONCLUSION

For all the foregoing reasons, the decision of the New York Supreme Court for New York County should be reversed.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION, by



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