IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2288

THE STATE OF FLORIDA,

Petitioner,

vs.

J.P., a Child,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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QUESTION PRESENTED

WHETHER THE TAMPA JUVENILE CURFEW ORDINANCE IS CONSTITUTIONAL?

STATEMENT OF THE CASE AND FACTS

On December 27, 1996, the State filed a Petition for Delinquency against Respondent, charging him with violating Tampa's Juvenile Curfew Ordinance on December 7, 1996. (R. 8-9). Prior to the adjudicatory hearing Respondent filed a motion to declare the Ordinance unconstitutional on the ground that it was void for vagueness, restricted the rights of free speech, association, and assembly, penalized wholly innocent conduct and was overbroad. (R. 12-59). On February 4, 1997, a hearing, consisting solely of legal argument, was held on said motion. (R. 109-125). The trial court denied the motion, and Respondent pled no contest reserving his right to appeal the denial of his motion to declare the Juvenile Curfew Ordinance unconstitutional. (R. 121-122).

The Second District, after reviewing the juvenile curfew under the Equal Protection Clause's intermediate standard of review, affirmed the trial court and found that the juvenile curfew ordinance was constitutional. The Second District then certified two questions to the this Court. The first was what is the appropriate standard of review and the second, under the appropriate standard of review, was the ordinance constitutional. This Court agreed with the State that the appropriate standard of review is strict scrutiny and then

remanded the case to the Second District so it could answer the second question.

On remand the Second District found the ordinance was unconstitutional because it was enacted based on a general need to protect juveniles. This was error since the Tampa City Counsel enacted the juvenile curfew in the face of statistical evidence that it was facing a mounting problem of nighttime juvenile crime and victimization. The Second District refused to consider these statistics or remand the case to the trial court. Instead ,it reviewed the curfew ordinance as it if was enacted in a legislative vacuum and found that it was not narrowly tailored to the general interest of protecting juveniles. The Second District then certified the instant question to this Court. (A. 1-9).

This petition follows.

SUMMARY OF THE ARGUMENT

Tampa's Juvenile Curfew Ordinance is facially constitutional since it passes the strict scrutiny test of the Equal Protection Clause of the United States Constitution. Said provision requires that when a fundamental right is regulated, the State must have a compelling state interest, the regulation must promote that interest and must be narrowly tailored to advance that interest.

A youth curfew effects a minor's constitutional right to walk freely in public. This right can be regulated to protect the well being of children. Since the Tampa City Council was presented with statistical evidence that there was a problem with nighttime juvenile crime and victimization, Tampa's Ordinance was a legislative response which sought to promote parental responsibility, prevent juvenile victimization and stop juvenile crime. Thus, Tampa has a compelling interest and therefore can regulate a minor's activity during the night.

The regulation also promotes the compelling interest and is narrowly tailored to advance that interest. Here the Curfew Ordinance promotes the interest and is narrowly tailored to advance that interest since it seeks only to prevent the aimless roaming of the streets during curfew hours. The Ordinance excepts from its reach a host of legitimate activity and allows

minors to exercise all First Amendment rights. Keeping minors at home or under adult supervision promotes parental responsibility and protection from victimization. It also helps in the prevention of juvenile crime. The Ordinance is narrowly tailored to advance that interest since all activity is sanctioned if accompanied by a parent or if the activity is excepted from the Ordinance.

The Ordinance does not infringe on a parent's right to raise a child free from governmental intrusion and thus constitutional. A governmental intrusion into personal decision making must promote the compelling state interest of preventing a demonstrable harm to a child. Here, that compelling state interest exists in preventing juvenile victimization from crime. Thus, the Ordinance does not violate a parent's right to raise a child free from government intrusion.

ARGUMENT

THE TAMPA JUVENILE CURFEW ORDINANCE IS CONSTITUTIONAL.

This Court has determined that the proper standard of review of a juvenile curfew ordinance is strict scrutiny analysis of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[1] *T.M. v. State*, 784 So.2d 442 (Fla. 2001). The State submits that juvenile curfew ordinances drafted with the specificity of Tampa's Juvenile Curfew Ordinance, are not violative of either the United States Constitution or the Florida Constitution. *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied sub nom. Qutb v. Bartlett*, 114 S. Ct. 2134 (1994).

Under strict scrutiny analysis, the government must demonstrate a compelling state interest for a law which infringes on a fundamental right. If there is not a compelling state interest for the law, the government may not even attempt to regulate the right in question. *Dunn v. Blumstein*, 405 U.S.

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[1] Article I, Section 2 of the Florida Constitution, Florida's Equal Protection Clause, has been given the same scope as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *The Florida High School Activities Ass'n., Inc. v. Thomas*, 434 So.2d. 306 (Fla. 1983). Thus the State will rely on federal as well as state law to determine the propriety of the claim. *Traylor v. State*, 596 So.2d. 957 (Fla. 1992).

330, 342 (1972). Although the government must establish a compelling state interest, such an establishment, in and of itself, is insufficient to defeat an equal protection challenge. In furtherance of the compelling state interest, the government cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Laws affecting constitutional rights must be drawn with "precision," *NAACP v. Button*, 371 U.S. 415, 438 (1963), and must be "tailored" to serve their legitimate objectives. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969). If there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, the government may not choose the way of greater interference. If the government acts at all, it must choose "less drastic means." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). *In re Estate of Greenberg*, 390 So.2d 40 (Fla. 1980). Thus, the "strict scrutiny" test under equal protection analysis, requires that the State establish that the juvenile curfew ordinance is necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest. *T.M. v. State*, 784 So.2d 442, 443 n.1 (Fla. 2001).

Although a juvenile curfew ordinance implicates the fundamental rights of minors, the strict scrutiny analysis of

those rights differ from the strict scrutiny analysis of the same rights of adults.

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. It remains, then, to examine whether there is any significant state interest in [the effect of the ordinance] that is not present in the case of an adult.

Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74-75 (1976). Thus minors' rights are not coextensive with the rights of adults because the State has a greater range of interests that justify the infringement of minors' rights.

In *Bellotti v. Baird*, 443 U.S. 622 (1979) the United States Supreme Court recognized three reasons for allowing a court to treat the rights of minors differently from the rights of adults. They are the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing. The foregoing test enables courts to determine whether the State has a compelling interest justifying greater restrictions on juveniles than on adults. *Nunez v. City of San Diego*, 114 F.3d 935, 945 (9th Cir. 1997); *Qutb v. Strauss*, 11

F.3d 488, 492 n.6 (5th Cir. 1993).

It is within this framework that this Court must apply strict scrutiny review of the juvenile curfew since it seeks to regulate the fundamental right liberty right of minors to walk the streets free from governmental interference. The juvenile curfew also seeks to regulate a parent's due process right to rear children without undue governmental interference. The State will first address the effect the juvenile curfew has on minors' rights and then on parents' rights.

STRICT SCRUTINY REVIEW

In order to survive strict scrutiny, the classification created by the juvenile curfew ordinance must be narrowly tailored to promote a compelling governmental interest. *Plyler v. Doe*, 457 U.S. 202, 217 (1982). To be narrowly tailored, there must be a sufficient nexus between the stated government interest and the classification created by the ordinance. *Id.* at 216-17.

THE CITY OF TAMPA'S COMPELLING GOVERNMENTAL INTEREST

Tampa, as evidenced in Section 14-26.1(f) of the Ordinance, has stated its compelling interest as follows:

(f) The purposes of this article are:

> (1) to protect juveniles from themselves and from other citizens, residents and visitors of the City of Tampa from the dangers of crime which occur on sidewalks, streets, and in public places, and semi-public places during late night and early morning hours.
>
> (2) to decrease the amount of criminal activity engaged in by juveniles
>
> (3) to promote and enhance parental control over juveniles.

The foregoing purposes of the Ordinance establish a compelling governmental interest since the City has a compelling interest in protecting the entire community from crime, *Schall v. Martin,* 467 U.S. 253, 264 (1984), including juvenile crime. The City's interest in protecting the safety and welfare of its minors is also a compelling interest. *Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997); *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993).

The City also has a compelling interest in protecting minors from the dangers of public places at night. This interest is particularly compelling based on the *Bellotti* reasons regarding differential treatment of minors.[2] The consideration of the

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[2] The City can have a compelling interest in protecting minors from certain conduct that it does not have for adults. *Sable Communications v. FCC*, 492 U.S. 115 (1989)(holding that a ban on dial-a-porn is not appropriate for adults, although it might be for minors).

Bellotti factors establishes that the greater restrictions of minors may be justified because they have a greater vulnerability at night than do adults and because minors are not equally able as adults to make mature decisions regarding the safety of themselves and others. *Prince v. Massachusetts*, 321 U.S. 158, 167-68 (1944)(finding that the state's interest in protecting children from "diverse interests of the street" justified restriction on selling street literature that would not have been permissible on adults). Thus, the City's conclusion that minors are more susceptible to the dangers of the night and are generally less equipped to deal with the danger that does arise also establishes a compelling interest in placing greater restrictions on minors than adults to insure the minors' own safety.

In accordance with the foregoing, there is a compelling governmental interest under the Equal Protection Clause to safeguard the well-being of children. This includes the protection of minors from adults and other minors and this is based on the fact that minors do not have the capacity to make informed decisions on matters critical to their well-being. Thus, Tampa's goals of promoting parental responsibility for their minor children, the protection of minors from victimization and exposure to criminal activity, and to decrease

the amount of juvenile crime are the compelling governmental interests necessary to allow the regulation of minors' rights to walk freely in public during nighttime hours. *Metropolitan Dade County v. Pred*, 665 So.2d 252 (Fla. 3d DCA 1995); *Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997); *Qutb v. Strauss*, 11 F. 3d 488 (5th Cir. 1993).

THE ORDINANCE IS NARROWLY TAILORED

The State submits that Tampa's Juvenile Curfew Ordinance is narrowly tailored to promote the goals of insuring parental responsibility and preventing juvenile victimization and crime, since the record reflects statistical support for the need of the curfew[3] and the exceptions are sufficiently broad to only minimally burden minors' rights to free movement and free speech.

STATISTICAL SUPPORT FOR THE CURFEW

Initially, the State submits that statistical support for

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[3] Although statistical support for the curfew was not provided to the trial court, statistical support was provided to the Tampa City Council when the curfew ordinance was enacted. The Petitioner requested the Second District to take judicial notice of those statistics, but the motion was denied. For ease of reference, the statistics are contained in the Appendix to this brief.

the curfew is unnecessary to determine if it is narrowly tailored to survive strict scrutiny review. The Constitution does not require the government to produce "scientifically certain criteria of legislation." *Ginsberg v. New York*, 390 U.S. 629, 642-43 (1968). A number of courts have not required statistical support in upholding juvenile curfews.

In *Bykofsky v. Borough of Middletown*, 401 F.Supp. 1242 (M.D. Pa. 1975), *affm'd*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976), a curfew ordinance was challenged, and the governmental interests it sought to enhance were:

> (1) the protection of the younger children in Middletown from each other and from other persons on the street during night time hours; (2) the enforcement of parental control of and responsibility for their children; (3) the protection of the public from nocturnal mischief by minors; and (4) reduction in the incidence of juvenile criminal activity.

Id. at 1255. In finding that the curfew ordinance furthered its purposes the Court found, that even in the absence of any statistical data, it would take judicial notice of the rapidly increasing crime rate among juveniles and that teenagers commit a high percentage of all serious crimes and that a curfew would prevent some juvenile crime. As to enhancing parental control, the Court took judicial notice of the following:

> ... Moreover, the underlying assumption that

> likelihood of criminal activity decreases as the amount of control exercised by parents over the activities of their children increases is not an unreasonable tenet. The greater the breakdown in the social structure of the family unit or the greater the parental neglect, then the greater the chance of anti-social behavior by the minor. Thus, to the extent the curfew induces parents, under the pain of imposition of a criminal penalty, to exercise their control where they otherwise might allow their children freer rein and ignore their nighttime whereabouts and activities, it is effective in decreasing nocturnal juvenile crime and mischief and in strengthening the family unit.

Id. at 1256.

Arizona, in *In the Matter of the Appeal of Maricopa County,* 887 P. 2d 599 (Ariz. Ct. App. 1994), argued that all three of the *Bellotti* factors supported the constitutionality of the Phoenix juvenile curfew ordinance. It asserted that youths are more vulnerable to crime and peer pressure than adults; that minors lack experience, perspective and judgment to recognize and avoid detrimental choices such as drugs, alcohol and crime; and that the city's restriction on minors' movement after 10:00 p.m. reinforces parental authority and home life, and encourages parents to actively supervise their children.

The Court found that the foregoing purposes established the compelling state interest. The first *Bellotti* factor, particular vulnerability of minors, was satisfied since the

curfew was directed at crime and drugs and they are more damaging to minors based on their vulnerability. The second *Bellotti* factor, the inability to make critical decision, was also satisfied because the minors' vulnerability renders their decision making process suspect. Finally, the third *Bellotti* factor, the importance of the parental role to child rearing, was also satisfied. For the third factor the Court took judicial notice of the fact that the curfew ordinance rests on the implicit assumption that the traditional two parent family has dissolved. As such, the State has an interest in reaching those families and helping them cope with reality.

If there is a need for statistical data, the State's statistical evidence in the instant case clearly establishes the necessary statistical support for the curfew. During the Tampa City Council's public hearing on the need for a juvenile curfew statistical evidence was presented concerning juvenile arrests and victimization for the years of 1994 and 1995. These statistics were compiled from the Florida Department of Law Enforcement and the Tampa Police Department records. They were restricted to juveniles between the ages of 6 to 16 and excluded domestic violence victims. (A. 13-14).

The arrest statistics established that for the combined years the total number of juvenile arrests was 11,387. The

total number of juvenile arrests that occurred between 11p.m. and 6a.m. was 1,273 and that those arrested that were 16 years old or younger was 462. The percentage of juvenile arrests that occurred between 11p.m. and 6a.m. was 11.18% and the percentage of those arrested that were 16 years old or younger was 36.29%. (A. 13).

The victimization statistics established that for the combined years the total number of juvenile victims was 6,807. The total number of juvenile's that were victims of crimes that occurred between 11p.m. and 6a.m. was 3,849 and that those victimized that were 16 years old or younger was 295. The percentage of juvenile victimization that occurred between 11p.m. and 6a.m. was 56.54% and the percentage of those victimized that were 16 years old or younger was 7.66%. (A. 14).

As established by the foregoing, Tampa had a real problem with juvenile crime and victimization during the curfew hours. Thus, the City Council's legislative decision to enact a juvenile curfew as a means of addressing the problem has a legitimate connection to its compelling interest of reducing juvenile crime and victimization.

The fact that the foregoing statistical evidence does not necessarily establish a logical connection between the ordinance and the reduction of crime and juvenile victimization is of no

moment. These same concerns were considered and rejected in *Nunez v. City of San Diego*, 114 F.3d 935, 948 (9th Cir. 1997).

> Notwithstanding our expressed concerns, we reject a challenge to the ordinance that is based on the argument that a curfew is not particularly effective a meeting the City's interest. The City has established some nexus between the curfew and its compelling interest of reducing juvenile crime and victimization. This is particularly true because of our conclusion that minors have a special vulnerability to the dangers of the streets at night. We will not dismiss the City's legislative conclusion that the curfew will have a salutary effect on juvenile crime and victimization.

The Second District refused to consider the foregoing statistics which the Tampa City Council considered when it found that a problem existed with nighttime juvenile crime and victimization. It was these statistics which was the basis for the legislative response of the enactment on the instant juvenile curfew ordinance. The Second District's refusal was based on the fact that these statistics were never presented to the trial court and thus denied Petitioner's request, prior to the instant opinion, to take judicial notice of these statistics and after the opinion was issued denied Petitioner's motion for rehearing which requested a limited remand to the trial court for consideration of these statistics.

Instead, the Second District analyzed the issue as if the

Tampa City Council passed its juvenile curfew ordinance without a specific need. Thus the Second District's analysis of whether Tampa had a compelling governmental need for a juvenile curfew was based on the general proposition that a governmental agency may have compelling governmental interest in controlling the whereabouts of juveniles during late hours. The Second District then held that absent any specific statistics that establish a compelling governmental need for a juvenile curfew, Tampa's juvenile curfew was not narrowly tailored to, based on the generalized finding, to withstand strict scrutiny review.

The State submits that the Second District's refusal to consider the statistics utilized by the Tampa City Council to determine there was a specific compelling interest for the prevention of nighttime juvenile crime and victimization, was an abuse of discretion and an attempt make the obvious mandate of the Tampa City Council subservient to the discretion of the Second District. *Ellis v. State*, 622 So.2d 991 (Fla.1993). The history of this litigation clearly establishes that the Second District abused its discretion by not considering the statistics utilized by the Tampa City Council when it determined there was a nighttime juvenile crime and victimization problem.

The trial court upheld the constitutionality of the ordinance on February 4, 1997. At that time, the law was

unsettled whether the constitutionality of juvenile curfew under the equal protection clause was to be determined under rational basis test, heightened scrutiny test or strict scrutiny test. Thus, when Respondent challenged the juvenile curfew ordinance in the trial court, no statistics were presented to the Court nor did Respondent object to the State's failure to present statistics. In fact, the Second District's original opinion held that the juvenile curfew ordinance was only subject to heightened scrutiny and found the curfew constitutional without the need for statistical support. After this Court held that juvenile curfew's are subject to strict scrutiny, on remand the State sought judicial notice of the statistics that were utilized by the Tampa City Council to support the curfew so that the Second District could review them *de novo*. Thus, the Second District was aware that statistical support existed, but refused to follow the law and consider them *de novo*, or *sua sponte* relinquish the case to the trial court for its consideration of the statistic's. *Ellsworth v. Insurance Co. of North America*, 508 So.2d 395 (Fla. 1st DCA 1987) (Florida appellate courts may consider legislative staff summaries in construing statutes and such reports may be consulted in the court's independent research, through advocacy, or through introduction into the record at the trial level by judicial

notice.) Instead, the Second District acted as if they statistics did not exist in order to substitute its opinion, in place of the Tampa City Council, on the need for a juvenile curfew .

Thus, the remainder of this brief will address the constitutionality of the juvenile curfew ordinance under the assumption that this Court will review the statisitics *de novo*.

THE SCOPE OF THE EXCEPTIONS

In order to be narrowly tailored, the juvenile curfew ordinance must ensure that the broad curfew minimizes any burden on the minor's fundamental right to move about freely at night. Thus, the juvenile curfew ordinance exceptions must sufficiently exempt legitimate activities from its ambit. An examination of the instant exceptions establishes that all legitimate activities are exempted therefrom.

The Ordinance's exceptions are contained in Section 14-26.4 and includes the following:

4 Exceptions

> The provisions of the Juvenile Curfew Ordinance shall not apply if the juvenile is:
>
> (a) accompanied by a parent.

(b) engaged in a lawful employment activity or traveling to or returning home from a lawful employment activity without any detour and using the most direct route.

(c) in a motor vehicle engaged in interstate travel.

(d) on an errand at the written approval and direction of the juvenile's parent, without any detour and using the most direct route.

(e) involved in or attempting to remedy, alleviate or respond to an emergency.

(f) attending an official school, religious, or organized recreational activity supervised by adults at least twenty-one (21) years of age and sanctioned by Hillsborough County, Hillsborough County School Board, City of Tampa, a municipality, a charitable or religious organization or other similar entity, which organizations take responsibility for the juvenile as an invitee, or going to or returning home from any such activity without any detour and using the most direct route.

(g) on the swale or sidewalk abutting the juvenile's residence or the residence of a next door neighbor if the neighbor has not complained to the police department about the juvenile's presence.

(h) exercising First Amendment rights protected by the United States Constitution such as freedom of speech, or free exercise of religion.

(i) married in accordance with law or had disability of nonage removed by a court of competent jurisdiction.

(j) homeless or uses a public or semi-public place as his or her usual place or abode.

> (k) when City Council pursuant to application by a sponsor of an event not provided for in these exceptions, authorizes juvenile(s) to be in a public or semi-public place during curfew hours.

By including the foregoing exceptions Tampa has enacted a narrowly drawn juvenile curfew that allows the City to meet its stated goals of protecting juveniles from victimization, increasing parental responsibility and decreasing juvenile crime while respecting the rights of the affected minors. A juvenile may move about freely in the City subject to the curfew when accompanied by a parent or another authorized adult. If the juvenile is traveling interstate, intrastate, running an errand, responding to an emergency, returning from a school sponsored function, a civil organization's sponsored function, or a religious function, or working and going to or from work, the Ordinance does not apply. If the juvenile is just outside his house, married or homeless, the Ordinance also does not apply.

The fact that the Ordinance does not have an exception allowing minors to be out on the street at night with parent's consent does not unduly broaden the scope of the ordinance or does it unduly narrow its exceptions. Such an exception is not required since the exception would swallow the curfew. By allowing parental consent to override the Ordinance would ignore the fact that minors have a special vulnerability to the dangers

of the streets at night. A minor's victimization, who is not pursuing a legitimate activity and is unsupervised in the streets at night, would not be prevented simply because he tells his assailant that he has a note from his parent.

Minors, like adults, have a fundamental right to freedom of expression. *Tinker v. Des Moines Independent Sch. Dist.*, 393 U.S. 503 (1969). Expression includes speech and expressive conduct. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). However, not every law that burdens expressive conduct implicates the First Amendment. Laws which regulate conduct implicate the First Amendment only if they impose a disproportionate burden on those engaged in First Amendment activities; or constitute governmental regulation of conduct with an expressive element. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

Tampa's Juvenile Curfew Ordinance does not restrain any First Amendment rights. The Ordinance in Section 4, exempts from the Ordinance a host of activities that cannot be regulated, including the exercise of any right protected by the First Amendment. The Ordinance only regulates conduct and that conduct is the aimless roaming of the city streets during the curfew hours. Since a minor's right to move about freely in public during nighttime hours is subject to regulation it is not a prior restraint if there is a compelling State interest to

regulate the conduct. Although there is regulation of conduct, the Ordinance does not regulate rights protected by the First Amendment. It is a general regulation of conduct, not speech.

The only activity the Juvenile Curfew Ordinance restricts is the aimless roaming through the City during the curfew hours. The State submits that this restriction when balanced with the compelling interest sought to be addressed - protecting juveniles and increasing parental control - the imposition is minimal. A minor is not under any restriction if accompanied by a parent and this exception alone promotes the compelling interest since if accompanied by a parent, parental responsibility will be increased and the minor would not be subject to victimization by other adults or commit crimes. Therefore, Tampa’s Juvenile Curfew Ordinance is narrowly tailored to address the City’s compelling interest and any burden this Ordinance places upon minors’ constitutional rights is minimal.

THE ORDINANCE’S PENALTY EXCEEDS THE STATUTORY PENALTY

The only flaw in this juvenile curfew ordinance is in a part of its penalty provisions for juveniles who repeatedly violate the ordinance. According to Section 5 of the Ordinance, the penalty for a first curfew violation is a warning. Section 8 of

the Ordinance provides:

> ...A juvenile found to be in violation of subsection 3 shall be subject to penalty and rehabilitation as ordered by the court pursuant to Florida Statute, Chapter 39, Part II, not to exceed a maximum penalty as provided by Tampa Code Section 1-6.

The warning for the first violation is narrowly tailored. However, an adjudication of delinquency for a second curfew violation, is not so narrowly tailored since the purpose of the Ordinance is to protect minors and not to victimize them.

The State submits, however, that the penalty for a second violation's failure to withstand strict scrutiny does not mandate that the entire Ordinance be declared unconstitutional. Rather, this penalty provision can be severed from the Ordinance. Severability of the penalty clause for second violations, depends on the following test:

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provision, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Waldrup v. Dugger, 562 So.2d 687, 693 (Fla.1990). In *Waldrup,*

an inmate challenged the 1983 amendments to the gain time statutes as a violation of the Ex Post Facto clause of the U.S. Constitution. The Court held that the incentive gain time portion of the legislative scheme violated the prohibition against ex post facto laws. To save the constitutionality of the entire statute, the Court then severed the unconstitutional portion of the act. Severing the unconstitutional portion was permissible in that case because the severed portion could be replaced with the pre-1983 law, the legislative purpose (regarding gain time) could still be accomplished, the "good" and "bad" portions of the act were not so inseparable that it could be said the Legislature intended to pass one but not the other, and the act remained complete in itself after the invalid provisions were stricken.

In accordance with the foregoing test, the penalty provision for a second curfew violation can be severed from the Ordinance. Severing the portion of the penalty provision is permissible because the legislative purpose of the curfew ordinance of protecting minors from victimization and reducing juvenile crime will still be accomplished without the second penalty provision since the primary concern of the ordinance is to keep minors off the street at night. Based on the foregoing legislative purpose, the "good" and "bad" portions of the Ordinance are not

so inseparable that it could be said that the City intended to pass one but not the other. After severing the penalty provision, the curfew ordinance is complete in itself since the real penalty is against the parents' for their failure to have their children obey the law.

By severing the penalty for second violations by minors, the curfew ordinance would be similar to how the State treats habitual truants. The minor who is a habitual truant is provided treatment, required to perform community service and pay a minimum civil penalty of no more than $5 a day for each school day missed. §§ 232.19(7) (d) 1 & 2 and 984.151, Fla. Stat. (2000). The parent who fails to have his child attend school regularly commits a misdemeanor of the second degree and is subject to a 60 day term of imprisonment and a $500 fine. § 232.19(7) (a) 1, Fla. Stat. (2000).

PARENTS' RIGHTS TO REAR THEIR CHILDREN

Although the right to rear children without undue governmental interference is a fundamental component of the due process clause, *Ginsberg v. New York*, 390 U.S. 629, 639 (1968), the State submits that this Ordinance presents only a minimal intrusion into parents' rights. In fact, the only aspect of parenting that this Ordinance bears upon is the parents' right

to allow the minor to remain in public places, unaccompanied by a parent or other authorized adult, during the hours restricted by the curfew ordinance. Because of the broad exceptions included in the curfew ordinance, the parent retains the right to make decisions regarding his child in all other areas: the parent may allow the minor to remain in public so long as the minor is accompanied by a parent or other adult who is at least twenty-one years of age and who is authorized by the parent to have custody of the minor. The parent may allow the minor to attend all activities by organized groups such as church groups, civic organizations, schools and amusement parks. The parent may still allow the child to hold a job, to seek help in an emergency situation and to run an errand. Thus, it is clear that this curfew ordinance does not infringe on parents' fundamental rights to raise their children. *Qutb v. Strauss*, 11 F.3d 488, 496-97 (5th Cir. 1993).

BUSINESS OWNER, OPERATOR OR EMPLOYEE RIGHTS

The Respondent was charged by a petition of delinquency in Juvenile Court. Juvenile delinquency matters are criminal in nature. *State v. C.C.*, 476 So. 2d 144 (Fla. 1985). The constitutionality of a criminal statute should be determined either in a proceeding wherein one is charged under the statute

or in an action alleging an imminent threat of such prosecution. *Tribune Company v. Huffstetler*, 489 So. 2d 722 (Fla. 1986). A defendant in a criminal prosecution may not challenge the constitutionality of a portion of the statute which does not affect him. *State v. Hagan*, 387 So. 2d 943 (Fla. 1980).[4] Therefore, Respondent lacks standing to challenge the part of the Curfew that imposes obligations on business owners, operators or employees.

[4] Respondent can not assert standing pursuant to the overbreadth doctrine. In a facial challenge to the overbreadthness of a law, a party may assert First Amendment rights of others. In such a situation, the court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail and the court can only rule on the matters affecting the party. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *State v. Keaton*, 371 So. 2d 86 (Fla. 1979). As established *infra.*, the Ordinance does not affect First Amendment rights and thus the overbreadth doctrine does not apply.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court quash the decision of the District Court and find that Tampa's Juvenile Curfew Ordinance is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF PETITIONER** was furnished by U.S. mail to **A. VICTORIA WIGGINS**, Attorney for Respondent, Public Defender's Office, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, on this day of December, 2002.

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Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

MICHAEL J. NEIMAND
Assistant Attorney General