

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2452

THE STATE OF FLORIDA,

Petitioner,

vs.

T.M., A.N. & D.N.,  
Children,

Respondents.

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON THE MERITS

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QUESTION PRESENTED

WHETHER THE PINELLAS PARK JUVENILE  
CURFEW ORDINANCE IS  
CONSTITUTIONAL?

## STATEMENT OF THE CASE AND FACTS

The State filed a Petition for Delinquency against Respondent, T.M., charging her with violating Pinellas Park's Juvenile Curfew Ordinance by remaining in a public place or establishment during curfew hours. (R. 2). The Respondent entered a denial to the Petition. (R. 4).

Prior to the adjudicatory hearing the Respondent, T.M., filed a motion to dismiss the Petition on the ground that the Juvenile Curfew Ordinance was unconstitutional. Respondent contended that the Juvenile Curfew Ordinance violated her State and Federal equal protection rights since it prohibited activities without an adequate rational relationship to its stated purpose and without a compelling governmental interest. The motion to dismiss further alleged that the Ordinance violated Respondent's State and Federal due process rights since the Ordinance was an arbitrary, vague and overbroad invasion of the inherent liberties of juveniles and their parents and also allowed for selective enforcement. It was further alleged that the Ordinance violated Respondent's State and Federal rights to freedom of speech, association, peaceful assembly and religion. Finally, Respondent alleged the Ordinance violated her right to Privacy under the Florida Constitution since it compels juveniles and their parents to explain their activities in order

to defend themselves. (R. 18-23).

The State filed a Petition for Delinquency against Respondent, D.N., charging him with violating Pinellas Park's Juvenile Curfew Ordinance by remaining in a public place or establishment during curfew hours. (R. 294). The Respondent entered a denial to the Petition. (R. 295).

Prior to the adjudicatory hearing the Respondent, D.N., filed a motion to dismiss the Petition on the ground that the Juvenile Curfew Ordinance was unconstitutional. The Respondent, D.N., raised the same complaints against the Ordinance as Respondent, T.M. Respondent, D.N. additionally contended that the Ordinance was unconstitutional since its penalty provision for violating the Ordinance was greater than the one imposed by state statutes. (R. 296-301).

The State filed a Petition for Delinquency against Respondent, A.N., charging him with violating Pinellas Park's Juvenile Curfew Ordinance by remaining in a public place or establishment during curfew hours. (R. 324). The Respondent entered a denial to the Petition. (R. 325).

Prior to the adjudicatory hearing the Respondent, A.N., filed a motion to dismiss the Petition on the ground that the Juvenile Curfew Ordinance was unconstitutional. The Respondent, A.N., raised the same complaints against the Ordinance as

Respondent, T.M. Respondent, A.N., additionally contended that the Ordinance was unconstitutional since its penalty provision for violating the Ordinance was greater than the one imposed by state statutes. (R. 327-332).

The State filed a Response and a Supplemental Response to the foregoing motions. (R. 51-157). The State responded that the Juvenile Curfew Ordinance was constitutional since it was based on the compelling governmental interest of protecting the well being of juveniles and that it was narrowly drawn to meet said compelling governmental interest. (R. 57). The State also provided statistics which established that the Juvenile Curfew Ordinance furthered the compelling governmental interest. (R. 54, 74-79). The statistics compared the first six months the Juvenile Curfew was in effect, from June 7 to November 30, 1997 with the same six month period of 1996, the year prior to the effective date of the Curfew. (R. 74). The statistics established, *inter alia*, that all juvenile contacts between 11 p.m. and 6 a.m. (except for curfew violations) decreased from 620 in 1996 to 305 in 1997 and that out of the 38 different categories of juvenile contacts examined, 27 showed a decrease in crime, victimization or juvenile contact. (R. 76-79).

The trial court then heard argument on the motions to dismiss. (R. 158-247). Thereafter, on February 8, 1998, the

trial court entered a written order finding that Pinellas Park's Juvenile Curfew Ordinance unconstitutional. (R. 253-283). The trial court realized there was no consensus concerning whether a juvenile curfew effects a minor's fundamental rights. Instead, the trial court found that the juvenile curfew effects the parent's fundamental right to rear their children without state interference. The trial court then applied the strict scrutiny test of the equal protection clause. The trial court stated that in order to withstand strict scrutiny review the curfew must meet a compelling governmental need and be narrowly tailored to meet that need. The trial court ruled that there was a compelling governmental need.

At the outset, it appears that every federal court that has considered a juvenile curfew law has found or assumed that there is a compelling state interest in protecting the safety and well-being of children and in reducing juvenile crime. See: Hutchins, *supra*, at 44 n.14. Although this Court is not convinced that the record presented sufficiently establishes that the City of Pinellas Park's juveniles are more likely than adults to be either perpetrators or victims of criminal activity, the City has a substantial and legitimate interest in reducing juvenile crime and victimization while promoting juvenile safety. In this regard, the Court must conclude, as have all other federal courts that have considered this issue of whether there is a compelling government interest with regard to a juvenile curfew law, that the City has a compelling governmental interest sufficient to meet the first prong of the strict

scrutiny analysis.

(R. 271). However, the trial court then declared the curfew unconstitutional finding it was not narrowly tailored. The trial court did not base its ruling on whether the Respondents' fundamental right of freedom of movement was violated by the Ordinance. Rather, the trial court held that since the Ordinance infringed upon a parent's fundamental right to raise a child free from governmental intrusions it was unconstitutional. The trial court rejected the State's position that the parents did not have standing in a juvenile delinquency petition charging their child with a violation of the Ordinance to challenge its constitutionality. The trial court based its decision on a federal circuit court decision where the juveniles and parents sought injunctive relief against enforcement of the statute.

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. The 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. Based on the foregoing statement by the trial court, it held that the trial court's finding that the ordinance was unconstitutional and its failure to refer to statistical data in the written order indicated that the statistics were not persuasive to the trial court. The Second District then concluded that its independent review led to the conclusion that statistical data did not establish that the curfew ordinance reduced juvenile crime during the curfew hours. Thus, the Second District held that the data failed to demonstrate that the ordinance was precisely tailored. The Second District then certified the instant question to this Court. (A. 1-6).

This petition follows.

## **SUMMARY OF THE ARGUMENT**

Pinellas Park'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 Pinellas Park was presented with statistical evidence that there was a problem with nighttime juvenile crime and victimization, its Ordinance was a legislative response which sought to promote parental responsibility, prevent juvenile victimization and stop juvenile crime. Thus, Pinellas Park has a compelling interest and therefore can regulate a minor's activity during the night. In light of this legislative need to an actual problem, Pinellas Park enacted its juvenile curfew ordinance. Thus, the Second District erred in finding the ordinance was not precisely tailored since in its opinion the curfew was not an effective means to deal with a recognized problem of nighttime juvenile crime and victimization.

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 PINELLAS PARK 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.<sup>1</sup> *T.M. v. State*, 784 So.2d 442 (Fla. 2001). The State submits that juvenile curfew ordinances drafted with the specificity of Pinellas Park's Juvenile Curfew Ordinance, are not violative of either the United States Constitution or the Florida Constitution. *Qutb v. Strauss*, 11 F.3d 488 (5<sup>th</sup> 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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<sup>1</sup> 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 (9<sup>th</sup> Cir. 1997); *Qutb v. Strauss*, 11

F.3d 488, 492 n.6 (5<sup>th</sup> 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 PINELLAS PARK'S COMPELLING GOVERNMENTAL INTEREST**

Pinellas Park in Section 16-124 (B)(2) of the Juvenile Curfew Ordinance, has stated its compelling interest as follows:

2. Intent. The intent and purpose of this

section is to protect juveniles in the City of Pinellas Park from harm and victimization, to promote the safety and well being of juveniles in the City of Pinellas Park, to reduce the crime and violence committed by juveniles in the City of Pinellas Park, to promote and enhance parental control over juveniles, and to protect the safety of all citizens, residents, and visitors of the City.

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 (9<sup>th</sup> Cir. 1997); *Qutb v. Strauss*, 11 F.3d 488, 492 (5<sup>th</sup> 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.<sup>2</sup> The consideration of the *Bellotti* factors establishes that the greater restrictions of

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<sup>2</sup> 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).

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, Pinellas Park'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 (9<sup>th</sup> Cir. 1997); *Qutb v. Strauss*, 11 F. 3d 488 (5th Cir. 1993).

#### **THE ORDINANCE IS NARROWLY TAILORED**

The State submits that Pinellas Park's'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 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 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 provided statistical evidence in the instant case and this evidence clearly establishes the necessary statistical support for the efficacy of the curfew. The following is a comparison of all juvenile contacts between 11 p.m. to 6 a.m from June 7 to November 30, 1996 and 1997:

Total number of juvenile contacts between 2300 hours and 0600 hours.

<u>1996</u>	<u>1997</u>
620	660
Minus curfew violations	<u>-355</u>
	305

<u>Robbery/Theft:</u>	<u>1996</u>		<u>1997</u>	
<u>%+/-</u>				
Victim	10		3	-70%
Suspect	7		5	-29%
Witness	8		8	No change
Other	2		1	-50%

<u>Burg/Trespass/Loitering</u>	<u>1996</u>		<u>1997</u>	<u>%+/-</u>
Victim	5		3	-40%
Suspect	65		25	-62%
Witness	4		9	+56%
Other	5		2	-60%

<u>Battery/Assault:</u>	<u>1996</u>		<u>1997%+/-</u>
Victim	15	15	No change
Suspect	12	6	-50
Witness	20	10	-50%
Other	6	5	-17%
<u>Domestic Violence:</u>	<u>1996</u>		<u>1997%+/-</u>
Victim	4	7	+43%
Suspect	6	4	-33%
Witness	15	14	-7%
Other	7	5	-29%
<u>Child Abuse/Lewd acts:</u>	<u>1996</u>		<u>1997%+/-</u>
Victim	5	9	+44%
Suspect	1	1	No change
Witness	5	1	-80%
Other	0	5	+100%
<u>Attempt Homicides:</u>	<u>1996</u>		<u>1997%+/-</u>
Victim	4	0	-100%
Suspect	4	0	-100%
Witness	2	1	-50%
Other	1	0	-100%
<u>Throw Deadly Missile:</u>	<u>1996</u>		<u>1997</u>
<u>%+/-</u>			
Victim	3	1	-67%
Suspect	0	1	+100%
Witness	0	4	+100%
Other	0	1	+100%
<u>Sexual Battery:</u>	<u>1996</u>		<u>1997</u>
<u>%+/-</u>			
Victim	1	0	-100%
Suspect	0	0	No change
Witness	1	0	-100%
Other	0	0	No change

The following categories were not broken down into specific sub-groups but only into total juvenile contacts.

All categories in section #1 showed a reduction in juvenile contact from last year.

<u>Section #1</u>	<u>1996</u>		<u>1997%+/-</u>
Car jacking	3	0	-100%
Discharging of Weapon	2	0	-100%
Disorderly Conduct	3	0	-100%
Information Report	7	0	-100%
Counterfeiting	1	0	-100%
Tampering w/victim	1	0	-100%
Youth Protect program	1	0	-100%
Warrant Served	9	1	-89%
FIR's	173	19	-89%
Bicycle Violations	32	7	-78%
Narcotics Violations	15	4	-73%
Property Damage	3	1	-67%
General Disturbances	11	4	-64%
Harassing Phone Calls	10	4	-60%
Marchman Act (Intoxication)	6	3	-50%
Juvenile Complaints	26	13	-50%
Vandalism	15	8	-47%
Traffic stop/Accidents	61	47	-23%

All categories in section #2 show an increase in juvenile contact from last year.

<u>Section #2</u>	<u>1996</u>		<u>1997%+/-</u>
Fires	0	1	+100%
Alcohol Violation	0	1	+100%
Arson	0	2	+100%
Check Welfare	0	1	+100%
Bomb Threat	0	1	+100%
Smoking Violation	0	2	+100%
Baker Act	1	4	+75%
Obstruction of L.E.O.	3	6	+50%
Asst. Other Agency	13	17	+24%
Escaped Prisoner	1	1	No change
Animal Complaint	1	1	No change

(R. 76-78). As the foregoing statistical data shows, the Ordinance promotes its compelling governmental interest inasmuch as since the curfew has been in effect there has been a reduction in many of the most serious crimes committed by and

against juveniles. Although there were 40 more juvenile contacts in 1997 than in 1996, more than half of all contacts were for curfew violations. This establishes that the police are intervening before the juveniles commit a crime or become a victim of crime. Finally, out of the foregoing 38 categories, 27 showed a decrease in crime, victimization, or juvenile contact.

As established by the foregoing, Pinellas Park 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 Second District denigrated the efficacy of the foregoing statistical evidence on the grounds that it does not establish a logical connection between the ordinance and the reduction of crime and juvenile victimization. These same concerns were considered and rejected in *Nunez v. City of San Diego*, 114 F.3d 935, 948 (9<sup>th</sup> 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.

Thus, the Second District abused its discretion in substituting its opinion on the efficacy of the juvenile curfew over that of the legislative body of the City of Pinellas Park. Therefore, the remainder of this brief will address the constitutionality of the juvenile curfew ordinance under the assumption that there was a compelling governmental interest for the juvenile curfew.

#### **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 (E) and includes the following:

**(E) EXCEPTIONS.** The provisions of the Juvenile Curfew

Ordinance shall not apply to any juvenile who is:

1. Accompanied by his or her parent or by another adult who is at least twenty-one (21) years of age and who is authorized by the juvenile's parent to have custody of the minor.
2. Involved in an emergency or engaged, with his parent's permission, in an emergency errand.
3. Attending or traveling directly to or from an activity that involves the exercise of rights protected under the First Amendment of the United States Constitution (e.g. religious services, governmental meeting, political party meeting).
4. Going directly to or returning directly from lawful employment, or who is in a public place or establishment in connection with or as required by a business, trade, profession, or occupation in which the juvenile is lawfully engaged.
5. Returning directly home from a school-sponsored function, a religious function, or a function sponsored by a civic organization.
6. On the property of, or on the sidewalk of, the place where he or she resides, or who is on the property or sidewalk of an adult next-door neighbor with that neighbor's permission.
7. Engaged in interstate travel or bona fide intrastate travel with the consent of the juvenile's parent.
8. Attending an organized event held at and sponsored by a theme park or entertainment complex as defined in s. 509.013(9).
9. In a public place or establishment

during restricted hours in accordance with the terms authorized by City Council pursuant to City Council approval of an activity or event which is not specifically provided for in sub-paragraphs 1 through 8 of this Section and which is sponsored by a school, religious, civic, social, or other similar organization or group.

By including the foregoing exceptions Pinellas Park 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 emergency errand, 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 involved in an emergency, 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).

Pinellas Park'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, Pinellas Park'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 violate the ordinance. Section (D)3 of the Ordinance provides:

3. A juvenile who violates this Juvenile Curfew Ordinance shall receive a written warning for his or her first violation. A juvenile who violates this Juvenile Curfew Ordinance after having received a prior written warning shall be subject to the penalty and rehabilitation as ordered by a court of competent jurisdiction pursuant to Florida Statute, Chapter 39, Part II, not to exceed a maximum penalty of a fine of up to \$500.00 or by incarceration in an appropriate facility for a term not exceeding six (6) months, or by both such fine and incarceration.

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 (5<sup>th</sup> 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).<sup>3</sup> Therefore, Respondent lacks standing to challenge the part of the Curfew that imposes obligations on business owners, operators or employees.

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<sup>3</sup> 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 Pinellas Park'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: **BRUCE G. HOWIE**, Attorney for T.M., 5720 Central Avenue, St. Petersburg, Florida 33707; **ROBERT L. HAMBRICK**, Attorney for A.N. and D.N., 13575 58<sup>th</sup> Street North, Clearwater, Florida 33760; and to **EDWARD D. FOREMAN**, Pinellas Park City Attorney, 100 2nd Avenue North, Suite 300 St. Petersburg, Florida 33701, on this \_\_\_\_ day of December, 2002.

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\_\_\_\_\_  
**MICHAEL J. NEIMAND**  
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