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| LINDA RICHARDSON, on behalf of herself and her minor child, SHAINA HARRIS,<br><br>Plaintiff,<br><br>v.<br><br>BOROUGH OF WANAQUE,<br><br>Defendant. | SUPERIOR COURT OF NEW JERSEY<br>CHANCERY DIVISION: PASSAIC COUNTY<br>DOCKET NO.<br><br>Civil Action |

# PLAINTIFF'S BRIEF IN SUPPORT OF APPLICATION FOR ORDER TO SHOW AND FOR PRELIMINARY INJUNCTION

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## PRELIMINARY STATEMENT

On September 22, 2012, Shaina Harris ("Harris"), a college student, was stopped by Wanaque police while only steps from her home and issued a summons and complaint pursuant to the Borough of Wanaque's (the "Borough") juvenile curfew ordinance (the "Curfew Ordinance"). At the time, Harris was returning from Burger King located less than 200 feet from her home and immediately on the other side of a small bridge which is also the location of her family's mailbox and garbage collection bins. Harris, who had parental permission for her trip, was not detained and cited for taking someone's property, injuring some other person, a traffic violation, or engaging in other unlawful activity. Harris was detained and cited because she was under eighteen years old and was in public after 10:00 p.m., a violation of the Curfew Ordinance.

The Curfew Ordinance applies 365 days a year and applies to those with entirely innocent reasons for being in public. It applies to those with permission from their parents or guardians to be out, as occurred here. The Curfew Ordinance imposes fines and community service not only on minors who are found in public during curfew hours, but also on their parents and guardians. The Curfew Ordinance is a means of preventative detention that locks nearly all law-abiding, innocent minors in their homes every night, presumably in an effort to prevent undesirable activity by the few. This drastic curtailment of liberty would never be tolerated if imposed on adults. It is equally offensive – and, as shown below, unconstitutional – as applied to minors.

Plaintiff Linda Richardson ("Richardson") brings this application because ongoing enforcement of the Curfew Ordinance irreparably impairs her daughter's well-established, fundamental rights to frequent public places, to associate for political and social purposes, and to travel intrastate. The impairment is not abstract. It has a direct impact on Harris's everyday life, requiring her to forego basic, lawful activities. Richardson also seeks restoration of her equally

well-established rights to raise her daughter as she thinks best, free from unwarranted governmental intrusion. Finally, Richardson seeks relief from the Borough's imposition of penal sanctions on her and others similarly situated because she is the parent of a minor found in violation of the Curfew Ordinance.

Under well-established authorities, the Borough's assault on Richardson and Harris's fundamental freedoms can only be justified if the restraints are narrowly tailored to serve compelling governmental interests. The Borough cannot satisfy this standard. The Curfew Ordinance also fails to pass constitutional muster because it is hopelessly vague. Vague penal enactments must be set aside if they fail to give ordinary citizens fair notice of what is prescribed, if they give police too much discretion in enforcing the enactment, and if they interfere with the exercise of protected First Amendment rights. All three vices are present in the Curfew Ordinance.

The Curfew Ordinance deprives Harris of her freedom to undertake entirely innocent activities simply because she is not yet 18, and deprives Richardson of the right to decide whether to grant her daughter these simple liberties and responsibilities as she approaches adulthood. Richardson asks this Court to restore to her and her daughter's everyday freedoms and to preliminarily enjoin enforcement of the Curfew Ordinance.

## STATEMENT OF FACTS

### I. THE CURFEW ORDINANCE

On December 12, 2005, the Borough adopted the Juvenile Curfew Act of 2005, Borough Ordinance No. 69-4A, as amended (the "Curfew Ordinance").[1] The Curfew Ordinance makes it unlawful for "any minor … to remain in or upon any public place or on the premises of any establishment within the Borough … during curfew hours" of 10:00 p.m. to 5:30 a.m. Id. at §69-4(A). The restrictions apply every day of the week. "Public place" is broadly defined as:

> Any place to which the public or a substantial group of the public has access, including, but not limited to, a public street, road, thoroughfare, sidewalk, bridge, alley, plaza, park, recreation or shopping area, public transportation facility, vehicle used for public transportation, parking lot or any other public building, structure or area.
>
> [Id. at §69-3.]

The Curfew Ordinance provides several exceptions where, for example:

> (1) The minor is accompanied by the minor's parent or guardian;
>
> (2) The minor is accompanied by an adult over 21 years of age authorized by a parent to accompany the minor for a designated period of time and specific purpose within a specific area;
>
> (3) The minor is exercising First Amendment rights protected by the Constitution, such as free exercise of religion, freedom of speech and the right of assembly;

[1] A true copy of the Curfew Ordinance is attached to the Verified Complaint **Exhibit A**. The Curfew Ordinance was adopted pursuant to N.J.S.A. 40:48-2.52, a statute authorizing municipalities to "enact an ordinance making it unlawful for a juvenile of any age under 18 years within the discretion of the municipality to be on any public street or in a public place between the hours of 10:00 p.m. and 6:00 a.m. unless accompanied by the juvenile's parent or guardian or unless engaged in, or traveling to or from, a business or occupation which the laws of this State authorize a juvenile to perform. Such an ordinance may also make it unlawful for any parent or guardian to allow an unaccompanied juvenile to be on any public street or in any public place during those hours." N.J.S.A. 40:48-2.52(b)(1).

> (4) There exists a case of an emergency or reasonable necessity, but only after the minor's parent or guardian has confirmed the facts establishing the emergency or reasonable necessity, including the points of origin and destination, the specific streets at a designated time for a designated purpose;
>
> (5) The minor is on the sidewalk that abuts the minor's residence or the sidewalk that abuts the residence of the next-door neighbor if the neighbor did not object to the minor's presence on the sidewalk;
>
> (6) The minor is in attendance at, or returning home by direct route from and within 30 minutes of the termination of, an official school activity or any activity of a religious, civic or voluntary association, which entity takes responsibility for the minor; [or]
>
> (7) The minor is in a motor vehicle with the consent of his or her parent or guardian engaged in normal travel, either intrastate or interstate, through the Borough of Wanaque[.] [2]
>
> [Id. at §69-5.]

There is no exception for cases where the minor has parental consent to be in public during curfew hours.

The Curfew Ordinance further prohibits "any parent or guardian of a minor to knowingly or negligently permit or by insufficient control allow the minor to be in any public place or on the premises of any establishment within the Borough … during curfew hours." Id. at §69-4(C). Any minor found to be in violation of the Curfew Ordinance "shall be detained by the Wanaque Police Department at the police headquarters and released into the custody of the minor's parent, guardian or an adult person acting in loco parentis." Id. at §69-6(C). Both the minor and parent/guardian found guilty of violating the Curfew Ordinance are subject to a fine of $100 and 15 hours of community service for a first offense and up to $1,000 and 50 hours of community service for multiple offenses. Id. at §69-7(A).

[2] For a full list of curfew exceptions, see Curfew Ordinance at §69-5.

The following "findings" supported enactment of the Curfew Ordinance:

> A. The Mayor and Council of the Borough of Wanaque have determined that there has been an increase in juvenile violence and crime by persons under the age of 18 years in the Borough of Wanaque and that much of said activity takes place during night and evening hours and on school days during the hours in which school is in session.
>
> B. The Mayor and Council of the Borough of Wanaque have determined that persons under the age of 18 years are particularly susceptible, because of their lack of maturity and experience, to participate in unlawful and gang-related activities and to be the victims of older perpetrators of crime.
>
> C. The Mayor and Council of the Borough of Wanaque have determined that a curfew for those under the age of 18 years will be in the interest of public health, safety and general welfare and will help to attain these objectives and to diminish the undesirable impact of this conduct on the citizens of the Borough of Wanaque.
>
> D. The Mayor and Council of the Borough of Wanaque have determined that passage of a curfew will protect the welfare of minors by:
>
> > (1) Reducing the likelihood that minors will be the victims of criminal acts during the curfew hours and during the hours that school is in session.
> >
> > (2) Reducing the likelihood that minors will become involved in criminal acts or be exposed to narcotics trafficking during the curfew hours and during the hours that school is in session.
> >
> > (3) Aiding parents or guardians in carrying out their responsibility to exercise reasonable supervision of minors entrusted to their care.
>
> [Id. at §69-2.]

## II. SHAINA HARRIS

Richardson and Harris reside at 2 Lake Drive, Haskell, New Jersey, located within Wanaque Borough, in Passaic County, New Jersey. (Verified Compl. at ¶4.) Harris earned her General Education Development ("G.E.D.") diploma in November 2011. She is currently in her

second year of studies at Passaic County Community College. She began attending Passaic County Community College prior to September 2012. (Id. at ¶5.)

On the evening of September 22, 2012, Harris, who was 16 years old at the time, was home with her family and decided to walk to Burger King to pick up a milk shake. (Id. at ¶10.) Her home is located on a private road accessible by a bridge that is across the road from the home. (Id.) At approximately 11:00 p.m., with her parents' permission, Harris left her home and went to Burger King. (Id. at ¶11.) The Burger King is in full view of Harris's home and no more than 200 feet from the home. (Id.)

The mail boxes and garbage collection bins for the residents of the private road are on the other side of the bridge. (Id. at ¶12.) The Burger King property is directly across the street from the mailboxes and no more than 30 feet away. (Id.) On her short walk home, at approximately 11:30 p.m., Harris was stopped by Sergeant Calabro ("Calabro") of the Wanaque Police Department. (Id. at ¶13.) According to the police report, Harris was stopped because of the "time of night and she appeared to be a juvenile, which would be a violation of the Juvenile Curfew Act." (Id.) During the ensuing conversation, Calabro threatened to detain Harris and bring her to the Wanaque Police Station where she would be held until a parent or guardian came to pick her up. (Id.) Harris was able to contact her stepfather who came to pick her up. Harris was issued a summons and complaint charging her for violation the Curfew Ordinance. (Id.)

## III. CONTINUING INJURY FROM THE CURFEW ORDINANCE

There are a number of legitimate reasons for Harris to travel and/or visit public areas between the hours of 10:00 p.m. and 5:30 a.m. including, but not limited to, errands and social gatherings. Harris believes she should have the freedom to engage in age-appropriate activities regardless of whether those activities require public travel after 10:00 p.m. If Harris continues to

follow her beliefs, she will be at further risk of detainment and prosecution under the Curfew Ordinance.

Richardson wishes to continue to allow Harris the freedom to leave her home for age-appropriate reasons, even if her daughter is not going to return by 10:00 p.m. Richardson believes that it is in Harris's best interests to be involved in age-appropriate activities and associations that may require her to be in public areas after 10:00 p.m. Richardson wishes to continue to allow Harris to exercise the freedom and responsibility that she, as her parent, has decided is appropriate. If Richardson pursues her beliefs about what is best for her child, she will risk prosecution under the Curfew Ordinance.

Both Harris and Richardson face immediate and irreparable injury to their fundamental rights. They have no adequate remedy at law to redress those injuries.

## LEGAL ARGUMENT

### I. PLAINTIFF IS ENTITLED TO A PRELIMINARY INJUNCTION ENJOINING FURTHER ENFORCEMENT OF THE CURFEW ORDINANCE AND DETAINMENT FOR VIOLATIONS OF THE CURFEW ORDINANCE.

A plaintiff is entitled to a preliminary injunction when the failure to enjoin the defendant's conduct would cause irreparable harm, a balancing of the equities favors the plaintiff, and there is a reasonable probability of success on the merits. Crowe v. DeGioia, 90 N.J. 126, 132-4 (1982).

Here, Richardson and Harris will suffer irreparable harm if the Borough is not preliminary restrained. Harm is irreparable if it cannot be redressed by monetary damages. Id. at 132-33. Richardson and Harris will suffer immediate and irreparable harm if the Borough is not enjoined from detaining and penalizing minors and their parents for violations of the Curfew Ordinance. Continued enforcement will prevent Harris from exercising her fundamental right to

be present in and use public areas. It will prevent Harris from exercising her fundamental right to engage in peaceful travel and would infringe upon her rights of expression and assembly guaranteed under Article I, Paragraph 1 of the New Jersey Constitution and the First and Fourteenth Amendments to the United States Constitution. Enforcement of the Curfew Ordinance would also infringe on Richardson's fundamental right to raise her child. Damages resulting from violations of these fundamental rights cannot adequately be redressed by monetary damages.

Money cannot redress damages for deprivation of a plaintiff's fundamental constitutional rights. See E-Bru, Inc. v. Graves, 566 F.Supp. 1476, 1480 (D.N.J. 1983) (likelihood of success on constitutional claim constitutes irreparable injury for purposes of evaluating entitlement to preliminary injunction); Suenram v. Society of the Valley Hosp., 155 N.J.Super. 593, 603 (Law Div. 1977) (injunction should be issued to avoid interference with right to privacy); St. John's Evangelical Lutheran Church v. Hoboken, 195 N.J.Super. 414, 420-21 (Law Div. 1983) (preliminarily enjoining an ordinance because it would, among other things, infringe on First Amendment rights and thus cause irreparable harm); O'Brien v. Caledonia, 748 F.Supp. 403, 409 (7th Cir. 1984) ("When the threat of sanctions is so imminent, we must presume a deprivation of [constitutional] rights" and therefore "presum[e] irreparable harm.").

A balancing of the equities favors Richardson and Harris. If preliminary restraints are not imposed, Richardson and Harris will continue to be irreparably harmed and denied their constitutional rights. Harris and other innocent minors will be imprisoned in their homes and prevented from engaging in a variety of entirely appropriate and lawful activities. On the other hand, if this Court were to issue a preliminary injunction against enforcement of the Curfew Ordinance, the Borough would still have the unquestioned authority to enforce all criminal,

disorderly persons, and traffic laws. Thus, the harm that would befall Richardson and Harris if the Borough was not restrained from enforcement far outweighs any harm to the Borough if it is so restrained.

The final requirement – that Richardson have a reasonable probability of success on the merits – also favors granting an injunction. The remainder of this brief addresses that issue.

## II. CITIZENS UNDER THE AGE OF 18 ARE ENTITLED TO THE SAME PROTECTION OF THEIR FUNDAMENTAL CONSTITUTIONAL RIGHTS AS ADULTS.

"Neither the Fourteenth Amendment, nor the Bill of Rights is for adults alone." In re Gault, 387 U.S. 1, 13 (1967). "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

The Supreme Court has long since established that minors have rights equal to those of adults where First Amendment rights, Equal Protection rights, and Due Process rights are concerned. See West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (First Amendment); Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969) (same), Brown v. Board of Education, 347 U.S. 483 (1954) (Equal Protection); Goss v. Lopez, 419 U.S. 565 (1975) (Due Process); Reno v. Flores, 507 U.S. 292 (1993) (same); Bellotti v. Baird, 443 U.S. 622 (1979) (same). As Justice O'Connor explained in Flores:

> Children, too, have a core liberty interest in remaining free from institutional confinement. In this respect, a child's constitutional "freedom from bodily restraint" is no narrower than an adult's. Beginning with In re Gault, we consistently have rejected the assertion that "a child, unlike an adult, has a right 'not to liberty but to custody.'"
>
> [Reno, 507 U.S. at 316 (emphasis added, internal citations omitted).]

In fact, the Supreme Court has permitted differential treatment of minors and adults with regard to constitutional rights only in certain limited contexts where strictly prescribed parameters are satisfied. See Bellotti, 443 U.S. at 634.

In Bellotti, the Court constructed the analysis to be used in determining whether the state could burden minors' exercise of their fundamental rights solely due to their age. The Court identified three factors to be considered: (1) whether minors are "peculiarly vulnerable" in the situation presented; (2) whether the situation requires them to make "critical life decisions"; and (3) whether the state regulation will assist or detract from "the parental role in child rearing." Bellotti, 443 U.S. at 634.

None of these facts justifying reduced rights to minors are present here. First, there is no "peculiar vulnerability" of young men and women engaging in non-criminal activity during curfew hours. Second, as this case exemplifies, the act of staying out past 10:00 p.m. does not involve "critical decision-making." Harris was detained and charged while walking home for a Burger King, located less than 200 feet from her home.

Finally, the Curfew Ordinance ***detracts*** from the "parental role in child-rearing" by robbing parents of the authority to give their teenage children additional responsibility as they approach adulthood. Id. Consequently, the constitutional rights of the Borough's minors should not be treated as subordinate to those of adults.

The Supreme Court has consistently held that fundamental rights command the protection of strict scrutiny analysis when a state attempts to infringe on those rights. See Zablocki v. Redhail, 434 U.S. 374, 388 (1978); see also Plyler v. Doe, 457 U.S. 202, 216-217 (1982). When a law "interferes with the exercise of a fundamental right, [the law] cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those

interests." Zablocki, 434 U.S. at 682; see also Allen v. Bordentown, 216 N.J.Super. 557, 567-73 (Law Div. 1987).

Because, as demonstrated below, fundamental rights of Richardson and Harris are at stake in this case, the Curfew Ordinance is subject to strict constitutional scrutiny. Consequently, there is no presumption that the Curfew Ordinance is constitutional. Instead, the Borough must demonstrate that it has narrowly tailored the Curfew Ordinance to achieve compelling state interests or that the curfew is the least restrictive means of attaining compelling state objectives. See Zablocki, 434 U.S. at 388; Allen, 216 N.J.Super. at 567-73; Plyler, 457 U.S. at 216-217.

Having properly employed heightened scrutiny, numerous courts, including New Jersey Courts, have stricken juvenile curfew ordinances as unconstitutional. See, e.g., Betancourt v. Town of West New York, 338 N.J. Super. 415 (App. Div. 2001); Allen, 216 N.J.Super. at 557; Anonymous v. Rochester, 56 A.D.3d 139, 146 (App. Div. 2008), aff'd on other grounds, 915 N.E.2d 593 (N.Y. 2009) (holding the "right to free movement is a vital component of life in an open society, both for juveniles and adults"); Hodgkins ex rel. Hodgkins v. Peterson, 355 F.3d 1048 (7th Cir. 2004); Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997); Johnson v. Opelousas, 658 F.2d 1065 (5th Cir. 1981); Naprstek v. Norwich, 545 F.2d 815 (2d Cir. 1976); Gaffney v. City of Allentown, 1997 WL 597989 (E.D. Pa. Sept. 17, 1997); Waters v. Barry, 711 F.Supp. 1125 (D.D.C. 1989); McCollester v. Keene, 586 F.Supp. 1381 (D.N.H. 1984); Ashton v. Brown, 660 A.2d 447 (Md. 1995); Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992); City of Milwaukee v. K.F., 426 N.W.2d 329, 337 (Wis. 1988); In re Frank O, 201 Cal.App.3d 1041 (Cal. Ct. App. 1988); W.J W. v. State, 356 So.2d 48 (Fla. Dist. Ct. App. 1978); Seattle v. Pullman, 514

P.2d 1059 (Wash. 1973); In re Doe, 513 P.2d 1385 (Haw. 1973). Cf. Qutb v. Straus , 11 F.3d 488, 492 (5th Cir. 1993) (holding "the right to move about freely is a fundamental right").

## III. ENFORCEMENT OF THE CURFEW ORDINANCE SHOULD BE ENJOINED BECAUSE IT UNCONSTITUTIONALLY INFRINGES ON THE FUNDAMENTAL RIGHTS OF MINORS TO FREELY MOVE ABOUT AND BE PRESENT IN PUBLIC AREAS.

The United States Constitution protects individual liberties beyond those enumerated within its text. See Griswold v. Connecticut, 381 U.S. 479, 489-90 (1965); Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972); Right to Choose v. Byrne, 91 N.J. 287 (1982). Unenumerated fundamental rights have been acknowledged through interpretation of the Due Process Clause of the Fourteenth Amendment[3] and the Ninth Amendment to the United States Constitution. See Loving v. Virginia, 388 U.S. 1 (1967) (acknowledging the fundamental right to marriage); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (affirming the right to live with one's family); Roe v. Wade, 314 F.Supp. 1217, 1223 (N.D. Tex. 1970), aff'd in part, rev'd in part, 410 U.S. 113 (1973) (holding that abortion rights are protected by the Ninth Amendment); State v. Baker, 81 N.J. 99 (1979) (upholding the right to arrange a household with people of one's choosing).

The New Jersey Constitution, Article I, Paragraph 1, similarly provides that "[a]ll persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const., Art. 1, ¶1. However, "'the New Jersey Constitution is not a mirror image of the United States Constitution,'

[3] This clause forbids any state to "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1.

and there may be circumstances in which the State Constitution provides greater protections." Barone v. Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 107 N.J. 355, 368 (1987), quoting Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985)). Applying either the United States or New Jersey Constitution, it is well-settled that "[w]hen legislation impinges upon a fundamental right, or disparately treats a suspect class, it is subject to strict scrutiny, thereby requiring that the statute be the least restrictive alternative to accomplish a compelling governmental interest." McCann v. Clerk, City of Jersey City, 338 N.J. Super. 509, 526-27 (App. Div. 2001), citing Rinier v. New Jersey, 273 N.J. Super. 135, 140 (App. Div. 1994) and San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1016 (1995).

### A. The Curfew Ordinance Unconstitutionally Deprives Minors Of Their Fundamental Right To Be Present In Public Areas

The Curfew Ordinance violates Harris's substantive due process right to be present in public streets and other public areas. The United States Supreme court has described substantive due process as a constitutional guarantee of respect for personal freedoms that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental and implicit in the concept of ordered liberty." Rochin v. California, 342 U.S. 165, 169 (1952), quoting Snyder v. Commonwealth, 291 U.S. 97 (1934) and Palko v. State of Connecticut, 302 U.S. 319 (1937). Among these fundamental rights is the right to "walk or loaf or loiter or stroll." Papachristou, 405 U.S. at 171; see also Coates v. Cincinnati, 402 U.S. 611, 614-16 (1971). Thus, any ordinance that impedes a person's exercise of the right to stroll, loiter or otherwise move about in society must have a compelling state interest as its basis and must be narrowly tailored to achieve that interest.

Historically, curfew ordinances, like anti-vagrancy and anti-loitering laws, which have long since been eradicated, have been used to institutionalize racial discrimination and anti-immigrant sentiment. Thistlewood v. Trial Magistrate for Ocean City, 204 A.2d 688, 690 (Md. 1964); Eric Neisser, Recapturing The Spirit: Essays On The Bill Of Rights At 200, at 241-45 (1991). They furnish "a convenient tool for 'harsh and discriminatory enforcement by [law enforcement] officials against groups deemed to merit their displeasure.'" See Papachristou, 405 U.S. at 170, quoting Thornhill v. Alabama, 310 U.S. 88 (1940). Such ordinances create an atmosphere "in which the poor and unpopular are permitted to 'stand on a public sidewalk ... only at the whim of any police officer.'" Id., quoting Shuttlesworth v. Alabama, 382 U.S. 87, 90 (1965).

Notwithstanding this historical backdrop, the Borough has instituted a Curfew Ordinance that bans young people from public areas for seven and a half hours of every day. Subject to certain vague exceptions, a person under the age of eighteen in any public area within the town during curfew hours is vulnerable to detention. This practice, sanctioned by the Curfew Ordinance, violates a minor's substantive due process rights to walk, stroll, wander, loiter and loaf in public, which are "part of the amenities of life as we have known them." Id. at 164.

### B. The Curfew Unconstitutionally Interferes With The Fundamental Right Of Minors To Engage In Peaceful Intrastate Travel

The right to travel intrastate is a fundamental right. See Lutz v. City of York, 899 F.2d 255, 256 (3d Cir. 1990) (holding that the Substantive Due Process Clause protects an intrastate right to travel); see also Allen, 216 N.J.Super. at 567 ("The right to travel, loiter, and loaf are protected by the Due Process Clause"); Spencer v. Casavilla, 903 F.2d 171, 174 (2d Cir. 1990);

Cole v. City of Newport Housing Auth., 435 F.2d 807, 809-1 (1st Cir. 1970); Hawk v. Fenner, 396 F.Supp. 1, 4 (D.S.D. 1975).

The right to travel intrastate is implicated because the Curfew Ordinance prohibits all citizens under 18 years of age from engaging in ***any*** public travel, whether it be driving to the grocery store or walking to a fast-food restaurant. Therefore, the Curfew Ordinance must withstand heightened scrutiny if it is to endure, but it cannot. See Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986) (holding that "the State must come forward with a compelling justification" for burdening the right to travel); Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966).

There is simply no compelling justification for the Borough to restrain minors in their lawful exercise of their fundamental right to travel. The authority that the Curfew Ordinance gives to police officers to arrest young people who have committed no crimes is power without purpose. See Papachristou, 405 U.S. at 170. The Borough has declared open season on its teenage population, yet this Court is empowered, through its equitable jurisdiction and the applicable legal precedents, to close it. Given the absence of a compelling state interest to the contrary, it is necessarily the case that the rights of the Borough's minors to walk freely or to stand still on a public street without being detained deserve vindication.

## IV. ENFORCEMENT OF THE CURFEW SHOULD BE ENJOINED BECAUSE IT UNCONSTITUTIONALLY INFRINGES ON RIGHTS THAT ARE PROTECTED FROM GOVERNMENTAL INTRUSION BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

### A. The Curfew Ordinance Violates The Right To Associate Socially

The fundamental right of association is social as well as political. As the Supreme Court has explained:

> The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such prohibition,... [discriminates] against those whose association together is "annoying" because appearance is resented by the majority of their fellow citizens.
>
> [Coates, 402 U.S. at 615.]

The New Jersey Supreme Court has explained that "the [federal and state] constitutional liberty to freely associate … also encompasses associational ties designed to further the social … benefit of the group's members and associations that promote a 'way of life.'" In re Martin, 90 N.J. 295, 326 (1982).

The New Jersey Supreme Court has held that this fundamental right is not limited to association with blood relatives. Baker, 81 N.J. at 122. Rather, the Court recognized the counter-intuitiveness of protecting the relationship between two distant cousins, but not protecting the relationship between two close but unrelated friends. "The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved." Baker, 81 N.J. at 108.

The Court in Baker went on to note the effect of attempted enforcement of such ordinances. The ordinance in Baker, "'for example, would prohibit a group of five unrelated widows, widowers...or even of judges from residing in a single [residential] unit within the municipality" while permitting "a group consisting of ten distant cousins … [to] reside without violating the ordinance." Id.; see also Glasboro v. Vallorosi, 117 N.J. 421, 422, 428, 432 (1990) (following Baker and recognizing a group of ten unrelated college students as the functional

equivalent of a family for purposes of borough ordinance limiting use and occupancy of dwellings to "families" where the relationship was marked by stability and permanency.)

Small groups of unrelated teenagers who, because of common cultures, interests or experiences, share personal thoughts, feelings, beliefs, and other distinctly personal aspects of their lives with each other, rank objectively high on the spectrum of intimacy recognized by the courts. The youth directly affected by the curfew at issue stand to lose the very things that the Baker court seeks to promote – the development and maturation of intimate human relationships within the fabric of our constitutional scheme. The impact of the Curfew Ordinance on the fundamental right of youth to associate socially is not incidental. Rather, the Curfew Ordinance actively penalizes the innocent conduct of youth because a majority of the associations engaged in by young people that develop and perpetuate the type of intimate human relationships occur away from home and without parental supervision.

"[A]bsent a genuine emergency, a curfew aimed at all citizens could not survive constitutional scrutiny. This is true even though such a general curfew … would protect those subject to it from injury and prevent them from causing 'nocturnal mischief.'" Bykofsky v. Borough of Middletown, 429 U.S. 964, 965 (1976) (Marshall, J. dissenting); see also Sawyer v. Sandstorm, 615 F.2d 311, 317 (5th Cir. 1980) (striking a curfew ordinance prohibiting remaining in or upon any public street, as in the case at bar, on the grounds that "an enactment which criminalizes ordinary associational conduct not constituting a breach of the peace runs afoul of the first amendment"); Rull v. Marshall, 439 F.Supp. 303, 306 (M.D. Ga. 1977) (invalidating a curfew/loitering ordinance because "mere reports of juvenile delinquency and civil disorders are insufficient to justify an ongoing blanket curfew.") Because the vast majority of social association in the Borough, like the interaction between plaintiffs and other minors, are

innocent and socially appropriate, this blanket curfew criminalizing social association by minors in public is overbroad and unconstitutional.

### B. The Curfew Ordinance Discourages The Exercise Of First Amendment Rights

The fact that the Curfew Ordinance provides an exception where "[t]he minor is exercising First Amendment rights … such as free exercise of religion, freedom of speech and the right of assembly" does not preclude the possibility that that minors engaged in such activities will not be detained for violating the Curfew Ordinance. This was precisely the issue discussed in Hodgkins ex. rel. Hodgkins, where the Seventh Circuit Court of Appeals held that the inclusion of an affirmative defense for First Amendment activities did "not significantly reduce the chance that a minor might be arrested for exercising his First Amendment rights." Hodgkins ex rel. Hodgkins, 355 F.3d at 1064. Specifically, the court wrote:

> Granted, Indiana's curfew does not forbid minors from exercising their First Amendment rights during curfew hours, but it does forcefully discourage the exercise of those rights. The First Amendment defense will shield a minor from conviction, assuming that she can prove to the satisfaction of a judge that she was exercising her First Amendment rights, but, as discussed, it will not shield her from arrest if the officer who stops her has not actually seen her participating in a religious service, political rally, or other First Amendment event. The prospect of an arrest is intimidating in and of itself; but one should also have in mind what else might follow from the arrest. … The chill that the prospect of arrest imposes on a minor's exercise of his or her First Amendment rights is patent.
>
> The only way that a minor can avoid this risk is to find a parent or another adult designated by his parent to accompany him. But that alternative itself burdens a minor's expressive rights: adults may be reluctant or unable to accompany the minor to a late-night activity; a seventeen-year-old attending college away from home may be unable to recruit a parent or designated adult; and the minor himself may decide that participation is not worth the bother if he must bring a parent or other adult along with him. To condition the exercise of First Amendment rights on the willingness of an adult to chaperone is to curtail them.

[Id. at 1063.]

The same argument was made in Anonymous, where the court rejected the City's contention that the exception set forth in the subject ordinance relating to First Amendment activity adequately protected the rights of minors to engage in such activity. Anonymous, 56 A.D.3d at 149. The court held, instead, that:

> The exception … permits an officer to arrest a minor based solely on the officer's judgment whether the minor was engaged in constitutionally protected activity "as opposed to generalized social association with others." Further, even with the exception, the ordinance "leaves minors on their way to or from protected First Amendment activity vulnerable to arrest and thus creates a chill that unconstitutionally imposes on their First Amendment rights." Nor does the exception "significantly reduce the chance that a minor might be arrested for exercising his [or her] First Amendment rights."
>
> [Id., quoting Hodgkins, 355 F.3d at 1048, 1051, 1059, 1064.]

Here, despite the inclusion of a First Amendment exception, the Curfew Ordinance significantly discourages the exercise of First Amendment rights such as the freedom of speech and the right of assembly. See Anonymous, 56 A.D.3d at 146 ("By subjecting juveniles to arrest merely for being in a public place during curfew hours, the ordinance forcefully and significantly discourages protected expression"). As in Hodgkins, the unbridled discretion afforded to officers under the Curfew Ordinance significantly discourages minors such as Harris from engaging in ***any*** activity, including those protected under the First Amendment, for fear of punishment and/or detainment.

## V. ENFORCEMENT OF THE CURFEW SHOULD BE ENJOINED BECAUSE IT UNCONSTITUTIONALLY INTERFERES WITH THE FUNDAMENTAL RIGHT OF PARENTS TO CONTROL THE UPBRINGING OF THEIR CHILDREN.

The Supreme Court "has consistently recognized the fundamental right of parents to raise their children free of interference from the state." Betancourt v. Town of West New York, 338 N.J.Super. 415, 421 (App. Div. 2001), citing Santosky v. Kramer, 455 U.S. 745, 747-48 (1982); Wisconsin v. Yoder, 406 U.S. 205, 234 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923). This right has been found to be within the fundamental right of privacy protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See, e.g., Santosky, 455 U.S. at 753.

"New Jersey Courts have also recognized that 'a parent's interest in the "companionship, care, custody and management" of their children deserves special protection.'" Betancourt, 338 N.J.Super. at 421, quoting In re Guardianship Servs. Regulations, 198 N.J.Super. 132, 144 (App. Div. 1984)(additional citations omitted). As such, "[i]n cases where the government seeks to dictate facets of the parent-child relationship, it must overcome the strong constitutional presumption in favor of parental authority over governmental authority." Id., citing Reno v. ACLU, 521 U.S. 844, 878-79 (1997) (holding that the Internet access regulation at issue violated parents' rights to regulate their children's use of computers as they see fit).

The Supreme Court has also established that its recognition of a parent's right to make decisions that affect the daily lives of his or her children stems from "the historic respect – indeed, sanctity would not be too strong a term – traditionally accorded to the relationships that develop within the unitary family." Michael H. v. Gerald D., 491 U.S. 110, 123 (1989). This respect for parental control of the upbringing of children is precisely the basis for the requirement that an attempt by the State to interfere with a parent's decision-making role

undergo strict constitutional scrutiny. See Zablocki, 434 U.S. at 386 (holding the right to marry must withstand strict scrutiny because the decision to marry is "on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships").

In the context of curfews, courts have held that such restrictions impose an unconstitutional burden on a parent's substantive due process rights. For example, in Anonymous, the New York Supreme Court, Appellate Division, held a curfew ordinance "unconstitutional on the ground that it violate[d] the fundamental substantive due process right of plaintiff father to rear his child without undue governmental interference." Anonymous, 56 A.D.3d at 150.

The Court of Appeals affirmed, holding:

> [T]he Rochester curfew "does not allow an adult to pre-approve even a specific activity after curfew hours unless a custodial adult actually accompanies the minor. Thus, parents cannot allow their children to function independently at night, which some parents may believe is part of the process of growing up." Consequently we conclude that the challenged curfew is not substantially related to the stated goals of promoting parental supervision.
>
> [Anonymous, 915 N.E.2d at 601.]

According to the Curfew Ordinance, "[t]he Mayor and Council of the Borough of Wanaque … determined that passage of a curfew will protect the welfare of minors by … (3) Aiding parents or guardians in carrying out their responsibility to exercise reasonable supervision of minors entrusted to their care." Curfew Ordinance at §69-2. There is no indication in the language of the Curfew Ordinance whether the Curfew Ordinance was, in whole or in part, the result of a particular need for greater parental oversight in the community. To the extent same was the impetus for the Curfew Ordinance, the "notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is

repugnant to American tradition." Anonymous, 915 N.E.2d at 601, quoting Hodgson v. Minnesota, 497 U.S. 417, 446-447 (1990).

The Curfew Ordinance infringes upon the established right of parents to make decisions for their children free of governmental intrusion. Without compelling justification, the Curfew Ordinance criminally punishes not only minors, who may be in public during curfew hours at the instruction or with the permission of their parents, but also parents who "knowingly or negligently permit" a minor to be in public during curfew hours. Thus, the Curfew Ordinance strips parents of the authority to decide that it is acceptable for their children to be in public past 10:00 p.m., with absolutely no exceptions for weekends or holidays. The Curfew Ordinance does not only apply to families in which the children have been neglected by the parents or have been found to be in need of state supervision by a court of law. It affects ***all*** families, including the overwhelming majority who do not need or want governmental assistance in child rearing.

Similar to parents who control their children's Internet access (as in Reno), the parents here have the duty and authority to decide if their children may go out in the evenings, as part of the "process of teaching, guiding, and inspiring by precept and example," which is "essential to the growth of young people into mature, socially responsible citizens." Bellotti, 443 U.S. at 637-38. The Curfew Ordinance undermines this parental role. A parent, not a government official, is in the best position to prepare a child for adult life by allowing him or her to have the increasing responsibility that is in keeping with the particular maturity level of that minor. As the Ninth Circuit observed in Nunez v. City of San Diego:

> [A] curfew is, quite simply, the exercise of sweeping state control irrespective of parent wishes. Without proper justification, it violates upon the fundamental right to rear children without undue interference. [A curfew] ordinance is not a permissible "supportive" law, but rather an undue, adverse interference by the state.

[Nunez, 114 F.3d at 952 (internal citations omitted).]

The Supreme Court has recognized that "the tradition of parental authority is ... one of the basic presuppositions" of "our tradition of individual liberty." Bellotti, 443 U.S. at 638. Numerous other courts have stricken down curfew ordinances because they have concluded that parents have the right to decide the whereabouts of their children without state intrusion. See Allen, 216 N.J.Super. 557 (Law Div. 1987); K.L.J. v. State, 581 So.2d 920 (Fla. Dist. Ct. App. 1991); City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992); Brown v. Ashton, 611 A.2d 599 (Md. App. 1992). Thus, it is constitutionally impermissible for a mayor and city council to substitute their judgment about child rearing for that of parents despite their own determination that passage and enforcement of the Curfew Ordinance will somehow "aide[] parents … in carrying out their responsibility to exercise reasonable supervision of minors entrusted to their care." Curfew Ordinance at §69-2(D)(3).

## VI. THE CURFEW ORDINANCE SHOULD BE ENJOINED BECAUSE IT IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST AND THUS FAILS TO SATISFY STRICT SCRUTINY.

As noted, "[w]hen legislation impinges upon a fundamental right, or disparately treats a suspect class, it is subject to strict scrutiny, thereby requiring that the statute be the least restrictive alternative to accomplish a compelling governmental interest." McCann, 338 N.J. Super. at 526-27 (App. Div. 2001) (additional citations omitted). The Curfew Ordinance is unconstitutional because it is not narrowly tailored to attain a compelling state interest, nor is it the least restrictive means to accomplish such an interest. Id.; Zablocki, 434 U.S. at 388.

The Curfew Ordinance is facially applicable to all persons under the age of 18, not merely those who have previously committed crimes. For example, a minor, such as Harris, who is returning home from a college study-group session for an upcoming exam or some other

meeting with friends, although engaging in innocent conduct, is as susceptible to detainment same as a "gang-member" selling drugs on a street corner. The Curfew Ordinance makes the innocent minor a target for arrest even if the minor has parental permission to return home after 10:00 p.m. from a study-group session that takes place two blocks from her home.

Moreover, the Borough cannot contrive a compelling state interest that would permit infringement of its minors' fundamental rights to engage in perfectly innocent activities. See Papachristou, 405 U.S. at 163 (enjoining a Jacksonville vagrancy ordinance that "makes criminal activities which by modern standards are normally innocent"). However, the Curfew Ordinance does so, by restricting all persons under the age of 18 to the confines of their homes except in limited circumstances. As such, the Curfew Ordinance is unsalvageably overbroad in the manner that it is tailored.

To the extent that the Borough may claim that the Curfew Ordinance is aimed at addressing "an increase in juvenile violence and crime" (see Curfew Ordinance at §69-2(A)), it is also admitting that the Curfew Ordinance is overbroad. It is elementary to observe that for all activities that minors might engage in that could objectively be considered a "crime," there are corresponding criminal statutes, both on the state and federal level. Consequently, the ***only*** conduct that this Curfew Ordinance could curtail, that is not already subject to criminal statutes, is innocent non-criminal conduct.

Even persons suspected of illegal activity are entitled to the right not to be detained because of a belief that they may commit crimes ***in the future***. Simply put, "a presumption that people who might walk or loaf or stroll ... or who look suspicious to the police are to become future criminals is too precarious for a rule of law." Papachristou, 405 U.S. at 171.

The Curfew Ordinance is fatally overbroad. Thus, the Curfew Ordinance fails to pass constitutional muster.

## VII. THE CURFEW ORDINANCE SHOULD BE ENJOINED BECAUSE IT IS IMPERMISSIBLY VAGUE IN VIOLATION OF THE NEW JERSEY AND UNITED STATES CONSTITUTIONS.

"Generally, under federal constitutional law, a 'statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'" Betancourt, 338 N.J.Super. at 422, quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); see also Smith v. Goguen, 415 U.S. 566, 572, n.8 (1974). Similarly, "[a] penal statute offends due process if it does not provide legally fixed standards and adequate guidelines for police and others who enforce penal laws." Id., citing Papachristou, 405 at 170; Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983). Thus, vague language and inadequate standards permit the subjective and therefore impermissible enforcement of penal ordinances by law enforcement personnel. Grayned v. City of Rockford, 408 U.S. 104 (1972).

A legislative enactment is unconstitutionally vague if: (a) it fails to define an offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited;" (b) if it fails to do so "in a manner that does not encourage arbitrary and discriminatory enforcement;" or (c) it "operates to inhibit the exercise of [basic First Amendment] freedoms." Betancourt, 338 N.J.Super. at 423, quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983); see also Grayned, 408 U.S. 108-09; Smith, 415 U.S. at 574; Papachristou, 405 U.S. at 162. New Jersey Courts have recognized that "[i]t is offensive to fundamental concepts of justice and violative of due process of law … to impose sanctions for violations of laws, whose language is doubtful, vague, and uncertain." Id. at 423, quoting Maplewood v. Tannenhaus, 64 N.J.Super.

80, 89 (App. Div. 1960), certif. denied, 34 N.J. 325 (1961). The Curfew Ordinance fails in all three respects. It does not provide fair notice of the conduct that is prohibited, it fails to discourage arbitrary enforcement, and it infringes on protected rights.

In Kolender, the Supreme Court held that a state statute requiring citizens to provide "credible and reliable identification" violates the due process requirement of the Fourteenth Amendment, because individual police officers were left with "virtually complete discretion" to decide which forms of identification satisfied this requirement. Kolender, 461 at 358. New Jersey courts have similarly focused upon the risk of arbitrary enforcement in reviewing vague loitering and curfew ordinances. See, e.g., State v. Caez, 81 N.J.Super. 315 (App. Div. 1962) (striking loitering ordinance as vague); Borough of Dumont v. Caruth, 123 N.J.Super. 331 (Mun. Ct. 1983) (Pashman, J., sitting by designation) (invalidating 11:00 p.m. park curfew ordinance in substantial part because of risk of arbitrary enforcement).

Similarly, in Betancourt, the Appellate Division affirmed the lower court's determination that the language of the West New York, New Jersey curfew ordinance (the "WNY Ordinance") was unconstitutionally vague. Betancourt, 338 N.J.Super. at 423-24. The WNY Ordinance, as is the case here, included exceptions where, for example: (i) the minor is "engaged in an errand involving a medical emergency;" or (ii) the minor is "attending religious services, extracurricular school activities, activities sponsored by a religious or community organization or other cultural, education or social events or is in direct transit to or from such events." Id. at 423. The court held that the "ordinary meaning" of the terms "social events," "cultural events," "activities sponsored by a community organization," "direct transit," "errand involving a medical emergency," and "cultural, educational or social events" – none of which were defined – were "open to differing interpretations by reasonable individuals." Id. at 423-24. As such, the WNY

Ordinance did "not give a clear standard as to what conduct [was] forbidden" and gave "a police officer … broad discretion to decide which activities and which juveniles fall with the ordinance's exceptions." Id. at 424.

The Betancourt court found further vagueness resulting from the use of the term "sponsored by a community organization" and "the ordinance exception for minors who are 'accompanied' by a person 'who is acting in the place of the parent or who is responsible for the care and welfare of the juvenile.'" Id. As to the former, the court noted: "Although most would consider the Boy Scouts to be a community organization, would the local martial arts or ballet school also qualify?" Id. As to the latter, the court posed the following question and answer:

> Under this definition, can an eighteen-year old babysitter be permitted to take the child he or she is caring for out into the public after 10:00 p.m.? The answer is not clear. Therein lies the constitutional failure of the WNY Ordinance. It cannot depend on subjective judgment calls by the police officers.
>
> [Id.]

Same was true in Allen, where the court found Bordentown's juvenile curfew ordinance to be unconstitutionally vague. As in Betancourt and here, Bordentown's juvenile curfew ordinance included an exception for minors "upon an emergency errand." Allen, 216 N.J.Super. at 564. No definition was provided for "emergency errand." Instead, the court held:

> An "emergency errand" could be one required for the purpose of securing immediate medical assistance for an injured parent or one merely designed to correct a social omission, such as the failure to deliver a promised gift. The first is surely an "emergency errand" but most would think the second is not. That determination, however, is subjective. The failure to deliver the gift may promote a family crisis and therefore be clearly an "emergency" in the minds of all members of the family but not in the mind of a police officer. The phrase cannot survive the vagueness challenge.
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> [Id. at 564-65.]

Finally, many of the curfew and loitering cases have noted that the vagueness of the ordinances risked banning activities protected by the First and Fourteenth Amendments. See Coates, 402 U.S. at 615-16 (holding that an ordinance prohibiting three or more persons to assemble and conduct themselves in an "annoying" manner was unconstitutionally vague); Wyche v. Florida, 619 So.2d 231, 236 (Fla. 1993) (holding an ordinance prohibiting loitering "under circumstances manifesting the purpose of...prostitution" as unconstitutionally vague); City of Maquoketa v. Russell, 484 N.W.2d 179, 185-86 (Iowa 1992) (holding a city juvenile curfew ordinance providing an exception for "parentally approved supervised activity" as unconstitutionally vague); City of Akron v. Roland, 618 N.E.2d 138, 146 (Ohio 1993) (an ordinance prohibiting loitering "under circumstances manifesting the purpose to engage in drug-related activity" is unduly vague).

Given these principles, the Curfew Ordinance cannot survive a vagueness challenge. For example, the Curfew Ordinance's definition of "guardian" is impermissibly vague. The Curfew Ordinance provides exceptions for minors who are "accompanied by [their] parent ***or*** guardian" and minors who are "in a motor vehicle with the consent of his or her parent ***or*** guardian engaged in normal travel, either intrastate or interstate, through the [Borough]." Curfew Ordinance at §69-5(A)(1), (7)(emphasis added). "Guardian" is defined as "[a] person other than a parent to whom legal custody of the minor has been given by court order ***or who is acting in the place of the parent or is responsible for the care, custody, control and welfare of the minor***." Id. at §69-3 (emphasis added). As was the case in Betancourt, the question remains whether an 18-year-old babysitter, teacher, cleric, or family friend is permitted to take the minor into public after 10:00 p.m. Likewise, is a minor's 18-year-old sibling, step-parent, grandparent, godparent, or other family member deemed a "guardian" under the Curfew Ordinance?

Also similar to Betancourt, the Curfew Ordinance provides an exception where "[t]here exists an ***emergency or reasonable necessity***, but only after the minor's parent or guardian has confirmed the facts establishing the emergency or reasonable necessity, including the points of origin and destination, the specific streets at a designated time for a designated purpose." Id. at 69-5(A)(4) (emphasis added). "[E]mergency or reasonable necessity" is not defined in the Curfew Ordinance. As to the former, does emergency mean medical emergency? Is it further limited to life-threatening medical emergencies or does it include broken bones, sprains, bruises, burns, flu and/or fever? Does it mean that the trip must be to a licensed medical professional or could it mean a trip to the store to obtain over-the-counter medicine or even ice to cool a fever? Must it involve a family member or could it concern a friend? More generally, does emergency include a flood, fire, or other condition in the home needing attention? Does it include a "social omission" as the court posited in Betancourt? Adding further ambiguity is the addition of the term "reasonable necessity." Is food and water a "reasonable necessity?" Is picking up a friend or family member in need of a ride home a "reasonable necessity?" When and how does a parent or guardian "confirm" the "emergency or reasonable necessity" and does this confirmation occur before or after the minor is detained?

Finally, the Curfew Ordinance provides an exception for "attendance at, or returning home by direct route from and within 30 minutes of the termination of, an official school activity or any activity of a religious, civic or voluntary association, which entity takes responsibility for the minor." Id. at §69-5(A)(6). The terms "official school activity" and "religious, civic or voluntary association" are indeterminate and open to differing interpretations by reasonable individuals, giving no clear standard as to what conduct is forbidden. Moreover, these terms

give the police broad discretion to decide which activities fall within the Curfew Ordinance's exceptions.

For example, what is considered an "official school activity" and do such activities require formal designation from a governing body or school official? Is a gathering of classmates to study, compete in sport, perform or attend a school play, attend a school dance, or simply socialize considered an "official school activity?" Does it matter if a teacher and/or school administrator is present? Is a "school" limited to academic schools (e.g., elementary, middle, and high schools), or does the exception include schools of music and art? Likewise, does a "religious activity" have to take place at a house of worship, overseen by a member of the clergy? Must the "religious activity" be related to a recognized religion and, if so, who makes the determination as to whether that religion is recognized? Would a group of minors meeting to pray or take part in bible study in a public place satisfy the "religious activity" exception?

The term "civic or voluntary association" is equally vague. In fact, the definition of "civic or volunteer association" which would depend upon the different perspective of various individuals based upon age, social status, gender, cultural background, and economic means. Of course, most reasonable people would agree that something like a Rotary Club or Boys Scouts (as was the court's example in Betancourt) are "civic associations." However, is a youth center or little league field considered a "civic association?" And what is a "voluntary association?" Does the term require that members and attendees are limited to "volunteers" who engage in some sort of charitable work in the community? To this end, must the "volunteer association" be a non-profit organization or could the "volunteer association" also have paid employees?

Moreover, what does "by a direct route" mean and who is to make that determination? Are minors required to follow certain guidelines when calculating a "direct" route? Does "direct

route" mean "by the physically most direct route possible" or does it mean "directly, without making any stops or delay?" How is a police officer, responsible for enforcing the Curfew Ordinance, supposed to ascertain whether a minor was in "direct route" home from an event?

With so many terms left undefined and open to varying interpretations, the Curfew Ordinance does not provide the residents of the Borough with a clear definition of what conduct is permissible. Even more significantly, it permits enforcing officers to decide on the spot, based on their cultural background and possible prior sentiments about the minor involved, whether the activity is excused or prohibited.

## VIII. ENFORCEMENT OF THE CURFEW ORDINANCE SHOULD BE ENJOINED BECAUSE SUCH ENFORCEMENT VIOLATES N.J.S.A. 2A:4A-31(A)(2).

Under the auspices of the Curfew Ordinance, Borough police have been taking citizens into custody merely because of their age. Pursuant to the Curfew Ordinance, "[a] minor who violates [the Curfew Ordinance] shall be detained by the Wanaque Police Department at the police headquarters and released into the custody of the minor's parent, guardian or an adult person acting in loco parentis." Curfew Ordinance at §69-6(C). "Regardless of what euphemistic term the police wish to employ to describe [the act of detaining or taking curfew violators into custody], its legal consequence is indistinguishable from a formal arrest." Anonymous, 56 A.D.3d at 144, quoting Matter of Martin S., 104 Misc.2d 1036, 1038 (N.Y. Fam. Ct. 1980). Traffic stops for speeding and other municipal ordinance violations usually go no further than the issue of a summons; why should a Curfew Ordinance violation be any different? Only one conclusion can reasonably be drawn: the Borough's practice of detaining persons suspected of violating the Curfew Ordinance is patently illegal.

Warrantless arrest of the Borough's minors under the Curfew Ordinance violates N.J.S.A. 2A:4A-31(a)(2) because that statute authorizes law enforcement officers to take a juvenile into

custody ***only for*** "delinquency, when there has been no process issued by a court, … pursuant to the laws of arrest and Rules of the Court." Rule 5:21-1 of the New Jersey Court Rules states that "a law enforcement officer may take into custody without process a juvenile who the officer has probable cause to believe is delinquent as defined by N.J.S.A. 2A:4A-23." N.J.S.A. 2A:4A-23 defines delinquency as "the commission of an act by a juvenile which, if committed by an adult, would constitute: (a) A crime; (b) A disorderly persons offense...; or (c) A violation of any other penal statute, ordinance, or regulation." Because a juvenile's presence in a public place after 10:00 p.m. would be neither an offense nor a violation of a statute, ordinance, or regulation if ***committed by an adult***, juveniles such as Harris are not "delinquent" as defined by N.J.S.A. 2A:4A-23. Consequently, since non-delinquent juveniles may not be arrested without a warrant pursuant to the "Rules of the Court," namely Rule 5:21-1, warrantless arrest of non-delinquent juveniles such as Harris is impermissible under N.J.S.A. 2A:4A-31(a)(2).

The above rationale was applied in Anonymous. Anonymous involved, among other things, the constitutionality of a curfew ordinance that authorized the detainment of a minor "reasonably believed" to have violated the subject ordinance. Anonymous, 56 A.D.3d at 143. As is the case under New Jersey law, under the New York Family Court Act, "a police officer is authorized to take a child under the age of 16 into custody without a warrant ***only*** in cases where an adult could be arrested for a crime, and a violation does not fall within the definition of a crime." Id. at 144 (emphasis added). As such, the court held that "[b]y authorizing the arrest of minors under the age of 16 for a curfew violation, the ordinance [was] inconsistent with the Family Court Act." Id. As discussed, the same is true here.

## CONCLUSION

The Borough has unconstitutionally restrained all persons under the age of 18 from being in its public areas for nearly one-third of every day. The Curfew Ordinance infringes on the minors' fundamental rights to movement, to live free of illegal arrest, to engage in their educational, social and employment activities, and to be free from prosecution simply because of their age. Their parents' fundamental right to be to raise them children free of governmental interference is also being violated by the Borough. The Curfew Ordinance is over-broad and vague and cannot legitimately be employed to infringe upon basic constitutional rights. The Borough's continuing enforcement of the Curfew Ordinance and detainment for violations of the Curfew Ordinance irreparably harms individuals, including Richardson and Harris, on a daily basis. Accordingly, Richardson requests entry of an order preliminarily enjoining the Borough from further prosecution and detainment under the Curfew Ordinance.

COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.
On Behalf of the ACLU of New
Jersey Foundation

-and-

AMERICAN CIVIL LIBERTIES
UNION OF NEW JERSEY
FOUNDATION
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her Minor Child, Shaina Harris

Dated: March 7, 2013

BY: _____
Edward S. Kiel