No. _____

In the Supreme Court of the United States

LAMEL JEFFERY, THADDEUS BLAKE and CHAYSE PENA, on behalf of Themselves and Others Similarly Situated,

Petitioners,

-against-

CITY OF NEW YORK, BILL DE BLASIO, in his individual capacity and ANDREW CUOMO, in his individual capacity,

Respondents.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The freedom of movement is "a necessary concomitant of the stronger Union the Constitution created." *U.S. v. Guest*, 383 U.S. 745, 758 (1966). It is "a right so elementary," *id.*, that when it is "curtailed" in the form of a "curfew or home detention," "all other rights suffer." *Aptheker v. Sec'y of State*, 378 U.S. 500, 520 (1964)(Douglas, J., dissenting). This Court has made clear that any action that touches upon such a fundamental right requires the government to "prove with evidence," *Mast v. Fillmore Cnty., Minnesota*, 141 S. Ct. 2430, 2433 (2021)(Gorsuch, J., concurring), that the action, 1) is necessary to serve a compelling need; 2) will "in fact" address this need in a "direct and material way," *Turner Broad. System, Inc. v. F.C.C.,* 512 U.S. 622, 664 (1994); and, 3) that no "less restrictive means" exist to accomplish the same, *Turner,* 512 U.S. at 668.

The Questions Presented are:

1. Whether the constitutionality of the largest mass curfew in American history can be determined at the pleading stage in the absence of record evidence based solely upon the government's declaration of an emergency.

2. Whether the factual predicate required to scrutinize an abridgment of fundamental rights can be exclusively supplied by judicially noticing "facts" contained in news and media coverage.

PARTIES TO THE PROCEEDING

Petitioners are Lamel Jeffery, Thaddeus Blake, and Chayse Pena, on behalf of themselves and others similarly situated.

Respondents are former Mayor Bill de Blasio, former Governor Andrew Cuomo, and the City of New York (collectively "respondents").

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Petitioners Lamel Jeffery, Thaddeus Blake, and Chayse Pena, on behalf of themselves and others similarly situated (collectively "petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, No. 22-2745, entered August 16, 2024 (Pet. App. at 78a), is reported at 113 F.4th 176. The Memorandum and Order of the United States District Court for the Eastern District of New York, No. 20-cv-2843, entered on January 21, 2022 (Pet. App. at 56a), is unreported but available at 2022 WL 204233.

JURISDICTION

On August 16, 2024, the Second Circuit issued its opinion affirming the District Court's dismissal of petitioners' Complaint under FRCP 12(b)(6). The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and 1367. The Second Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

This case involves United States Constitution Amendments I, IV, V, and XIV; and New York City Executive Orders 117 (June 1, 2020), 118 (June 1, 2020), and 119 (June 2, 2020).

The First Amendment provides, in pertinent part:

> Congress shall make no law…abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble…

U.S. Const. amend. I

The Fourth Amendment provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause…

U.S. Const. amend. IV.

The Fifth Amendment provides, in pertinent part:

> No person shall…be deprived of life, liberty, or property, without due process of law…

U.S. Const. amend. V

The Fourteenth Amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law…

U.S. Const. amend. XIV.

New York City Executive Orders 117 (June 1, 2020), 118 (June 1, 2020), and 119 (June 2, 2020) are reproduced in the appendix to this petition. (Pet. App. at 47a-55a).

INTRODUCTION

The case concerns the largest adult curfew in American history – in peacetime or war. During the summer of 2020, respondents issued a series of Emergency Orders, which made it a crime for any person within the City limits (over eight million people) to "be in public." (*Id.* at 47a-55a). The Orders effectively placed one of the most populated cities in the world on nighttime house arrest for an entire week. Per the Orders themselves, their avowed purpose was to "protect" the City's residents from "severe endangerment and harm to their health, safety and property," which they claimed existed because of acts of "assault, vandalism, property damage, *and/or* looting," committed by "*some* persons" during the George Floyd protests. (*Id.*). Given their vagueness regarding the quantum, nature and/or location of these harms, millions of residents were left to question the constitutionality of respondents' knee-jerk suspension of their most fundamental rights.

In an unprecedented opinion, the Second Circuit claimed – at the pleading stage – that the Orders satisfied the highest form of constitutional scrutiny as a matter of law. (*Id.* at 78a-134a). However, unlike the strict scrutiny standard set forth by this Court, the sophistic standard applied by the Second Circuit relieved respondents of any *evidentiary* burden to prove the necessity, effectiveness or tailoring required to justify such a monumental infringement upon constitutional freedoms. (*Id.*). Instead, the tone of the

decision focused on the "wide latitude" that "must" be afforded to the government's ability to "protect public safety," concluding that because "governments are better able to justify actions taken in response to civic exigencies," their responses "are more likely to satisfy heightened scrutiny." (*Id.* at 117a). The court then filled in the evidentiary gaps with "facts" plucked from editorialized and sensationalized media accounts of the protests, which the court deemed to be of "unquestioned accuracy." (*Id.* at 86a(n.3); 84a-93a). In the court's view, those media accounts warranted only one conclusion, that the curfew "must be recognized as a matter of law" to be a constitutionally permissible abridgment of fundamental freedoms "to prevent escalating crime and restore order to the City." (*Id.* at 129a-130a).

Over fifty years ago, this Court forewarned of the media's "enormous[] power[] and influen[ce]" and its "capacity to manipulate popular opinion and change the course of events." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 249 (1974)(alteration added). Combine this influence with what Justice Gorsuch recently described as the emergence of an "ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable," *Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021)(Gorsuch, J., dissenting from denial of certiorari), and it is not hard to envision the frightening consequences that might flow from allowing the media machine to dictate and constitutionalize governmental action. Yet this is the groundwork laid by the Second Circuit's opinion.

A writ is therefore necessary because the decision here not only upends this Court's strict scrutiny precedent in a novel area of fundamental constitutional

rights, but because it has wide-reaching constitutional ramifications. It trades fundamental rights for whatever story of fear and panic an agendized media might spin on a given situation at a given time.

STATEMENT OF THE CASE

A. The curfew

On June 4th and 5th of 2020, petitioners Lamel Jeffery, Thaddeus Blake, and Chayse Pena, were arrested outside of their homes by members of the New York City Police Department ("NYPD") for violations of the Emergency Executive Orders issued by respondents on June 1, 2020, and on June 2, 2020, respectively (hereinafter "Orders" or "curfew").[1] (Pet. App. at 47a-55a; 28a-30a). It is undisputed that the sole basis for petitioners' arrests was their violation of the curfew and that petitioners had committed no other crime or violation of law except "be[ing] in public." (*Id*. at 28a-30a).

The Orders upon which petitioners were arrested had been issued by respondents in the wake of the George Floyd protests. (*Id*. at 47a-55a). With virtually no exceptions, the Orders committed an entire City (over eight million individuals) to house arrest during the nighttime hours, making it a crime for any person

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[1] The first curfew (Executive Order 117, (Pet. App. at 53a)) was issued on June 1, 2020, and applied from 11 p.m. on June 1st until to 5 a.m. on June 2nd. The second curfew (Executive Order 118, (*id*. at 47a)) was also issued on June 1, 2020, and applied from 8 p.m. on June 2nd, until to 5 a.m. on June 3rd. The third curfew (Executive Order 119, (*id*. at 50a)) was issued on June 2, 2020, and applied from 8 p.m. on June 2nd, until 5:00 a.m. on June 7th. The third curfew was lifted one day prior to its deadline under mounting pressure from civil rights organizations. (*Id*. at 7a).

or vehicle to "be in public" during the proscribed timeframe.[2] (*Id.*). Each Order contained identical language regarding their professed necessity: "to protect the City and its residents from severe endangerment and harm to their health, safety and property" from "actions of assault, vandalism, property damage, *and/or* looting" by "*some* persons" committed "during the hours of darkness, [when] it is especially difficult to preserve public safety during such hours." (*Id.*). The Orders provided no further detail as to the nature, quantum, frequency or location of these acts, and offered no explanation as to what, if any, basis there was to support the conclusion that committing eight million law-abiding citizens to house arrest would deter the criminal actions of a select few. (*Id.*).

B. The proceedings below

1. On June 26, 2020, petitioners, on behalf of themselves and others similarly situated, filed a putative class action complaint in the United States District Court for the Eastern District of New York. (*Id.* at 1a). The complaint alleged that respondents' curfew had violated their fundamental rights under the First, Fourth, Fifth and Fourteenth Amendments because,

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[2] The only exceptions to the Orders were for "police officers, peace officers, firefighters, first responders [] emergency medical technicians, individuals travelling to and from essential work and performing essential work, people experiencing homelessness and without access to a viable shelter, and individuals seeking medical treatment or medical supplies." (*Id.* at 47a-55a). Interestingly, police officers, peace officers, firefighters, first responders and emergency medical technicians, were exempt *regardless* of whether they were on duty, while essential workers were *only* exempt if they were "performing essential work." (*Id.*). There were no exceptions for individuals otherwise engaged in lawful behavior.

i) the criminal activity of a small number of persons, occurring with minimal frequency in a few discrete locations, did not provide a compelling need for the house arrest of eight million individuals; ii) there was no reason to believe that abridging the rights of millions of individuals would in fact serve to curb or deter these criminal acts; and, iii) there was no evidence to suggest that less intrusive measures could not have accomplished these goals. (*Id*. at 1a-46a).

2. On January 21, 2022, prior to any discovery, the District Court granted respondents' motion to dismiss the complaint. (*Id*. at 56a-77a). Despite the lack of any fact-finding or evidence, the court concluded that the curfew satisfied strict scrutiny. (*Id.*). Parroting the Orders themselves, the court found that respondents "ha[d] a legitimate and compelling state interest in protecting the community from crime," (*id*. at 71a; 47a-55a), and that the house arrest of eight million individuals was narrowly tailored to further that interest because "the curfew applied only during nighttime hours, when [] law enforcement face[d] greater difficulties in preserving public safety." (*Id.* at 72a; 47a-55a). The District Court did not discuss the effectiveness of a citywide curfew as a means of curbing criminal behavior, nor was there any mention of less intrusive alternatives that might have accomplished those goals. (*Id*. at 71a-72a).

3. On appeal, petitioners argued that the District Court had anesthetized the strict scrutiny standard by determining it in the absence of evidence. (CMECF No. 40 & 67). Particularly, that a generic description of crime deterrence could not establish a compelling need when the only evidence at the pleading stage was that criminal activity was – by all known metrics –

minimal, being committed by a small number of people, and occurring only in a few isolated sections of the City. (*Id*.). Likewise, petitioners faulted the court for assuming, without evidence, that a curfew imposed against millions of law-abiding residents was an effective – let alone the least restrictive – means of addressing those needs. (*Id*.).

The Second Circuit affirmed the dismissal. (Pet. App at). It acknowledged the "heavy burden" that respondents faced to justify the curfew under strict scrutiny. (*Id*. at 118a). It also recognized that deciding strict scrutiny would "rarely, if ever," be appropriate at the pleading stage in the absence of a factual record. (*Id*. at 105a). Yet, it nevertheless concluded that the curfew satisfied strict scrutiny as a matter of law. (*Id*. at 78a-134a). In the court's view, the Orders served a compelling interest "in curbing escalating nighttime crime and disorder," (*id*. at 119a), and that their temporal identity "with much of the worst violence and destruction," (*id*. at 124a), rendered them to be "the least restrictive means then available to defendants to prevent escalating crime and to restore order in the City," (*id*. at 129a).

The court located the "facts" to support its decision not in any evidentiary record or factual findings, but rather from its judicial notice of "contemporaneous media reports" describing the state of affairs in New York City at the time. (*Id*. at 130a; 84a-93a). The court reasoned that the "pervasiveness and consistency across [those] reports" gave them an "indicia of unquestioned accuracy," thus making judicial notice appropriate. (*Id*. at 86a(n.3)). It rejected petitioners' arguments that the media had sensationalized the facts on the ground and transformed a few lawless acts into

a spiraling vortex of criminality. (*Id.* at 11a; 86a(n.3)). It also used respondents' own Department of Investigations Report – published months *after* the complaint was filed[3] – to "confirm[]" the veracity of the media accounts, (*id.* at 85a), even though the statistics contained in that report corroborated that 90% of *all* arrests that occurred during the George Floyd protests were for petty, non-violent, misdemeanor offenses.[4]

Armed with these editorialized media portrayals, the court's conclusion that the curfew was necessary to combat "criminality border[ing] on chaos," (*id.* at 133a), was essentially sacrosanct. In essence, the Second Circuit established a new norm for fundamental rights whereby a court need only look to the New York Times or Washington Post for the "facts" required to justify the largest abridgment of fundamental rights in American history.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision represents a gross departure from this Court's jurisprudence in the area of fundamental rights by permitting media narrative to legitimize governmental action in the absence of fact-finding. Such a rule is at odds with strict scrutiny and can only be corrected by this Court. This case provides an ideal opportunity to do so.

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[3] *See* New York City Department of Investigations, *Investigation Into NYPD Response to the George Floyd Protests* (December 18, 2020) ("DOI Report"), https://www.nyc.gov/assets/doi/reports/pdf/2020/DOIRpt.NYPD%20Reponse.%20GeorgeFloyd%20Protests.12.18.2020.pdf (last visited November 8, 2024).

[4] *See* DOI Report at pp. 8-26.

I. The declaration of an emergency does not alter the fundamental rights analysis in the absence of a factual record

"In any society there come times when the public is seized with fear and the importance of basic freedoms is easily forgotten." *U. S. v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 388 (1971)(Black, J. dissenting). However, as Justice Harlan once admonished, "[t]he Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest." *Downes v. Bidwell*, 182 U.S. 244, 384 (1901)(Harlan, J., dissenting)(alteration added). "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." *Nebbia v. People of New York*, 291 U.S. 502, 545 (1934)(McReynolds, J., separate opinion)(citations omitted).

In recent years, members of this Court have observed a "judicial impulse" – particularly from the Second Circuit – to stay out of the way in times of crisis." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 25 (2020)(Gorsuch, J., concurring); *see also Dr. A v. Hochul*, 142 S. Ct. 552, 559 (2021)(Gorsuch, J., dissenting). But, as Justice Kavanaugh recently admonished, while some measure of "judicial deference in an emergency or a crisis," may be warranted, such deference "does not mean wholesale judicial abdication, especially when important questions" involving fundamental constitutional rights are at play. *Roman Catholic Diocese*, 592 U.S. at 30 (Kavanaugh, J., concurring).

On trend with this judicial impulse is the Second Circuit's opinion in this case. The lip service paid to

this Court's constitutional standards while justifying the wholesale displacement of the fundamental rights of millions is either a sobering example of judicial abdication or of judicial legerdemain. To be sure, a "measure of humility," (Pet. App. at 117a), will never suffice to protect fundamental rights in difficult times. In the words of Justice Gorsuch, "[t]he test of this Court's substance lies in its willingness to defend more than the shadow of freedom in the trying times, not just the easy ones." *Hochul*, 142 S. Ct. at 559 (Gorsuch, J., dissenting)(alteration added).

A. The curfew abridged the fundamental rights of millions of individuals

This Court has recognized that the concept of "freedom of movement" is "deeply engrained in our history" and "may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." *Kent v. Dulles*, 357 U.S. 116, 126 (1958). Moreover, unlike most other fundamental rights, the freedom of movement finds its source in four separate Constitutional Amendments. As Justice Douglas explained,

> the right to move freely from State to State is a privilege and immunity of national citizenship….Freedom of movement is kin to the right of assembly and to the right of association…Absent war, I see no way to keep a citizen from traveling within or without the country, unless there is power to detain him…e.g., unless he has been convicted of a crime or unless there is probable cause for issuing a warrant of arrest by standards of the Fourth Amendment. This freedom of movement is the very essence of our free society, setting us apart…

Aptheker, 378 U.S. at 519–20 (Douglas, J., dissenting); *see also Bykofsky v. Borough of Middletown*, 429 U.S. 964, 964–65 (1976)(Marshall, J., dissenting)("[t]he freedom to leave one's house and move about at will is 'of the very essence of a scheme of ordered liberty"); *Wallace v. Kato,* 549 U.S. 384, 388–89 (2007)("when a man is lawfully in a house, it is imprisonment to prevent him from leaving the room in which he is."); *Stotland v. Pennsylvania*, 398 U.S. 916, 921 (1970)(Douglas, J., dissenting)("one's constitutional right to freedom of movement [] of course is essential to the exercise of First Amendment rights")(alteration added).

Thus, although "there have been recurring differences in emphasis within the Court as to the source of [this] constitutional right," *Guest*, 383 U.S. at 758-759 (alteration added), there is no question that the "right of free movement—the right to go to any State or stay home as one chooses—it is an incident of national citizenship and occupies a high place in our constitutional values," *People of State of N. Y. v. O'Neill*, 359 U.S. 1, 14 (1959)(Douglas, J., Concurring). Indeed, it is the exalted status of this right, that led Justice Marshall to opine that "absent a genuine emergency, a curfew aimed at all citizens could not survive constitutional scrutiny" even where it "would protect those subject to it from injury and prevent them from causing 'nocturnal mischief.'" *Bykofsky*, 429 U.S. at 965 (Marshall, J., dissenting).

The curfew in this case criminalized "be[ing] in public" for any reason – lawful or otherwise. (Pet. App. at 47a-55a). The methodology used by the Second Circuit to uphold this sweeping regulation without a shred of record evidence demands this Court's attention.

B. This Court has never held that heightened constitutional scrutiny may be met without substantial evidentiary support

As a general proposition, "[w]hen a fundamental right is at stake the Government can act only by narrowly tailored means that serve a compelling state interest." *Dep't of State v. Munoz*, 144 S. Ct. 1812, 1821 (2024)(*citing Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))(alteration added). To meet this threshold, this Court has always, and unwaveringly, required the government show a "substantial," *Turner*, 512 U.S. at 666, or "strong basis in evidence," *Wisconsin Legis. v. Wisconsin Elections Comm'n*, 595 U.S. 398, 404 (2022), to believe that burdening fundamental rights is necessary to address a compelling need.

In doing so, the government must point to "'record evidence or legislative findings' demonstrating the need to address a special [harm]." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 307 (2022)(alteration added). It must also prove "that the regulation will in fact alleviate th[is] harm[] in a direct and material way." *Turner*, 512 U.S. at 664 (alteration added). Finally, the government must demonstrate that "'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests" were either unavailable or would have been ineffective. *Id*. at 668. The Second Circuit's decision was completely untethered from these standards for at least four reasons.

1. *Scrutiny Cannot Occur Absent Evidence*. As Justice Alito once commented, "a court engaged in any serious form of scrutiny would [] question[] the absence of evidence," supporting governmental action. *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 590 U.S. 336, 369–70 (2020) (Alito, J.,

dissenting)(alteration added). For this reason, the Court has historically believed it "necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity" of a given governmental regulation. *Id*. Antithetically, under rational basis review, the government is under "no obligation to produce evidence" and it is petitioners who must "negative every conceivable basis which might support" the challenged action. *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 75 (2001).

The Second Circuit's decision mouthed the words strict scrutiny, but its analysis, which decided the curfew's constitutionality without *any* evidentiary record, was rational basis. Rather than concern itself with allowing petitioners to develop a factual record, it was far more "*mindful* that the challenged curfew…was imposed in response to a declared emergency," which according to the court, demanded that respondents be given "latitude" to make "difficult decisions." (Pet. App. at 117a). Instead of questioning the lack of evidence, the court backdoored its analysis with conclusory remarks and circular logic, declaring that "government responses to [civic] emergencies are more likely to satisfy heightened scrutiny," because "governments are better able to justify actions taken in response to civic exigencies." (*Id*.).

However, whatever "leeway" governments may enjoy, this Court has never approved action "whose necessity is supported by no evidence" whatsoever. *Cooper v. Harris*, 581 U.S. 285, 306 (2017).

2. *Generic harms are insufficient*. The Court has "long warned against" defining compelling needs "at an artificially high level of generality." *Does 1-3 v.*

Mills, 142 S. Ct. 17, 20 (2021). "[S]trict scrutiny demands a more precise analysis," one that cannot occur without "specific application" to "*this* community." *Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring)(emphasis in original)(alteration added); *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963)(noting that "[p]recision" is the "touchstone" in adjudicating our "most precious freedoms.")(alteration added).

The court's decision recognized petitioners' allegations that at the time of the curfew, criminal behavior was "extremely limited" and being committed by "a small number of individuals" in a few discrete areas of the City. (Pet. App. at 120a). It also acknowledged that "daily arrests were then lower than they had been" in the several months prior to the protests. (*Id.* at 119a). Even the DOI report – upon which the court heavily relied – confirmed that over 90% of all arrests made during the entire protest period were for petty, non-violent, misdemeanor offenses, just as petitioners' complaint had alleged.[5] Yet, rather than afford these allegations weight or analyze the scarcity of criminal behavior in comparison to the population of the City as a whole – less than .0002% of which were engaging in any form of serious crime – the court found there to be "no question" that a compelling need for the curfew existed. (*Id.* at 119a).

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[5] The DOI report indicates that there were 2048 *total* arrests from May 28th through June 6th. Of those arrests, 1853 were for petty offenses related to public disorder or disobedience to police authority and only 8% were for felony offenses. *See* DOI Report, at pp. 8-26.

It reasoned that "there is always a compelling public interest in stopping violence and lawless destruction of property," *even if* those acts are "relatively small or limited [in] number." (*Id*. at 120a). But there is crime and violence in any city, and the suggestion that a compelling need will, ipso facto, *always* exist regardless of any particularized inquiry is a marked departure from the "[p]recision" that this Court has called the "touchstone" of fundamental rights. *Button*, 371 U.S. at 438 (alteration added)(emphasis added). It is also exactly the type of "high level of generality," *Mills*, 142 S. Ct. at 20, that this Court has cautioned against.

Apart from this sweeping assertion, the court fixated on the complaint's acknowledgment that there were "tumultuous and confrontational moments in some areas in the City and even incidents of looting, destruction of property, and violence." (Pet. App. at 120a). In the court's view, this singular statement outweighed the totality of allegations suggesting that such activity was extremely minimal. (*Id*. at 119a-121a). In this respect, its analysis bore a striking resemblance to its decision, which this Court reversed, in *Natl. Rifle Assn. of Am. v. Vullo*, 602 U.S. 175 (2024). There, the Court criticized the Second Circuit's choice to "tak[e] the complaint's allegations in isolation" and its "fail[ure] to draw reasonable inferences" in petitioners' favor on matters affecting fundamental rights. *Id.* at 177–78 (alteration added). The same isolated analysis exists here, which also appears to have "contributed to its mistaken conclusion" on strict scrutiny. *Id*. at 199 (Gorsuch, J., concurring).

Consider too, the court's attempt here – as it did in *Vullo* – to manufacture "obvious alternative

explanation[s]" to "defeat[] plausibility." *Id*. at 195 (alteration added)(internal citations and quotations omitted). Rather than infer, for example, that lower crime rates at the time plausibly suggested that the City was *safer* immediately preceding the curfew, the court concluded that COVID and its attendant "limits on public activity" were solely responsible for this statistical trend. (Pet. App. at 119a). However, it seems fallacious to assume that people intent on committing crime would have curbed their behavior in response to COVID. One might even conclude that COVID presented a perfect opportunity to commit acts of lawlessness while others were sheltered in place. "Of course, discovery in this case might show" that certain statistics "should be understood differently," *Vullo*, 602 U.S. at 195, but the Second Circuit went to great lengths to avoid any discovery on these issues, which speaks to the need for this Court's review.

3. *No evidence that the curfew addressed the need*. To regulate in the area of fundamental rights, the government "must have [] a 'strong basis in evidence' to conclude that [the] remedial action was *necessary*, '*before*" it implements a specific course of conduct." *Wisconsin Legis.*, 595 U.S. at 404 (emphasis in original)(citation omitted). As this Court explained in *Turner*, this requires a showing that the action taken "will *in fact* alleviate the[] harms in a direct and material way." *Id.* at 664 (alteration added). Therefore, a court "must examine carefully" not only the need, but also "the *extent* to which [the need] [is] *served* by the challenged regulation." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499 (1977)(emphasis added)(alteration added). Were it otherwise, "a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

The opinion below skipped this analysis entirely. There was no discussion of a curfew's *general* effectiveness – or lack thereof – in preventing or deterring crime. (*See id.* at 118a-134a). And there was no mention of the reasons, if any, that respondents believed that a citywide curfew in *this* case would effectively prevent or deter crime. (*See id.*). Instead, just as the District Court had done, the Second Circuit simply assumed that an adult curfew – imposed on millions of law-abiding citizens – would serve to deter the criminal acts of a small few. This assumption was flawed for several reasons.

First, it is presumed that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." *Bartnicki v. Vopper*, 532 U.S. 514, 529–30 (2001). Therefore, as Chief Justice Roberts has explained, a "prophylaxis-upon-prophylaxis approach," which involves stacking additional criminal penalties on top of existing penal laws "requires that we be particularly diligent in scrutinizing the law's fit." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 221 (2014)(internal citations and quotations omitted). The rationale being that those who are intent on lawlessness in the face of existing criminal penalties are unlikely to be deterred by additional sanctions. *See, e.g.*, *Watchtower Bible and Tract Socy. of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 169 (2002)("it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance.").

Any such scrutiny was conspicuously absent from the court's decision here. Even worse, there was no logical reason to believe that the additional, *less severe*, penalties imposed by the curfew in this case would succeed in deterring crime where *harsher* penalties imposed by existing criminal statutes had failed. See, e.g., *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011)("In the face of [the State's] contribution limits [and] strict disclosure requirements...it is hard to imagine what marginal corruption deterrence could be generated by [an additional measure]")(alteration in original).

Second, neither the District Court nor the Court of Appeals required respondents to provide any reason why imposing a curfew on *law-abiding* residents would serve to deter the criminal acts of non-law-abiding individuals. (*See id.* at). As this Court has commented, it would be "quite remarkable" to conclude that suppressing the fundamental rights of "law-abiding [individuals]" is permissible in order to "deter conduct by a non-law-abiding third party." *Bartnicki*, 532 U.S. at 529–30 (alteration added).

Third, the decision acknowledged that the one-week curfew was imposed *"after"* the first curfew "had *proved inadequate* to curb escalating crime." (Pet. App. at 125a). Put another way, what basis would there be for respondents to determine that an additional curfew would "in fact" serve their goal of reducing crime "in a direct and material way," *Turner,* 512 U.S. at 664, when the first curfew had "proved inadequate" to accomplish the very same goal? (Pet. App. at 125a).

To be sure, even if respondents had "good reasons" to conclude that a curfew "might" work, it does not

establish the requisite conclusion that a curfew imposed on millions was "demanded" by the circumstances. *Wisconsin Legis.*, 595 U.S. at 403–04. A true strict scrutiny standard will never be met where, as here, there is "no evidence" to show that the curfew was an effective means "of deterring such conduct." *Bartnicki*, 532 U.S. at 530–31 (strict scrutiny not met where there was "no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions").

4. *No evidence of less restrictive means*. Where fundamental rights are concerned, this Court has historically found "[b]road prophylactic rules" to be "suspect." *Button*, 371 U.S. at 438 (alteration added). "[E]ven [if] the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)(alteration added). "Under strict scrutiny, the government must adopt 'the least restrictive means of achieving a compelling state interest." *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021).

The Second Circuit's tailoring analysis was almost universally focused on what it called the "limited scope of the challenged curfew." (Pet. App. at 124a). In the court's view, narrow tailoring was established as a matter of law because the curfew was "limited to one week," and left people "free to travel wherever they wished for fifteen hours of each day." (*Id.* at 127a).

This Court has rejected such a narrow view of strict scrutiny, instructing instead that "[t]he breadth of legislative abridgment must be viewed in the light

of less drastic means for achieving the same basic purpose." *Americans for Prosperity*, 594 U.S. at 610–11 (alteration added). "Put another way, so long as the government can achieve its interests in a manner that does not burden [a fundamental right], it must do so." *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 541 (2021)(alteration added). The government must prove that other alternatives "will not work" to alleviate the particular harms sought to be cured. *Mast*, 141 S. Ct. at 2433 (Gorsuch, J., concurring)(alteration added).

Much like the court's ipse dixit in other portions of its strict scrutiny analysis, its conclusion that the curfew came "only after contemplating alternative courses of action" fares no better. (Pet. App. at 122a). Absent here as well, was any evidence or elaboration as to what these "alternative courses" actually were. (*Id*. at 122a-134a). Instead of requiring respondents to "show[] that they seriously undertook to address the problem with less intrusive tools readily available to [them]," *McCullen v. Coakley*, 573 U.S. 464, 494 (2014)(alteration added), the court found that respondents had "*apparently*" done so, (Pet. App. at 129a), by virtue of their refusal to "seek intervention by the National Guard," (*id*.), and their "initial[]," (*id*. at 123a), choice not to implement a curfew.

The court then supplied its own reasons to reject the alternatives proposed by petitioners – notwithstanding the lack of evidence that respondents had ever considered them. It opined, for example, that the "unpredictab[ility]," (*id*. at 119a-120a), of criminal activity would have rendered a narrower curfew, cabined to the specific areas of the City where criminality

was occurring, futile. (*See id*. at 130a). Yet, the decision acknowledged, that even according to respondents' own DOI report, the highest incidents of criminal activity were limited to 6 specific areas – comprising less than 1% of the curfew's geographic reach. (*See id*. at 84a; 88a; 6a). These areas also *all* happened to be the City's most well-known commercial districts, where even the most uninformed observer might reasonably expect to be the focal point of any criminal activity. At minimum, it raises questions as to whether more focused policing would have been equally, if not more, effective than committing millions of individuals to house arrest who were nowhere near these locations. It is also difficult to accept the court's straw man proposition that limiting the curfew to *commercial* districts might raise Equal Protection concerns. (*Id*. at 131a(n.31)).[6]

The court also found narrow tailoring evidenced by the curfew's exceptions for "police officers, firefighters, persons engaged in certain essential work, persons in need of medical care or supplies, and homeless persons without access to shelter." (*Id*. at 125a). It did not discuss, however, the curfews' failure to provide any exceptions for other lawful – yet necessary – activities like, for instance, getting groceries, getting diapers, taking the dog out, or simply going for a walk. (*See id*.); *but see, e.g.*, *Papachristou v. City of*

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[6] There was no discussion of any *other* less restrictive measures, such as petitioners' suggestion to create more exceptions for legitimate activity. (*See id*. at 130a-131a).

Jacksonville, 405 U.S. 156, 164 (1972)(noting that those who "choose to take an evening walk" should be able to do so "without finding [themselves] staring into the blinding beam of a police flashlight.'")(alteration added).

Contemplate finally, the court's willingness to pass the curfew because it was imposed "when most law-abiding persons were already likely to be in their homes rather than traveling outside." (Pet. App. at 124a). But just as First Amendment rights are "not limited to things that do not matter much," *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), other fundamental rights are not limited to the times that people are exercising them. In the words of Justice Jackson uttered nearly a century ago, "[t]hat would be a mere shadow of freedom." *Id.* (alteration added).

This Court has never countenanced "burn[ing] the house to roast the pig." *Butler v. State of Mich.*, 352 U.S. 380, 383 (1957). But the decision here applies this logic and seeks to take it a step further. The Second Circuit would permit burning the whole neighborhood so long as a pig *might* be inside one of the houses, and then justify those actions based on whether the houses were being occupied. If "[p]recision" is indeed the "touchstone" of any infringement on fundamental rights, *id.* at 383 (alteration added), the Second Circuit's use-it-or-lose-it reasoning cannot stand.

II. Conjecture has never been sufficient to justify the abridgment of a fundamental right

Where fundamental right are involved, the burden rests with the government to "point to 'record evidence or legislative findings' demonstrating the need to

address a special problem." *Cruz,* 596 U.S. at 307. While the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised," *City of Erie v. Pap's A.M.,* 529 U.S. 277, 311 (2000)(internal citations and quotations omitted), "[t]his Court has *never* accepted mere conjecture as adequate" to carry this burden on a fundamental right. *Nixon v. Shrink Missouri Govt. PAC*, 528 U.S. 377, 379 (2000)(emphasis added)(alteration added).

As discussed in the preceding section, the Second Circuit's decision drastically departs from these principles. Worse yet, it seeks to supply the requisite "facts" to justify strict scrutiny through outside media reports whose veracity, objectivity, and accuracy is, at best, untested. This Court must disavow any notion that media narratives can justify curtailing fundamental freedoms, or that the doctrine of judicial notice can be expanded to areas so fraught with potential bias.

A. Allowing media reports to provide factual support for the abridgment of fundamental rights conflicts with this Court's precedent

Strict scrutiny requires that the government "demonstrate that the recited harms are real, not merely conjectural," *Turner*, 512 U.S. at 624, a standard that "demands more than supposition," *Mast*, 141 S. Ct. at 2433, and "requires a justification far stronger than mere speculation." *U.S. v. Natl. Treas. Employees Union*, 513 U.S. 454, 475–76 (1995).

Faced with the lack of an evidentiary record to support the house arrest of over eight million individuals, the Second Circuit created its own factual record by judicially noticing "facts" portrayed by "contemporaneous media reports." (Pet. App. at 86a(n.3); 84a-88a). Based on these "facts" – which petitioners were never allowed to challenge – the court was able to paint a picture of "criminality border[ing] on chaos" (*id*. at 133a) whereby any governmental regulation cast as "protecting the community" (*id*. at 102a) would be virtually unassailable. The problem with the court's expansive use of judicial notice in the context of fundamental rights is twofold.

1. *Inherent reasons to question the media's truth.* Under the Federal Rules of Evidence, a judicially noticed fact must be one "not subject to reasonable dispute because" it is either "generally known" within the trial court's jurisdiction, or because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b). According to the Second Circuit, the media reports it used to constitutionalize the curfew – almost all of which came from the New York Times – fit this description because of their "pervasiveness and consistency." (Pet. App. at 86a(n.3)). It held that because the reports were "largely consistent with one another in their factual accounts of specific events," (*id*. at 85a), they bore an "indicia of unquestioned accuracy," (*id*. at 86a(n.3)), thus permitting the stories told by these reports to be worthy of judicial notice as "facts generally known," (*id*. at 86a).

However, this Court has on several occasions expressed reservations that precisely illustrate why media narratives are ill-suited for judicial notice. In

Miami Herald for example, this Court referenced Justice Douglas's observation that the number of "newspapers that give a variety of views and news that is not slanted or contrived are few indeed." *Id.* at 253. Those "deep concern[s]" that existed fifty years ago are no less applicable today where media conglomeration results in news reporting that "seldom presents two sides of an issue," and "often hammers away on one ideological or political line" in order to "inculcate in its readers one philosophy, one attitude—and to make money.'" *Id.* (alteration added).

Current Justices on this Court have also voiced similar, and more far-reaching concerns about the present state of news and media. Perhaps the most forceful – and most fitting in the context of judicial notice – was Justice Gorsuch's dissent from the denial of certiorari in *Berisha*, wherein he explained that "revolutions in technology" have "deeply erod[ed]" an older "economic model that supported reporters, fact-checking, and editorial oversight," which in turn, has helped "the distribution of disinformation" to "become a profitable business." *Id.* at 2427. Moreover, as this Court noted in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024), media is now distributed through the vehicle of social media platforms, which "[l]ike the editors [and] cable operators," are all "in the business, when curating their feeds, of combining 'multifarious voices' to create a distinctive expressive offering," which results in the "unabashed[] control [of] content that will appear to users, exercising authority to remove, label or demote messages they disfavor." *Id.* at 2403–06 (alterations added).

Needless to say, reports provided by news and media now – as they did then – raise "serious questions

of diversity of information and opinion," *Miami Herald*, 418 U.S. at 250, as well as the "business incentives fostered by our new media world" that promote the dissemination of "the most sensational information as efficiently as possible without any particular concern for truth." *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting). This all calls into question the Second Circuit's use of media reports, however "consistent," (Pet. App. at 85a), to constitutionalize the curfew here, and its refusal to accept plaintiffs' "characterization" of the media reports as "sensationalistic." (*Id.* at 86a(n.3)).

2. Media influence in the modern era. By now, the media's "capacity to manipulate popular opinion and change the course of events" is beyond cavil. *Miami Herald*, 418 U.S. at 249. In no other area does there exist "in a few hands the power to inform the American people and shape public opinion." *Id.* at 250. Whether these are virtues to be extolled or demonized is of no moment, as they are realities of our modern society. And the potential for abuse that exists in "homogeneity of editorial opinion, commentary, and interpretive analysis," *id.*, cannot be understated "given the momentous changes in the Nation's media landscape," *Berisha*, 141 S. Ct. at 2430 (Gorsuch, J., dissenting), which allow for the dissemination of second-to-second media reports for "immediate consumption virtually anywhere in the world." *Id.*

The opinion below epitomizes these dangers. On the one hand, promising caution in "identifying facts" that are "sufficiently beyond controversy to warrant judicial notice," (Pet. App. at 84a), and on the other, issuing a decision steeped in media editorialization of the alleged facts being noticed. While noticeable

facts *might*, for example, arguably include statistics from a news report, they do not include characterizations of "criminality border[ing] on chaos," (*id.* at 133a), or "escalating violence and destruction," (*id.* at 93a), that "tested the ability of the police to maintain control." (*Id.* at 103a). Describing the City as having "spiraled into chaos," (*id.* at 89a), is not a judicially noticeable fact. Yet the Second Circuit's decision was replete with these narratives, which it claimed justified the curfew.

Although it is perhaps naïve to think that the judiciary is somehow immune to the vast influence of the media, this Court should not allow a decision to exist that endorses such a rule – even tacitly. As Justice Douglas repeated, "[t]he fears and doubts of the moment may loom large, but we lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees." *Lerner v. Casey*, 357 U.S. 399, 415 (1958)(Douglas, J., dissenting)(internal citations and quotations omitted). While we value the media's unfettered ability to disseminate information, the scope of our fundamental rights cannot be determined by media agenda and narrative.

B. This Court has found similar uses of judicial notice to be violative of due process

While this Court has never directly addressed the issues raised in this petition, there are analogs. The Sixth Circuit's decision in *Krause v. Rhodes*, 471 F.2d 430 (6th Cir. 1972) for example, which arose from the tragic events taking place at Kent State University during the height of the Vietnam War protests, provides some guidance. There, the Sixth Circuit dismissed plaintiffs' cause of action based on the notion

that it "ought not to limit the Governor in the exercise of his discretion to call out the National Guard to suppress a riot or insurrection." *Id.* at 440. Particularly, the Sixth Circuit held that the complaint's acknowledgement of "certain disorders" occurring on campus was a "conce[ssion] that there was disorder which had not been terminated by normal civilian controls" such that it could "take judicial notice" that a "state of insurrection" existed at the time, and ignore as "clearly contrived" any factual allegations to the contrary. *Id.* at 447.

This Court reversed, and Justice Burger, in writing for the Court, explained,

> the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that 'mob rule existed at Kent State University.' There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the courts from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed.

Scheuer v. Rhodes, 416 U.S. 232, 249–50 (1974).

Similarly, in *Garner v. State of La.*, 368 U.S. 157 (1961) the Court was troubled by the Louisiana Supreme Court's application of judicial notice to establish a "history of race relations" justifying the conclusion that "petitioners' presence at the lunch counters might cause a disturbance which it was the duty of the police to prevent." *Id.* at 173. This Court again reversed, concluding that "[t]o extend the doctrine of

judicial notice to the length pressed" would implicate due process insofar as it would deprive petitioners "any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon." *Id*.

Consider here, the Second Circuit's similar use of judicial notice to establish "criminality border[ing] chaos," (Pet. App. at 133a), in the absence of any factual record, *and* in the face of well-pled facts to the contrary. Consider too, that like the situation in *Scheuer* and *Garner*, here "[t]here was no opportunity afforded petitioners to contest the facts assumed in [those] conclusions," *Scheuer*, 416 U.S. at 249-50 (alteration added), or to "challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon." *Garner*, 368 U.S. at 173.

This Court should not permit the use of salacious, fear-soaked media narratives to perform an end run around its fundamental rights jurisprudence. As Justice Brandeis warned over a century ago, "[m]en feared witches and burnt women," *Whitney v. California*, 274 U.S. 357, 376 (1927)(Brandeis, J., concurring). And that was before mass media or the internet.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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