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

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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November 14, 2024

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

THE CITY OF NEW YORK, BILL DE BLASIO, Mayor of New York City, Individually and in his Official Capacity, ANDREW CUOMO, Governor of the State of New York, Individually and in his Official Capacity, and P.O.s JOHN DOE #1-50, Individually and in their Official Capacity, (the name John Doe being fictitious, as the true names are presently unknown),

Defendants.

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PROPOSED CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

ECF CASE

Plaintiffs Lamel Jeffery, Thaddeus Blake, and Chayse Pena, on behalf of themselves and others similarly situated, by their attorneys, Cohen & Fitch LLP, complaining of the defendants, respectfully alleges as follows:

PRELIMINARY STATEMENT

1. Plaintiffs bring this action on behalf of themselves and others similarly situated seeking class certification compensatory damages and attorney's fees pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988 for violations of theirs and others similarly situated civil rights, as said rights are secured by said statutes and the Constitutions of the State of New York and the United States.

2. Under a policy, pattern, and practice set and enforced by defendant city and state officials from June 1, 2020, through June 8, 2020, Bill De Blasio, Andrew Cuomo, the City of New York ("the City") (collectively "defendants"), the New York City Police Department ("NYPD"), and New York City Police Officers unlawfully imprisoned an entire City by legally prohibiting individuals from leaving their homes for any lawful purpose during certain hours of the day/night and/or lawfully exercising their freedom of movement, freedom of speech, their right to equal protection under the law and their right to be free from search, seizure, and arrest in the absence of probable cause in violation of the U.S. Constitution (the "Curfew Orders").

3. Further, pursuant to defendants' policy, pattern, and practice, NYPD officers stopped, searched, seized, and arrested individuals without probable cause who had committed no crime, were lawfully outside their homes and/or exercising their right to free movement, travel, free assembly, and free speech in violation of the U.S. Constitution.

4. Defendants' policy, pattern, and practice was enforced in predominantly low income, minority neighborhoods and/or otherwise in a manner that predominantly and disparately impacted individuals based on racial classifications while white affluent communities were largely permitted to violate the mandatory Curfew Orders without consequence in violation of the U.S. Constitution.

5. Defendants' policy, pattern, and practice was constitutionally unnecessary and unjustified under the circumstances, not narrowly or rationally tailored to the purported purpose for which these policies were allegedly put into practice, and overly restrictive and harsh when balanced against the dangers they were purportedly designed to prevent when far less restrictive measures were readily available in violation of the U.S. Constitution.

FACTUAL BACKGROUND

Continuing Acts of Police Violence Against the Black Community Spark Nationwide Outrage

6. By now, all but the plainly ignorant would deny that Black and minority communities across the country have historically been the epicenter for discriminatory and violent law enforcement practices from the pre-civil war Black Codes, to Jim Crow, to the unpunished perpetrators of hate crimes during the Civil Rights Movement, to the more recent racially disparate practices of Stop and Frisk.

7. This history of violence and racial injustice

at the hand of law enforcement has only been highlighted over the last decade with several high-profile killings. Some of the names include:

- Eric Garner – July 2014;
- Michael Brown – August 2014;
- Tamir Rice – November 2014;
- Freddie Gray – April 2015;
- Walter Scott – April 2015;
- Alton Sterling – July 2016;
- Philando Castile – July 2016;
- Charles Kinsey – July 2016;
- Delrawn Small – July 2016;
- Stephon Clark – March 2018;
- Botham Jean – September 2018;
- Dominique Clayton – May 2019;
- Atatiana Jefferson – October 2019;

8. Most recently, however, on March 13, 2020, Breonna Taylor was shot dead inside her own home during the execution of a search warrant; and, on May 25, 2020, George Floyd died in police custody after an officer continuously kneeled on his neck while he was in handcuffs despite his pleas for air.

9. In the wake of these incidents – especially following George Floyd's death – tens of thousands of individuals exercising their constitutional rights under the First Amendment to voice their outrage at the repulsive abuse of power that had occurred,

began protests and demonstrations in major cities across the country.

Lawful Protests and Demonstrations Take Hold in New York City on May 28, 2020

10. With the massive public outcry ignited by the death of George Floyd, years of systemic police abuses were brought to the forefront and individuals rallied across U.S. cities to demand change and accountability in law enforcement agencies.

11. New York City was no exception, and beginning on May 28, 2020, thousands of marchers, protestors, and demonstrators began gathering in various sections of the five boroughs to protest police brutality against Black and minority communities.

12. As even defendants acknowledged – albeit disingenuously – these protests were necessary and important to address the continuing and systemic racial disparities, inequities and injustices present in law enforcement practices across the country.

13. While thousands of individuals took part in the protests, even by defendants' own admission, the *vast majority* of demonstrators were peaceful and exemplified the lawful exercise of First Amendment freedoms bestowed under the United States Constitution.

The Protests Were Overwhelmingly Peaceful Punctured with Scattered Incidents of Criminal Behavior by a Select Few

14. While it was outwardly recognized by most in the City – *including defendants* – that "the vast majority of protesters [we]re there peacefully," and should be lauded for their participation in lawful and protected First Amendment activity, there were – as one might reasonably expect in any mass demonstration prompted by outrage over acts of police violence – there were tumultuous and confrontational moments in some areas in the City and even incidents of looting, destruction of property, and violence by a small number of individuals.

15. However, despite the inflammatory and racially divisive media, political and governmental commentary surrounding the protests, most observers – especially those who were actually living in New York City at the time – recognized that the majority of incidents of criminality involved property destruction and theft isolated to a few small pockets in the City.

16. Specifically, there were reports that property destruction, vandalism, and looting occurred in the Bronx to stores on Fordham Road from Webster Avenue to Jerome Avenue, in Manhattan to stores on Sixth Avenue, in Herald Square, the Diamond District, and SoHo, and in downtown Brooklyn near the Barclay Center and outside of three police precincts.

Defendants' Decision to Issue a Mandatory Citywide Curfew for the First Time in 75 Years in Response to Scattered Incidents of Low-Level Criminal Behavior

17. In response to the three days of overwhelmingly non-violent protesting and demonstration that took place between May 28th and May 31st, on June 1, 2020, defendants took the virtually unprecedented step of issuing a citywide Order, which made it illegal and unlawful for any city resident to set foot outside their home between the hours of 11:00 p.m. June 1, 2020, and 5:00 a.m. on June 2, 2020 ("June 1st Order").

18. Specifically, the June 1st Order proscribed that during the aforementioned period, "no persons or vehicles may be in public," and that "any person who knowingly violate[d] the provisions in this Order [would] be guilty of a Class B misdemeanor."

19. Thereafter, on June 2, 2020, defendants issued a second Curfew Order, which was substantially identical to the June 1st Order, but which extended and expanded the duration of citywide home confinement – namely, from the hours of 8:00 pm to 5:00 am from June 3, 2020, through June 8, 2020 ("June 2nd Order").[1]

20. Prior to the June 1st Order and June 2nd Order (collectively the "Curfew Orders"), the last

[1] Defendant De Blasio terminated the Curfew Orders a day early on June 7, 2020 under mounting pressure from politicians and civil rights organizations.

time an official curfew was imposed anywhere in New York City was in 1943, when then-mayor Fiorello LaGuardia ordered a curfew to halt Harlem protests after police shot and injured an African American soldier.

21. However, unlike the present Curfew Orders, the 1943 curfew was imposed in connection with the deployment of the National Guard in order to curb race riots had already enveloped the neighborhood, *claimed the lives* of 6 individuals and injured 495.

22. Similarly, in 1943 New York City had a small fraction of the population of the City today, and the curfew was imposed solely in Harlem and it lasted for approximately one day.

The Curfew Orders' Infringed on Fundamental Rights Guaranteed Under the Constitution

23. There is a reason that City residents and the plaintiffs herein have never been subjected to anything close to the present Curfew Orders in over 75 years – and it is not because there have been no incidents of political, social, or racial unrest in the City over that time.[2]

24. Rather, since our country was established,

[2] Indeed, there have been numerous and well documented instances of equally – if not more – vociferous and fervent protesting, demonstration and even rioting throughout the City over the last 75 years, many of which exceeded the levels of violence exhibited by the Floyd protests yet never produced a citywide house arrest

the imposition of oppressive restrictions like curfews – especially in a city the size of New York – has almost always been resoundingly outweighed by the value that our country places on personal liberties and freedoms guaranteed under the Constitution.

25. In that vein, the Supreme Court has long since recognized that "[t]he freedom to leave one's house and move about at will is 'of the very essence of a scheme of ordered liberty,'" and that as consequence "a curfew aimed at all citizens could not survive constitutional scrutiny…even though such a general curfew…would protect those subject to it from injury and prevent them from causing 'nocturnal mischief.'"[3]

26. In other words, despite even the best intentions, such sweeping prohibitions on constitutionally guaranteed rights are seldom justified unless – at the time of their enactment – there exists a *clear, imminent danger so substantial* that it would *outweigh* the fundamental freedoms that the government seeks to strip away.

27. Yet from June 1, 2020, through June 7, 2020 defendants' Curfew Orders did just that, making it illegal for millions of city residents to exercise their freedom of movement, freedom of speech, freedom of assembly and/or otherwise leave their home for any reason – outside of medical necessity – during

[3] Bykofsky v Boroough of Middletown, 429 US 964, 964-65 (1976).

the hours set forth in the Order (which for all but the first day of the Curfew Order began at a time when it was still daylight out).[4]

By All Objective Measures, there was Absolutely No Justification to Confine Millions of Individuals to House Arrest for Nine Hours a Day

28. The Curfew Orders were based on non-descript claims that their imposition was "necessary to protect the City and its residents from severe endangerment and harm to their health, safety and property," and that the specific times chosen were because the acts that purportedly "severe[ly] endanger[ing]" the health, safety, and property of the city's residents were allegedly "happening primarily during the hours of darkness, and [was] especially difficult to preserve public safety during such hours."

29. However, even the language of the Curfew

[4] The only exceptions to this rule were for "police officers, peace officers, firefighters, first responders and 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." Peculiarly, however, essential workers were made exempt only if they were working, yet all other enumerated individuals – i.e. first responders – were exempt regardless of whether they were on or off duty. In other words, if an off-duty police officer wanted to go outside for an evening stroll, they were free to do so while their non-officer neighbor was confined to house arrest. Such an absurd distinction only exemplifies the haste and thoughtlessness of the Curfew Orders in the first instance.

Orders belies the severity and extent of the alleged "severe endangerment," indicating only that "demonstration activities were subsequently *escalated,* by *some* persons, to *include* actions of assault, vandalism, property damage, and/or looting."

30. First, it was abundantly clear – to all those living in the city, not blindly hypnotized by the sensationalistic media coverage and governmental commentary which sought to prey on racial tensions and stoke fear – that the extent to which the protest/demonstrations had "escalated" into criminal behavior was extremely limited.

31. Further, generic claims of "act[s]" of assault, vandalism, property damage, and/or looting committed by "*some persons*" in a city of *millions* during demonstrations involving *tens of thousands* – which defendants admittedly were overwhelmingly peaceful – is woefully insufficient to justify the blanket confinement, detainment, seizure of millions against their will.

32. By way of comparison – and assuming *arguendo* that arrests are a measure of criminality – there were approximately 1,000 arrests (250 per day) that occurred during the 4 days of protesting in New York City before the imposition of the curfew.

33. By contrast, *before* the protests and the outbreak of COVID-19, there were approximately 31,643 arrests made in New York City in January and February alone – and average of 536 *per day*.

34. In other words, before the "escalated" demonstrations, millions of City residents went about their daily life without the necessity of a curfew despite the fact that the City was statistically at least *50% more dangerous* – with *more than twice the number of daily arrests* – than it was during the Floyd protests.

35. Similarly, the NYPD's COMPSTAT statistics, which records *reported* crime, shows that the in the week *preceding* the issuance of the Curfew Orders, reports of the NYPD's Major 7 offenses (Murder, Rape, Robbery, Felony Assault, Burglary, Grand Larceny, Grand Larceny Auto) were actually down over 20%, meaning that the overwhelming majority of criminality that occurred during the protests, prior to the curfew, was for non-violent offenses such as vandalism, theft, and property damage.

36. In short, while the Curfew Orders claim that they were "necessary to protect the City and its residents from severe endangerment and harm to their health [and] safety," the objective criteria that the City normally uses to showcase rises and falls in criminal activity shows that the City as a whole was actually *significantly safer* during the Floyd Protests then it was during normal, non-curfew periods.

37. Indeed, if ever there was a question about the comparative urgency and necessity of the City's Curfew Orders, one need only look to the fact that similar measures were *NEVER* put in place to curb the spread of COVID-19 despite the fact that the

virus had actually caused the deaths of thousands and it was widely believed that staying at home would curb the spread.[5]

Defendants' Inconsistent Statements Regarding the Purpose of the Order

38. Notwithstanding that there was no evidence to support defendants' claims of imminent danger necessary to justify such broad restrictions on fundamental liberties, defendants' own public statements also contradicted the alleged purpose of the Curfew Orders.

39. In fact, defendant De Blasio repeatedly stated that the Curfew Orders were merely "new tool[s]" to "magnify [defendants'] ability to control the situation" and to "strengthen the strategies" of law enforcement to curb criminal activity.

40. While it may very well be true that confining millions of people to house arrest will have a crime reduction effect, this is a far cry from a truly emergent situation that would present the clear and present danger of severe and imminent harm to justify such an unprecedented restriction.

41. By way of analogy, for years people used to justify the NYPD's Stop and Frisk practices by claiming its effect on crime reduction, but *whatever* truth those claims may have had, its arguable utility as a useful law enforcement "tool" or "strategy" ultimately could not justify violating the rights of millions. The same is true for defendants'

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[5] Defendants have repeatedly promulgated their COVID-19 slogan of: "Stay Home, Stop the Spread, Save Lives."

Curfew Orders.

Defendants Failure to Balance the "Need" for a Curfew Against other Concerns or Consider Less Restrictive Alternatives to Accomplish the Same Goals

42. Not only was there no emergent or imminent danger that would have necessitated the Curfew Orders – orders which relegated the entire population of one of the largest cities in the world to house arrest – lacking, but the breadth, scope, and severity of the Curfew Orders were grossly disproportionate to any purported need for them in the first instance.

43. For instance, per the Curfew Orders, "any person who knowingly violate[d] the provisions in th[e] Order[s] [was] guilty of a Class B misdemeanor."

44. This is an extremely harsh penalty, a conviction for a B Misdemeanor carries potential penalties of up to 90 days imprisonment, one year of probation and/or a fine of up to five hundred dollars ($500), not to mention that a conviction carries with it a permanent criminal record, which could have untold future consequences in terms of employment, etc.

45. However, rather than consider these consequences, defendants simply slapped their Curfew Orders on millions of residents under threat of criminal liability without thinking about whether there was a less severe method of accomplishing the same alleged goals of safety.

46. For example, perhaps defendants could have considered a *civil fine* or *non- criminal* sanction for violation of the Curfew Orders; perhaps they could have considered a less prohibitive time frame – especially since by all known accounts, the severe instances of criminal behavior were happening after midnight; perhaps defendants might have considered a more narrow location restriction – namely, to retail areas of the City where nearly all serious incidents were occurring; or, perhaps they could have created exceptions for the Curfew Order for individuals who were in close proximity to their own personal residence.

47. Any one of these measures would have at least been arguably justified and balanced in relation to the rights infringed upon and the purported necessity of the Curfew Orders and would have minimized the deprivation of liberty on millions.

The Curfew Orders Occurred at a Time When Being Outside in Any Capacity Was a Mental Health Necessity

48. In addition to the lack of any attempt to balance the "need" for the Curfew Orders with the fundamental liberty interests of millions, there was also an utter lack of thought concerning the timing of the Order in light of the already prohibitive environment which had existed for months following the emergence of COVID-19.

49. In particular, for months individuals have been substantially restricted – out of fear, safety

concerns, and social distancing measures – from engaging in the normal life activities that millions had enjoyed prior to the pandemic.

50. Accordingly, simply getting out of their homes responsibly – even for moments at a time – was an absolute mental health necessity for millions.

51. Indeed, both state and local governments in New York had recognized that "[g]etting outdoors to walk, jog, hike, garden, ride a bicycle or visit a park are healthy ways to stay active, spend time with your family, and reduce stress and anxiety while engaging in social distancing strategies."

52. Thus, defendants' Curfew Orders were not only a grossly disproportionate restriction on fundamental constitutional liberties but were also a needless restriction on one of the few ways that individuals could maintain levels of mental health after already several months of relative quarantine.

53. Accordingly, the overly oppressive restrictions on the ability of millions to simply go outside for fresh air in the evening, coupled with the restraint on their ability to responsibly exercise their right to speech and assembly in the aftermath of George Floyd's death, made the Curfew Orders all the more unjustifiable and illegal.

Defendants Arrest Approximately 1,349 for Violating the Curfew Orders

54. In addition to the seven days in which defendants' Curfew Orders effectively sentenced

the entire city to house arrest, defendants also arrested and summonsed approximately 1,349 individuals for allegedly violating the Curfew Orders.

55. Further, the claims made by defendant De Blasio to deflect criticism over the Curfew Orders – namely, that he "understood" that there would be many who would simply be "going about their business or on their way home," and that individuals engaged in such lawful activities would "not run the risk of a confrontation with police" – proved to be false.

56. In fact, more people were arrested for violating the Curfew Orders than were arrested for being engaged in the very criminal behavior that the Curfew Orders were purportedly implemented to protect in the first place.

57. As a result, the plaintiffs herein – and over one thousand other New Yorkers – were subject to police confrontation in the form of stops, searches, seizures, arrests, handcuffing, summonses, and criminal prosecutions for doing nothing more than being outside of their homes in public after 8 p.m, and engaging in activity which would have been otherwise lawful in the absence of the Curfew Orders.

The Disproportionate Enforcement of the Curfew Orders in a Racially Disparate Manner

58. In addition to the unconstitutional enactment and enforcement of the Curfew Orders

as a whole, the impacts of the Curfew Orders were acutely felt by residents of predominantly Black and minority neighborhoods.

59. Specifically, the plaintiffs herein, as well as other Black and minority individuals, comprise only 40% of the City's total population, *YET* somehow managed to receive nearly 70% of the curfew arrests and summonses (over 2 times as many as their white counterparts) during the defendants' enforcement of the Curfew Orders.

60. This number does not account for the additional hundreds to thousands of individuals who were stopped, seized, and/or searched as the result of allegedly violating defendants' Curfew Orders.

61. In other words, while defendant De Blasio's assurances that individuals engaged in legitimate and lawful behavior would not "risk confrontation with police," was likely true in predominantly white neighborhoods, the same was *not true* in Black and minority neighborhoods where City's house arrest was strictly enforced thereby further compounding the unconstitutionality of their conduct.

Millions of New Yorkers that Were Falsely Imprisoned in Their Homes for Seven Days

62. In addition to the thousands of individuals who were falsely stopped, searched, seized, arrested, and/or summonsed for allegedly violating the Curfew Orders, millions of New Yorkers remained otherwise imprisoned within their own

homes during the Curfew Orders.

63. These individuals were forced to stay inside for nine hours a day for a week, never venturing into the fresh air for a moment between dusk till dawn, lest they risk police confrontation, arrest, and/or prosecution for violating blatantly unconstitutional Curfew Orders.

64. In short, in a time where stress levels were already at a peak and the need for some quantum of stress relief outdoors – if even for a moment – was at its greatest due to the COVID-19 pandemic, defendants forced millions of law-abiding residents to suffer to stress and deprivation of liberty of house arrest for an entire week, all because of the petty criminal behavior of a scattered few.

The Racially Divisive Curfew Orders Were Constitutionally Overbroad and Unnecessary Under the Circumstances and Recompense Must be Made to Those Affected

65. As a result of defendants' unconstitutional Curfew Orders, thousands of New Yorkers were deprived of their freedom of movement and assembly, freedom of speech and subjected to deprivations of liberty in the form of stops, searches, seizures, arrests, summonses, handcuffing, and criminal prosecution for doing nothing more than being outside of their homes in public after 8 p.m and engaged in otherwise lawful activity.

66. The enforcement of the Curfew Orders was visited primarily, predominantly, and

impermissibly on Black and minority residents of New York City in violation of their constitutional guarantees of Equal Protection under the law.

67. As a result of defendants' unconstitutional Curfew Orders, millions of New Yorkers were falsely imprisoned, deprived their freedom of movement, freedom of speech and unconstitutionally deprived of their liberty in the form of house arrest under threat of confrontation with police, search, seizure, arrest and/or criminal prosecution.

68. These Curfew Orders were unnecessary and unjustified under the circumstances as criminal activity prior to the imposing of the Curfew Orders was quite limited in scope, severity, and location.

69. These Curfew Orders were unconstitutionally overbroad, and not narrowly or rationally tailored to the purported dangers for which they were designed to protect.

70. The Curfew Orders were overly severe in comparison to the dangers presented prior to their institution and overly restrictive, severe, and unbalanced in proportion to the liberty interest at stake and the level of their constitutional infringement.

71. These unconstitutional and illegal acts degrade, humiliate, and cause harm to their victims. Individuals are forced to suffer unwarranted deprivations of personal liberty with untold mental and personal consequences. The fact that this policy has since ended is of no assistance

to the millions of New Yorkers already affected by Curfew Orders. Justice requires that defendants be held accountable for their oppressive, unreasonable, and unconstitutional behavior.

72. This action is brought pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988, and the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

73. Jurisdiction is founded upon 28 U.S.C. §§ 1331, 1343(a) and 1367.

VENUE

74. Venue is properly laid in the Eastern District of New York under U.S.C. § 1391(b), in that this is the District in which a substantial part of the events or omissions giving rise to the claim occurred and where at least one defendant resides.

JURY DEMAND

75. Plaintiffs respectfully demand a trial by jury of all issues in this matter pursuant to Fed. R. Civ. P. 38(b).

PARTIES

76. Plaintiff LAMEL JEFFERY was at all relevant times a resident of the City and State of New York.

77. Plaintiff CHAYSE PENA was at all relevant times a resident of the City and State of New York.

78. Plaintiff THADDEUS BLAKE was at all relevant times a resident of the City and State of New York.

79. Defendant CITY OF NEW YORK was and is a municipal corporation duly organized and existing under and by virtue of the laws of the State of New York.

80. Defendant CITY OF NEW YORK maintains the New York City Police Department, a duly authorized public authority and/or police department, authorized to perform all functions of a police department as per the applicable sections of the New York State Criminal Procedure Law, acting under the direction and supervision of the aforementioned municipal corporation, City of New York, who was responsible for the policy, practice, supervision, implementation, and conduct of all NYPD matters and was responsible for the appointment, training, supervision, and conduct of all NYPD personnel, including the defendants referenced herein. In addition, at all relevant times, Defendant City was responsible for enforcing the rules of the NYPD, and for ensuring that NYPD personnel obey the laws of the United States and of the State of New York.

81. That at all times hereinafter mentioned P.O.s JOHN DOE #1-50 were training, supervisory, and policy-making personnel within the NYPD who implemented, enforced, perpetuated and/or allowed the unconscionable and unconstitutional enforcement activity to occur in connection with the Curfew Orders that are the subject of this action, acting in the capacity of agents, servants, and employees of defendant City and within the scope of their employment as such.

Plaintiffs are unable to determine the names of these NYPD Supervisory defendants at this time and thus sue them under a fictitious designation.

82. At all relevant times defendant BILL DE BLASIO was the Mayor of the City of New York and, as such, was a "policymaker" who made and enforced the policies of the NYPD and the Curfew Orders that are the subject of this action, and who acted in his capacity as Mayor, agent, servant, and employee of defendant City, within the scope of his employment as such, and under color of state law.

83. At all relevant times defendant ANDREW CUOMO was the Governor of the State of New York and, as such, was a "policymaker" who influenced, directed, made and enforced the Curfew Orders and policies that are the subject of this action, and who acted in his capacity as Governor, within the scope of his employment as such, and under color of state law.

84. That at all times hereinafter mentioned the defendants, either personally or through their employees, were acting under color of state law and/or in compliance with the official rules, regulations, laws, statutes, customs, usages and/or practices of the State or City of New York and/or New York, Bronx, Kings, Queens and Richmond Counties.

85. During all times mentioned in this complaint, the defendants and each of them separately and in concert, engaged in acts and/or omissions which constituted deprivations of

plaintiffs' constitutional rights, equal protections, and the privileges and immunities of the plaintiffs, and while these acts were carried out under color of law, they had no justification or excuse and were instead illegal, improper, and unrelated to any activity in which law enforcement officers may appropriately and legally engage in the course of protecting persons and/or ensuring civil order.

CLASS ACTION ALLEGATIONS

86. Plaintiffs LAMEL JEFFERY, THADDEUS BLAKE, and CHAYSE PENA bring this action as a class action under Fed. R. Civ. P. 23(b)(3) for violations of their constitutional rights. The Rule (b)(3) Classes are comprised of all: a) all persons who were wrongfully stopped, searched, seized, arrested, detained, summonsed, and/or subjected to criminal prosecution in violation of their constitutional rights pursuant to defendants' policy, pattern and practice of enforcing unconstitutional Curfew Orders throughout the City from June 1, 2020, through June 7, 2020, who had otherwise committed no crime or violation of law; b) all individuals belonging to a suspect and protected racial classification who were disproportionately and wrongfully stopped, searched, seized, arrested, detained, summonsed, and/or subjected to criminal prosecution in violation of their constitutional rights pursuant to defendants' policy, pattern and practice of enforcing unconstitutional Curfew Orders throughout the City from June 1, 2020, through June 7, 2020, who had otherwise committed no

crime or violation of law; and, c) all individuals who were falsely imprisoned and prevented from leaving their homes under fear of arrest, seizure, criminal prosecution in violation of their constitutional rights pursuant to defendants' policy, pattern and practice of enforcing unconstitutional Curfew Orders throughout the City from June 1, 2020, through June 7, 2020, who had otherwise committed no crime or violation of law.

87. All members of the Rule (b)(3) classes were injured as a result of defendants' conduct.

88. Upon information and belief, the Rule (b)(3) classes include hundreds of thousands of individuals and is so numerous that joinder of all class members is impracticable.

89. The questions of law and fact presented by plaintiffs LAMEL JEFFERY, THADDEUS BLAKE, and CHAYSE PENA are common to other members of the class. Among others, the questions of law and fact common to the class are: (i) that defendants had a policy, pattern, and practice of enforcing unconstitutional Curfew Orders; (ii) that these Curfew Orders were enforced in a racially disparate manner; (iii) the defendants' policy, pattern, and practice caused individuals to suffer deprivations of liberty and (vi) that the appropriate compensatory remedies that will be needed to ensure that the harmful effects of this practice are nullified and remedied.

90. Common issues of law and fact such as those

set forth above (and many others) predominate over any individual issues.

91. This unconstitutional policy, pattern, and practice has resulted in the wrongful detention, charging, handcuffing, confinement, deprivation of liberty, prosecution, psychological, physical, and emotional injury of citizens who have committed no crimes or violations of law. The claims and practices alleged in this complaint are common to all members of the class.

92. The violations suffered by plaintiffs LAMEL JEFFERY, CHAYSE PENA, and THADDEUS BLAKE are typical of those suffered by the class. The entire class will benefit from the monetary relief sought.

93. Plaintiffs LAMEL JEFFERY, THADDEUS BLAKE, and CHAYSE PENA have no conflict of interest with any class members, and will fairly and adequately protect the interests of the class. Counsel that is competent and experienced in federal class action and federal civil rights litigation has been retained to represent the class. Cohen & Fitch LLP is a law firm with an office in New York City over (12) years of civil litigation experience. Further, Cohen & Fitch LLP has extensive experience in civil rights litigation against state and local governments, and the NYPD, and also has experience in class action lawsuits. Further Cohen & Fitch LLP is also experienced in police, prosecutorial, and court practices in the criminal courts throughout New York City given the fact that the partners of Cohen

& Fitch LLP were both former prosecutors and have also maintained a significant criminal defense practice. Collectively, the firm has litigated thousands of civil rights claims against the City of New York and the NYPD and has an intimate knowledge of the criminal process from arrest through prosecution.

94. This action is superior to any other method for the fair and efficient adjudication of this legal dispute, as joinder of all members is not only impracticable but impossible given the volume of the violations as well as the transient nature of the members of the class. The damages suffered by certain members of the Class, although substantial, are small in relation to the extraordinary expense and burden of individual litigation and therefore it is highly impractical for such Class members to attempt redress for damages incurred individually.

95. There will be no extraordinary difficulty in the management of the Class action.

FACTS

96. Plaintiff LAMEL JEFFERY is a twenty (20) year old African American man.

97. Plaintiff THADDEUS BLAKE is a thirty-four (34) year old African American man.

98. Plaintiff CHAYSE PENA is a twenty (20) year old Hispanic man.

The Constitutional Violations against Lamel Jeffery

99. On June 4, 2020, at approximately 10:00 p.m., plaintiff LAMEL JEFFERY was attending a barbeque in the vicinity of Eastern Parkway and Franklin Avenue, Kings County, New York.

100. At the aforesaid time and place, NYPD officers arrived and approached plaintiff who was committing no crimes or violations of law and commanded plaintiff to go inside of the building where the barbeque was occurring outside of.

101. While plaintiff did not live in that building, he informed the officers that he would go home, which was around the corner.

102. However, as plaintiff began to walk towards his home several NYPD officers aggressively stopped and tackled plaintiff and placed him in handcuffs despite having no probable cause to do so.

103. Plaintiff was verbally, physically, and mentally abused by the officers although he had committed no crimes or violations of law.

104. Plaintiff was then taken into NYPD custody and held for approximately ten (10) hours, where plaintiff was not free to leave until the officers released him without charges.

The Constitutional Violation Against Thaddeus Blake

105. On June 5, 2020, at approximately 8:39 p.m. plaintiff THADDEUS BLAKE was in the vicinity of

350 East 143 Street, in Bronx County, New York.

106. At the aforesaid time and place, plaintiff was lawfully standing in front of the building where he resided when NYPD officers approached plaintiff for no legitimate reason and ordered him to go inside his building.

107. At the time, plaintiff was charging his phone in an electrical outlet connected to the building and informed the officers that he would go inside but needed to first retrieve his phone.

108. However, despite having committed no crimes or violations of law, several officers aggressively approached and seized plaintiff without probable cause, slamming him to the ground and aggressively handcuffing him behind his back.

109. Plaintiff was verbally, physically, and mentally abused by the officers although he had committed no crimes or violations of law.

110. Plaintiff was then taken into NYPD custody and held for approximately five (5) hours, where plaintiff was not free to leave until the officers released him with a criminal summons requiring him to appear in court.

111. Upon information and belief, those charges will be dismissed in their entirety.

The Constitutional Violation Against Chayse Pena

112. On June 5, 2020, at approximately 10:00 p.m. plaintiff CHAYSE PENA was in the vicinity of

West 49th Street and 9th Avenue, New York County, New York.

113. At the aforesaid time and place, plaintiff was lawfully present in the neighborhood of his residence attempting to find a parking space when he was stopped by several NYPD officers in a patrol car.

114. Although plaintiff lived in the neighborhood and explained to the officers the reason he was outside, he was ordered out of his vehicle.

115. Even though plaintiff had committed no crimes or violations of law, several officers searched plaintiff and his car – yielding no contraband – and then placed him in restraints with his arms behind his back without probable cause.

116. Plaintiff was verbally, physically, and mentally abused by the officers although he had committed no crimes or violations of law.

117. Plaintiff was then taken into NYPD custody and held for approximately four (4) hours, where plaintiff was not free to leave until the officers released him with a criminal summons requiring him to appear in court.

118. Upon information and belief, those charges will be dismissed in their entirety.

The Unconstitutional Custom, Policy, and Practice of the City

119. At all relevant times, the City, acting through the NYPD, maintained an express policy,

custom and practice of unconstitutional Curfew Orders, thousands of New Yorkers were deprived of their freedom of movement and assembly, freedom of speech, freedom and subjected to deprivations of liberty in the form of stops, searches, seizures, arrests, summonses, handcuffing, and criminal prosecution for doing nothing more than being outside of their homes in public at night and engaged in otherwise lawful activity.

120. The enforcement of the Curfew Orders was visited primarily, predominantly, and impermissibly on Black and minority residents of New York City in violation of their constitutional guarantees of equal protection under the law.

121. As a result of defendants' unconstitutional Curfew Orders, millions of New Yorkers were falsely imprisoned, deprived their freedom of movement, freedom of speech and unconstitutionally deprived of their liberty in the form of house arrest under threat of confrontation with police, search, seizure, arrest and/or criminal prosecution.

122. These Curfew Orders were unnecessary and unjustified under the circumstances as criminal activity prior to the imposing of the Curfew Orders was quite limited in scope, severity, and location.

123. These Curfew Orders were unconstitutionally overbroad, and not narrowly or rationally tailored to the purported dangers for which they were designed to protect.

124. The Curfew Orders were overly severe in

comparison to the dangers presented prior to their institution and overly restrictive and unbalance in proportion to the liberty interest at stake and level of constitutional infringement.

125. The conduct of the defendants has been a substantial factor in the harassment, confinement, and deprivation of liberty suffered by the plaintiffs herein and a proximate cause of the constitutional violations and damages alleged in this complaint.

FIRST CLAIM FOR RELIEF FOR DEPRIVATION OF FEDERAL RIGHTS UNDER 42 U.S.C. § 1983

126. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in the proceeding paragraphs with the same force and effect as if fully set forth herein.

127. All of the aforementioned acts of defendants, their agents, servants, and employees, were carried out under the color of state law.

128. All of the aforementioned acts deprived plaintiffs and the members of the Class of the rights, equal protections, privileges and immunities guaranteed to citizens of the United States by the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States of America, and in violation of 42 U.S.C. § 1983.

129. The acts complained of were carried out by the aforementioned individual defendants in their capacities as policymakers, city and state officials and/or police officers with all of the actual and/or

apparent authority attendant thereto.

130. The acts complained of were carried out by the aforementioned individual defendants in their capacities as police officers, pursuant to the customs, usages, practices, procedures, and the rules of the City of New York and the New York City Police Department, all under the supervision of ranking officers of said department.

131. Defendants, collectively and individually, while acting under color of state law, engaged in conduct that constituted a custom, usage, practice, procedure, or rule of the respective municipality/authority, which is forbidden by the Constitution of the United States.

SECOND CLAIM FOR RELIEF FOR VIOLATION OF FOURTH AMENDMENT RIGHTS UNDER 42 U.S.C. § 1983

132. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in the proceeding paragraphs with the same force and effect as if fully set forth herein.

133. As a result of defendants' aforementioned conduct, plaintiffs and other members of the Class were subjected and unreasonable deprivations of liberty in the form of illegal, and improper stops, searches, seizures, detention, confinement, arrest, summonsing and criminal prosecution by the defendants, without any probable cause, privilege, consent or any legitimate basis under the law.

134. Defendants illegal Curfew Orders have caused the class to be "arrested" in their

movements without and legitimate basis to do so under the law and without probable cause to believe that they have committed any crimes or violations of law.

135. As a direct and proximate result of the misconduct and abuse of authority detailed above, plaintiffs sustained the damages hereinbefore alleges.

136. As a result of the foregoing, plaintiffs' and members of the Class' liberty was restricted for an extended period of time, and they were put in fear for their safety, were humiliated and subjected to handcuffing, and other restraints, without probable cause.

THIRD CLAIM FOR RELIEF VIOLATION OF FIRST AMENDMENT RIGHTS UNDER 42 U.S.C. § 1983

137. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in the proceeding paragraphs with the same force and effect as if fully set forth herein.

138. The actions taken by defendants violated plaintiff's first amendment right to freedom of speech and peaceably assemble.

139. Defendants' unlawful and constitutional conduct constituted a prior restraint on plaintiffs' ability to peaceably assemble and engaged in protected speech in their own neighborhoods, public sidewalks, and in areas open and freely accessible to the general public.

140. Defendants' Curfew Orders were enforced in a manner that prohibited the peaceable gathering of minority residents of New York City in their own neighborhoods.

141. Defendants' policy is designed and to keep said residents inside of their homes thereby preventing them from exercising their rights to speech and peaceably assemble on public streets and areas in violation of their rights as secured by the First Amendment.

142. The Curfew Orders have been enforced in a manner that essentially prevents minority residents in low-income neighborhoods from exercising their rights to assemble whatsoever in their own neighborhoods in areas that are and should be accessible to the public at large in violation of their rights under the First Amendment.

143. Defendants' Curfew Orders were unnecessary and unjustified under the First Amendment as the circumstances as criminal activity prior to the imposing of the Curfew Orders were quite limited in scope, severity, and location.

144. Defendants' Curfew Orders were unconstitutionally overbroad, and not narrowly or rationally tailored to the purported dangers for which they were designed to protect in violation of the First Amendment.

145. Defendants' Curfew Orders were improperly balanced under the First Amendment in that the criminal sanctions and liberty restrictions were

overly severe in comparison to the dangers presented prior to their institution.

146. As such, defendants' conduct in having an implementing said policy is in direct violation of plaintiffs' and other members of the Class, rights to freedom of speech, and assembly as secured by the First and Fourteenth Amendments.

FOURTH CLAIM FOR RELIEF VIOLATION OF FOURTEENTH AMENDMENT RIGHTS UNDER 42 U.S.C. § 1983

147. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in the proceeding paragraphs with the same force and effect as if fully set forth herein.

148. As a result of defendants' aforementioned conduct, plaintiffs and other members of the Class were subjected and unreasonable deprivations of liberty, restrictions, and prohibitions on their freedom of travel and movement in the form of unconstitutional Curfew Orders.

149. The Curfew Orders unconstitutionally restricted, prohibited, and/or otherwise curtailed plaintiffs' and other members of the Class, freedom of movement by confining them to house arrest under threat of stop, seizure, arrest, and prosecution.

150. The Curfew Orders unconstitutionally restricted, prohibited, and/or otherwise curtailed plaintiffs' freedom of movement and other members of the Class, by subjecting plaintiffs to illegal, and improper stops, searches, seizures,

detention, confinement, arrest, summonsing and criminal prosecution for doing nothing more than being in public outside of their homes.

151. Defendants illegal Curfew Orders have unconstitutionally restricted, prohibited and/or otherwise curtailed plaintiff's freedom of movement by "arresting" them in their movements and/or confining them to house arrest without and legitimate basis to do so under the law and without probable cause to believe that they have committed any crimes or violations of law.

152. Defendants' Curfew Orders were enforced in a manner that disparately affected the rights movement and travel of minority residents of New York City in their own neighborhoods.

153. Defendants' policy is designed and to keep residents inside of their homes thereby preventing them from exercising their rights to be present and move freely for lawful purposes outside of their homes on public streets and areas in violation of their rights as secured by the Fifth and Fourteenth Amendments.

154. Defendants' Curfew Orders were unnecessary and unjustified so as to deprive plaintiffs of their fundamental right to freedom of travel and movement under the Fifth and Fourteenth Amendments as the circumstances as criminal activity prior to the imposing of the Curfew Orders was quite limited in scope, severity, and location.

155. Defendants' Curfew Orders were

unconstitutionally overbroad, and not narrowly or rationally tailored to the purported dangers for which they were designed to protect, in violation of the Fifth and Fourteenth Amendment.

156. Defendants' Curfew Orders were improperly balanced under the Fifth and Fourteenth Amendments in that the criminal sanctions and liberty restrictions were overly severe in comparison to the dangers presented prior to their institution.

157. As such, defendants' conduct in having an implementing said policy is in direct violation of plaintiffs' rights, those of the Class, to freedom of movement, and travel as secured by the Fifth and Fourteenth Amendments.

158. As a direct and proximate result of the misconduct and abuse of authority detailed above, plaintiffs sustained the damages hereinbefore alleges.

159. As a result of the foregoing, plaintiffs' and members of the Class' liberty was restricted for an extended period of time, and they were put in fear for their safety, were humiliated and subjected to handcuffing, and other restraints, without probable cause.

FIFTH CLAIM FOR RELIEF VIOLATION OF EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS UNDER 42 U.S.C. § 1983

160. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in the proceeding

paragraphs with the same force and effect as if fully set forth herein.

161. The Curfew Order was enforced against plaintiff in a manner that disparately affected them based on their racial demographic in violation of their rights as secured by the Fifth and Fourteenth Amendments of the Constitution.

162. The conduct of the City has been to enforce their illegal Curfew Orders disproportionally in predominantly Black and minority neighborhoods although these Orders were constitutionally illegitimate and plaintiffs had committed no crimes or violations of law.

163. Other similarly situated white residents have not been impacted or targeted in the same manner by these illegal Curfews in violation of the rights of these racial minorities as secured by the Fifth and Fourteenth Amendments to the Constitution.

164. As a result of the foregoing, a class of plaintiffs in certain racial classifications were disproportionally subjected to heavier and stricter enforcement of the illegal Curfew Orders in the form of confrontations with police, stops, searches, seizures, arrests, restraints, confinement, and criminal prosecution without any reasonable or compelling basis in violation of their rights under the Fifth and Fourteenth Amendments.

SIXTH CLAIM FOR RELIEF FOR MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983

165. Plaintiffs repeat, reiterate and reallege each and every allegation contained in the proceeding paragraphs as if the same were more fully set forth at length herein.

166. During the seven days in which defendants Curfew Orders sentenced the entire City to house arrest, the plaintiff class was subject to police confrontation in the form of stops, searched. seizures, arrests, handcuffing, summonses, and criminal prosecutions for doing nothing more than being outside of their homes in public after 8 p.m., and engaging in activity which would have been otherwise lawful in the absence of the Curfew Orders.

167. The enforcement and impacts of the Curfew Orders were acutely felt by residents of predominantly Black and minority neighborhoods.

168. Members of the plaintiff class were unlawfully confined to house for seven days between dusk till dawn, lest they risk police confrontation, arrest and/or prosecution for violating blatantly unconstitutional Curfew Orders.

169. The acts complained of were carried out by the aforementioned individual defendants and subordinate officers of the NYPD in their capacities as police officers and officials, with all the actual and/or apparent authority attendant thereto.

170. The acts complained of were carried out by the aforementioned individual defendants and subordinate NYPD officers in their capacities as police officers and officials pursuant to the customs, policies, usages, practices, procedures, and rules of the City of New York and the New York City Police Department, all under the supervision of defendants DEBLASIO and CUOMO and other ranking officers of said department.

171. The unlawful Curfew Order was established and enforced by City and State policy-making officials within the NYPD and caused the deprivation of plaintiffs' rights and those of other Class members.

172. The aforementioned customs, policies, usages, practices, procedures, and rules of the City of New York and the New York City Police Department include, but are not limited to, the following unconstitutional practices:

i. Establishing, implanting and enforcing Curfew Orders in violation of the First, Fourth, Fifth and Fourteenth Amendments;

ii. Subjecting thousands of New Yorkers to deprivations of liberty, freedom of movement and travel, assembly and speech in the form of stops, searches, seizures, arrests, summonses, handcuffing and criminal prosecution for doing nothing more than being outside of their homes in public after 8

p.m and engaged in otherwise lawful activity;

iii. Enforcing illegal Curfew Orders primarily, predominantly and impermissibly on Black and minority residents of New York City in violation of their constitutional guarantees of equal protection under the law;

iv. Subjecting millions of New Yorkers to false imprisonment, deprivation of their freedom of movement, freedom of speech, freedom of assembly in the form of house arrest under threat of confrontation with police, search, seizure, arrest and/or criminal prosecution;

v. Establishing and enforcing Curfew Orders that were unnecessary and unjustified under the circumstances as criminal activity prior to the imposing of the Curfew Orders was quite limited in scope, severity, and location;

vi. Establishing and enforcing Curfew Orders were unconstitutionally overbroad, and not narrowly or rationally tailored to the purported dangers for which they were designed to protect;

vii. Establishing and enforcing Curfew Orders were overly severe in comparison to the dangers presented

prior to their institution and overly restrictive and unbalance in proportion to the liberty interest at stake and level of constitutional infringement.

173. The existence of the aforesaid unconstitutional customs and policies may be inferred from repeated occurrences of similar wrongful conduct as is the case with the three (3) plaintiffs in this matter as well as the City's own statements, statistics, and reports.

174. The foregoing customs, policies, usages, practices, procedures, and rules of the City of New York and the New York City Police Department constituted deliberate indifference to the safety, well-being, and constitutional rights of plaintiffs and members of the Class.

175. The foregoing customs, policies, usages, practices, procedures, and rules of the City of New York and the New York City Police Department were the direct and proximate cause of the constitutional violations suffered by plaintiffs and members of the Class as alleged herein.

176. The foregoing customs, policies, usages, practices, procedures, and rules of the City of New York and the New York City Police Department were the moving force behind the constitutional violations suffered by plaintiffs and the members of the Class as alleged herein.

177. As a result of the foregoing customs, policies, usages, practices, procedures, and rules of the City of New York and the New York City Police

Department, plaintiffs and members of the Class were subject to police confrontation in the form of house arrest, stops, searches, seizures, arrests, handcuffing, summonses and criminal prosecutions in the absence of any criminal behavior or wrongdoing.

178. As a result of the foregoing customs, policies, usages, practices, procedures, and rules of the City of New York and the New York City Police Department, plaintiffs and members of the Class were caused to appear in court to be prosecuted unconstitutionally and in many instances causing them to lose time from work or school in violation of their constitutional rights.

179. As a result of the foregoing customs, policies, usages, practices, procedures, and rules of the City of New York and the New York City Police Department, plaintiffs and members of the Class were targeted based on an impermissible classification under the Equal Protection Clause of the Fourteenth Amendment, their race.

180. As a result of the foregoing customs, policies, usages, practices, procedures, and rules of the City of New York and the New York City Police Department, plaintiffs and members of the Class were deprived of their rights to liberty, speech, assembly, movement and travel under the First, Fourth, Fifth and Fourteenth Amendments to the Constitution.

181. Defendants, collectively and individually, while acting under color of state law, were directly

and actively involved in violating the constitutional rights of plaintiffs and members of the Class.

182. Defendants, collectively and individually, while acting under color of state law, acquiesced in and encouraged a pattern of unconstitutional conduct by subordinate police officers, and were directly responsible for the violation of the constitutional rights of plaintiffs and members of the class.

183. All of the foregoing acts by defendants deprived plaintiffs and members of the Class of federally protected rights, including, but not limited to, the right:

ii. Not to be deprived of liberty without due process of law;

iii. To be free from search, seizure and arrest not based upon probable cause;

iv. Freely move lawfully outside one's home;

v. To receive equal protection under the law;

vi. To peaceably assemble and express free speech.

WHEREFORE, plaintiffs and members of the Class request the following relief jointly and severally as against all of the defendants:

1. A judgment declaring that defendants have committed the violations of law alleged in this action;

2. Compensatory damages against all defendants in an amount to be proven at trial;

3. Punitive damages against all defendants, except the City, in an amount to be proven at trial;

4. An order awarding disbursements, costs, and attorneys' fees pursuant to 42 U.S.C. § 1988; and

5. Such other further relief that the court may deem just and proper.

Dated: New York, New York
June 26, 2020

BY:_____/S_____
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THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, NY 10007

EMERGENCY EXECUTIVE ORDER NO. 118

DECLARATION OF LOCAL STATE OF EMERGENCY

June 1, 2020

WHEREAS**,** on March 12, 2020, the City issued a Declaration of Emergency Related to the presence of COVID-19 in the City ("COVID-19 Declaration of Emergency"); and

WHEREAS, Emergency Executive Order No. 98, issued March 12, 2020, and extended by Emergency Executive Order No. 112, issued May 9, 2020, contains a declaration of a state of emergency in the City of New York due to the threat posed by COVID-19 to the health and welfare of City residents, and such declaration remains in effect; and

WHEREAS, large gatherings increase the potential for spread of the virus; and WHEREAS**,** peaceful demonstrations began in the City in

response to the death of George Floyd, a Black man in Minneapolis who died after one or more officers knelt on his neck, the latest in a long line of deaths of Black men and women that have spurred protests across our nation, but demonstration activities were subsequently escalated, by some persons, to include actions of assault, vandalism, property damage, and/or looting; and

WHEREAS**,** the City remains subject to State and City Declarations of Emergency related to the novel coronavirus disease, COVID-19; and

WHEREAS, the violent acts have been happening primarily during the hours of darkness, and it is especially difficult to preserve public safety during such hours;

WHEREAS, the imposition of a curfew is necessary to protect the City and its residents from severe endangerment and harm to their health, safety and property; and

WHEREAS, on June 1, 2020 I declared a state of emergency to exist within the City of New York,

NOW, THEREFORE, pursuant to the powers vested in me by the laws of the State of New York and the City of New York, including but not limited to the New York Executive Law § 24(1)(a), the Charter and Administrative Code of the City of New York, and the common law authority to protect the public in the event of an emergency:

Section 1. A state of emergency is hereby

declared to continue to exist within the City of New York.

Section 2. I hereby order a City-wide curfew from 8:00pm on June 2, 2020 until 5:00am on June 3, 2020. During this time, no persons or vehicles may be in public.

Section 3. This Order shall not apply to police officers, peace officers, firefighters, first responders and 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. "Essential work" is work performed by essential businesses or entities as defined or permitted by the Empire State Development Corporation.

Section 4. This Order shall take effect immediately. Sections 2 and 3 of this Order shall remain in effect through June 3, 2020 unless rescinded, superseded, or amended by further Order. Failure to comply with this Order shall result in orders to disperse, and any person who knowingly violates the provisions in this Order shall be guilty of a Class B misdemeanor.

Bill de Blasio,
MAYOR

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, NY 10007

EMERGENCY EXECUTIVE ORDER NO. 119

June 2, 2020

WHEREAS**,** on March 12, 2020, the City issued a Declaration of Emergency Related to the presence of COVID-19 in the City ("COVID-19 Declaration of Emergency"); and

WHEREAS, Emergency Executive Order No. 98, issued March 12, 2020, and extended by Emergency Executive Order No. 112, issued May 9, 2020, contains a declaration of a state of emergency in the City of New York due to the threat posed by COVID-19 to the health and welfare of City residents, and such declaration remains in effect; and

WHEREAS, large gatherings increase the potential for spread of the virus; and

WHEREAS**,** peaceful demonstrations began in the City in response to the death of George

Floyd, a Black man in Minneapolis who died after one or more officers knelt on his neck, the latest in a long line of deaths of Black men and women that have spurred protests across our nation, but demonstration activities were subsequently escalated, by some persons, to include actions of assault, vandalism, property damage, and/or looting; and

WHEREAS**,** the City remains subject to State and City Declarations of Emergency related to the novel coronavirus disease, COVID-19; and

WHEREAS, the violent acts have been happening primarily during the hours of darkness, and it is especially difficult to preserve public safety during such hours;

WHEREAS, the imposition of a curfew is necessary to protect the City and its residents from severe endangerment and harm to their health, safety and property; and

WHEREAS, on June 1, 2020 I declared a state of emergency to exist within the City of New York,

NOW, THEREFORE, pursuant to the powers vested in me by the laws of the State of New York and the City of New York, including but not limited to the New York Executive Law § 24(1)(a), the Charter and Administrative Code of the City of New York, and the common law authority to protect the public in the event of an

emergency:

Section 1. I hereby order a City-wide curfew to be in effect each day from 8:00pm until 5:00am, beginning at 8:00pm on June 3, 2020 and ending at 5:00am on June 8, 2020. During this time, no persons or vehicles may be in public between the hours of 8:00pm and 5:00am.

Section 2. This Order shall not apply to police officers, peace officers, firefighters, first responders and 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. "Essential work" is work performed by essential businesses or entities as defined or permitted by the Empire State Development Corporation.

Section 3. This Order shall take effect immediately. Failure to comply with this Order shall result in orders to disperse, and any person who knowingly violates the provisions in this Order shall be guilty of a Class B misdemeanor.

Bill de Blasio,
MAYOR

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, NY 1007

EMERGENCY EXECUTIVE ORDER NO. 117

DECLARATION OF LOCAL STATE OF EMERGENCY

June 1, 2020

EMERGENCY EXECUTIVE ORDER

WHEREAS**,** on March 12, 2020, the City issued a Declaration of Emergency Related to the presence of COVID-19 in the City ("COVID-19 Declaration of Emergency"); and

WHEREAS, Emergency Executive Order No. 98, issued March 12, 2020, and extended by Emergency Executive Order No. 112, issued May 9, 2020, contains a declaration of a state of emergency in the City of New York due to the threat posed by COVID-19 to the health and welfare of City residents, and such declaration remains in effect; and

WHEREAS, large gatherings increase the

potential for spread of the virus; and WHEREAS**,** peaceful demonstrations began in the City in response to the death of George Floyd, a Black man in Minneapolis who died after one or more officers knelt on his neck, the latest in a long line of deaths of Black men and women that have spurred protests across our nation, but demonstration activities were subsequently escalated, by some persons, to include actions of assault, vandalism, property damage, and/or looting; and

WHEREAS**,** the City remains subject to State and City Declarations of Emergency related to the novel coronavirus disease, COVID-19; and

WHEREAS, the violent acts have been happening primarily during the hours of darkness, and it is especially difficult to preserve public safety during such hours; and

WHEREAS, the imposition of a curfew is necessary to protect the City and its residents from severe endangerment and harm to their health, safety and property;

NOW, THEREFORE, pursuant to the powers vested in me by the laws of the State of New York and the City of New York, including but not limited to the New York Executive Law § 24(1)(a), the Charter and Administrative Code of the City of New York, and the common law authority to protect the public in the event of an emergency:

Section 1. A state of emergency is hereby declared to exist within the City of New York.

Section 2. I hereby order a City-wide curfew from 11:00pm on June 1, 2020 until 5:00am on June 2, 2020. During this time, no persons or vehicles may be in public.

Section 3. This Order shall not apply to police officers, peace officers, firefighters, first responders and 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. "Essential work" is work performed by essential businesses or entities as defined or permitted by the Empire State Development Corporation.

Section 4. This Order shall take effect immediately. This Order shall remain in effect through June 2, 2020 unless rescinded, superseded, or amended by further Order. Failure to comply with this Order shall result in orders to disburse, and any person who knowingly violates the provisions in this Order shall be guilty of a Class B misdemeanor.

Bill de Blasio,
MAYOR

UNITED STATES DISTRICT COURT
EASTERN DISTRJCT OF NEW YORK

LAMEL JEFFERY, THADDEUS BLAKE, and CHAYSE PENA, on behalf of themselves and others similarly situated,

Plaintiffs,

-against-

THE CITY OF NEW YORK, ERIC ADAMS, Mayor of New York City, in his Official Capacity, BILL DE BLASIO, Former Mayor of New York City, Individually, ANDREW CUOMO, Former Governor of the State of New York, Individually, and P.O.s JOHN DOE #1-50, Individually and in their Official Capacity, (the name John Doe being fictitious, as the true names are presently unknown),

Defendants.

MEMORANDUM & ORDER

20-CV-2843 (NGG) (RML)

NICHOLAS G. GARAUFIS, United States District Judge.

Plaintiffs bring this putative class action against New York City (the "City") and its current Mayor Eric Adams, and former Mayor Bill de Blasio (individually, "current Mayor" and "former Mayor," and, together with the City, the "City Defendants"); the former Governor of New York State, Andrew Cuomo (the "former Governor");

and 50 unnamed New York Police Department officers, challenging the constitutionality of the temporary curfew imposed in New York City in early June 2020. The former Governor filed a motion to dismiss the complaint in its entirety. (Gov.'s Mot. to Dismiss (Dkt. 24); Gov.'s Mem. in Supp. of Mot. to Dis- miss ("Gov.'s Mot.") (Dkt. 25); Reply in Supp. of Gov.'s Mot ("Gov.'s Reply") (Dkt. 28).) The City Defendants filed a partial motion to dismiss. (City Defs.' Mot. to Dismiss (Dkt. 19); City Defs.' Mem. in Supp. of Mot. to Dismiss ("City's Mot.") (Dkt. 20); Reply in Supp. of City's Mot. ("City's Reply") (Dkt. 23).) The court held oral argument via videoconference on April 21, 2021. (Apr. 21, 2021 Min. Entry.)

For the reasons explained below, the former Governor's motion to dismiss the complaint and the City Defendants' partial motion to dismiss certain claims against them are GRANTED.

I. BACKGROUND

The following facts are taken from the complaint, which the court accepts as true when deciding a motion to dismiss. *See Harris v. Mills,* 572 F.3d 66, 71 (2d Cir. 2009).

A. The New York City Curfew

Beginning in late May 2020, demonstrations against police brutality and racial discrimination arose in New York City and around the globe, triggered in large part by the murder of George Floyd by former Police Officer Derek Chauvin on May 25, 2020. (Compl. ¶¶ 10-11.) The

demonstrations in New York City were predominantly peaceful, with some isolated incidences of violence, looting, and property damage. *(Id.* ¶¶ 13-16.)

On June 1, 2020, in response to the widespread protests, a citywide overnight curfew was imposed. *(Id.* ¶¶ 17-18; *see also* June 1, 2020 Exec. Order No. 117 (Dkt. 25-1).) The initial cur- few, which, with certain exceptions, barred individuals from leaving their residences, applied from 11:00 p.m. on June 1 to 5:00 a.m. on June 2. (Compl. ¶¶ 17-18.)

On June 2, a second order was issued, which extended the over- night curfew to remain in place until June 7, and which expanded the applicable hours to last from 8:00 p.m. each night to 5:00 a.m. each morning. *(Id.* ¶ 19.) The curfew was repealed on June 6, one day prior to its anticipated expiration. *(Id.* ¶ 19 n.1.)

B. The Parties

Defendants are the City of New York, its former Mayor Bill de Blasio, individually, and current Mayor Eric Adams, in his official capacity; the former Governor of the State of New York Andrew Cuomo in his individual capacity;[1] and 50 unnamed New York Police Department ("NYPD") officers. *(Id.* ¶ 2.)

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[1] The Complaint asserted claims against Governor Cuomo in his individual and official capacities. On November 23, 2020, the parties entered a stipulation dismissing, with prejudice, the official capacity claims against the former Governor. (Stip. (Dkt. 18).)

Each named Plaintiff is a New York City resident who was arrested for being outside of his residence while the curfew was in effect. Plaintiffs also allege that, in total, approximately 1,349 individuals were arrested and summonsed for violating the curfew, and that those arrests were made in a racially disparate manner. *(Id.* ¶¶ 54, 58, 66.) Plaintiffs further allege that the curfew resulted in the false imprisonment of millions of New Yorkers by confining them to their homes while it was in effect. *(Id.* ¶¶ 62-63, 67.)

1. Lamel Jeffery

On June 4, Plaintiff Lamel Jeffery was attending a barbeque at Eastern Parkway and Franklin Avenue in Brooklyn, New York. *(Id.* ¶¶ 99-100.) Around 10:00 p.m., he was approached by NYPD officers, who directed him to enter the adjacent building. *(Id.* ¶ 100.) Jeffery, who lived around the comer, responded that he would go home and began walking toward his residence. *(Id.* ¶¶ 100-102.) The officers then "aggressively stopped and tackled him," and "verbally, physically, and mentally abused" him. *(Id.* ¶ 103.) After being taken into custody and held for ten hours, he was released without charges. *(Id.* ¶ 104.)

2. Thaddeus Blake

On June 5, Plaintiff Blake was outside of his residence near 350 East 143 Street, in Bronx County, New York. *(Id.* ¶¶ 105-106.) At approximately 8:39 p.m., he was approached by NYPD officers who directed him to enter the

building. *(Id.* '1106.) He replied that he would retrieve his phone, which was charging nearby, and then would go inside. *(Id.* ¶¶ 106-107.) The officers then "aggressively approached and seized him without probable cause, slamming him to the ground and aggressively handcuffing him behind his back." *(Id.* ¶¶ 108.) He was taken into custody and held for five hours before he was released with a criminal sum- mons, which Plaintiffs allege will be dismissed in its entirety. *(Id.* **¶¶110-11.)**

3. Chayse Pena

On June 5, Plaintiff Pena was in his car at West 49th Street and Ninth Avenue in Manhattan. *(Id.* '1112.) He was stopped by several NYPD officers at approximately 10:00 p.m. *(Id.* ¶¶ 113-14.) He explained to the officers that he lived nearby and was looking for parking. *(Id.)* The officers then searched his car and placed him in restraints with his arms behind his back. *(Id.* ¶ 115.) He was taken into custody and held for four hours before he was released with a criminal summons, which Plaintiffs allege will be dismissed in its entirety. *(Id.* ¶¶ 117-18.)

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face."' *Ashcroft v. Iqba4* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)).[2] "A claim has facial plausibility

[2] When quoting cases, and unless otherwise noted, all

when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "In deciding a motion pursuant to Rule 12 (b)(6), the Court must liberally construe the claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff." *Brown v. Omega Moulding* Co., No. 13-cv-5397 (SJF) (ARL), 2014 WL 4439530, at *2 (E.D.N.Y. Sept. 9, 2014) *(citing Aegis Ins. Services, Inc. v. 7 World Trade* Co., *L.P.,* 737 F.3d 166, 176 (2d Cir. 2013)). However, "mere labels and conclusions or formulaic recitations of the elements of a cause of action will not do; rather, the complaint's factual allegations must be enough to raise a right to relief above the speculative level." *Arista Records, LLC v. Doe 3,* 604 F.3d 110, 120 (2d Cir. 2010). "In assessing the legal sufficiency of a claim, the court may consider those facts alleged in the complaint, as well as documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." *Patane v. Clark,* 508 F.3d 106, 112 (2d Cir. 2007). The court may also take judicial notice of media coverage related to the allegations in the Complaint. *See 421-ATenants Ass'nv. 125 Court St. LLC,* 760 Fed. App'x. 44, 49 n.4 (2d Cir. 2019).

III. THE FORMER GOVERNOR'S MOTION TO DISMISS

Plaintiffs assert constitutional claims against the

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citations and quotation marks are omitted, and all alterations are adopted.

former Gover- nor, in his individual capacity, under 42 U.S.C. § 1983. He argues that all claims against him should be dismissed because the com- plaint fails to plead his personal involvement in the alleged wrongdoing. The court agrees.

A. Applicable Law

To state a plausible claim for relief under § 1983, a plaintiff must plead ((the elements of the underlying constitutional violation directly against the official." *Tangreti v. Bachmann,* 983 F.3d 609, 620 (2d Cir. 2020). This standard requires the plaintiff to plead "defendant's personal involvement in the alleged constitutional deprivation" with specific factual support. *Grullon v. City of New Haven,* 720 F.3d 133, 138 (2d Cir. 2013); *Williams v. City of New York,* 2005 WL 2862007, at *3 (S.D.N.Y. Nov. 1, 2005). Personal involvement may be established by pleading that the defendant directly participated in the challenged conduct, or by alleging that:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who com- mitted the wrongful acts, or (5) the defendant exhibited deliberate indifference

> to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995).

Moreover, "[p]leadings that do not differentiate which defendant was involved in the unlawful conduct are insufficient to state a claim." *Ying Li v. City of New York,* 246 F. Supp. 3d 578, 598 (E.D.N.Y. 2017) (citing *Wright v. Orleans Cnty.,* No. 14-cv-0622A, 2015 WL 5316410, at *13 (W.D.N.Y. Sept. 10, 2015) (In a §1983 case, "[g]roup pleading is insufficient for purposes of Rule 8(a)(2) [of the FRCP] which requires a short and plain statement of the claim showing that the pleader is entitled to re- lief.").)

B. Discussion

Plaintiffs fail to plead the former Governor's personal involvement in the allegedly wrongful conduct. The complaint, which is 183 paragraphs long, references former Governor Cuomo in only three paragraphs, alleging that:

> Bill de Blasio, Andrew Cuomo, the City of New York ..., the New York City Police Department ("NYPD"), and New York City Police Officers unlawfully imprisoned an entire City by legally prohibiting individuals from leaving their homes for any lawful purpose during certain hours of the day/night and/or lawfully exercising their freedom of movement, freedom of speech, their right to equal protection under the law and their right to be

> free from search, seizure, and arrest in the absence of probable cause in violation of the U.S. Constitution,

(Compl. ¶¶ 2);

> At all relevant times defendant ANDREW CUOMO was the Governor of the State of New York and, as such, was a (policymaker' who influenced, directed, made and enforced the Curfew Orders and policies that are the subject of this action, and who acted in his capacity as Governor, within the scope of his employment as such, and under color of state law,

(id. ¶¶ 83); and

> The acts complained of were carried out by the aforementioned individual defendants and subordinate NYPD officers in their capacities as police officers and officials pursuant to the customs, policies, usages, practices, procedures, and rules of the City of New York and the New York City Police Department, all under the supervision of defendants DEBLASIO and CUOMO and other ranking officers of said department,

(id. ¶¶ 170) (emphases in original).

The complaint fails to distinguish what, if anything, former Governor Cuomo allegedly did to enact, implement, or enforce the allegedly unconstitutional curfew. And to the extent that it points to the state as a higher authority or incorporates, by reference, the former Governor's

press release concerning the curfew, the allegations against the former Governor remain inadequate. *See Ying Li,* 246 F. Supp. 3d at 599 ("[T]he mere listing of [defend- ants] as supervisors in a press release is insufficient to create an inference of personal involvement absent further allegations."); *see also Colon,* 58 F.3d at 873-74 ("The bare fact that [the defendant] occupies a high position in [] New York ... is insufficient to sustain [plaintiffs] claim."). The undifferentiated group pleadings in the Complaint are inadequate to allege either direct participation or policy-making involvement by the former Governor in the alleged violations. All claims against the former Governor are therefore dismissed.

IV. THE CITY DEFENDANTS' MOTION TO DISMISS

Plaintiffs claim, *inter alia,* that the curfew unconstitutionally burdened their fundamental rights to freedom of movement and freedom of speech, and that it violated Fourth Amendment protections against false arrest and false imprisonment. The City Defendants move to dismiss most of Plaintiffs' claims against them,[3]

[3] Plaintiffs also claim that the curfew was selectively enforced in violation of their constitutional rights. (Compl. ¶¶ 4, 58-61.) In support of that claim, they allege that 70% of the curfew arrests and summonses were issued to Black and minority New Yorkers-over twice as many as for white New Yorkers, although Black and minority New Yorkers comprise only 40% of the City's population. *(Id.*¶ 59.) The City Defendants do not challenge this claim.

arguing that the curfew was lawful on its face and that Plaintiffs' arrests were therefore supported by probable cause. *(See* City's Mot. at 5-19.) The City Defendants also seek dismissal of the claims against the former Mayor in his individual capacity on qualified immunity grounds and for failure to allege his per- sonal involvement in executing the curfew. *(See id.* at 19-22.)

A. Standard of Review

When considering whether a government action unconstitutionally burdens a movant's rights, the court first "ascertain[s] the appropriate level of scrutiny" to apply. *Ramos v. Town of Vernon,* 353 F.3d 171, 174 (2d Cir. 2003). The City Defendants contend that the curfew was a valid exercise of emergency power under the standard described in *United States v. Chalk,* 441 F.2d 1277 (4th Cir. 1971), *cert. denied,* 404 U.S. 943 (1971), while Plaintiffs argue that the curfew was subject to- and unsustainable under-strict scrutiny review. In the alternative, Plaintiffs argue that, if the court were to accept the City Defendants' proposed standard, the question of whether an emergency existed is a factual dispute which requires discovery and which cannot be resolved on a motion to dismiss. *As* explained below, the court concludes that heightened scrutiny applies and that the curfew was valid under that review.

(City's Reply at 1 n.1.) Nor do they challenge Plaintiffs' municipal liability claims against the City.

1. The Tiers of Scrutiny

In general, laws that do not discriminate based on membership in a suspect or quasi-suspect class and that do not burden fundamental or important rights are subject to rational basis review. *See Ramos,* 353 F.3d at 174-75. "A law will survive this level of scrutiny unless the plaintiff proves that the law's class-based dis- tinctions are wholly irrational." *Id.* at 175.

Intermediate scrutiny-a more searching standard-applies to laws that discriminate based on membership in a quasi-suspect class or that burden an important, though not constitutional, right. *See United States v. Coleman,* 166 F.3d 428, 431 (2d Cir. 1999) (per curiam). "Under intermediate scrutiny, the government must show that the challenged legislative enactment is substantially related to an important governmental interest." *Ramos,* 353 F.3d at 175.

Strict scrutiny, the most stringent of the three tiers, applies to laws that discriminate based on membership in a protected class or that burden a fundamental right. *See Plyler v. Doe,* 457 U.S. 202, 216-17 (1982). To satisfy strict scrutiny, the government must show that its selected means were narrowly tailored to serve its compelling interest. *Reno v. Flores,* 507 U.S. 292, 301-02 (1993).

2. The Fourth Circuit's Deferential Chalk Standard

In *Chalk,* the Fourth Circuit upheld arrests

executed for violating an emergency curfew that had been imposed by the mayor of Asheville, North Carolina, in response to violent clashes between high school students and police. 441 F.2d at 1278. The court, reviewing the mayor's authority to declare a state of emergency along with the constitutionality of the curfew itself, reasoned that the mayor's action fell within his "broad discretion necessary for the executive to deal with an emergency situation." *Id.* at 1280. Accordingly, the court declared that "the scope of our review in a case such as this must be limited to a determination of whether the mayor's actions were taken in good faith and whether there is some factual basis for his decision that the restrictions imposed were necessary to maintain order." *Id.* at 1281.

B. Freedom of Movement

1. Level of Scrutiny

Plaintiffs contend, and the court agrees, that the curfew burdened fundamental rights guaranteed by the First, Fourth, and Fourteenth Amendments and, therefore, is subject to strict scrutiny review. Freedom of movement, which includes the freedom to travel within a state, is a well-established fundamental right. *See Williams v. Town of Greenburgh,* 535 F.3d 71, 75 (2d Cir. 2008). Curfews, which innately hold "impeding travel [as] [their] primary objective[s]," are quintessential restrictions on travel. *Att'y Gen. of N.Y. v. Soto-Lopez,* 476 U.S. 898, 903 (1986) ("A state law implicates the right to travel when it actually

deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right."); *Ramos,* 353 F.3d at 176. And where government action burdens adults' fundamental right to travel, strict scrutiny applies. *Gaffney v. City of Allentown,* No. 97-cv-4455, 1997 WL 597989, at *4 (E.D. Pa. Sept. 17, 1997).

The City Defendants contend that the tiers of scrutiny are inapplicable because of the emergency circumstances of civil unrest in which the curfew was enacted. They ask this court to apply the Fourth Circuit's deferential *Chalk* standard. The court, guided by Second Circuit reasoning in *Ramos,* declines this invitation.[4] In *Ramos,* the

[4] Meanwhile, Plaintiffs' discussion of *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63 (2020)–to argue for heightened review–and the City Defendants' analogy to *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, 38 (1905)–to argue for more deferential review–are both similarly misplaced. Courts agree that *Roman Catholic Diocese,* in which the Supreme Court held that New York's capacity limitations were not neutral toward religion, and, therefore, were subject to–and fatally flawed under–strict scrutiny review, does not extend outside of the Free Exercise context. *See, e.g., Butler v. City of New York,* No. 20-cv-4067 (ER), 2021 WL 4084501, at *5 (S.D.N.Y. Sept. 8, 2021) (collecting cases). Nor does *Jacobson,* in which the Court upheld Massachusetts' smallpox vaccine mandate under what amounted to rational basis review, extend so far be- yond its public health context to reach the security interest implicated here. In his *Roman Catholic Diocese* concurrence, Justice Gorsuch underscores the importance of these distinctions, explaining that *Jacobson* was inapposite to the Free Exercise question because it "involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction."

Second Circuit considered the constitutionality of a generally applicable juvenile curfew. 353 F.3d 171. Because the curfew restricted the narrower juvenile right to freedom of movement, the court applied intermediate scrutiny and concluded that the curfew was unconstitutional. *Id.* at 176. The court reasoned, however, "that were this ordinance applied to adults, it would be subject to strict scrutiny." *Id.*

There is no reason for this court to depart from the Second Circuit's reasoning in *Ramos.* Here, the curfew burdened the well- settled and fundamental right to intrastate travel. Thus, it is subject to strict scrutiny. *See Ramos,* 353 F.3d at 175; *see also Johnson v. City of Cincinnati,* 310 F.3d 484, 502 (6th Cir. 2002) (applying strict scrutiny to ordinance barring certain individuals from entering certain neighborhoods); *Embry v. City of Clover- port, KY,* No. 02-cv-560 (JGH), 2004 WL 191613, at *2 (W.D. Ky. Jan. 22, 2004) (applying strict scrutiny to curfew order). Accordingly, the next question for the court is whether the curfew orders were "narrowly tailored to achieve a compelling governmental interest."[5]

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141 S. Ct. at 70 (Gorsuch, J., concurring).

[5] The court agrees with Plaintiffs' position that, if it were to apply the *Chalk* standard, dismissal would be inappropriate on a motion to dismiss. *See WWBITV, Inc. v. Vil. of Rouses Point,* 589 F.3d 46, 51 (2d Cir. 2009) (whether "a genuine emergency exists is a factual issue").

2. Discussion

The government has a "legitimate and compelling state interest in protecting the community from crime." *Schall v. Martin,* 467 U.S. 253, 264 (1984); *see also Gaffney,* 1997 WL 597989, at *5 (preventing crime is a compelling state interest). Although Plain- tiffs allege that violence, looting, and conflict were not widespread, they concede that episodes of unrest occurred in various neighborhoods in the city. This is adequate to establish the compelling state interest. *See In re New York City Policing During Summer 2020 Demonstrations,* No. 20-cv-8924 (CM) (GWG), 2021 WL 2894764, at *18 (S.D.N.Y. July 9, 2021) (holding that there was a compelling state interest for the curfew). The central inquiry is therefore whether the curfew was narrowly tailored to achieve that end. *See Pyke v. Cuomo,* 567 F.3d 74, 77 (2d Cir. 2009).

Defendants have established an adequately close nexus between the goal of protecting public safety and the enactment of the curfew to further that goal. Here, unlike the generally applicable juvenile curfew in *Ramos,* the duration of the curfew was limited in time and was updated to respond to the changing circumstances in the city: The first Executive Order enacted a one-night curfew, lasting from 11:00 p.m. to 5:00 a.m.; a subsequent Executive Order extended the hours from 8:00 p.m. to 5:00 a.m. and extended the date range to June 7; and a later Executive Order terminated the curfew on June 6, one day prior to its planned expiration.

C*f Embry,* 2004 WL 191613, at *3 (invalidating curfew that was not time-limited on the grounds that it was not narrowly tailored). For its entire duration, the curfew applied only during nighttime hours, when, Defendants argue, law enforcement faces greater difficulties in preserving public safety. *See al.so In re New York City Policing During Summer 2020 Demonstrations,* 2021 WL 2894764, at *18. And, with episodes of violence occurring in various parts of different boroughs, the court agrees that the City was justified in enacting the curfew as a citywide measure. Accordingly, the freedom of movement challenge is dismissed.

C. Freedom of Speech

Plaintiffs also contend that the curfew was an unlawful restriction on speech. The court disagrees. "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark v. Cmty. for Creative Nonviolence,* 468 U.S. 288, 293 (1984). Where, as here, the regulation is imposed "without reference to the content of regulated speech," it is valid as long as it is "narrowly tailored to serve a significant government interest" and "leave[s] open ample alternative channels for communication of the information." *Id.*

Applying that standard, the court concludes that the curfew was a valid content-neutral restriction on the time, place, and manner of Plaintiffs' expression. As explained, the compelling government interest in public safety is well-established, and the temporary curfew, which was

modified twice in response to changing circumstances, was narrowly tailored to achieve that end. In addition, the curfew left open "ample alternative channels" for expressive activity. At its most restrictive, the curfew was in effect for no more than nine hours each night, leaving fifteen hours per day in which the curfew was not in effect and in which New Yorkers were not restricted from exercising their speech rights. The court therefore concludes that the curfew did not violate the First Amendment on its face. *See In re New York City Policing During Summer 2020 Demonstrations,* 2021 WL 2894764, at *18 (upholding the June 2020 curfew as a valid restriction on speech).

D. Fourth Amendment Search and Seizure

The City Defendants move to dismiss Plaintiffs' Fourth Amendment claims that their arrests were unlawful seizures, arguing that probable cause for violating the curfew existed. (Mot. at 17-19.) "Probable cause...constitutes...a complete defense to an action for false arrest." *Weyant v. Okst,* 101 F.3d 845, 852 (2d Cir. 1996). "In general, probable cause to arrest exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Id.* According to Plaintiffs, they were each violating the curfew when they were arrested, and they do not allege that they were permitted to do so by any of the curfew's

exceptions. (Compl. ¶¶ 99-101, 105-106, 112-113.) Therefore, their arrests were lawful under the Fourth Amendment. *See Atwater v. City of Lago Vista,* 532 U.S. 318, 354 (2001) (upholding arrests based on probable cause "even [for] a very minor criminal offense").

The City Defendants also argue for dismissal of the claim that the curfew falsely imprisoned millions of New Yorkers in their homes. False imprisonment claims, like false arrest claims, follow the law of the state where the arrest occurred. *See Russo v. City of Bridgeport,* 479 F.3d 196,203 (2d Cir. 2007). Under New York law, a movant "must show, *inter alia,* that the defendant intentionally confined him without his consent and without justification." *Weyant,* 101 F.3d at 852. Here, the lawfulness of the curfew justifies the alleged false imprisonment. Accordingly, these claims are also dismissed.

E. Claims Against the Former Mayor in His Individual Capacity[6]

The former Mayor argues that all claims against him in his individual capacity related to the enforcement of the curfew should be dismissed because Plaintiffs failed to allege his personal involvement on those claims. *(Id.)* As discussed, to

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[6] The City Defendants argue that claims against the former Mayor in his individual capacity relating to the enactment of the curfew should be dismissed since he is entitled to qualified immunity (City's Mot. at 19-22.) However, the court need not address this argument since the court has dismissed Plaintiffs' claims regarding the curfew's facial constitutionality.

be liable under Section 1983, a defendant must have been personally involved in the alleged constitutional violation. *See Wright v. Smith,* 21 F.3d 496, 501 (2d Cir. 1994). "A plaintiff must therefore allege facts that would, if proven, establish the government official's personal involvement in the violation of the plaintiffs rights." *In re New York City Policing During Summer 2020 Demonstrations,* 2021 WL 2894764, at *15.

Plaintiffs failed to accomplish that task here. They cite several public statements made by former Mayor Bill de Blasio concerning the purpose and enforcement of the curfew orders. (Compl. ¶¶ 39, 55, 61.) They also incorporate by reference the orders themselves, *(id.* ¶¶ 17-20, 19 n.1.), which were each signed by the former Mayor *(see* June **1,** 2020 Exec. Order No. 117; June 1, 2020 Exec. Order No. 118 (Dkt. 25-2); June 2, 2020 Exec. Or-der No. 119 (Dkt. 25-3); June 5, 2020 Exec. Order No. 121 (Dkt. 25-4); June 7, 2020 Exec. Order No. 122 (Dkt. 25-5)). However, as explained, it was not unlawful for the former Mayor to enact the curfew. And Plaintiffs have not alleged any facts that would suggest that the former Mayor was personally involved in selectively enforcing the curfews against some New Yorkers and not others. Accordingly, the former Mayor's motion to dismiss the claims against him in his individual capacity are granted.[7]

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[7] On January 20, 2022, the court received Plaintiffs' letter requesting clarification of the court's January 14, 2022

V. CONCLUSION

For the reasons explained above, the motions are resolved as follows:

1. All claims against the former Governor are DISMISSED.
2. All claims alleging that the curfew was facially unconstitutional are DISMISSED.
3. All claims alleging that the arrests were unlawful are DIS- MISSED.
4. All claims alleging false imprisonment are DISMISSED.
5. All claims against the former Mayor in his individual capacity are DISMISSED.
6. The selective enforcement and municipal liability claims are SUSTAINED.

The City Defendants are directed to answer the Complaint within 14 days of this decision. Plaintiffs and the City Defendants are directed to confer and contact Magistrate Judge Robert M. Levy for next steps on the remaining claims.

The clerk of the court is respectfully directed to remove former Governor Cuomo from the case

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Order to reflect that the substitution of Eric Adams for Bill de Blasio not be extended to individual capacity claims, and requesting that the court's November 12, 2022 Order substituting Kathy Hochul for Andrew Cuomo be rescinded. In light of the court's decision to dismiss the claims against former Governor Cuomo and former Mayor de Blasio in their individual capacities, the court need not further address Plaintiffs' letter.

caption.

SO ORDERED.

Dated: Brooklyn, New York
January 21, 2022

/s/ Nicholas G. Garaufis
Nicholas G. Garaufis
United States District Judge

22-2745-cv
Jeffery v. City of New York

In the

United States Court of Appeals
for the Second Circuit

AUGUST TERM 2023

No. 22-2745-cv

LAMEL JEFFERY, THADDEUS BLAKE,
AND CHAYSE PENA,

Plaintiffs-Appellants,

v.

CITY OF NEW YORK; ERIC ADAMS, in his official capacity as Mayor of the City of New York; BILL DE BLASIO, in his individual capacity; and ANDREW CUOMO, in his individual capacity,

Defendants-Appellees.*

SUBMITTED: SEPTEMBER 14, 2023

DECIDED: AUGUST 16, 2024

Before: RAGGI, LOHIER, and CARNEY,
Circuit Judges.

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* The Clerk of Court is respectfully directed to amend the caption as set forth above.

Plaintiffs appeal from a judgment of the United States District Court for the Eastern District of New York (Garaufis, *J.*) dismissing this § 1983 putative class action for money damages sustained when, in June 2020, plaintiffs were arrested for violating a week-long nighttime curfew imposed by New York City in response to violence and destruction attending demonstrations protesting the death of George Floyd at the hands of Minneapolis police. Plaintiffs submit that the curfew violated rights protected by the First, Fourth, and Fourteenth Amendments to the Constitution, particularly, the right to travel, which this court has recognized to apply intrastate. They submit that the district court correctly determined that the curfew had to withstand strict scrutiny to survive their right-to-travel challenge, but erred in concluding at the pleadings stage that the curfew withstood such scrutiny. Assuming that strict scrutiny applies to the challenged curfew, dismissal was warranted because the pleadings, considered together with judicially noticeable facts, demonstrate that the curfew (1) served a compelling governmental interest in curbing escalating crime and restoring public order and (2) was narrowly tailored to that interest, thereby precluding plaintiffs from stating a plausible right-to-travel claim. *See* Fed. R. Civ. P. 12(b)(6).

AFFIRMED.

Joshua P. Fitch, Cohen & Fitch LLP, New York, NY, *for Plaintiffs-Appellants*.

Jesse A. Townsend (Sylvia O. Hinds-Radix, Corporation Counsel, Richard Dearing, Rebecca L. Visgaitis, *on the brief*), *for* City of New York; Eric Adams, in his official capacity; and Bill de Blasio, in his individual capacity, *Defendants-Appellees*.

Nicole Gueron, Clarick Gueron Reisbaum LLP, New York, NY, *for* Andrew Cuomo, in his individual capacity,
Defendant-Appellee.

REENA RAGGI, *Circuit Judge*:

At issue on this appeal is a constitutional challenge to a nighttime curfew imposed throughout New York City ("City") for the one-week period between June 1 and June 7, 2020, in response to violence and destruction attending certain public demonstrations protesting the May 25, 2020 death of George Floyd at the hands of Minneapolis police ("Floyd demonstrations"). At the time, City residents were already subject to various restrictions imposed to control the spread of the COVID-19 virus, including a 10-person limit on

public gatherings.[1] Plaintiffs Lamel Jeffery, Thaddeus Blake, and Chayse Pena were each arrested for violating the challenged curfew in circumstances unrelated to the referenced Floyd demonstrations or the COVID-19 limitations. In this action filed in the Eastern District of New York (Nicholas G. Garaufis, *Judge*), plaintiffs sued the City; former City Mayor Bill de Blasio; former New York State Governor Andrew Cuomo; and 50 unnamed City police officers, seeking a declaration that the curfew, on its face, violated their constitutional rights to travel, to assemble, to be free from unlawful arrest, and to equal protection of law, as secured by the First, Fourth, and Fourteenth Amendments to the Constitution. Pursuant to 42 U.S.C. § 1983, plaintiffs also seek money damages from these defendants for their constitutional violations.

Plaintiffs now appeal from so much of a final judgment entered in the district court on September 23, 2022, as dismissed their right-to-travel challenge for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). Plaintiffs maintain that the district court correctly determined that a right-to-travel challenge to a curfew triggers strict scrutiny, but they argue that the court erred in concluding as a matter of law at the pleadings stage that the challenged curfew here withstands

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[1] See N.Y. Comp. Codes R. & Regs. tit. 9, § 8.202.33 (2020) (May 22, 2020 state order prohibiting non- essential gatherings of more than ten individuals); City of N.Y., Emergency Exec. Order No. 115 (May 24, 2020 City order authorizing same).

such scrutiny. Assuming that strict scrutiny is the appropriate standard for review of plaintiffs' right-to-travel challenge, we conclude that dismissal was warranted in this case. Even when viewed "in the light most favorable to plaintiffs," the facts alleged in plaintiffs' complaint, considered together with "all matters of proper judicial notice and public record," *Melendez v. City of New York*, 16 F.4th 992, 996– 97 & n.2 (2d Cir. 2021), admit a single conclusion, *i.e.*, that the challenged curfew—implemented against the highly unusual and well-documented confluence of a deadly global pandemic and nationwide Floyd demonstrations—(1) served compelling governmental interests in curbing escalating crime and restoring public order, and (2) was narrowly tailored to those interests. *See Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (stating strict scrutiny standard). Accordingly, we affirm the challenged judgment of dismissal.

BACKGROUND

I. City Demonstrations and Criminal Activity Following the Death of George Floyd

On May 25, 2020, Minneapolis police officers arrested George Floyd, a 46- year-old African-American man, for allegedly buying cigarettes with a counterfeit $20 bill. This court has recognized that "[w]hat happened next," both in Minneapolis and across the nation, "is now well known":

> When Floyd resisted sitting in the back

> seat of the police squad car, saying he was claustrophobic, three officers pinned him face-down on the ground. A white officer knelt on Floyd's neck for nearly ten minutes while Floyd repeatedly said he could not breathe. Floyd was pronounced dead that night, and video of his encounter with the police went viral, sparking major protests against police brutality and racism in Minneapolis and around the country.

Connecticut State Police Union v. Rovella, 36 F.4th 54, 59 (2d Cir. 2022).

As plaintiffs acknowledge, in the City, such protests involved thousands of persons and spanned all five boroughs: "[B]eginning on May 28, 2020, thousands of marchers, protestors, and demonstrators began gathering in various sections of the five boroughs to protest police brutality against Black and minority communities." Compl. ¶ 11. Plaintiffs allege that the vast majority of demonstrators were "peaceful," *id.* ¶ 13, a point that defendants do not dispute, *see* City Appellees' Br. at 6. Nevertheless, as plaintiffs further acknowledge, there were "tumultuous and confrontational moments in some areas in the City," *id.* ¶ 14, and "severe instances of criminal behavior," *id.* ¶ 46, including "looting, destruction of property, and violence by a small number of individuals," *id.* ¶ 14. To illustrate, the complaint references "reports" of "property destruction,

vandalism, and looting" in the Bronx along Fordham Road; in Manhattan along Sixth Avenue, in Herald Square, in the Diamond District, and in SoHo; and in Brooklyn near the Barclays Center and outside three police precincts. *Id.* ¶ 16.

While the Complaint does not identify the specific "reports" referenced, it is apparent that it alludes to contemporaneous news reports. In considering such reports, we are mindful that a court must exercise "caution" in identifying facts contained therein as sufficiently "beyond controversy" to warrant judicial notice for the truth of what they state. *International Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998). That is particularly so on a Rule 12(b)(6) motion for dismissal, where plaintiffs lack an opportunity for discovery or an evidentiary hearing. *See, e.g.*, *Melendez v. City of New York*, 16 F.4th at 997 n.2 (collecting cases); *United States v. Strock*, 982 F.3d 51, 63 (2d Cir. 2020); *Oneida Indian Nation of N.Y. v. State of New York*, 691 F.2d 1070, 1086 (2d Cir. 1982).

Thus, at the outset, we note that our judicial notice of facts reported by the media is here limited as follows. We take judicial notice of media reports insofar as they detail widely documented events that plaintiffs themselves reference or generally acknowledge in their pleadings. *See NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 149 n.1 (2d Cir. 2012) (stating that this court assumes plaintiffs' allegations to be true "unless conclusory or contradicted by more

specific allegations or documentary evidence"); *see generally Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1095 (2d Cir. 1995) (declining to credit plaintiff's "attenuated allegations" insofar as they "are contradicted both by more specific allegations in the Complaint and by facts of which we may take judicial notice"). We also take notice of news reports insofar as they demonstrate the sort of information available to City officials at the time of the challenged curfew. *Cf. United States v. Nieves*, 58 F.4th 623, 633–34 (2d Cir. 2023) (taking judicial notice of news articles, not for truth, but to assess how to probe venire for potential bias in light of news coverage). Finally, we take notice that media reports of violence and destruction in the City at the time here at issue were not episodic but, rather, pervasive, largely consistent with one another in their factual accounts of specific events, and subsequently confirmed in a detailed public report of the City's Department of Investigation ("DOI").[2] Given the highly unusual confluence of a

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[2] See New York City Dep't of Investigation, Investigation into NYPD Response to the George Floyd Protests (Dec. 2020) ("DOI Report"), nyc.gov/assets/doi/reports/pdf/2020/DOIRpt.NYPD%20Response.%20GeorgeFloyd%20Protests.12.18.2020.pdf [perma.cc/4HJG-2BFC]. The DOI is "the City's independent inspector general," DOI's Mission and History, nyc.gov/site/doi/about/mission.page [perma.cc/5H99-WLAN], broadly authorized by law "to make any study or investigation" which it deems "in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency," N.Y.C. CHARTER § 803(b). Every City officer or employee must provide "[f]ull cooperation" to DOI, at risk of

global pandemic and nationwide Floyd demonstrations, these limiting circumstances combine to allow us to conclude that the media reports referenced herein were sufficiently widely publicized and documented to reflect "facts generally known" within the City at the relevant time.[3] *Williams v. New York City Hous. Auth.*,

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suspension or termination. Id. § 1128(a) & (b). See also In re Dep't of Investigation of City of New York, 856 F.2d 481, 482 (2d Cir. 1988) (describing DOI's authority to issue compulsory process); Rose Gill Hearn, Integrity and the Department of Investigation, 72 FORDHAM L. REV. 415, 416–18 (2003) (describing measures to ensure DOI's independence).

[3] Between May 29 and June 8, 2020, virtually every established news outlet reported daily on City demonstrations triggered by George Floyd's death, as well as on attending criminal activity. The following citations are illustrative, but the list is far from exhaustive:

> Jim Mustian, Chaos and destruction as New York City protest turns violent, ASSOCIATED PRESS (May 30, 2020) ("AP, May 30, 2020"), apnews.com/article/a786e36787da75082b3f9893b2129a0e [perma.cc/E9A9-QN2B];
>
> Alan Feuer & Azi Paybarah, Thousands Protest in N.Y.C., Clashing With Police Across All 5 Boroughs, N.Y. TIMES (May 30, 2020) ("NYTimes, May 30, 2020"), nytimes.com/2020/05/30/nyregion/protests-nyc-george-floyd.html [perma.cc/8P6B-DRRK];
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> N.Y.C. Protests Turn Violent, N.Y. TIMES (May 31, 2020) ("NYTimes, May 31, 2020"), nytimes.com/2020/05/31/nyregion/nyc-protests-george-floyd.html [perma.cc/D7AZ-NB6N];
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> Arian Campo-Flores et al., Anger and Unrest Sweep

61 F.4th 55, 61 n.2 (2d Cir. 2023) (internal quotation marks omitted); *see also Nationalist Movement v. City of Cumming*, 913 F.2d 885, 893 (11th Cir. 1990) (holding that court permissibly took judicial notice of violence sometimes attending plaintiff's rallies because (1) rallies "had been the subject of national media publicity and attention," (2) court's observations "were apparently based on local and national media accounts, as well as on public records," and (3) relevant facts "were

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Across U.S., WALL ST. J. (June 1, 2020) ("WSJ, June 1, 2020"), wsj.com/articles/george-floyd-protests-minneapolis-11590844180 [perma.cc/X345- PCWM];

Michael Herzenberg et al., We Were Out Covering Protests in NYC This Weekend. This Is What We Saw, SPECTRUM NEWS NY1 (June 2, 2020) ("NY1, June 2, 2020"), ny1.com/nyc/all- boroughs/news/2020/06/01/reporter-ron-lee-on-protest-coverage-in-new-york-city [perma.cc/CDX2-229A].

In the absence of such pervasiveness and consistency across many reports (or some other indicia of unquestioned accuracy), see Williams v. New York City Hous. Auth., 61 F.4th 55, 61 n.2 (2d Cir. 2023), news reports will likely not warrant such notice.

Insofar as plaintiffs dismiss media coverage as "sensationalistic," Compl. ¶ 30, we decline to credit that conclusory characterization. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding court need not credit "mere conclusory statements" in complaint). Instead, we take notice of news reports only as just indicated in text.

generally known within" local geographic area).[4]

As for the DOI Report, here too, we take judicial notice only insofar as it(1) details events generally acknowledged by plaintiffs, and (2) contains confirming New York Police Department ("NYPD") statistical data on which plaintiffs themselves sometimes rely in their pleadings. *See* Compl. ¶¶ 32–35, 54– 57, 59 (relying on NYPD statistics to compare number of arrests before and during curfew period); DOI Report at 9 n.6 (describing DOI's compilation of NYPD arrest statistics for relevant period). We do not notice that report for its interpretation of events or its assessment of the efficacy of the City's response to events.

Thus, consistent with these parameters and plaintiffs' own acknowledgment that violence, destruction, and looting sometimes attended Floyd demonstrations in various City locations, we take notice of reports detailing such conduct. For example, plaintiffs acknowledge reported destruction, vandalism, and looting at Brooklyn's Barclays Center and outside three Brooklyn police precincts. *See* Compl. ¶ 16. News accounts from the night of May 29 report that an "initially peaceful demonstration" outside the Barclays

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[4] The Eleventh Circuit's opinion was initially vacated after that court voted to rehear the case en banc, see 921 F.2d 1125 (11th Cir. 1990) (mem.), but the en banc court subsequently reinstated the panel's decision, see 934 F.2d 1482 (11th Cir. 1991) (en banc). The Supreme Court affirmed the Eleventh Circuit without discussion of judicial notice. See Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992).

Center "spiraled into chaos . . . as protestors skirmished with police officers, destroyed police vehicles and set fires." AP, May 30, 2020 (reporting protesters pelting police with water bottles and police spraying eye-irritating chemical into crowd multiple times); *see id.* (reporting worsening situation later in evening with certain demonstrators setting fire to one police vehicle while others battered another police vehicle with a club; meanwhile, at nearby location, protesters wearing helmets and carrying makeshift shields threw objects while advancing on police who responded with batons and arrests); *accord* NYTimes, May 30, 2020 (noting that on May 29, "violent protests erupted outside Barclays Center in Brooklyn, where some in the crowd had hurled bottles and firebombs at the police").[5]

The DOI Report confirms these accounts and provides particulars. It states that, on Friday night, May 29, a crowd of approximately 3,000 people gathered outside the Barclays Center. DOI Report at 10. "Video [of that gathering] posted to social media captured some of the violent clashes

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[5] Police use of force during the City's Floyd demonstrations is a matter of ongoing litigation in this circuit. See, e.g., In re New York City Policing During Summer 2020 Demonstrations, 27 F.4th 792, 795 (2d Cir. 2022) (reversing denial of police union's motion to intervene in litigation challenging "police actions and practices in response to demonstrations that occurred in the summer of 2020"); In re New York City Policing During Summer 2020 Demonstrations, No. 20-cv-08924-CM (S.D.N.Y.) (litigation in district court). We, therefore, express no view as to such conduct at this time.

between police and protesters, including images of police officers shoving or striking protesters, police vehicles set on fire, and two separate incidents where individuals struck NYPD vehicles with incendiary devices." *Id.* Meanwhile, around 9:00 p.m. that same night, a "volatile confrontation with police officers" occurred outside Brooklyn's 88th police precinct, resulting in 20 arrests and five officer injuries. *Id.* Another confrontation took place around 10:00 p.m. outside Brooklyn's 79th precinct, resulting in "six additional arrests, including one person armed with a loaded handgun." *Id.* NYPD statistics reported more than 200 arrests related to the protests were logged on May 29, while 59 officers were reported injured and 37 police vehicles damaged. DOI Report at 10.

News accounts of events the following day, May 30, reported "[t]housands of demonstrators" again taking to City streets, "blocking traffic, setting fire to police vehicles and clashing with officers at simultaneous marches that raged through all five boroughs." NYTimes, May 30, 2020. Floyd demonstrations that day were reported "through Harlem, the East Village, Times Square, Columbus Circle, Jackson Heights in Queens, the Flatbush section of Brooklyn and portions of the Bronx and Staten Island." *Id.* News reports recounted that "[m]any of the[se] actions were peaceful," but that some protests became violent "at intervals," with people "overturn[ing] trash cans, smash[ing] store windows, set[ting] fire to police cars, and hurl[ing] bottles and other debris at crowds of officers," who sometimes used

batons on protesters or drove police cars forward into crowds of protesters. *Id.* The DOI Report, in detailing events of May 30, confirmed blocked traffic on the FDR Drive, the West Side Highway, and the Manhattan Bridge, police vehicles set on fire, and police use of force against protesters. DOI Report at 11–13. On May 30, NYPD statistics reported nearly 350 arrests, 91 officers injured, and 55 police vehicles damaged. *See id.* at 13.

In one well-known incident from the early morning hours of May 30—well known because it found its way into federal court—two licensed attorneys were arrested—and subsequently convicted—for attempting to distribute Molotov cocktails to protesters, with one of the attorneys throwing a Molotov cocktail into an unoccupied police vehicle. *See United States v. Mattis*, 963 F.3d 285, 287 (2d Cir. 2020); *id.* at 296 (Newman, *J.*, dissenting) (detailing defendants' actions, some captured on videotape, in concluding that their release on bail "subjects the community to an unacceptable risk of danger"); William K. Rashbaum & Andrea Salcedo, *Two Lawyers Arrested in Molotov Cocktail Attack on Police in Brooklyn*, N.Y. TIMES (May 31, 2020), nytimes.com/2020/05/31/nyregion/nyc-protests-lawyer- molotov-cocktail.html [perma.cc/K6B4-BUH4].

News reports indicated that other cities, also experiencing criminal activity in conjunction with Floyd demonstrations, imposed curfews and/or deployed the National Guard. *See* Derrick Bryson

Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), nytimes.com/article/george-floyd-protests-timeline.html[perma.cc/BV6C-NP4F] (noting that on May 31, 2020, "National Guard was deployed in more than two dozen states to assist overwhelmed police departments, and dozens of mayors extended curfews"). At that time, however, Mayor de Blasio stated that "he would not issue a curfew" in the City, "citing the effectiveness of the police department and what he characterized as a small number of protesters for a city of 8 million people." NYTimes, May 30, 2020. Plaintiffs appear to agree with this assessment, maintaining that no different conclusion was later warranted.

Contemporaneous news reports, however, indicated worsening conditions the next night, Sunday, May 31, with "jarring scenes of flaming debris, stampedes and looted storefronts." NYTimes, May 31, 2020 (describing "[f]lames nearly two stories high" leaping from trash cans set afire in vicinity of Manhattan's Union Square at approximately 10:00 p.m.). "As the night wore on, violent confrontations between protestors and police officers erupted throughout Manhattan and Brooklyn," with protesters throwing "glass bottles and trash at the police, while large groups of officers charged down streets, pushing crowds of demonstrators aside and using batons as they made arrests." *Id.* Looting also became more prevalent: "Much of SoHo, the East Village, and Flatiron neighborhoods in Manhattan was ransacked as people filled garbage bags with shoes, clothes and other goods, and shouted to each other

which store would be next." *Id.* A group heading up Manhattan's Fifth Avenue "began smashing telephone booths, bus kiosks, CitiBike terminals and storefronts." *Id.*

The DOI subsequently confirmed this escalating violence and destruction on May 31, noting the deployment of larger numbers of police officers to Midtown and Lower Manhattan after 11:20 p.m. "to prevent further looting and commercial break-ins." DOI Report at 14. That violence included shots being fired around 11:38 p.m. in Queens at a police officer sitting inside a marked police vehicle, resulting in non-life-threatening injuries. *See id.* Shortly before 3:30 a.m., another "police officer was struck by a vehicle on West 8th Street in Manhattan." *Id.* DOI cites statistics indicating approximately 349 arrests logged, 34 police officers reported injured, and 13 police vehicles damaged on May 31. *See id.*

II. The Challenged City Curfew

A. Executive Order 117

It was only at this point that a curfew was imposed. As the Complaint alleges, on Monday, June 1, 2020, Mayor de Blasio and Governor Cuomo jointly announced the decision to address escalating violence and property damage in the City by increasing police presence and "issuing a citywide Order" implementing a curfew. Compl. ¶ 17.[6] To that end, the mayor signed Emergency

[6] See City of New York, Mayor de Blasio and Governor Cuomo Announce Citywide Curfew in New York City

Executive Order No. 117.[7] At the outset, that order notes that other executive orders from earlier in the year had already declared a state of emergency in the City "due to the [public health] threat posed by COVID-19," which threat was increased by "large gatherings" that facilitated "spread of the virus." Executive Order 117 at 1. The order then states that "peaceful demonstrations" had begun in the city in response to the death of George Floyd, but that such "demonstration activities were subsequently escalated, by some persons, to include actions of assault, vandalism, property damage, and/or looting." *Id.* Noting that such "violent acts have been happening primarily during the hours of darkness" when it is "especially difficult to preserve public safety," the order concludes that "the imposition of a curfew is necessary to protect the City and its residents from severe endangerment and harm to their health, safety, and property." *Id.* Accordingly, invoking authority conferred on the mayor by New York Executive Law § 24(1)(a),[8] as well as

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Beginning at 11 PM Tonight (June 1, 2020), nyc.gov/office-of-the-mayor/news/394-20/mayor-de- blasio-governor-cuomo-citywide-curfew-new-york-city-beginning-11-pm [perma.cc/FG3S-FY9A].

[7] City of New York, Office of the Mayor, Emergency Executive Order No. 117 ("Executive Order 117") (June 1, 2020), nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-117.pdf [perma.cc/KZC7-8ZHW]. We may take judicial notice of executive orders. See Rynasko v. New York Univ., 63 F.4th 186, 191 n.4 (2d Cir. 2023).

[8] New York Executive Law § 24 states in pertinent part as

unspecified provisions of the City Charter, Administrative Code, and the common law, the order declares a state of emergency to exist within the City and imposes "a City- wide curfew from 11:00 p.m. on June 1, 2020 until 5:00 a.m. on June 2, 2020." Id. at 2. Pursuant to such curfew, "no persons or vehicles may be in public" except for "police officers, peace officers, firefighters, first responders and emergency medical technicians, individuals travelling to and from essential work and performing essential work, people experiencing homelessness and without access to a viable

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follows:

> 1. Notwithstanding any inconsistent provision of law, general or special, in the event of a disaster, rioting, catastrophe, or similar public emergency within the territorial limits of any county, city, town or village, or in the event of reasonable apprehension of immediate danger thereof, and upon a finding by the chief executive thereof that the public safety is imperiled thereby, such chief executive may proclaim a local state of emergency within any part or all of the territorial limits of such local government. . . . Following such proclamation and during the continuance of such local state of emergency, the chief executive may promulgate local emergency orders to protect life and property or to bring the emergency situation under control. As illustration, such orders may, within any part or all of the territorial limits of such local government, provide for:
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> a. the establishment of a curfew and the prohibition and control of pedestrian and vehicular traffic, except essential emergency vehicles and personnel.

N.Y. EXEC. LAW § 24(1)(a).

shelter, and individuals seeking medical treatment or medical supplies." *Id.* The order states that a failure to comply with the curfew will result in an order to disperse, and that a knowing violation of the curfew will constitute a class B misdemeanor. *See id.*; *see also* N.Y. PENAL LAW § 70.15(2) (punishing class B misdemeanors by up to three months' imprisonment).

B. Executive Orders 118 and 119

Even before the initial order went into effect, reports of looting in multiple boroughs on the night of June 1 led Mayor de Blasio to conclude that a single night of curfew would be insufficient to restore order to the City. Accordingly, he ordered a second night of curfew from 8 p.m. on June 2 through 5 a.m. on June 3.[9] *See* Gloria Pazmino & Debora Fougere, *NYC Officially Under Curfew; Second Set for Tuesday Night, de Blasio Says*, SPECTRUM NEWS NY1 (June 1, 2020), ny1.com/nyc/all-boroughs/news/2020/06/01/new-york-city-curfew-protests [perma.cc/92SYPAHT] (explaining that mayor decided on June 1 to extend curfew "after looting was seen and reported in multiple boroughs in the evening"); *see also* Dana Rubinstein & Jeffery C. Mays, *Here's What Led to N.Y.C.'s First Curfew in 75 Years*, N.Y. TIMES (June 2, 2020), nytimes.com/2020/06/02/nyregion/curfew-new-york- city.html [perma.cc/6BSA-CVAZ]

[9] City of New York, Office of the Mayor, Emergency Executive Order No. 118 ("Executive Order 118") (June 1, 2020), nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-118.pdf [perma.cc/QGU4-PH7T].

("It was still a few hours before New York City would fall under a historic curfew on Monday night, but Mayor Bill de Blasio could already see that it was not working.").

The DOI confirmed that as the night of June 1 continued, the City experienced "a significant amount of violence, looting, and arrests," with NYPD statistics indicating approximately 2,300 commercial burglaries, 650 arrests, 73 police officers injured, and six police vehicles damaged. DOI Report at 15–16. Thus, on June 2, the mayor signed Executive Order No. 119, which extended the 8:00 p.m. to 5:00 a.m. curfew through June 8, 2020. *See* Compl. ¶ 19.[10] At a press conference announcing this extension, Mayor de Blasio reiterated his support for peaceful protesters, but stated that there had been "a lot of trouble in some parts of the city" the night of June 1 that was unacceptable, *e.g.*, "a small group of criminals attack[ing] their own neighborhood in the Bronx, tear[ing] down their own people"; other "people com[ing] to a swath of Midtown, Manhattan to attack luxury stores"; and "vicious," "purposeful" attacks on police officers. Press Conference Tr.[11]

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[10] City of New York, Office of the Mayor, Emergency Executive Order No. 119 ("Executive Order 119") (June 2, 2020), nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-119.pdf [perma.cc/XUJ5-66VD]

[11] *See* City of New York, Transcript: Mayor de Blasio Holds Media Availability ("Press Conference Tr.") (June 2, 2020), nyc.gov/office-of-the-mayor/news/397-20/transcript-mayor-de-blasio-holds-media- availability [perma.cc/CD9K-4GKH]. We do not consider the mayor's statements for their truth, but

Thus, to "ensure . . . peace and order" in the City, he was extending the curfew. *Id.* The mayor expressed his intent "to work actively and strategically to stop any disorder," with the goal of ending the curfew on the morning of June 8. *Id.*

The expanded curfew did not immediately end violence and destruction in the City. Nevertheless, the City experienced a "notable decrease" in reports of "commercial burglaries and ATM robberies" on the night of June 2. DOI Report at 18. Total arrests also decreased modestly on June 2, to approximately 550, but with the majority related to violations of the curfew rather than more serious crimes. *See id.* The downward trend generally continued in the following days, with a "significant decrease in reported looting and vandalism" on June 3, a "continued decrease in reported looting and vandalism" on June 4, and still further declines in criminal activity on June 5 and 6. *Id.* at 19–22.

C. Executive Order 122

On June 7, when "[l]argely peaceful gatherings were held throughout the day, and NYPD arrests for protest-related activity dropped dramatically," *id.* at 23, Mayor de Blasio signed

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only for the fact that they were said, thus indicating defendants' contemporaneous rationale for extending the curfew. *See Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (stating that, in considering whether challenged policy was narrowly tailored, government justification cannot be "invented *post hoc*" (internal quotation marks omitted)).

Executive Order No. 122, which immediately terminated the emergency curfew one day ahead of its scheduled expiration. *See* Compl. ¶ 23 n.1.[12] At a press conference announcing that decision, the mayor stated that the City had now experienced "five days in a row . . . where we see peaceful protests predominating" and that "each day" had seen "a better and better situation" with "fewer and fewer arrests."[13]

III. Plaintiffs' Arrests for Violating the Curfew

Plaintiffs are New Yorkers who were arrested for violating the challenged curfew in circumstances unrelated to the Floyd demonstrations. They do not allege that they had any special justification for violating the curfew; rather, they allege that the curfew was facially unconstitutional.

A. Lamel Jeffery

Lamel Jeffery alleges that he was arrested for violating the curfew on the evening of June 4, 2020, while attending an outdoor barbecue in Brooklyn. He asserts that, after police officers

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[12] City of New York, Office of the Mayor, Emergency Executive Order No. 122 ("Executive Order 122") (June 7, 2020), nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eeo-122.pdf [perma.cc/WH3P-8P6J]

[13] City of New York, Transcript: Mayor de Blasio Holds Media Availability (June 7, 2020), nyc.gov/office-of-the-mayor/news/413-20/transcript-mayor-de-blasio-holds-media-availability [perma.cc/Y6BN-2J6C].

ordered him to go indoors, he "informed the officers that he would go home, which was around the corner." Compl. ¶ 101. As he began to walk home, however, "several NYPD officers aggressively stopped and tackled [him] and placed him in handcuffs despite having no probable cause to do so." *Id.* ¶ 102. Jeffery was taken into custody for approximately ten hours, after which he was released without charge.

B. Thaddeus Blake

Thaddeus Blake alleges that he was arrested around 8:45 p.m. on June 5. At that time, he was standing in front of his apartment building in the Bronx when police officers ordered him to go inside. Blake responded that he would do so once he retrieved his phone from an electrical outlet. Several police officers then allegedly "slamm[ed] him to the ground and aggressively handcuff[ed] him behind his back." *Id.* ¶ 108. Blake was taken into custody for approximately five hours, whereupon he was released with a criminal summons to return to court.

C. Chayse Pena

Chayse Pena alleges that he was arrested at approximately 10 p.m. on June 5 when he was driving around the Hell's Kitchen neighborhood of Manhattan looking for a parking spot. Police officers stopped him, ordered him out of his car, searched the vehicle, and then placed Pena "in restraints with his arms behind his back." *Id.* ¶ 115. Pena was held in custody for approximately

four hours, after which he was released with a criminal summons to return to court.

IV. Dismissal of the Complaint

Approximately two weeks after the curfew ended, plaintiffs filed this putative class action in the Eastern District of New York suing the City, then- Mayor de Blasio in his official and individual capacities, then-Governor Cuomo in his official and individual capacities, and 50 unnamed "John Doe" police officers. The complaint seeks a declaration that the challenged curfew, on its face, violates rights secured by the First, Fourth, and Fourteenth Amendments to the Constitution, including the right to travel, and it seeks money damages pursuant to 42 U.S.C. § 1983. Present Mayor Eric Adams has been substituted for former Mayor de Blasio in claims against the latter in his official capacity. *See* Fed. R. Civ. P. 25(d) (providing for automatic substitution of public officer's successor for official-capacity claims). Meanwhile, the parties have stipulated to the dismissal of claims against Governor Cuomo in his official capacity.

Before certification of any class, defendants moved for dismissal of all of the named plaintiffs' claims except those for "selective enforcement and municipal liability." *Jeffery v. City of New York*, No. 20-CV-2843 (NGG) (RML), 2022 WL 204233, at *4 n.3, *8 (E.D.N.Y. Jan. 24, 2022).[14] The district

[14] There is no "stand-alone cause of action" for "municipal liability." *Askins v. Doe No. 1*, 727 F.3d 248, 253 (2d Cir. 2013). Rather, municipal liability obtains when the municipality "has promulgated a custom or policy that

court granted the motion as to all claims at issue on this appeal. In dismissing individual liability claims against Governor Cuomo, the district court ruled that the complaint failed to allege the former governor's "personal involvement in the allegedly wrongful conduct." *Id.* at *3. As to official-capacity claims against the mayor, the district court dismissed plaintiffs' right-to-travel challenge upon concluding that the curfew survived strict scrutiny because it addressed the government's compelling interest in protecting the community from crime and was narrowly tailored to that purpose. *See id.* at *6 (noting curfew's (1) limited duration, (2) periodic updates responding to changing circumstances, (3) application only during nighttime hours, and (4) backdrop of "violence occurring in various parts of different boroughs"). The court dismissed plaintiffs' First Amendment challenge upon concluding that the curfew was a valid, content-neutral restriction on the time, place, and manner of plaintiffs' expression. *See id.* at *7 (observing that curfew left "ample alternative channels" for expressive activity). It dismissed plaintiffs' Fourth Amendment challenge because officers had probable cause to arrest them for violating the

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violates federal law and, pursuant to that policy, a municipal actor has tortiously injured the plaintiff." *Id.*; *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). We need not pursue the point further because, as stated *infra* at 18, plaintiffs agreed to have the district court dismiss their remaining claims with prejudice in order to secure an appealable final judgment.

curfew. *See id.* As to claims against the mayor in his individual capacity, the district court ordered dismissal because (1) the curfew was facially lawful, and (2) there was no allegation that Mayor de Blasio was personally involved in racially discriminatory enforcement of the curfew. *See id.* at *8.[15]

After the district court denied plaintiffs' motion for entry of partial final judgment pursuant to Fed. R. Civ. P. 54(b), *see Jeffery v. City of New York*, No. 20- CV-2843 (NGG) (RML), 2022 WL 2704760, at *5 (E.D.N.Y. July 12, 2022), plaintiffs stipulated to the dismissal of their remaining claims with prejudice. Endorsing that stipulation, the district court then entered the September 23, 2022 final judgment in favor of defendants from which plaintiffs timely filed this appeal.

DISCUSSION

I. Standard of Review

"A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(6) when the pleadings fail to 'contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Brokamp v. James*, 66 F.4th 374, 386 (2d Cir. 2023) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Because a judgment of dismissal pursuant to Fed. R. Civ. P. 12(b)(6) can only be

[15] Having thus dismissed the individual-liability claims against Governor Cuomo and Mayor de Blasio, the district court did not address these defendants' alternative arguments for qualified immunity.

entered if a court determines that, as a matter of law, a plaintiff failed to state a claim upon which relief can be granted, we review that legal determination *de novo*." *Melendez v. City of New York*, 16 F.4th at 1010.

II. The District Court Correctly Dismissed Plaintiffs' Right-To-Travel Claim

On appeal, plaintiffs challenge only the dismissal of their right-to-travel claim. *See* Appellants' Br. at 17–48; Reply Br. at 3–5 (acknowledging pursuit only of right-to-travel claim, but asserting that right derives from multiple constitutional amendments). We therefore deem plaintiffs' remaining claims abandoned and do not discuss them further. *See Jackler v. Byrne*, 658 F.3d 225, 233 (2d Cir. 2011) (deeming claims not raised in appellate brief abandoned).

With respect to their right-to-travel claim, plaintiffs argue that the district court correctly recognized that the challenged curfew had to withstand strict scrutiny to avoid being held unconstitutional, but erred in concluding as a matter of law at the pleadings stage that the curfew withstood such scrutiny. In response, defendants argue that plaintiffs' particular right-to-travel claim—implicating a temporary curfew imposed in emergency circumstances—does not warrant strict scrutiny. Nevertheless, they submit that, even applying strict scrutiny, plaintiffs' right-to-travel claim was properly dismissed under Rule 12(b)(6). That last conclusion cannot be reached lightly. As

this court has observed, when a constitutional challenge to a law triggers heightened scrutiny—whether strict or intermediate—dismissal "will rarely, if ever, be appropriate at the pleading stage." *Cornelio v. Connecticut*, 32 F.4th 160, 172 (2d Cir. 2022) (internal quotation marks omitted). Because heightened scrutiny "will frequently require the government to identify evidence[] or, at least, provide sound reasoning that draws reasonable inferences based on substantial evidence, courts will generally wait until the summary judgment stage of the litigation to determine if the burden has been carried as a matter of law." *Brokamp v. James*, 66 F.4th at 397 (internal quotation marks omitted). "Nevertheless, in some circumstances," a heightened scrutiny "determination can be made on a motion to dismiss." *Id.* (affirming dismissal on pleadings while applying intermediate scrutiny to challenged statute); *see also Citizens United v. Schneiderman*, 882 F.3d 374, 380–85 (2d Cir. 2018) (same); *Walker v. Beard*, 789 F.3d 1125, 1135–38 (9th Cir. 2015) (affirming Rule 12(b)(6) dismissal of claim on strict scrutiny). For reasons we now explain, this is such a case.

A. Curfew Laws

Curfew laws have a long pedigree in Anglo-American law. *See* ENCYCLOPÆDIA BRITANNICA, *Curfew* 903 (1967). The word "curfew" derives from the Old French "cuevrefu," meaning cover fire, and curfew laws were originally a fire-prevention regulation that used a bell to

signal persons to extinguish or cover their fires and retire for the night. *See id.* Such laws date to the reign of Alfred the Great, with stricter enforcement under William the Conqueror. *See id.* William's strict enforcement is thought to have had a second purpose: impeding Saxon resistance to Norman rule. *See* W.L. MELVILLE LEE, A HISTORY OF POLICE IN ENGLAND 16 (1901) (stating that curfew was "intended as a check upon the Saxons, to prevent them from meeting after dark, and discussing the shortcomings of their oppressors, or for other political purposes"). Thus, since well before this country's founding, "curfew" had a dual meaning: (1) "[a] law requiring that all fires be extinguished at a certain time in the evening, usu[ally] announced by the ringing of a bell," and (2) "[a] regulation that forbids people (or certain classes of them, such as minors) from being outdoors or in vehicles during specified hours." BLACK'S LAW DICTIONARY 481 (11th ed. 2019).

The latter form of curfew was employed ignominiously in this country before the Civil War to restrict the movement of slaves and, sometimes, free Blacks. *See Jennings v. Washington*, 13 F. Cas. 547, 547 (C.C.D.C. 1838) (No. 7,284) (upholding District of Columbia curfew on "slaves, free negroes, and mulattoes"); *see also City of Memphis v. Winfield*, 27 Tenn. 707, 709 (1848) (holding that curfew law applicable to "any free negro or slave" could not "be enforced against free persons of color"). American curfew laws have also been applied to minors, with some being struck down as an "undue invasion of the personal liberty of the

citizen" and an "attempt to usurp the parental functions," *Ex parte McCarver*, 46 S.W. 936, 937 (Tex. Crim. App. 1898), and others being upheld based on minors' more limited claim to protected liberty, *see Thistlewood v. Trial Magistrate for Ocean City*, 204 A.2d 688, 690–91 (Md. 1964) (collecting curfew cases and noting that few consider constitutionality of such regulations). American curfew laws have also been imposed at times of "riot or civil disorder," frequently being upheld unless imposed in the absence of statutory authority. Jeffrey F. Ghent, Annotation, *Validity & Construction of Curfew Statute, Ordinance, or Proclamation*, 59 A.L.R.3d 321, §§ 3[a], 3[b] (1974).[16] Only the last use of curfew is at issue in this case, with plaintiffs appealing dismissal of their complaint insofar as they allege a violation of the right to travel, not rights of free speech or equal protection.

B. The Right To Travel

1. Constitutional Origins of Right To Travel Interstate

Although "[t]he word 'travel' is not found in the text of the Constitution," the Supreme Court has long recognized a "constitutional right to travel from one State to another," *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (internal quotation marks omitted), as "fundamental to the concept of our Federal Union," *United States v. Guest*, 383 U.S. 745,

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[16] As noted *supra* at 12 n.8, the curfew here at issue was imposed pursuant to N.Y. EXEC. LAW § 24.

757–58 (1966) (recognizing right to "interstate travel"); *see Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (recognizing right to interstate travel is "necessary concomitant of the stronger Union the Constitution created" (internal quotation marks omitted)), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). As the Court long ago explained, "[w]e are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States." *Crandall v. Nevada*, 73 U.S. (6 Wall) 35, 49 (1867) (internal quotation marks omitted). The Court has traced this first component of the right to *interstate* travel to Article IV of the Articles of Confederation. *See Saenz v. Roe*, 526 U.S. at 501 & n.13 ("[T]he people of each State shall have free ingress and regress to and from any other State." (quoting ARTICLES OF CONFEDERATION of 1781, art. IV)).

That article, in turn, informed what the Supreme Court in *Saenz* identified as a second component of the right to interstate travel "expressly protected" by constitutional text, *i.e.*, the Privileges and Immunities Clause. *Id.* at 501; *see* U.S. CONST., art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").[17]

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[17] *See Saenz v. Roe*, 526 U.S. at 501 n.13 (quoting 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, p.112 (M. Farrand ed. 1966) stating that Privileges and Immunities Clause was "formed exactly upon the principles of the 4th article of the present [Articles of] Confederation").

The Supreme Court has construed this text to mean that "by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits." *Saenz v. Roe*, 526 U.S. at 501 (explaining that Clause thus "removes from the citizens of each State the disabilities of alienage in the other States" (internal quotation marks omitted)).

Constitutional text, specifically, the Fourteenth Amendment, also safeguards a third component of the right to interstate travel identified in *Saenz*, *i.e.*, "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." *Id.* at 502; *see* U.S. CONST. amend. XIV, § 1 ("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 . . . deny to any person within its jurisdiction the equal protection of the laws."). Finding the *Saenz* plaintiffs' challenge to a state rule that discriminated against citizens based on the length of state domicile to implicate this third component of the right to travel, the Supreme Court ruled neither "mere rationality nor some intermediate standard of review should be used to judge the [rule's] constitutionality." 526 U.S. at 504. The rule was subject to scrutiny "no less strict" than that applied to review of a state residency requirement for welfare benefits in *Shapiro v. Thompson*, 394 U.S. 618 (1969). *Id.*; *see id.* at 499–500 (observing

that *Shapiro* held classification having effect of imposing penalty on right to travel violated Equal Protection Clause unless shown to be necessary to protect compelling governmental interest).

2. The Right To Travel Intrastate

Defendants submit that precedents discussing constitutional support for a right to travel *interstate* are largely irrelevant here, where plaintiffs challenge a curfew that limited their ability to travel *intrastate*.[18] To be sure, the Supreme Court has not decided whether the constitutional right to travel safeguards free movement within a given State as well as between States. *See Memorial Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 255–56 (1974) (declining to address whether Constitution protects right to "intrastate travel"). The Court has sent sometimes conflicting signals on the point. *Compare, e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993) (stating that "purely intrastate restriction does not implicate the right of interstate travel"), *with City of Chicago v. Morales*, 527 U.S. 41, 54 (1999) (plurality opinion) (stating that "individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a

[18] We do not consider whether a curfew, which precludes any movement outside the home during appointed hours, necessarily limits interstate as well as intrastate travel. Plaintiffs make no such argument and, in any event, for reasons stated *infra* at 29–40**,** we conclude that, even on strict scrutiny, plaintiffs' intrastate travel claim fails as a matter of law on the pleadings.

part of our heritage, or the right to move to whatsoever place one's own inclination may direct [as] identified in Blackstone's Commentaries" (internal quotation marks and citations omitted)), *and Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (stating that walking, loitering, and similar activities "are historically part of the amenities of life as we have known them").

We need not here try to predict whether the Supreme Court will recognize a constitutional right to intrastate travel because this court has already done so. *See, e.g.*, *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 100 (2d Cir. 2009) ("[W]e have recognized the Constitution's protection of a right to intrastate as well as interstate travel."); *Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990) ("Though the Supreme Court has dealt only with the right to travel between states, our Court has held that the Constitution also protects the right to travel freely within a single state."). In doing so, the court has not located that right in any particular constitutional text. Rather, it has identified a constitutional right to travel, whether interstate or intrastate, as fundamental to "personal liberty." *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971) ("It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."). We recognize that Courts of Appeals are divided as to whether the Constitution affords a

right to intrastate travel.[19] This panel is, of course, bound by our precedent recognizing such a right. *See United States v. Barrett*, 102 F.4th 60, 82 (2d Cir. 2024) (noting "longstanding rule that a panel of our court is bound by the decisions of prior panels until such times as they are overruled either by an en banc panel of our court or by the Supreme Court" (internal quotation marks and brackets omitted)).

This court has "not . . . sharply defined" the outer parameters of a right to intrastate travel. *Williams v. Town of Greenburgh*, 535 F.3d 71, 75 (2d Cir. 2008). It has, however, assessed the right in a variety of contexts, rejecting challenges to policies imposing only "minor restriction[s]" on travel, *see Selevan v. New York Thruway Auth.*, 711 F.3d 253, 257–60 (2d Cir. 2013) (internal quotation marks omitted) (upholding disparate

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[19] *See United States v. Baroni*, 909 F.3d 550, 587–88 (3d Cir. 2018) (collecting cases in explaining that four courts (First, Second, Third, and Sixth Circuits) recognize right to intrastate travel; while five courts (Fourth, Fifth, Seventh, Eighth, and Tenth Circuits) have declined or hesitated to do so and the Court of Appeals for the D.C. Circuit appears "internally conflicted"), *rev'd on other grounds sub nom. Kelly v. United States*, 590 U.S. 391 (2020). The Ninth Circuit has declined to decide whether a right to intrastate travel exists, *see Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 n.7 (9th Cir. 1997), while the Eleventh Circuit presumably remains bound by the Fifth Circuit's 1975 determination that no such right exists, *see generally Wright v. City of Jackson*, 506 F.2d 900, 901–02 (5th Cir. 1975); *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*) (adopting precedents of Fifth Circuit decided on or before September 30, 1981).

bridge tolls based on residency); *see also Williams v. Town of Greenburgh*, 535 F.3d at 76 (holding that right to travel does not restrict "municipality's decision to limit access to its facilities"), while recognizing the right to extend even to victims of private actors engaged in civil rights conspiracies, *see Spencer v. Casavilla*, 903 F.2d at 175–76 (upholding civil rights conspiracy claim against private actors who, with racial animus, beat to death person traveling on public road).

As pertinent here, this court has recognized a municipal curfew to implicate the right to intrastate travel. *See Ramos v. Town of Vernon*, 353 F.3d 171 (2d Cir. 2003). At issue in *Ramos* was an as-applied challenge to a permanent nighttime curfew imposed on minors. This court recognized that such a curfew "limits the constitutional right to free movement" within the defendant town. *Id.* at 176. We held that right to extend to minors, even at night, "absent parental prohibition." *Id.* at 187. Nevertheless, because the challenged curfew affected "children's constitutional rights," which the court viewed as more circumscribed than those of adults, it applied "intermediate," rather than "strict," scrutiny. *Id.* at 180 (holding strict scrutiny "too restrictive a test to address government actions that implicate children's constitutional rights").[20] In finding the curfew not to

[20] To satisfy intermediate scrutiny, the government must show that its challenged action served "important governmental objectives" and employed means "substantially related to the achievement of those objectives." *Ramos v. Town of Vernon*, 353 F.3d at 180 (internal quotation marks

withstand such scrutiny, the panel majority acknowledged the government's strong interest in both safeguarding "the welfare of its young citizens" and "protecting all its citizens from crime," *id.* at 181 (internal quotation marks omitted), but concluded that the government's failure to proffer evidence that crime was elevated during the curfew's nighttime hours, or that minors were either the target or cause of crime so as to warrant a curfew directed particularly at them, precluded satisfaction of the second requirement, *see id.* at 186–87. Accordingly, it declared the curfew unconstitutional and enjoined its further operation. *See id.* at 187.[21]

Thus, to the extent defendants suggest that plaintiffs' right-to-travel claim was properly dismissed because their curfew challenge alleges a limitation on only intrastate travel, that argument is foreclosed by our controlling precedent. At the same time, our precedent appears to recognize that the right to travel, like most constitutional rights,

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omitted). To satisfy strict scrutiny, the government must show that its challenged action served "a compelling governmental interest" and employed means "narrowly tailored" to that interest. *Selevan v. New York Thruway Auth.*, 711 F.3d at 257–58 (internal quotation marks omitted); *see also Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. at 734

[21] In dissent, then-Senior Judge Winter questioned minors' possession of a constitutional right to travel and maintained that, in any event, the challenged ordinance survived "any level of scrutiny." *Ramos v. Town of Vernon*, 353 F.3d at 189, 196.

is not unlimited. *Cf. United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024) (making point with respect to Second Amendment rights).

3. Heightened Scrutiny

At the same time this court subjected the juvenile curfew in *Ramos* to an intermediate form of heightened scrutiny, it "assume[d]" that if the challenged curfew had "applied to adults, it would be subject to strict scrutiny." 353 F.3d at 176. The curfew here at issue plainly applied to adults. Nevertheless, *Ramos*'s "assumption" does not necessarily dictate strict scrutiny for two reasons. First, *Ramos*'s strict-scrutiny assumption was based on a hypothetical curfew applicable to adults and, thus, is non-binding *dictum*. *See, e.g.*, *Jimenez v. Walker*, 458 F.3d 130, 142 (2d Cir. 2006) (explaining that while "[h]oldings—what is necessary to a decision—are binding," "[d]icta—no matter how strong or how characterized— are not" (internal quotation marks omitted)); *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 134 (2d Cir. 1993) (concluding that statement in prior case was *dicta* "because it goes beyond the facts of the case").

Second, unlike the permanent curfew at issue in *Ramos*, the challenged curfew here was ephemeral, operating for approximately one week in response to a declared emergency. Defendants argue that whatever standard pertains for scrutinizing the constitutionality of a permanent curfew, a more deferential standard should apply to a temporally limited curfew imposed in time of emergency. In support, they point us to *United*

States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

At issue in *Chalk* was a three-night curfew imposed on all residents of Asheville, North Carolina, in the wake of a violent clash between police officers and high school students. *See id.* at 1278. The Fourth Circuit upheld that curfew as a constitutional exercise of the mayor's emergency authority. While acknowledging that a mayor's "decision that civil control has broken down to the point where emergency measures are necessary is not conclusive or free from judicial review," the court concluded that judicial review of such a decision was properly "limited to a determination of [1] whether the mayor's actions were taken in good faith and [2] whether there is some factual basis for his decision that the restrictions he imposed were necessary to maintain order." *Id.* at 1281. Answering both questions in the affirmative, the court upheld the challenged curfew. *Id.* at 1281–82; *see also Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996) (using *Chalk* standard in upholding months-long curfew imposed on residents of Dade County, Florida in aftermath of Hurricane Andrew), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

After careful review, we are not persuaded to apply *Chalk*'s deferential standard to the curfew in this case. As this court recently stated, "we grant no special deference to the executive when the exercise of emergency powers infringes on constitutional rights." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020). Thus, we

continue to apply a level of heightened scrutiny to curfews challenged as violating the right to travel.

In applying heightened scrutiny here, we are nevertheless mindful that the challenged curfew was temporally limited to one week and imposed in response to a declared emergency. As to the latter, this court has observed that "the uncertainties that accompany many novel emergencies" may require government officials to make difficult decisions and call "for a measure of humility on the part of the reviewing judge." *Id.* Recognizing government officials to have "wide latitude in issuing emergency orders to protect public safety or health," however, does not warrant giving such officials "*carte blanche* to impose any measure without justification or judicial review." *Robinson v. Att'y Gen.*, 957 F.3d 1171, 1179 (11th Cir. 2020); *see Melendez v. City of New York*, 16 F.4th at 1041. If governments are better able to justify actions taken in response to civic exigencies, it is not because relaxed judicial scrutiny applies to such measures but, rather, because government responses to such emergencies are more likely to satisfy heightened scrutiny. *Cf. Bykofsky v. Borough of Middletown*, 429 U.S. 964, 965 (1976) (Marshall, *J.*, joined by Brennan, *J.*, dissenting from denial of certiorari) (concluding that strict scrutiny applied to curfew ordinance while expressing "little doubt but that, *absent a genuine emergency*, see e.g., *United States v. Chalk*, 441 F.2d 1277 (C.A.4 1971), a curfew aimed at all citizens could not survive constitutional scrutiny" (emphasis added)).

In sum, even recognizing that the challenged curfew was temporally limited and responsive to an emergency, we conclude that it is properly subjected to some level of heightened scrutiny. Rather than conclusively decide whether that scrutiny should be intermediate or strict, we apply the latter and, upon doing so, conclude, as the district court did, that plaintiffs fail plausibly to plead a violation of the constitutional right to travel.

C. The Challenged Curfew Satisfies Strict Scrutiny

To satisfy strict scrutiny, the government must show that its challenged policy "is narrowly tailored to serve a compelling governmental interest." *Selevan v. New York Thruway Auth.*, 711 F.3d at 257–58 (internal quotation marks omitted); *see Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. at 734 (stating standard). "While this is a heavy burden, it is not true that strict scrutiny is strict in theory, but fatal in fact." *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 246 (2d Cir. 2014) (internal quotation marks omitted); *see Walker v. Beard*, 789 F.3d at 1135–38 (concluding on pleadings that government satisfied strict scrutiny).

1. Compelling State Interest

As the Supreme Court has stated, "[t]he legitimate and compelling state interest in protecting the community from crime cannot be doubted." *Schall v. Martin*, 467 U.S. 253, 264 (1984) (internal quotation marks omitted). This

court too has recognized as "beyond cavil that . . . states have substantial, indeed, compelling, governmental interests in public safety and crime prevention." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015).

Plaintiffs do not seriously dispute that preventing crime and maintaining civil order are compelling state interests. Rather, they submit that the interest cannot be defined "at a high level of generality" and must be analyzed in the particular context in which it is asserted. *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021). We agree. Nevertheless, we conclude from the pleadings and judicially noticeable facts detailed in the Background section of this opinion that there can be no question that defendants imposed the challenged curfew to serve a compelling state interest in curbing escalating nighttime crime and disorder occurring unpredictably throughout the City that was resisting control by traditional means of policing.

In urging otherwise, plaintiffs submit that the severity of the crime problem prompting imposition of the challenged curfew can reasonably be disputed because daily arrests were then lower than they had been in January and February 2020. The argument fails because it ignores a salient fact: the intervening surge in the COVID-19 pandemic, which, in March 2020, resulted in numerous mandated and voluntary limits on public activity that necessarily brought a decline in all such activity, criminal as well as lawful. *See supra* at 3

n.1. In any event, the general decline in crime highlighted by plaintiffs cannot refute what they themselves acknowledge, *i.e.*, that when the challenged curfew was imposed, "there were tumultuous and confrontational moments in some areas in the City and even incidents of looting, destruction of property, and violence" arising unpredictably across the City. Compl. ¶ 14 ; *see supra* at 6–14 (referencing contemporaneous news reports of violence and property destruction throughout City, as well as subsequent DOI report confirming such activity and compiling NYPD statistics detailing sharp increase in criminal activity).

Plaintiffs nevertheless insist that no *compelling* interest in restoring order can be identified as a matter of law because such criminal behavior was "extremely limited," Compl. ¶ 30, and engaged in by only "a small number of individuals," *id.* ¶ 14. We disagree. First, there is always a compelling public interest in stopping violence and lawless destruction of property. Whether the means chosen to do so—here, a week-long, nighttime curfew—is narrowly tailored in light of its effect on the right to travel is properly addressed at the second, not the first, step of strict scrutiny. In any event, in a City with a population exceeding eight million, the participation of several hundred—perhaps even several thousand—people in an activity might appear a relatively small or limited number. But when that activity is violence, looting, and destruction, and when it occurs at unpredictable locations across the City and

escalates over several days, it cannot be disputed that the public has a compelling interest in government officials curbing that criminality and restoring order.

Thus, we conclude as a matter of law that strict scrutiny's first demand, for a compelling public interest, is here satisfied. We proceed to consider its second demand for narrow tailoring.

2. The Challenged Curfew Was Narrowly Tailored To Reduce Crime and Restore Public Order

"Narrow tailoring requires the government to demonstrate that a policy is the least restrictive means of achieving its objective." *Agudath Israel of Am. v. Cuomo*, 983 F.3d at 633 (internal quotation marks omitted). This requires a showing that there are no "less restrictive alternatives [that] would be at least as effective in achieving" the objective. *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 878 (2d Cir. 2008) (internal quotation marks omitted and alteration in original).

Plaintiffs fault the district court for simply "assum[ing]" that the challenged curfew was narrowly tailored to advance the defendants' professed objective of reducing crime and public disorder. Appellants' Br. at 23. We are not persuaded that the district court relied only on an assumption in granting dismissal. In any event, on our own *de novo* review, we conclude that the requisite narrow tailoring is demonstrated as a matter of law by the totality of the pleadings and

judicially noticeable facts.[22]

In part, narrow tailoring is indicated by the fact that the City imposed the curfew only after contemplating alternative courses of action. To explain, as plaintiffs acknowledge, the challenged curfew was no general crime-control measure; rather, it was imposed in response to a particular "tumultuous and confrontational moment[]" in the City's history. Compl. ¶ 14. That moment began on or about May 28, 2020, when "thousands" of demonstrators, motivated by George Floyd's death at the hands of Minneapolis police, gathered "in various sections of the [City's] five boroughs to protest police brutality against Black and minority communities." *Id.* ¶ 11. From the first, at least some demonstrators engaged in unlawful conduct, *e.g.*, blocking major transportation arteries, breaking store windows, destroying police vehicles, and setting fires. *See supra* at 8–11. Many demonstrations devolved into physical, even violent, confrontations with police. *See id.* Mayors in other cities, experiencing similar disturbances in connection with Floyd demonstrations, imposed curfews and/or deployed the National Guard. *See supra* at 10; *see also Verastique v. City of Dallas*, 106 F.4th 427, 430 (5th Cir. 2024) (explaining that, in Dallas, Floyd "demonstrations ultimately devolved into several

[22] While we necessarily discuss points indicative of narrow tailoring individually, it is by considering them in total that we reach the tailoring conclusion compelling dismissal. Thus, we do not here decide whether a curfew imposed in different circumstances would survive strict scrutiny.

days of riots, destruction of property, and assaults on police" (internal quotation marks omitted)); *Marks v. Bauer*, 107 F.4th 840, 842 (8th Cir. 2024) (describing "damage caused by rioting and looting" in Minneapolis following Floyd protests); *United States v. Pugh*, 90 F.4th 1318, 1323 (11th Cir. 2024) (explaining that, in Mobile, Alabama, Floyd protest "devolved into a riot," resulting in federal criminal charges); *Packard v. Budaj*, 86 F.4th 859, 862 (10th Cir. 2023) (explaining that, during Floyd protests, Denver mayor declared state of emergency, imposed curfew, and requested assistance from mutual aid police departments); *United States v. Olson*, 41 F.4th 792, 795 (7th Cir. 2022) (stating that "[l]ike many major American cities, Madison, Wisconsin was embroiled in violent and disruptive protests during the weekend of May 30–31, 2020, in the wake of George Floyd's death," with "crowds of hundreds engaged in rampant looting, vandalism, arson, and widespread violence"). Mayor de Blasio, however, initially chose not to do so. Voicing support for demonstrators' right to protest peacefully and noting that the vast majority of demonstrators were in fact peaceful, he continued to address unlawful conduct and outbreaks of violence through traditional policing. *See supra* at 10.

By June 1, however, it became evident that traditional policing, even with greater numbers of officers, was inadequate to curb violence and destruction across the City. Indeed, such criminality was increasing, both in numbers and severity, as confirmed by the very NYPD arrest

statistics otherwise relied upon by plaintiffs in their pleadings. On the night of May 31, physical confrontations between police and protesters had grown more numerous and aggressive, additional fires had been set, greater property damage had been caused, and brazen looting had increased in more parts of the City. *See supra* at 11. Also, that night, police lives were threatened, with shots fired at one officer sitting inside a marked police vehicle in Queens, and another officer struck by a motor vehicle in Manhattan. *See id.* In total, 349 people were arrested across the City, 34 police officers were reported injured, and 13 police vehicles were damaged in a single night. *See id.* Only at that point did Mayor de Blasio, in consultation with the City's police commissioner and Governor Cuomo, decide to impose a curfew. As the mayor noted at a June 2 press conference, "[w]e did not expect [the looting that] started Sunday night at nine." Press Conference Tr.

Narrow tailoring is further evident from the limited scope of the challenged curfew. Initially, it was ordered for a single night and for only six hours, from 11:00 p.m. on June 1 to 5:00 a.m. on June 2. Those hours, which coincided with much of the worst violence and destruction then experienced, were also when most law-abiding persons were already likely to be in their homes rather than traveling outside.[23] The initial curfew

[23] This likelihood was greatly enhanced in May-June 2020 by various state and local orders, imposed in response to the coronavirus pandemic, which limited the numbers and venues

thus left New Yorkers free to travel as they wished for eighteen hours of every day.[24]

The curfew was also narrowly tailored in that it provided exceptions for persons who particularly needed to be outdoors during curfew hours: police officers, firefighters, persons engaged in certain essential work, persons in need of medical care or supplies, and homeless persons without access to shelter. *See supra* at 13.

Thus, to the extent plaintiffs complain that the imposition of *any* curfew violated their constitutional right to travel, their claim was properly dismissed because the pleadings and judicially noticeable facts admit no dispute that (1) the curfew addressed a legitimate and compelling state interest in protecting the community from violence and destruction; (2) traditional policing had proved inadequate to curb that criminality, which was in fact escalating; and (3) the initial curfew was narrowly tailored as to duration, hours, and exceptions to address the compelling public interest with minimal intrusion on the right to

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in which persons could congregate. *See, e.g.*, *supra* at 3 n.1.

[24] We need not here decide whether such a temporally limited curfew might be analogized to a time, place, and manner restriction on First Amendment rights which, when content neutral, need survive only intermediate scrutiny. *See, e.g.*, *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 202 (2d Cir. 2013). Here we conclude only that the curfew's temporal limit is one of many factors demonstrating that it was narrowly tailored to address the City's compelling interest in curbing escalating violence and destruction and restoring public order.

travel. Thus, the initial curfew withstands strict scrutiny as a matter of law.[25]

The same conclusion applies to curfew extensions ordered on June 1 and 2: the first extending the curfew for one more night from 8:00 p.m. on June 2 to 5:00 a.m. on June 3, and the second extending that curfew until June 8, a period of almost a week.[26] Focusing on the longer curfew extension, its narrow tailoring is evident from pleadings and indisputable facts.

Specifically, the one-week curfew, like the initial curfew, was tailored to apply only during nighttime hours, which was when violence, property damage, and looting were escalating in the city. As Mayor de Blasio acknowledged in announcing the extended curfew, Floyd demonstrations continued to be "overwhelmingly peaceful" during the daytime on June 1. Press

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[25] In urging otherwise, plaintiffs point to a June 1, 2020 statement by the City's police commissioner expressing skepticism that a curfew would quell rioters. The statement does not indicate that the commissioner thought a curfew was *more* than the least necessary to curb crime and restore order. Rather, it indicates concern as to how effective a curfew would be if people did not heed it.

[26] June 8 coincided with the governor's announced plan to lift certain restrictions imposed in response to the COVID-19 pandemic. *See New York City Is Expected to Open June 8, Cuomo Says*, N.Y. TIMES (May 29, 2020), nytimes.com/2020/05/29/nyregion/coronavirus-new-york-live-updates.html [perma.cc/U6MH-BVPT] (reporting that City would begin phase 1 of reopening of certain nonessential businesses on June 8).

Conference Tr. It was when night fell that there was "a lot of trouble in some parts of the city." *Id.*; *see supra* at 13–15; Compl. ¶ 46.

While the extended curfew's operation from 8:00 p.m. to 5:00 a.m. limited law-abiding persons' freedom of movement for nine hours—three hours more than the initial curfew—this time span was nevertheless narrowly tailored to the time of most compelling public interest in curbing escalating crime.[27] Law-abiding persons, including peaceful Floyd demonstrators, remained free to travel wherever they wished for fifteen hours of each day, subject only to COVID-related limitations. Mayor de Blasio effectively made this point when, in announcing the extended curfew, he asked Floyd demonstrators who wished to continue their peaceful protests to "do it in the daytime hours and then please go home, because we have work to do this evening to keep a peaceful city." Press Conference Tr. The extended curfew, like the initial curfew, was also narrowly tailored by various exceptions for certain workers and homeless persons.

Most important, the extended curfew was limited to one week. That distinguishes this case from *Ramos v. Town of Vernon*, 353 F.3d 171, which involved a curfew of indefinite duration. *See generally Tinius v. Choi*, 77 F.4th 691, 700–01 (D.C. Cir. 2023) (observing, in context of First

[27] We note that sunset on June 1, 2020, was 8:22 p.m. and sunrise on June 2, 2020, was 5:26 a.m., hours that roughly equate to those of the extended curfew.

Amendment challenge triggering intermediate scrutiny, that challenged three-night curfew was "very different" from permanent curfew).

Moreover, the pleadings and judicially noticeable facts admit no dispute that a one-week curfew was imposed only after a one-night curfew, together with increased policing, had proved inadequate to curb escalating crime on the night of June 1. Plaintiffs' Complaint acknowledges "property destruction, vandalism, and looting" along Fordham Road in the Bronx, in Manhattan along Sixth Avenue, in Herald Square, in the Diamond District, and in SoHo, and in Brooklyn near the Barclays Center. Compl. ¶ 16. Detailing some such events, the DOI states that, "[b]y 10:00 p.m." on June 1, "there were reports of widespread looting of commercial businesses in Midtown and Lower Manhattan, including at Macy's Department Store in Herald Square." DOI Report at 15. "Significant looting" also occurred in the Bronx in the late evening and the early morning of June 2, "notably in the commercial corridor along Fordham Road in the western Bronx, and at the Bay Plaza Shopping Center . . . in the eastern Bronx." *Id.* at 16. From 4:00 p.m. on June 1 to 4:00 a.m. on June 2, police statistics report "approximately fifty-one ATM robberies . . . , 23% occurring in the Bronx's 46th precinct alone, and 2,319 'commercial burglary' 911 calls." *Id.*[28]

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[28] DOI noted that in previous weeks, "the same twelve-hour period . . . typically produced fewer than 50 commercial burglary 911 calls." DOI Report at 16.

In addition, Mayor de Blasio apparently considered and rejected alternative measures, including the suggestion that he seek intervention by the National Guard. *See* Press Conference Tr. (explaining that he did not think it necessary or "wise" to employ the National Guard, which was "not trained for the circumstance" then confronting the City).[29] The City also made ongoing assessments of the curfew, which resulted in its early termination on June 7 as reports of violence, destruction, and attending arrests steadily declined over five days. *See supra* at 15. While such ongoing assessment and early termination may not, by themselves, be dispositive, they are strong indicators of narrow tailoring. *See generally United States v. Sec'y of Hous. & Urban Dev.*, 239 F.3d 211, 220 (2d Cir. 2001) (concluding, on strict scrutiny, that race-conscious measures that were both "flexible and ephemeral" were narrowly tailored to advance compelling governmental interest (internal quotation marks omitted)).

In these specific and well-documented circumstances, extending the curfew for one week—while retaining (and, in fact, exercising) the discretion to end it early if circumstances improved—must be recognized as a matter of law as the least restrictive means then available to

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[29] As noted *supra* at 10, other cities experiencing criminal activity in conjunction with Floyd demonstrations had reportedly begun to deploy the National Guard in addition to imposing curfews.

defendants to prevent escalating crime and to restore order in the City.

In urging otherwise, plaintiffs submit that a less restrictive means for curbing crime and restoring order would have been to cabin the curfew "to the specific areas [of the City] where criminality was occurring." Appellants' Br. At 27. Plaintiffs' Complaint, however, fails to allege facts plausibly indicating that criminality was limited to discrete areas of the City. They make "mere conclusory statements" to that effect, which we need not credit. *Ashcroft v. Iqbal*, 556 U.S. at 678; *see* Compl. ¶ 15. Indeed, such a conclusory assertion is belied not only by the specific events detailed in contemporaneous media reports,[30] and the subsequent statistically documented DOI Report, but also by plaintiffs' pleadings, *see* Compl. ¶ 16 (quoted *supra* at 36). These indisputably show that, while criminality was sometimes localized, it occurred across many parts of the City with persons frequently migrating from certain locations to others, even across boroughs, in ways that were

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[30] *See, e.g.*, NYTimes, May 30, 2020 (describing protesters moving "through Harlem, the East Village, Times Square, Columbus Circle, Jackson Heights in Queens, the Flatbush section of Brooklyn and portions of the Bronx and Staten Island, sometimes seeming to move independently but at other moments appearing to break apart, come together and re-splinter in a way that tested the ability of the police to maintain control"; demonstrators pelting police vehicle in Park Slope, Brooklyn; "bottles and firebombs" being hurled at police outside Brooklyn's Barclays Center; and protesters smashing window of police S.U.V. at 14th Street and Fourth Avenue in Manhattan).

not always predictable. In such dynamic circumstances, strict scrutiny's demand for the use of a least restrictive alternative did not require defendants to assume that criminal activity would be confined only to certain City neighborhoods or to limit a curfew order to those neighborhoods.[31]

Our narrow tailoring conclusion finds support in decisions of two of our sister circuits reviewing First Amendment challenges to curfews on intermediate scrutiny: *Tinius v. Choi*, 77 F.4th 691 [D.C. Cir.], and *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005). In *Tinius*, the court upheld the Rule 12(b)(6) dismissal of a challenge to a curfew that, like the one here at issue, was imposed to curb "rioting, vandalism, looting, and arson" attending otherwise peaceful Floyd demonstrations. 77 F.4th at 696.[32] Employing reasoning similar to our own, the D.C. Circuit concluded that extension of the D.C. curfew from

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[31] Such an endeavor can raise other concerns. *See, e.g.*, *Hutchins v. District of Columbia*, 188 F.3d 531, 544 (D.C. Cir. 1999) (*en banc*) (plurality opinion) (rejecting argument that District "was obliged to confine the curfew to high-crime areas of the city," which "would have opened the Council to charges of racial discrimination"); *but see Washington v. Davis*, 426 U.S. 229, 242 (1976) (rejecting proposition that "law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another").

[32] The D.C. Circuit declined to address plaintiffs' right-to-travel challenge to the curfew, deeming the argument forfeited by the failure to raise it in the district court. *See Tinius v. Choi*, 77 F.4th at 706.

one night to an additional two nights was "narrowly tailored" because the extension was "limited" and "temporary" and imposed "in response to a spike in serious crime" that was particularly prevalent at night. *Id.* at 700. In these circumstances, the court ruled that the mayor's "measured approach show[ed] tailoring to the public safety interest." *Id.* Further, although the *Tinius* plaintiffs had not challenged the citywide scope of the D.C. curfew, the court concluded that such an application was justified by the curfew order's recounting of "vandalism . . . across multiple areas of the city." *Id.* at 701–02.

In *Menotti v. City of Seattle,* the Ninth Circuit upheld an award of summary judgment in favor of defendants on a facial challenge to a Seattle order precluding entry into parts of the city during a meeting of the World Trade Organization ("WTO"). *See* 409 F.3d at 1118. Like the curfew here, that order was imposed in the wake of protests, some of which included looting, property destruction, the use of Molotov cocktails, and assaults on law enforcement officers, WTO delegates, and members of the public. *See id.* at 1120–23 (observing that "disruption of normal city life was so extreme in some locations that it bordered on chaos"). The Ninth Circuit concluded that the order satisfied intermediate scrutiny because it was narrowly tailored to serve Seattle's "significant interest in maintaining public order, . . . a core duty that the government owes its citizens." *Id.* at 1131. The court explained that "once multiple instances of violence erupt, with a

breakdown in social order," a city is permitted to "act vigorously . . . to restore order for all of its residents and visitors." *Id.* at 1137.

The curfew here, like the curfew in *Tinius*, was imposed in response to documented violence, destruction, and looting "across multiple areas" of a large, densely populated city. 77 F.4th at 702. The curfew here, like the preclusion order in *Menotti*, was imposed in response to criminality "border[ing] on chaos." 409 F.3d at 1121. Further, as in *Tinius,* the City here employed a "measured approach" to curb criminal activity. 77 F.4th at 700. It first relied on traditional policing; then, when criminality escalated, it supplemented traditional policing with a one-night curfew; then, when criminality continued to escalate, it extended the curfew for an additional six nights; and finally, when conditions improved and stabilized, the City ended the curfew one night early. *See id.* at 696–97, 700. In these circumstances, even on strict scrutiny, we conclude as a matter of law that the extended curfew was narrowly tailored to employ the least restrictive means to serve the City's compelling public interest in curbing escalating crime and restoring order.

The challenged curfew satisfying both requirements of strict scrutiny, we conclude that plaintiffs fail as a matter of law to state a plausible claim for violation of their right to travel and, accordingly, we affirm dismissal of that claim as

against all defendants.[33]

CONCLUSION

For the reasons stated in this opinion, we conclude that the district court correctly dismissed plaintiffs' right-to-travel challenge to a week-long nighttime curfew imposed in New York City to curb escalating violence, destruction, and looting occurring in conjunction with otherwise peaceful demonstrations protesting the Minneapolis death of George Floyd. Upon *de novo* review, we conclude that the challenged curfew withstands even strict scrutiny.

Accordingly, we **AFFIRM** the judgment of dismissal.

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[33] Having so concluded, we need not consider defendants' further argument that insofar as Mayor de Blasio and Governor Cuomo are sued in their individual capacities, dismissal was warranted on grounds of qualified immunity. Nor need we address Governor Cuomo's argument that plaintiffs failed to allege his personal involvement in the imposition of the curfew.