

OPINION ON REHEARING

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re A. G., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

A. G.,

Defendant and Appellant.

D053991

(Super. Ct. No. J220062)

APPEAL from a judgment of the Superior Court of San Diego County, Laura H. Parsky, Judge. Affirmed in part and reversed in part.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

The People alleged in an amended petition that A. G., a minor, came within the juvenile court jurisdiction under Welfare and Institutions Code<sup>1</sup> section 602 because she violated Vehicle Code sections 23136, subdivision (a), and 22349, subdivision (a), and the curfew provisions codified in San Diego Municipal Code section 58.0102. The court found true the allegations of the Vehicle Code section 22349, subdivision (a), violation and the San Diego Municipal Code section 58.0102 violation, and found A. G. was a person described in sections 601 and 602. At the dispositional hearing, the court placed A. G. on six months' probation.

A. G. challenges the true finding that she violated either San Diego's curfew ordinance (San Diego Ord. No. 0-18416, hereafter the curfew ordinance) or San Diego Municipal Code section 58.0102, the codification of the curfew ordinance. She asserts both the curfew ordinance and San Diego Municipal Code section 58.0102 contain an implied prerequisite requirement for a true finding that she must have previously received a curfew violation warning citation, and there was no evidence she had previously received a warning citation. She also raises a due process claim arising out of the discrepancy, discussed at parts I.C. and II, between the curfew ordinance and its codification in San Diego Municipal Code section 58.0102. She also asserts the curfew ordinance and San Diego Municipal Code section 58.0102 violate the equal protection clauses of the United States and California Constitutions.

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

## FACTUAL AND PROCEDURAL HISTORY

A. The Offenses

On May 28, 2008, at approximately 1:00 a.m., Officer Rodriguez of the California Highway Patrol stopped a speeding vehicle on Interstate 8. A. G. was driving, and was the sole occupant of, the vehicle. Rodriguez asked A. G. why she was speeding, and A. G. responded that she was trying to arrive home before her parents. Rodriguez also noticed signs A. G. had been consuming alcohol and administered two field sobriety tests. Although he concluded A. G. had been drinking alcohol, and the amended petition included the allegation that A. G. had violated Vehicle Code section 23136, subdivision (a), that allegation was dismissed at trial.

B. The Hearings

Defense counsel objected to the amended petition to the extent it added the alleged San Diego curfew violation. Defense counsel argued that the "[section] 625.5[, subdivision] (d) process has [not] been followed," and a true finding for violating curfew based merely on her "passing through a town" would deny A. G. her rights under both the federal and state Constitutions. The court noted A. G.'s objections but proceeded with trial. After hearing the evidence and further argument, the trial court entered true findings that A. G. violated San Diego Municipal Code section 58.0102 and Vehicle Code section 22349, subdivision (a), and found she was a person described in sections 601 and 602.

### C. The Appellate Proceedings

After the parties filed their initial briefs, and responded to this court's inquiry with supplemental briefs focusing on the validity of San Diego Municipal Code section 58.0102 under the equal protection clauses, and after hearing oral argument, this court filed its initial opinion in this matter (*People v. A. G.* (Feb. 4, 2010, D053991)) concluding San Diego Municipal Code section 58.0102 was invalid under equal protection principles. Our conclusion was based, in part, on the fact that San Diego Municipal Code section 58.0102, subdivision (c)(7), provided a defense to prosecution when the minor was "attending an official school, religious, or other recreational activity supervised by adults and sponsored by the City of San Diego, a civic organization, or another similar entity that takes responsibility for the minor," but did not permit the minor to travel to or from those activities after 10:00 p.m. unless accompanied by an adult. (San Diego Mun. Code, §§ 58.0101, 58.0102, subd. (c)(7).)

After *People v. A. G.* was filed, the People petitioned for rehearing. In support of the request for rehearing, the People conceded San Diego Municipal Code section 58.0102, subdivision (c)(7) contained no "coming and going" supplement to the activities exempted under that subdivision. However, the People informed this court, for the first time, that the curfew ordinance (ostensibly codified in San Diego Mun. Code, § 58.0102) did contain a "coming and going" supplement for "attending an official school, religious, or other recreational activity supervised by adults and sponsored by the City of San Diego, a civic organization, or another similar entity that takes responsibility for the minor." (San Diego Ord. No. 0-18416, § 2; San Diego Mun. Code, § 58.0102, subd.

(c)(7).) This court granted the petition for rehearing, and asked the parties to file supplemental briefs addressing several key issues raised by the discrepancy between the curfew ordinance and the incomplete codification of that ordinance in San Diego Municipal Code section 58.0102. First, does the discrepancy between an ordinance or statute enacting a law and the incomplete codification of the law raise additional issues that require evaluation by the court? Second, when a discrepancy exists between an ordinance or statute enacting a law and the codification of the law in a municipal or other code, which law must the court examine to evaluate constitutional challenges to a true finding of violation of the law? Finally, assuming this court must focus on City of San Diego Ordinance No. 0-18416 and disregard San Diego Municipal Code section 58.0102, did the presence of a "going to and returning home from" supplement to "attending an official school, religious, or other recreational activity" exception cure the infirmities discussed by this court in its initial opinion? Both parties have filed supplemental briefs, and we now evaluate the issues presented considering this newly disclosed landscape.

## II

### THE ORDINANCE RATHER THAN THE CODIFICATION IS THE RELEVANT LAW

As a preliminary matter, we first determine which version—the ordinance or the codification—is the relevant enactment for purposes of assessing A. G.'s various challenges to the true finding she violated the San Diego curfew.

The People argue, and A. G. concedes, numerous cases have stated that when there is a conflict between a challenged law as enacted and as codified, the court must

treat the law as enacted as the relevant and controlling law. (See *Stephan v. U.S.* (1943) 319 U.S. 423, 426; *U.S. v. Welden* (1964) 377 U.S. 95, 98, fn. 4; *U.S. v. Ward* (3d Cir. 1997) 131 F.3d 335, 339-340.) The codification of statutory enactments serves to compile and publish the enactments, but "the fact that published versions of the . . . Code do not include [all of the enactment] is of no moment. 'A compilation of laws . . . is merely a systematic arrangement of all the statutes of a particular state published to facilitate the discovery of the law. . . . The omission of statutes from the compilation, disastrous as it may be to the hurried lawyer in search of the statutory material, is without effect and if the statute is still in force its omission from the compilation is without legal significance.' [Quoting 1A Sutherland, *Statutory Construction* (4th ed. 1973) § 28.04, p. 318.]" (*People v. Andrade* (1983) 141 Cal.App.3d Supp 36, 40.) The codification "cannot prevail over the [enactment] when the two are inconsistent" (*Stephan v. U.S.*, *supra*, 319 U.S. at p. 426), and accordingly, "when there is a conflict during the process of codification, the Act as originally passed controls." (*State v. Hicks* (Tenn. 1992) 835 S.W.2d 32, 37.)

Although A. G. asserts the language in the above-cited cases was dicta, at least one of the cases—*U.S. v. Ward*, *supra*, 131 F.3d 335—involved resolution of a conflict between the enactment and the codification necessary to the decision. In *Ward*, the issue was whether the trial court had properly ordered the defendant to be tested for the presence of HIV. At trial, the prosecution argued the court had the power to order the testing for the presence of HIV pursuant to the Violence Against Women Act (108 Stat. 1796, 1945-50), codified in part at title 42 United States Code sections 10607(c) and

14011 (1995). The trial court rejected the Violence Against Women Act as a basis for permitting the test, finding it "void" because a codification defect did not specify which individuals were subject to testing for the presence of HIV, even though the Statutes at Large did identify which individuals would be subject to testing. (*Ward*, at pp. 338-339.) The appellate court held that, although the codification errors resulted in "a clear conflict between the codification and Statutes-at-Large version of the Act . . . 'the Code cannot prevail over the Statutes at Large when the two are inconsistent.' [Quoting *Stephan v. U.S.*, *supra*, 319 U.S. at p. 426] . . . When there is such a conflict, the version in the Statutes at Large . . . must control." (*Ward*, at pp. 339-340.) The court concluded that because "the codified version of the Act was not the fault of [Congress] but of the codifiers [and] the Act gave the district court authority to order the accused to undergo a blood test if the showing prescribed [by the Act] was made" (*id.* at p. 340), the appellate court remanded the case to the district court with directions to apply the Act and to make the Act's factual findings to assess whether to order the testing. (*Id.* at p. 343.)

We are convinced by the foregoing authorities that, at least to the extent we assess A. G.'s challenge to the true finding on the ground that she had not received the prior warning as provided in section 625.5,<sup>2</sup> we must assess the provisions contained in City of

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<sup>2</sup> Although our conclusion below—that the true finding must be vacated because deficiencies in the charging documents violated due process protections afforded to all citizens—technically moots A. G.'s statutory interpretation argument under section 625.5, we nevertheless exercise our discretion to reach that argument because it is a matter of continuing public interest and the issue is likely to recur. (See generally *Nebel v. Sulak* (1999) 73 Cal.App.4th 1363, 1367-1368.) Additionally, jurisprudential restraint cautions that a court should only reach constitutional questions if the matter cannot be resolved on

San Diego Ordinance No. 0-18416 (and concomitantly disregard San Diego Mun. Code, § 58.0102 to the extent it differs from San Diego Ord. No. 0-18416) to resolve that claim.

### III

#### THE SAN DIEGO CURFEW ORDINANCE

The San Diego curfew ordinance provides it is unlawful for any minor to be present in any public place or on the premises of any establishment within the City of San Diego between the hours of 10:00 p.m. any evening of the week, until 6:00 a.m. the following day. (San Diego Ord. No. 0-18416, § 2; San Diego Mun. Code, §§ 58.0101, 58.0102, subd. (a).) However, the curfew ordinance also specifies (San Diego Ord. No. 0-18416, § 2; San Diego Mun. Code, § 58.0102, subd. (c)) that it is a defense to prosecution under that ordinance when the minor is:

"(1) accompanied by the minor's parent or guardian, or by a responsible adult;

"(2) on an errand at the direction of the minor's parent or guardian, or the responsible adult, without any detour or stop;

"(3) in a motor vehicle involved in interstate travel;

"(4) engaged in an employment activity, or going to or returning home from an employment activity, without any detour or stop;

"(5) involved in an emergency;

"(6) on the sidewalk abutting the minor's residence;

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nonconstitutional grounds (see generally *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 671), and because the concurring opinion concludes the San Diego curfew ordinance is invalid under the equal protection clauses of the United States and California Constitutions, an initial evaluation of A. G.'s nonconstitutional challenge to the true finding is appropriate.

"(7) attending an official school, religious, or other recreational activity supervised by adults and sponsored by the City of San Diego, a civic organization, or another similar entity that takes responsibility for the minor, or going to or returning home from, without any detour or stop, an official school, religious, or other recreational activity supervised by adults and sponsored by the City of San Diego, a civic organization, or another similar entity that takes responsibility for the minor;

"(8) exercising First Amendment rights protected by the United States Constitution; or

"(9) emancipated pursuant to law."<sup>3</sup>

The San Diego curfew ordinance provides that, before taking any enforcement action under this section, a police officer must ask the apparent offender's age and reason for being in the public place or on the premises of the establishment during curfew hours, and shall not issue a citation or make an arrest under this section unless the officer reasonably believes an offense has occurred and, based on any responses and other circumstances, none of the above defenses under the curfew ordinance are applicable.

#### IV

#### THE STATUTORY INTERPRETATION CLAIM

A. G. does not assert, under the strict terms of the San Diego curfew ordinance, there was no evidence to support the true finding. Instead, A. G. relies on section 625.5 as mandating that a juvenile can be found in violation of a curfew ordinance only if the

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<sup>3</sup> San Diego Municipal Code section 58.0102, subdivision (c)(7) provides that there is a defense to prosecution when the minor is: "attending an official school, religious, or other recreational activity supervised by adults and sponsored by the City of San Diego, a civic organization, or another similar entity that takes responsibility for the minor." However, this codification does not include a "going to or returning" provision within the defense.

juvenile had previously been issued a warning citation for a curfew violation. A. G. argues that *In re Justin B.* (1999) 69 Cal.App.4th 879 held section 625.5 was intended to occupy the field, and therefore asserts the San Diego curfew ordinance contains an implied element that, before a juvenile can be found in violation of that ordinance, the prosecution must plead and prove the juvenile had previously been issued a warning citation. From this predicate, A. G. asserts the true finding must be reversed because the prosecution neither pleaded nor proved A. G. had previously been issued a warning citation for a curfew violation.

Section 625.5 provides it shall "only apply to a city, county, or city and county in which the governing body of the city, county, or city and county has enacted an ordinance prohibiting minors from remaining in or upon the public streets unsupervised after hours and has adopted a resolution to implement this section." (*Id.* at subd. (b).)

Section 625.5 provides:

"(c) Except as provided in subdivision (d), law enforcement personnel are authorized to temporarily detain any minor upon a reasonable suspicion based on articulable facts that the minor is in violation of the ordinance described in subdivision (b) and to transport that minor to his or her place of permanent or temporary residence within the state, whether the place of residence is located within or without the jurisdiction of the governing body, or to the custody of his or her parents or legal guardian. . . .

"(d) Upon the first violation of the ordinance described in subdivision (b), the law enforcement officer shall issue to the minor a warning citation regarding the consequences of a second violation of the ordinance. A designated representative of the governmental entity issuing the citation shall mail to the parents of the minor or legal guardian a notification that states that upon a second violation, the parents or legal guardian may be held liable for actual administrative and transportation costs, and that requires the parents

or legal guardian to sign and return the notification. This notification shall include a space for the explanation of any circumstances relevant to an applicable exemption from the fee as provided by subdivision (e). This explanation shall be reviewed by a designated representative of the governmental entity that issued the citation and notification. If the explanation is found to be insufficient, the representative may request a consultation with the parents or legal guardian for the purpose of discussing the circumstances claimed to be relevant to an applicable exemption.

"(e) A fee for the actual costs of administrative and transportation services for the return of the minor to his or her place of residence, or to the custody of his or her parents or legal guardian, may be charged jointly or severally to the minor, his or her parents, or legal guardian, in an amount not to exceed those actual costs. Upon petition of the person required to pay the fee, the governmental entity issuing the citation shall conduct a hearing as to the validity of the fees charged, and may waive payment of the fee by the minor, his or her parents, or legal guardian, upon a finding of good cause. If authorized by the governing body, the city, county, or city and county may charge this fee, in which case the city, county, or city and county may (1) provide for waiver of the payment of the fee by the parents or legal guardian upon a determination that the person has made reasonable efforts to exercise supervision and control over the minor, (2) provide for a determination of the ability to pay the fee and provide that the fee may be waived if neither the minor nor the parents or legal guardian has the ability to pay the fee, (3) provide for the performance of community service in lieu of imposition of the fee, and (4) provide for waiver of the payment of the fee by the parents or legal guardian upon a determination that the parents or legal guardian has limited physical or legal custody and control of the minor."

We construe section 625.5 to determine whether the Legislature intended by that enactment to preclude cities or counties from treating curfew violations as misdemeanors when the juvenile has not previously received the warning citation described in subdivision (d). In construing a statute, we apply settled rules of statutory construction: "When construing a statute, we must "ascertain the intent of the Legislature so as to

effectuate the purpose of the law." ' [Citations.] '[W]e begin with the words of a statute and give these words their ordinary meaning.' [Citation.] 'If the statutory language is clear and unambiguous, then we need go no further.' [Citation.] If, however, the language supports more than one reasonable construction, we may consider 'a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' [Citation.] Using these extrinsic aids, we 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*People v. Sinohui* (2002) 28 Cal.4th 205, 211-212.)

We are convinced section 625.5 was not intended to superimpose a prior warning requirement before an ordinance may validly treat a curfew violation as a misdemeanor. First, section 625.5 by its own terms specifies it shall only apply when the governing body has (1) enacted an ordinance prohibiting minors from remaining in or upon the public streets unsupervised after hours, and (2) "*has adopted a resolution to implement this section.*" (§ 625.5, subd. (b).) Thus, the legislative language on its face shows section 625.5 has no application unless the governing body has opted into the provisions of section 625.5 by adopting an implementation resolution, and A. G. has not cited any basis for concluding the City of San Diego has adopted that resolution. (Cf. *In re Charles C.* (1999) 76 Cal.App.4th 420, 426, fn. 4 [limitations imposed by section 625.5 inapplicable where no resolution adopted].)

More importantly, we are convinced section 625.5 was not designed to define the minimum elements of a curfew offense in California. Instead, its primary purpose is to relieve cities and counties of one of the fiscal burdens caused by curfew violators, and concomitantly to provide financial disincentives for minors and their parents to ignore curfew laws, by providing a mechanism by which the costs associated with detaining and transporting minors who violate curfew regulations are borne by the parents and/or minors rather than by the general public. Section 625.5 expressly stated it was "the intent of the Legislature in enacting this section to accomplish the following purposes: [¶] (1) To safeguard the fiscal integrity of cities and counties by enabling them to recoup the law enforcement costs of identifying, detaining, and transporting minors who violate curfew ordinances to their places of residence[,] [¶] (2) To encourage parents and legal guardians to exercise reasonable care, supervision, and control over their minor children so as to prevent them from committing unlawful acts[,] [and] [¶] (3) To help eradicate criminal street gang activity." (§ 625.5, subd. (a).) To accomplish those purposes, the statutory scheme contemplates that, "[e]xcept as provided in subdivision (d)," when an officer suspects the minor is in violation of the curfew ordinance, the officer may detain the minor *and* transport that minor to his or her place of permanent or temporary residence (§ 625.5, subd. (c)), and the minor or parent may be required to pay the costs associated with that law enforcement activity. (§ 625.5, subd. (e).) The subdivision (d) exception provides that, "[u]pon the first violation of the ordinance described in subdivision (b), the law enforcement officer shall issue to the minor a warning citation regarding the consequences of a second violation of the ordinance," and requires that a notification be

sent to the parents or legal guardian stating they may be held liable for actual administrative and transportation costs if there is a second violation. (§ 625.5, subd. (d).)

The apparent intent behind section 625.5 is not to superimpose a prior citation element into all curfew ordinances, but is instead to impose a "prior citation/notice to parents" requirement *if* the governing body wishes to take advantage of section 625.5's authorization for recouping from a parent or minor the law enforcement costs associated with a second violation. Even assuming the City of San Diego had adopted a resolution implementing section 625.5, the prior citation requirement would be relevant only to actions for recoupment against the minor or parent, and would be irrelevant to whether the minor violated the underlying curfew ordinance.

A. G.'s reliance on *In re Justin B.*, *supra*, 69 Cal.App.4th 879 is misplaced. The issue in that case was *not* whether the minor had violated the curfew ordinance; to the contrary, the minor was not even *charged* with that offense. Instead, the sole issue was whether a minor could be arrested and subjected to a lengthy detention and custodial interrogation at a police station based on a curfew violation. The *Justin B.* court, relying on an attorney general opinion that stated a curfew violation would not permit transporting the minor to the police station and subjecting him to a custodial interrogation at a police station (*id.* at p. 890), as well as its view that section 625.5 limited the types of actions a police officer may take and did not include arrest and custodial interrogations (*Justin B.*, at pp. 888-889), concluded the statements by the minor were the product of an unlawful search and seizure. (*Id.* at p. 890.) Even assuming *Justin B.* was correctly decided (but see *In re Charles C.*, *supra*, 76 Cal.App.4th at pp. 425-428 [concluding

*Justin B.* was wrongly decided]), it has no application here because there is no claim A. G. was wrongly detained or interrogated.

V

THE DISCREPANCY BETWEEN THE ORDINANCE AND THE CODIFICATION,  
WHEN COUPLED WITH THE CHARGE CONTAINED IN THE PETITION,  
VIOLATED A. G.'S DUE PROCESS RIGHTS

In A. G.'s supplemental brief, responding to this court's inquiries after we granted the People's petition for rehearing, she argued that the discrepancy between the curfew ordinance and the codification of that ordinance offended the fair-notice protection encompassed by the due process clause, and the true finding she violated the curfew ordinance must therefore be reversed.

With exceptions not pertinent here, it is "[w]ithout a doubt [that] a juvenile in a delinquency matter is entitled to the same constitutional guarantees of due process as those accorded an adult criminal defendant. (*In re Gault* (1967) 387 U.S. 1, 30-31.) This includes constitutionally adequate notice of the charges." (*In re Jesse P.* (1992) 3 Cal.App.4th 1177, 1182.) As further observed by the *Jesse P.* court, "[t]he "preeminent" due process principle is that one accused of a crime must be "informed of the nature and cause of the accusation." (U.S. Const., Amend. VI.) Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' [Quoting *People v. Jones* (1990) 51 Cal.3d 294, 317.]" (*In re Jesse P.*, at p. 1182; accord, *In re Jonathan T.* (2008) 166 Cal.App.4th 474, 482-484 [court sustained petition

against a juvenile that charged home invasion robbery under Pen. Code, § 211 but failed adequately to allege element of "acting in concert" as Pen. Code, § 213 enhancement; held: due process precluded court from imposing term of confinement premised on acting in concert enhancement].)

In this case, the amended petition alleged A. G. violated San Diego Municipal Code section 58.0102, not that she had violated San Diego Ordinance No. 0-18416. Because section 58.0102 of the San Diego Municipal Code omitted an important exception to the curfew law's proscriptions, the charging document necessarily deprived A. G. of the required notice of the elements of the offense with which she was charged.<sup>4</sup> Because an essential component of due process is that a penal statute must permit "[o]rdinary people of common intelligence . . . to be able to understand what is prohibited by the statute and what may be done without violating its provisions" (*People v. Ellison* (1998) 68 Cal.App.4th 203, 207), and A. G. was charged with violating an statute that in fact did not permit a person of ordinary intelligence to know what conduct could be engaged in without violating its provisions, we conclude the discrepancy between the

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<sup>4</sup> We need not decide in this case whether the "going and coming" exception "is descriptive of or an element of the offense charged [which] must be negated in the pleading [citation], [or instead constitutes an] exception[] [which is] not a part of the statute defining the offense and constitute a matter of defense [which renders] the pleading . . . sufficient without any allegation showing that the exception does not exist." (*People v. Mason* (1960) 184 Cal.App.2d 317, 356.) Instead, it is the omission from the Municipal Code of any mention of the exception that is dispositive, because it precluded either the prosecution from alleging its nonexistence or the defense from interposing the exception as an affirmative defense.

ordinance and the codification, when coupled with the charge contained in the petition, violated A. G.'s due process rights.

DISPOSITION

The true finding that A. G. violated San Diego Municipal Code section 58.0102 is reversed. In all other respects the judgment is affirmed.

CERTIFIED FOR PUBLICATION

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McDONALD, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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NARES, J.

McDonald, J., concurring.

I take the unusual step of writing a concurring opinion even though I have also authored the majority opinion. I believe the majority opinion accurately summarizes the law and properly applies that law to the narrow issues resolved by the majority opinion, and agree the true finding that A. G. violated San Diego Municipal Code section 58.0102 must be reversed. However, I believe there is an additional and significant basis for reversing the true finding that is not addressed by the majority opinion: whether the San Diego curfew ordinance is invalid because it violates the equal protection clauses of the federal and state Constitutions. I write separately to explain my view that the San Diego curfew ordinance is invalid under the equal protection clauses of the federal and state Constitutions because it burdens a minor's First Amendment rights to speech and association without being narrowly tailored to serve the state interest.

A. A. G.'s Facial Challenge

A. G. asserts the San Diego curfew ordinance is invalid under the rationale employed by *Nunez by Nunez v. City of San Diego* (9th Cir. 1997) 114 F.3d 935 (*Nunez*) in which the court invalidated San Diego's previous curfew law; she argues the current iteration of the San Diego curfew ordinance continues to offend the equal protection clause. The People counter that the San Diego curfew ordinance is valid, under the rationale of *Qutb v. Strauss* (5th Cir. 1993) 11 F.3d 488 (*Qutb*), because the current version of the San Diego curfew ordinance contains exceptions that adequately safeguard protected conduct.

### *The Appropriate Standard of Review*

The equal protection clause "is essentially a direction that all persons similarly situated should be treated alike." (*City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439.) Only if the challenged government action classifies or distinguishes between two or more relevant groups must a court conduct an equal protection inquiry. (*Brennan v. Stewart* (5th Cir. 1988) 834 F.2d 1248, 1257.) Here, the San Diego curfew ordinance indisputably distinguishes between classes of individuals on the basis of age, and because the San Diego curfew ordinance distinguishes between two groups, I analyze the San Diego curfew ordinance under the equal protection clause.

Curfew ordinances of varying configurations have a long history, both in California (see, e.g., *Alves v. Justice Court* (1957) 148 Cal.App.2d 419) and in other jurisdictions around the country (see Note, *Juvenile Curfews and the Major Confusion over Minor Rights* (2005) 118 Harv. L. Rev. 2400, 2402), and numerous courts in both the state and federal systems have addressed constitutional issues similar to the issues implicated by the San Diego curfew ordinance. (See, e.g., *State v. J.P.* (Fla. 2005) 907 So.2d 1101; *Treacy v. Municipality of Anchorage* (Alaska 2004) 91 P.3d 252; *Ramos v. Town of Vernon* (2d Cir. 2003) 353 F.3d 171 (*Ramos*); *Hutchins v. District of Columbia* (D.C. Cir. 1999) 188 F.3d 531 (*Hutchins*); *Nunez, supra*, 114 F.3d 935; *Qutb, supra*, 11 F.3d 488.) The courts that have analyzed the constitutionality of the curfew ordinance before them have disagreed over the appropriate level of scrutiny to apply: some courts appear to have applied the deferential "rational basis" level of scrutiny (see, e.g., *Sale ex rel. Sale v. Goldman* (W.Va. 2000) 539 S.E.2d 446, 456; *People v. Walton* (1945) 70

Cal.App.2d Supp. 862, 866-867); others have applied the so-called "intermediate scrutiny" approach (see, e.g., *Hodgkins ex rel. Hodgkins v. Peterson* (7th Cir. 2004) 355 F.3d 1048, 1057 (*Hodgkins*); *Ramos, supra*, 353 F.3d at p. 181; *Hutchins, supra*, 188 F.3d at p. 541); and a third group of courts have applied "strict scrutiny" to the ordinances under review. (See, e.g., *Nunez, supra*, 114 F.3d at p. 946; *Qutb, supra*, 11 F.3d at p. 492.)

I initially determine the appropriate level of scrutiny for a court to employ in assessing A. G.'s equal protection challenge to the validity of the San Diego curfew ordinance. A. G. asserts strict scrutiny is the applicable standard to test whether the San Diego curfew ordinance violates her right to equal protection under the federal and state Constitutions, while the People contend we must reject A. G.'s equal protection challenge if the classifications established by the San Diego curfew ordinance satisfy the rational basis standard of review.

Generally, legislation is presumed to pass constitutional muster and will be sustained under the Equal Protection Clause if the classification drawn by the statute or ordinance is rationally related to a legitimate state interest. (*City of Cleburne, Tex. v. Cleburne Living Center, supra*, 473 U.S. at p. 440.) However, when the classification either disadvantages a "suspect class" or impinges on a "fundamental right," the ordinance is subject to strict scrutiny review. (*Plyler v. Doe* (1982) 457 U.S. 202, 216-217.) Because age is *not* a suspect classification, statutory classifications based on age are ordinarily subject to rational basis review. (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 470.)

A. G. argues, however, that strict scrutiny should apply because the ordinance infringes on fundamental rights protected by the Constitution: the rights of free movement, travel, and free speech. Certainly, there is substantial authority for the proposition that laws burdening the "constitutional right to travel, or, *more precisely, the right of free interstate migration*" will be subjected to strict scrutiny. (*Attorney General of New York v. Soto-Lopez* (1986) 476 U.S. 898, 902, italics added.) Although the United States Supreme Court has not explicitly held that *intrastate* travel is similarly a fundamental right protected by the federal constitution (see *Schor v. City of Chicago* (7th Cir. 2009) 576 F.3d 775, 780; see also *Hutchins, supra*, 188 F.3d at p. 537 [right to travel under federal constitution may be limited to narrower right to "travel across borders, not mere 'locomotion' "]), some California cases have characterized the right to intrastate travel as "a basic human right protected by the United States and California Constitutions as a whole. Such a right is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law." (*In re White* (1979) 97 Cal.App.3d 141, 148; see also *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1100-1101.)

Although cases such as *Tobe* and *White* appear to support the conclusion that California recognizes a right to intrastate travel for adults that would be fundamental for equal protection purposes, it is unnecessary in this case definitively to delineate the extent to which an adult's right to intrastate travel is a "fundamental right." Even assuming an ordinance directly restricting movement of an adult *would* impinge on that adult's fundamental rights and thereby subject any classification to strict scrutiny (cf. *City of Chicago v. Morales* (1999) 527 U.S. 41, 54), the critical question is whether a *minor* has

a corresponding right that would require the same restrictive level of scrutiny. In many situations, minors do *not* possess the same constitutional rights possessed by adults; for example, minors are afforded less freedom of choice than adults with respect to numerous rights, including marriage, labor, voting, or access to First Amendment-protected expression of the "adult entertainment" variety, all of which are (or likely would be deemed) fundamental when exercised by an adult. The inherent differences between minors and adults—the minor's immaturity, vulnerability, and need for parental guidance—have been recognized by the United States Supreme Court as the basis to justify treating minors differently from adults under the Federal Constitution. (See *Bellotti v. Baird* (1979) 443 U.S. 622, 634-635.) "So 'although children generally are protected by the same constitutional guarantees . . . as are adults, the State is entitled to adjust its legal system to account for children's vulnerability' by exercising broader authority over their activities." (*Hutchins, supra*, 188 F.3d at p. 541, quoting *Bellotti, supra*, 443 U.S. at p. 635.)

*Bellotti's* rationale is persuasive to the extent a curfew ordinance constrains a minor from freely engaging in conduct in which an adult counterpart would be free to engage. For example, there is little doubt that (even absent a curfew) police could take into custody a vulnerable eight-year-old child found alone at night on a city street for the child's own safety and well-being, while a similar treatment of an adult would be impermissible. Even assuming police may not do the same to a more mature minor solely under the *parens patriae* function, an unemancipated minor still does not have the right to freely "come and go at will." (*Vernonia School Dist. 47J v. Acton* (1995) 515

U.S. 646, 654.) Indeed, "juveniles, unlike adults, are always in some form of custody" (*Schall v. Martin* (1984) 467 U.S. 253, 265), and they lack an unfettered right to travel because their right to free movement is limited at least by their parents' authority to consent to or prohibit movement. (See *Ramos, supra*, 353 F.3d at pp. 182-183.) As one court observed when it elected to apply intermediate scrutiny to a curfew ordinance despite its impacts on the juvenile's right of movement, "it would be inconsistent to find a fundamental right here, when the [Supreme] Court has concluded that the state may intrude upon the 'freedom' of juveniles in a variety of similar circumstances without implicating fundamental rights . . . ." (*Hutchins, supra*, 188 F.3d at p. 539.)

New York's highest court recently observed, "[r]ather than categorically applying strict scrutiny to a curfew which implicates a minor's right to free movement simply because the same right, if possessed by an adult, would be fundamental, courts have found that intermediate scrutiny is better suited to address the complexities of curfew ordinances . . . ." (*Anonymous v. City of Rochester* (2009) 13 N.Y.3d 35, 46-47 (*Anonymous*)). Selection of this intermediate scrutiny standard acknowledges the unquestioned precepts that minors do have rights protected by the Constitution but are concomitantly subject to greater regulation and control by the state than are adults (*Ramos, supra*, 353 F.3d at pp. 180-181), yet nevertheless provides a sufficiently probing scrutiny that reconciles the competing considerations of rigorously protecting constitutional rights while retaining adequate flexibility to accommodate legislation carefully crafted to address the particularized situation of minors. (See *Hutchins, supra*,

188 F.3d at p. 541.) As summarized by the Fourth Circuit when it selected intermediate scrutiny to evaluate an equal protection challenge to a curfew ordinance:

"In light of the case law, two things seem clear. First, children do possess at least qualified rights, so an ordinance which restricts their liberty to the extent that this one does should be subject to more than rational basis review. Second, because children do not possess the same rights as adults, the ordinance should be subject to less than the strictest level of scrutiny. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693, n. 15 (1977) (plurality opinion) (when minors are involved the level of scrutiny 'is apparently less rigorous than the "compelling state interest" test applied to restrictions on the privacy rights of adults'); [citation]. We thus believe intermediate scrutiny to be the most appropriate level of review and must determine whether the ordinance is 'substantially related' to 'important' governmental interests." (*Schleifer by Schleifer v. City of Charlottesville* (4th Cir. 1998) 159 F.3d 843, 847 (*Schleifer*).

I agree with the line of authority represented by *Schleifer*, and conclude the constitutional validity of the San Diego curfew ordinance under an equal protection challenge should be tested under the intermediate scrutiny standard.

#### *Application of the Test*

The intermediate-scrutiny test, as first articulated in *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 447 U.S. 557, examines whether the asserted governmental interest promoted by the law is substantial, whether the law directly advances the governmental interest asserted, and whether the law is not more extensive than is necessary to serve that interest. (*Id.* at p. 566.) "The court has clarified that the last part of the test—determining whether the regulation is not more extensive than 'necessary'—does not require the government to adopt the least restrictive means, but instead requires only a 'reasonable fit' between the government's purpose and the

means chosen to achieve it. [Citation.]" (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 952.)

The parties do not dispute the underlying purposes served by the San Diego curfew ordinance include reducing juvenile crime and preventing juveniles from victimization. The courts have generally recognized those governmental interests served by curfew ordinances are at least substantial within the meaning of the intermediate scrutiny test (see, e.g., *Hutchins, supra*, 188 F.3d at p. 542 ["there can be no serious dispute that protecting the welfare of minors by reducing juvenile crime and victimization is an important government interest"]) and, indeed, have even been found to be sufficiently compelling to satisfy the most rigorous of the equal protection tests. (See, e.g., *Nunez, supra*, 114 F.3d at p. 947 [concluding City's interest in reducing juvenile crime and juvenile victimization are compelling interests]; *Qutb, supra*, 11 F.3d at p. 492.)

It is the second and third interrelated prongs of the inquiry—whether the particularized provisions of the curfew ordinance directly and materially advance those governmental interests (*Schleifer, supra*, 159 F.3d at p. 849) and whether those provisions are substantially broader than necessary to advance those interests (see, e.g., *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 800)—that have provided the primary grist for the judicial mill. For those courts that have applied intermediate scrutiny to assess curfew ordinances, some have concluded the curfew ordinance satisfies the second prong because they concluded the statute directly and materially advanced the governmental interests of protecting juvenile's safety and preventing juvenile crime (see,

e.g., *Schleifer, supra*, 159 F.3d at pp. 849-851; *Hutchins, supra*, 188 F.3d at pp. 542-545), while other courts appear to have reached the contrary conclusion.<sup>1</sup> (See, e.g., *Ramos, supra*, 353 F.2d at pp. 183-187; *Anonymous, supra*, 13 N.Y.3d at pp. 48-51 [concluding there was no substantial nexus between evils to be remedied and nocturnal restrictions on minors].)

In evaluating whether the final two interrelated prongs of the intermediate scrutiny analysis—whether the fit between the government's interests and the means chosen to achieve those interests is direct and not substantially more burdensome than necessary to achieve those goals—the courts have generally recognized the appropriate focus should be placed on the *exemptions* to determine whether the ban on nighttime activities is substantially more burdensome than necessary to remedy the evils at which the ban was directed. (See, e.g., *Qutb, supra*, 11 F.3d at pp. 493-494; *State v. J.P., supra*, 907 So.2d at p. 1117 ["[t]he scope of the exceptions to the curfew is of more significance in assessing whether an ordinance is narrowly tailored"]; *Schleifer, supra*, 159 F.3d at pp. 851-852 [upholding curfew because its "narrow scope and comprehensive list of

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<sup>1</sup> The courts that have applied strict scrutiny to assess curfew ordinances likewise appear to be split over whether the curfew ordinance directly advanced the governmental interests of protecting juvenile's safety and preventing juvenile crime. (Compare *Nunez, supra*, 114 F.3d at p. 948 ["[w]e will not dismiss the City's legislative conclusion that the curfew will have a salutary effect on juvenile crime and juvenile victimization"] and *Qutb, supra*, 11 F.3d at p. 493 [concluding sufficient nexus existed between the stated interests and the classifications created by the ordinance] with *Commonwealth v. Weston W.* (Mass. 2009) 913 N.E.2d 832, 845 [concluding imposition of criminal liability for curfew violation is an "extraordinary and unnecessary response" and no showing the use of criminal rather than civil penalties provided any increased benefits toward reducing juvenile crime or protecting juveniles against victimization] and *State v. J.P., supra*, 907 So.2d at pp. 1118-1119.)

[exceptions] represents the least restrictive means to advance Charlottesville's compelling interests").) The courts that have invalidated curfew ordinances, under either the intermediate scrutiny analysis or strict scrutiny analysis, have generally done so because they concluded the exemptions/defenses within the ordinances did not provide adequate breathing room to accommodate the minor's ability either to exercise constitutionally protected fundamental rights (such as First Amendment activities or interstate travel) or to engage in other activities that carried none of the dangers the curfew law was designed to ameliorate.<sup>2</sup> (See, e.g., *Hodgkins, supra*, 355 F.3d at pp. 1060-1065; *Johnson v. City of Opelousas* (5th Cir. 1981) 658 F.2d 1065, 1072-1074 [absence of exemptions for benign activities fatal to curfew ordinance]; *State v. J.P., supra*, 907 So.2d at pp. 1117-1119 [failure to have statutory exceptions for juveniles engaged in "legal, wholesome activities who have the permission of their parents" was overly broad]; *Nunez, supra*, 114 F.3d at pp. 948-951 [failure to exempt minors engaged in legitimate activities with or

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<sup>2</sup> For those courts that have applied strict scrutiny to curfew ordinances, similar considerations have convinced many of those courts that the ordinances were invalid. (See *State v. J.P., supra*, 907 So.2d at pp. 1117-1119 [failure to have statutory exceptions for juveniles engaged in "legal, wholesome activities who have the permission of the parents" was overly broad]; *Nunez, supra*, 114 F.3d at pp. 948-951 [failure to exempt minors engaged in legitimate activities with or without parental permission or to exempt minors who seek to exercise First Amendment rights during curfew hours was overly broad].) However, other courts employing strict scrutiny have examined the exemptions/defenses under the ordinance and concluded that "[b]y including the defenses to a violation of the ordinance, the city has enacted a narrowly drawn ordinance that allows the city to meet its stated goals while respecting the rights of the affected minors." (*Qutb, supra*, 11 F.3d at p. 494, fn. omitted; accord, *Treacy v. Municipality of Anchorage, supra*, 91 P.3d at pp. 267-268 [curfew exemptions for minors engaged in legitimate activities, including exemption for traveling to and from such activities, found to be least restrictive means to achieve objectives of the curfew].)

without parental permission or to exempt minors who seek to exercise First Amendment rights during curfew hours was overly broad].) Conversely, those courts that have upheld curfew ordinances, under either level of scrutiny, have reasoned the exemptions or defenses provided by the particular ordinance under consideration significantly narrowed the curfew's operative effect to those nocturnal activities that involved conduct both unprotected and likely to generate the dangers at which the statute was targeted. (See, e.g., *Hutchins, supra*, 188 F.3d at p. 545, fn. omitted [statute upheld applying intermediate scrutiny based in part on recognition that "the eight defenses to the curfew strengthen the relationship between the curfew and its goal of reducing juvenile crime and victimization by narrowing the scope of the curfew [by] ensur[ing] that the ordinance does not sweep all of a minor's activities into its ambit but instead focuses on those nocturnal activities most likely to result in crime or victimization"]; *Qutb, supra*, 11 F.3d at p. 494, fn. omitted ["[b]y including the defenses to a violation of the ordinance, the city has enacted a narrowly drawn ordinance that allows the city to meet its stated goals while respecting the rights of the affected minors"]; *Schleifer, supra*, 159 F.3d at pp. 851-852; *Treacy v. Municipality of Anchorage, supra*, 91 P.3d at pp. 267-268 [exemptions for minors engaged in legitimate activities, including exemption for traveling to and from such activities, sufficiently tailored to achieve objectives of the curfew].)

It is the narrowing impact of the exemptions provided by the San Diego curfew ordinance that is pivotal to my conclusion. Under this curfew ordinance, a minor is not subject to misdemeanor liability if in public while accompanied by the minor's parent, guardian, or another responsible adult; in a motor vehicle involved in interstate travel; is

involved in an emergency undertaking; or is on the sidewalk abutting the minor's residence. (San Diego Ord. No. 0-18416, § 2; San Diego Mun. Code, § 58.0102, subds. (c)(1), (c)(3), (c)(5), & (c)(6).) Additionally, as long as the minor does not engage in any detour or stop, the minor is not subject to misdemeanor liability if on an errand at the direction of the minor's parent, guardian, or other responsible adult, or is engaged in (or going to or returning home from) an employment activity, or is engaged in (or going to or returning home from) an official school, religious, or other recreational activity supervised by adults and sponsored by the City of San Diego, a civic organization, or another similar entity that takes responsibility for the minor. (San Diego Mun. Code, § 58.0102, subds. (c)(2), (c)(4) & (c)(7).) These exemptions largely track the exemptions that persuaded other courts to hold the ordinance sufficiently narrowly tailored to avoid being substantially more burdensome than necessary to achieving the significant government interests underlying the ordinance.<sup>3</sup>

However, because the San Diego curfew ordinance does not exempt certain other types of conduct, I conclude the particularized provisions of the curfew ordinance impose constraints substantially broader than necessary to the direct and material advancement of those governmental interests. My principal concern is that, although the ordinance nominally protects the minor's ability to "exercise[e] First Amendment rights protected by the United States Constitution," the protection is a hollow one because it applies only when the minor is engaged in those activities after 10:00 p.m. with (or even without)

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<sup>3</sup> See, e.g., *Hutchins*, *supra*, 188 F.3d at pp. 534-535 [substantively similar exemptions]; *Qutb*, *supra*, 11 F.3d at p. 498 [substantively similar exemptions].

parental permission but it does not provide for the minor *to travel to or from those* activities except when accompanied by an adult.<sup>4</sup> Additionally, the curfew ordinance contains no "going to or coming home from" exemption that would permit a minor safely to pass from one exempt location to another, which circumscribes a minor's ability to attend activities like an evening study group hosted in a fellow student's home (or even a social occasion at that home) and limits the minor to attending those events only when the minor is certain the work (or festivities) will end with enough time to allow the minor's pre-curfew return home. Thus, the ordinance sweeps within its ambit entirely benign (or even laudable) conduct, and the People offer no articulation of how circumscribing such benign conduct directly and materially furthers the underlying governmental interests of preventing crime and victimization.

At least three other courts, applying the same intermediate scrutiny to curfew ordinances that I employ to the San Diego curfew ordinance, have concluded the ordinances were invalid. (See *Hodgkins, supra*, 355 F.3d 1048; *Ramos, supra*, 353 F.3d 171; *Anonymous, supra*, 13 N.Y.3d 35.) Although the ordinances considered by those courts contained slight variations, and the rationales of those courts for invalidating the ordinances contain elements not germane here, they have expressed at least some level of concern that the ordinance either imposed restrictions that left inadequate space for the

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<sup>4</sup> The requirement of adult supervision for going to and from First Amendment activities may impermissibly confer on a parent a de facto veto right over after-hours exercise of the minor's First Amendment rights. (See Whitaker, *Gay-Straight Alliances And Free Speech: Are Parental Consent Laws Constitutional?* (2009) 24 Berkeley J. Gender L. & Just. 48, 60) ["[w]hat remains unclear is whether the State may use parental authority to indirectly limit constitutional rights that the State may not limit directly".])

exercise of First Amendment rights (see *Hodgkins, supra*, 355 F.3d at p. 1064 [only way for minor to avoid risk of arrest under curfew law while exercising First Amendment rights was to find adult to accompany him and "[t]o condition the exercise of First Amendment rights on the willingness of an adult to chaperone is to curtail them"]),<sup>5</sup> or that the restrictions imposed on minors were not limited to those types of conduct that had a reasonably tight nexus to the underlying goals of the ordinance. (See, e.g., *Ramos, supra*, 353 F.3d at pp. 183-187; *Anonymous, supra*, 13 N.Y.3d at pp. 48-51.) The San Diego curfew ordinance suffers from both defects: it imposes de facto restrictions on or conditions to the exercise of First Amendment rights, and it restricts the minor's ability to engage in activities after 10:00 p.m. in otherwise safe (and potentially supervised) environments without any suggestion that going directly to (or returning directly home from) those locales implicates the juvenile crime and juvenile victimization goals of the ordinance.

I conclude that, although a more narrowly tailored curfew ordinance is within the legislative prerogative, the present ordinance "sweeps too broadly and includes within its ambit" "otherwise innocent and legal conduct by minors even when they have the permission of their parents." (*State v. J.P., supra*, 907 So.2d at p. 1117.) I conclude the

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<sup>5</sup> On rehearing, the People suggest we should follow the dissenting opinion in *State v. J.P., supra*, 907 So.2d 1101, 1120 (dis. opn. of Cantero, J.), which argued in favor of upholding the curfew ordinance under consideration there, as better reasoned. However, the dissenting opinion in *State v. J.P.* did not examine an ordinance containing a de facto restriction on a minor's First Amendment rights, because the ordinance there expressly exempted a juvenile who was attending "or traveling to or from" an activity that involves the exercise of rights protected under the First Amendment. (*State v. J.P., supra*, 907 So.2d at p. 1106.)

San Diego curfew ordinance is unconstitutional, and would also vacate the true finding on this separate ground.

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McDONALD, J.