APL-2013-00034

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

Against

TODD JOHNSON,

Defendant-Appellant.

BRIEF AMICUS CURIAE FOR DEFENDANT-APPELLANT

on behalf of the New York City Bar Association

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INTEREST OF AMICUS CURIAE

The New York City Bar Association (the "Association"), established in 1870, is a professional organization of more than 24,000 members that seeks to promote the fair and effective administration of justice. The Association, by its Criminal Law Committee, submits this amicus brief to further the Association's work to promote "the fair and effective administration of justice, and a respect for the rule of law at home and abroad."[1] From the 1980s onward, the City Bar has expanded its involvement in access to justice initiatives including in the area of criminal justice.

PRELIMINARY STATEMENT

In a two-and-a-half page decision, the Appellate Division, First Department, creates a precedent that permits police to order individuals standing in a public place to disperse and to arrest them for failure to disperse if police intelligence suggests that one or more of the individuals is in a gang. The decision *People v. Johnson* renders New York State's disorderly conduct statute void for vagueness. Like vague statutes, the judicial decision both fails to notify the citizenry of prohibited conduct and opens the door to arbitrary law enforcement. The decision renders N.Y. Penal Law § 240.20(6) the functional equivalent of a Chicago gang loitering ordinance struck down as unconstitutionally vague by the Supreme Court

[1] http://www.nycbar.org/about-us/overview-about-us

in *Morales v. City of Chicago*, 527 U.S. 41 (1999). Under the *Johnson* decision, like the unconstitutional Chicago ordinance, the police can order any group of two or more persons reasonably believed to contain a gang member to disperse although no criminality or disruption was observed. Under the *Johnson* decision, like the unconstitutional Chicago ordinance, no guidelines are provided to determine when an order to disperse may be issued or the duration or scope of such orders. Under the *Johnson* decision, like the unconstitutional Chicago ordinance, the right to stand on the street in a small group is dependent upon the unguided discretion of law enforcement.

Additionally, the judicial expansion of the disorderly conduct statute permits police to make an arrest where neither reasonable suspicion nor probable cause is established. Although the very allegation that an individual is a gang member, or associates with gang members, is highly inflammatory, in actuality, *gang intelligence is not limited to criminal conduct or actual gang members*. Gang intelligence covers suspected as well as actual gangs, and non-criminal political and social engagement of suspected groups. Nor are "gang members" identified by criminal conduct or gang activity. Instead, gang databases include individuals based on appearances and association with gang members. No arrest or conviction is necessary to be included in the databases as a gang member. No notice is given to individuals included in gang databases and there is no means for challenging

inclusion. Because of the broad criteria for collecting gang intelligence and classifying gang members, gang intelligence is over-inclusive, including non-gang members and former gang-members. Arresting individuals based on suspected gang status, rather than actual conduct, is a violation of due process.

STATEMENT OF FACTS

Four men were arrested at about 3 p.m. on October 29, 2009, and charged with disorderly conduct for standing on a sidewalk after an order to disperse was issued by the police. According to the testimony at a hearing challenging probable cause for the arrest, NYPD intelligence indicated that some or all of the men were associated with a gang called the 40 Wolves. A38, A53. According to the arresting officer, the 40 Wolves "terrorized" the neighborhood and were known for robberies and shootings. A32. The officer had previously arrested two of the four men. A38. No information was provided to the hearing court about whether the arrests were for minor offenses (like the disorderly conduct charge in this case) or for more serious offenses, or whether the arrests actually resulted in charges or convictions. Nor were any specifics provided regarding prior misconduct of any of the men.

There was no testimony regarding what the men were doing before the police ordered them to disperse. When the arresting officer arrived at the scene, the police had lined up the four men with their backs to a deli and one of the four

men was partially blocking the entrance to the deli. A36, A61. There was no testimony that pedestrian traffic was disrupted by the four men, or that any pedestrians were present at the time. Nor was there any testimony indicating why the police originally ordered the men to disperse or when they issued this order.

The Supreme Court first found that the arresting officer was familiar with community complaints regarding a gang called the 40 Wolves, that he knew two of the four individuals to be gang members, that he had seen Mr. Johnson in the company of known gang members, and that non-gang members do not hang out with gang members. A114-115. The court held that the arresting officer had probable cause to arrest Mr. Johnson because at least one member of the group was partially blocking the entrance of a deli, Mr. Johnson disobeyed when ordered to disperse, and pedestrian traffic – had there been any -- would have been obstructed. A118. The Appellate Division, First Department affirmed, and found probable cause for the arrest based on the gang allegations. A4-6. Specifically, the Appellate Division stated that "[g]iven the information the officer had about the gang problems that had occurred at that location in the past and the gang background of several of the men, he had a reasonable basis to believe their presence could cause public inconvenience, annoyance or alarm. Defendant's failure to obey the police officer's direction provided probable cause to arrest him." A5.

ARGUMENT

POINT I

THE APPELLATE DIVISION'S DECISION TRANSFORMS THE DISORDERLY CONDUCT STATUTE INTO AN UNCONSTITUTIONALLY VAGUE GANG LOITERING ORDINANCE.

"The American legal system espouses the principle *nullum crimen sine lege, nulla poena sine lege*, or 'no crime without law, no punishment without law.' In other words, a person may not be convicted and punished unless her conduct was defined as criminal (today, in the United States by statute rather than by judges)." Joshua Dressler, *et al.*, *Cases and Materials on Criminal Law*, 92 (6th Ed. 2012). There is no law in New York that makes gang membership a crime or prohibits a gang member from standing on a street corner, nor does New York prohibit association with gang members. The Appellate Division's decision rewrites the disorderly conduct statute in a manner that renders it functionally indistinguishable from a Chicago gang loitering ordinance that was struck down by the Supreme Court as unconstitutionally vague.

A. The Vagueness Doctrine.

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352,

357 (1983) (citations omitted). Of particular relevance to the instant case, if a criminal statute is impermissibly vague, the police will not be guided by clear standards. *People v. Stuart*, 100 N.Y.2d 412, 420-21 (2003). Indeed, a vague statute "confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring). And, where there are no standards governing the exercise of discretion granted by a statute, it "results in a regime in which the poor and the unpopular are permitted to 'stand on a public sidewalk . . . only at the whim of any police officer.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (ellipses in original) (quoting *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965)).

Courts have developed a two-step inquiry in addressing vagueness challenges. The first relates to fair notice: to ensure that no person is punished for conduct not reasonably understood to be prohibited, the court must determine whether the statute in question is "sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Stuart*, 100 N.Y.2d at 420 (internal quotations and citations omitted). The second inquiry is whether the statute includes minimal guidelines to govern law enforcement and limit arbitrary or discriminatory application. *People v. Bright*, 71 N.Y.2d 376, 383 (1988). The absence of objective standards to guide law

enforcement "permits the police to make arrests based upon their own personal, subjective idea of right and wrong." *Id.*; *see also Kolender*, 461 U.S. at 359 ("Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.") (alteration in original) (internal quotations and citation omitted).

Although the two vagueness inquiries are related, this Court has recognized that arbitrary or discriminatory enforcement is "perhaps, the more important aspect of the vagueness doctrine." *Bright*, 71 N.Y.2d at 383 (citing *Kolender*, 461 U.S. at 358). Thus, this brief will first address the lack of clear guidelines for law enforcement before turning to the lack of notice in the following section.

B. The Appellate Division's Decision Leaves § 240.20 Susceptible to Arbitrary and Discriminatory Enforcement.

In *City of Chicago v. Morales*, the Supreme Court held that a Chicago gang loitering ordinance was unconstitutionally vague because "[t]he broad sweep of the ordinance [ ] violate[d] 'the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (quoting *Kolender*, 461 U.S. at 358). The ordinance, like the Appellate Court's decision in this case, allowed police to order any group of individuals in

specified areas with a history of gang problems to disperse based on the gang background of one or more of the members of the group.

The Gang Congregation Ordinance, adopted after hearings by the Chicago City Council, provided in pertinent part:

> (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Id. at 47, n.2. The ordinance provided definitions for the terms "loiter" and "criminal street gang." *Id.* To "loiter" meant "to remain in any one place with no apparent purpose." *Id.* "Criminal street gang" was defined as "any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." *Id.*

The Chicago Police Department limited enforcement of the ordinance "to designate[d] areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community" but did not release locations of these designated areas to the public. *Id.* at 48-49. During the three years that the ordinance was enforced before it was struck down

as unconstitutionally vague by the Illinois Supreme Court, the City of Chicago Police Department issued over 89,000 dispersal orders and arrested over 42,000 people. *Id.* at 49.

The Supreme Court accepted the finding of the Illinois Supreme Court that the definition of loitering "provides absolute discretion to police officers to decide what activities constitute loitering." *Id.* at 61 (internal quotations and citation omitted). The Court rejected arguments that the presence of a gang member, the definition of loitering, and adoption of internal rules limiting enforcement placed "sufficient limitation on the 'vast amount of discretion' granted to the police in [the ordinance's] enforcement." *Id.* at 63-64.

In the instant case, with no legislative process, ordinance, or definitions to direct law enforcement discretion whatsoever, the Appellate Division interprets the disorderly conduct statute in a manner that transforms it into the functional equivalent of the anti-gang ordinance struck down by the Supreme Court in *Morales*. Like the Chicago ordinance, the Appellate Division's decision gives the police the power to order a group of people standing with someone with a gang background in an area that has experienced gang problems to disperse and to arrest that group for failure to obey the order. Unlike the Chicago ordinance, here there are no legislative guidelines to limit the "vast amount of discretion" this decision grants law enforcement.

In upholding the arrest in the instant case, the Appellate Division has put its imprimatur on a disorderly conduct arrest based on the mere "presence" of individuals, alleged to have a "gang background," in a location that previously "had gang problems." A5. By the plain language of its decision, the Appellate Division has stripped the disorderly conduct statute of its intent requirement and any objective standards governing the exercise of discretion. As in *Morales*, an order to disperse may be issued to purported gang members and whoever they may be standing with, even if their conduct is entirely innocent. *See* 527 U.S. at 60 ("It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa ....").

The disorderly conduct statute as interpreted by the Appellate Division now provides police unfettered discretion to subjectively determine (i) if a given location has previously had "gang problems;" (ii) whether an individual has a "gang background" (or in the case of Mr. Johnson, whether they "hung out" with individuals with a "gang background"); (iii) whether the individuals' "presence" alone could cause a public inconvenience;" and (iv) whether to order anyone standing with an alleged gang member to disperse without any indication that he or she had any intent to disrupt the public. *See Stuart*, 100 N.Y. 2d at 421 ("A vague statute impermissibly delegates basic policy determinations to the police (and

eventually to judges and juries) for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.") (citations and internal quotations omitted); *Bright*, 71 N.Y.2d at 385 (holding that loitering statute which required suspect to give "satisfactory explanation of his presence" in order to avoid arrest was unconstitutionally vague in part because the "determination as to what constitutes a 'satisfactory explanation' is left entirely up to the policeman on the scene without any legislative guidance whatsoever, and renders the statute unconstitutional").

The absence of any legislative directive defining the operative terms -- "gang," "gang problem" and "gang background" -- creates the likelihood of arbitrary law enforcement. Without any such guidance, the Appellate Division's decision transforms application of the disorderly conduct statute into an **exercise of unlimited discretion** for law enforcement. *See Morales*, 527 U.S. at 60-61 (definition of loitering as "to remain in any one place with no apparent purpose" provided "absolute discretion to police officers to decide what activities constitute loitering"); *Papachristou*, 405 U.S. at 170 ("Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their

displeasure.'") (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)); *Bright*, 71 N.Y.2d at 383 ("The absence of objective standards to guide those enforcing the laws permits the police to make arrests based upon their own personal, subjective idea of right and wrong.").

Indeed, because these terms are undefined, arbitrary enforcement cannot be avoided as different police departments and individual officers settle upon different meanings. *See Morales*, 527 U.S. at 61 ("'The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined.'") (quoting *Smiley v. Kansas*, 196 U.S. 447, 455 (1905)); *see also Lanzetta v. New Jersey*, 306 U.S. 451, 457 (1939) (striking down penal statute making it a crime to be a "gangster" in part due to vagueness and uncertainty in regard to persons within the scope of the statute). Without *any* – let alone, uniform – standards defining "gang problems" and "gang background," the Appellate Division's decision paves the way for arbitrary enforcement of § 240.20.

C. The Appellate Division's Decision Transforms § 240.20 into a Statutory Provision that Fails to Provide Notice of what is Prohibited.

The need for clear statutory warnings to alert individuals of prohibited conduct has been a part of this Court's jurisprudence for over a century. *See People v. Phyfe*, 136 N.Y. 554 (1893) (reversing conviction where statute did not

contain a "clear and positive expression of the legislative intent" to make an act criminal). It is axiomatic that when basic rights of life and freedom are at stake, citizens must be given unequivocal notice that prohibited conduct is illegal, and not be left to guess at a statute's meaning. *See Lanzetta*, 306 U.S. at 453 ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.").

In the absence of any legislative or other uniform standards as to what constitutes a "gang" or "gang membership," a judicially-created expansion of the disorderly conduct statute that permits law enforcement to order any individuals with "gang backgrounds," and those accompanying them, to leave a public place or face arrest creates a notice issue that is insurmountable. *Papachristou*, 405 U.S. at 166 ("In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided.") (citation omitted); *Lanzetta*, 306 U.S. at 458 ("the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment").

An individual who is completely unaware that he is congregating with someone whom the police believe has a gang background has no notice upon which to conform his conduct to the requirements of the law. *See Morales*, 527

U.S. at 59 ("Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law.") (Stevens, Souter, and Ginsberg, JJ.); *Bright*, 71 N.Y.2d at 382-83 ("Consistent with our concept of basic fairness, due process requires that a penal statute be sufficiently definite by its terms so as to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.") (internal quotations and citations omitted).

Finally, fair notice is vitiated if otherwise innocent conduct is criminalized because of the presence of alleged gang members. *See Bright*, 71 N.Y.2d at 383 ("the Legislature may not criminalize conduct that is inherently innocent merely because such conduct is sometimes attended by improper motives, since to do so would not fairly inform the ordinary citizen that an otherwise innocent act is illegal") (internal quotations and citation omitted); *Fenster v. Leary*, 20 N.Y.2d 309, 312-13 (1967) (striking down vagrancy statute where "it unreasonably makes criminal and provides punishment for conduct ... which in no way impinges on the rights or interest of others").

An individual may well be uncertain if a neighbor, an acquaintance, or the individual himself has been identified by police intelligence as having potential

gang affiliation. As a result, that individual has no basis on which to determine whether he can stand with other individuals in a public place. Nor can he assess if he is being issued a lawful order to disperse by which he must abide. Because the expansion of the disorderly conduct statute does not provide adequate notice and covers otherwise innocent conduct, the Appellate Division's interpretation of the statute renders it unconstitutionally vague.

POINT II

THERE ARE NO COMMONLY ACCEPTED DEFINITIONS FOR GANG MEMBERS AND "GANG BACKGROUND" CANNOT PROVIDE A BASIS FOR PROBABLE CAUSE OR POLICE DISPERSAL ORDERS ABSENT ALLEGATIONS OF SPECIFIC CONDUCT.

To understand the breadth of the implication of the Appellate Division's decision for the rule of law and constitutional norms, it is useful to understand the nature and role of gang intelligence. Gang intelligence is collected not just to facilitate investigation of particular crimes, but also to allow intervention and mediation of potential disputes, and to target diversion programs for at-risk youth. Thus gang intelligence, like most intelligence, covers subjects of interest and is not confined to actual criminals or even to actual gang members. As Professor James Jacob of NYU School of Law has written, "[i]ncreasingly, police create gang databases for intelligence purposes—independent of conviction, arrest, or even a

criminal investigation." James B. Jacobs, *Gang Databases: Context and Questions*, 8 Criminology & Public Policy 705, 705 (2009).

To complicate matters, New York does not have state-wide standards for identifying gang members or for collecting, maintaining, or purging gang intelligence. Instead, local law enforcement agencies adopt their own definitions and collect gang intelligence according to their own predilections. For the most part these definitions are contained in internal documents and are not disclosed to the public. Some law enforcement agencies may not define these terms at all. Because these terms are so critical and definitions of them are difficult to obtain, this brief relies on particular available definitions to demonstrate the breadth of gang intelligence.[2] Analysis of these terms demonstrates the broad implications of the Appellate Division's decision.

A. NYPD's Definition of Gang Related Intelligence.

The NYPD Patrol Guide contains a definition of "Gang Related Intelligence" that makes it clear that gang intelligence may or may not relate to criminality and may be related to suspected gangs and suspected gang members as well as actual gangs and actual gang members:

> GANG RELATED INTELLIGENCE – Information about a gang, *suspected gang*, an individual gang, or *suspected gang*

[2] Although these definitions are reviewed because they are available, they appear to be consistent with the practices recorded by the National Gang Center in other states. *See infra* at IIB.

> *member*. This includes information about gang meetings, recruiting attempts by gangs, *plans by gang members to organize or take part in protests, marches, and other public events, self-styled "community" events organized by a gang*, as well as any information useful in developing profiles and intelligence about gang activities.

NYPD Patrol Guide, Interim Order 24, Reporting Gang Related Activity, Procedure 212-13, July 11, 2008 (emphasis added), available at http://ksapublications.info/app/pg/PG212.pdf.

For the NYPD at least, gang intelligence relates to both gangs and *suspected* gangs, to both members and *suspected* members. *Id.* Gang intelligence is not limited to contemplated criminal activities but to all activities, including social and political activities of suspected gangs. *Id.* Accordingly, permitting the right to stand on the sidewalk to be circumscribed by "gang intelligence" will be over-inclusive and encompass suspected and non-gangs as well as gangs. For example, an informal group of youth may be identified as a "suspected gang" by the NYPD, but the actual "gang intelligence" may relate to minor delinquent behavior. Joseph Goldstein & J. David Goodman, *Frisking Tactic Yields to a Focus on Youth Gangs*, N.Y. Times, Sept. 18, 2013, at A1 ("Veteran officers keep lists of teenagers believed to be affiliated with crews. . . . On the street, the officers might pick them up for truancy or issue summonses for biking on the sidewalk, to reinforce the notion that the police are watching.").

While criteria and definitions for gang intelligence may vary by law enforcement agency across the state, the very nature of "intelligence," as defined by the New York City Police Department, and the purposes for which it is collected (particularly youth diversion efforts), will result in intelligence that extends to non-gang members and non-gangs.

B. Identifying "Gang Members."

While the criteria for identifying gang members and potential gang members vary from law enforcement agency to law enforcement agency, such criteria generally do not require any conviction or arrest. Of the seven states that have legislative criteria for identifying gang members and associates, none requires any criminal conviction or arrest. *Brief Review of Federal and State Definitions of the Terms "Gang," "Gang Crime," and "Gang Member"* National Gang Center, Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice (December 2012), 4-7.[3] Instead, each requires that two or more criteria of a list be met. The list typically includes such items as, self-admission, dress, tattoos, correspondence with gang members, and the rather circular "identified by law enforcement as a gang member." *Id.* Often whether an individual is arrested or stopped with gang members is also included, but because only two or three criteria

[3] Available at http://www.nationalgangcenter.gov/content/documents/definitions.pdf

are necessary for classification as a gang member, it is not necessary that a gang member ever be arrested.

For example, in Arizona, if an individual satisfies two or more of the following criteria, he can be designated as a "Criminal street gang member":

- Self proclamation
- Witness testimony or official statement
- Written or electronic correspondence
- Paraphernalia or photographs
- Tattoos
- Clothing or colors
- Any other indicia of street gang membership

Id. at 4. The National Gang Center provides similar criteria for the other six states that have statutory criteria. It is worthwhile reviewing these criteria, as the definition of "gang members" nowhere requires any criminal conduct.

In states like New York where no legislation defines criteria for determining gang membership, each jurisdiction adopts its own criteria or amasses gang intelligence on an informal basis. These criteria are generally not published. For example, if the NYPD has specific criteria for determining gang membership, they are neither in the Patrol Guide, published on the NYPD website, nor otherwise accessible. In general, as can be seen from the criteria in the National Gang Center publication, law enforcement agencies tend to adopt definitions under which association, clothing, tattoos, and statements -- not criminal conduct -- are used to identify a large number of potential gang members.

The similarities can be seen in the Nassau County police department's criteria for classifying "gang members." Like most available law enforcement criteria, Nassau County does not require proof of any criminal conduct to classify an individual as a gang member. Attached as Appendix A to this brief is the Nassau County Police Department's "Gang Identifiers" criteria. Under the criteria, either self-admission or a finding that three of the following criteria are satisfied will justify classification of an individual as a gang member:[4]

> (1) tattoos depicting gang affiliation;
> (2) style of dress consistent with gang membership;
> (3) possession of gang graffiti on personal property or clothing;
> (4) use of hand signs or symbols associated with gangs;
> (5) reliable informant identified person [sic] gang member;
> (6) associates with known gang members;
> (7) prior arrests with known gang members; crime consistent with usual gang activity;
> (8) statements from family members indicating gang membership;
> (9) other law enforcement agencies identifying subject as a gang member;
> (10) attendance at gang functions or known gang hangouts; and
> (11) identified by other gang members or rival gang members.

Only one of the criteria relates in any way to criminal conduct -- "arrest with known gang members, crimes consistent with usual gang activity." Individuals can

[4] While Nassau criteria are similar to those in the National Gang Center publications, many jurisdictions require only 2 criteria for classification as gang members. *See Brief Review of Federal and State Definitions of the Terms "Gang," "Gang Crime," and "Gang Member"* at 4-7.

be certified as members based on dress, where they are seen, and with whom they are seen.

If the Appellate Division's decision is permitted to stand, "intelligence" based on association, dress and presence at "gang hangouts" would provide justification for orders to disperse and subsequent arrest in the absence of any intent to cause public inconvenience, annoyance or alarm.

C. Gang Databases are Over-Inclusive of Young Men of Color.

The broad criteria used to determine gang membership and affiliation create a substantial risk that gang intelligence files are over-inclusive. Given the emphasis on association with alleged gang members and appearance, there is a significant risk that over-inclusive databases will also have a substantial racial impact. Law enforcement agencies in New York State (and in most states) do not notify individuals included in gang databases or disclose statistics or information relating to the demographics of databases.[5] Analogous databases that have disclosed such information, however, show sharp race discrepancies.

In Minnesota, for example, the NAACP and local community groups held hearings about the gang databases maintained in that state. Community Justice

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[5] California recently passed a law requiring law enforcement to provide written notice to an individual and his or her parents if they intend to designate a person who is under 18 as a gang member, associate or affiliate in a gang database. Cal. Penal Code § 186.34(b) (signed October 13, 2013). Other than California, other states do not require such notice. It is important to note that individuals over 18 are not entitled to notice and that if law enforcement wishes to maintain gang intelligence that is not in a shared database, notice is not required.

Project, Evaluation of Gang Databases in Minnesota & Recommendations for Change, University of St. Thomas In Collaboration with Saint Paul NAACP, 3-4 (Nov. 2009).[6] The state maintained two databases, both of which used the same ten-point criteria:

1. Subject admits to being a gang member;
2. Is observed to associate on regular basis with known gang members;
3. Has tattoos indicating gang membership;
4. Wears gang symbols to identify with a specific gang;
5. Is in a photograph with known gang members and/or using gang-related hand signs;
6. Name is on gang document, hit list, or gang-related graffiti;
7. Is identified as a gang member by a reliable source;
8. Arrested in the company of identified gang members or associates;
9. Corresponds with known gang members or writes and/or receives correspondence about gang activity;
10. Writes about gang (graffiti) on walls, books and paper.

Id. The community groups that evaluated the Minnesota databases posed the following question about the criteria used: "Do the ten-point criteria evidence criminal gang activity or do they highlight factors that are synonymous with urban youth culture?" *Id.* at 19.

The differences between the two Minnesota databases demonstrate that the ten-point criteria, which are similar to the criteria used by Nassau County and other states, when used without reference to criminal conduct, were over-inclusive of youth of color and under-inclusive of white gang members. One of the databases,

[6] Available at http://twincities.indymedia.org/files/GangsofStPaulReport.pdf

the Minnesota Gang Pointer File, unlike most databases, required: (1) a conviction for a gross misdemeanor or felony, (2) a minimum age of 14, and (3) three criteria (of 10) which, like those that are used by Nassau County, related to association and appearance. *Id.* at 3. The second state-wide database, GangNet, identified suspected gang members who met only one of the criteria; no conviction or minimum age was required. *Id.* at 10-11. In 2008, *36%* of the 2,500 individuals included in the database that required a conviction and three criteria were white, while *only 18%* of the 17,000 individuals listed as suspected gang members in GangNet were white. *Id.* at 3, 22. This example illustrates the fact that eliminating actual criminality allows discretionary and suspicion-based determinations based merely on association.

The over-inclusiveness of many gang databases may help to explain the following "'odd and oddly little noted contradiction' . . . that membership in youth gangs was widely reported to have climbed to unprecedented high levels by the latter half of the 1990s, yet youth violence decreased sharply during that period." Judith Greene and Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, A Justice Policy Institute Report, 11 (July 17, 2007) (Hereinafter *Gang Wars*).[7]

[7] Available at http://www.justicepolicy.org/uploads/justicepolicy/documents/07-07_rep_gangwars_gc-ps-ac-jj.pdf

Unfortunately, once an individual is included in a law enforcement gang database, there is little oversight or incentive to ensure the databases are purged of non-gang members or former gang members.[8] Analogous to gang databases are the more high-profile terrorist no-fly and watch lists. Until 2008, Nelson Mandela was included on the terrorist watch list; it took an act of Congress to have his name removed.[9] Like the terrorism watch lists, individuals included in gang intelligence databases are not advised of the criteria for inclusion, are not notified that they have been included, and have no process for challenging the designation. *See* Joshua D. White, *The Constitutional Failure of Gang Databases*, 2 Stan. J. Civ. Rts. & Civ. Liberties 115, 118 (2005). They may be included in gang databases years after they distance themselves from gangs.

Given the broad criteria that focus on association and appearances and not conduct, and the lack of any mechanism for notification or challenge, gang intelligence may well be over-inclusive particularly for young men of color who live in gang-dominated neighborhoods. Moreover, under the precedent established by the Appellate Division, even if an individual has no actual or suspected

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[8] Charles M. Katz & Vincent Webb, Policing Gangs in America 220-221 (2006) (units that purge databases maintain an archive of purged records for internal use); Charles M. Katz, *Issues in the Production and Dissemination of Gang Statistics: An Ethnographic Study of a Large Midwestern Police Gang Unit*, 49 Crime & Delinquency 485, 500 (July 2003) (Sage Publications) (despite guidelines that required continuous purging, database had not been purged for four years prior to research period).

[9] *The Black Hole of Terrorism Watch Lists*, N.Y. Times, Dec. 16, 2013, at A24.

involvement with a gang, if he or she simply stands in public with others believed by law enforcement to have a gang background, that individual can be ordered to move and arrested for failure to do so.

D. The Relatively Low Rate of Gang-Related Offenses Belies Any Need for the Sweeping Powers the Appellate Division Would Grant the Police.

While it is an issue for the legislature to decide whether additional statutes are necessary to address gang issues, it must be noted that New York State in general and New York City in particular have extremely low incidents of gang crime. *Gang Wars* at 14 ("Gang crime makes for occasional—sometimes sensational—news headlines in New York, and no seasoned New Yorker would deny the existence of street gangs. Yet gang-related offenses represent just a tiny blip on the New York Crime scene...."). The fact that gang-related crimes are not a bigger problem has, in fact, been attributed to the non-punitive, non-arrest approach to gang intervention adopted by New York. *Id.* 15-29 (comparing the punitive suppression approaches of Chicago and Los Angeles to the social work based Youth Board approach adopted in New York City in the 1950s).

As a whole, according to the FBI, New York State is among the states with the lowest level of gang crimes. The National Gang Intelligence Center of the FBI reports that the rate of gang crime in New York State is in the *lowest* category of

zero to two gang crimes per 1,000 people. The 2011 National Gang Threat Assessment: Emerging Trends, 13 (2011).[10]

Despite news stories that may make gangs appear to be a bigger problem than they really are, New York City has extremely low levels of gang crime. The Mayor's Management Report from September 2013 provides the NYPD's numbers for "Gang Motivated Incidents"[11] for the past five years:[12]

FY09	FY10	FY11	FY12	FY13
335	228	303	310	254

Of course, gang members and suspected gang members, like other members of society, may engage in delinquent behavior and criminal acts that are not motivated by gang association, but the problem of gang motivated incidents is more sensational than it is common.

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[10] Available at http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends.

[11] Gang Motivated Incidents are defined in the same Patrol Guide 212-13, as follows: GANG MOTIVATED INCIDENT – Any gang related incident done primarily:

a. To benefit or further the interests of the gang, *or*
b. As part of an initiation, membership rite, or act of allegiance to or support for a gang, *or*
c. As a result of a conflict or fight between gang members of the same or different gangs.

(emphasis in the original).

[12] Mayor's Management Report, September 2013, p. 4, available athttp://www.nyc.gov/html/ops/downloads/pdf/mmr2013/2013_mmr.pdf

Similarly, in recent years New York City has had an extremely low murder rate, of which only a small percentage is attributed to gangs by the NYPD. The NYPD began including "Gang" as a reason for homicides in its annual report on Murder in New York City in 2011. In 2011, only five percent of the city's 515 homicides were attributed to gangs.[13] In 2012, the NYPD attributed nine percent of the 419 homicides to gangs.[14] In 2012 gangs trailed all other causes except "other" and "robbery/burglary" and in 2011, "gangs" trailed all other categories.[15]

A policy that permits individuals standing with actual or suspected gang members to be ordered to move on is neither constitutional nor a necessary tool to respond to the threat that gangs pose in New York State. Law enforcement may and has used intelligence to address gang problems but does not need to use intelligence regarding suspected status to arrest people for standing in public places.

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[13] Murder in New York City, 3 (2011). Report of the NYPD available at http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2011_murder_in_nyc.pdf

[14] Murder in New York City, 3 (2012), Report of the NYPD available at http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/murder_in_nyc_2012.pdf

[15] The other categories are Dispute/Revenge, Drug, Domestic, Robbery/Burglary, Unknown and Other.

E. Because Gang Intelligence Relates Primarily to Non-Criminal Conduct it Cannot Provide a Basis for a Dispersal Order or Probable Cause to Arrest Absent Specific Conduct Justifying Such Intrusions.

As discussed above, law enforcement agencies determine gang membership without any requirement of prior criminal conduct on the part of alleged members and the collection of gang intelligence is not limited to actual gang members but also includes information regarding *suspected* gangs members and *suspected* gangs. Thus, as in the instant case, the use of "gang intelligence" or "gang background" to justify a dispersal order and arrest criminalizes mere status as a member or potential member of a suspected group. Neither the federal constitution nor New York State law permits arrests based on suspicion or suspected status alone. *People v. Berck*, 32 N.Y.2d 567, 572 (1973) (striking down statute that permits arrest of one who loiters "under circumstances which justify suspicion that [a person] may be engaged in or about to engage in crime") (alteration in original); *Fenster v. Leary*, 20 N.Y.2d 309, 316 (1967) (striking down vagrancy statute noting that vagrancy laws were used to arrest "suspected criminals, with respect to whom the authorities do not have enough evidence to make a proper arrest or secure a conviction on the crime suspected"). Nor can law enforcement labels, such as gambler or gangster, substitute for specific conduct justifying law enforcement intrusion. *Spinelli v. United States*, 393 U.S. 410, 414 (1969), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213 (1983) (allegation

that defendant "was 'known' … [by] federal and local law enforcement as a gambler and an associate of gamblers is but a bald and unilluminating assertion of suspicion that is entitled to *no weight*" in the determination of probable cause for arrest) (emphasis added); *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939) (striking down statute that criminalized the status of being a gangster which "condemn[ed] no act or omission"). Like the vagrancy law struck down by this Court in *Fenster*, the disorderly conduct statute was never intended to be "an administrative short cut to avoid the requirements of constitutional due process in the administration of criminal justice." *Fenster*, 20 N.Y.2d at 316.

CONCLUSION

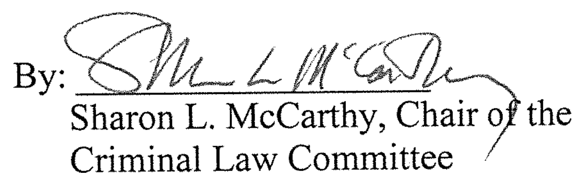
If the New York legislature or local governments were to determine that gang problems require additional laws, these legislatures could adopt appropriate statutes. If the legislature wished to frame laws that prohibit individuals from standing in public places with gang members, it could attempt to do so consistent with constitutional requirements. In drafting such a law, the legislative branch would have to address the infirmities that rendered the Chicago anti-gang loitering ordinance unconstitutional. Such legislation would need to define critical terms to provide notice to the public and standards to guide law enforcement's exercise of discretion. The Appellate Division's decision bypasses this vital legislative process, creates an offense in the absence of any statute, and renders the disorderly

conduct statute unconstitutionally vague. Accordingly, the decision should be reversed.

Dated: New York, New York
January 2, 2014

Respectfully submitted,

NEW YORK CITY BAR
ASSOCIATION

By: 
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APPENDIX A

Nassau County Police Department Gang Identifiers

Nassau County
Police Department

Task Force Against Gangs
Coordinators Office

THOMAS R. SUOZZI
COUNTY EXECUTIVE

1490 Franklin Avenue
Mineola, New York 11501
(516) 573-5208

JAMES H. LAWRENCE
COMMISSIONER

GANG IDENTIFIERS

To be classified as a gang member we need:

1. Self admission of gang membership

-OR-

Any three of the following, not necessarily on the same day:

2. Tattoos depicting gang affiliation
3. Style of dress consistent with gang membership
4. Possession of gang graffiti on personal property or clothing
5. Use of hand signs or symbols associated with gangs
6. Reliable informant identified person gang member
7. Associates with known gang members
8. Prior arrests with known gang members: Crimes consistent with usual gang activity
9. Statements from family members indicating gang membership.
10. Other law enforcement agencies identifying the subject as a gang member
11. Attendance at gang functions or known gang hangouts
12. Identified by other gang members or rival gang members

Any further questions pertaining to gang identification contact Gang Investigations Squad
573-7047