APL-2013-00034

New York County Indictment No. 05822/10

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

TODD JOHNSON,

Defendant-Appellant.

PROPOSED BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT

WILLIAM C. SILVERMAN
GREENBERG TRAURIG, LLP
Attorneys for Amici Curiae The National Association of Criminal Defense Lawyers and The New York State Association of Criminal Defense Lawyers
200 Park Avenue
New York, New York 10166
212-801-9200

Date Completed: December 27, 2013

STATEMENT PURSUANT TO RULE 500.1(f)

The proposed *Amici Curiae*, the National Association of Criminal Defense Lawyers ("NACDL") and the New York State Association of Criminal Defense Lawyers ("NYSACDL") have no parents, subsidiaries, or affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Constitutional Provisions

State Statutes

PRELIMINARY STATEMENT

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Since the adoption of the Constitution, this right has been protected by state and federal courts as a bulwark against unreasonable and arbitrary police action. Yet here, the First Department upheld a finding of probable cause based on grounds that consistently and explicitly have been rejected.

According to the People's own allegations, Todd Johnson was outside a deli in Harlem with three others when he was approached by police and asked to leave. When he demurred, he was arrested for disorderly conduct under Penal Law § 240.20. The People would have this Court affirm the First Department's decision upholding probable cause based on three grounds: (1) a generalized allegation of prior gang activity in the area (Respondent's Brief at 24); (2) the presence of Mr. Johnson, an alleged gang member, with three other alleged gang members (Respondent's Brief at 25); and (3) the allegation – not mentioned by the First Department – that one of those alleged gang members (but not Mr. Johnson) was standing partially in front of the deli's entrance. (*Id.* at 6-7, 25; A39-41,

60-62, 115). These bare bones allegations do not rise to the level of probable cause. Indeed, if the First Department were affirmed here, the ability of police to make arrests for disorderly conduct would be virtually unchecked as they could make arrests based purely on subjective, generalized criteria. Additionally, it would provide the public with insufficient guidance as to when, how, or why they might be subject to arrest. Such a standard runs afoul of the Constitution in multiple respects, and should not be upheld by this Court.

STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit professional bar association that represents the Nation's criminal defense attorneys. Its mission is to promote the proper and fair administration of criminal justice and to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a membership of approximately 10,000 direct members and an additional 35,000 affiliate members in all fifty States and thirty nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges.

The New York State Association of Criminal Defense Lawyers (NYSACDL) is a non-profit organization of more than 750 criminal defense attorneys who practice in the State of New York; it is the largest private criminal bar association in the State. Its purpose is to provide assistance to the criminal

defense bar to enable its members to better serve the interests of their clients and to enhance their professional standing.

This case implicates the core mission of NACDL and NYSACDL. As criminal defense lawyers know all too well, disorderly conduct and anti-loitering statutes – in the absence of clearly defined limits on police discretion – can sweep countless innocent people into the criminal justice system, particularly members of minority groups. The First Department's affirmance of the lower court's decision offends basic, essential, and well-established constitutional principles. NACDL and NYSACDL therefore have a deep and direct interest in seeing the issues presented here properly resolved.

STATEMENT OF POSITION

NACDL and NYSACDL urge this Court to reverse the decision and order of the First Department, grant Mr. Johnson's motion to suppress and dismiss the indictment.

STATEMENT OF FACTS

On October 29, 2010, Mr. Johnson was seen outside a delicatessen 50 feet from his home in Harlem with three other men. (A66-67). One of the men, Henry Rosario, is alleged to have been standing partially in front of the deli doorway (A60-61), though Mr. Johnson was not. The arresting New York City Police Officer, Christian Martinez, believed the four to be members of the "40 Wolves"

gang based upon his "past dealings" (including prior arrests of the other men) and unspecified "police intel." (A36, 38-39, 52-53). The police allegedly were aware of "gang activity involving fights, shootings and drug dealing" in the area. (A63-64). Because the four men refused to "clear the corner," Martinez placed them under arrest. (A40-41, 55). Mr. Johnson was then frisked, taken to the station house, and searched, revealing a small amount of controlled substance. (A44-47).

The Supreme Court denied Mr. Johnson's motion to suppress based on a belief that "any pedestrian traffic that would have occurred would have been blocked from going into the store." (A118). On appeal, the First Department – without significant discussion – upheld the lower court's decision but did not adopt its reasoning. The First Department held: "Given 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 reasonable basis to believe their presence could cause public inconvenience, annoyance or alarm." (A5).

ARGUMENT

I. THERE WAS NO PROBABLE CAUSE TO ARREST TODD JOHNSON

A bedrock principle of Fourth Amendment jurisprudence is that probable cause contains an objective component. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . . [I]t is imperative that the facts be judged against an objective standard. . . ." *Terry v. Ohio,* 392 U.S. 1, 21 (1968). "The requisite knowledge must be more than subjective; it should have at least some demonstrable roots." *People v. Sobotker*, 43 N.Y.2d 559, 564 (1978); *see also Brown v. Texas*, 443 U.S. 47, 51 (1979).

The People point to three grounds for probable cause to support the First Department's decision:

1. The suspected gang membership of Mr. Johnson and the three other men he was with (Respondent's Brief at 25);
2. Prior gang-related crime in the area (Respondent's Brief at 24-25); and
3. The observation of Mr. Johnson standing near someone who was "blocking part of the deli's entrance" (Respondent's Brief at 25).

These grounds – standing alone and taken together – do not, as a matter of law, constitute probable cause to commit disorderly conduct or any other crime.

A. Mr. Johnson's Alleged Gang Membership is Entitled to No Weight When Assessing Probable Cause

The First Department relied on the alleged gang background of "several of the men" in finding probable cause. (A5). The People argue here that probable cause was appropriately established because Mr. Johnson was a suspected gang member standing with other suspected gang members outside a deli. (Respondent's Brief 24-25). Fourth Amendment jurisprudence, however, flatly rejects the First Department's rationale here.

The allegation that a suspect was "known" to law enforcement as an associate of criminals "is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising" probable cause. *Spinelli v. United States*, 393 U.S. 410, 414 (1969), *abrogated on other points by Illinois v. Gates*, 462 U.S. 213 (1983) (citing *Nathanson v. United States*, 290 U.S. 41, 46 (1933)).[1] Furthermore, "just as a simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause, we do not believe it may be used to give additional weight to allegations that would otherwise be insufficient." *Id.* at 418-19; *see also People v. Wirchansky*, 41 N.Y.2d 130, 135 (1976) ("a suspect's reputation may not be used 'to give additional weight to allegations that would otherwise be insufficient'") (quoting *Spinelli*, 393 U.S. at 414).

[1] *See also Commw. v. Antobenedetto*, 315 N.E.2d 530, 534 (Mass. 1974); *Yancey v. State*, 44 S.W.3d 315, 321 (Ark. 2001); *State v. Tassin*, 343 So. 2d 681, 691 (La. 1976); *State v. Baca*, 640 P.2d 485, 488 (N.M. 1982).

Here, in the absence of specific and objective facts susceptible to judicial review, the mere assertion of a police officer's subjective "suspicion" does not buttress a claim of probable cause. In alleging that Mr. Johnson was a gang member, the People rely on, in the words of Officer Martinez, "intelligence from people being arrested, his picture being taken and being put up on a wall, that intelligence from the 32nd Precinct." (A53). No detail is provided on how this intelligence was gathered. No detail is provided on what, if any, criminal gang activity the intelligence suggested that Mr. Johnson was involved in.[2] The only facts tying Mr. Johnson to a gang were prior conversations near his home with persons the Police suspected to be gang members and testimony from Officer Martinez that members of the gang "only hang out with each other on the block." (A38-39, 54-55). There is no evidence of the content of those conversations, which could have been about the score of the latest baseball game or what sandwiches to order from the deli. "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor

[2] Officer Martinez's testimony on the sources of this gang intelligence is instructive:
Q: Can you tell us that these people in intelligence know he's a member?
A: I can't tell you. All I know is he's been identified as a 40 Wolves member.
Q: By who?
A: Intel.
Q: Who is intel?
A: Intel. (A53).

circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli*, 393 U.S. at 416. That standard clearly was not met here.

Indeed, the First Department's reliance on gang membership is completely at odds with the United States Supreme Court's decision in *City of Chicago v. Morales*, 527 U.S. 41 (1999), which struck down Chicago's "gang loitering" ordinance. The ordinance in *Morales* empowered certain police officers in pre-defined areas working off an official list of alleged gang members to order a group of individuals to disperse if one of them appeared on the list. The Supreme Court found the ordinance unconstitutional, observing: "Friends, relatives, teachers, counselors, or even total strangers might unwittingly [violate the ordinance] if they happen to engage in idle conversation with a gang member." *Id.* at 63. There is no principled distinction between what the Supreme Court rejected in *Morales* – an attempt to criminalize mere association with a gang – and the First Department's decision here that gang membership can form the basis for probable cause that a crime was committed. *See also People v. Havelka,* 45 N.Y.2d 636, 641 (1978) ("The mere fact that [police] saw a group of [motorcycle club] members congregate outside their own clubhouse, and that they were dressed in a manner typical of motorcyclists" was insufficient to establish probable cause, and overturning the search of the group.)

In short, suspected gang membership was not an appropriate basis for probable cause and, accordingly, the First Department's decision is clear error.

B. Prior Gang Problems at the Location Did Not Establish Probable Cause to Arrest Mr. Johnson

The People assert as a second basis for probable cause, as articulated by the First Department, "the gang problems that had occurred at that location in the past. . . ." (Respondent's Brief at 24-25, A5). This assertion also runs contrary to well-established constitutional law: "An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (citing *Brown v. Texas*, 443 U.S. 47 (1979)).[3] Rather, this Court, in *People v. McIntosh*, 96 N.Y.2d 521, 527 (2001), explained that in addition to this kind of bare allegation, it is "crucial whether a nexus to conduct exist[s], that is, whether the police were aware of or observed conduct which provided a particularized reason [for the police action in question]." As explained below, there was no such nexus here and thus any "gang problems" that

[3] *See also Moreno v. Baca*, 431 F.3d 633, 642 (9th Cir. 2005) ("nervousness in a high crime area, without more, [does] not create reasonable suspicion to detain an individual"); *Holeman v. City of New London*, 425 F.3d 184, 190 (2d Cir. 2005) (stating that driving in a circuitous route in high-crime area at 4:30 a.m. is not enough, standing alone, to support a finding of reasonable suspicion, a lower burden than probable cause); *People v. Huggins*, 131 P.3d 995 (Cal. 2006) (allowing consideration of high crime in the area only in conjunction with defendant's "following a woman and a police officer in a suspicious manner").

occurred in the past at the location were not an appropriate basis for the arrest of Mr. Johnson.

C. Partial Obstruction of a Doorway Cannot Provide a Basis for Probable Cause Without Evidence of Public Harm

In arguing that this Court should uphold the First Department's finding of probable cause, the only possible "nexus to conduct" identified by the People is the alleged partial obstruction of the deli entrance by Mr. Rosario, a point not even mentioned by the First Department. This conduct (to the extent it can even be called "conduct") cannot save the First Department's decision because there is no indication it was accompanied by the "intent to cause public inconvenience, annoyance or alarm, or recklessly created risk thereof," as required under the disorderly conduct statute. Penal Law §240.20.

As this Court recently stated, "[t]he significance of the public harm element in disorderly conduct cases cannot be overstated. In virtually all of our prior decisions, the validity of disorderly conduct charges has turned on the presence or absence of adequate proof of public harm. . . . We have clarified that the risk of public disorder does not have to be realized but the circumstances must be such that defendant's intent to create such a threat (or reckless disregard thereof) can be readily inferred." *People v. Baker*, 20 N.Y.3d 354, 360 (2013) (citing cases). This Court has vigorously enforced the statutory mandate that there be a threat to the public. *Compare People v Tichenor*, 89 N.Y.2d 769, 776 (1997) (upholding

disorderly conduct conviction after finding that defendant's actions of cursing and spitting at officer were done with "a goodly number of curious or aroused bar patrons gathered in the doorway, necessitating the officer's call for backup aid"), *with People v. Jones*, 9 N.Y.3d 259, 262 (2007) (reversing a conviction for disorderly conduct after failure to obey an order to disperse, noting that "[n]othing in the information indicates how defendant, when he stood in the middle of a sidewalk at 2:01 A.M., had the intent to or recklessly created a risk of causing 'public inconvenience, annoyance or alarm'") (quoting Penal Law § 240.20(5)).

And for good reason: to pass constitutional muster there must be some quantum of evidence to distinguish criminal conduct from the myriad innocent and constitutionally protected acts New Yorkers engage in every day. As this Court explained in the course of striking down a disorderly conduct charge that arose from a defendant standing on a sidewalk, "[t]he conduct sought to be deterred under the statute is 'considerably more serious than the apparently innocent' conduct of defendant here." *Jones*, 9 N.Y.2d at 262 (quoting People v. Carcel, 3 N.Y.2d 327, 331 (1957)).

That principle is vital in appropriately assessing probable cause. "We have frequently rejected the notion that behavior which is susceptible of innocent as well as culpable interpretation, will constitute probable cause. It is equally true that innocuous behavior alone will not generate a founded or reasonable suspicion

that a crime is at hand." *People v. De Bour*, 40 N.Y.2d 210, 216 (1976) (citations omitted); *see also People v. Carrasquillo*, 54 N.Y.2d 248, 254 (1981) ("In passing on whether there was probable cause for an arrest, we consistently have made it plain that the basis for such a belief must not only be reasonable, but it must appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator, for conduct equally compatible with guilt or innocence will not suffice.").

Mr. Johnson's conduct did not even approach the line drawn by the statute. To establish public harm, the courts look to a number of factors: "the time and place of the episode under scrutiny; the nature and character of the conduct; the number of other people in the vicinity; whether they are drawn to the disturbance and, if so, the nature and number of those attracted; and any other relevant circumstances." *People v. Weaver*, 16 N.Y.3d 123, 128 (2011).

Nothing here suggested any risk of public harm. In another disorderly conduct case involving a group of men outside a bodega, the Second Department found that "[t]he evidence adduced at the pretrial suppression hearing did not establish that the defendant had committed disorderly conduct, where it merely showed that, at the time of his arrest, the defendant was standing with a group of men in front of a bodega at 12:30 a.m. There was no evidence presented that any other members of the public were present at the time of the defendant's arrest...."

People v Guevara-Carrero, 938 N.Y.S.2d 185, 185 (2d Dep't 2012). Critical to the Second Department's ruling was the lack of any evidence establishing "public inconvenience, annoyance or alarm." *Id.* Similarly here, there was no showing that any pedestrians were in the vicinity at the time of the arrest. (A43).

Straining the argument even further is the fact that it was Mr. Rosario, not Mr. Johnson, who is alleged to have partially blocked the doorway. (A39-41, 60-62, 115). The Supreme Court has made clear that probable cause must be an individualized determination: it cannot be transferred based upon a determination of probable cause as to another individual who happens to be in the vicinity. "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).[4] Concluding that the behavior of Mr. Rosario – itself here entirely innocent conduct – constitutes probable cause to arrest Mr. Johnson for disorderly conduct is completely insupportable.

[4] *See also Lippert v. State*, 664 S.W.2d 712, 718 (Tex. Crim. App. 1984) ("*Ybarra* makes clear that constitutional protections are possessed individually"); *People v. Juarez*, 770 P.2d 1286, 1290 (Colo. 1989) (adopting *Ybarra* in suppressing evidence seized from defendant's van, parked outside a house in which police had uncovered marijuana).

In short, Fourth Amendment jurisprudence demands that even when taken together the three factors cited by the People (only two of which addressed by the First Department) do not constitute probable cause to arrest Mr. Johnson. Indeed, to allow probable cause on such meager grounds would eviscerate the protections offered by New York's disorderly conduct statute; protections that, as explained in more detail below, are required for any statutory interpretation to remain constitutional.

II. WERE THE COURT TO UPHOLD PROBABLE CAUSE ON THESE FACTS, THE NEW YORK DISORDERLY CONDUCT STATUTE WOULD BE UNCONSTITUTIONAL

Affirming the First Department's decision would not simply run afoul of existing precedent regarding probable cause, but would also call into question the constitutionality of Penal Law § 240.20. Specifically, the standard espoused by the People would grant police virtually unfettered discretion in determining probable cause for violations of § 240.20(6), and provide citizens insufficient warning of when they are, or are not, subject to arrest. This approach has been flatly rejected by federal and state courts alike, which require clear, objective criteria for enforcing criminal laws generally and anti-loitering statutes in particular.

The United States Supreme Court has established that a penal statute runs afoul of the Due Process Clause of the Fourteenth Amendment "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or

leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giacco v. State of Pennsylvania*, 382 U.S. 399, 402-03 (1966).[5] The vagueness doctrine goes beyond the plain text of the statute itself and takes into account how the statute is interpreted by courts and how the statute is applied in practice. *Shuttlesworth v. Birmingham*, 382 U.S. 87, 91 (1965) (Alabama ordinance criminalizing failure to comply with police orders to disperse was vague on its face, but was not vague as interpreted by the state's courts). "To the extent the statute can be interpreted to support dragnet, streetsweeping operations absent probable cause of actual criminality, it conflicts with established notions of due process." *Newsome v. Malcolm*, 492 F.2d 1166, 1173 (2d Cir. 1974) (holding that a New York anti-loitering statute was void as vague in part because it "could lend itself to the abuse of pretextual arrests of people who are members of unpopular groups or who are merely suspected of engaging in other crimes, without sufficient probable cause to arrest for the underlying crime"); *Lawson v. Kolender*, 658 F.2d 1362, 1369 (9th Cir. 1981), *aff'd*, 461 U.S. 352 (1983) (holding an interpretation of a state statute insufficient where it would safeguard against unwarranted convictions but where it "does not protect against arbitrary arrests or police harassment").

[5] *See also Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that (all persons) are entitled to be informed as to what the State commands or forbids") (citation and quotation marks omitted); *Brown v. Texas*, 443 U.S. 47, 51 (1979); *In re Anderson*, 69 Cal. 2d 613, 649 (1968); *State v. Liuzza*, 457 So. 2d 664, 665 (La. 1984); *Commw. v. Cain*, 471 Pa. 140, 181 (1977).

There are two principal reasons why vague criminal statutory schemes violate due process. First, they fail to provide "fair notice" to enable ordinary citizens to conform his or her conduct to the law. *Morales*, 527 U.S. at 58 (plurality opinion). "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *Id.* (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)); *see also People v. Bright*, 71 N.Y.2d 376, 382-83 (1988) (noting that due process requires that penal statutes be sufficiently definite so as to give a person of ordinary intelligence fair notice of what the law prohibits).

Second, vague standards "violate[] 'the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Morales*, 527 U.S. at 60 (plurality opinion) (quoting *Kolender v. Lawson*, 461 U.S. 352 at 358 (1983)). These standards are necessary to avoid the danger of arbitrary and discriminatory enforcement, as "[t]he 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." *Bright*, 71 N.Y.2d at 383. A vague statute "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Id.* (citations and quotation marks omitted).

Additionally, statutes, such as anti-loitering statutes, which potentially infringe on essential rights and freedoms like the freedom of movement and assembly, are deserving of special scrutiny. "[F]reedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful – knowing, studying, arguing, exploring, conversing, observing and even thinking.'" *Anonymous v. City of Rochester*, 13 N.Y.3d 35, 45 (2009) (citation and quotation marks omitted) (holding that a city curfew for minors was subject to intermediate scrutiny and noting that "[f]or an adult, there is no doubt that [the freedom of movement] is fundamental and an ordinance interfering with the exercise of such a right would be subject to strict scrutiny"); *see also Morales*, 527 U.S. at 53 (noting that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment" and holding that the anti-loitering statute at issue deserved heightened scrutiny because it "infringes on constitutionally protected rights") (plurality opinion).

Mindful of the constitutional issues such statutory schemes present, New York courts have upheld § 240.20(6) by construing it in a manner that provides the public and police with objective criteria to determine whether conduct violates the law. *See People v. Bakolas*, 59 N.Y.2d 51 (1983) (discussing objective standard of "public disturbance"); *Tichenor*, 89 N.Y.2d at 775 (explaining that

Penal Law § 240.20 has survived constitutional attack because "the statute, first, 'provide[s] sufficient notice of what conduct is prohibited; second, the statute [is not] written in such a manner as to permit or encourage arbitrary and discriminatory enforcement'" (citations omitted)). At the same time, courts routinely have invalidated anti-loitering statutes that lack objective standards. *See Morales*, 527 U.S. 41; *Bright*, 71 N.Y.2d 376. Thus, this Court has "upheld loitering statutes only when they either prohibited loitering for a specific illegal purpose or loitering in a specific place of restricted public access." *Bright*, 71 N.Y.2d at 384; *see also City of New York v. Andrews*, 719 N.Y.S.2d 442, 452 (Queens Sup. Ct. 2000) ("In this State [a person's right to remain in the public area of his or her choice] can be limited by statutes which make the act of loitering for the purpose of committing various criminal offenses an offense in itself . . . or which penalize loitering in specific places of restricted public access. Anti-loitering statutes which lack these features are generally stricken for vagueness.") (citations omitted).

The theory adopted by the First Department would read such safeguards out of the disorderly conduct statute and create the very problems the vagueness doctrine was meant to prevent. Here, the First Department upheld an arrest for disorderly conduct following an order to disperse based on suspected gang affiliation and past crime in the area but without any indication of public harm or

other indicia of criminal conduct. This is just the sort of offense – or lack of offense – that courts have found unconstitutionally vague because it provides no meaningful guidance for ordinary people to judge when they could be subject to arrest and no limitation on police discretion. *See Morales*, 527 U.S. at 59 ("[T]he terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance . . . After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again?").

Moreover, the definition of "gang member," as applied here, lacks any kind of clear definition. *See Lanzetta v. State of New Jersey*, 306 U.S. 451 (1939) (finding a statute vague that made it a penal offense to be a "gangster"); *see also Fenster v. Leary*, 20 N.Y.2d 309, 314 (1967) (citing *Lanzetta* in noting that statutes cannot stand "if the class of persons coming within their ambit is so vaguely defined as to make it unclear to potential violators just what conduct will subject them to criminal liability and what will not"). This case is even more problematic than *Lanzetta*, as the definition of gang membership here is entirely within the discretion of the New York Police Department, rather than determined by statute.

Indeed, here gang membership was determined entirely on the basis of conclusory police "intel" and Mr. Johnson's conversations with other suspected

gang members. The Supreme Court, however, explicitly rejected that as a basis for criminal prosecution in *Morales*, 527 U.S. at 62 (noting that the invalid statute "applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them").

Nor does the allegation that someone standing near Mr. Johnson was partially in front of the deli entrance somehow rectify these vagueness concerns. In this regard, *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965), is instructive. In that case, the United States Supreme Court held that, on its face, a state ordinance that prohibited loitering on a sidewalk was unconstitutionally vague because it would allow someone to stand on a public sidewalk "only at the whim of any police officer of that city." *Id.* at 90.[6] The People's position is even more suspect in this case because it would allow the arrest of someone on a public street simply because he was standing near a person partially in front of an entrance to a store. The mere fact that Mr. Johnson refused Officer Martinez's command to disperse would not save the statute either since "the mere refusal to move on after a police officer's requesting that a person standing or loitering should do so is not enough to support the offense." *Id.* at 91.

[6] While holding that the ordinance was unconstitutional on its face, the Supreme Court upheld the Alabama Court of Appeal's interpretation, which required additional elements beyond the plain language of the ordinance. *Shuttlesworth*, 382 U.S. at 91.

If the First Department's decision were upheld, people simply talking on a public street near their homes could be subject to arrest. They would have no way to determine, among other things: (1) whether the police consider them or any person nearby a gang member; (2) how close he or she needs to be to a suspected gang member to be considered "together"; (3) whether the suspected gang member was sufficiently blocking pedestrians; or (4) whether the police deem their neighborhood to be of sufficiently high crime to justify an arrest for disorderly conduct.

Nor does the First Department provide any substantive limitation on police discretion. Affirming Mr. Johnson's conviction would eliminate reliable oversight of police assessments of: (1) who is a gang member; (2) who could be arrested for being in the same vicinity as a suspected gang member; (3) how to distinguish innocent conduct from disorderly conduct; or (4) which areas have a sufficient criminal history to provide support for disorderly conduct arrests. Indeed, anyone considered to be a gang member would become a roving carrier of probable cause – unknowingly spreading probable cause to those within an undefined and unascertainable proximity. NACDL and NYSACDL have extensive experience with the dangers of unbridled police discretion, particularly for minorities and disfavored social groups. The overreaching standard of the First Department

places far too much discretion in the hands of police officers, leaving the door wide open to arbitrary and discriminatory enforcement.

CONCLUSION

The probable cause requirement of the Fourth Amendment guarantees every American, regardless of where he or she lives, freedom from arbitrary and harassing police conduct, requiring that any arrest be backed by objective and individualized facts. The theory of probable cause adopted by the First Department would eviscerate this core principle, leaving the police with unchecked authority and the public insufficient notice about when they might be subject to arrest. The National Association of Criminal Defense Lawyers and The New York State Association of Criminal Defense Lawyers respectfully urge this Court to reverse the order of the First Department, grant Mr. Johnson's motion to suppress, and reverse the conviction.

Dated: New York, New York
December 27, 2013

Respectfully submitted,

GREENBERG TRAURIG LLP

By: _____
William C. Silverman
200 Park Avenue
New York, NY 10166
(212) 801-3148

Richard D. Willstatter
Vice-Chair, NACDL
Amicus Curiae Committee
200 Mamaroneck Ave., Suite 605
White Plains, NY 10601
(914) 948-5656

Marc Fernich
Chair, NYSACDL
Amicus Curiae Committee
810 Seventh Ave., Suite 620
New York, NY 10019
(212) 446-2346

Attorneys for Amici Curiae