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Vodak v. City of Chicago Victory in a Mass Arrest and Defense Case

By Joey L. Mogul

On March 20, 2003, over 800 people were arrested *en masse* at an anti-Iraq war demonstration in the City of Chicago. Approximately nine years later, the civil rights class action brought on behalf of those arrested, *Vodak v. City of Chicago*, 03 C 2463 (N.D. Ill), settled for $6.2 million. The following article discusses the criminal defense of those arrested, certification of a subsequent class of plaintiffs in the civil rights action, defeat of a counterclaim raised against the plaintiffs in the litigation and an appeal to the Seventh Circuit Court of Appeals to re-instate the case after it was dismissed on summary judgment.

As spring arrives and in anticipation of several massive protests on the horizon—May Day; the NATO conference in Chicago; the RNC/DNC conferences in Tampa, Florida and Charlotte, North Carolina; and the renewal of Occupy encampments nationwide—this article is written with the hope that it contributes to the on-going discussion of how to effectively advocate for and defend the constitutional rights of people protesting in the United States.

The March 20, 2003, Demonstration Against the Iraq War

In the evening on March 19, 2003, after months of demonstrations opposing armed action against Iraq, President

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George W. Bush ordered the first strike, dropping bombs on the Iraqi people. Many people were angered by this action and wanted to demonstrate against what they believed was an unjust and illegal war.

Activists across the United States had in fact prepared for such a day and made preliminary plans to orchestrate mass demonstrations in opposition to the onset of the war. The same was true in Chicago, Illinois. In anticipation of such an event, anti-war activists put out a call requesting people to come to the Federal Plaza, in the heart of downtown Chicago, to protest the war the day after it began. It was planned as a spontaneous demonstration because no one knew when President Bush and his administration were going to launch the first strike. Hence, there was no time for march organizers to comply with the Chicago Municipal permit ordinance which required seven days advance notice to obtain a permit to march in the street.

On March 20, 2003, at 5:00 p.m., approximately 10,000 people from all walks of life gathered to demonstrate against the war. There were school teachers and school children, counselors, union members, people who had never attended a demonstration before, and those who had marched in support of civil rights and against the Vietnam war.

Members of the Chicago Police Department (CPD) were also there in numbers. Several high ranking CPD officials were present at the rally, while CPD Superintendent Terry Hillard monitored the demonstration from his command room at police headquarters, watching the demonstration on video screens, listening to radio transmissions, and communicating telephonically with his command personnel at the scene.

Like other local and national law enforcement agencies, the CPD had been monitoring peace, antiwar, leftists and anarchist activists' Web sites for months beforehand. The CPD's Organized Crime Division's Intelligence Section had also deployed undercover officers to infiltrate several anti-war and peace organizations and spy on their meetings and teach-ins.[1] Thus, before the rally began, the CPD was well aware of the fact that there would be a spontaneous demonstration to protest the beginning of the Iraq war, and that the demonstrators did not have a permit to march in the street. Nonetheless, CPD officials were prepared to accommodate the massive demonstration they expected and planned accordingly.

When the march was set to begin, CPD Command Personnel waived the permit requirement, discussed possible march routes with the organizers, and made arrangements for the march by clearing the streets of vehicular traffic near Federal Plaza. They never once advised those present at the Plaza that there was no permit to march, or warn them that if they marched without a permit they could be arrested. Instead, the CPD blocked off streets and proceeded to have uniformed CPD officers, both on foot and horseback, lead, escort and follow the march. Consequently, the vast majority of those in attendance were unaware that there was no permit for the march, and the CPD's actions failed to indicate otherwise.

After the rally, people poured out of the Plaza and headed east to Lake Shore Drive (LSD), a major thoroughfare in the City.[2] CPD Commander John Risley gave express permission to one of the march organizers

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that the march could proceed on LSD. The CPD then further enabled the march by cutting off traffic from entering and proceeding on LSD and by escorting people on foot and horseback onto LSD. Again, there were no warnings from the CPD that marchers could not march on LSD, although they had the means and opportunity to do so.

CPD members, supervised by CPD Commander Joseph Griffin, controlled the procession of the march on LSD, occasionally stopping the march and then allowing it to proceed. Latecomers were directed by CPD members to head up a ramp to join the march on LSD, while CPD members would not allow other marchers to leave the demonstration on LSD.

The march exited LSD at Oak Street heading west towards Michigan Avenue, otherwise known as "the Magnificent Mile," where marchers were stopped by the CPD. CPD Command Personnel convened at this location, and after consulting with Superintendent Hillard, decided not to allow the march to proceed southbound on Michigan Avenue as requested by some march organizers. Instead, Superintendent Hillard and other superiors decided that the march should "go back the way it came," and CPD Commanders Risley and Griffin informed a handful of marchers of this decision, but the CPD did not communicate these instructions to the entire crowd. As a result, scores of people were unaware of the CPD's decision.

Eventually, the march turned around on Oak Street, wound its way back onto inner LSD, accompanied by CPD members on foot and horseback, and later headed west on Chicago Avenue. At this point the march had dwindled in size from about 10,000 people to less than a thousand. At the intersection of Chicago Avenue and inner LSD, some marchers were led or directed by CPD members to travel west on Chicago Avenue and the CPD failed to issue any orders not to do so or to prevent people from traveling in this direction.

CPD Command Personnel Stopped the March and Arrested Plaintiffs Without Giving Orders to Disperse

As the march headed west on Chicago Avenue, CPD Command Personnel decided to stop and terminate the march at Michigan Avenue. They ordered lines of police officers to assemble just east of Michigan Avenue and west of Mies Van Der Rohe Way on Chicago Avenue to prevent people from leaving the area, thereby creating the "bounded area." CPD officers, clad in riot gear and holding batons, stood shoulder to shoulder in these lines and prevented the marchers and others from leaving the area, despite numerous requests by individuals to do so.

CPD Command Personnel then met on Chicago Avenue for more than 20 minutes and discussed how they were going to handle the crowd. During this conference, they decided, with the explicit consent of Superintendent Hillard, to arrest the people in the bounded area without giving them orders to disperse or an opportunity to voluntarily leave. In accordance with this decision, CPD Command Personnel issued orders that were communicated down the chain of command, to arrest all people in the bounded area while Superintendent Hillard warned Area 2 and 5 Police Headquarters to expect a large number of arrestees.

CPD Command Personnel Criminally Charged Hundreds of Protesters

Approximately 500 people were indiscriminately arrested and taken into custody without warning or an opportunity to leave, while the remaining individuals were detained in the bounded area for one and a half to three hours. While the arrests were being conducted, Command Personnel met again on Chicago Avenue to discuss what charges to bring against the arrestees. With the consultation and approval of Superintendent Hillard, they collectively decided to charge all those arrested and taken into police custody with reckless conduct which they alleged everyone committed on Chicago Avenue.

Later, after people were taken into police custody, CPD Command Personnel allowed the remaining people to leave. However, before people could leave they were compelled to abandon their banners, signs and other protest paraphernalia, and walk single file with their hands raised in the air through a gauntlet of officers. In some instances, people's bags were searched before they were allowed to leave.

In addition to confining, ensnaring and arresting the crowd, CPD members engaged in excessive force which included storming into the crowd and striking people with batons. Several women were assaulted after they sat down on the ground to indicate to the CPD that they were peaceful and nonviolent. One of the protestors[3] spoke out, condemning an officers' egregious use of force. In retaliation, police officers

brutally arrested him by striking him in the face and breaking his nose. Other individuals were intentionally handcuffed too tightly with the plastic flexicuffs which caused many wrist injuries and pain.

Of the 500 plus people taken into custody, 224 were subsequently released without charges because the CPD could not specifically identify who arrested them. The more than 300 arrested who remained were formally charged with one count of reckless conduct, a class A misdemeanor under Illinois law, based on a fictional set of allegations.

The CPD alleged the crimes committed by all of the men arrested were wholly disparate from the crimes allegedly committed by the females arrested in the exact same bounded area. For the males, the boilerplate police narrative in virtually identical arrest reports was:

> The above subject was arrested for Reckless Conduct in that he endangered the bodily safety of citizens by acting in such a reckless manner so as to disrupt vehicular and pedestrian traffic. The defendant acted with total disregard for the personal safety of motorists and pedestrians.

For most females, the following boilerplate narrative was used:

> The above subject along with 1000s of persons endangered the safety of others in that they blocked access to the fire station, positioned themselves in front of the water pumping station and blocked access to the emergency entrance to Northwestern Hospital and refused to leave the area after being ordered to do so by the police.

The evidence established these allegations were patently false. There was no emergency room entrance to Northwestern Hospital on Chicago Avenue. Moreover, video taken by the CPD did not depict women actively blocking any of the enumerated buildings or refusing orders to disperse as alleged. Instead, CPD video supported the arrestees' allegations that people were trapped in the bounded area, that many were asking, even begging, CPD officers for the opportunity to leave the area, and that they were refused the opportunity to do so.

Those taken to the station were held somewhere between 10 and 30 hours, and in a few cases up to 40 hours. Some were released on personal recognizance bonds, while others were compelled to pay $100 before they were released.

The CPD failed to conduct any investigation whatsoever to determine who among the arrestees actually participated in the march and under what circumstances. Many of the people arrested participated in the protest from its starting point in the Plaza, while others joined the march after it exited LSD or when it arrived on Chicago Avenue. Many other individuals were mere bystanders, including a mother and daughter duo who were out shopping for a prom dress, a jogger, and several individuals forced to exit a rerouted CTA bus. The named plaintiff, Kevin Vodak, was an attorney who was serving as a National Lawyer's Guild (NLG) legal observer and was clearly identified as such when he was arrested.

Chicago NLG's Mass Defense of the Arrestees

Many NLG attorneys and legal workers were present at the demonstration, and scores of attorneys received telephone calls from those detained in the bounded area, who were reporting that they were not being allowed to leave and that they had no idea why there were being detained and arrested. In response, several attorneys and protestors who were not formally arrested provided crucial jail support and solidarity to those who were taken into police lock-ups by collecting and posting people's bond and by compiling lists of those who had been arrested. Those arrested also organized on behalf of themselves in creative, resilient ways, by using their cell phones to take pictures in the police lock up and passing around sign up sheets in squadrols to document those arrested. Documenting the names and contact information of those arrested and detained at the demonstration played a pivotal role in the case. It helped the Chicago NLG communicate with arrestees that it was willing to represent people in their criminal cases and it also aided the legal team in the civil rights case to identify class members and key witnesses.

Shortly thereafter, the Chicago NLG held a meeting and hundreds of individuals who had been arrested and detained at the demonstration attended. In order to determine who been charged, released, or detained as well as those in need of criminal representation, the Chicago NLG distributed intake forms for people to complete. The intake sheets requested that each individual indicate the extent of their seizure; the time,

date, and location of their first court date; and whether they knew of any witnesses to their circumstances. These forms were instrumental when organizing the mass criminal defense team. Defense attorneys in the civil rights case later sought to discover these documents and moved to compel their production. Plaintiffs' counsel refused to produce them and prevailed in their arguments that they were protected from disclosure by the attorney-client privilege. See *Vodak v. City of Chicago, et al.,* 03 C 2463, 2004 WL 783051 (N.D. Ill., Nolan, J., Jan. 16, 2004).

The People's Law Office, on behalf of the Chicago NLG, then organized the mass defense subcommittee comprised of over a dozen attorneys who volunteered to represent those arrested for free. Providing such representation helped create a united front among those charged and people felt empowered to fight the charges, thereby shifting the power in the system that often compels those accused to take a plea deal. Ultimately, the State could not meet its burden and dismissed all of the cases,[4] enabling 90% of those charged with the opportunity to join the class and pursue the vindication of their rights.

The Civil Rights Complaint

On April 10, 2003, a team of attorneys associated with Chicago's NLG[5] filed a civil rights class action against the City of Chicago, Superintendent Hillard and other CPD police personnel alleging those arrested were seized in violation of their rights to free speech, assembly, and liberty guaranteed by the First, Fourth, and Fourteenth Amendments and Illinois law, and that the City of Chicago was liable under *Monell v. N.Y.C. Dept. of Soc. Serv.* 436 U.S. 658 (1978), *respondeat superior* and a claim under Illinois' indemnification statute. Additionally, claims for excessive force, battery and the denial of adequate medical care were brought on behalf of seven individual plaintiffs.

A year later, sixteen people who were arrested at or near the demonstration filed a separate complaint, *Beal, et al. v. City of Chicago, et al.*, 04 C 168 (N.D.Ill.), bringing similar Constitutional and state law claims against some of the same CPD defendants named in *Vodak*. The *Beal* case was assigned to the same judge presiding over *Vodak*, but plaintiffs' counsel in *Beal* were successful in defeating the *Beal* defendants' motion to consolidate discovery in the two cases.

The City and CPD's Defense of the Mass Arrests

From the minute the CPD began the mass detention and arrests on Chicago Avenue, the CPD and later counsel for the defendants (Freeborn and Peters, a large, private law firm the City contracted with to defend the civil rights case) sought to paint the demonstration as a "mob." Despite the lack of any credible evidence to do so, defendants continued to advance these claims throughout the entire course of the litigation. Defendants consistently sought to tap into the well-known archetype of the "riotous protestor" and were relying on presumptions held by the mainstream media and society that those who protest in the streets are immature, irrational and disorderly for taking to the streets to express their objections to the U.S. Government's policies and actions.[6]

The objective evidence, however, indicated that this was a peaceful demonstration that was not violent, obstructive or even remotely akin to a "mob." No business or store windows were broken in connection with the demonstration, and there were only two documented instances of property damage committed over the entire course of the demonstration. Nobody was arrested or charged for this property damage. Moreover, there was only one reported instance of a battery to a CPD officer, and that unknown individual was never arrested for such alleged conduct.

A total of two motorists stuck in traffic complained that a few, unidentified marchers harassed them and banged on their cars. The videos and pictures from the march indicated, however, that many motorists were supportive of the demonstration. Contrary to the testimony of several high ranking CPD officers, the videos did not depict roving, angry marchers attacking motorists or cars as their exaggerated testimony suggested.

Defendants also sought to justify the mass arrests by relying on the tactic of "guilt by association." Pursuing this line of defense, they repeatedly highlighted, cited and greatly embellished claims of property damage or unruly conduct committed by a few unidentified individuals during the course of the march. Defendants also discovered and attempted to admit evidence of plaintiffs' prior arrests for acts of civil disobedience to argue that he or she had a propensity to engage in civil disobedience and therefore their participation in the March 20th march was also an act of civil disobedience.

Finally, defendants repeatedly tried to criminalize, intimidate and discredit people for their political beliefs, by not only ridiculing their desire to speak out against the war, but by harassing them during their depositions by asking them to divulge the names of people who belonged to various antiwar, peace, anti-imperialist, or anarchist organizations in contravention of their First Amendment right to freedom of association and privacy. See *National Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.").

Plaintiffs' legal team was not immune from such attacks as well. At various points throughout the litigation, defendants raised plaintiffs' counsel's association with the NLG and repeatedly attempted to introduce NLG materials that indicated its support for protestors who engage in civil disobedience to suggest that the NLG provoked individuals to engage in civil disobedience in order to profit from civil suits challenging the police departments' responses to such demonstrations.

Plaintiffs' Motion for Class Certification

Soon after filing the initial complaint, plaintiffs' counsel moved to certify a class of 800 people who were arrested in the bounded area. In so doing, plaintiffs' counsel recognized there were significant differences in the injuries incurred by the three distinct groups of people based on differing lengths of detention. Plaintiffs therefore also moved to certify three sub-classes to account for the different legal claims and possible damage awards among the putative class members. The three subclasses included approximately 300 people who were detained for one and a half to three hours before they were released from the bounded area (A-1); 224 people taken into custody who were released without being charged (A-2); and 300 plus people who were taken into custody and charged with one count of reckless conduct (A-3). The central thrust of the argument was that the class representative plaintiffs were similarly situated and treated the same as other class members when the CPD defendants, in a coordinated police action, seized them all in the bounded area and subsequently arrested them for allegedly engaging in the exact same conduct.

Defendants vigorously opposed class certification and repeatedly objected to the reality that people were arrested *en masse*.[7] Accordingly, defendants argued that there were individualized circumstances that were assessed by the CPD to justify each person's arrest. They asserted that individuals committed acts of resisting arrest and civil disobedience in refusing to leave the bounded area, and/or that officers gave individuals orders to disperse which required individual determinations that could not be decided on a class-wide basis.

In short, a determination would have to be made as to whether there was probable cause to arrest all of the plaintiffs as a unit, or if there were individualized circumstances justifying each individual arrest.

The Court held a two-day hearing to determine whether the class should be certified. In addition to calling some of the class representative plaintiffs and other class members to demonstrate their similar experiences, plaintiffs' legal team collected and submitted 250 affidavits from members of the class who all attested that they were arrested and/or detained on Chicago Avenue without being given an order to disperse or an opportunity to leave. Plaintiffs' counsel further supplemented the record with deposition testimony of CPD Command Personnel that demonstrated that they did not consider individual circumstances when they ordered that plaintiffs be surrounded and later arrested in the bounded area, and cited to deposition testimony of several CPD patrol officers who admitted that they did not have any discretion to determine who should or should not have been arrested.

Defendants called a handful of CPD patrol officers who claimed that they gave individual orders to disperse and provided opportunities to leave. They also submitted deposition testimony of several CPD officials who claimed they observed nameless and unidentified class members resist arrest or engage in civil disobedience.

These arguments were belied by overwhelming evidence which demonstrated that the arrests were coordinated and class members were treated uniformly. Not a single arrest report indicated any person resisted arrest. The videos, including those taken by the CPD, did not corroborate allegations of civil disobedience and several CPD patrol officers testified that they never gave nor heard any orders to disperse nor provided opportunities to leave.

Prior to the class certification hearing, plaintiffs' legal team was determined to disprove defendants'

claims that plaintiffs were arrested on the basis of their individual conduct. Towards this end, plaintiffs' counsel deposed several of the officers named on arrest reports and learned that not only were the allegations in the arrest reports fabricated, but the names of the purported arresting officers were falsified as well. According to the reports, plaintiffs were arrested by CPD officers who were retired from the department, off duty, or were not present at the demonstration, including a crossing guard, a youth officer and a person working in the female lock up that night. Moreover, according to the police reports, three arresting officers were purportedly responsible for conducting the arrest of 129 women, but when deposed they acknowledged they arrested, at best, a total of fifteen people altogether. Officers' deposition testimony and defendants' responses to requests to admit further revealed that defendants were unable to identify any arresting officer who could testify to any individualized conduct by over 700 of the plaintiffs.[8] Thus, defendants had no proof to support their exaggerated claims that people were arrested on the basis of individualized circumstances.

On April 17, 2006, the District Court rejected defendants' assertions that there was no common nucleus of facts to the class members claims, and thereby certified plaintiffs' class. The Court found that the legal and factual issues regarding CPD command personnel's actions in surrounding the people in the bounded area predominated over any minor differences of experiences and damages. *See Vodak v. City of Chicago*, 03 C 2463, 2006 WL 1037151 (N.D. Ill., Apr. 17, 2006) (Kendall, J.).

Defendants' Counterclaim

Unlike other civil rights cases brought on behalf of those subjected to mass arrest, those arrested at the 2003 antiwar demonstration were slapped with a counterclaim during the course of the litigation. In an unprecedented action, the City, relying on § 8-28-020 of the Chicago Municipal Code,[9] claimed that the class plaintiffs in *Vodak* were liable for $1.5 million, the alleged cost of regular and overtime hours expended by members of the CPD when they escorted the march and when they detained, arrested, and subsequently criminally prosecuted the class plaintiffs.

The central thrust of the City's counterclaim was based on the allegation that the class plaintiffs marched in the streets without a permit. According to the City, the class plaintiffs not only violated Chicago Municiapal Ordinance § 10-8-330 (the Chicago Permit Ordinance), but they also violated eight other State laws or Chicago municipal ordinances by breaching the peace, creating a public nuisance, obstructing traffic, or improperly using roadways, crosswalks, and bridges when they allegedly marched with other class members and thousands of others in the streets. Thus, they were responsible for paying for their alleged violations of the law.

It was noteworthy that neither the plaintiffs in *Beal* nor the individual plaintiffs in *Vodak* were named as counter-defendants in the counterclaim. The City was seeking to hold the class plaintiffs, a mere 800 people, liable for the cost of CPD police services incurred when escorting 10,000 people in the march. The City's strategy revealed that they filed the counterclaim in order to deter putative class members from joining the litigation. It also was an attempt to send a frightening message to future protestors that they may be forced to pay for their own arrests.

The counterclaim was chilling in other respects as well. It had the potential to extinguish plaintiffs' entire class action. If the District Court or jury were to find that the CPD Defendants were aware of facts that gave rise to probable cause, or arguable probable cause, that plaintiffs violated any of the enumerated laws, including many of the traffic regulations which were strict liability offenses without a *mens rea* requirement, the plaintiffs could not prevail on their Fourth Amendment claims. *See Devenpeck v. Alford,* 125 S.Ct. 588, 593 (2004); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). The counterclaim also caused serious confusion of the key Constitutional issues at stake in the litigation, and ultimately complicated and delayed the litigation.

Plaintiffs' counsel moved to dismiss the counterclaim which was initially granted by the District Court. The Court found that that the claim failed to provide class members with notice of their individual liability, but it granted the City leave to refile. In response, the City filed an amended counterclaim against the class representative plaintiffs, and the new District Court Judge now presiding over the case denied plaintiffs/counter-defendants' motion to dismiss.

The City then sought to certify a counter-class. In response to plaintiffs/counter-defendants' objections to such certification, the District Court found that members of plaintiffs/counter-defendants' class did not engage in any "standardized unlawful conduct" to satisfy

the requirements of commonality and predominance pursuant to Fed. R. Civ. P. Rule 23. *See Vodak v. City of Chicago*, 03 C 2463, 2008 WL 687221, 3 (N.D. Ill., J. Kendall, 2008). As the Court noted:

> [S]ome joined the march before marchers were turned around at Michigan Avenue; some joined after; and some were merely bystanders who were never a part of the march. Some individuals sat in the street and others stood on the sidewalk. Some were aware that the group did not have a permit to march and some were not.
>
> Under these facts, the alleged violations of law are not attributable to the group as a class. Some plaintiffs may not have committed any of the violations alleged by the City. For example, bystanders cannot be guilty of marching without a permit. Persons who only walked on the sidewalk could not have obstructed the roadways. Marchers who may have joined the march after the City turned the crowd around at Michigan Avenue may have been unaware of any orders from police and thus could not have violated those orders. Thus, even though it is a low hurdle, the Court finds that the City has not satisfied the commonality requirement in this case.

Id.

The District Court's Grant of Summary Judgment to the Defendants

In light of the District Court's ruling denying the certification of the counter-class, there was hope that the District Court could be convinced that the counterclaim was unconstitutional and meritless. Moreover, on March 20, 2007, the District Court in *Beal* denied the CPD defendants' motion for summary judgment seeking qualified immunity with respect to plaintiffs' First and Fourth Amendment claims. In so doing, the Court in *Beal* found that there were disputed issues of material fact and that the law, as conceded by the defendants, was clearly established under *Dellums v. Powell*, 566 F.2d 167, 173 (D.C. Cir. 1977) and *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 120 (D.C. Cir. 1977), that people at demonstrations had a right to an order to disperse prior to their arrest where they were not violent or obstructive.

In the summer of 2008, plaintiffs moved for summary judgment on the counterclaim, arguing that the CPD ratified the march when it allowed the plaintiffs to march in the street despite their lack of an advanced written permit. At this stage, plaintiffs' counsel had amassed a wealth of undisputed facts that demonstrated that the CPD engaged in acts that enabled the march to proceed in the streets. Moreover, the plaintiffs established that the CPD was empowered under the permit ordinance to waive the need for a permit, and that it had done so on several occasions at other protest marches.

Plaintiffs also moved for summary judgment on the their Fourth Amendment claims, arguing that any orders to disperse that were allegedly given by the CPD were not reasonably calculated to reach the entire crowd in the bounded area pursuant to the holding in *Dellums v. Powell*, 566 F.2d 167, 179, 181 (D.C. Cir. 1977). In the absence of such orders, defendants did not have individual, particularized probable cause to justify each of the class members' arrest.

The defendants filed a motion for summary judgment seeking judgment on all claims except for those brought on behalf of the individual plaintiffs. Their reliance on disputed facts depicting the march as an unruly mob featured prominently in their memorandum of law and they relied on 995 factual assertions containing snippets of CPD defendants' testimony in support of their claims.

After initial briefs were filed in *Vodak*, the District Court ordered the parties in *Vodak* and *Beal* to file supplemental briefs regarding defendants' abandonment of their position in *Beal* that *Dellums* and *Washington Mobilization Committee* clearly established the law with respect to the demonstrators' constitutional rights.

On February 25, 2009, on the eve of trial, after the completion of over 150 depositions and a voluminous pretrial order, as well as the distribution of notice to the class, the District Court, seizing on the permit issue, reversed course and granted defendants' motions for summary judgment on all of plaintiffs' claims. *See Vodak v. City of Chicago*, 623 F. Supp.2d 933 (N.D. Ill., February 25, 2009). The Court held that the CPD defendants were entitled to qualified immunity with respect to plaintiffs' First and Fourth Amendment claims because it was not clearly established that plaintiffs had a right to an order to disperse prior to their arrests and it was reasonable for the CPD defendants to arrest all of the plaintiffs for participating in a march without a permit. *Id.* at 959. According to the District Court:

> Given the clear precedent that First Amendment rights must yield to the municipality's obligation to safely regulate traffic on public streets in order to protect the safety of the population and to provide emergency services, a police officer faced with an unpermitted, amorphous group of thousands of marchers in the public streets could have reasonably believed that probable cause to arrest the marchers existed.

Id.

The District Court also granted judgment to the City with respect to plaintiffs' *Monell* claim, holding that Illinois state law established that Superintendent Hillard was not a municipal policymaker with respect to decisions to arrest and that "generally, the City Counsel [sic] and the Police Board set municipal policy for the Chicago Police Department." *Id.* at 965. In so doing, the District Court relied heavily on *Auriemma v. Rice,* 957 F.2d 397 (7th Cir. 1992) wherein the Seventh Circuit found that the CPD Superintendent was not a final policy maker for purposes of *Monell* where he allegedly failed to promote and/or demote white police officers in contravention of a City ordinance passed by the City Council which forbade racial considerations from being considered with respect to hiring, promoting and terminating people in the City employ. This was not the first time the *Auriemma* decision had been cited to defeat a police misconduct *Monell* claim against the City, and it was a huge impediment to securing *Monell* liability in many civil rights cases in the Northern District of Illinois. *See, e.g., Latuszkin v. City of Chicago*, 250 F.3d 502, 505 (7th Cir. 2001).

Next, in a holding that appeared to contradict the ruling dismissing plaintiffs' Fourth Amendment claims, the District Court granted the plaintiffs/counter-defendants' motion for summary judgment on the City's counterclaim. In this portion of its opinion, the Court addressed the arguments of class members that the CPD had ratified their actions in marching in the streets, and found those arguments were pivotal. *See Vodak,* 624 F.Supp2d at 968. The Court further held that "the City has been unable to set forth any evidence of illegal conduct specific to the plaintiffs at issue in this case—we know nothing regarding specific illegal conduct of the plaintiffs that could subject them to liability," *id.* at 969, and granted summary judgment on the counterclaim against the City.

The Court entered final judgment in favor of all defendants and counter-defendants in *Vodak* and terminated the case, although the claims of the individual plaintiffs were not adjudicated. Subsequently, the Court *sua sponte* vacated that judgment and reinstated the claims of the individual plaintiffs, and plaintiffs' counsel subsequently settled their claims for $275,000 prior to the appeal.

On June 30, 2009, the District Court reversed itself in *Beal* and granted summary judgment to the defendants in that case as well.

The Appeal to the Seventh Circuit Court of Appeals

Refusing to abandon the fight for the plaintiffs' Constitutional rights, plaintiffs' counsel appealed the dismissal of their class claims. One of the primary issues of the appeal was to convince the Seventh Circuit that there were disputed issues of fact as to whether the CPD had ratified the demonstration that precluded the grant of summary judgment, and to argue that if plaintiffs could establish the CPD ratified the march then the absence of a permit could not be used as a rationale to arrest the plaintiffs. The second goal was to distinguish and limit the holding in *Auriemma* in order to establish that Superintendent Hillard did exercise final policy making authority under *Monell* when he participated in the decision to order the plaintiffs' mass arrest.

The City filed a notice of cross appeal seeking to challenge the Court's dismissal of their counterclaim and their motion to certify a counter-class. In the course of briefing, the City, now represented by Corporation Counsel, rather than private counsel (who had made nearly $4 million representing the defendants), abandoned its effort to resurrect its counterclaim against the plaintiffs.

Defendants' brief, like their motion for summary judgment in the District Court, contained a powerful, but disingenuous and inaccurate, narrative, replete with disputed facts that depicted the march as violent, destructive and obstructive with protestors wreaking havoc and chaos. Much of plaintiffs' reply brief was spent deconstructing defendants' factual narrative to demonstrate they were relying on improper facts to make their arguments.

On March 17, 2011, three days before the 8th anniversary of the demonstration, the Seventh Circuit,

in a unanimous opinion authored by Judge Richard A. Posner, ruled in favor of the plaintiffs, reversing the District Court's ruling and reinstating the case. *See Vodak v. City of Chicago*, 639 F.3d 738, 745-746 (7th Cir. 2011). The Court's opinion was sweeping in nature, affirming the rights of all protestors to engage in spontaneous demonstrations and limiting the holding in *Auriemma* to hold that the CPD Superintendent can act with final policy making authority under *Monell*. Both were significant victories that will benefit plaintiffs in police misconduct cases in the future, particularly when seeking to hold the City of Chicago liable for the actions of its' Superintendent.

The Court held the facts set forth by the plaintiffs established that the CPD Defendants waived the permit requirement and allowed the march to proceed in the street, thereby ratifying the demonstration. Thus, the absence of an advanced written permit was of no moment and it did not provide the CPD defendants with probable cause to arrest all those present in the bounded area. The Court did not fault the protestors for not obtaining a permit, but instead blamed the Chicago permit ordinance, noting that "[t]he underlying problem is the basic idiocy of a permit system that does not allow a permit for a march to be granted if the date of the march can't be fixed in advance, but does allow the police to waive the permit requirement just by not prohibiting the demonstration." *Id.* at 746.

The Court went on to find that the demonstration was peaceful on plaintiffs' version of the facts, and that the plaintiffs, therefore, were entitled to an order to disperse and an opportunity to leave prior to their mass arrest. As the Court stated:

> The police were numerous, in riot gear, and formidable. The crowd was just milling about, predominantly peaceably (the defendants do not agree that the crowd was peaceable, but this is a disputable and disputed contention; it cannot be confirmed without a trial). The police could have ordered the demonstrators to go back to the inner drive, could probably have herded them back there, and having done so herded them (along with lesser crowds at other side streets) the rest of the way back to Federal Plaza**.** What they could not lawfully do, in circumstances that were not threatening to the safety of the police or other people, was arrest people who the police had no good reason to believe knew they were violating a police order. *Barham v. Ramsey*, 434 F.3d 565, 573, 369 U.S. App. D.C. 146 (D.C. Cir. 2006); *Papineau v. Parmley, supra*, 465 F.3d at 59-60; *Fogarty v. Gallegos*, 523 F.3d 1147, 1158-59 (10th Cir. 2008); *cf. Gonzalez v. City of Elgin*, 578 F.3d 526, 537-38 (7th Cir. 2009).

Vodak, 639 F.3d at 745-746. The Court rejected the defendants' depiction of the demonstration as an unruly mob, and at one point chided the defendants' presentation of the disputed facts in their brief as "unhelpful." *Id.* at 740. More significantly, the Court, in conformity with precedent from across the country, found that the minor misconduct committed by a few in the demonstration could not justify the mass arrest of hundreds, thereby implicitly upholding the right of protestors and others at a demonstration to be free from an arrest that is not predicated upon individual, particularized probable cause of criminal conduct. *See Barham v. Ramsey*, 434 F.3d 565, 573, 575 (D.C. Cir. 2006); *Fogarty v. Gallegos*, 523 F.3d 1147, 1158-59 (10th Cir. 2008); *Buck v. City of Albuquerque*, 549 F.3d 1269, 1287 (10th Cir. 2008); *Papineau v. Parmley*, 465 F.3d 46, 59 (2d Cir. 2006); *Dellums*, 566 F.2d at 173; *Washington Mobilization Committee,* 566 F.2d at 120.

The Court also roundly rejected the District Court's holding that it was not clearly established that the CPD defendants could not arrest people under such circumstances and that protestors were not entitled to an order to disperse, stating:

> The district judge ruled that it was not clearly established law on March 20, 2003, that police cannot upon revocation of a permit arrest any demonstrator who does not immediately cease demonstrating and leave the scene. If this is right, then the judge's ruling that the police are protected by the doctrine of qualified immunity from liability in damages to any demonstrator or suspected demonstrator who was arrested is also right. But the premise is wrong. The Supreme Court had held decades earlier that police must give notice of revocation of permission to demonstrate before they can begin arresting demonstrators. *Cox v. Louisiana*, supra, 379 U.S. at 571-73; see also *Buck v. City of Albuquerque*, 549 F.3d 1269, 1283-84 (10th Cir. 2008); *Dellums v. Powell*, 566 F.2d 167, 182-83, 184 U.S. App. D.C. 275 (D.C. Cir. 1977).

Vodak, 639 F.3d at 746-47. The Court in so ruling did not solely rely on prior legal precedent to deny the CPD defendants immunity with respect to their arrests. The Court, qualified employing a seldom invoked prong of the qualified immunity analysis, also held that the existence of this right was so patently obvious and needed no prior support to be respected. As the Court stated:

> No precedent should be necessary, moreover, to establish that the Fourth Amendment does not permit the police to say to a person go ahead and march and then, five minutes later, having revoked the permission for the march without notice to anyone, arrest the person for having marched without police permission. This would be "an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." *Cox v. Louisiana, supra*, 379 U.S. at 571, *quoting Raley v. Ohio*, 360 U.S. 423, 426, 79 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959). So this is one of those cases in which a defense of immunity would fail even in the absence of a precedent that had established the illegality of the defendants' conduct. *United States v. Lanier*, 520 U.S. 259, 269-70, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997); *Northen v. City of Chicago*, 126 F.3d 1024, 1028 (7th Cir. 1997). The absence of a reported case with similar facts may demonstrate nothing more than widespread compliance with well-recognized constitutional principles. *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994); *see also K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

Id.

The Court also considered the orders the CPD defendants alleged they gave to the demonstration when the march was stopped at Oak and Michigan that marchers could not march on Michigan Avenue and had to return to the Plaza *via* LSD or disperse. Defendants argued it was reasonable for the CPD Command Personnel to believe plaintiffs violated these orders thereby justifying their mass arrest. Even when adopting the defendants' disputed version of events—that the CPD used bullhorns to communicate these orders—the Court found it was unreasonable for CPD defendants to assume the marchers heard them. As the Court stated:

> And even if the dispersal orders were given, there would have to be evidence that the police reasonably believed that the protestors who were arrested, or at least most of them, had heard the orders. For this could not be assumed.

Id. at 745. Thus, defendants could not rely solely on their own testimony to argue that such orders were properly given to justify people's arrests. Instead, the Court ruled an objective analysis must be utilized to determine if the orders given are constitutionally sufficient, and the Court found these orders were not. The affirmation of this important Constitutional safeguard, established in *Dellums v. Powell*, is relevant to many present day demonstrations, including the recent mass arrests of Occupy Wall Street protestors on the Brooklyn Bridge in October 2011.

The Court then turned to the issue of whether the City was liable for Superintendent Hillard's participation in the decision to effectuate the mass arrests under *Monell*. The City contended that Superintendent Hillard did not have final policy making authority because the Chicago City Council alone, acting through ordinances, possessed such power. The Court rejected this "extravagant claim," noting that such a rationale would preclude the Mayor from having final policy making authority: "Not even acts of the Mayor are acts of the City, it contends; they are merely acts of an errant employee." *Id.* at 747.

The Court then evaluated the factors enumerated in *Valentino v. Village of South Chicago Heights,* 575 F.3d 664, 676 (7th Cir. 2009), finding they all weighed in favor of finding Superintendent Hillard had policy making authority when ordering the plaintiffs' mass arrests. The Court found he was not constrained by policies of other officials or legislative bodies, the decision was not subject to meaningful review and the decision to effectuate the mass arrests was in the realm of his official grant of authority. As the Court noted:

> the only rule governing policies and procedures regarding mass arrests is Chicago Police Department General Order 02-11 (Nov. 1, 2002), issued in the name of the City's Superintendent of Police pursuant to a provision of the Chicago Municipal Code stating that "the superintendent shall be responsible for the general management and control of the police department and shall have full and complete authority to administer the department in a manner consistent with the ordinances of the city, the laws of the state, and

> the rules and regulations of the police board." § 2-84-040. The City Council can enact ordinances that constrain the Superintendent's authority to make mass arrests in demonstration situations, but it hasn't done so, and thus it has allowed him to be sole policymaker in relation to the events at issue in this case.

Vodak, 639 F.3d at 747-748.

The Court distinguished the holding in *Auriemma*, the decision cited by the *Vodak* Court and several other District Courts to find the CPD Superintendent could not, as a matter of law, be a final policymaker for purposes of *Monell*. The Court found the Superintendent in *Auriemma* was constrained by a City Council ordinance that limited his discretion regarding employment decisions, but there was no similar constraint in this instance. The Court further clarified that laws "that complicate an ultimate policymaker's authority" are different from laws that "remove or curtail" such authority and the former do not extinguish a decision maker's authority. *Id.* at 749. By way of example, the Court noted that the City Council presides over the CPD's budget which may affect police training and other actions but it does not confine the Superintendent's "nonfiscal *authority.*" *Id.* In conclusion, "the superintendent *was* the City, so far as the demonstration and arrests were concerned." *Id.* at 748.

Beyond holding that plaintiffs could proceed on their Fourth Amendment and *Monell* claims, the Court re-affirmed people's rights to engage in spontaneous public demonstrations, ruling that cities cannot "flatly ban groups of people from spontaneously gathering on sidewalks or in public parks in response to a dramatic news event." *Id.* at 749. Noting a timely response is often essential to communicating one's message, the Court ruled that municipalities could not use permit requirements to delay, and thereby extinguish, protestors' free speech. *Id*. (quoting *NAACP v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984): "Simple delay may permanently vitiate the expressive content of a demonstration. A spontaneous parade expressing a viewpoint on a topical issue will almost inevitably attract more participants and more press attention, and generate more emotion, than the 'same' parade 20 days later. The later parade can never be the same. Where spontaneity is part of the message, dissemination delayed is dissemination denied.").

While the Court's decision was limited to reversing the District Court's ruling and remanding the case for a trial to resolve the disputed factual issues,[10] it sent a strong message to the defendants that a jury was likely to find that the CPD defendants violated plaintiffs' rights when they were "reacting ad hoc and perhaps in some panic" and then "resorted to mass arrests without justification. Or so at least a trier of fact could find on the record compiled to date." *Id.* at 746. The Court urged an "expeditious resolution" of the case. *Id.* at 751.

Settlement of the Class Claims

After the case was remanded to the District Court, again on the eve of trial, the parties reached a $6.2 million settlement for the class members. This settlement does not include 42 U.S.C.A. § 1988 attorneys' fees and costs incurred by plaintiffs' legal team.

The compensation each of the class members will receive, pursuant to the settlement, depends upon the sub-class to which he or she belongs. Class members who were arrested, charged and had to go to court (sub-class A-3), will receive up to $15,000 each. Those arrested and released without being charged (sub-class A-2), will receive up to $8,750 each. Those who were held on the street for over 90 minutes (sub-class A-1), will receive up to $500 each. In addition, people who were named in the lawsuit as class representatives and class members who were required to give depositions will receive incentive payments for the extra time they expended, and, in the case of the class representatives, for the burdens and risks they endured during the litigation.

In addition to receiving substantial compensation for the class members whose Constitutional rights were violated, the settlement sent a powerful message to the City and its' police department that they must respect the right to free speech and assembly, a message they claimed to have heard. The day the settlement was disclosed to the public, the new CPD Superintendent, Gerry McCarthy, acknowledged "important lessons" the CPD learned from *Vodak* about dealing with large groups of protestors, including the need to provide individuals with orders to disperse and opportunities to leave.[11] A City spokesperson also noted that the City has "greatly improved its crowd-control methods by incorporating what was learned from the 2003 protest and subsequent litigation and settlement."[12]

The Upcoming NATO Protests in Chicago

Hopefully, the *Vodak* litigation and its resolution will influence the way Mayor Rahm Emmanuel and the CPD treat protestors converging in Chicago for the upcoming demonstrations against NATO. In response to the *Vodak* settlement, NLG Executive Director Heidi Boghosian noted, "[s]hort-sighted attempts to extinguish free speech often come at great expense."[13] But the Seventh Circuit's decision and the subsequent settlement, like any other legal case, are not a panacea for ensuring protestors' rights will be respected.

The recent passage of new permit ordinances in anticipation of the upcoming NATO conference, dubbed "Sit Down and Shut Up" by Occupy Chicago, are troubling, and their passage does not bode well for protestors' exercise of their Constitutional rights. The new ordinances increase the City's and CPD's powers and restrict the ability of protestors to take to the street free from onerous encumbrances. For example, the new permit ordinance requires march organizers to obtain $1 million in insurance coverage for almost all marches that take place in the downtown area. Moreover, march organizers are responsible for indemnifying the City and must reimburse it for any damage caused by third parties at a demonstration. Further, march organizers are also required to register any sound amplification devices or signs and banners that are too large for one person to carry. Such provisions may well have a chilling effect and deter people from holding demonstrations because organizers cannot control or regulate who attends a demonstration, what they may bring to it, and how they may behave. Moreover, the new ordinances permit the City and CPD to extend their powers of police surveillance, and grant the CPD the power to deputize law enforcement officials, including DEA, FBI, and Illinois State Police.

Again, there is hope that that the CPD and other newly deputized law enforcement officers do not mass arrest protestors during the anti-NATO demonstrations. If they do and they attempt to use these highly technical violations of the new permit ordinance as an after-the-fact justification for shutting down the demonstration, the NLG will defend the arrestees and the city will once again face costly civil rights litigation brought to vindicate protestors' rights.

ENDNOTES

1. Plaintiffs' counsel brought a successful motion to compel the discovery of the files and documents pertaining to these undercover investigations, defeating defendants' claims that they were protected from disclosure by the law enforcement privilege. See *Vodak v. City of Chicago*, 2004 WL 2032147, 5 (N.D.Ill. 2004) (Nolan, J).

2. For a map of the demonstration, visit Westlaw to view *Vodak v. City of Chicago*, 639 F.3d 738, 751 (7th Cir. 2011).

3. This protestor, Brad Thomson was later named as a plaintiff and he subsequently joined the People's Law Office in 2004 and worked on the civil rights case.

4. Only one person who was arrested and faced charges relating to the demonstration was forced to defend himself at trial. He was not arrested in the bounded area. He was arrested when he travelled downtown to check on his son who was detained in the bounded area. When seeking assistance from an officer, he was grabbed by several CPD officers, physically escorted to a squadrol, and cut with the handcuffs they used on him warranting medical attention and stitches. CPD officers, adding insult to his injuries, charged him with disorderly conduct and resisting arrest, claiming he failed to obey their order to disperse. He was later found not guilty at a bench trial after a video offered into evidence directly refuted the Officers' bogus allegations. He subsequently filed a lawsuit against the CPD and obtained a $50,000 settlement.

5. The class action lawsuit was litigated by People's Law Office attorneys Joey Mogul, Janine Hoft, John Stainthorp, and Sarah Gelsomino along with attorneys Melinda Power and Jim Fennerty, as well as paralegal Brad Thomson of People's Law Office. This article relies heavily on the collective work completed by this team over the course of the litigation, including the briefs to the Seventh Circuit Court of Appeals. However, any errors in this article are attributable only to the author.

6. For further discussion of the demonization and infantalization of people who engage in street activism and civil disobedience see Deborah B. Gould's *Moving Politics: Emotion and ACT UP's Fight Against AIDS,* (Chicago: The University of Chicago Press, 2009), p. 274: "Politicians, the corporate media, and other dominant institutions frequently condemn protest politics as extremist, particularly when they understand democracy in terms of harmony and unity of the population rather than as a form of governance that follows an indeterminate path.")

7. Defendants' counsel refused to admit that the CPD engaged in a mass arrest in response to plaintiffs request to admit. In response, plaintiffs' counsel brought a motion challenging the sufficiency of the defendants' objections and responses. The Magistrate Judge granted plaintiffs' motion and ordered defendants to respond, forcing the defendants' concession as to this issue.

8. Again, the defendants were forced to admit, in responses to requests to admit, that there were no police officers or witnesses that could testify to any individualized conduct on the part of the 17 named plaintiffs other than to testify that they were present in the bounded area.

9. Chicago Municipal Code § 8-28-020 provides that: "Any person who causes the city or its agents to incur costs in order to provide necessary services as a result of such person's violation of any federal, state or local law ... shall be liable to the city for those costs. This liability shall be collectible in the same manner as any other personal liability."

10. Plaintiffs' counsel abandoned their affirmative motion for summary judgment on plaintiffs' Fourth Amendment claims on appeal.

11. Fran Spielman, "$6.2 million settlement for '03 antiwar protesters; Case offers useful lessons, police chief says," *Chicago Sun Times*, February 10, 2012; John Byrne, "Emanuel refuses to weigh in on city sticker flap, protest settlement," *Chicago Tribune*, February 9, 2012.

12. *See* Michael Tarm, "Settlement in 2003 Chicago protest lawsuit," *The Associated Press,* February 8, 2012.

13. NLG Press Release, "NLG reaches $6.2 Million settlement in class action against Chicago police," February 9, 2012.

CASE UPDATES

On April 2, 2012, the United States Supreme Court, in a 5 to 4 decision, decided the jail strip search case of *Florence v. Board of Chosen Freeholders*, ___ U.S. ___, 132 S.Ct. 1510 (2012), affirming the split decision of Third Circuit Court of Appeals. (See, *Supreme Court Hears Arguments in Jail Strip Search Case*, PMCRLR, Vol. 10, No. 6, November/December 2011 for a discussion of the decisions below and the oral arguments before the Supreme Court).

Albert Florence, an African American, was riding as a passenger in a vehicle that was stopped for speeding on a New Jersey interstate. The officers ran a check on Florence and found an old warrant for failure to pay a fine after he had pleaded guilty to weapons related offenses. He showed proof that he had paid the fine to the officers, but he was nonetheless arrested, handcuffed, arrested, and taken first to the Burlington County Jail, where, pursuant to the County's strip search policy, he was forced to strip naked, lift his genitals, and open his mouth in order to be visually examined for contraband. He was then compelled to take an observed shower. Six days later he was taken to the Essex County Jail where he was again strip searched, this time with the added indignity of squatting and coughing for his anus to be visually observed. The next day he was finally brought before a judge who said he was "appalled" by the course of events and released him. Florence then sued the officers and counties involved, alleging, *inter alia*, that he was subjected to searches pursuant to unconstitutional county policies that violated 42 U.S.C.A. § 1983 and the Fourth Amendment. The district court granted summary judgment in Florence's favor on this claim, *Florence v. Board of Chosen Freeholders of the County of Burlington*, 2008 WL 800970 (D.N.J. Mar. 20, 2008)), and the defendants took an interlocutory appeal to the Third Circuit.

In a 2-1 decision, the Third Circuit reversed the District Court. *Florence v. Board of Chosen Freeholders of the County of Burlington*, 621 F.3d 296 (3rd Cir. 2010). After noting that ten Circuit Courts of Appeals had decided to the contrary, the Third Circuit majority, relying on two subsequent *en banc* decisions, *Powell v. Barrett*, 541 F.3d 1298, 1314 (11th Cir. 2008) (en banc) and *Bull v. City and County of San Francisco*, 595 F.3d 964, 975 (9th Cir. 2010) (en banc), held that under the Supreme Court's decision in *Bell v. Wolfish*, 441 U.S. 520, (1979), blanket suspicionless jailhouse strip searches of persons arrested for minor offenses was constitutionally permissible. The Supreme Court granted *certiorari* on the following question presented: "Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of every individual arrested for any minor offense no matter what the circumstances." *Florence v. Board of Chosen Freeholders of the County of Burlington,* No. 10-945, *cert. granted*, ___ U.S. ___ , 131 S. Ct. 1816, (April 4, 2011).

Justice Kennedy wrote the majority opinion, which first emphasized that in *Turner v. Saffley,* 482 U.S. 78, 89 (1987) "the [Supreme] Court has confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate's constitutional rights must be upheld 'if it is reasonably related to legitimate penological interests.'" *Florence,* 132 S.Ct. at 1515. Justice Kennedy then turned to *Bell v. Wolfish*, which upheld the blanket strip searching of prisoners after jail contact visits, as "the starting point for understanding how this framework applies to Fourth Amendment challenges." *Florence,* 132 S.Ct. at 1516. Drawing heavily from the amicus briefs of numerous prison warden and police associations, as well as from his own predilections, which he had articulated at oral argument, Justice Kennedy supported a blanket search rule by opining that "people detained for minor offenses can turn out to be the most devious and dangerous criminals," and citing to the necessity of finding weapons and other contraband hidden in and around body cavities, discovering gang tattoos, and detecting lice and other health problems. *Id.* at 1520. Moreover, the "laborious administration of prisons would become less effective and likely less fair and evenhanded were the practical problems inevitable from the rules suggested by the petitioner to be imposed as a constitutional mandate." *Id.* at 1521. In conclusion, Justice Kennedy, in a section of the opinion in which Justice Thomas did not join, placed some limitations on the Court's holding, excepting strip searches of persons not placed in the jail's general population, strip searches that include touching, and strip searches designed to harass or humiliate.

Chief Justice Roberts and Justice Alito filed separate concurrences, in which they further delineated the exceptions to the blanket rule suggested by Justice Kennedy. Roberts pointed out that Florence was not arrested for a minor traffic offense, and that there was

no alternative to his placement in general population, while Alito, after pointing out that a visual strip search "can be humiliating and deeply offensive to many," wrote that the Court "explicitly reserves judgment" on "whether it is always reasonable, without regard to the offense or the reason for detention, to strip search an arrestee before the arrestee's detention has been reviewed by a judicial officer." *Id*. at 1524-25.

Justice Breyer wrote the dissenting opinion, joined by Justices Ginsburg, Sotomayor and Kagan. Breyer first pointed out that, in contrast to the breadth of the *certiorari* question presented, "[t]his case is limited to strip searches of those persons entering a jail's general population." *Florence,* 132 S.Ct. at 1525. Additionally, he emphasized that the searches in question, because they "involve close observation of the private areas of a person's body . . . constitute a far more serious invasion of that person's body" than do searches that consist only of undressing and taking an observed shower. *Id*.

Relying on a wide range of studies, regulations, and empirical data, including from the American Correctional Association, the Bureau of Prisons, and the National Police Accountability Project of the National Lawyers Guild, while distinguishing *Bell* on its facts, Justice Breyer debunked much of the majority's seemingly blind deference to prison officials, whose word, he stated, while "important," standing alone could "not be sufficient." *Florence,* 132 S.Ct. at 1531. In his view, the invasion of privacy occasioned by the kind of strip search at issue was "particularly acute" when it was performed on persons arrested for minor offenses such as a traffic ticket, for not paying a civil fine, or for a minor trespass. *Id*. at 1526. Hence he found that the invasion of privacy at issue did not meet the *Bell* and *Turner* requirement that it be "reasonably related" to the justifying "penological interest" and not be "exaggerated." *Florence,* 132 S.Ct. at 1531-32. In conclusion, the dissent could "not find justification for the strip search policy at issue here—a policy that would subject those arrested for minor offenses to serious invasions of their personal privacy." *Id.* at 32.

In summary, the *Florence* decision is essentially limited to the facts of the case, with eight justices agreeing that the decision does not extend to traffic offenses, to cases where the person is not placed in general population, where the search is designed to harass or humiliate, or is performed before a *Gerstein* probable cause hearing is held.