ORAL ARGUMENT NOT YET SCHEDULED

No. 08-7083

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SARAH CARR, *et al*.,

Appellees,

v.

DISTRICT OF COLUMBIA,

Appellant.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES

Arthur B. Spitzer
Fritz Mulhauser
American Civil Liberties Union of the National Capital Area
1400 20th Street, NW, #119
Washington, DC 20036
202/457-0800

Daniel M. Schember
Susan B. Dunham
Gaffney & Schember, P.C.
1666 Connecticut Avenue, N.W.
Suite 225
Washington, D.C. 20009
202/328-2244

Counsel for Appellees

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*

The following parties and no *amici* appeared below: (1) Sarah Carr, Allyson Kirk, Chelsea Kirk, Jonathan Scolnik, and Matthew Singer, plaintiffs; and District of Columbia, defendant; (2) Sarah Carr, Allyson Kirk, Chelsea Kirk, Jonathan Scolnik, and Matthew Singer, appellees; and District of Columbia, appellant, appear in this Court. To date, no *amicus* has appeared in this Court.

Rulings Under Review

The rulings at issue are the June 30, 2008, Order Granting Injunction (Doc 66) and the June 17, 2008, order granting plaintiffs' motion for partial summary judgment and denying defendant's motion for partial summary judgment (Doc 63 at 18) (Amended Memorandum Opinion, Doc 69, issued July 15, 2008) by United States District Judge Ellen Segal Huvelle. The court's Amended Memorandum Opinion is reported at 561 F. Supp. 2d 7. There is no official citation to the Order Granting Injunction.

Related Cases

This case has not been previously before this Court. This case was before the United States District Court for the District of Columbia as *Carr v. District of Columbia*, Civil Action No. 06-00098 (ESH). There are no related cases.

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ISSUES PRESENTED FOR REVIEW

I. Whether the Fourth Amendment barred the mass arrest—for rioting in the street, or marching in the street without a written permit—of persons that police trapped in an alley, where:

a. police officers on a street where vandalism and street marching had occurred saw a group run down the street and turn into an alley;

b. at the time this group entered the alley, the police did not know whether anyone else was in the alley;

c. police arrived at the other entrance to the alley, where no continuous police observation of events or the persons present had occurred, and herded or ordered into that entrance many people who were on the sidewalk;

d. the police could not identify any individual arrested in the alley as a person they had seen in the street where vandalism and street marching had occurred.

II. Assuming that all persons trapped in the alley had been marching in a street where vandalism had occurred, whether the First and Fourth Amendments barred their arrest for rioting where:

a. of the 250-300 persons in the street, many marched peacefully for political purposes;

b. acts of vandalism, including window-breaking, were committed near the march, by some persons in or near the march; but police had no evidence identifying any individual who either committed these acts or encouraged them by word or gesture;

c. when vandalism occurred, police officers who saw it were behind the march, could not see everyone in the street, had no view of the front of the march, and had no evidence that everyone had committed or encouraged the vandalism;

d. a small portion of the persons in the street ran away after the vandalism and turned into an alley, while many others continued to march peacefully in the street, or walked on the sidewalk next to the march.

III. Whether the First and Fourth Amendments barred mass arrest of street marchers for parading without a written permit, where:

a. official policy required the police to facilitate and support street marches having no written permits and never, under any circumstances, to arrest persons simply for marching in the street;

b. the police knew in advance the time and route of the march and expressly acknowledged that the policy stated above applied to a march at that time, on that route;

c. the police gave no order to disperse, nor made any other announcement informing marchers that the march would not be allowed or must cease.

STATUTE

42 U.S.C. § 1983 (Excerpt)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of . . . the District of Columbia, subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF FACTS

The Street March and the Mass Arrest in the Alley

On the night of January 20, 2005, in the Adams Morgan neighborhood of the District of Columbia, 250-300 people marched in the street to protest the inauguration of the President. On the order of then-Commander Cathy Lanier, who is now the District's Chief of Police, officers trapped in an alley and arrested the five named plaintiffs and approximately 65 other persons.

Peaceful Political Marching, by Many

After a concert—at which announcements of the march were made and a leaflet announcing the march route was distributed—250-300 people assembled on Columbia Road and marched west toward 18th Street.[1] (J.A.153, 177-80, 396, 401-06, 461, 557, 562.) Two videotapes, J.A.557 and 562—on a DVD disk in the addendum, which also includes an aerial photomap—show substantial portions of

[1] The route went south on 18th Street to Florida Avenue, then on Florida to the Hilton Hotel. (J.A.396.) Undercover officers at the concert informed Ms. Lanier of the route well before the march began. (J.A.40, 44-46, 58.)

the march. They show many people peacefully walking west on Columbia Road toward 18th Street.[2]

Vandalism by Unidentified Individuals

Officers behind the march saw unidentified individuals near or among the marchers commit vandalism, including window-breaking near Columbia Road and 18th Street.[3] (J.A.47, 50-51, 55, 69-70, 123-24.) The police had no information identifying anyone who did this. (J.A.566-68.) Nor did they have information identifying anyone who had encouraged vandalism by word or gesture.[4]

Continued Peaceful Marching by Many, While Some Ran Away

As the vandalism by unidentified individuals occurred, the march continued to move forward (J.A.82), turning south on 18th Street from Columbia Road.

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[2] Appellees urge the Court to view the videotapes, which bring the facts to life in a way that text cannot.

[3] None of the plaintiffs committed vandalism. The class certification order (Doc 27) excludes vandals. Their number was small compared to the 250-300 marchers. Ms. Lanier said "at least 10 to 15 rocks or bricks" were thrown, "[a]t least four or five" newspaper boxes were hauled into the street, and "several" people spray painted objects or started small fires trash receptacles. (J.A.464-66, 564-68.)

[4] Declarations by Ms. Lanier and her "scribe"—an officer who rode with her in a car, following the march from behind—assert that "it appeared" that "everyone," "as a group response" "cheered and raised their arms in apparent celebration" when windows were broken. **(**J.A.50-51, 59.) The declarations, however, do not reveal how it was possible for the officers to see or hear that each and every individual among the 250-300 persons cheered or raised an arm, and did so with intent to encourage, rather than condemn, window-breaking. Ms. Lanier admitted, "I couldn't see the whole crowd." (J.A.463.) A videotape portion shot from the rear of the march shows that no one there could see all of the marchers. (J.A.562.)

(J.A.557.) A videotape shows many persons at the front of the march turning south on 18th Street from Columbia Road, continuously walking peacefully, facing forward, and committing no acts of vandalism. (J.A.557.) Plaintiff Carr, who was near the front of the march, saw no window-breaking. (J.A.334.) Plaintiff Singer—who was in a nightclub on 18th Street south of Columbia Road when he saw the march go by, and left the club to learn the message of the march—also saw no window-breaking. (J.A.441-44.) He saw no vandalism of any kind, nor any evidence that any vandalism had occurred. (*Id*.)

Police officers who were behind the march say some persons ran away after the window-breaking that occurred near Columbia Road and 18th Street. (J.A.51, 55, 123-24.) The officers say this group ran south on 18th and turned west into the alley, which is north of Belmont Road. (*Id*.) The officers do not say there was any wrongdoing by anyone in this group while it ran away. The officers, who were on 18th Street north of the alley, followed them into the alley. (*Id*.)

Ms. Lanier, who was in a car behind the march (J.A.69, 460), did not see the group that ran away and turned west into the alley. (J.A.478.) Her declaration says: "As MPD attempted to apprehend the subjects who were destroying property, the subjects and the protestors began to run from the area. . . . [P]rotestors . . . ran into the alley." (J.A.71.) No one identified "the subjects." (J.A.566-68.)

Not everyone ran away. Many persons, including the named plaintiffs, continued to walk peacefully south on 18th Street, or the sidewalk, proceeding south of the alley to Belmont Road. (J.A.413-14, 441-42, 584, 587-88, 557, 562, 610-11.) The Kirks, who were at the back of the march, left the march and walked on the sidewalk, after Allyson Kirk saw a single instance of window-breaking. (J.A.141-42, 349-51.) The videotapes show many persons peacefully walking south on 18th Street or the sidewalk, to Belmont. (J.A.557, 562.)

The March Turns onto Belmont; Trap and Arrest in the Alley

Other police arrived on 18th Street, south of Belmont. (J.A.413-16, 557.) One of the videotapes shows police cars on 18th Street, south of Belmont, as the front of the march approaches Belmont. (J.A.557.) At the intersection of 18th and Belmont, plaintiff Scolnik, who was near the back of the march, saw an officer signaling that marchers should not continue south on 18th and that no officers prevented a right turn onto Belmont.[5] (J.A.413-16.)

Many persons, including the named plaintiffs, turned right onto Belmont; went to Columbia Road; and stood or walked on Columbia Road or the sidewalk.

[5] Police officer declarations say that officers formed a line across 18th Street "south of the alley." (J.A.55, 124.) They do not indicate when this occurred or whether the line was south of Belmont as well as south of the alley. A videotape shows that police were present at the intersection of 18th and Belmont as the march approached but does not show a police line. (J.A.557.) No declaration asserts that there was police line north of Belmont Road. No declaration asserts that marchers barged through a police line to get to Belmont.

(J.A.557, 562, 584, 587-91, 599-601, 624-26, 629-32.) The videotapes show many people peacefully walking south on 18th Street, or the sidewalk, and turning right on Belmont in the direction of Columbia Road. (J.A.557, 562.) One of the videotapes shows many people peacefully walking, and some running, west on Belmont, or the sidewalk, to Columbia Road. (J.A.557.) Both videotapes show many people peacefully standing or walking, individually or in small groups, on the Columbia Road sidewalk near Belmont Road.[6] (J.A.557 and 562.)

On Columbia Road, between Belmont Road and 18th Street, there is another main entrance to the alley.[7] (J.A.55, 557, 562.) All of the named plaintiffs and their companions entered the alley from this entrance. Plaintiff Carr and her friends, who were walking on the sidewalk, no longer demonstrating, were ordered by police to turn around, and were herded by police into the alley. (J.A.583-84.) Police also herded plaintiffs Singer and Scolnik, and others near them, into the

[6] One of the videotapes also shows some persons walking onto Columbia Road from Belmont and shows wrongdoing by individuals near the intersection of Columbia and Belmont—pushing a dumpster or putting two wooden pallets on the road. (J.A.557.) The videotape does not show any encouragement or approval of these acts by anyone else. Nor does it show that everyone in the vicinity could see these acts. No evidence shows any other wrongdoing in this vicinity.

[7] The alley is basically T-shaped, with the top of the "T" going from 18th to Columbia, the two main entrances. The trunk of the "T" runs north from the top. As a videotape shows, there is another narrow outlet to Columbia Road at the base of the trunk. (J.A.557.) (The videographer exits the alley via this outlet.) In this brief, references to the Columbia Road alley entrance are to the main entrance, not the narrow outlet.

alley. (J.A.624-26, 630-32.) Plaintiffs Chelsea and Allyson Kirk, who were no longer demonstrating, voluntarily went into the Columbia Road alley entrance because the alley led back to 18th Street, from where they hoped to find their way to the Metro. (J.A.589-91, 599-601.) A videotape shows police cars arriving on Columbia Road near the alley entrance. (J.A.557.) Both videotapes show officers on Columbia Road ordering or herding many people on the sidewalk into the Columbia Road entrance to the alley. (J.A.557 and 562.)

On the order of Ms. Lanier, the police—who at no time gave an order to disperse (J.A.509-10)—arrested for rioting the persons who were trapped in the alley. (J.A.480-81.) There is no evidence of any wrongdoing in the alley. Ms. Lanier did not personally see the arrests in the alley. (J.A.480.)

In a declaration, Ms. Lanier said that she had ordered the persons in the alley arrested for parading without a permit, not rioting. (J.A.71.) Contemporaneous reports also indicate this. (J.A.517, 566-67.) At her deposition, however, she said she had ordered arrests for rioting, but had later switched the charge to parading without a permit after consulting the police department's lawyer. (J.A.480-81.)

Lack of Evidence Concerning Who Was in the Alley

No police officer declaration says that, at the time some persons ran into the alley from 18th Street, no one else was in the alley. No declaration states that the blocking of the Columbia Road alley entrance by police officers occurred before

this group ran into the alley from 18th Street—or that after the Columbia Road entrance was blocked, and before this group entered from 18th Street, police had searched the alley and found no one there. No declaration states that police ever blocked the alley's narrow outlet onto Columbia Road.[8] A videotape shows an individual entering the alley from the 18th Street sidewalk as many people peacefully walk south past the alley entrance. (J.A.562.)

No declaration says that an officer was able to see, and saw, that no one entered the alley from the 18th Street sidewalk before or at the same time as the group that ran in from the street. A declaration states that "uninvolved" persons were not arrested, but it describes the "uninvolved" persons only as those who "stood" on the sidewalk. (J. A.51-52.)

No police officer declaration identifies any arrestee as a person whom the officer had seen commit or encourage any act of vandalism, or even as a person whom the officer had seen in the street. No police cordon separated demonstrators in the street from other persons in the area. (J.A.557, 562.)

No police officer declaration identifies any arrestee as a person whom the officer had seen enter the alley from a particular entrance. No declaration states that a police officer saw any named plaintiff enter the alley from 18th Street, rather than Columbia Road.

[8] *See supra* note 7.

No police officer declaration states what any individual or group was doing in the area near the Columbia Road alley entrance before they entered the alley. The videotapes show many persons peacefully standing or walking on the sidewalk, individually or in small groups. (J.A.557, 562.) The videotapes show officers arriving and ordering or herding many people on the Columbia Road sidewalk into the Columbia Road alley entrance. (*Id*.)

Inability of the Police to See Everyone in the Street

Ms. Lanier rode in a car, following the march from behind. (J.A.69.) According to her, there were 250 to 300 marchers. (J.A.461.) Ms. Lanier testified, "I couldn't see the whole crowd." (J.A.463.) A portion of one of the videotapes, shot from the rear of the march, shows that a person behind the march could not see all of the marchers. (J.A.562.)

None of the declarations of the officers who saw and followed a group that ran south on 18th Street and west into the alley—a group that Ms. Lanier did not see (J.A.478)—states that the officer saw everyone in the street. (J.A.50-51, 54-55, 123-124.) Like Ms. Lanier, these officers were behind the march. (*Id*.)

There is no declaration by any officer who was in front of the march. A major portion of one of the videotapes is shot from in front of the march. (J.A.557.) It shows many people continuously marching peacefully, turning south

on 18th Street from Columbia Road, walking peacefully south on 18th to Belmont, facing forward, and committing no acts of vandalism. (*Id*.)

District of Columbia Policy on Street Marches

District of Columbia policy required police both to accommodate political street marches that had no written permits and to not, under any circumstances, arrest persons simply for parading in the street without a written permit. Former MPD Chief Ramsey said:

> [T]he vast majority of demonstrations in our city—approximately 80 percent over the past year [meaning 2003]—are non-permitted marches and rallies. These are events that spring up without advance notice, and which we [meaning District of Columbia police] must respond to and support.

(J.A.540.) Ms. Lanier said, "[w]e would not simply arrest someone for parading without a permit. . . . I can think of no circumstances . . . where for simply parading without a permit we would do that. We would facilitate that parade." (J.A.459.) The District announced this policy in open court several months before the plaintiffs' arrest. (J.A.501.)

Police knew the time and route of the march before it began. (J.A.58.) Asked why the police, given this knowledge, did not tell the assembling marchers that permission to march was denied, Ms. Lanier said, "Because I wouldn't do that. I would never prevent a group who wants to peacefully march to march." (J.A.490.) Ms. Lanier said, "The MPD did not prohibit the march." (J.A.59.)

In 2002, there had been another nighttime street demonstration in the same neighborhood, with amplified sound, "fire breathers," and no written permit. No arrests were made for demonstrating without police permission. (J.A.638-50.)

SUMMARY OF ARGUMENT

Contrary to the District's brief, no evidence shows that the only persons arrested in the alley, who numbered about 70, were members of a group of demonstrators that police saw run south on 18th Street and turn west into the alley. No evidence asserts that the alley was empty when the group ran in, and it was impossible for police on the street north of the alley entrance to maintain line-of-sight contact with all members of the group after they turned the corner into the alley. Undisputed evidence ignored by the District establishes that many people on the sidewalk near the *other* entrance to the alley were herded or ordered by police into that alley entrance, without any evidence that all of those persons previously had been demonstrating in the street.

The undisputed evidence shows that arrestees could have included persons who merely had been walking down the sidewalk or who had entered the alley from the back door of a building. Police were unable to identify any arrestee as a person they had seen demonstrating in the street. Mass arrest of everyone trapped in the alley therefore was barred by *Barham v. Ramsey*, 424 F.3d 565, 574 (D.C. Cir. 2006), even if merely demonstrating in the street was grounds for arrest.

The First and Fourth Amendments barred mass arrest for rioting of everyone marching in the street. No officer could see the conduct of all members of the group of 250-300 marchers, or even the overall appearance of all segments of the group. All officers who saw some of the group, and who say they saw vandalism including window-breaking, were *behind* the march. It was impossible for them to see the front of the march and none claims to have seen it. The police therefore had no evidence that everyone at the front had committed, encouraged, ratified—or that they even had seen or otherwise knew about—any of the vandalism that occurred behind them as they continued to peacefully march forward. A videotape shot from in front of the march confirms the obvious. It shows many people at the front of the march continuously marching peacefully, facing forward, committing no vandalism, and having no view of events behind them.

Even marchers who saw the vandalism could not be arrested merely for continuing to march peacefully, because there was no evidence that the peaceful marchers specifically intended to further the vandalism. *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 919 (1982). Peaceful marchers had no duty to cease their own constitutionally-protected conduct or to take affirmative steps to distance themselves from the wrongdoers. *Id*. at 925 n. 69.

Even if peaceful demonstrators did have a duty to move away from the scene of vandalism—though they did not—that is precisely what they did. Videotapes

show many people peacefully marching south on 18th street, away from the scene of vandalism, proceeding south of the 18th Street entrance to the alley, and turning right onto Belmont Road. No evidence asserts that everyone on 18th Street was rioting as the march went south, past the alley entrance, and turned onto Belmont. The videotapes, including part of one showing this group from behind, establish that no such assertion properly could be made. Undisputed evidence, including the videotapes, show that many people went up Belmont to Columbia Road and stood or walked on the sidewalk near the Columbia Road entrance to the alley, where many persons were ordered or herded into the alley by police.

Even if peaceful demonstrators had a duty not only to leave the scene of vandalism, but also to stop demonstrating—though they did not—that is precisely what many of them did. According to the police officers, a portion of the 250-300 demonstrators ran away from the scene of vandalism and left the march by going into the alley—consistent with innocence and in accordance with any duty to depart that an erroneous view of the law might impose. Others left the scene of vandalism, and the march, by leaving the street and walking south on the sidewalk, next to the march—going right on Belmont and right again onto the Columbia Road sidewalk.

Even if all persons trapped in the alley had been demonstrating in the street—though police had no probable cause to believe that this was the case—the

persons trapped in the alley included those who had peacefully continued to march in the street, away from the scene of vandalism; those who had left the march but had continued walking on the sidewalk, next to the march; and those who had run away from the scene of vandalism and gone into the alley. There was no evidence of wrongdoing by the last group, *while* it ran away, and there was no evidence of any wrongdoing *in* the alley, by anyone. There was no probable cause to arrest everyone in any of these three groups, let alone everyone in all of them.

Under the circumstances, mass arrest of everyone in the alley—even assuming, improperly, that all of them had been demonstrators—was impermissible unless the police issued an order to disperse and afforded the persons in the alley an opportunity to comply. *Barham*, 434 F.3d at 576. It is undisputed that the police never gave an order to disperse.

The First and Fourth Amendments also barred mass arrest of the street demonstrators for parading without a written permit. Under District policy, the demonstrators did not need a permit to march in the street at the time, and on the route, that they chose. Under District policy, the marchers were not subject to arrest unless they violated some law other than the law concerning written permits.

Though the District's argument is not clear, the District appears to assert that under its policy *all* street marchers were subject to arrest without warning—for the criminal offense of parading without a written permit—if *some* of the marchers

violated other laws. Such a policy is not constitutional. It is contrary to the due process requirement of personal guilt. It also is contrary to the First Amendment requirement that all "manner" restrictions on parading in the public street be reasonable. Vulnerability of all demonstrators to sudden mass arrest due to events beyond their control—misconduct by some among them—is not constitutional. It denies breathing space to and chills the exercise of First Amendment rights.

Because District policy did not require the street marchers to have a written permit, their presence in the street at the time and place they chose was in accordance with official policy. Though the police could end the march if circumstances reasonably warranted this, they could not arrest marchers—for being in the street without permission—without issuing an order to disperse and affording the marchers opportunity to comply. *Dellums v. Powell*, 566 F.2d 167, 183 (D.C. Cir. 1977). Police could have done this after they trapped persons in the alley, but they never did.

Even if the District's policy is set aside and it is assumed, instead, that District law prohibited all street marches not having a written permit, the police lacked probable cause to believe that everyone marching in the street actually knew that the march had no written permit—the constitutionally required *mens rea* element of the offense of demonstrating in a public street without police permission. *United States v. Sheehan*, 512 F.3d 621, 631 (D.C. Cir. 2008);

American-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 611-12 (6th Cir. 2005). Absent an order to disperse, or an announcement informing the marchers that they had no permit, police lacked probable cause to believe that each and every person in the street actually knew that no permit had been issued.

The District's contrary position is unsupported by any case law and unacceptable. Street marchers have no duty to know customary permit-granting practices and to try to figure out from circumstances whether it was likely that a permit had been issued for the time and place of the march; and nothing that happened *during* the march provided marchers any information about whether a permit had been issued in the days, weeks, or months before.

ARGUMENT

I. The District's Brief Misstates the Undisputed Facts; Police Forced Some Arrestees into the Alley from Columbia Road, Not 18th Street; and Uninvolved Persons Could Have Been Trapped and Arrested

The District's legal position rests on two misstatements of the undisputed facts concerning the persons who were trapped and arrested in the alley.

A. The District Erroneously Argues that Officers "Maintained Line-of-Sight Contact" with Persons who Entered the Alley from 18th Street

The District erroneously asserts that its "evidence establishe[s] that the police maintained line-of-sight contact" (DC Brief at 27) with the group that ran south on 18th Street and turned west into the alley—the people that the District

claims were arrested. (*Id.*; *see also* DC Brief at 10**.)** The evidence does not establish that police officers "maintained line-of-sight contact" with this group and therefore were able to distinguish them from others who may have been in the alley.

No police declaration asserts continuous "line-of-sight contact." (J.A.51, 55, 124.) Nor would it have been possible for the officers to do this. If, as the District claims, this was the group that was arrested, then there were about 70 persons in this group. (J.A.71.) Officers on 18th Street *north* of the alley necessarily lost sight of members of this group as they turned the corner into the alley.[9]

Even if a declaration said that one of the officers "maintained line-of-sight contact" with 70 running persons after they turned the corner into the alley, the Court would have to disregard it. Under Fed. R. Civ. P. 56(e)(1), declarations "supporting or opposing" summary judgment "must be made on personal knowledge" and show "competen[ce] to testify on the matters stated." To the extent that declarations assert that officers saw what they could not possibly have seen, the declarations must be disregarded. *Jackson v. United States*, 353 F.2d 862, 867 (D.C. Cir. 1965) (invoking doctrine of inherent incredibility to discredit police testimony and noting that "[i]n some cases police testimony . . . will simply

[9] The videotapes (J.A.557, 562) show the 18th Street entrance to the alley, including the solid brick walls on either side that would have obscured the officers' view of people once they ran into the alley.

be too weak and too incredible . . . to accept . . . . It is enough to invoke the doctrine if the . . . allegations . . . seem highly questionable in the light of common knowledge and experience.").

B. The District's Assertion that All Arrestees Entered the Alley from 18th Street Misstates the Undisputed Facts

The District's brief, at 10, also misstates the undisputed facts when it says that "protestors, including Singer, ran south along 18th Street and into [the] alley" and "[t]hose protestors were arrested in the alley and are the plaintiffs here."

This portrayal of the facts does not square with the numbers. The District says that the police line was "south of the alley" and that "the protestors ran south down 18th Street toward the police line and turned into the alley where they were pursued, contained, and arrested," DC Brief at 35—as if all of "the protestors" ran into the alley from 18th Street because they had nowhere else to go, and all of "the protestors" then were trapped and arrested. There were, however, 250-300 protestors. (J.A.46, 461.) Only about 70 persons were trapped and arrested in the alley. (J.A.71.) The District's brief ignores this discrepancy and the obvious question: if only a small portion of the protestors entered the alley from 18th Street, what did all the other protestors do?

The District then ignores undisputed evidence—the videotapes (J.A.557, 562)—that conclusively answer this question. Many protestors did not run into the alley from 18th Street; rather, they peacefully walked further south to Belmont

Road, accompanied by many persons on the sidewalk; turned right on Belmont; went to Columbia Road; stood or walked on the sidewalk; and were ordered or herded into the Columbia Road entrance to the alley.

The evidence the District cites—J.A.51, 55, 71, 124, 142—does not support its portrayal of the facts. The evidence at J.A.142 makes no reference to entering the alley from 18th Street. The police officer declarations at J.A.51, 55, and 124 establish only that officers on 18th Street, north of the alley, saw a group run south on 18th Street and turn west into the alley, and that the officers followed this group and arrested persons they found in the alley. None of these declarations mentions Singer, or any other named plaintiff.

None of the officers' declarations identifies any arrestee as a person that the officer saw enter the alley from 18th Street. No declaration asserts, and no other evidence shows, that the alley was empty when protestors ran in. Nor would it have been possible for officers on the street, north of the alley, to have seen whether the alley was empty. At some point, officers blocked the Columbia Road alley entrance; but no declaration states that they also blocked the other exit, the narrow outlet. No declaration states that the blocking of the Columbia Road alley entrance occurred before the group ran into the alley from 18th Street, and that after

the Columbia Road entrance was blocked, and before the group ran in from 18th Street, police had searched the alley and found no one there.[10]

Ms. Lanier's declaration, J.A.71, adds nothing to the other officers' declarations. She did not see the group that went into the alley from 18th Street (J.A.478) and did not see the arrests in the alley (J.A.480).

The undisputed testimony of the named plaintiffs is consistent with the videotapes. All of them turned right onto Belmont from 18th Street. (J.A.584, 587-91, 599-601, 624-26, 629-32.) All of them went to Columbia Road, where they entered the alley, either voluntarily or as a result of being ordered or herded by police. (*Id*.)

The District erroneously argues that plaintiffs' undisputed testimony creates material disputed facts "regarding how the protestors came to be in the alley." DC Brief at 27-28 n. 5. The plaintiffs, and the videotapes ignored by the District, do not tell a story that conflicts with what the police officers say they saw and did, and were able to see and do. Rather, plaintiffs' undisputed testimony and the videotapes tell an undisputed *part* of the story that the officers' declarations do not mention.

The videotapes and plaintiffs' undisputed testimony conflict only with the *misstatement* of the evidence in the District's brief. The District's assertions that

[10] As the appended photomap shows, this T-shaped alley cannot be scanned at a glance, and many buildings back onto it.

officers "maintained line of sight contact" with the protestors who entered the alley from 18th Street, and that the persons arrested in the alley all were protestors who entered from 18th Street, are supported by *no* evidence and conflict with the undisputed evidence.

The District's assertion that plaintiffs' testimony creates material disputed facts also is based on a false premise—that plaintiffs "claim that the police had no basis from which to conclude that persons who were in the alley were protestors." DC Brief at 27-28 n. 5. Plaintiffs do not claim this. Rather, plaintiffs claim that the police had no basis from which to conclude that *all* persons in the alley were protestors. The undisputed material fact established by the videotapes and plaintiffs' undisputed testimony is that *some* persons, including some arrestees, entered the alley from Columbia Road, not 18th Street.

This undisputed fact is material because no police officer declaration asserts that the officer was able to see and saw that no one other than demonstrators entered the Columbia Road alley entrance. There is no evidence that every person who entered the alley from that entrance was a person who had been demonstrating in the street, not simply walking by on the Columbia Road sidewalk.

II. The Mass Arrest was Unlawful Because Police Had No Reasonable, Particularized Grounds to Believe that Every Individual Arrested in the Alley Had Been in the Street

With the District's misstatements of the undisputed facts set aside, this case is controlled by *Barham v. Ramsey*, 424 F.3d 565 (D.C. Cir. 2006). Like the mass arrest in *Barham*, the mass arrest here violated the requirement of individualized probable cause. *Id*. at 573 ("probable cause is a reasonable ground for belief of guilt, and . . . belief of guilt must be particularized with respect to the person to be . . . seized") (quotation marks and citation omitted).[11]

In *Barham* this Court rejected arguments for arrest that "refer generically to what 'demonstrators' were seen doing" and fail to assert "that the particular individuals observed committing violations were the same people arrested." 424 F.3d at 574. In *Barham*, police believed that demonstrators had committed crimes in a street, but they arrested all persons in a park, without being able to identify any individual as a demonstrator they had seen in the street and without reasonable grounds to believe that only demonstrators were in the park. *Id*. at 569, 574. The arresting officer "never asserted that the park was empty before 'demonstrators' began entering it." 424 F.3d at 569.

[11] The District's brief, at 33 n.6, erroneously suggests that the meaning of individualized probable cause can be derived from cases concerning searches at Border Patrol checkpoints or drug testing of students or government employees—searches that require no suspicion at all, let alone probable cause.

The circumstances here are the same. Police believed demonstrators had committed crimes in the street, but they arrested all persons they trapped in an alley, without being able to identify any particular individual as a person they had seen in the street and without reasonable grounds to believe that everyone they trapped had been in the street. The police did not maintain "line-of-sight contact" with the group that they saw run into the alley from 18th Street; the police never asserted that the alley was empty before this group ran in; a person could have entered the alley from the back door of a building; police herded or ordered some persons, including arrestees, into the Columbia Road entrance to the alley; and no evidence asserts a reason to believe that these persons included no one who had been simply passing by on the Columbia Road sidewalk.

As far as the police knew, the persons trapped in the alley were an "undifferentiated mass." *Barham*, 424 F.3d at 575. The *Barham* Court held:

> No reasonable officer in Newsham's position could have believed that probable cause existed to order the sudden arrest of every individual in Pershing Park. Even assuming that Newsham had probable cause to believe that *some people* present that morning had committed arrestable offenses, he nonetheless lacked probable cause for detaining *everyone* who happened to be in the park.
>
> * * *
>
> Appellants have attempted to justify the sweep by focusing on the allegedly illegal activities observed *near* the scene of the arrest *before* "demonstrators" converged on Pershing Park. . . . Nowhere have appellants suggested that the particular individuals observed committing violations were the same people arrested; instead, they refer generically to what "demonstrators" were seen doing. This is the upshot of making arrests based on the plaintiffs' occupancy of a randomly selected zone, rather than

> participation in unlawful behavior. While we have no reason to doubt that unlawful activity might have occurred in the course of the protest--with some individuals engaging in disorderly conduct, for example--the simple, dispositive fact here is that appellants have proffered no facts capable of supporting the proposition that Newsham had reasonable, particularized grounds to believe every one of the 386 people arrested was observed committing a crime.
>
> The fluidity of movement in and around the park preceding the arrests . . . discredits any attempt to discern probable cause to arrest every person who happened to be there. . . . There is no indication of how an officer might distinguish between a "demonstrator" and a person walking to work.

434 F.3d at 573, 574 (emphasis in original). The pertinent facts of the arrest here can be stated by making only three changes to this passage from the *Barham* opinion—substituting "the alley" for "Pershing Park," "Lanier" for "Newsham," and "approximately 70" for "386." Under *Barham*, the 2005 Inauguration night mass arrest in the alley was unlawful.

The District erroneously argues that *Barham* is distinguishable because "[p]laintiffs presented no evidence that anyone who had not joined the demonstration was arrested," and "there is not a scintilla of evidence that there was anyone arrested other than protestors." DC Brief at 10 and 32. This argument overlooks that the District bears the burden of proving probable cause. *Dellums v. Powell*, 566 F.2d 167, 175-76 (D.C. Cir. 1977); *Clarke v. District of Columbia*, 311 A.2d 508, 511 (D.C. 1973). Plaintiffs are entitled to summary judgment on this issue if they merely point to deficiencies in the evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) ("[W]ith respect to an issue on which the

nonmoving party bears the burden of proof," a moving party is entitled to summary judgment by "pointing out . . . that there is an absence of evidence to support the nonmoving party's case.").

The District's argument also misconstrues the holding in *Barham*. Contrary to the District's brief at 35 n. 7, *Barham* did not hold that police having probable cause to arrest some unidentifiable demonstrators who enter a park may arrest everyone in the park unless the police *actually know* that there is at least one person there who is not a demonstrator. Rather, *Barham* held that, to arrest everyone in the park for having unlawfully demonstrated in the street, the police had to have reasonable grounds to believe "that the park was empty before 'demonstrators' began entering it," or, perhaps, "that everyone who was not a protestor left the park as demonstrators entered." 434 F.3d at 569. The mass arrest in *Barham* was egregious because there was evidence that the park was not empty when demonstrators entered, but the absence of such evidence would not have made the mass arrest lawful. The defect noted in *Barham* was that the arresting officer "*never asserted* that the park was empty before 'demonstrators' began entering it." 434 F.3d at 569 (emphasis added). The same defect is present here.

The District also erroneously argues that the mass arrest of everyone trapped in the alley was a permissible "mistaken identity" arrest. DC Brief at 33-35.[12] This

[12] The District did not present its "mistaken identity" argument to the district court.

argument is incompatible with the holding in *Barham* and is not supported by the cases that the District cites. These cases say that where reasonable, particularized grounds exist to arrest an individual, mistaken arrest of a different individual to whom the particularized grounds reasonably appear to apply is not unlawful. *See Hill v. California*, 401 U.S. 797, 802 (1971); *United States v. Glover*, 725 F.2d 120, 122 (D.C. Cir. 1984).[13] These cases do not say that mass arrest of everyone in a particular geographic location is permissible, where police cannot identify *any* particular individual to whom the grounds for arrest apply and have *no* information reasonably indicating that only persons to whom the grounds apply are present. These are the circumstances here and in *Barham*.

This invalidity of the mass arrest under *Barham* is dispositive; but it is also true that the mass arrest was unlawful even on the unwarranted assumption that everyone whom the police trapped in the alley had been marching in the street.

III. The First and Fourth Amendments Barred Mass Arrest of All the Street Marchers for Rioting, Where Many Marched Peacefully, Police Officers Could Not See Everyone When Vandalism Occurred, a Small Group then Ran Away, and Many Others Continued to March Peacefully

The undisputed facts establish that mass arrest of all of the street marchers for rioting was impermissible under the First and Fourth Amendments. It is undisputed, and the videotapes (J.A.557, 562) indisputably show, that at the start of

[13] The District also cites *Brinegar v. McCollan*, 443 U.S. 137, 145 (1979); but *Brinegar* is not a mistaken identity case.

the protest march 250-300 persons peacefully walked on Columbia Road toward 18th Street. The District does not claim that everyone was rioting as the march commenced and moved toward 18th Street, and the videotapes indisputably refute any such claim.[14]

Near Columbia Road and 18th Street, while the march turned south on 18th, some unidentified persons threw objects, breaking several windows, and committed lesser acts of vandalism. (J.A.50-51, 69-70, 464-71.) There is no evidence that any officer was able to see the entire crowd when this happened, and Ms. Lanier testified that she could not do so. (J.A.463.) All of the officers who say they saw vandalism by some in the crowd were behind the march. (J.A.47, 49-51, 55, 124.) None of these officers had a view of the front of the march.[15]

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[14] The District does not argue that chanting, drumming, wearing a bandanna, walking in traffic, or carrying a torch is rioting, nor would any such claim be proper. *See* DC Brief at 18; *Barnett v. United States*, 525 A.2d 197, 199 (D.C. 1987) (walking "into the path of a vehicle which is so close that it is impossible for the driver to yield" not an arrestable offense). Nor does the District claim that officers saw "everyone" do one of these acts. The videotapes show they did not. (J.A.557, 562.) Ms. Lanier testified that "dozens" carried torches, but that carrying a torch was not unlawful. (J.A.463, 570-71.) A videotape portion showing the entire march, from the side, as it passes by on Columbia Road, shows fewer than six torches. (J.A.562.) Whether a lawful act was done by dozens, or only a half-dozen, however, is not material.

[15] The "blood on the pavement," DC Brief at 8, was not probable cause to arrest demonstrators, as subsequent investigation confirmed. (J.A.472-78); Keith L. Alexander, *Officer Pleads Guilty to Assault, 05' Inauguration Protestor Hurt*, Wash. Post, December 20, 2008, at B2.

Officers say that, after the window-breaking, a small portion of the 250-300 persons in the street ran away from the scene of the vandalism, south on 18th, and then west into the alley. (J.A.51, 55, 124.) No evidence asserts there was any wrongdoing by any of them *while* they ran, or asserts there was any wrongdoing *in* the alley. Ms. Lanier does not state which portion of the back of the crowd she saw, but it was not this group. (J.A.478.)

Many persons continued walking peacefully south on 18th Street or the sidewalk. (J.A.413-16, 441-42, 587-88, 557, 562.) A videotape portion, shot from in front of the march, shows many people continuously marching peacefully, turning south on 18th from Columbia Road, walking peacefully south on 18th, past the entrance to the alley, all the way to Belmont Road—all while facing forward and committing no acts of vandalism. (J.A.557.) A portion of the other videotape shows many persons peacefully walking on the sidewalk next to the march. (J.A.562.) Another portion of this videotape shows the street march from behind, as it approaches and turns right onto Belmont Road; it also shows this group to be peacefully marching. (*Id*.)

After turning right onto Belmont, or the Belmont Road sidewalk, many people went to Columbia Road or the Columbia Road sidewalk, and entered or were ordered or herded by police into the alley. (J.A.557, 562, 583-84, 630-32, 589-91, 599-601.) The District does not argue, and the videotapes show that no

argument properly could be made, that *everyone* in this group was rioting as they went south of the 18th Street alley entrance, right on Belmont, and right on Columbia Road—some in the street, some on the sidewalk. The police officer declarations say nothing about any of these people.

A. There is No Competent Evidence that "Everyone" in the Street Cheered or Raised an Arm in Support of Window-Breaking

The District says "several protestors" committed vandalism, DC Brief at 23; it does not claim that everyone in the street did so. (J.A.96.) Nor is there competent evidence that everyone in the street encouraged or ratified an act of vandalism.[16]

Declarations by Ms. Lanier and her "scribe"—who rode with her in a car, following the march from behind—assert that "it appeared" that "everyone in the group" or "the mob" "together" "as a group response" "cheered and raised their arms in apparent celebration" when unknown individuals broke windows. (J.A.50-51, 59.) In the court below, however, the District did not dispute our demonstration that it was impossible for Ms. Lanier and her scribe to see or hear that each and every individual cheered or raised an arm, and did so with intent to encourage, rather than condemn, window-breaking. Nor does the District's

[16] The "arrest paperwork," DC Brief at 26, is not competent evidence establishing individualized probable cause; it says only what a "group" did and that the officer saw the "demonstration." (J.A.242.)

appellate brief attempt to rebut this demonstration, though the district court expressly agreed with it. (J.A.25.)

No one following the 250 to 300 marchers in a car could have seen whether, in any instance, everyone raised an arm. If all marchers in the rear of the march simultaneously raised their arms, it would have been impossible for the officers to see whether anyone in the front, let alone everyone, did so as well.[17]

Also, it is not possible for a person hearing a cheer from 250-300 people to know whether every individual cheered and did so approvingly. Assuming the overall tone was an approving cheer, it was not possible for the officers to know whether *each* individual cheered in an approving tone, or an approving majority drowned out a minority that was silent or shouted disapproval, or a louder minority drowned out a silent or less loud disapproving majority.

Under Fed. R. Civ. P. 56(e)(1), declarations "supporting or opposing" summary judgment "must be made on personal knowledge" and show "competen[ce] to testify on the matters stated." Because it was impossible for officers riding in a car behind the march to know that each and every individual in the street cheered or raised an arm to approve window-breaking, the officers'

[17] The evidence confirms the obvious. Ms. Lanier testified: "I couldn't see the whole crowd." (J.A.463.) A portion of one of the videotapes is shot from the rear of the march. (J.A.562.) It also confirms the obvious. A person behind the march could not see the entire march. The videotape shows that only a small percentage of the marchers could be seen by anyone following the march.

declarations are not competent proof of these matters. They must be disregarded. *Jackson v. United States*, 353 F.2d 862, 867 (D.C. Cir. 1965).

B. The Crowd's "Appearance" to Officers Behind the March was No Basis to Arrest Everyone; the Officers Could Not See the Whole Crowd and, in Particular, had No View of the Front of the March

Apart from the incompetent evidence about cheering and raising arms, there is no evidence that "everyone" in the street committed or encouraged vandalism.[18] The District erroneously asserts that it is "undisputed that *the crowd* . . . engaged in numerous unlawful acts of property destruction" and "that *the crowd* appeared to be acting with a singularity of purpose *in carrying out these acts*." DC Brief at 14. There is no evidence that the "crowd"—everyone in the street—engaged in or carried out these acts. Ms. Lanier "couldn't see the whole crowd." (J.A.463.)

No officer claims to have seen the whole crowd. Nor would it have been possible for a single officer to have done so. All of the officers who say they saw some of the crowd, moreover, including Ms. Lanier, were behind the march. These officers had no view at all of a large segment of the crowd—those at the front of the march. The officers not only had no knowledge of the behavior or appearance of the front of the march, they also had no information indicating that

[18] The District argued below that all marchers were subject to arrest for conspiracy to riot because they marched after reading the leaflet announcing the march or hearing an announcement at the concert. The district court held this conspiracy theory to be frivolous. (J.A.27.) The District does not raise it on appeal.

people at the front of the march even saw, or otherwise knew about, any of the acts of vandalism that occurred behind them. Officers located behind the march could not possibly have had such knowledge, and no officer claims to have had it.[19] The portion of a videotape that is shot from the front of the march, as it turns south from Columbia Road onto 18th Street and continues south on 18th Street, shows that many people, all marching peacefully, had no ability to see vandalism that occurred behind them. (J.A.557.)

The District erroneously argues that, because the videotapes do not show the wrongdoing that the officers saw, "they do nothing to counter the officers' assessment of the crowd's appearance" and "[a]ny contention to the contrary depends on a material dispute of fact." DC Brief at 25 n. 3. This argument

[19] The District's brief apparently recognizes this problem and seeks to solve it by citing the testimony of plaintiff Carr, who was near the front of the march. DC Brief at 24 n.2. This is improper. As the District acknowledges, DC Brief at 25 nn.3 and 4, the issue of probable cause turns on what the officers saw at the time, not what they might find out through discovery in a civil suit. What Carr saw near the front of the march, moreover, is not evidence of what everyone else near the front was able to see, including persons in front of her. Plaintiff Singer saw no vandalism of any kind, nor any evidence that any vandalism had occurred. (J.A.443-44.) Carr saw no window-breaking (J.A.334), saw only about three persons commit lesser vandalism (J.A.137), and saw only evidence that spray painting had occurred. (*Id*.) The Kirks, at the back of the march, saw only a single instance of spray painting by persons not in the march and saw newspaper boxes in the street; Allyson saw a single instance of window-breaking that Chelsea did not see (J.A.141-42, 348-49, 380-87.) Scolnik, also near the back of the march, saw newspaper boxes in the street, the same instance of window-breaking, and evidence of spray painting. (J.A.412, 417.) The observations of the plaintiffs, even if they had been known to the police, did not indicate that everyone in the street was rioting.

overlooks the dispositive point. Our "contention," established by the undisputed facts, is that it was *not possible* for the officers to make an "assessment of the crowd's appearance" because it is undisputed that they could not see the whole crowd. They had no view at all of the front of the march.

For this reason, the District erroneously relies on the part of the opinion in *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 122 (D.C. Cir. 1977), that says "[i]f all members of a group are arrested, . . . testimony of policemen who were at the scene [may prove] there was probable cause to believe that the group as a whole was violating the law by violence or obstruction." DC Brief at 33. The police did not arrest all 250-300 demonstrators. They arrested about 70 persons. They lacked "probable cause to believe that [the 250-300 demonstrators] as a whole [were] violating the law" because the police could not see the entire demonstration. They had no view of the front of the march.[20]

The District erroneously asserts that Allyson Kirk's Internet blog "describe[s] the behavior of the crowd as a whole," "confirm[s]" Ms. Lanier's perception, and "corroborates" the officers' observations. DC Brief at 25 and 25 n.

[20] If the District attempted to apply the *Cullinane* passage just to the subgroup that ran away into the alley from 18th Street, the mass arrest would be invalid under *Barham*—because police forced into the alley, and arrested, demonstrators who were not part of this subgroup, including the named plaintiffs. Thus, even if all the persons arrested in the alley were demonstrators, they were, under this scenario, an "undifferentiated mass" of demonstrators. *Barham*, 424 F.3d at 575.

4. Kirk's blog does not say she was able to see the whole crowd, and she expressly testified that she "could not see all the way to the front [of the march]." (J.A.183.)

Kirk testified that it was the concert and beginning of the march that were "very energizing and uplifting, motivating feeling of unity amongst people and protestors who were all there for the same purpose at that time" (J.A.364), not the two instances of misconduct that she saw—a single instance of spray painting by two individuals who were not in the march (J.A.141); and a single instance of window-breaking which caused her to leave the march. (J.A.141-42, 348-49.)

Kirk did not see what Ms. Lanier claims to have seen, and her Internet blog consequently does not "corroborate[]" Ms. Lanier's perception or the other officers' observations. Kirk disagreed with Ms. Lanier's assertion that "a large number of participants in the unlawful parade were destructive and violent." (J.A.70.) Kirk testified that "it was not a large number of the participants that were disruptive and violent." (J.A.357-58.) Kirk's blog is not evidence "that the crowd appeared to be acting with a singularity of purpose in carrying out" acts of property destruction. DC Brief at 14.[21]

[21] The "direct action" that Kirk applauded in her blog was not "violence and property destruction." She testified that by "revolutionary action" she meant "Speaking out . . . in a public setting," (J.A.193), and that by "direct action," she meant "marching and . . . to make the purpose of the march aware to others by sound and by action" (J.A.194). She stated that "the plan was marching peacefully and arriving at the Hilton Hotel to demonstrate against the inaugural ball." (J.A.219.) She did not defend "the criminal misconduct." (J.A.196-97.)

C. The Police had No Evidence that Everyone in the Small Portion of the Crowd that Ran Away or the Larger Portion that Continued to Walk Peacefully Specifically Intended to Further Rioting

The First and Fourth Amendments barred the mass arrest for rioting of the people who, after the window-breaking near Columbia Road and 18th Street, either ran away or continued to walk peacefully south on 18th Street or the sidewalk, to Belmont and then to Columbia Road. *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 888 (1982) (peaceful participants in a civil rights boycott could not be held liable though the boycott had "included elements of criminality").[22]

Even if all the peaceful marchers knew that other marchers had committed unlawful acts, the peaceful marchers could not be held liable for those acts unless they specifically intended to further them. *Id*., 458 U.S. at 919 (*citing United States v. Robel*, 389 U.S. 258 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966)). Guilt by mere continued, knowing political association with the guilty is barred by the First Amendment. *Robel*, 389 U.S. at 266. The police did not have probable

[22] In *Claiborne Hardware* the Court held that the First Amendment barred the lower court's conclusion "that the entire boycott was unlawful." *Id*. at 888 and 915. There was evidence that the boycott had included "violence against the persons and property of boycott breakers." *Id*. at 897. Despite this, persons who participated in the boycott by picketing peacefully could not be held liable for the criminal acts of the violent participants. 458 U.S. at 888.

cause to believe that everyone who ran away or continued to walk peacefully specifically intended to further the vandalism.[23]

The peaceful marchers had no duty to stop marching peacefully, even if they saw others near them commit crimes. *Claiborne Hardware*, 458 U.S. at 925 n. 69 (peaceful boycott participants had no duty to repudiate the violent acts of, or disassociate themselves from, violent boycott participants). When "violence . . . occurs in the context of constitutionally protected activity, . . . precision of regulation is demanded. The presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to . . . liability and on the persons who may be held accountable." *Id*., 458 U.S. at 916-17 (italics, citation, and internal quotation marks omitted). *See also NAACP v. Button*, 371 U.S. 415, 433 (1963)) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

Because the peaceful marchers had no duty to stop marching, police could not infer specific intent to further vandalism merely from their continued peaceful marching. Allowing such an inference would render the specific intent requirement meaningless.

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[23] As noted, the police did not even have probable cause to believe that all marchers, including those in front, had *seen* the window-breaking or other vandalism. Because the officers could not see the front of the march, they had no probable cause to believe that everyone at the front had encouraged or ratified any of the vandalism that the officers saw.

The District erroneously argues that the principle applied in *Claiborne Hardware* is inapplicable here because vandalism occurred in the presence of the peaceful marchers. DC Brief at 36.[24] The *Claiborne Hardware* opinion expressly said that the *Robel* principle applies when "violence . . . occurs in the . . . presence of activity protected by the First Amendment." 458 U.S. at 916-17. Apart from First Amendment law, mere presence at the start of a riot is not grounds for arrest. *See, e.g.*, *Ferguson v. Estelle*, 718 F.2d 730, 734 (5th Cir. 1983). Under *Claiborne Hardware*, mere presence at the start of a riot plus continued peaceful political marching cannot be grounds for arrest.

If the *Robel* and *Claiborne Hardware* principle did not apply to this case, peaceful demonstrators would be under an obligation immediately to cease their constitutionally protected conduct whenever they saw illegal acts by persons in the area whom the police reasonably might perceive to be associated with the demonstration. To avoid arrest, peaceful demonstrators would have to stop marching and, according to the District, go to the sidewalk and stand still.[25] Peaceful demonstrators would be subject to arrest if police had probable cause to

[24] The police, however, lacked probable cause to believe that rioting had occurred in the presence of *everyone* in the street, including those at the front of the march.

[25] The only persons whom the police acknowledged to be innocent were persons who stood on the sidewalk. (J. A.51-52.) Apparently, anyone who moved, whether in the street or on the sidewalk, was deemed to be fair game for trap and arrest.

believe that the demonstrators saw the unlawful acts of others and continued to demonstrate, even if they actually did not see the unlawful acts.

Subjecting peaceful political marchers to arrest if they merely continue to march peacefully after some among them commit acts of vandalism denies "breathing space" to peaceful assembly. *Button*, 371 U.S. at 433. Such vulnerability to arrest does not "regulate . . . with narrow specificity." *Id.*

The District erroneously relies on *United States v. Bridgeman*, 523 F.2d 1099 (D.C. Cir. 1975), *Ferguson v. Estelle*, 718 F.2d 730, 736 (5th Cir. 1983), *State v. Garland*, 756 P.2d 343, 345 (Ariz. App. 1988), and *People v. Garcia*, 187 N.W.2d 711 (Mich. App. 1971). DC Brief at 36-37. Those riot cases did not involve riots that "occur[red] in the . . . presence of activity protected by the First Amendment." *Claiborne Hardware*, 458 U.S. at 916-17. The First Amendment "restraints on the grounds that may give rise to . . . liability and on the persons who may be held accountable," *id.*, were not applicable in those cases.[26] The duty of a "person [to] distance himself from the assembly when *anyone* in the group

[26] *Bridgeman* involved an attempted prison break. A prisoner's mere presence at the scene of the prison riot supported an inference of participation in the riot because the prisoners were under an affirmative obligation to be elsewhere—in their cells. *United States v. Bridgeman*, 523 F.2d 1099, 1111 (D.C. Cir. 1975). The riot in *People v. Kim*, 630 N.W.2d 627 (Mich. App. 2001), also cited by the District on page 36 of its brief, arose in the context of a political demonstration, but mere failure to leave was not the basis for any charges. There was evidence that each defendant rushed toward police and threw projectiles. *Id.* at 632.

manifests an intent to engage in unlawful conduct," *Garland*, 756 P.2d at 345 (emphasis added), cannot be imposed on a peaceful demonstrator in a First Amendment assembly, because doing so would be incompatible with the breathing room that must be accorded First Amendment rights.[27]

D. Because Peaceful Marchers Could Not Be Arrested for the Vandalism of Others, Police Could Not Arrest Everyone in the Street Absent an Order to Disperse

Because peaceful people in a First Amendment assembly have no duty to take affirmative steps to disassociate themselves from criminals in the assembly, people may continue their peaceful conduct—even if the crowd as a whole appears to be unruly—unless police order them to disperse. As this Court said in *Barham*, "[p]olice officers may quell an unruly demonstration by dealing with the crowd as a unit[, but] only after invoking a valid legal mechanism for clearing the area [such as police lines] and then providing an opportunity for affected persons to follow an order to disperse." 434 F.3d at 576 (internal quotation marks omitted) (*citing Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977)).[28]

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[27] Nonetheless, by running or walking away from the scene of window-breaking, many demonstrators did "distance" themselves from the wrongdoing.

[28] The District erroneously argues that this "codifies" disobedience of a dispersal order "as an element of the offense" of rioting. DC Brief at 41. An officer who sees an individual throw a rock through a window does not have to order him to disperse, and allow him an opportunity to leave, before arresting him. An order to disperse is required where, as here, police cannot identify who threw the rocks.

A rule of law allowing arrest of an entire First Amendment assembly without an order to disperse due to riotous acts of some persons in or near the assembly would impermissibly chill the exercise of the First Amendment right to peaceful political assembly. It would say that to demonstrate peacefully is to risk arrest—and all its consequences[29]—unless one is willing and able to be extraordinarily vigilant to detect and respond immediately to circumstances beyond one's control. It would require demonstrators to focus not on expressing their political views but on scanning their surroundings, including the actions of hundreds of others, to ensure that they immediately detect unlawful acts, and immediately thereafter cease their own peaceful demonstrating—in a way that no reasonable officer possibly could perceive to be a failure on their part to meet this obligation. Such an obligation would be incompatible with the First Amendment.[30]

[29] The consequences of arrest include humiliation and handcuffing; detention precluding performance of other obligations (such as retrieving children from a daycare facility); and an arrest record that impairs reputation and employment opportunity, and interferes with or even precludes international travel.

[30] Adopting the District's legal theory would give racists an effective way to impose hardships and arrest records on multitudes of peaceful civil rights marchers—just show up at the civil rights march, pretend to be a marcher, and throw a few rocks. The District's theory would provide the same weapon to governments that might be hostile to demonstrators' political views, or to demonstrations in general. Government *agents provocateur* are not a hypothetical fear. We presented below a documented instance in which Canadian police attempted to insert into a peaceful demonstration officers in plain clothes who carried rocks and wore bandanas over their faces. Doc 59, Pls.' Mem. at 17 n.17.

The District's assertion that it was "hopelessly impractical" for the police to give an order to disperse, DC Brief at 38, is absurd. The police could have given an order to disperse in the alley, after they used police lines to clear the street, and after they surrounded and controlled the group that they trapped—just as this Court said in *Barham*. Whenever police have the ability to arrest a person or a group, they necessarily have the ability, instead, to give the person or group an order to disperse. Instead of applying handcuffs, the police need only say words. It's that simple.

E. Even if Peaceful Street Marchers Had a Duty to Leave the Scene of Vandalism or Even to Stop Demonstrating—though They Had No Such Obligation—the Police Lacked Probable Cause to Believe that Everyone Trapped in the Alley Had Failed to Do So

It is undisputed that the vast majority of the protestors arrived at the scene of the window-breaking by peaceful marching. The District does not claim that everyone was rioting the moment the march began, and the videotapes (J.A.557, 562) show that no such claim could be sustained.

After window-breaking occurred near the intersection of Columbia Road and 18th Street, a small portion of the crowd, according to the police, ran away into the alley; and undisputed evidence shows that many others either left the march and walked south on the 18th Street sidewalk, or continued marching south in the street, away from the scene of vandalism. (J.A.557, 562.) There is no evidence that the group that ran away into the alley committed any act of vandalism, while running.

The District does not claim that everyone who continued walking south, either in the street or on the sidewalk, was rioting as they went south of the alley entrance, turned right on Belmont Road, went to Columbia Road, and turned onto Columbia Road or the Columbia Road sidewalk, where police forced many into the alley. Again, the videotapes (J.A.557, 562) show that no such claim could be sustained. And there is no evidence of any wrongdoing in the alley.

The undisputed evidence shows that the actions of all three groups—those that ran away into the alley; those that left the street and walked on the sidewalk; and those who continued marching in the street, away from the scene of vandalism—were consistent with innocence, and not probative of guilt, under even the riot cases that do not involve First Amendment assemblies, and that impose a duty to leave the scene of rioting in order to be free from vulnerability to arrest. For this reason as well, the police lacked probable cause to arrest everyone that they trapped in the alley.

IV. Absent an Order to Disperse, the First and Fourth Amendments Barred Arrest of the Marchers for Parading without a Written Permit

The First and Fourth Amendments precluded mass arrest of all demonstrators for parading without a written permit—for two distinct reasons.

A. Under the District's Policy the Marchers Did Not Need a Written Permit; They Could Not be Arrested Absent an Order to Disperse

Undisputed evidence shows that it was District of Columbia policy both to accommodate political street marches that had no written permit and under no circumstances to arrest persons simply for parading in the street without a written permit. (J.A.540, 459, 501.) Ms. Lanier acknowledged that this policy applied to the street march here—the time and route of which she knew in advance. (J.A.40, 44-46, 58.) She said that there were no circumstances in which she would arrest persons simply for parading in the street and that she would facilitate, and never prohibit, a march *at the very time, and on very the route,* of this march. (J.A.459, 490.)

Given this evidence, ignored by the District's brief, the District's argument that the street marchers should have known that the police would not allow their march, because of its time and location, DC Brief at 47, is unacceptable. The undisputed evidence establishes that, under the District's policy, the street marchers did not need a written permit in order to parade in the street at the time and place they chose, and that they would be free from vulnerability to arrest unless they violated some law *other than* the law concerning written permits, in which case they could be arrested for violating that *other* law.

The District erroneously argues that every street marcher was subject to arrest for parading without a written permit because "protestors" were "chanting

and banging on drums, . . . carrying torches and using them to set fires, and . . . placing obstacles in the roadway to impede the flow of traffic"; and "the protest culminated in a riot." DC Brief at 47. The District's argument is not clear, but the District does not argue that everyone did one of these acts.[31] Nor would the undisputed evidence allow such an argument. Thus, the District's argument necessarily says that, under the District's policy, the police were allowed to arrest *every* marcher—on a criminal charge of parading without a written permit—if *some* of them chanted, drummed, carried a torch, set a fire, or put an obstacle in the road to impede traffic, or rioted.

Such a policy is unconstitutional. It violates the due process requirement that guilt be personal. *Scales v. United States*, 367 U.S. 203, 224-25 (1961) ("[i]n our jurisprudence guilt is personal"; punishment without personal guilt violates due process).

[31] The District asserts elsewhere that everyone rioted, but the District does not repeat that assertion in arguing that everyone was subject to arrest for parading without a written permit. When the District says that "the protest culminated in a riot," we assume the District is arguing that District policy allowed the police to arrest every street marcher for parading without a permit if there was "*a* riot," *even if* every street marcher was not a rioter. If we are wrong about this, however, and the District in referring to "a riot" actually is arguing that police had probable cause to arrest every street marcher for parading without a written permit because the police had probable cause to arrest every street marcher for rioting, then Argument III above is dispositive. Argument III shows that the police did not have probable cause to arrest every street marcher for rioting.

Such a policy also violates the First Amendment. It is an unreasonable "manner" restriction on political assembly in the street. Peaceful political street marching is protected by the First Amendment and is subject only to *reasonable* time, place, or manner restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clarke v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry Education Assn. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983). A policy that says street marchers do not need to have a written permit to be free from arrest for parading at a particular time and place—but then subjects *everyone* in the march to sudden arrest without warning, for the criminal offense of parading without a written permit, if *some* of the marchers act in a manner that violates another law—is not constitutional. For the reasons discussed earlier, *supra* at 38-39 and 41, such a policy denies breathing space to, and chills, the First Amendment right to assemble peacefully for political purposes.

To be constitutional, the District's policy must be what the evidence plainly says it is and was—namely, that street marchers do not need a written permit in order to parade in the street and they are not vulnerable to arrest unless there is *individualized* probable cause to arrest *them* for violating some law *other than* the law concerning written permits.

Where, as here, demonstrators are marching in a public street at a time and a place that is allowed by official policy, the police may withdraw permission to

continue marching, if circumstances arise that make it reasonable for the police to do so; but they must communicate the withdrawal of permission by issuing an order to disperse, or a similar order, and afford the street marchers reasonable opportunity to comply with the order. *Dellums v. Powell*, 566 F.2d 167, 183 (D.C. Cir. 1977). As this Court said in *Barham*:

> *Dellums* held that a group of demonstrators lawfully gathered on the Capitol steps could not be arrested unless the Chief had reason to believe (1) that the demonstrators could be validly evicted under the Capitol Grounds ordinance, (2) that the police gave demonstrators an order to disperse that "apprised the crowd as a whole that it was under an obligation to leave," and (3) that there had been a "reasonable opportunity" to comply.

Barham, 424 F.3d at 576 (citation omitted). This is dispositive.[32]

This point applies even if all the street marchers actually knew that the march did not have a written permit. Even if they knew this, they still were entitled to rely on the District's policy saying that they did not need to have a written permit.

But if the undisputed evidence of the District's policy is set aside and it is assumed for the sake of argument that District law and policy said only that it was a criminal offense to parade in the street without a written permit, the First and

[32] As noted above, *supra* at 42, it is never impossible to issue an order to disperse and to afford an opportunity to comply, prior to arrest. If a demonstration is spread out or noisy and the police must use police lines to gather and quiet a crowd, they always can give an order to disperse once they have achieved the necessary control. Whenever police have sufficient control of individuals to arrest and handcuff them, they have sufficient control to, instead, tell them to disperse.

Fourth Amendments still precluded mass arrest of all of the street marchers, without an order to disperse.

B. Absent an Order to Disperse, the Police Lacked Probable Cause as to the *Mens Rea* Element of the Offense of Parading Without a Written Permit—an Element Required by the First Amendment

Arrest for demonstrating in the street without a written permit is prohibited by the First Amendment absent evidence establishing probable cause to believe that each person arrested *actually knew* that no written permit had been issued. *United States v. Sheehan*, 512 F.3d 621, 631 (D.C. Cir. 2008); *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611-12 (6th Cir. 2005). Because police neither gave an order to disperse nor otherwise informed the marchers that they were parading without a permit, the police had *no* evidence, and therefore no probable cause to believe, that each and every marcher actually knew that the march lacked a written permit. *See United States v. Sheehan*, 512 F.3d 621, 630, 633 (D.C. Cir. 2008) (where probable cause as to *mens rea* element is based on police warning given at the scene, defendant must be allowed to present evidence that she did not hear the warning).

The District erroneously argues that, as to each and every marcher, police had probable cause on the *mens rea* element of the offense because "the protest march was not publicized in advance." DC Brief 46. The police had no probable cause to believe that each individual in the street knew that all marches with

written permits are publicized in advance—even if all such marches *are* publicized, though the District presented no evidence of this. The police, moreover, had no evidence indicating that everyone in the street knew that the march had not been publicized.

Before deciding to join a political march, individuals have no duty to be knowledgeable about the normal advertising practices associated with marches that have written permits, and to search public sources or to ask questions of others to discover whether the march has been publicized; or to telephone the police or approach an officer at the scene, if any are there, to ask whether a written permit has been granted; or to be knowledgeable about police permit-granting standards and practices and to assess, based on that knowledge and surrounding circumstances, the likelihood whether a permit likely was or was not issued sometime in the days, weeks, or months preceding the march. Imposing such duties, and subjecting persons to arrest if police perceive them to have failed to meet them, would have an impermissible chilling effect on First Amendment rights. As the court explained in *City of Dearborn*:

> There is scarcely a more powerful form of expression than the political march. . . . As it progresses, it may stir the sentiments and sympathies of those it passes, causing fellow citizens to join in the procession as a statement of solidarity.
>
> * * *
>
> [T]he Ordinance placed the onus upon every participant to be aware of whether the march has a permit, and . . . the potential protestor would be well advised to seek personal verification from a city official that the

> demonstration has been authorized, or run the risk of being thrown in jail. Requiring potential march participants to seek authorization from city officials before joining a public procession or risk being jailed is antithetical to our traditions, and constitutes a burden on free expression that is more than the First Amendment can bear.

418 F.3d at 611-12.[33]

The District erroneously argues that, as to each and every marcher, police had probable cause on the *mens rea* element because "the march began with an announcement that the protest would involve 'crashing' an inaugural ball, something that no one could reasonably believe the police would ever sanction." DC Brief at 47. The police had no information indicating that each individual in the street had heard this announcement, understood "crashing" to mean commit a crime at or inside the building hosting the ball, and knew that to get a permit to march to the location of the ball the march organizers necessarily would have told the police that they intended, after the march, to commit a crime at or inside a building and therefore that no permit had been requested or that the police must have denied the request.

Before deciding to join a political march, individuals have no duty to make sure that they attend a pre-march meeting to hear all the pertinent announcements or, if they happen to be at such a meeting, to make sure they hear them. A person

[33] The facts here illustrate the point about a "political march . . . stir[ring] the sentiments and sympathies of those it passes, causing fellow citizens to join in the procession." Plaintiff Singer was in a nightclub when he saw the march pass. He went into the street to learn the message of the march. (J.A.441.)

on the sidewalk trying to decide whether to join a march passing by has no duty to hesitate, fearful that there may have been some pre-march announcement providing information that she does not know, and that there may be some unknown vulnerability to arrest if she dares to step into the street. Exercise of First Amendment rights cannot be transformed by governments or the police into a risk-laden undertaking full of hidden traps for the unwary.

The District erroneously argues that, as to each and every marcher, police had probable cause on the *mens rea* element because "the march began at approximately 11:30 p.m. and the protestors proceeded through a residential neighborhood" while chanting political slogans, banging on drums (like a fife and drum corps), and carrying torches symbolic of freedom. DC Brief at 47. Prospective street marchers, such as out-of-town visitors to the nation's capital, like Singer, have no duty to be knowledgeable about police permit-granting standards, or to know that police never grant permits for late-night political demonstrations in a neighborhood having nightclubs with live, amplified music, such as the nightclub then being patronized by the out-of-town visitor, on an evening that occurs in the nation's capital only once every four years, and at a time when political celebrations are occurring at many locations throughout the city, including a ball at a hotel located within walking distance. Residents of the neighborhood, then on the street, have no duty to know that the nighttime

demonstration that they saw in their neighborhood in the recent past, with amplified sound and fire-breathers, at which no arrests were made (J.A.638-50), actually had no permit, and that everyone in that demonstration was vulnerable to sudden arrest; and that if they now join the similar demonstration then before their eyes they, too, will be in danger of sudden arrest—due to lack of a written permit.

The District erroneously argues that, as to each and every marcher, police had probable cause on the *mens rea* element because some marchers set fires, put newspaper boxes in the street, or rioted. That such events occurred was not evidence that every marcher knew that no written permit had been issued sometime in the days, weeks, or months before the march. Criminal acts can occur at a march that has a permit. Permit-holders have no control over who shows up at a demonstration. The commission of crimes by some persons at a demonstration is not evidence that the march organizers planned the crimes, and that for this reason they requested no permit, or that their permit request must have been denied because they told the police all about the crimes they were planning. Nor is it evidence that each and every person in the street knew any of these things.

To make a lawful mass arrest for demonstrating without a written permit, police must order demonstrators to disperse and afford them reasonable opportunity to comply. Only then can police have probable cause to believe that *all* persons who continue to demonstrate are doing so with actual knowledge either

that there is no permit or that the police have revoked it. Because the police gave no order to disperse, or similar announcement saying that there was no permit or that they had revoked it, the police had no probable cause to arrest all of the street marchers for knowingly demonstrating without a permit.

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

Arthur B. Spitzer
Fritz Mulhauser
American Civil Liberties Union
of the National Capital Area
1400 20th Street, NW, #119
Washington, DC 20036
202/457-0800

Daniel M. Schember
Susan B. Dunham
Gaffney & Schember, PC
1666 Connecticut Avenue, NW, Suite 225
Washington, DC 20009
202/328-2244

On behalf of the D.C. Chapter, National Lawyers Guild and the American Civil Liberties Union of the National Capital Area

Counsel for Appellees

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CERTIFICATE OF COMPLIANCE UNDER FRAP 32(A)(7)(C)

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,965 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

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_____

Daniel M. Schember
Attorney for Appellees

Dated:_____

ADDENDUM

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief for Appellees were mailed, proper first-class postage prepaid, this ___ day of May, 2009, to

Stacy L. Anderson
Office of the Solicitor General
Office of the Attorney General
441 4th Street, N.W. Suite 600S
Washington D.C. 20001

_____
Daniel M. Schember