SUPREME COURT OF THE UNITED STATES

No. 97–1121

CITY OF CHICAGO, PETITIONER *v.*
JESUS MORALES ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

[June 10, 1999]

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The duly elected members of the Chicago City Council enacted the ordinance at issue as part of a larger effort to prevent gangs from establishing dominion over the public streets. By invalidating Chicago's ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery. The ordinance is not vague. "[A]ny fool would know that a particular category of conduct would be within [its] reach." *Kolender* v. *Lawson*, 461 U. S. 352, 370 (1983) (White, J., dissenting). Nor does it violate the Due Process Clause. The asserted "freedom to loiter for innocent purposes," *ante*, at 9, is in no way "'deeply rooted in this Nation's history and tradition,'" *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997) (citation omitted). I dissent.

I

The human costs exacted by criminal street gangs are inestimable. In many of our Nation's cities, gangs have "[v]irtually overtak[en] certain neighborhoods, contributing to the economic and social decline of these areas and causing fear and lifestyle changes among law-abiding residents." U. S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Assistance, Monograph: Urban Street

Gang Enforcement 3 (1997). Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own homes. See U. S. Dept. of Justice, Attorney General's Report to the President, Coordinated Approach to the Challenge of Gang Violence: A Progress Report 1 (Apr. 1996) ("From the small business owner who is literally crippled because he refuses to pay 'protection' money to the neighborhood gang, to the families who are hostages within their homes, living in neighborhoods ruled by predatory drug trafficking gangs, the harmful impact of gang violence . . . is both physically and psychologically debilitating").

The city of Chicago has suffered the devastation wrought by this national tragedy. Last year, in an effort to curb plummeting attendance, the Chicago Public Schools hired dozens of adults to escort children to school. The youngsters had become too terrified of gang violence to leave their homes alone. Martinez, Parents Paid to Walk Line Between Gangs and School, Chicago Tribune, Jan. 21, 1998, p. 1. The children's fears were not unfounded. In 1996, the Chicago Police Department estimated that there were 132 criminal street gangs in the city. Illinois Criminal Justice Information Authority, Research Bulletin: Street Gangs and Crime 4 (Sept. 1996). Between 1987 and 1994, these gangs were involved in 63,141 criminal incidents, including 21,689 nonlethal violent crimes and 894 homicides. *Id.* at 4–5.[1] Many of these

[1] In 1996 alone, gangs were involved in 225 homicides, which was 28 percent of the total homicides committed in the city. Chicago Police Department, Gang and Narcotic Related Violent Crime, City of Chicago: 1993–1997 (June 1998). Nationwide, law enforcement officials estimate that as many as 31,000 street gangs, with 846,000 members, exist. U. S. Dept. of Justice, Office of Justice Programs, Highlights

criminal incidents and homicides result from gang "turf battles," which take place on the public streets and place innocent residents in grave danger. See U. S. Dept. of Justice, Office of Justice Programs National Institute of Justice, Research in brief, C. Block & R. Block, Street Gang Crime in Chicago, 1 (Dec. 1993); U. S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Journal, J. Howell, Youth Gang Drug Trafficking and Homicide: Policy and Program Implications, (Dec. 1997); see also Testimony of Steven R. Wiley, Chief, Violent Crimes and Major Offenders Section, FBI, Hearing on S. 54 before the Senate Committee on the Judiciary, 105th Cong., 1st Sess., 13 (1997) ("While street gangs may specialize in entrepreneurial activities like drug-dealing, their gang-related lethal violence is more likely to grow out of turf conflicts").

Before enacting its ordinance, the Chicago City Council held extensive hearings on the problems of gang loitering. Concerned citizens appeared to testify poignantly as to how gangs disrupt their daily lives. Ordinary citizens like Ms. D'Ivory Gordon explained that she struggled just to walk to work:

> "When I walk out my door, these guys are out there . . . . They watch you. . . . They know where you live. They know what time you leave, what time you come home. I am afraid of them. I have even come to the point now that I carry a meat cleaver to work with me . . . . I don't want to hurt anyone, and I don't want to be hurt. We need to clean these corners up. Clean these communities up and take it back from them." Transcript of Proceedings before the City Council of

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of the 1996 National Youth Gang Survey (OJJDP Fact Sheet, No. 86, Nov. 1998).

> Chicago, Committee on Police and Fire 66–67 (May 15, 1997) (hereinafter Transcript).

Eighty-eight-year-old Susan Mary Jackson echoed her sentiments, testifying, "We used to have a nice neighborhood. We don't have it anymore . . . . I am scared to go out in the daytime. . . . you can't pass because they are standing. I am afraid to go to the store. I don't go to the store because I am afraid. At my age if they look at me real hard, I be ready to holler." *Id.*, at 93–95. Another longtime resident testified:

> "I have never had the terror that I feel everyday when I walk down the streets of Chicago. . . . . I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it's come to the point where I say, well, do I go out today. Do I put my ax in my briefcase. Do I walk around dressed like a bum so I am not looking rich or got any money or anything like that." *Id.*, at 124–125.

Following these hearings, the council found that "criminal street gangs establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas." App. to Pet. for Cert. 60a–61a. It further found that the mere presence of gang members "intimidate[s] many law abiding citizens" and "creates a justifiable fear for the safety of persons and property in the area." *Ibid.* It is the product of this democratic process– the council's attempt to address these social ills– that we are asked to pass judgment upon today.

II

As part of its ongoing effort to curb the deleterious effects of criminal street gangs, the citizens of Chicago sensibly decided to return to basics. The ordinance does nothing more than confirm the well-established principle

that the police have the duty and the power to maintain the public peace, and, when necessary, to disperse groups of individuals who threaten it. The plurality, however, concludes that the city's commonsense effort to combat gang loitering fails constitutional scrutiny for two separate reasons– because it infringes upon gang members' constitutional right to "loiter for innocent purposes," *ante*, at 9, and because it is vague on its face, a*nte*, at 11. A majority of the Court endorses the latter conclusion. I respectfully disagree.

A

We recently reconfirmed that "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause." *Glucksberg*, 521 U. S., at 721 (quoting *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion)). Only laws that infringe "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'" offend the Due Process Clause. *Glucksberg*, *supra*, at 720–721.

The plurality asserts that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Ante*, at 9. Yet it acknowledges– as it must– that "antiloitering ordinances have long existed in this country." *Ante*, at 9, n. 20; see also 177 Ill. 2d 440, 450, 687 N. E. 2d 53, 60 (1997) (case below). ("Loitering and vagrancy statutes have been utilized throughout American history in an attempt to prevent crime by removing 'undesirable persons' from public before they have the opportunity to engage in criminal activity"). In derogation of the framework we articulated only two Terms ago in *Glucksberg*, the plurality asserts that this history fails to "persuad[e] us that the right to engage in loitering that is entirely harm-

less . . . is not a part of the liberty protected by the due process clause." *Ante,* at 10, n. 20. Apparently, the plurality believes it sufficient to rest on the proposition that antiloitering laws represent an anachronistic throwback to an earlier, less sophisticated, era. For example, it expresses concern that some antivagrancy laws carried the penalty of slavery. *Ibid.* But this fact is irrelevant to our analysis of whether there is a constitutional right to loiter for innocent purposes. This case does not involve an antiloitering law carrying the penalty of slavery. The law at issue in this case criminalizes the failure to disobey a police officer's order to disperse and imposes modest penalties, such as a fine of up to $500 and a prison sentence of up to six months.

The plurality's sweeping conclusion that this ordinance infringes upon a liberty interest protected by the Fourteenth Amendment's Due Process Clause withers when exposed to the relevant history: Laws prohibiting loitering and vagrancy have been a fixture of Anglo-American law at least since the time of the Norman Conquest. See generally C. Ribton-Turner, A History of Vagrants and Vagrancy and Beggars and Begging (reprint 1972) (discussing history of English vagrancy laws); see also *Papachristou* v. *Jacksonville,* 405 U. S. 156, 161–162 (1972) (recounting history of vagrancy laws). The American colonists enacted laws modeled upon the English vagrancy laws, and at the time of the founding, state and local governments customarily criminalized loitering and other forms of vagrancy.[2] Vagrancy laws were common in the

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[2] See, *e.g.,* Act for the Restraint of idle and disorderly Persons (1784) (reprinted in 2 The First Laws of the State of North Carolina 508–509 (J. Cushing comp. 1984)); Act for restraining, correcting, supressing and punishing Rogues, Vagabonds, common Beggars, and other lewd, idle, dissolute, profane and disorderly Persons; and for setting them to work (reprinted in The First Laws of the State of Connecticut 206–210

decades preceding the ratification of the Fourteenth Amendment,[3] and remained on the books long after.[4]

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(J. Cushing comp. 1982)); Act for suppressing and punishing of Rogues, Vagabonds, common Beggars and other idle, disorderly and lewd persons (1788) (reprinted in The First Laws of the Commonwealth of Massachusetts 347–349 (J. Cushing comp. 1981)); Act for better securing the payment of levies and restraint of vagrants, and for making provisions for the poor (1776) (reprinted in The First Laws of the State of Virginia 44–45 (J. Cushing comp. 1982)); Act for the better ordering of the Police of the Town of Providence, of the Work-House in said Town (1796) (reprinted in 2 The First Laws of the State of Rhode Island 362–367 (J. Cushing comp. 1983)); Act for the Promotion of Industry, and for the Suppression of Vagrants and Other Idle and Disorderly Persons (1787) (reprinted in The First Laws of the State of South Carolina, Part 2, 431–433 (J. Cushing comp. 1981)); An act for the punishment of vagabond and other idle and disorderly persons (1764) (reprinted in The First Laws of the State of Georgia 431–433 (J. Cushing comp. 1981)); Laws of the Colony of New York 4, ch. 1021 (1756); 1 Laws of the Commonwealth of Pennsylvania, ch. DLV (1767) (An Act to prevent the mischiefs arising from the increase of vagabonds, and other idle and disorderly persons, within this province); Laws of the State of Vermont, §10 (1797).

[3] See, *e.g.*, Kan. Stat. ch. 161, §1 (1855); Ky. Rev. Stat., ch. CIV, §1 (1852); Pa. Laws, ch. 664 §V (1853); N. Y. Rev. Stat., ch. XX, §1 (1859); Ill. Stat., ch. 30, §CXXXVIII (1857). During the 19th century, this Court acknowledged the States' power to criminalize vagrancy on several occasions. See *Mayor of New York* v. *Miln*, 11 Pet. 102, 148 (1837); *Passenger Cases*, 7 How. 283, 425 (1849) (opinion of Wayne, J.); *Prigg* v. *Pennsylvania*, 16 Pet. 539, 625 (1842).

[4] See generally C. Tiedeman, Limitations of Police Power in the United States 116–117 (1886) ("The vagrant has been very appropriately described as the chrysalis of every species of criminal. A wanderer through the land, without home ties, idle, and without apparent means of support, what but criminality is to be expected from such a person? If vagrancy could be successfully combated . . . the infractions of the law would be reduced to a surprisingly small number; and it is not to be wondered at that an effort is so generally made to suppress vagrancy"). See also R. I. Gen. Stat., ch. 232, §24 (1872); Ill. Rev. Stat., ch. 38, §270 (1874); Conn. Gen. Stat., ch. 3, §7 (1875); N. H. Gen. Laws, ch. 269, §17 (1878); Cal. Penal Code §647 (1885); Ohio Rev. Stat., Tit. 1, ch. 8, §§6994, 6995 (1886); Colo. Rev. Stat. ch. 36, §1362 (1891); Del.

Tellingly, the plurality cites only three cases in support of the asserted right to "loiter for innocent purposes." See *ante,* at 9–10. Of those, only one– decided more than 100 years after the ratification of the Fourteenth Amendment– actually addressed the validity of a vagrancy ordinance. That case, *Papachristou, supra,* contains some dicta that can be read to support the fundamental right that the plurality asserts.[5] However, the Court in *Papachristou* did not undertake the now-accepted analysis applied in substantive due process cases– it did not look to tradition to define the rights protected by the Due Process

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Rev. Stat., ch. 92, Vol. 12, p. 962 (1861); Ky. Stat., ch. 132, §4758 (1894); Ill. Rev. Stat., ch. 38, §270 (1895); Ala. Code, ch. 199 §5628 (1897); Ariz. Rev. Stat., Tit. 17, §599 (1901); N. Y. Crim. Code §887 (1902); Pa. Stat. §§21409, 21410 (1920); Ky. Stat. §4758–1 (1922); Ala. Code, ch. 244, §5571 (1923); Kan. Rev. Stat. §21–2402 (1923); Ill. Stat. Ann., 606 (1924); Ariz. Rev. Stat., ch. 111, §4868 (1928); Cal. Penal Code, Pt. 1, Tit. 15, ch. 2, §647 (1929); Pa. Stat. Ann., Tit. 18, §2032 (Purdon 1945); Kan. Gen. Stat. Ann. §21–2409 (1949); N. Y. Crim. Code §887 (1952); Colo. Rev. Stat. Ann. §40–8–20 (1954); Cal. Penal Code §647 (1953); 1 Ill. Rev. Stat., ch. 38, §578 (1953); Ky. Rev. Stat. §436.520 1953); 5 Ala. Code, Tit. 14, §437 (1959); Pa. Stat. Ann., Tit. 18, §2032 (Purdon 1963); Kan. Stat. Ann. §21–2409 (1964).

[5] The other cases upon which the plurality relies concern the entirely distinct right to interstate and international travel. See *Williams* v. *Fears,* 179 U. S. 270, 274–275 (1900); *Kent* v. *Dulles,* 357 U. S. 116 (1958). The plurality claims that dicta in those cases articulating a right of free movement, see *Williams, supra,* at 274; *Kent, supra,* at 125, also supports an individual's right to "remain in a public place of his choice." Ironically, *Williams* rejected the argument that a tax on persons engaged in the business of importing out-of-state labor impeded the freedom of transit, so the precise holding in that case does not support, but undermines, the plurality's view. Similarly, the precise holding in *Kent* did not bear on a constitutional right to travel; instead, the Court held only that Congress had not authorized the Secretary of State to deny certain passports. Furthermore, the plurality's approach distorts the principle articulated in those cases, stretching it to a level of generality that permits the Court to disregard the relevant historical evidence that should guide the analysis. *Michael H.* v. *Gerald D.,* 491 U. S. 110, 127, n. 6 (1989) (plurality opinion).

Clause. In any event, a careful reading of the opinion reveals that the Court never said anything about a constitutional right. The Court's holding was that the antiquarian language employed in the vagrancy ordinance at issue was unconstitutionally vague. See *Papachristou*, *supra*, at 162–163. Even assuming, then, that *Papachristou* was correctly decided as an original matter– a doubtful proposition– it does not compel the conclusion that the Constitution protects the right to loiter for innocent purposes. The plurality's contrary assertion calls to mind the warning that "[t]he Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. . . . [We] should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare." *Moore*, 431 U. S., at 544 (White, J., dissenting). When "the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Ibid.*

B

The Court concludes that the ordinance is also unconstitutionally vague because it fails to provide adequate standards to guide police discretion and because, in the plurality's view, it does not give residents adequate notice of how to conform their conduct to the confines of the law. I disagree on both counts.

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At the outset, it is important to note that the ordinance does not criminalize loitering *per se*. Rather, it penalizes loiterers' failure to obey a police officer's order to move along. A majority of the Court believes that this scheme

vests too much discretion in police officers. Nothing could be further from the truth. Far from according officers too much discretion, the ordinance merely enables police officers to fulfill one of their traditional functions. Police officers are not, and have never been, simply enforcers of the criminal law. They wear other hats– importantly, they have long been vested with the responsibility for preserving the public peace. See, *e.g.*, O. Allen, Duties and Liabilities of Sheriffs 59 (1845) ("As the principal conservator of the peace in his county, and as the calm but irresistible minister of the law, the duty of the Sheriff is no less important than his authority is great"); E. Freund, Police Power §86, p. 87 (1904) ("The criminal law deals with offenses after they have been committed, the police power aims to prevent them. The activity of the police for the prevention of crime is partly such as needs no special legal authority"). Nor is the idea that the police are also *peace officers* simply a quaint anachronism. In most American jurisdictions, police officers continue to be obligated, by law, to maintain the public peace.[6]

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[6] See, *e.g.*, Ark. Code Ann. §12–8–106(b) (Supp. 1997) ("The Department of Arkansas State Police shall be conservators of the peace"); Del. Code Ann. Tit. IX, §1902 (1989) ("All police appointed under this section shall see that the peace and good order of the State . . . be duly kept"); Ill. Comp. Stat. Ann. ch. 65, §5 11–1–2(a) (Supp. 1998) ("Police officers in municipalities shall be conservators of the peace"); La. Rev. Stat. Ann. §40:1379 ("(West) Police employees . . . shall . . . keep the peace and good order"); Mo. Rev. Stat. §85.561 (1998) ("[M]embers of the police department shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city"); N. H. Rev. Stat. Ann. §105:3 (1990) ("All police officers are, by virtue of their appointment, constables and conservators of the peace"); Ore. Rev. Stat. §181.110 (1997) ("Police to preserve the peace, to enforce the law and to prevent and detect crime"); 351 Pa. Code Art. V, ch. 2, §5.5–200 ("The Police Department . . .shall preserve the public peace, prevent and detect crime, police the streets and highways and enforce traffic statutes, ordinances and regulations relating thereto"); Texas

In their role as peace officers, the police long have had the authority and the duty to order groups of individuals who threaten the public peace to disperse. For example, the 1887 Police Manual for the City of New York provided:

> "It is hereby made the duty of the Police Force at all times of day and night, and the members of such Force are hereby thereunto empowered, to especially preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, *disperse unlawful or dangerous assemblages, and assemblages which obstruct the free passage of public streets, sidewalks, parks and places.*" Manual Containing the Rules and Regulations of the Police Department of the City of New York, Rule 414 (emphasis added).

See also J. Crocker, Duties of Sheriffs, Coroners and Constables §48, p. 33 (2d ed. rev. 1871) ("Sheriffs are, *ex officio*, conservators of the peace within their respective counties, and it is their duty, as well as that of all constables, coroners, marshals and other peace officers, to prevent every breach of the peace, and to *suppress every unlawful assembly*, affray or riot which may happen in their presence") (emphasis added). The authority to issue dispersal orders continues to play a commonplace and crucial role in police operations, particularly in urban areas.[7] Even the

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Code Crim. Proc. Ann., Art. §2.13 (Vernon 1977) ("It is the duty of every peace officer to preserve the peace within his jurisdiction"); Vt. Stat. Ann., Tit. 24, §299 (1992) ("A sheriff shall preserve the peace, and suppress, with force and strong hand, if necessary, unlawful disorder"); Va. Code Ann. §15.2–1704(A) (Supp. 1998) ("The police force . . . is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances").

[7] For example, the following statutes provide a criminal penalty for

ABA Standards for Criminal Justice recognize that "[i]n day-to-day police experience there are innumerable situations in which police are called upon to order people not to block the sidewalk, not to congregate in a given place, and not to 'loiter' . . . . The police may suspect the loiterer of considering engaging in some form of undesirable conduct that can be at least temporarily frustrated by ordering him or her to 'move on.'" Standard 1–3.4(d), p. 1.88, and comments (2d ed. 1980, Supp. 1986).[8]

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the failure to obey a dispersal order: Ala. Code §13A–11–6 (1994); Ariz. Rev. Stat. Ann. §13–2902(A)(2) (1989); Ark. Code Ann. §5–71–207(a)(6) (1993); Cal. Penal Code Ann. §727 (West 1985); Colo. Rev. Stat. Ann. §18–9–107(b) (1997); Del. Code Ann., Tit. 11, §1321 (1995); Ga. Code Ann. §16–11–36 (1996); Guam Code Ann., Tit. 9, §61.10(b) (1996); Haw. Rev. Stat. Ann. §711–1102 (Michie 1994); Idaho Code §18–6410 (1997); Ill. Comp. Stat. Ann., ch. 720 §5/25–1(e) (West 1993); Ky. Rev. Stat. Ann. §§525.060, 525.160 (Baldwin 1990); Me. Rev. Stat. Ann., Tit. 17A, §502 (1983 Mass. Ann., Laws, ch. 269, §2 (1992); Mich. Comp. Laws §750.523 (1991); Minn. Stat. Ann. §609.715 (West 1987); Miss. Code Ann. §97–35–7(1) (1994); Mo. Ann. Stat. §574.060 (Vernon 1995); Mont. Code Ann. §45–8–102 (1997); Nev. Rev. Stat. Ann. §203.020 (Michie 1997); N. H. Rev. Stat. Ann. §§644:1, 644:2(II)(e) (1996); N. J. Stat. Ann. §2C: 33–1(b) (West 1995); N. Y. Penal Law §240.20(6) (McKinney 1989); N. C. Gen. Stat. §14–288.5(a) (1999); N. D. Cent. Code §12.1–25–04 (1997); Ohio Rev. Code Ann. §2917.13(A)(2) (Baldwin 1997); Okla. Stat. Ann. Tit. 21, §1316 (West 1983); Ore. Rev. Stat. §166.025(1)(e) (1997); 18 Pa. Cons. Stat. Ann. §5502 (1983); R. I. Gen. Laws §11–38–2 (1994); S. C. Code Ann. §16–7–10(a) (1985); S. D. Codified Laws §22–10–11 (1998); Tenn. Code Ann. §39–17–305(2) (1997); Tex. Penal Code Ann. §42.03(a)(2) (Vernon 1994); Utah Code Ann. §76–9–104 (1995) V. I. Code Ann. Tit. 5, §4022 (1997); Vt. Stat. Ann., Tit. 13, §901 (1998); Va. Code Ann. §18.2–407 (Michie 1996); Wash. Rev. Code Ann. §9A.84.020 (West 1988); W. Va. Code §61–6–1 (1997); Wis. Stat. Ann. §947.06(3) (West 1982).

[8] See also Ind. Code Ann. §36–8–3–10(a) (1997) ("The police department shall, within the city: (1) preserve peace; (2) prevent offenses; (3) detect and arrest criminals; (4) suppress riots, mobs, and insurrections; (5) disperse unlawful and dangerous assemblages and assemblages that obstruct the free passage of public streets, sidewalks, parks, and

In order to perform their peace-keeping responsibilities satisfactorily, the police inevitably must exercise discretion. Indeed, by empowering them to act as peace officers, the law assumes that the police will exercise that discretion responsibly and with sound judgment. That is not to say that the law should not provide objective guidelines for the police, but simply that it cannot rigidly constrain their every action. By directing a police officer not to issue a dispersal order unless he "observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place," App. to Pet. for Cert. 61a. Chicago's ordinance strikes an appropriate balance between those two extremes. Just as we trust officers to rely on their experience and expertise in order to make spur-of-the-moment determinations about amorphous legal standards such as "probable cause" and "reasonable suspicion," so we must trust them to determine whether a group of loiterers contains individuals (in this case members of criminal street gangs) whom the city has determined threaten the public peace. See *Ornelas* v. *United States*, 517 U. S. 690, 695, 700 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . . [O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists") (citations and internal quotation marks omitted). In sum, the Court's conclusion that the ordinance is impermissibly vague because it "'necessarily entrusts

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places . . ."); Okla. Stat. Ann., Tit. 19, §516 (1988) ("It shall be the duty of the sheriff . . . to keep and preserve the peace of the their respective counties, and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections . . . ").

lawmaking to the moment-to-moment judgment of the policeman on his beat,'" *ante*, at 15, cannot be reconciled with common sense, longstanding police practice, or this Court's Fourth Amendment jurisprudence.

The illogic of the Court's position becomes apparent when JUSTICE STEVENS opines that the ordinance's dispersal provision "would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members." *Ante*, at 18-19. See also *ante*, at 4 (O'CONNOR, J., concurring in part and concurring in judgment) (endorsing Court's proposal). With respect, if the Court believes that the ordinance is vague as written, this suggestion would not cure the vagueness problem. First, although the Court has suggested that a scienter requirement may mitigate a vagueness problem "with respect to the adequacy of notice to the complainant that his conduct is proscribed," *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 499 (1982) (footnote omitted), the alternative proposal does not incorporate a scienter requirement. If the statute's prohibition were limited to loitering with "an apparently harmful purpose," the criminality of the conduct would continue to depend on its external appearance, rather than the loiterer's state of mind. See Black's Law Dictionary 1345 (6th ed. 1990) (scienter "is frequently used to signify the defendant's guilty knowledge"). For this reason, the proposed alternative would neither satisfy the standard suggested in *Hoffman Estates* nor serve to channel police discretion. Indeed, an ordinance that required officers to ascertain whether a group of loiterers have "an apparently harmful purpose" would require them to exercise *more* discretion, not less. Furthermore, the ordinance in its current form– requiring the dispersal of groups that contain at least one gang member– actually vests less discretion in the police than

would a law requiring that the police disperse groups that contain *only* gang members. Currently, an officer must reasonably suspect that one individual is a member of a gang. Under the plurality's proposed law, an officer would be required to make such a determination multiple times.

In concluding that the ordinance adequately channels police discretion, I do not suggest that a police officer enforcing the Gang Congregation Ordinance will never make a mistake. Nor do I overlook the *possibility* that a police officer, acting in bad faith, might enforce the ordinance in an arbitrary or discriminatory way. But our decisions should not turn on the proposition that such an event will be anything but rare. Instances of arbitrary or discriminatory enforcement of the ordinance, like any other law, are best addressed when (and if) they arise, rather than prophylactically through the disfavored mechanism of a facial challenge on vagueness grounds. See *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

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The plurality's conclusion that the ordinance "fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted," *ante*, at 16, is similarly untenable. There is nothing "vague" about an order to disperse.[9]

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[9]The plurality suggests, *ante*, at 15, that dispersal orders are, by their nature, vague. The plurality purports to distinguish its sweeping condemnation of dispersal orders from *Colten* v. *Kentucky*, 407 U. S. 104 (1972), but I see no principled ground for doing so. The logical implication of the plurality's assertion is that the police can never issue dispersal orders. For example, in the plurality's view, it is apparently unconstitutional for a police officer to ask a group of gawkers to move along in order to secure a crime scene.

While "we can never expect mathematical certainty from our language," *Grayned* v. *City of Rockford*, 408 U. S. 104, 110 (1972), it is safe to assume that the vast majority of people who are ordered by the police to "disperse and remove themselves from the area" will have little difficulty understanding how to comply. App. to Pet. for Cert. 61a.

Assuming that we are also obligated to consider whether the ordinance places individuals on notice of what conduct might subject them to such an order, respondents in this facial challenge bear the weighty burden of establishing that the statute is vague in all its applications, "in the sense that no standard of conduct is specified at all." *Coates* v. *Cincinnati*, 402 U. S. 611, 614 (1971). I subscribe to the view of retired Justice White– "If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face." *Kolender*, 461 U. S., at 370–371 (dissenting opinion). This is certainly such a case. As the Illinois Supreme Court recognized, "persons of ordinary intelligence may maintain a common and accepted meaning of the word 'loiter.'" *Morales*, 177 Ill. 2d, at 451, 687 N. E.2d, at 61.

JUSTICE STEVENS' contrary conclusion is predicated primarily on the erroneous assumption that the ordinance proscribes large amounts of constitutionally protected and/or innocent conduct. See *ante*, at 11, 13, 16–17. As already explained, *supra*, at 5-9, the ordinance does not proscribe constitutionally protected conduct– there is no fundamental right to loiter. It is also anomalous to characterize loitering as "innocent" conduct when it has been disfavored throughout American history. When a category of conduct has been consistently criminalized, it can hardly be considered "innocent." Similarly, when a term has long been used to describe criminal conduct, the need to subject it to the "more stringent vagueness test" sug-

gested in *Hoffman Estates*, *supra*, at 499, dissipates, for there is no risk of a trap for the unwary. The term "loiter" is no different from terms such as "fraud," "bribery," and "perjury." We expect people of ordinary intelligence to grasp the meaning of such legal terms despite the fact that they are arguably imprecise.[10]

The plurality also concludes that the definition of the term loiter– "to remain in any one place with no apparent purpose," see 177 Ill. 2d, at 445, 687 N. E. 2d, at 58– fails to provide adequate notice.[11] "It is difficult to imagine," the plurality posits, "how any citizen of the city of Chicago standing in a public place . . . would know if he or she had an 'apparent purpose.'" *Ante*, at 12-13. The plurality underestimates the intellectual capacity of the citizens of

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[10] For example, a 1764 Georgia law declared that "all able bodied persons . . . who shall be found loitering . . . all other idle vagrants, or disorderly persons wandering abroad without betaking themselves to some lawful employer or honest labor, shall be deemed and adjudged vagabonds," and required the apprehension of "any such vagabond . . . found within any county in this State, wandering, strolling, loitering about." (reprinted in The First Laws of the State of Georgia, Part 1, 376–377 (J. Cushing comp. 1981)). See also, *e.g.*, Digest of the Laws of Pennsylvania 829 (F. Brightly ed., 8th ed. 1853) ("The following described persons shall be liable to the penalties imposed by law upon vagrants . . . . All persons who shall . . . be found loitering"); Ky. Rev. Stat., ch. CIV, §1, p. 69 (1852) ("If any able bodied person be found loitering or rambling about, . . . he shall be taken and adjudged to be a vagrant, and guilty of a high misdemeanor").

[11] The Court asserts that we cannot second-guess the Illinois Supreme Court's conclusion that the definition "'provides absolute discretion to police officers to determine what activities constitute loitering,'" *ante*, at 17 (quoting 117 Ill. 2d 440, 457, 687 N. E. 2d 53, 63 (1997). While we are bound by a state court's construction of a statute, the Illinois court "did not, strictly speaking, construe the [ordinance] in the sense of defining the meaning of a particular statutory word or phase. Rather, it merely characterized [its] 'practical effect'. . . . This assessment does not bind us." *Wisconsin* v. *Mitchell*, 508 U. S. 476, 484 (1993).

Chicago. Persons of ordinary intelligence are perfectly capable of evaluating how outsiders perceive their conduct, and here "[i]t is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [loitering] and that would be covered by the statute." See *Smith* v. *Goguen*, 415 U. S. 566, 584 (1974) (White, J., concurring in judgment). Members of a group standing on the corner staring blankly into space, for example, are likely well aware that passersby would conclude that they have "no apparent purpose." In any event, because this is a facial challenge, the plurality's ability to hypothesize that some individuals, in some circumstances, may be unable to ascertain how their actions appear to outsiders is irrelevant to our analysis. Here, we are asked to determine whether the ordinance is "vague in all of its applications." *Hoffman Estates*, 455 U. S., at 497. The answer is unquestionably no.

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Today, the Court focuses extensively on the "rights" of gang members and their companions. It can safely do so—the people who will have to live with the consequences of today's opinion do not live in our neighborhoods. Rather, the people who will suffer from our lofty pronouncements are people like Ms. Susan Mary Jackson; people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens. As one resident described, "There is only about maybe one or two percent of the people in the city causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop." Tr. 126. By focusing exclusively on the imagined "rights" of the two percent, the

Court today has denied our most vulnerable citizens the very thing that JUSTICE STEVENS, *ante,* at 10, elevates above all else– the "freedom of movement." And that is a shame. I respectfully dissent.