MASSIE et al v. GOVERNMENT OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA Doc. 156

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALLIANCE FOR GLOBAL JUSTICE, et al.,	)	
Plaintiffs,	)	Case No.: 01-CV-00811 (PLF)(JMF)
DISTRICT OF COLUMBIA, et al.,	)	
Defendants.	)	

MOTION FOR SUMMARY JUDGMENT
FILED BY THE PLAINTIFF CLASS AND BY ELIZABETH BUTLER
AGAINST THE DISTRICT OF COLUMBIA MUNICIPALITY

I. Background

At the start of a weekend of anticipated mass protests against U.S. Government policies supporting the International Monetary Fund (IMF) and World Bank (WB) in April, 2000, the District of Columbia Metropolitan Police Department (MPD) sought to disrupt protest activity, take protestors off of the streets, and frighten others away from participating in or interacting with those demonstrations by sending a message that people risked arrest by merely being around the protests, even if they did not break the law.

On the afternoon of April 15, 2000, an undisputedly peaceful march protesting police misconduct and the Prison Industrial Complex interacted and intermixed with the public. The police escorted march proceeded, at times spread out along as many as five city blocks, and brought into its midst persons, tourists and passers-by. The marchers sought to engage the public with spontaneous political action. They passed out leaflets, sang and cheered, and invited people to learn about the subject of the protest, ask questions, and to join in.

At an arbitrarily select moment, the police sprung a trap to preemptively arrest those who had participated in the march. As the lead portion of the march, the portion containing organizers, moved into a the block of 20th Street between I and K Streets, the police split up the march and established police

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lines that trapped and seized everyone who was at that time present within that block. The march was spread out and intermixed with the public over a large number of city blocks. This trap and arrest tactic succeeded in accomplishing the arrest of 673 persons for "parading without a permit," a non-arrestable civil infraction.

The MPD arrested everyone found or trapped within that particular block: peaceful sidewalk marchers, bystanders, interested persons who had been attracted by the demonstration and had approached to learn more, journalists, National Lawyers Guild Legal Observers who wore highly visible green fluorescent caps declaring their status, and others. Anyone within this block who was associated with the peaceful and police escorted march, including those associated by mere physical proximity, were intentionally surrounded and arrested.

Those arrested were held by police for as long as 30+ hours, strapped in a stress and duress position with one wrist bound to the opposite ankle using flexcuffs.

II. Summary Judgment Standards

Pursuant to Federal Rule of Civil Procedure 56, summary judgment should be granted where the movant has shown that there are no genuine issues of material fact and that the moving party is entitled to summary judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Waterhouse v. District of Columbia, 298 F.3d 989, 991 (D.C. Cir. 2002).

The Court must view draw all reasonable inferences from the evidence in favor of the non-movant. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, when the moving party has carried its burden, the non-movant must raise more than "some metaphysical doubt as to the material facts." Only a *genuine* issue of disputed fact will then suffice to defeat the motion. Id. at 586.

As presented below, judgment should be awarded as a matter of law in favor of the plaintiff class against the District of Columbia municipality on common law claims pursuant to *respondeat superior* and constitutional claims pursuant to 42 U.S.C. §1983. Judgment should be awarded as a matter of law in

favor of plaintiff Elizabeth Butler against the District of Columbia municipality on common law claims pursuant to *respondeat superior*.[1]

III. The Burden of Proof to Establish the Legality of the Arrest Falls Upon the Defendant

"[A]n allegation of arrest and imprisonment without warrant shifts to the defendant the burden of justifying the arrest. . ." Dellums v. Powell, 566 F.2d 167, 175-176 (D.C. Cir. 1977) (providing detailed analysis of burdens of proof and persuasion in false arrest claims in order "to aid later analysis" by the Courts).

"In the instant case it is undisputed that members of the plaintiff class were arrested without a warrant. Thus the unlawfulness of the plaintiffs' subsequent and admitted imprisonment is presumed as a matter of law. . ." Id. at 176.

In the instant case, that the plaintiff class was arrested without warrant is not disputed. As in Dellums, the burden of establishing the legality of the arrest falls upon the defendant. Even if it did not fall upon the defendant, and rested solely upon the shoulders of plaintiffs, it is clear for reasons set forth herein that the arrest of the plaintiff group and Ms. Butler were unlawful and unconstitutional as a matter of law.

IV. The Class Arrests for Parading Without a Permit Are Unlawful and Unconstitutional as a Matter of Law

All members of the plaintiff class were arrested for "parading without a permit." Plaintiffs Statement of Material Facts Not in Genuine Dispute (PSMF) at ¶1.

[1] The only claims and theories advanced in this motion are those which can issue as a matter of law. Claims of other plaintiffs, and additional theories of liability for any or all plaintiffs, while meritorious, are not presented here where they are viewed as turning on disputed issues of fact.

[2] "Processions and parades, except funerals, shall not be allowed except by permit issued by the Chief of Police. . ."

A. It is Unconstitutional to Arrest Under the Parading Without a Permit Regulation

1. It is a Violation of the Fourth Amendment to Arrest for the Civil Infraction of Parading Without a Permit, Which Has Been Expressly Decriminalized and is a Non-Arrestable Infraction

Police are prohibited by the Fourth Amendment to the U.S. Constitution from arresting an individual on the basis of a civil infraction. See Doe v. Metro. Police Department, D.C., 445 F.3d 460, 469 (D.C. Cir. 2006) (Fourth Amendment violated where individuals were arrested for a civil offense, underage drinking); U.S. v. Green, Crim. Action No. 06-0031 (JR), slip op. at 6, (D. D.C. June 14, 2006) (improper vehicular tinted windows, a civil infraction, is not an arrestable offense and cannot be used to justify even a search); Barnett v. United States, 525 A.2d 197, 199-200 (D.C. 1987) ("appellant was arrested for violating a pedestrian traffic regulation which is a civil infraction for which only a monetary sanction may be imposed. Consequently the arrest was invalid . . . In sum, this is a case involving an unconstitutional search and seizure that cannot be tolerated.")

It would effectively dissolve the Fourth Amendment if the requirement of criminal misconduct was removed. Probable cause to arrest requires a showing that the police have "enough information to warrant a [person] of reasonable caution in the belief that *a crime* has been committed and that the person arrested has committed it." United States v. Short, 570 F.2d 1051, 1053 (D.C. Cir. 1978) (quoting Bailey v. United States, 389 F.2d 305, 309 D.C. Cir. 1967) (internal quotations omitted) (emphasis added); See also Barham, 445 F.3d at 572 – 573.

Parading without a permit is a civil pedestrian traffic violation. See 18 D.C. Mun. Regs. §2603.1 (traffic code provision identifying "parading without a permit" as a civil pedestrian infraction).

Prior to the effective date of the Traffic Adjudication Act of 1978, initial jurisdiction of all traffic offenses was vested in the Criminal Division of D.C. Superior Court. Traffic offenses were prosecuted by the Office of the Corporation Counsel. Parading without a permit was a criminal traffic offense "punished by a fine of no more than $300, or imprisonment for not more than ten (10) days, or both." See Ex. 1, 21 DCR 2476, 2481 (March 31, 1975).

In 1978, the Council of the District of Columbia enacted sweeping legislation that decriminalized nearly all traffic violations generally, including the pedestrian offense of parading without a permit, and transferred initial jurisdiction of traffic offenses from D.C. Superior Court to the D.C. Department of Transportation. D.C. Code §50-2301.01 ("It is the intent of the Council of the District of Columbia . . . in the adoption of this chapter [through the Traffic Adjudication Act of 1978] is to decriminalize and to provide for the administration adjudication of certain [traffic] violations" including parading without a permit).

The Council established an *exclusive* system of civil penalty and enforcement, where the sole mechanism of enforcement for parading without a permit, all pedestrian related violations and nearly all other traffic violations was through a notice of infraction or a ticket. See D.C. Code §50-2301.56; 18 D.C. Mun. Regs. 3003.

The penalty for parading without a permit, once decriminalized, became a $25 fine. See Ex. 2, 25 DCR 9576, 9577 (April 20, 1979) (proposed rule amending penalty to $25 fine); Ex. 3, 26 DCR 1480 (notice of final rulemaking, effective date ten dates thereafter) (April 3, 1981); 18 D.C. Mun. Regs. §2603.1 ("The following civil infractions and their respective fines set forth in this section refer to pedestrians. . . Parading without a permit (§ 2218[2]) $25").

The District of Columbia stipulates that it was aware of the passage of the act that decriminalized traffic offenses. See Ex. 4, District of Columbia 30(b)(6) Dep. (Burke) at 106:17 – 107:5; PSMF at ¶2.

The District of Columbia also admits that parading without a permit then became identified as a civil infraction pedestrian offense in the District of Columbia Municipal Regulations. Id. at 105:11 – 106:11; Ex. 5, Herold Dep. at 181:1 – 8, 182:1 – 4 (CDU Coordinator Captain Jeffrey Herold concedes that parading without a permit "is a civil infraction" and a "traffic offense"); PSMF at ¶3.

[2] "Processions and parades, except funerals, shall not be allowed except by permit issued by the Chief of Police. . ." 18 D.C. Mun. Regs. §2218.1.

During the tenure of Chief of Police Ramsey, including on the date of the mass arrest in this case, the District maintained a policy or practice authorizing the arrest of protestors for parading without a permit. See Ex. 4, District of Columbia 30(b)(6) Dep. (Burke) at 103:13 – 17; PSMF at ¶4.

The District of Columbia admits that the MPD lacked the lawful authority to arrest the plaintiff class for parading without a permit on April 15, 2000.

> Q: Is it the position of the Fenty administration that it was incorrect to arrest for the pedestrian traffic offense of parading without a permit after the act which decriminalized pedestrian traffic offenses?
> A: Yes.
> Mr. Koger: Foundation.

Id. at 107:18 – 108:2.

> Q: On April 15, 2000, did the MPD have the lawful authority to arrest for parading without a permit?
> Mr. Koger: Legal conclusion.
> Q: You may answer.
> A: I don't believe so.
> Q: On September 27, 2002 [date of another set of mass arrests for parading without a permit], did the MPD have the lawful authority to arrest for parading without a permit?
> A: I don't believe so.

Id. at 108:12 – 22; PSMF at ¶5.

The District's designated spokesperson, Patrick Burke, the current Commander of the DC MPD's Homeland Security and Special Operations Division, is uncertain as to how the MPD could have justified a policy or practice authorizing arrests for parading without a permit. "I can only assume that we didn't know it was not a criminal charge." See Ex. 4, District of Columbia 30(b)(6) Dep. (Burke) at 107:15 – 17; PSMF at ¶6.

In fact, the MPD itself developed the proposal for the decriminalization of traffic offenses. In panel testimony before the D.C. Council in support of the Traffic Adjudication Act, MPD Chief Maurice Cullinane explained that the proposal for the Act was developed by the MPD with three other agencies. See Ex. 7, "Testimony on Bill 2-195, The 'District of Columbia Traffic Adjudication Act,' Before the Committee on the Judiciary and the Committee on Transportation and Environmental Affairs District of

Columbia Council at 1 (November 18, 1977) (statement of Maurice Cullinane, Chief of Police, Metropolitan Police Department).

MPD Police Chief Cullinane submitted that those traffic violations encompassed by the Act "can, and properly should, be treated as civil wrongs and their adjudication need not involve the same process as pertains in a criminal matter." Id. at 3 – 4.

As Chief Cullinane testified, by decriminalizing traffic violations the District was "*eliminating* jail, heavy fines and *arrest as sanctions*." Id. at 9 (emphasis added).

The stated and intended purpose of the Traffic Adjudication Act of 1978 was to decriminalize offenses, to transfer jurisdiction of parking and minor traffic offenses from the Criminal Division of D.C. Superior Court, and to establish an exclusive civil administrative enforcement system. See DC Code §50-2301.01; Ex. 8, Council of the District of Columbia Report, "Report on Bill No. 2-195, District of Columbia Traffic Adjudication Act" (May 24, 1978), at 2 – 4.

The D.C. Courts have held the effect of the act to be as intended, a decriminalization of traffic offenses.

> "It was the intent of the Council 'to decriminalize and to provide for the administrative adjudication of certain violations' of motor vehicle and traffic regulations . . . What has changed is that certain violations *no longer constitute criminal offenses*."

District of Columbia v. Sullivan, 436 A.2d 364, 365 – 66 (D.C. 1981) (emphasis added).

The plain language of the act, and the legislative history, are equally clear that *the Act supersedes any conflicting statutory or regulatory law and creates an exclusive system of civil administrative enforcement for all violations of law or regulation related to pedestrian offenses.*

> "The effect of Section 301 is to transfer the initial process for adjudicating all parking, standing, stopping and pedestrian offenses . . . from the D.C. Superior Court to the District of Columbia Department of Transportation. Section 301 further provides that *the section supersedes any provisions of existing law that conflict*."

See Ex. 8, Council of the District of Columbia Report, "Report on Bill No. 2-195, District of Columbia Traffic Adjudication Act" (May 24, 1978), at 18 (emphasis added).

> "Notwithstanding any other provision of law, *all violations of statutes, regulations, executive orders or rules relating to* parking, standing, stopping or *pedestrian offenses* within the District shall be processed and adjudicated pursuant to the provisions of this subchapter [which set out the civil administrative enforcement system]."

D.C. Code §50-2303.01 (emphasis added).

In other words, even if other laws colorably or arguably encompass pedestrian offenses the sole, exclusive and only mechanism for enforcement is civil, expressly non-criminal, and the only enforcement mechanism police may use is to issue a ticket.

Criminal sanctions, and arrest, are unauthorized and expressly prohibited.

The executive branch - - at whose request traffic offenses were decriminalized - - continued, at least in recent years under Chief Ramsey, to arrest protestors for the non-arrestable civil infraction of parading without a permit in order to disrupt lawful and peaceful assembly. In so doing, the MPD sought to manufacture a basis or establish a tactic whereby mass sweeping arrests at targeted protests could be effected by surprise, without warning or notice, causing not merely the termination of protected activity by police fiat but the preemption of ongoing protest activity in violation of both the Fourth and First Amendments to the U.S. Constitution.

The Office of the Attorney General (OAG), previously known as the Office of Corporation Counsel (OCC), is most disingenuous to contend that parading without a permit is an arrestable offense. The OAG itself knows that it is not. The presentation of arguments to the contrary is without basis and is frivolous.

The OCC's spokesperson at the time of the April 2000 mass arrest at issue, Leigh Slaughter, told the media that it was an error to arrest the plaintiffs for parading without a permit because that was a non-arrestable infraction, like a jaywalking ticket. See PSMF at ¶7.

This was reported as follows in *The Legal Times*:

> "Many [of the 700 arrested on April 16, 2000] initially were arrested for demonstrating without a permit, as had more than 600 of their brethren or crossing police lines on Saturday [April 15, 2000], but they will likely be charged with disorderly conduct
>
> Demonstrating without a permit violates a D.C. municipal regulation - - similar to a traffic ticket - - and carries no jail time. Leigh Slaughter, a spokesperson for the D.C. Corporation counsel, says prosecutors switched the charged because, by law, officers are not supposed to make arrests for parading without a permit."

See Ex. 9, Carrie Johnson, "Arrested Protestors Flood Superior Court," *The Legal Times*, April 17, 2000 at 1.

Neither the District of Columbia nor the Metropolitan Police Department demanded a correction, which indicates their adoptive admission of this statement. See Ex. 10, Affidavit of Crystal Kim.

Consistent with this public statement, the OCC actually directed that all MPD forms 759 (sworn field arrest forms) for the hundreds of arrestees in the plaintiff group in this case be "rewritten" after the fact in order to change the charge from parading without a permit. See Ex. 11, running resume of April 16, 2000 at 32 ("Corp. Counsel advises that all 759s that were written for marching w/o permit arrests have to be rewritten for unlawful entry[3]."); PSMF at ¶8.

Given that the field arrest forms purport to be signed and sworn statements by an officer to the fact that he or she has personally observed specific offending conduct,[4] this is a truly shocking directive for the OCC to destroy and manufacture evidence and suborn fraudulent statements. There is no legitimate way all officers may destroy or re-write original sworn arrest forms attesting that they observed a person "parading without a permit" to swearing that they observed an individual engaging in the specific and multiple elements of unlawful assembly. The prosecutor may be able to charge unlawful assembly if evidence exists, but it is completely unacceptable if not unlawful to later re-write the field arrest forms which are sworn and contemporaneous accounts of specific police observations.

Desperate to defend against the hundreds of false arrest claims in this class action,[5] the District has sought to justify the mass arrests for parading without a permit as having been effected not as a pedestrian traffic offense violating the traffic regulations, but as a pedestrian offense punishable under the

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[3] Based on the context, it appears the reference to unlawful "entry" was intended to be to unlawful "assembly."

[4] Field arrest forms are to be executed contemporaneous with the arrest. When an officer executes a field arrest form he or she is swearing and attesting that she personally observed the arrestee engaged in specifically identified offending conduct. See Ex. 24, Chang v. United States of America, Civil Action No. 02-2010, Herold Dep. at 96:7 – 100:4, 197:2 – 6.; PSMF at ¶9.

[5] The District itself represents that the damage claims of plaintiffs "may run into the millions or tens of millions of dollars." Defendants District of Columbia, Chief Charles Ramsey and Terrence W. Gainer's Objections to August 22, 2006 Report and Recommendation at 5 (Docket No. 243). This, however, is a consideration that should have deterred and prevented the mass false arrest of nearly 700 protestors, tourists, bystanders, journalists and legal observers in connection with the April, 2000 IMF/World Bank protests at issue herein and the subsequent false arrests of nearly 400 protestors, tourists, bystanders, journalists and legal observers in connection with the September, 2002 IMF/World Bank protests. Barham, et al. v. Ramsey, et al., Civil Action No. 02-2283.

residual penalty clause of the public space regulations, 24 D.C. Mun. Regs. §100.6, which applies to violations of public space regulations "for which a specific penalty is not provided" under law.

The parading without a permit regulations were issued "pursuant to Section 107, Highway and Traffic Regulations." See Ex. 1, 21 DCR 2476 (March 15, 1975). They were placed into the Police Regulations, Article 2, §3. See 24 D.C. Mun. Regs. §700, note regarding source.

In the early 1980s, the D.C. Office of Documents was established and its first mission was to consolidate all regulations of general applicability, including the then-existing police regulations, into an official legal compilation to be entitled the District of Columbia Municipal Regulations. See D.C. Law 2-153; D.C. Code § 2-611 *et seq*. The Office of Documents happened to move the definition of a parade - - which was originally enacted into the police traffic regulations - - into Title 24 of the D.C. Municipal Regulations, the title relating to public space and safety.[6] The traffic prohibition on parading without a permit remained in place within the DCMR title on traffic regulations. The establishment of the penalty remained in place with the DCMR title on traffic regulations.

The movement of the definition of a parade was an administrative action that was not intended to have legal consequences or create new offenses. The District of Columbia Documents Act, which transferred authority to the newly formed D.C. Office of Documents to compile and publish and distribute District regulations and statutes, did not vest that office with the authority to create new criminal offenses. See D.C. Law 2-153; D.C. Code § 2-611 *et seq*.

Nevertheless, the District contends because the definition of a parade was shuffled into Title 24 of the D.C. Municipal Regulations that 24 D.C. Mun. Regs. 705.1 that the residual penalty clause of the public space regulations is applicable.

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[6] See Ex. 12, reproduction of the cross-reference table identified the placement of police regulations into the Municipal Regulations compilation (Article 2, §3 of the police regulations was moved to "24 DCMR/Public Space & Safety, Chapter 7").

This argument is plainly false even within its own terms, as the *residual* provision does not apply to any violation for which a specific penalty is established. The penalty for parading without a permit is established under regulation to be a $25 fine, as per 18 D.C. Mun. Regs. §2603.1.

The District's argument, of course, also disregards the express provision in the Traffic Adjudication Act of 1978 that:

> Notwithstanding any other provision of law, all violations of statutes, regulations, executive orders or rules relating to parking, standing, stopping or pedestrian offenses within the District shall be processed and adjudicated pursuant to the provisions of this subchapter [which set out the civil administrative enforcement system]."

D.C. Code §50-2303.01.

The Council of the District of Columbia could not have been clearer: All violations of any DC law or regulation relating to pedestrian offenses are required to be processed as non-arrestable civil infractions within the Department of Transportation's civil administrative system.

The litigation position taken and maintained by the Office of the Attorney General is without basis. The OAG was summoned before the Council of the District of Columbia after the Council Judiciary Committee completed its investigatory report into a pattern and practice of police misconduct during mass demonstrations.

George Valentine, head of the OAG Civil Division, was met by complete disbelief from the Council when he testified that "our position in defending against the litigation" is that parading without a permit remains an arrestable offense. See Ex. 13, transcript of D.C. Council hearing on Bill 15-968, the "First Amendment Rights and Police Standards Act of 2004," October 7, 2004, genl'y at 113 – 117; id. at 113 (Council Judiciary Committee Chair Kathy Patterson demanded of Valentine, "How can that be when that was decriminalized?"). See also Media Ex. 1.

The intent of the Council was clearly stated when the Traffic Adjudication Act of 1978 decriminalized parading without a permit. It was clearly stated, yet again, by Committee Chair Kathy Patterson. The plain language of the relevant provisions is clear: there is one penalty for parading without a permit and that is a civil ticket. There is no public space violation and, even if there was one, the

applicable penalty still would remain enforcement through a civil notice of infraction imposing the standard penalty of $25.

2. The Parading Without a Permit Regulation is Unconstitutional Because by Imposing Strict Liability, it Creates an Unconstitutional Chill Upon Free Speech Activities

The parading without a permit regulation is unconstitutional because it imposes strict liability on march participants for violations regardless of whether participants know that the march lacks a permit. See American-Arab Anti-Dis. v. City of Dearborn, 418 F.3d 600, 610 - 613 (6th Cir. 2005) (parading without a permit regulation declared unconstitutional because, by imposing strict liability, the regulation unconstitutionally chilled the exercise of free speech rights); Sheehan v. D.C., slip op., Crim. Case No. 05-MJ-0649 (AK / TFH) (D. D.C. December 18, 2006) (agreeing "in principle" with the Dearborn case, but distinguishing case before the Court on the basis of its facts[8]).

The City of Dearborn case applies the U.S. Supreme Court ruling in Smith v. California, 351 U.S. 147 (1960). In Smith, the Supreme Court reversed the conviction of a bookstore owner who was held strictly liable for possession of obscene books. The Court found that the absence of a scienter requirement in regulating obscene materials would chill the dissemination of non-obscene, constitutionally protected materials.

In City of Dearborn, the Sixth Circuit found that "automatically criminalizing participation in a permitless march destroys the spontaneity and enthusiasm which public demonstrations of this nature are meant to engender. And by placing an unnecessary obstacle before the marchers' access to the public streets and sidewalks, the Ordinance chills a substantial amount of speech related to current events. Yet

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[8] The Sheehan case involved protestors who, having first advised the U.S. Park Police in writing of their intention to violate National Park Service regulations by protesting without a permit on the White House sidewalk, see Sheehan at 3, n. 4, thereafter challenged the legality of their arrest for demonstrating without a permit. In part, the challenge consisted of Cindy Sheehan's assertion that she lacked knowledge that the group lacked a permit.

The U.S. Park Police argues that the regulation did have, or should be interpreted as having a scienter requirement. The Park Police enforced the regulation as if it did have such a requirement, providing actual notice to every demonstrator that they lacked a permit and that arrest was imminent. Using amplified sound from two police cruisers, the U.S. Park Police delivered three warnings to the group that was seated in a formation upon the sidewalks, several minutes elapsed between each warning to afford participants time to leave the sidewalk. Only after the third warning did police arrest persons who disobeyed orders to leave. See Sheehan at 4 – 5.

speech related to current events is the type of speech which is 'situated at the core of our First Amendment values.'" City of Dearborn, 418 F.3d at 612. With the Dearborn ordinance in place, "the potential protestor would be well-advised to seek personal verification from a city official that the demonstration has been authorized" before joining in with a march. Id.

This Court should follow City of Dearborn and declare unconstitutional the District's parading without a permit regulation, violation of which - - according to the defendants - - subjects an individual to jail or custodial arrest regardless of whether the individual knew or had been provided notice that the event was lacking a permit.

B. There Can Be No Probable Cause to Arrest the Plaintiff Group For *Any* Charge Where, Rather Than Conducting Arrests Based on Particularized Instances of Alleged Conduct, Police Simply Corralled and Arrested Everyone Who Happened to be Upon a Public Block at an Arbitrary Moment

Where police arrest a demonstration or march or assembled group as a group or as a unit, police are constitutionally required to have probable cause to arrest the group, *as a group*. Dellums, 566 F.2d 167, 177 (defendant has burden of proof to establish the objective reasonableness of the claim that 1,200 arrestees *as a group* were in violation of the law); See also Ex. 6, D.C. Rule 30(b)(6) Dep. (Herold) at 67:16 – 68:12 (conceding that in the context of mass demonstration arrest, the MPD is required to have probable cause to arrest each individual without exception).

A defendant's claim that there was probable cause to arrest hundreds as a group will be reviewed by the Court and rejected if it is objectively unreasonable to impute unlawful conduct or intent to *every person* among the hundreds to be arrested. Dellums, 566 F.2d at 180 – 181 n30 and n31; See also Barham v. Ramsey, 434 F.3d at 573 (probable cause to arrest group is that *everyone* to be arrested had committed an offense).

Stated conversely, to establish probable cause to arrest a group as a group, the defendant's burden is to establish that it possessed an objectively reasonable basis for believing that there was not one individual among the nearly 700 who had engaged in no offending conduct. See, Barham v. Ramsey, 434 F.3d at 574 ("the simple, dispositive fact here is that appellants have proffered no facts capable of

supporting the proposition that [the MPD Assistant Chief] had reasonable, particularized grounds to believe *every one* of the 386 people arrested was observed committing a crime.") (emphasis added).

A warrantless search must be predicated on *particularized* probable cause. See Ybarra, 444 U.S. at 91 ("This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another. . .").[9] The Supreme Court "has made clear that the 'substance of all the definitions of probable cause is a reasonable belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized.'" Barham v. Ramsey, 434 F.3d at 573, quoting, Maryland v. Pringle, 540 U.S. 366, 370 – 71 (2003).

Yet, the MPD arrested everyone found to be present in the block of 20th Street between I and K Streets at a particular (and arbitrarily) selected moment.

The MPD fully admits that it cannot identify even a single officer to testify that she or he observed any particular arrestee engaged in allegedly unlawful conduct. *The District of Columbia admits that it would be "futile and pointless" to go through the lists of arrestees and ask whether there is an officer who saw the person engaged in unlawful conduct because the MPD cannot identify even one single officer who can provide testimony that she or he observed any particular arrestee engaged in unlawful conduct.* See Ex. 6, D.C. Rule 30(b)(6) Dep. (Herold) at 77:6 – 78:10; PSMF at ¶10.

There is no authority that suggests that a mass arrest so wholly devoid of particularized probable cause is lawful.

The manner of this arrest, the corralling and arresting of everyone found to be present upon a well-travelled public city block, absolutely precludes any showing of probable cause to arrest the plaintiff class as a group *for any charge*.

According to police accounts, the targeted march and the arrested plaintiff class were at all times peaceful. There are no allegations of vandalism or property destruction or violence. Id. at 237:9 - 17(there

[9] It bears repeating that plaintiffs' position is that there was no probable cause to arrest even a single person and that not a single plaintiff engaged in unlawful conduct. However, as this posture of this motion seeks summary judgment as a matter of law, plaintiffs present their arguments even assuming, *arguendo*, that there was some basis to arrest some person or persons on some charge. This is a concession to the posture of this motion and should not be interpreted as suggesting that there was cause to arrest even one person within the plaintiff class.

was "no violence involved in that demonstration" and the District makes no allegations of vandalism associated with the march either); Ex. 5, Herold dep. at 168:1 ("I would categorize them as nonviolent."); Ex. 14, Gary Fitzgerald dep. at 78:9 – 13 (when trapped and surrounded, plaintiffs were simply milling about, some sitting down); Ex. 15, Gainer dep. at 155:16 – 21 (when plaintiffs were trapped and surrounded, "for the most part, they were either standing or shifting on their feet or milling about."); PSMF at ¶11.

The MPD knew that there were present persons completely unconnected to any allegedly offending conduct, and consequently lacked probable cause to arrest the group as a group, i.e., to arrest on *any charge* everyone who happened to be upon that public block.

Commander Jose Acosta fully admits that he knew at the time of the arrests that the police lines had surrounded uninvolved people who happened to be on 20th Street between I and K Streets at the moment the trap was sprung. "There was a mixture of people in place [within the arrest zone formed by the two police lines] at the time when the march got there." See Ex. 16, Acosta dep. 133:2 – 3. There were "several bus loads of tourists" in the area. Id. at 133:21. "The protest march was there. Obviously there were a lot of other people there, too." Id. at 97:19 – 21; PSMF at ¶12.

This is not instance in which the MPD corralled a cohesive group of persons, without trapping others, into an uninhabited area. The arrest zone, a public sidewalk and block in downtown Washington, D.C. just north of the George Washington University campus and South of DuPont Circle, was in use by the public.

According to the District of Columbia in Rule 30(b)(6) testimony, within the very five minutes before the arrest zone was established, there *were* civilians on the sidewalks of I Street between 19th Street and 20th Street abutting what would become the arrest zone on 20th Street between I and K. See Ex. 5, Herold dep. at 173:8 – 174:7. No efforts were made to clear the sidewalks of civilians in the area before converting the public sidewalks to be a mass arrest zone. Id. at 157:10 – 18 ("I don't know if the sidewalks were clear or not."). Nor did Herold even bother to make inquiries or otherwise ascertain whether there were pedestrians upon the sidewalks within the arrest zone as it was formed. Id. at 158:19 –

159:7. Chief Ramsey admits that he does not know “who was on the street and who wasn’t on the street” when the police lines were established. Id. at 161:15 – 21; PSMF at ¶12.

Once the police lines were established, and hundreds trapped therein, there was no avenue of exit. See Ex. 14, Fitzgerald dep. at 112 – 117 (arrestees given no opportunity to disperse and he observed no avenues of exit once police lines were executed); PSMF at ¶13. The police lines were unyielding. Everyone on that city block was seized.

Herold attests that people approached police lines and presented circumstances or requests to leave and that none were allowed to avoid arrest (with the exception of certain selected journalists, discussed below). See Ex. 5, Herold Dep. at 189:7 – 15; PSMF at ¶14. There was no differentiation based on circumstance or conduct. If a person was present within that public block, she or he was arrested. That was the criteria.

The police did not differentiate between who they assert were “illegal” demonstrators and any person who had just left one of the nearby shops and restaurants and was walking upon the sidewalk when the march came by and the trap sprung.

The police did not differentiate between persons they assert were allegedly engaged in an unlawful march with “a common purpose,” see 24 D.C. Mun. Regs. §705.1, from passersby who had approached or even walked briefly along with the march because they were interested in hearing the political speech, receiving a leaflet, asking questions, reading a placard or observing the spectacle of free speech and democracy within the nation’s capital.

The police did not differentiate between persons protesting and those who were overtly identifiable by their distinctive fluorescent green caps to be National Lawyers Guild Legal Observers, mere passive observers not engaged in protesting or marching.

The MPD did not differentiate tourists who were corralled with everyone else.

The District did not attempt to differentiate marchers who travelled solely upon the sidewalk. The District concedes that probable cause to arrest an individual for parading without a permit did not exist where that person had marched or traveled solely upon the sidewalk during the march. See Ex. 17,

Ramsey dep. at 196:9 – 15; Ex. 6, D.C. 30(b)(6) Dep. (Herold) at 135:14 – 136:2; Ex. 16, Acosta dep. at 106:16 – 21; Ex. 4, D.C. Rule 30(b)(6) Dep. (Burke) at 109:10 – 15. According to the District, that rule holds true even for a protestor who walks on the sidewalk alongside persons who parade in the roadway without a permit. See Ex. 6, D.C. (Herold) at 142:12 – 14; PSMF at ¶15.

Yet, at the time of the arrests the MPD had made no effort to determine whether any of the people who were arrested had, in fact, been on the sidewalk the whole time. See Ex. 17, Ramsey dep. at 197:3 – 8. Ramsey admits that he does not know "who was on the street and who wasn't on the street' when the police lines were established. Id. at 161:15 – 21. Ramsey does not recall asking anyone whether there were uninvolved pedestrians within the arrest zone as it was executed. Id. at 161:22 – 162:6. Herold made no efforts, either, to determine whether the area had been cleared of uninvolved pedestrians before it became an arrest zone. See Ex. 5, Herold dep. at 158:19 – 159:7; PSMF at ¶16.

The only category of persons who were allowed to leave the arrest zone, to escape arrest despite having travelled with the march, was selected credentialed journalists/media. Id. at 189:7 – 192:4. According to Terrence Gainer, it was a practice of the MPD to allow credentialed journalists to be exempt from arrest "out of respect and deference" to their First Amendment rights. See Ex. 15, Gainer Dep. at 177:16 – 178:11. Independent media or freelance journalists were not allowed to leave, even though they too had been caught in the arrest zone. There was no general announcement that credentialed media could leave. They had to know, and also have the opportunity, to present themselves near Herold or another supervisor for de-arrest. See Ex. 5, Herold dep. at 189:11 – 192:4. Less than ten knew or were able to do so. Id. at 191:3; PSMF at ¶17. Yet, these very circumstances establish that the MPD knew at the time that it had seized within its arrest zone journalists - - who the MPD claims were exempt from arrest, if one accepts this claim at face value. Consequently, the MPD knew that it did not have cause to arrest everyone who was trapped in the arrest zone and yet proceeded.

It is undisputed or uncontroverted that persons in the class who were not in any way associated with the march (aside from physical proximity) were corralled and arrested.

A final investigatory report,[10] produced internally by the MPD after charges of misconduct in the mass arrests of protestors in September, 2002, found as follows with respect to the April, 2000 mass arrest at issue in this litigation:

> "It now appears that many non-involved witnesses and passers-by were corralled along with hundreds of actual protestors and arrested in that [April, 2000] event. The Metropolitan Police Department has to carefully examine the logistics, but more importantly, the likely ramifications of placing hundreds of protesters and bystanders under arrest . . . . [The MPD] must carefully consider its actions from an inescapable litigious standpoint.
>
> A meeting was recently held by the Office of the General Counsel and attended by representatives from the Office of the Corporation Counsel, Civil Rights and Force Investigation Division, and Special Services Command. This was an important first step in analyzing current practices with a view toward reducing liability . . ."[11]

See Ex. 18, Final Report Relative to Complaints of Misconduct Made at the October 24, 2002 Hearing of the Committee of the Judiciary of the Council of the District of Columbia, Concerning the IMF/World Bank Protests, report dated January 21, 2003 at 16; See PSMF at ¶ 18.

The "Final Report Relative to Complaints. . ." purports to be, and is, a final agency report. See PSMF at ¶¶19 – 24. In Rule 30(b)(6) testimony, the District of Columbia concedes that there is only one final report and it is so denominated as the "Final Report Relative to Complaints of Misconduct. . ." See Ex. 4, District of Columbia 30(b)(6) Dep. (Burke) at 51:9 – 19, 53:11 – 19; See genl'y, id. at 47:19 – 55:21; PSMF at ¶19.

The District of Columbia attests that the substance and language of the Final Report was accurate at the time of its completion and continued to be accurate to date. PSMF at ¶25 .

With respect to the excerpt cited above pertaining specifically to the April 15, 2000 mass arrest, the District testified[12] that it possesses no reason to believe that the substance is inaccurate, id. at 191:14 –

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[10] This report is admissible evidence. See Fed. R. Evid. 803(8) (public records and reports); Fed. R. Evid. 804(b)(3) (statement against interest); Fed. R. Evid. 801(d)(admission by a party-opponent); Fed. R. Evid. 807 (residual hearsay exception).

[11] Reflecting their systematic contempt and disregard for constitutional rights, even in this report the concern of the MPD is not that they engaged in a mass violation of civil rights. The concern is that it may cost them. They are keenly aware that the underlying mass arrest, and related admissions and statements, are against the pecuniary interest of the MPD and the District of Columbia and that they are exposed to civil liability. See Fed. R. Evid. 804(b)(3) (hearsay exception for statements against interest).

[12] The Rule 30(b)(6) deposition referenced in this paragraph was provided in Barham v. District of Columbia, Civil Action No. 02-002283 (EGS) (arising in connection with the mass arrest of hundreds of protestors during the

192:6, and *admits that uninvolved persons were arrested in the April 15, 2000 mass arrest*, id. at 193:6 – 10. PSMF at ¶26.

The D.C. Circuit sharply faulted Chief Ramsey and the MPD for the unconstitutional practice of corralling and arresting everyone who happened to be within a city block in a busy downtown area at an arbitrarily selected moment on the occasion of the September, 2002 IMF/WB protests and related mass false arrest. See Barham, 434 F.3d at 574 (unconstitutionally arresting the group and sweeping up uninvolved persons is the natural "upshot of making arrests based on the plaintiffs' occupancy of a randomly selected zone, rather than participation in unlawful conduct.").

The D.C. Circuit in Barham v. District of Columbia observed that the fluidity of movement of persons in connection with the Pershing Park mass arrests discredited any attempt to claim probable cause to arrest everyone who happened to be within the park. Barham v. Ramsey, 434 F.3d 565, 574 (D.C. Cir. 2006).

The march in the instant case was admittedly fluid, See Ex. 6, D.C. Rule 30(b)(6) Dep. (Herold) at 265:9 – 266:2 (march was not static, was spread out "everywhere" and at times over five city blocks); PSMF at ¶¶27 – 28. It was also constantly changing in composition. PSMF at ¶29.

Protest marches are inherently fluid in composition. Their *raison d'etre* is to engage the public and create spontaneous intermingling and intermixing and exchange between marchers and passers-by.

A march, while moving along the public ways, superimposes itself over uninvolved persons who happen to be in the area, engaging those persons with their message and encouraging interaction and joining, and is consequently even more inherently fluid and changing in composition than a stationary assembly.

> "[P]arades and processions are a unique and cherished form of political expression, serving as a symbol of our democratic tradition. There is scarcely a more powerful form of expression than the political march. Unlike stationary demonstrations or other forms of pure speech, the political march is capable of reaching and mobilizing the larger community of citizens. It is intended to provoke emotive and spontaneous action, and this

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September, 2002 IMF/World Bank protests). Captain Matthew Klein, who signed the Final Report as the Commanding Officer, Force Investigation Team, was the spokesperson for the District on this subject.

> is where its virtue lies. As it progresses, it may stir the sentiments and sympathies of those it passes, causing fellow citizens to join in as a statement of solidarity."

American-Arab Anti-Dis. v. City of Dearborn, 418 F.3d 600, 611-612 (6th Cir. 2005).

Unlike a stationary demonstration, in which interested persons may choose to approach and engage with the protest, in a march it is the protest which is in motion and which superimposes itself around the ordinary activities of the public. As a march moves upon a public way, initially uninvolved persons come into the midst of the protest. Some do so because they step into the midst of the march out of common cause. Others happen to be nearby and seek to learn more about the political spectacle. Persons who have no connection to the march find themselves within the contours of the mobile demonstration.

A defendant who engages in the simultaneous trap and mass arrest of hundreds of persons on a public city block assumes the obligation to ensure that probable cause exists to arrest each of those many hundreds of persons. The failure to so ensure will invalidate any claim to probable cause to arrest the group, as a group, and consequently subject that defendant to liability.

These constitutional principles are clearly established. The District of Columbia MPD itself caused the clear articulation of the long-existing probable cause requirements in the context of mass demonstration arrests through its repeated instances of mass false arrests of thousands of protestors and others during the Vietnam War era.

The D.C. Circuit has long provided the DC MPD with a roadmap for how it may lawfully conduct the extraordinary event of a mass arrest during demonstrations where there may be present persons who have not been violent or obstructive. This roadmap and clearly established law - - which requires issuance of orders to disperse - - was recently affirmed in connection with the denial of qualified immunity for Chiefs Ramsey and Peter Newsham in connection with the September 27, 2002 mass arrest of IMF/WB protestors.

> "As plaintiffs aptly state, Dellums establishes a "bright line rule" that "where a group contains persons who have not been violent or obstructive, police may not mass arrest the demonstration as a group without fair warning or notice and the opportunity to come into compliance and disperse. . . The Dellums Court found the police chief's failure to make sure his dispersal orders were *actually heard*, not merely given, rendered the mass arrest

> illegal. Dellums, 566 F.2d at 183. Here, it is uncontroverted that Assistant Chief Newsham didn't even *attempt* to give a dispersal order, thus rendering the arrests in flat conflict with the clearly established parameters of Dellums."
> Barham, 338 F. Supp.2d at 58 (emphasis in original).

As Judge Sullivan put it, "There simply isn't any ambiguity to the established law." Id. at 59. The U.S. Court of Appeals affirmed Judge Sullivan's ruling in agreement.

> "Our case law addressing large-scale demonstration scenarios does not suspend – or even qualify – the normal operation of the Fourth Amendment's probable cause requirements. Rather, this case merely amplifies one essential premise bearing on the case at hand: when compelling circumstances are present, the police may be justified in detaining an undifferentiated crowd of protestors, but only after providing a lawful order to disperse followed by a reasonable opportunity to comply with that order."[16]

Barham v. Ramsey, 434 F.3d 565, 575 (D.C. Cir. 2006), citing, Washington Mobilization v. Cullinane, 566 F.2d 107 (D.C. Cir. 1977) and Dellums v. Powell, 566 F.2d 157, 183 (D.C. Cir. 1977).

Where police are unable, due to demonstration noise or any other reason, to communicate the dispersal order[17] to the group as a whole or as a unit, the police are constitutionally required to warn each demonstrator individually, with opportunity to comply or disperse, before arresting that demonstrator. See Dellums, 566 F.2d 167, 184 n.42; id., 566 F.2d 167, 181 n.31, citing Cullinane at 120.

[16] The District of Columbia often justifies the mass arrest of protest groups by selectively quoting and mischaracterizing the section of the Cullinane case in which the D.C. Circuit writes, "Confronted with a mob, the police cannot be expected to single out individuals; they may deal with the crowd as a unit."

The D.C. Circuit responded to this by observing that this one line, so referenced, is out of context and fails to convey the holding and reasoning in the Cullinane and Dellums cases. See Barham, 434 F.3d at 575.

The law distinguishes between police *authority to control* an unruly demonstration with police lines from the *authority to arrest* a demonstration as a unit. The latter obviously not merely terminates protest activity but results in the loss of liberty of those arrested.

Before a demonstration or march may be dealt with or controlled as a unit through the use of police lines, it must first cross a constitutional threshold. "It is the tenor of a demonstration as a whole that determines whether the police may intervene; and if it is substantially infected with violence or obstruction the police may act to control it as a unit." Barham, 434 F.3d at 575, citing, Cullinane, 566 F.2d at 120.

However, where a group contains any individuals for whom police lack probable cause to arrest, the police are constrained by those individuals' constitutional rights from executing a mass arrest of the group as a group. Under such circumstances, "the police may validly order violent or obstructive demonstrators to disperse or clear the streets. If any demonstrator or bystander refuses to obey such an order after fair notice and opportunity to comply, his arrest does not violate the Constitution even though he has not previously been violent or obstructive." Id.

[17] Any dispersal order of course must also be lawful, based on permissible bases, and constitutionally sound. In the instant case, there was no such predicate.

The MPD Mass Demonstration Manual itself reflects these requirements,[18] although the practice under Chief Ramsey was to ignore and violate the manual.

It is undisputed that no order to disperse was given to the class. PSMF at ¶30.

Not one of the class representatives heard a warning either to leave the streets or heard *any* directive or order that indicated imminent arrest absent compliance with a directive. See Ex. 19, a – n; PSMF at ¶31. Indeed, persons trapped by the MPD repeatedly asked the police to be allowed to disperse and were refused by the District of Columbia whose intention it was to sweep up and jail them all.

It was the de facto policy and practice under Chief Ramsey and Assistant Executive Chief Terrance Gainer to mass arrest for parading without a permit without first providing a lawful order to

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[18] The manual provides as follows:

Crowd Dispersal

When the intensity level of a crowd rises and unlawful disruption, either through violent or passive means, is occurring to the extent that the Field Commander determines there is a need to make a positive police response, he will instruct the affected unit commanders, where time and circumstances permit, to issue warnings to the crowd to disperse. In issuing such warnings the following procedures shall be utilized by unit commanders.

Issuance of Warnings

The issuance of warnings shall be of such amplification and repetition as to be heard by the entire assemblage.

Issuances shall be made by the unit commander from stationary vantage points that are observable to the crowd, or to a large number of participants.

Additional warnings, where necessary, shall be given from police vehicles, equipped with public address systems, moving around the crowd.

The warning shall consist of an announcement citing the offenses or violations that are being committed by the participants, and a request or order, whichever is applicable, that the crowd disperse. Whenever possible, this warning shall be written out prior to the announcement, to ensure clarity and accuracy, and consistency, if the warning is repeated.

The entire warning process shall be documented by means of an audio-visual recording, if available.

Verbal Persuasion

As a first means of dispersing a crowd under static conditions, the unit commander shall attempt to verbally persuade the crowd to disperse of its own accord by announced available exit routes.

Arrest

If, after a reasonable amount of time following the initial warning, the crowd refuses to disperse, the unit commander shall issue a final warning ordering the participants to disperse or be subject to arrest.

If, after a reasonable amount of time following the final warning, the crowd continues in its refusal to disperse, the unit commander shall direct that the violators be arrested.

The number of warnings given, the method used, and the time intervals between warnings, and between the final warning and any order to arrest, shall be recorded on the commander's log. Documentation shall be made (pictorially if possible) of exit routes available to the crowd, and of any persons who leave the area. See Ex. 20, MPD Manual at 23 – 25.

disperse followed by a reasonable opportunity to comply. It was the de facto policy and practice for the MPD to engage in mass arrests of persons associating with First Amendment protected activity without any warning to the group at all. See Ex. 15, Gainer Dep. at 161:9 – 163:6 (no need under policy to give the group as a whole notice or warning and opportunity to comply), 219:18 – 222:4 ("I don't believe that warning was required [prior to arrest] for marching, parading without a permit"); Ex. 17, Ramsey Dep. At 199:16 – 200:7 ("We do not have to first give them an order to disperse" if persons are parading without a permit); Ex. 6, D.C. 30(b)(6) Dep. (Herold) at 210:3 – 16 ("not necessary" that there first be an order or request to disperse in the context of use of police lines to cordon demonstrations and effect a mass arrest). PSMF at ¶32.

The *de facto* policy and practice deviated from the actual, formal policy. According to the District of Columbia's Rule 30(b)(6) deponent, if police allowed any marching to proceed without an advance written permit, the police were not authorized to arrest for parading without a permit absent provision of a clearly audible general order to the crowd to disperse the march. See Ex. 4, District of Columbia 30(b)(6) Dep. (Burke) at 111:10 – 113:2; PSMF at ¶33. More generally, under formal policy, police were not authorized to arrest where the MPD had not first provided two warnings or orders to disperse and the opportunity to comply. Id. at 109:1 – 9. PSMF ¶34.

C. There is No Probable Cause to Arrest for "Related Offenses"

1. The MPD Claims Probable Cause to Arrest Existed For Only Two Offenses: Parading Without a Permit and Failure to Obey the Lawful Order of a Police Officer

According to the District of Columbia, the only two offenses for which it claims probable cause to arrest in connection with the April 15, 2000 march are parading without a permit and failure to obey the lawful order of an officer. D.C. Rule 30(b)(6) Dep. (Herold) at 190:20 – 191:3; PSMF at ¶35.

As above, the District of Columbia has not a single witness who can associate any particular arrestee with any alleged offending conduct, whether that be failure to obey or any other charge. PSMF at ¶10.

2 . There is No Probable Cause to Arrest for Failure to Obey

Chief Ramsey attests that municipal intent was to arrest everyone who was in any way "involved in the march," a criteria which is hardly a proxy for having engaged in prohibited conduct, let alone the specific offense of "failure to obey." See Ex. 17, Ramsey dep. At 164:13 – 15 (intended to arrest "[i]ndividuals that were involved in the march"), id. at 175:6 – 12 (intended to arrest participants in the march); PSMF at ¶36.

Nevertheless, the District tries to manufacture a defense by asserting that Jeffrey Herold, based on his own personal observations, can establish probable cause to arrest the class as a whole for failure to obey. Trying to make that happen, Jeffrey Herold claimed that, while outside the arrest zone, he gave an unspecified sub-group of persons repeated warnings to leave the street which were both heard and disobeyed.

According to Herold, he did not record his provision of such orders in any log or document. See Ex. 5, Herold dep. at 183:4 – 183:12; PSMF at ¶37.

According to Herold, only *his* purported provision of orders to leave the street formed the basis for any failure to obey charge. He knows of no other orders that were discussed at the on-scene command staff meetings. Id. at 182:18 – 183:3; PSMF at ¶38.

Herold's testimony, even if assumed to be true, does not establish probable cause to arrest the entire plaintiff class.

Herold admits that he cannot identify even one particular individual who he claims heard and disobeyed such an order. See Ex. 6, D.C. Rule 30(b)(6) Dep. (Herold) at 77:17 – 78:3; PSMF at ¶10.

Herold is even unable to reliably estimate the number of persons that he claims to have heard such an order from him and disobeyed it. According to Herold, his estimate is around 400 persons disobeyed him "plus or minus 200 on that estimate." Id. at 180:20 – 21; See genl'y id. at 175:21 – 182:4; PSMF at ¶39.

This is plainly insufficient to constitute particularized probable cause to arrest each of the nearly 700 persons who were arrested.

Herold concedes that he is unable to attest that all persons in the march heard his alleged orders. Id. at 170:20 – 171:3 ("There were many, many people that were not in that block so whether they heard or didn't hear really had no effect on what I was doing"); PSMF at ¶40.

He also attests to circumstances that would make it impossible to claim - - and he does not so claim- - that he was communicating with the march as a whole. Id. at 146:15 – 22 (march was not one cohesive group, was fragmented and strung out); Id. at 149:1 – 150:6 (same); Id. at 266:2 – 7 (march spread out at times over five blocks, when he encountered it was spread over three blocks); Id. at 266:15 – 22 (when Herold was allegedly directing people out of the street, the march itself was "essentially spread out everywhere from 19th and I through 21st - - between 21st and 22nd and Penn"); PSMF at ¶41.

According to Herold, at the time he purportedly issued such orders the march was engaged in "loud and boisterous" protest. See Ex. 5, Herold dep. at 174:12 – 13; PSMF at ¶42. Herold claims to have issued the orders only from the rear of the march and knows of no attempts to issue such orders at the front of the march. Id. at 174:20 – 175:6; PSMF at ¶43.

Unable to identify any particular person who heard and disobeyed his purported order, Herold and the District argue that if a person was arrested then she must have heard and disobeyed an order. This is backwards. The requirement of probable cause is the predicate for the arrest. It is not that the fact of arrest constitutes evidence of probable cause.

The Chief of Police, even with the full benefit of all information gathered to date, claims only to have *assumed* that orders were given and disobeyed. Notably, Ramsey doesn't recall Herold bringing his purported orders to the Chief's attention during on-scene command staff discussions.

Ramsey concedes he has no personal knowledge of the provision of such orders and has no idea as to upon what this purported belief is based. Ramsey admits that there is an absence of any record that the provision of such warnings was made. See Ex. 17, Ramsey dep. at 178:14 – 16; PSMF at ¶44. According to policy, all significant events related to mass arrests are to be recorded in the Commander's Mass Demonstration Event Log. See Ex. 20, MPD Manual 36; PSMF at ¶47. There is no record

anywhere, not in the Joint Operations Command Center Log, not in recorded police channel communications, not in after action reports.

Ramsey is remarkably cavalier about the absence of information on this critical issue.

> Q: You don't even know who gave these orders to which you are referring; correct?
> A: That's correct.
>
> Q: And you didn't know at the time who gave the orders to which you are referring?
> A: Not specifically.
>
> Q: You didn't seek out the person?
> A: Any police officer has that authority so it really didn't matter.
>
> Q: Was the number of warnings given recorded on the commander's log?
> A: Don't know.
>
> Q: Was the time intervals, if there were any, between warnings, if any were given, written in the commander's log?
> A: Don't know.

See Ex. 17, Ramsey dep. at 184:4-19; PSMF at ¶44.

Ramsey does not know or identify who may have purportedly provided him with information that any orders were given. Id. at 130:3-5. Nor does he recall whether he believed that amplified sound was used to communicate such an order, id. at 130:6-9, or the precise substance of the order, id. at 130:10-16, or where along the march route any individuals were alleged to have been on the roadway, id. at 131:3-9. Ramsey does not know on how many occasions he believed that persons had stepped upon the roadway, id. at 128:13-14. At the time of the arrests, he did not bother to ask how many people were involved in the alleged stepping upon the street. Id. at 128:18-21. Nor did he ask for how long of a duration were the unspecified individuals upon the roadway. Id. at 128:22 – 129:3. Ramsey did not ask whether purported movement in the street was due to an obstruction in the sidewalk, e.g., a construction site. Id. at 128:4-8; PSMF at ¶45.

Ramsey testified that he "made an assumption" that all 2000+ marchers and all members of the plaintiff class had heard a warning to leave the street. Id. at 181:3-6; Id. at 180:18-22 ("I assume that [communication of orders to leave the streets] was adequate since I had been told that people had, in fact,

complied at one point.”). PSMF at ¶46. Of course, the predicate for an arrest for failure to obey is not merely that an order was given, but that an order was disobeyed.

Furthermore, claimed assumptions cannot substitute for constitutional compliance.

Nor can the MPD constitutionally justify arresting all of the persons in between I and K Streets on 20th Street on the purported basis that at an earlier time some individual or individuals refused to obey an order to leave the street. Probable cause to arrest is specific to the person who has allegedly engaged in misconduct. Police cannot constitutionally arrest a group of demonstrators on the basis that some other group or even a sub-group of demonstrators have engaged in unlawful conduct. see Ybarra v. Illinois, 444 U.S. 85, 91 (1979) ("Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another. . . ."). Chief Ramsey presented a similar argument in connection with the September, 2002 IMF/WB mass false arrests, which the D.C. Circuit emphatically rejected. Barham, 434 F.3d at 573 – 576.

There is no evidence in the record that such orders were given to the class or any evidence that any orders were disobeyed by the class. There is no evidence supporting probable cause to arrest the class for failure to obey, and there is also no evidence supporting probable cause to arrest any individual class member for failure to obey.

D. The Class Arrests are Invalid and Unconstitutional as a Matter of Law Pursuant to Sullivan v. Murphy

After the 1971 May Day protests, during which the MPD suspended field arrest reporting requirements as an expedient to mass arrest, the D.C. Circuit held that mass demonstration arrests are presumptively violative of the Fourth Amendment where not accompanied by a contemporaneous Polaroid photograph and field arrest form executed by one who was in fact the arresting/witnessing officer. Sullivan v. Murphy, 478 F.2d 938, 967 (D.C. Cir. 1973); Sullivan v. Murphy, 380 F. Supp. 867 (D.D.C. 1974). This presumption may be rebutted only by an affirmative showing of individualized

probable cause (e.g. through the testimony of an arresting or witnessing officer). Sullivan v. Murphy, 478 F.2d at 967. The burden of making such a showing is upon defendants. Sullivan v. Murphy, 478 F.2d at 967 n.58.

Following the aforementioned appellate holding, which issued on interlocutory appeal, the U.S. District Court entered an order[20] declaring as "invalid and unconstitutional" all arrests lacking adequate field arrest documentation for which the MPD could not make an affirmative showing of probable cause. The Court also declared as "invalid and unconstitutional," all arrests - - irrespective of field arrest forms - - for which the police could not make an affirmative representation that they possessed evidence of probable cause. See Sullivan v. Murphy, 380 F. Supp. 867, 868 (D. D.C. 1974).

Such order was entered by the Court, as a matter of law.

In the instant case, no field arrest forms for the mass arrest were ever received by the MPD records division. Even where there may be field arrest forms that have been located, the District is unable to make any affirmative or supporting showing of probable cause through, for example, the testimony of an arresting/witnessing officer. As a matter of practice and expediency during this mass arrest, the MPD never recorded the identities of officers who purportedly observed the class members engaged in offending conduct (if any ever existed).

For the reasons stated below, the instant case false squarely within the Sullivan_framework and summary judgment on liability for false arrest should be granted to the plaintiff class.

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[20] The Court ordered "1. that this Court's order of June 23, 1971, that this action shall be maintained as a class action is reaffirmed, and the class consists of all persons arrested from and including May 3, 1971, through May 6, 1971, as to whom the defendants failed to follow normal booking procedures and lack a contemporary field arrest form, photograph, or other evidence of probable cause for arrest, and those as to whom, irrespective of alleged contemporaneous field arrest forms and photographs, the defendants have been unable, after an adequate personal consultation with their witness or witnesses, to certify to this Court their ability to establish probable cause for arrest or a *prima facie* case of guilt of the alleged offense committed; 2. That the seizures of members of the class described in paragraph I of this order be, and they hereby are, declared invalid and unconstitutional, and further, that there being no affirmative showing by the defendants in this regard, all seizures except those specifically adjudicated in a Court proceeding in the Superior Court, based upon a contemporaneous photograph and field arrest form executed by the one who was, in fact, the arresting officer, be, and they hereby are, declared invalid and unconstitutional; and the defendants are forthwith directed to set forth the specific names of such individuals, if any, who were so convicted upon such photographs and field arrest forms, together with certifications from each arresting officer as to the time, place, and circumstances of arrest and that he was in fact the arresting officer, and such persons shall be deemed excluded from the class; *Provided,* plaintiffs may challenge any such certifications. . ." Sullivan v. Murphy, 380 F. Supp. 867, 868 (D.D.C. 1974).

1. The MPD Did Not Maintain Field Arrest Forms for the Mass Arrest

The District of Columbia admits that not one single arrest record was received by the Records Division in connection with the April 15, 2000 mass arrest, see Ex. 21, D.C. 30(b)(6) Dep. (Gantt) at 38:1 - 40:9, PSMF at ¶48, placing these mass arrests squarely within the Sullivan presumption that they were constitutionally impermissible.

According to the District of Columbia Rule 30(b)(6) records deponent, no field arrest forms are known to exist. Id. at 43:12 – 21; PSMF at ¶49.

2. The District is Unable to Make an Affirmative Showing of Probable Cause for any Individual

The District concedes that, with respect to the hundreds of members of the class, it cannot produce any witnesses who can testify that they observed any particular individual engaging in specific offending conduct. Id. at 77:6 - 78:10; PSMF at ¶10.

The District of Columbia, through its counsel at the Office of the Attorney General (OAG), further represents that "we have not identified and our documents do not identify to us any arresting officers from the April, 2000 mass arrests. . . should that change, I will notify all counsel immediately but I don't know how to change that at this time." See Ex. 6, D.C. 30(b)(6) Dep. (Herold) at 270-1 (attorney Thomas Koger); PSMF at ¶51.

Even if field arrest forms could be or were located, they would be unhelpful to establish probable cause. The officers identified as "arresting officers" on the field arrest forms are merely those who placed flexcuffs on the arrestee. Id. at 55:9 - 16. As a general practice, the "arresting" officers[21] did not observe their arrestee(s) engaged in allegedly offending conduct. Id. at 54:13 – 19. PSMF at ¶51.

For example, Sergeant Keith DeVille flexcuffed one of the April 15 arrestees. When asked what conduct the arrestee had been engaged in prior to the time of arrest, DeVille conceded that he didn't know what he was doing. When pressed for the basis of this individual's arrest, DeVille testified that there was

"probable cause to believe he was engaged in a protest." See Ex. 22, DeVille Dep. at 148:20 – 150:10; PSMF at ¶52.

The District acknowledges that it did not record *anywhere* the identity of an individual officer or witness who purportedly observed any particular arrestee engaged in alleged misconduct. Id. at 55:17-56:3; PSMF at ¶53.

The District of Columbia, through its Rule 30(b)(6) spokesperson, was presented with each and all of the documents and printouts that contain lists of names or identity information of the class members. The District agreed it would be *"futile and pointless"* to go through each name for the purpose of disclosing whether there was any witness to the arrestee having engaged in unlawful conduct, as *no such information is available for any member of the class.*

> Q: You do not have testimony to provide today as to the identity of any officers who may have observed conduct constituting parading without a permit linked to specific arrestees?
> Herold: Not linked to specific arrestees.
>
> Q: What - - What information do you have about the identity of persons who have observed events relating to parading without a permit that are more generalized?
> Herold: Those would be [my] personal observations.
>
> Q: Okay. And as we go through the chain of events we shall go through that. Other than what you have testified to just a moment ago, there isn't other information that you possess regarding the identity of persons who would be witnesses to the specific arrestees, being able to say this person did that at this place at this time?
> Herold: No, I couldn't do that. I couldn't say that.
>
> Q: So it would be futile and pointless at this moment to, for example, for us to go through all 200 pages of Exhibit B or to go through the CJIS printouts or to go through the collateral list and ask you name by name who saw this person doing something unlawful?
> Herold: I would agree with you.

See Ex. 6, D.C. Rule 30(b)(6) Dep. (Herold) at 77:6 - 78:10; PSMF at ¶54.

There is no evidence from which to support the arrest of the putative class as a group or to support the arrest of any individual within the putative class.

3. The MPD Engaged in Systematic Falsification of Arrest Records

An officer who executes a field arrest form is attesting that she observed the arrestee engaging in particular unlawful conduct. When an officer executes a field arrest form she is swearing and attesting that she personally observed the arrestee engaged in specified offending conduct. See Exhibit 24, Herold dep. in Chang at 96:7 - 100:4, 197: 2 - 6. If the officer did not personally observe the conduct leading to the arrest, she is to identify on the field arrest form the witnessing officer(s). Sullivan v. Murphy, 478 F.2d 938, 946 (D.C. Cir. 1973).

However, the District concedes that the systematic practice used on April 15, 2000 was that the signing officer was merely the officer who placed the arrestee in handcuffs and, notwithstanding the signed and sworn execution of the field arrest form, had not observed the arrestee engaging in particular unlawful conduct. The officers who swore to having observed conduct constituting the offense, systematically had not. The field arrests forms - - which the OCC recommended be rewritten after the fact[23] and which are now lost or destroyed - - are all false. Even were they located, they would be useless, except as additional evidence of fraudulent statements commitment by the MPD on a massive scale.

Similar false representations can be found in the Criminal Justice Information System (CJIS) and other police arrest records. In those records, MPD Special Operations Division (SOD) Commander Michael Radzilowski is falsely identified as the arresting officer for *over two hundred (200) arrestees*.[24] See genl'y Ex. 23, Radzilowski dep. at 124:6 - 132:15; PSMF at ¶55.

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[23] See Ex. 11, running resume of April 16, 2000 at 32.

[24] After the mass false arrests during the May Day demonstrations of the early 1970s, the Court imposed new requirements including that in a mass arrest situation any single officer can be the "arresting officer" for no more than 15 arrestees. The purpose of this judicially imposed requirement was to ensure that the arresting officer can reasonably have independent recollection of the particular conduct of each arrestee that allegedly constituted the offense. See Exhibit 24, Herold Dep. in Chang at 96:15 - 97:15. See also Ex. 21, MPD Manual for Mass Demonstrations and Responding to Civil Disturbances; Ex. 25, Barham, et al. v. Ramsey, et al., 434 F.3d 565 (D.C. Cir 2006).

As the arresting officer for 200 arrestees, plaintiffs'' counsel sought to depose the MPD's former Commander Radzilowski, now in retirement. The District required plaintiffs to fly Mr. Radzilowski up from Florida (and further required that plaintiffs board him in a $300 / night hotel) in order for him to appear for deposition.

Former Commander Radzilowski testified under oath that *he was not even on the scene of the arrests* despite being listed as the arresting officer for over two hundred (200) arrestees. He testified that he did not arrest a single individual. The arrest processing system will not function unless an arresting officer is identified for an arrestee. Mr. Radzilowski recalled that an officer from Prisoner Control called him to say "they need a name for arrests" and Radzilowski told them to go ahead and enter his name. See Ex. 23, Radzilowski dep. at 124:6 - 125:11, 127:18 - 129:5. They called him because "I'm Mr. SOD. I was the head of SOD [Special Operations Division]." Id. at 129:4 – 5; PSMF at ¶56.

There are no reliable arrest records, just as there are no witnesses to any alleged unlawful conduct.

This type of extraordinary (or ordinary, as it may be) inability to either produce documentation or establish probable cause for the arrests of nearly seven hundred persons places this case squarely within the circumstances confronted in connection with the 1971 May Day demonstrations in Sullivan v. Murphy. This Court should, as did the Sullivan Court, order and declare the arrest of the plaintiff class to be invalid and unconstitutional.

E. The District of Columbia Is Liable for the Mass False Arrest of the Class Pursuant to *Respondeat Superior* for the Common Law Claims and also Pursuant to 42 U.S.C. §1983 for the Constitutional Claims

The municipal defendant, the District of Columbia, is liable for the intentional torts of its officers acting within the scope of employment through *respondeat superior*. See Wade v. District of Columbia, 310 A.2d 857, 860 - 863 (D.C. 1972). It is therefore liable to the class for the mass false arrest, in the absence of probable cause, of the class.

The District of Columbia is also liable to the class for constitutional violations pursuant to 42 U.S.C. §1983. The arrest of the class was made pursuant to municipal policy, practice or custom and was both approved and ratified by Chief Ramsey.[25]

1. The District of Columbia Arrested the Class Pursuant to an Unconstitutional Policy or Practice of Arresting Protestors for Parading Without a Permit

Municipal liability is established where the challenged conduct was pursuant to an unconstitutional policy, practice or custom. See Monell v. Dept. of Soc. Servs., 436 U.S. 658, 695 (1978).

For reasons stated above, it is a constitutional violation to arrest for the non-arrestable civil infraction of parading without a permit.

During the tenure of Chief of Police Charles Ramsey, including on the date of the April 15, 2000 mass arrest in this case, the District maintained a policy or practice authorizing the arrest of protestors for parading without a permit. See Ex. 4, District of Columbia Rule 30(b)(6) Dep. (DC designee Burke) at 103:13 – 17; Ex. 6, District of Columbia Rule 30(b)(6) Dep. (DC designee Herold) at 40:14 – 41:4; PSMF at ¶4.

2. The April 15, 2000 Mass Arrest Was Approved by a Final Decision of Chief Ramsey, a Municipal Policy Maker; It Was Again Later Ratified by Chief Ramsey

Municipal liability is established where, as here, the challenged action was approved or ratified by a municipal officer with final policymaking authority. City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. City of Cinncinnati, 475 U.S. 469 (1986).

Charles Ramsey, as the Police Chief, had final policymaking authority with respect to the police generally, see 6A DCMR §800 (authorities of Chief of Police) and the conduct of mass arrests of protestors specifically, Ex. 17, Ramsey Dep. at 244:7 – 12 (Mayor delegates or "entrusts" to MPD the decision as to when to make mass arrests); PSMF at ¶57.

Chief Ramsey approved the April 15, 2000 mass arrest. PSMF at ¶58.

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[25] The presentation of theories of Monell liability for the purposes of this motion is limited to those for which summary judgment, without reference to genuinely disputed facts, is appropriate. Additional theories that depend on disputed issues of fact are not presented herein.

The custodial arrests began only after Chief Ramsey and Executive Assistant Chief (EAC) Gainer had been briefed and had approved and/or affirmed that mass arrest should occur. See Ex. 6, D.C. 30(b)(6) Dep. (Herold) at 183:15 – 184:10 (meeting with Acosta, Ramsey and Gainer occurred approximately twenty to thirty minutes before the first flexcuffs were applied). Chief Gainer admits that he and Ramsey were first briefed at the scene and that they acquiesced or affirmed or approved the execution of the mass arrests. See Ex. 15, Gainer Dep. at 170:10 – 14; See also Ex. 6, D.C. 30(b)(6) Dep. (Herold) at 192:18 – 193:8 (Chief Ramsey concurred with decision to arrest); id. at 195:19 – 196:16 (Gainer conveyed "approval" for arrests, before flexcuffs began to be used); PSMF at ¶58.

Any contention that Chief Ramsey's conduct did not constitute approval can be dispensed with by reference to Dellums v. Powell, 566 F.2d 216 (D.C. Cir. 1977), in which the D.C. Police Chief Jerry V. Wilson contended he was insufficiently involved with anti-Vietnam war era mass arrests for liability to attach. There, the D.C. Circuit upheld the jury finding of liability where the Chief retained personal operational control at the scene and could have withdrawn officers had he so desired, and had "collaborated on the charge upon which arrests were to be made," and advised against taking additional steps to ensure the effectiveness of dispersal orders when there was "some doubt" that the orders had been heard. Dellums, 566 F.2d at 219.

In the instant case, Chief Ramsey was the most senior officer at the scene of the arrests,[26] was "in overall command of the department,"[27] was Field Commander for the IMF/WB event,[28] had personal operational control at the scene of the mass arrests,[29] was briefed at the scene about the arrests to be made,

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[26] See Ex. 17, Ramsey Dep. at 145:9 – 11.

[27] See Ex. 28, Chain of Command (the IMF/WB event operations plan provides that Ramsey "will be in overall command of the department").

[28] Chief Ramsey testified that he is "always the field commander." See Ex. 17, Ramsey Dep. at 145:14-16.

The MPD's handbook on mass demonstrations states that "The Chief of Police, or an official designated by him, will be the Field Commander at scenes of mass demonstrations and civil disturbances." See Ex. 20 at 2.

[29] Chief Ramsey, as police chief, was the field commander. See ex. 17, Ramsey Dep. at 145:1-4 (the "field commander is the chief of police, me."); Ex. 20, MPD Manual for Mass Demonstrations and Responding to Civil Disturbances (January, 1996 rev'n) at 2 ("The Chief of Police, or an official designated by him, will be the Field Commander at scenes of mass demonstrations and civil disturbances."). Section 800 of Title 6A of the D.C.

in his words, "because it is part of my responsibility to ask why the arrests were taking place",[30] was on the scene over an hour before the custodial arrests began,[31] had the authority to stop the arrests and chose not to do so because he "saw no reason to",[32] either approved or affirmed the arrests,[33] and to this day approves the arrests as being "justified."[34] He has no apologies for the conduct of the MPD, which he characterizes as "magnificent" and restrained. See Ex. 17, Ramsey Dep. at 277:8 – 22; PSMF at ¶59.

In the more recent case of Barham v. District of Columbia, Chief Ramsey was held to have tacitly approved mass arrests where he was told the ostensible basis for arrest and did not countermand the decision and order to mass arrest. Barham v. Ramsey, 338 F. Supp.2d 48, 60 (D.D.C. 2004), aff'd, *434 F.3d 565* (D.C. Cir. 2006).

The District of Columbia, in Rule 30(b)(6) deposition, concurs that once Chief Ramsey arrived on the scene, he became the official in charge of the mass arrest. See Ex. 4, D.C. Rule 30(b)(6) Dep. (DC designee Burke) at 114:17 – 22; PSMF at ¶61.

Furthermore, Chief Ramsey - - during his tenure as Chief - - explicitly ratified the mass arrest. See Ex. 17, Ramsey Dep. at 197:9-11 (As of the date of his deposition in March, 2005, Ramsey still

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Municipal Regulations states: "The Chief of Police shall, when necessary, immediately proceed to the scene of any riot, tumultuous assemblage, or other unusual occurrence and take command of the force and direct its efforts in the work at hand." 6A D.C. Mun. Regs. 800.4.

In a deposition relating to another mass detention of protestors in connection with the 2001 Presidential Inauguration, Chief Ramsey attested that once he arrives on the scene he is the officer in charge. The responsibilities of an officer in charge on the scene is "[t]o evaluate the situation, to consult with any subordinate members or others that may be there, to make a decision as to what ultimate action ought to be taken by the Department." See Ex. 35 at 113, deposition of Chief Charles H. Ramsey in International Action Center, et al. v. United States, et al., Civil Action No. 01-00072 (GK), United States District Court for the District of Columbia.

[30] See Ex. 17, Ramsey Dep. at 155:5 – 13; See also id. at 149:21 – 150:10, 153:1 – 6.

[31] See Ex. 15, Gainer Dep. at 154:18 – 155:1, 164:9 – 166:3 (on scene one hour before custodial arrests began); Ex. 17, Ramsey Dep. at 132:1 – 7 (Gainer and Ramsey arrived together).

[32] See Ex. 17, Ramsey dep. at 166:22 – 167:17; Ex. 6, D.C. 30(b)(6) Dep. (Herold) 199:14 – 21 (Ramsey was briefed on the basis for the arrests and had the authority to cause their cessation).

[33] See Ex. 15, Gainer Dep. at 170:7 – 14 ("I don't know if [Ramsey] gave a verbal approval or okay. The two of us were there and asked questions and got the buses there and didn't protest our presence, and we acquiesced and affirmed it.")

[34] See Ex. 17, Ramsey Dep. at 197:9 – 11.

approved of the mass arrests); Ex. 6, D.C. Rule 30(b)(6) Dep. (DC designee Herold) at 200:3 – 9 (to this day, neither Gainer nor Ramsey has expressed disapproval). According to Chief Ramsey, he has "no apologies" for the conduct of the police in connection with the April, 2000 demonstrations and maintains that the MPD conducted itself "magnificently." See Ex. 17, Ramsey Dep. at 277:8 – 278:4; PSMF at ¶60

V. The Arrest of Elizabeth Butler Constitutes Common Law False Arrest, As a Matter of Law

Elizabeth Butler moves for summary judgment against the District of Columbia pursuant to *respondeat superior* for the intentional tort of its officers in causing her false arrest for "failure to obey" an order to leave the premises of 1328 Florida Avenue, protestors' Convergence Center, on April 15, 2000.

The municipal defendant, the District of Columbia, is liable for the intentional torts of its officers acting within the scope of employment through *respondeat superior*. See Wade v. District of Columbia, 310 A.2d 857, 860 - 863 (D.C. 1972). It is therefore liable to Ms. Butler for her false arrest.[35]

There was no probable cause to arrest Ms. Butler for failure to obey, or any other offense.

Furthermore, there exists no witnessing or arresting officer to provide testimony in support of the arrest of Elizabeth Butler for failure to obey.

Ms. Butler was an activist organizer who had demonstration-related responsibilities in connection with protestors' Convergence Center, a meeting and gathering space located at 1328 Florida Avenue. From the period of January, 2000 she had been actively involved in organizing for the Convergence Center. In the days leading up to April 15, 2000, Ms. Butler been coordinating trainings and art sessions and coordinating the use of the Convergence Center for persons who were planning to protest in connection with the April 16 and 17, 2000 IMF/WB protests. See Ex. 27, Butler Dep. at 8:16 – 11:14; PSMF at ¶62.

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[35] The decision to move for summary judgment only on *resondeat superior* grounds should not be taken as a suggestion that Monell liability under 42 U.S.C. §1983 does not exist. However, the bases for Monell liability with respect to Ms. Butler are viewed by plaintiffs' counsel as turning on disputed issues of fact and are therefore not presented in the context of this motion.

On April 15, 2000, the District of Columbia sent dozens of police into the Convergence Center and shut it down. Ms. Butler was at the door of the Convergence Center when officers pushed their way in, without a warrant. Id. at 47:12 – 48:17; PSMF at ¶63.

Ms. Butler met with a police officer who introduced himself as the officer in charge. Id. at 48:7 – 51:2; PSMF at ¶64.

Ms. Butler believed that her and everyone else's rights were being violated by the police action to raid and close down the Convergence Center. However, she recognized the importance of cooperating with the police in order to avoid a situation in which police would create a pretext for a mass arrest.

Ms. Butler explained in her deposition:

> "We offered to go through [the Convergence Center] and remove any concerning items [the presence of which the police claimed violated the Fire Code]. They [the police] refused that. They said we will sort this out later. Everyone has to leave immediately. And I offered, given that they were quite clear with their dozens of officers, that regardless of whether or not that [order to leave] was a violation of the law, regardless of whether or not we had a right to be there, regardless of whether or not they were actually violating our First Amendment rights to free speech, a right to congregate and prepare for these demonstrations, they were saying that if everyone didn't leave immediately, that they were going to arrest them, even though they did not have a warrant. Even though we offered to remove any offending fire code violation items, that they were saying if everyone did not leave, they were going to arrest them.
>
> I said to the gentleman in charge, fine, let *us* do it. They were not going to trust you, given the fact that you just barged in the front door with dozens of officers, and let *us* remove people from the premises, in which case myself and other people started announcing to everyone that they needed to leave the building, that the police were telling us that they were going to get arrested if we didn't leave."

Id.at 50:15 – 51:19.

The officer in charge advised that the protestors could remove personal property only as they left the premises. Ms. Butler communicated that, at large, and a line was formed with people passing personal property, backpacks, etc., out the door. Id. at 55:14 – 56:17; PSMF at ¶65.

There were multiple instances when rank and file officers turned to Ms. Butler and asked her, as they were demanding generally, to leave. The officer in charge told those officers "She can stay. She's helping us get people out." For this reason, she was never required to leave. Id. at 55:9 – 12; PSMF at ¶66.

There came a time when another MPD official, an African-American man displaying a gold badge and wearing a trench coat, appeared on the scene. He countermanded the earlier allowance that personal property could leave the premises, and ordered that it all be returned. Ms. Butler explained to him that the officers had been telling us that personal property can be removed, but the man insisted that nothing could leave. Id. at 55:13 – 56:1; PSMF at ¶67.

As the evacuation became completed with the aid of Ms. Butler, she was leaving the building along with a number of officers. The MPD official with the gold badge and trench coat approached. He pointed to Ms. Butler and the one other woman who was also aiding the evacuation and he said, "I am sick of these two, arrest them." Id. at 71:20 – 72:13, 74:6 – 75:5; PSMF at ¶68.

Another officer complied. Ms. Butler repeatedly asked why she was being arrested. The officer who placed the handcuffs on her told her that she would have to ask him, referring to the man with the gold badge and trench coat. Id. at 74:9 – 74:12. That man refused to answer. Id.; PSMF at ¶69.

Ms. Butler did not learn the charge for her arrest until her arraignment. Id. at 74:19 – 75:4; PSMF at ¶70.

Ms. Butler was never given a lawful order which she failed to obey. Id. at 74:22 – 75:1. PSMF at ¶71.

Ms. Butler was, in fact, cooperating with the police.

> "I had been through the entire time cooperating with the police, irony of the entire situation. I had been one of the main people asking people to comply with the police order to remove themselves from the premises. So, the entire time I had been communicating with people and helping aid the evacuation of the building.
> Once I established that regardless of whether or not we had a right to be there, the police were intent on either leaving by our own feet or in paddy wagons, and once I had clearly established that there was no way to address the clear violations of our civil rights at that moment, then it was more important for me to make sure that the people who had come to the demonstration against the IMF and the World Bank had a chance to do that, rather than sit in a jail cell for days, which was clearly in my opinion at the time the reasons that the dozens of officers had shown up with the paddy wagons was to prevent the demonstrations the next day.
>
> So, I was aiding an evacuation, not because I believe that they had a right to actually evacuate the building, but because I wanted to make sure that the people who had come

in from around the country had the ability the following day to be on the streets and to demonstrate against the IMF and the World Bank. . ." Id. at 67:16 – 68:7.

Conclusion

For the reasons stated above, and all others that may be deemed by the Court to be just and appropriate, judgment should issue as a matter of law in favor of the plaintiff class against the District of Columbia municipality on common law claims pursuant to *respondeat superior* and constitutional claims pursuant to 42 U.S.C. §1983. Judgment should issue as a matter of law in favor of plaintiff Elizabeth Butler against the District of Columbia municipality on common law claims pursuant to *respondeat superior*.

Respectfully submitted,

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_/s/________________________

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