SUPREME COURT OF THE UNITED STATES

No. 97–1121

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

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

[June 10, 1999]

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins, concurring in part and concurring in the judgment.

I agree with the Court that Chicago's Gang Congregation Ordinance, Chicago Municipal Code §8–4–015 (1992) (gang loitering ordinance or ordinance) is unconstitutionally vague. A penal law is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" or fails to establish guidelines to prevent "arbitrary and discriminatory enforcement" of the law. *Kolender* v. *Lawson*, 461 U. S. 352, 357 (1983). Of these, "the more important aspect of vagueness doctrine 'is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id.*, at 358 (quoting *Smith* v. *Goguen*, 415 U. S. 566, 574–575 (1974)). I share JUSTICE THOMAS' concern about the consequences of gang violence, and I agree that some degree of police discretion is necessary to allow the police "to perform their peacekeeping responsibilities satisfactorily." See *post*, at 12 (dissenting opinion). A criminal law, however, must not permit policemen, prosecutors, and juries to conduct "'a standardless sweep . . . to pursue their personal predilections.'" *Kolender* v. *Lawson*, *supra*, at 358 (quoting *Smith* v. *Goguen*, *supra*, at 575).

The ordinance at issue provides:

> "Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section." App. to Pet. for Cert. 61a.

To "[l]oiter," in turn, is defined in the ordinance as "to remain in any one place with no apparent purpose." *Ibid.* The Illinois Supreme Court declined to adopt a limiting construction of the ordinance and concluded that the ordinance vested *"absolute* discretion to police officers." 177 Ill. 2d 440, 457, 687 N. E. 2d 53, 63 (1997) (emphasis added). This Court is bound by the Illinois Supreme Court's construction of the ordinance. See *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949).

As it has been construed by the Illinois court, Chicago's gang loitering ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement officers. In particular, it fails to provide police with any standard by which they can judge whether an individual has an *"apparent* purpose." Indeed, because any person standing on the street has a general "purpose"– even if it is simply to stand– the ordinance permits police officers to choose which purposes are *permissible*. Under this construction the police do not have to decide that an individual is "threaten[ing] the public peace" to issue a dispersal order. See *post*, at 11 (THOMAS, J., dissenting). Any police officer in Chicago is free, under the Illinois Supreme Court's construction of the ordinance, to order at his whim any person standing in a public place with a suspected gang member to disperse. Further, as construed by the Illinois court, the ordinance applies to hundreds of thousands of persons who are *not* gang mem-

bers, standing on any sidewalk or in any park, coffee shop, bar, or "other location open to the public, whether publicly or privately owned." Chicago Municipal Code §8–4–015(c)(5) (1992).

To be sure, there is no violation of the ordinance unless a person fails to obey promptly the order to disperse. But, a police officer cannot issue a dispersal order until he decides that a person is remaining in one place "with no apparent purpose," and the ordinance provides no guidance to the officer on how to make this antecedent decision. Moreover, the requirement that police issue dispersal orders only when they "reasonably believ[e]" that a group of loiterers includes a gang member fails to cure the ordinance's vague aspects. If the ordinance applied only to persons reasonably believed to be gang members, this requirement might have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued. Cf. *ante,* at 18–19. But, the Illinois Supreme Court did not construe the ordinance to be so limited. See 177 Ill. 2d, at 453–454, 687 N. E. 2d, at 62.

This vagueness consideration alone provides a sufficient ground for affirming the Illinois court's decision, and I agree with Part V of the Court's opinion, which discusses this consideration. See *ante,* at 18 ("[T]hat the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue"); *ante,* at 18–19 ("It is true . . . that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members"). Accordingly, there is no need to

consider the other issues briefed by the parties and addressed by the plurality. I express no opinion about them.

It is important to courts and legislatures alike that we characterize more clearly the narrow scope of today's holding. As the ordinance comes to this Court, it is unconstitutionally vague. Nevertheless, there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence. For example, the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a "harmful purpose," see *id.*, at 18, from laws that target only gang members, see *ibid.*, and from laws that incorporate limits on the area and manner in which the laws may be enforced, see *ante*, at 19. In addition, the ordinance here is unlike a law that "directly prohibit[s]" the "'presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways,'" that "'intimidates residents.'" *Ante*, at 7 (quoting Brief for Petitioner 14). Indeed, as the plurality notes, the city of Chicago has several laws that do exactly this. See *ante*, at 7–8, n. 17. Chicago has even enacted a provision that "enables police officers to fulfill . . . their traditional functions," including "preserving the public peace." See *post*, at 10 (THOMAS, J., dissenting). Specifically, Chicago's general disorderly conduct provision allows the police to arrest those who knowingly "provoke, make or aid in making a breach of peace." See Chicago Municipal Code §8–4–010 (1992).

In my view, the gang loitering ordinance could have been construed more narrowly. The term "loiter" might possibly be construed in a more limited fashion to mean "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities." Such a definition would be consistent with the Chicago City Council's findings and would avoid

the vagueness problems of the ordinance as construed by the Illinois Supreme Court. See App. to Pet. for Cert. 60a–61a. As noted above, so would limitations that restricted the ordinance's criminal penalties to gang members or that more carefully delineated the circumstances in which those penalties would apply to nongang members.

The Illinois Supreme Court did not choose to give a limiting construction to Chicago's ordinance. To the extent it relied on our precedents, particularly *Papachristou* v. *Jacksonville*, 405 U. S. 156 (1972), as *requiring* it to hold the ordinance vague in all of its applications because it was intentionally drafted in a vague manner, the Illinois court misapplied our precedents. See 177 Ill. 2d, at 458–459, 687 N. E. 2d, at 64. This Court has never held that the intent of the drafters determines whether a law is vague. Nevertheless, we cannot impose a limiting construction that a state supreme court has declined to adopt. See *Kolender*, 461 U. S., at 355–356, n. 4 (noting that the Court has held that "[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation we must take the statute as though it read precisely as the highest court of the State has interpreted it'" (citations and internal quotation marks omitted)); *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982) (noting that where the Court is "dealing with a state statute on direct review of a state-court decision that has construed the statute[,] [s]uch a construction is binding on us"). Accordingly, I join Parts I, II, and V of the Court's opinion and concur in the judgment.