D.C. Criminal Code Reform Commission

Testimony of Executive Director Jinwoo Park on B25-0555 the "Addressing Crime Trends (ACT) Now Amendment Act of 2023"

COMMITTEE ON THE JUDICARY & PUBLIC SAFETY HEARING
November 29, 2023

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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I. Introduction

The CCRC submits this written testimony as a supplement to oral testimony provided at the November 29, 2023 hearing held by the Committee on the Judiciary and Public Safety. The CCRC also notes that it has not provided oral or written remarks on every Title within this bill.

II. Comments on Specific Provisions

A. Changes to the First Degree Theft Offense and New Directing Organized Retail Theft Offense

The bill includes two separate provisions that appear to be targeted at addressing retail theft. The provisions would expand the first degree theft offense and create a new separate directing organized retail theft offense. For the reasons set forth below, the CCRC opposes the proposed changes to first degree theft and creation of the new directing organized retail theft offense.

1. Changes to First Degree Theft

This bill creates two new forms of first degree theft. Currently, theft is divided into two grades. First degree theft, which requires that the property stolen is valued at $1,000 or more; and second degree theft, which requires that the property has any value. The two degrees of theft carry significantly different maximum penalties: first degree theft is a felony with a maximum sentence of 10 years, while second degree theft is a misdemeanor with a maximum sentence of 180 days. This bill would redefine first degree theft to include stealing 10 or more items with a value of at least $250 over a 30-day period, or in the course of or in furtherance of such theft, knowingly commits assault or intentionally destroys or damages the property of the retail establishment. Because these changes are unnecessary to ensure criminal liability and risk imposing disproportionately severe penalties, the CCRC opposes these changes to the first degree theft offense.

a. 10 Items Valued at $250

Re-defining first degree theft to include stealing 10 or more items over a 30 day period with an aggregate value of $250 is both unnecessary and risks disproportionately severe penalties. This change is unnecessary when applied to items being stolen over a prolonged 30 day period. Under current law, if a person steals 10 items on 10 separate occasions, they can be prosecuted for *10 separate* counts of theft. Even if each item is valued at under $1,000 and only misdemeanor liability applies to each count, this would provide a maximum aggregate sentence of nearly 5 years.[1] Moreover, under the current D.C. Voluntary Sentencing Guidelines, sentences for even non-violent misdemeanors may be ordered to be served *consecutively* when they did not occur on a single day.

Imposing a 10-year maximum sentence for stealing multiple items valued at $250 is disproportionately severe. Theft is a non-violent property offense that is typically treated as a misdemeanor. Felony theft liability is reserved for objects with significant value. For example, if someone steals a single backpack that contains three textbooks, two notebooks, three pens and a pack of gum with an aggregate value of $250 or more, they would be subject to felony liability with a 10 year maximum sentence. Stealing a single bag also valued at $250 would be a

[1] Second degree theft is punishable by 180 days. D.C. Code § 22-3212. Ten counts of misdemeanor theft would therefore authorize a maximum aggregate sentence of 1,800 days, or 4 years and 339 days.

misdemeanor, with a 180 maximum sentence; less than *one twentieth* the sentence for stealing a bag that contained 9 items.

b. Commits Assault or Destroys or Damages the Property of the Retail Establishment

The bill would change the first degree theft offense to include either knowingly committing assault or intentionally destroying or damaging the property of the retail establishment during the course of and in furtherance of the theft. With respect to committing an assault during the course of and in furtherance of theft, this revision is unnecessary as this conduct is criminalized as robbery. With respect to causing property damage of a retail establishment, this revision is also unnecessary as separate charges of malicious destruction of property can be brought. In addition, applying felony liability to non-violent property crimes, *regardless of the value involved*, is disproportionately severe. Accordingly, the CCRC objects to these changes to the first degree theft offense.

Knowingly committing an assault during the course of a theft constitutes robbery, and it is unnecessary to re-define the theft offense to include this conduct. Both the D.C. Court of Appeals[2] and centuries of legal authorities[3] have clearly stated that theft and robbery are distinguished by the use force or threats. This revision would eviscerate this fundamental distinction between larceny and robbery by treating theft accomplished through the use of force or threats as not only robbery, but theft.

This revision creates clear overlap between the theft and robbery statutes but provides no guidance as to whether a person may be convicted of *both* theft and robbery based on a single act. If the offenses are intended to merge, this revision is entirely superfluous. Any person who commits first degree theft by committing an assault would *necessarily* also have committed robbery, which carries a maximum sentence of 15 years. If the offenses do not merge, the penalties are disproportionately severe. A person who commits assault during the course of a theft could be convicted of both first degree theft and robbery, which together carry an aggregate maximum sentence of 25 years. If these offenses do not merge, committing even a minor assault, such as a shove, in furtherance of theft would be subject to a maximum sentence ***5 years longer than the maximum sentence for second degree sexual abuse***[4] (which includes engaging in sexual intercourse with an unconscious person) and ***10 years longer than committing assault with intent to kill.***[5] The use of force in furtherance of theft is serious conduct, and the code already adequately criminalizes and penalizes this conduct through the robbery statute.

Revising first degree theft to include any property damage to a retail establishment creates disproportionate penalties. Although property damage constitutes an additional harm beyond theft itself, that harm is properly accounted for by the current malicious destruction of property offense.[6] Malicious destruction of property is punishable by up to 180 days, or 10 years if the property damage is more than $1,000. Similar to the theft offense, felony liability is reserved for causing damage to highly valuable property. Under this revision, a person who steals a single candy bar and while fleeing knocks over a store display causing minor property damage would be subject to

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[2] *Lattimore v. United States*, 684 A.2d 357, 360 (D.C. 1996).

[3] *See*, § 20.3. Robbery, 3 Subst. Crim. L. § 20.3 (3d ed.) (noting that "Robbery consists of all six elements of larceny . . . plus two additional requirements: [] that the property be taken from the person or presence of the other and [] that the taking be accomplished by means of force or putting in fear.").

[4] D.C. Code § 22-3003.

[5] D.C. Code § 22-401.

[6] D.C. Code § 22-303.

a 10 year felony, even though the value of property taken and damaged was very low. This non-violent property crime would be subject to the same maximum sentence as aggravated assault, which requires inflicting serious bodily injury.[7]

2. Creates New Directing Organized Retail Theft Offense

The bill creates a new directing organized retail theft offense. This offense requires that the defendant directs, recruits, or coerces two or more people to commit theft of merchandise valued at more than $1,000, with intent sell, barter, or trade the merchandise, or fraudulently return the merchandise to a retail merchant. The organized retail offense would be punishable by a maximum of 15 years. Although the CCRC takes this conduct seriously, it opposes creation of this new offense because it does not address a gap in liability or create proportionate penalties.[8] All conduct covered under this offense is already covered by *multiple* criminal statutes under current law, and creating a new offense that would authorize an additional 15-year maximum sentence is disproportionately severe for a non-violent property offense.

The current code provides liability both for people who direct others to engage in criminal acts and those who agree to commit criminal acts with others. People who direct others to commit a criminal offense may be charged as accomplices, and are subject to the same maximum sentences as those who actually commit the offense.[9] Accomplice liability requires that the person aids, assists, or even merely *encourages* another person to commit an offense.[10] A person who directs, recruits, or coerces another to commit offense can be held liable for that offense as an accomplice.

In addition, people who agree to commit a crime together can be held liable for criminal conspiracy.[11] Conspiracy liability has two basic requirements. First, two or more persons agree to commit a criminal act.[12] A person can be convicted of conspiracy even if they only agreed to play a minor role in the criminal act.[13] For example, merely aiding a group in planning the criminal act is sufficient to satisfy this element of conspiracy liability. Second, at least one party to the conspiracy must take one overt act in furtherance of the conspiracy.[14] The overt act requirement is

[7] D.C. Code § 22-404.01.
[8] While organized retail theft undoubtedly occurs, the CCRC does not have data available to demonstrate exactly how prevalent this conduct is within the District, or the degree to which it has become more common in recent years. However, national news outlets have reported that the National Retail Federation overstated the role of organized retail theft on total lost merchandise by a factor of 10. Eduardo Medina, *Retail Group Retracts Startling Claim About 'Organized' Shoplifting*, N.Y. Times, December 8, 2023.
[9] D.C. Code § 22-1805.
[10] D.C. Code § 22-1805. Accomplice liability requires "advising, inciting, or conniving at the offense, or aiding or abetting the principal offender[.]". The D.C. Court of Appeals has held that "one can be found guilty of aiding and abetting by merely encouraging or facilitating a crime." *Evans v. United States*, 160 A.3d 1155, 1161 (D.C. 2017); *Settles v. United States*, 522 A.2d 348, 356 (D.C. 1987).
[11] *McCullough v. United States*, 827 A.2d 48, 59 (D.C. 2003) (noting "a conspiracy count does not merge with any underlying offense").
[12] E.g., *McCullough*, 827 A.2d at 58; *Gibson v. United States*, 700 A.2d 776, 779 (D.C. 1997).
[13] *Thomas v. United States*, 748 A.2d 931, 939 (D.C. 2000).
[14] D.C. Code § 22-1805a(b) ("No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose."). Hairston v. United States, 905 A.2d 765, 784 (D.C. 2006); see, e.g., Mitchell v. United States, 985 A.2d 1125, 1135 (D.C. 2009). The District's criminal jury instructions further clarify that this overt act must have been committed "for the purpose of carrying out the conspiracy." D.C. Crim. Jur. Instr. § 7.102.

not exacting. The DCCA has held that "a preparatory act, innocent in itself, may be sufficient."[15] Once a party to the conspiracy has committed just one overt act, all parties to the conspiracy may be held liable for criminal conspiracy, *even if the criminal offense is never actually committed*.

Accomplice and conspiracy liability doctrines under current law provide significant criminal penalties for the conduct defined under the proposed directing organized retail theft offense. In virtually every case in which a person commits the proposed directing organized retail theft offense, that person will also be liable for numerous offenses under current law as an accomplice and conspirator.

First, a person who directs others to commit retail theft can be prosecuted for theft as an accomplice. Under current law a person who directs 2 people to engage in retail theft would be guilty of two counts of misdemeanor theft, each carrying a maximum 180 day sentence. If the person directs additional persons to engage in theft, they can be convicted as an accomplice to each separate theft, increasing the maximum range of penalties. If any person steals property valued at $1,000 or more, the person directing that theft can be convicted as an accomplice to first degree theft, subject to a maximum 10 year sentence.

Second, in addition to accomplice liability for theft, a person who directs people to engage in organized retail theft can also be charged as an accomplice to *burglary*. The proposed statutory language for the organized retail theft offense defines the term "organized retail theft" as committing theft "of any merchandise." Although it is not explicitly included as an element of the offense, this definition strongly suggests that the proposed offense requires theft from a retail establishment. Second degree burglary is defined as entering any building—including a retail establishment—with intent to commit *any crime* within.[16] A person who enters a store with intent to shoplift an item from within has committed second degree burglary, a felony offense punishable by up to 15 years. Again, an accomplice may be punished as severely as one who actually commits the offense. A person who directs others to shoplift from a store can be charged as an accomplice to second degree burglary *as to each individual* who enters a store with intent to shoplift. Since the proposed directing organized retail theft offense requires that two or more people act in concert to steal merchandise, a person could be liable as an accomplice for two counts of second degree burglary, which would authorize a combined maximum *30 years* of incarceration.

Third, a person who organizes two or more people to engage in retail theft can be convicted of *conspiracy* to commit theft. Conspiracy, even to commit a misdemeanor offense such as petty theft or shoplifting, is a felony offense punishable by a maximum of 5 years.

Finally, in some cases additional charges can be brought. If the person directs *minors* to commit criminal offenses, that person can also be charged with contributing to the delinquency of a minor, which is punishable by up to 5 years for each minor.[17] The directing organized retail theft offense also includes *coercing* a person, which in some cases could blackmail,[18] which is subject to a 5 year maximum sentence.

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[15] *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992) (citing *Iannelli v. United States*, 420 U.S. 770, 786 n.17 (1975)).
[16] D.C. Code § 22-801.
[17] D.C. Code 22-811(b)(4). The maximum penalty for contributing to the delinquency of a minor is 180 days if the person causes a minor to engage in a misdemeanor, or 5 years if the person causes a minor to engage in a felony, such as second degree burglary.
[18] D.C. Code § § 22–3252.

a. The Proposed Directing Organized Retail Theft is More Difficult to Prove than Current Offenses

The proposed organized retail theft offense does not close a gap in law or even make it easier to make arrests or obtain convictions; conspiracy and accomplice liability are *easier* to prove than the proposed organized retail theft offense. In *every case* in which police officers have probable cause to make an arrest under the proposed directing organized retail theft offense, they have probable cause to make an arrest under current law. In *every case* in which the U.S. Attorney's office can prove beyond a reasonable doubt that the defendant committed directing organized retail theft, they can also prove that the defendant acted as an accomplice and conspirator to numerous criminal offenses.

The proposed directing organized retail theft offense is *more difficult* to prove than either accomplice or conspiracy liability as it requires both that the aggregate value of stolen items is $1,000 or more and that the items were intended to be sold, bartered, or traded, or fraudulently returned to a retail merchant. If a person directs others to steal merchandise and there is any reasonable possibility that the persons who stole the merchandise had intent to keep and use the items themselves, there is no liability under the proposed directing organized retail theft offense.

b. Directing Organized Retail Theft Penalized More Severely than 2nd Degree Murder

As discussed above, the conduct criminalized under the proposed directing organized retail theft offense is already criminalized under various provisions in the current D.C. Code, and subject to lengthy maximum sentences. A person who commits the proposed offense can, under current law, be charged with two counts of second degree burglary as an accomplice, two counts of misdemeanor theft as an accomplice, and criminal conspiracy. These offenses provide an aggregate maximum sentence of nearly 36 years.

Creating a new organized retail offense, which carries a 15 year maximum sentence and overlaps with current forms of liability would authorize an aggregate maximum sentence of nearly *51 years*. Absent aggravating factors, such as the decedent being a young child or elderly person, the maximum sentence for second degree murder is 40 years.[19] Therefore, directing two people to shoplift merchandise would be subject to a ***longer maximum sentence than second degree murder***. If the proposed offense is codified, the D.C. Code would authorize a longer sentence for directing two people to shoplift merchandise than for intentionally killing another person.

It is patently disproportionate to subject this conduct to a longer maximum sentence than second degree murder. Current offenses, which are easier to prove than the proposed directing organized retail theft offense, already provide ample penalties for this conduct.

This type of reactive legislation—which creates an unnecessary and overlapping criminal offense when penalties are already sufficiently severe—is the reason the District has a disorganized code with needlessly duplicative offenses and disproportionate penalties. This is type of legislation is why the current code has not just a destruction of property offense,[20] but a separate destroying boundary stones offense;[21] why there is not just an offense criminalizing disposing of trash into waterways,[22] but an offense that specifically prohibits disposing of watermelons and cantaloupes

[19] D.C. Code §§ 22-2104; 24–403.01(b-2).
[20] D.C. Code § 22-303.
[21] D.C. Code § 22-3309.
[22] D.C. Code § 8-902.

in the Potomac river.[23] It's why current code includes two threats statutes that are identical except one has a maximum sentence 40 times longer than the other.[24]

The District already has one of the worst criminal codes in the nation, and the CCRC recommends against further degrading the code with unnecessary, overlapping measures that create disproportionate penalties, while not improving public safety and order.

B. Reinstate Anti-Mask Law

The bill would re-instate an anti-mask law that would criminalize wearing a mask or hood with intent to engage in an array of specified behaviors including committing criminal offenses, civil infractions; depriving persons of equal protection under the law; using or threatening the use of force, to injure, intimidate, or interfere with any person because of their exercise of any right; intimidating, abusing, or harassing another person; or causing a person to fear for their personal safety. Although the law may serve useful law enforcement purposes, the CCRC notes that some applications of the law may violate first amendment free speech rights, and other uses that are constitutional may nonetheless create a risk of fourth amendment violations. The CCRC discusses the potentially problematic provisions below.

1. Recklessness Mental State as to Putting Others in Fear

The anti-mask offense criminalizes wearing a mask or hood "where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability." It is possible, at least as applied in particular cases, that this provision violates the Constitution's protections on free speech.

This last term, the Supreme Court decided *Counterman v. Colorado,* in which it reviewed a threats statute that was silent as to intent. The Court held that the First Amendment "requires proof that the defendant had some subjective understanding of the threatening nature of his statements . . . but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another."[25] However, the *Counterman* decision was limited to "true threats", i.e. "serious expression[s] conveying that a speaker means to commit an act of unlawful violence."[26] Whether a threat constitutes a "true threat" is not based on the speaker's intent, but on "what the statement conveys to the person on the other end."[27] If mask-wearing does not constitute a "true threat," arguably criminalizing mask-wearing on the basis of a reckless mental state may violate the First Amendment's free speech protections.

Whether or not the act of wearing a mask would be considered a "true threat" is an open question. Conduct such as burning crosses has previously been deemed a "true threat."[28] If a later court

[23] D.C. Code § 22-4402.
[24] D.C. Code §§ 22-407; 22-1810. The D.C. Court of Appeals has held that "both the misdemeanor and the felony offenses have identical elements." *Joiner v. United States*, 585 A.2d 176, 180 (D.C. 1991). However, the misdemeanor threats statute has a maximum sentence of 6 months and the felony threats statute has a maximum sentence of 20 years.
[25] *Counterman v. Colorado*, 600 U.S. 66, 69 (2023).
[26] *Id.* at 74 (internal quotations omitted).
[27] *Id.*
[28] *See, Virginia v. Black,* 538 U.S. 343 (2003).

found that wearing a mask did constitute a "true threat" then the recklessness mental state requirement of the proposed anti-mask statute would probably be deemed Constitutional under *Counterman*. This prong of the anti-mask law does require that "it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions," though this would not necessarily require that the mask-wearing constitutes a true-threat. Given that there are many reasons one would wear a mask, and First Amendment expression is clearly implicated by the statute, there is at least some risk that this statute could be found unconstitutional as applied in particular cases.

2. Use of the Anti-Mask Law to Conduct Terry Stops

In addition to possible first amendment concerns, the anti-mask law *could* be used in a manner that implicates fourth amendment rights as well. Testimony at the November 29, 2023 hearing indicated that the Metropolitan Police Department may be interested in using this statute as a means to stop people under the terms of *Terry v. Ohio*.[29] Under *Terry*, law enforcement may temporarily seize[30] a person for investigatory purposes when there is reasonable articulable suspicion that the person is going to commit a crime. This degree of suspicion is less stringent than that required to establish probable cause, which would authorize a lawful arrest. In addition, when an officer "has reason to believe that he is dealing with an armed and dangerous individual," the officer may also perform a pat-down search for weapons. In determining whether the temporary seizure is lawful, courts must assess the following: (1) there must be "articulable facts" evident in the Record, (2) that "taken together with rational inferences from those facts," (3) when viewed objectively, permit a law-enforcement officer to "reasonably" "conclude in light of his experience that criminal activity may be afoot."[31] This is true even if each of those acts may be "innocent in itself, but which taken together warranted further investigation."[32]

Under *Terry*, regardless of whether the mask-law is reinstated, officers who have reasonable articulable suspicion that a person is going to commit a crime are legally permitted to conduct an investigatory stop into possible criminal activity. For example, if a masked person is casing a store for a possible burglary or robbery, an officer is legally permitted to perform an investigatory stop under *Terry*. In these cases, whether the mask-law is reinstated will have no effect on officer's lawful authority to perform investigatory stops.

Re-instating the mask law would in certain cases authorize law enforcement to conduct *Terry* stops when there is articulable suspicion that a person is committing *the mask offense itself*, as opposed to some other independent offense such as robbery or burglary. As discussed above, the mask offense prohibits wearing a mask "where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability." Assuming criminalizing this type of mask-wearing does not violate the first amendment, without clear guidance, an officer would have wide latitude to decide what would put a person in reasonable fear for their safety. Some might feel that a person simply wearing a ski mask when it is not sufficiently cold outside is frightening enough and would feel entitled to make a stop or even an arrest. Certain religious garb covers the face and if an officer felt that it made other people feel

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[29] *Terry v. Ohio*, 392 U.S. 1 (1968).
[30] A "seizure" for the purposes of the Fourth Amendment occurs when a reasonable person would not feel free to terminate the police encounter. *Terry*, 392 U.S. at 16 (1968) ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").
[31] *Id*. at 21-22, 30.
[32] *Id*. at 22.

fearful then he would theoretically have the authority to make an arrest under the proposed statute, even if the arrestee had no intention to do anything to hurt or bother anyone.

The CCRC believes that *Terry* stops based on reasonable articulable suspicion that a person is going to commit the mask offense itself is Constitutionally permissible in many contexts, but there is a risk that these stops could be used in a broader context and ensnare innocent residents who happen to be wearing masks.

3. Wearing a Mask with Intent to Harass and Protected Speech

The proposed anti-mask law may implicate traditionally protected speech. The fourth prong of the proposed statute prohibits wearing a mask with the intent to intimidate, threaten, abuse, or *harass* any other person. The law already prohibits threats, which is consistent with Constitutional free speech protections, but depending on the conduct, there are instances where intent to harass can and should be legal. For example, a person is well within their rights to stand outside the Wilson building and yell at passing public officials about how the government is being run. This type of critical speech, even if non-threatening, could constitute harassment. If the same person, wishing to remain anonymous, yells at public officials while wearing a mask it appears that they could be in violation of anti-mask law, even though they are engaging in protected speech.

C. Drug-Free Zones

The bill proposes giving the Chief of the Metropolitan Police Department (MPD) power to declare "any public area a drug free zone for a period not to exceed 120 consecutive hours." "Drug free zone" is a statutorily defined term and cannot exceed a square of 1000 feet on each side. The bill provides factors the Chief must consider in deciding to declare a drug free zone, but on its face places no limitations on the Chief's authority and provides no required factual findings or standards for evaluating the enumerated factors.

If the Chief declares an area to be a drug free zone, the police must mark the borders of the drug free zone with barriers, tape, or stationed police officers and provide notice that "it is unlawful for a person to congregate in a group of 2 or more persons for the purpose of committing an offense under [the Controlled Substances Act] within the boundaries of the drug free zone, and to fail to disperse after being instructed to disperse by a uniformed officer of the police department who reasonable believes the person is congregating for the purpose of committing an offense under [the Controlled Substances Act]."

The bill then establishes a new two-part criminal offense for congregating in a group of 2 or more persons in a drug free zone with the purpose of committing an offense under the Controlled Substances Act (CSA), and failing to disperse after being instructed to disperse by a uniformed officer of the police department who reasonably believes the person is congregating for the purpose of committing an offense under the CSA. The bill provides that the determination that a person is congregating in the zone for the purpose of violating the CSA is based on the totality of the circumstances and provides numerous circumstances to be considered. Many of the enumerated circumstances cover wholly lawful conduct marginally or not at all relevant to the question of whether the person is *presently* congregating in the drug free zone for the purpose of violating the

CSA and will not be sufficient to establish a reasonable belief in the person's purpose.[33] The bill provides no guidance on how to evaluate the factors and does not require the officer's basis of reasonable belief to be based on the person's actual conduct while congregating in the zone.

The proposed bill does contain elements that address some of the reasons similar laws have been struck down as unconstitutional and may be construed narrowly enough to survive a facial challenge. If it survives, a careful implementation will be necessary to avoid unconstitutional enforcement. Assuming constitutionality though, the value of establishing a temporary drug free zone is unclear because (1) it will be extremely difficult for police to establish probable cause for the new offense in the absence of probable cause for another already existing offense, and (2) any deterrent impact on drug activity in the zone can be effectuated by an increase police presence and is not dependent on declaring a drug free zone.

1. Constitutionality

The constitutionally of a particular statute can be challenged through both facial challenges, meaning the statute attacked is unconstitutional on its face, and as-applied challenges, meaning the statute is constitutional on its face but attacked as unconstitutional in its implementation. Facial challenges are generally easier for governments to overcome than as-applied challenges. Courts have a strong preference for deciding constitutional questions on an as-applied basis[34] and generally only strike down statutes on their face when there is no set of circumstances under which the statute could be deemed valid."[35] When a narrow interpretation of statutory text can be imposed to avoid an unconstitutional construction, courts will typically adopt the narrowed interpretation that makes a statute constitutional under those narrow circumstances. This means even where statutory language is upheld as facially constitutional, a statute can be unconstitutional in a particular application of the law.

a. Facial Challenges

As noted above, courts have a strong preference for as-applied challenges and facial challenges to the constitutionality rarely succeed. Courts generally prefer to wait until the harm has occurred, such as after an unlawful arrest, to address a constitutional violation. When it comes to

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[33] For example, one of the circumstances listed includes that "such a person has no other apparent lawful reason for congregating in the drug free zone, such as waiting for a bus or being near one's own residence."

[34] The Sixth Circuit explained the preference for as-applied challenges stating: "Many of the concerns that underlie the ripeness doctrine—that '[t]he operation of the statute [will be] better grasped when viewed in light of a particular application" and that "the proper exercise of the judicial function' avoids deciding abstract and speculative questions, underlie, and are indeed echoed by, the courts' reluctance to grant relief in the face of facial, as opposed to as-applied, attacks on statutes. When 'determining whether a law is facially invalid,' as when determining whether a case is ripe, 'we must be careful not to ... speculate about 'hypothetical' or 'imaginary' cases' or to 'premature[ly] interpret[ ] ... statutes on the basis of factually barebones records.' 'Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.' As-applied challenges—the 'basic building blocks of constitutional adjudication'—remain the preferred route." *Warshak v. United States*, 532 F.3d 521, 528–29 (6th Cir. 2008) (internal citations omitted).

[35] *Plummer v. United States*, 983 A.2d 323, 338 (D.C. 2009), as amended on denial of reh'g and reh'g en banc (May 20, 2010) (explaining "this is so because 'a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the [a]ct would be valid,' i.e., that the law is unconstitutional in all of its applications.'").

constitutionally protected activity, however, courts have held post arrest remedies are not always sufficient.[36] The Supreme Court has also repeatedly held that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."[37]

The drug free zone statute is most likely to be challenged facially as void for vagueness, overbreadth, and violation of a person's right to be free from restrictions on liberty. [38] Vagueness and overbreadth challenges are often seen in the First Amendment context but can also be raised with respect to other restrictions on liberty under the Due Process clause. Statutes with similar but not identical provisions have been both upheld and struck down in other jurisdictions as facially unconstitutional. Due to variations in overall statutory schemes and uncertainty regarding how a court will interpret certain provisions, the CCRC cannot say definitively how Constitutional challenges to the proposed drug free zones would be resolved by District courts.

With respect to vagueness, a statute is void for vagueness when it either "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," or "encourages arbitrary and erratic arrests and convictions."[39] "The more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'"[40]

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[36] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." (citations omitted).

[37] *See e.g.*, *Sawyer v. Sandstrom*, 615 F.2d 311, 317–18 (5th Cir. 1980) ("To the extent that the ordinance does have legitimate drug enforcement purposes, there exist alternative means of accomplishing those ends…Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. A more artfully drawn ordinance would reach only those persons who are active participants in illegal narcotics transactions or who aid and abet the primary offender, without chilling the first amendment rights of persons engaged in essentially innocent associational conduct. Even if a municipality failed to adopt a local ordinance regulating drug activity, the Florida Legislature has provided law enforcement officers with a vast array of tools with which to combat illegal narcotics activity. The conduct which the state may punish without running afoul of the first amendment is more than adequately covered by these provisions.") (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *People v. Cressey*, 2 Cal.3d 836, 87 Cal.Rptr. 699, 708, 471 P.2d 19, 28 (1970);*Jolley v. City of Jacksonville*, 281 So.2d 901, 903 (Fla.Dist.Ct.App.1973)).

[38] *See City of Chicago v. Morales*, 527 U.S. 41, 52 (1999)("The city correctly points out that imprecise laws can be attacked on their face under two different doctrines. First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 612–615 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.") (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

[39] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *see also Ford v. United States*, 498 A.2d 1135, 1138–39 (D.C. 1985).

[40] *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (also stating: "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.").

"An ordinance is impermissibly overbroad if it deters constitutionally protected conduct while purporting to criminalize nonprotected activities."[41] Furthermore, "[l]egislative enactments that encompass a substantial amount of constitutionally protected activity within the parameters of criminalized conduct will be invalidated even if the statute has a legitimate application" when they are substantially overbroad "in relation to the statute's plainly legitimate sweep."[42]

A federal court struck down a drug free zone ordinance in Annapolis that permitted police officers to order a person to disperse when that person was "behaving in a manner indicating that the person is remaining at or in a public place located within a Drug–Loitering Free Zone for the purpose of engaging in drug-related activity as demonstrated by" any one of a series of described acts in the ordinance.[43] Part of the basis for striking the law was the total absence of a specific intent element that could, at least partially, address some of the vagueness and overbreadth concerns. The District Court in Maryland pointed out that "only those anti-loitering ordinances interpreted as including a specific intent requirement have been upheld against both prongs of a vagueness challenge. In contrast, anti-loitering ordinances that do not contain a *mens rea* element generally have been invalidated as unconstitutionally vague."[44]

The proposed law includes a specific intent requirement that requires that the person be congregating with the purpose of committing a drug offense.[45] However, although the intent requirement distinguishes this law from others that have been struck down as unconstitutional,[46] the intent requirement does not *guarantee* constitutionality as statutes containing specific intent requirements have been struck down when allowing police to infer criminal purpose from constitutionally protected conduct or failing to inform persons of all the circumstances that could result in an arrest.[47] In addition, statutes with specific intent requirements that have been upheld

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[41] N. Virginia Chapter, ACLU v. City of Alexandria, 747 F. Supp. 324, 326 (E.D. Va. 1990) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).
[42] *Id.* (internal citations omitted).
[43] *NAACP Anne Arundel Cnty. Branch v. City of Annapolis*, 133 F. Supp. 2d 795, 804 (D. Md. 2001).
[44] *Id*. at 808.
[45] *See* § 5(a) & § 2(2).
[46] *See City of Chicago v. Morales*, 527 U.S. 41, 57–58 (1999)("Its decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent. However, state courts have uniformly invalidated laws that do not join the term "loitering" *with a second specific element of the crime*"); s*ee also Ford v. United States*, 498 A.2d 1135, 1139 (D.C. 1985) (explaining "the solicitation statute prohibits specified conduct for the purpose of prostitution," "does not authorize the arrest of a person based on simple loitering" and "requires the wandering plus additional objective conduct evincing that the observed activity is for the purpose of prostitution" "mitigate[ing] the law's vagueness").
[47] *See N. Virginia Chapter, ACLU v. City of Alexandria,* 747 F. Supp. 324, 328 (E.D. Va. 1990) (striking down Alexandria drug loitering ordinance and stating "The separate specific intent requirement is nullified by the provision that deems engaging in the enumerated behaviors as manifesting an unlawful purpose. By equating unlawful purpose with seven innocent activities that may be accomplished by persons lacking unlawful intent, the Alexandria ordinance criminalizes a substantial amount of constitutionally protected activities."); *Cleveland v. Mathis*, 735 N.E.2d 949, 952 (1999) (explaining an ordinance prohibiting loitering for the purpose of prostitution by using the language "among the circumstances which may be considered" was found void for vagueness because "the word 'among' indicates there were other circumstances to form the basis of an arrest and conviction" and thus, "the average citizen was not informed of these circumstances by the statutory language"); *Silvar v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 129 P.3d 682, 685 (2006) (explaining that "the phrase '[a]mong the circumstances which may be considered in determining whether such purpose is manifested' is also unduly open-ended" and that "the word 'may' has been construed as permissive

also contain or have been interpreted to contain other features to ensure constitutionality such as requiring an additional overt act that manifests the illegal purpose.[48] Section 5(b) of the proposed law includes an open ended list of conduct that police may consider in assessing intent, including constitutionally protected and marginally relevant conduct,[49] but does not necessarily permit dispersal orders on the clearly unconstitutional basis. Thus, a court may or may not find this to be vague or overbroad after analyzing the entire scheme and employing a narrowing construction.

As an example, the Washington State Supreme Court upheld an anti-loitering law in Tacoma after it found under the statute "a person must perform objectively ascertainable, overt conduct [in addition to loitering] that is commonly associated with illegal drug-related activity, such as soliciting, enticing, inducing, or procuring another person to exchange, buy, sell, or use illegal drugs or drug paraphernalia" with the purpose of engaging in illegal drug-related activity."[50] That the loitering law included a specific intent requirement was not, on its own, sufficient to make the law Constitutional. The Washington Supreme Court stated that "[w]hile the potential overbreadth of the ordinance is *diminished* by the intent requirement, *it is critical* that the culpable mental state coexist with identifiable, articulable conduct reasonably consistent with the intent to buy, sell, or use illegal drugs."[51] The specific intent requirement in the proposed provision of the bill does not necessarily coincide with "identifiable, articulable conduct reasonably consistent with the intent to buy, sell, or use illegal drugs," which may be additionally required to make the statute constitutional.[52] While some of the conduct specified in the bill is reasonably consistent with intent to commit a drug offense, the bill also identifies conduct that may be considered as manifesting a purpose to commit a drug offense even if it has at best a very limited relationship to criminal intent.[53] The proposed statute does not specifically preclude a requirement of an additional overt act necessary to establish probable cause, and a court could determine that the conduct specified in the statute *is* reasonably consistent with intent to commit drug offenses, and uphold the constitutionality of the statute.

The proposed statute enumerates numerous factors to be considered in determining whether the person is congregating for the purpose of violating the CSA. It is well-established under the Fourth Amendment that before a police officer may even briefly stop and question a person suspected of criminal activity, a "police officer must be able to point to specific and articulable facts which,

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rather than mandatory, which indicates that nonenumerated factors can be considered" and holding that those two phrases "embod[y] a lack of specificity that is fatal to the ordinance.").

[48] *See e.g.*, *City of Tacoma v. Luvene*, 827 P.2d 1374, 1383–84 (Wash. 1992) (holding the culpable mental state in a statute must coexist with identifiable, articulable conduct reasonably consistent with the intent to buy, sell, or use illegal drugs to survive a facial challenge based on overbreadth).

[49] Most notably, the statute includes the fact that a "person has no other apparent lawful reason for congregating in the drug free zone" as a factor that may manifest purpose to commit a drug offense.

[50] *City of Tacoma*, 118 Wash. at 846 (stating also "this conduct, which is in addition to loitering, must be done for the purpose of engaging in illegal drug-related activity"); *see also Ford v. United States*, 498 A.2d 1135, 1140 (D.C. 1985) ("The District of Columbia solicitation statute in question here, *because it requires that conduct be for the purpose of prostitution and because it provides that objective criteria must be present in order to support a conviction*, is not void for vagueness.") (emphasis added).

[51] *City of Tacoma v. Luvene*, 827 P.2d 1374, 1383–84 (Wash. 1992) (emphasis added).

[52] *Id.*

[53] The bill identifies the fact that a "person has no other apparent lawful reason for congregating in the drug free zone" as a factor that may manifest purpose to commit a drug offense.

taken together with rational inferences from those facts, reasonably warrant that intrusion."[54] Many of the proposed statutory factors, however, do not constitute identifiable, articulable conduct reasonably consistent with a *present* purpose on the part of the persons congregating to violate the CSA that would support rational inferences for even a brief investigatory stop. For example, one of the factors listed is not having another apparent lawful purpose, a phrase criticized by the Supreme Court for having no common and accepted meaning.[55] Another factor is simply having a prior conviction for a drug offense no matter how old.[56] Such factors alone would be insufficient to establish a basis for a lawful arrest or even an investigatory seizure.[57]

Beyond vagueness and overbreadth, a clearer facial challenge may be made on Fourth Amendment grounds if courts determine a dispersal order constitutes a Fourth Amendment seizure requiring probable cause. As written, the statute permits a dispersal order, though not arrest, upon a showing of "reasonable belief" that a person is congregating for the purpose of engaging in illegal drug activity. "Reasonable belief" is a standard lower than probable cause in the District of Columbia Circuit.[58] However, the Fourth Amendment may require a probable cause showing prior to a restriction on the freedom of movement longer than a brief investigatory seizure such as the dispersal order authorized by the statute.[59] If probable cause is needed under the Fourth Amendment for a dispersal order of the nature authorized, the unambiguous statutory authorization for a dispersal order based on reasonable belief alone may not be amenable to a narrower constitutional interpretation consistent with current case law and could make the statute facially unconstitutional.

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[54] *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868 (1968).

[55] *City of Chicago v. Morales*, 527 U.S. 41, 56–57, 119 S. Ct. 1849, 1859, 144 L. Ed. 2d 67 (1999)("It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?").

[56] *Cf. People v. Smith*, 44 N.Y.2d 613, 620–21, 378 N.E.2d 1032, 1036 (1978) (holding statute not to be void for vagueness when construed to preclude arrest or conviction based on simple loitering by a known prostitute or anyone else and to require loitering plus additional objective conduct evincing that the observed activities are for the purpose of prostitution").

[57] *N. Virginia Chapter, ACLU v. City of Alexandria*, 747 F. Supp. 324, 328 (E.D. Va. 1990) ("By equating unlawful purpose with seven innocent activities that may be accomplished by persons lacking unlawful intent, the Alexandria ordinance criminalizes a substantial amount of constitutionally protected activities.").

[58] *See United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005), on reh'g in part, 179 F. App'x 60 (D.C. Cir. 2006)("As explicated by five other circuits, the "reason to believe" standard is satisfied by something less than would be required for a finding of "probable cause." *See Valdez v. McPheters*, 172 F.3d 1220, 1225–26 (10th Cir.1999); *United States v. Route*, 104 F.3d 59, 62 (5th Cir.1997); *United States v. Risse*, 83 F.3d 212, 216 (8th Cir.1996); *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir.1995); *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995).").

[59] *See also City of Chicago v. Morales*, 527 U.S. 41, 58–59 (1999) ("Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit. *If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty*. If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965)"); *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 262–63 (S.D. Ohio 2021))(explaining that the Fourth Amendment is implicated when a person's freedom of movement rather than the movement itself has been terminated and finding "a constitutionally redressable seizure can occur where officers use physical force to prevent protestors from coming any closer, such as by herding protestors, forming a skirmish line, or failing to provide a means of egress—where such governmental action is intentional and results in the termination of freedom of movement").

Finally, there is a possible issue with the power delegated to the Chief to declare a drug free zone without any required showing.[60] The statute gives the Chief power to unilaterally declare a drug free zone without requiring any conditions be present. It is true that the statute provides criteria that the Chief shall *consider* in deciding whether to designate a drug free zone. However, there is no explicit requirement that the Chief find that persons are endangered by illegal drugs before declaring a drug free zone and the statute does not explicitly place any limitations on the decision-making authority. [61] Likewise, the statute does not establish any condition that must be present before the declaration of a drug-free zone and actually permits the Chief to rely on *unverified* information, rather than objective evidence, not necessarily related to drug activity. The lack of limiting principles could lead to challenges for overbreadth or for being an unconstitutional delegation of authority as, arguably, the authority implicitly gives the Chief the power to establish a criminal offense without even a minimal finding with respect to the need to declare a drug free zone.[62] Of course, a court may read the factors enumerated in § 3(b) as limiting guiding principles to ensure constitutionality and establish a narrower authority to declare drug free zones than § 3(a) appears to provide. If this were to happen, dispersal orders made in cases where the Chief did not adhere to limiting principles required by courts but not clearly articulated in the statute could be held unlawful in an as-applied challenge.

b. As-Applied Constitutional Issues

Even if the statute is facially constitutional, individual applications of the statute could still result in as-applied constitutional challenges. The constitutional safeguards placed in the statute, such as the requirement that a person have the specific purpose of committing a drug crime when they congregate, must be given teeth in the implementation of the statute to avoid running afoul of the constitution. But the lack of clear statutory standards and the enumeration of constitutionally protected conduct and factors wholly insufficient to establish reasonable, articulable suspicion among the factors MPD officers can consider before issuing a dispersal order increase the

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[60] *See Unum Life Ins. Co. of Am. v. District of Columbia*, 238 A.3d 222, 232 (D.C. 2020) ("To articulate an intelligible principle to satisfy the nondelegation doctrine, the legislature must 'clearly delineate[ ] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.' In evaluating nondelegation, our analysis is not limited to the specific delegated authority; we consider the statutory scheme as a whole, including the purposes articulated by the legislature, limits placed on the delegation, and any guidance given to the agency.") (citing *Mistretta v. United States*, 488 U.S. 361, 372–73, (1989); *Skinner v. Mid-Am. Pipeline Co*., 490 U.S. 212, 219–20 (1989)); *see also People v. Lowrie*, 761 P.2d 778, 782 (Colo. 1988) ("A statutory delegation of authority to make rules carrying criminal sanctions for their violation, however, must not be so open-ended as to vest the agency with "unbridled authority to declare conduct criminal.").

[61] *Agnew v. District of Columbia*, 920 F.3d 49, 55 (D.C. Cir. 2019) ("A law invites arbitrary and discriminatory enforcement when "there are no standards governing the exercise of the discretion" it grants.) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

[62] Compare, for example, the pretrial detention statute which requires judges to make a finding that there is no condition or combination of conditions of release that would ensure the safety of the community or the person's return to court before detaining a person and then lists factors for the judge to consider in making that determination. *See* § 23-1322. Under that statute, judges are instructed as to factors to consider and given wide latitude in evaluating those factors. But the statute goes one step further than the proposed law here because it requires a factual determination as to whether a minimum threshold is established before the judges may detain a person. The proposed statute here does not specify any particular condition that must be satisfied prior to the declaration of a drug free zone thus imposing no explicit limit on the Chief's authority.

likelihood that officers will misunderstand the constitutionally permissible reach of the law and engage in unconstitutional enforcement.

As an initial matter, the inclusion of factors in the statute that clearly do not provide a sufficient basis for a reasonable belief that two or more persons are congregating for the purpose of committing a drug crime among the factors an officer may consider could lead officers to erroneously conclude they have enough evidence for a reasonable belief and issue unconstitutional dispersal orders. The standards for probable cause and reasonable belief with respect to whether a person is committing a crime for constitutional purposes will not be determined by the statutory factors listed as circumstances that officers can consider. By specifying certain circumstances as factors to be considered that do not "establish specific and articulable facts which, taken together with rational inferences from those facts" establish reasonable, articulable suspicion that criminal activity is currently or very recently afoot, the statute could suggest to an on the ground officer that the presence of one of these circumstances constitutes sufficient evidence to support a dispersal order.

For example, if two persons who had been convicted years ago of simple possession of a controlled substance were loitering in the area with "no other apparent lawful reason" after being dropped off by a vehicle registered to a known unlawful drug user, a police officer would still not have probable cause or a reasonable belief that they were *currently* congregating for the purpose of violating the Controlled Substances Act. This is true even though three of the statutory factors enumerated are present. If an officer only had that evidence, it would be unlawful for a police officer to order those persons to disperse and just the giving of a dispersal order might result in civil rights claim against the officer and the District. In this way, the statute may *suggest* an unlawful dispersal order is allowed even if it does not explicitly authorize it.

As another example, the new offense requires that the person not recongregate in the zone with another person *for the purpose* of committing an illegal drug offense before an offense is established. The statutory text may lead to confusion about the showing required to make an arrest after a dispersal order is given as failure to disperse alone will not establish a basis for a warrantless arrest. The offense for which a person could be arrested after failing to disperse will still require *probable cause* that the person is congregating for the purpose of committing a drug offense with another person who was also ordered to disperse. Arrests made based solely on remaining in the zone or recongregating in the zone and without probable cause as to a present purpose to congregate with the purpose of committing a drug offense will be unlawful under the Fourth Amendment and could lead to civil rights actions or motions to suppress.

2. Effectiveness of Drug Free Zones

Even assuming there are no Constitutional concerns with the drug-free zones, it is unclear what practical effect this law will have with respect to 1) allowing lawful arrest of persons within the drug-free zones who refuse to disperse; and 2) the deterrent effect produced by establishing the drug-free zones.

a. Arrest Authority Under the Proposed Bill

To give enforcement authority to officers, the bill creates a criminal offense for which people can be arrested. Pursuant to the proposed law, a person is prohibited from (1) congregating in a group of 2 or more persons in a designated "drug free zone" for the purpose of committing an offense under the CSA, and (2) failing to disperse after ordered to by a police officer who reasonably believes that the person is congregating for the purpose of committing an offense under the CSA. Officers may lawfully make a warrantless arrest when there is probable cause that an offense has been committed in their presence. As applied to this offense, if an officer has probable cause both that the person refused to disperse from the drug-free zone, and that the person congregated with 2 or more persons with the purpose to violate the CSA,[63] a lawful warrantless arrest can be made for violation of the failure to disperse offense. However, if an officer has probable cause that the person is congregating *for the purpose* of committing a drug offense, in virtually all cases the officer would also have probable cause *that the person is committing a drug offense*, and could arrest the person regardless of whether a drug-free zone had been established. For example, if an officer has probable cause that a person in a drug free zone has fentanyl that he intends to sell and that person refuses to disperse, the officer could arrest that person for the proposed failure to disperse offense, or simply arrest him for possession of a controlled substance with intent to distribute.

b. Deterrent Effect of Drug-Free Zones

There is consensus among criminologists that it is the certainty and swiftness of punishment, not the severity of penalties, that effectively deters criminal conduct. Under the bill, drug free zones would be conspicuous as they must be clearly designated by police tape, barriers, or police personnel, and information related to the boundaries and effective date of the drug free zone must be posted. Given these requirements, since there is an exceptionally high risk of being caught for committing a drug offense within the drug free zone, the zones should provide a powerful deterrent effect. However, this effect would likely be temporary as each zone can only remain in place for five days. The statute does not provide any limitations on the Chief from re-establishing the drug-free zone, which would extend the time in which the zone deters criminal conduct. However, it is not clear why a drug free zone would be more effective than an increased police presence in the area. It is the presence of police and the higher risk of being arrested for a serious drug offense that is most likely to deter illegal drug activity.[64]

[63] The statute defines "disperse" to require recongregating with the same individuals.

[64] *See NAACP Anne Arundel Cnty. Branch v. City of Annapolis*, 133 F. Supp. 2d 795, 812 (D. Md. 2001) ("Having concluded that the ordinance impacts a substantial amount of protected activity, the court examines its legitimate scope. First, the City certainly has a legitimate interest in protecting its citizens from the dangers of drug trafficking. *It is unclear, however, what the ordinance would add to the drug and loitering laws already in place even if it did contain a specific intent requirement*.") (emphasis added).