

NO.

In The
SUPREME COURT OF THE UNITED STATES

**CHRISTOPHER VENEKLASE, PAUL B. MEHL, DAROLD LARSON,
NANCY EMMEL AND JESSICA UCHTMAN,**
Petitioners,

v.

CITY OF FARGO,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court construed an ordinance expressly to protect picketing in residential areas except for “focused picketing taking place solely in front of a particular residence.” *Id.* at 483. Relying on *Frisby* and carefully observing it under a virtually identical ordinance, Petitioners conducted a residential prayer walk in Fargo, North Dakota covering six to eight houses. The Eighth Circuit nonetheless held in this case that the City of Fargo could criminalize Petitioners’ prayer walk based upon a residential privacy interest, and that a walk covering even 30 or 100 houses could also be prohibited.

The following questions are presented:

1. Whether a municipality may criminalize marching up and down a residential street, with persuasive intent, in front of 30 or even 100 houses, provided only that the picket goes past one “targeted” residence in the course of the march.
2. Whether the residential privacy interest enunciated in *Frisby v. Schultz* permits Respondent to criminalize the act of walking in silent prayer on public sidewalks in a continuous route past six to eight houses.
3. Whether all grounds for municipal liability under *Monell* principles are foreclosed when police officers are entitled to qualified immunity because of uncertainty in the law surrounding an unconstitutional arrest.
4. Whether election to participate in an *en banc* proceeding by a newly appointed Court of Appeals judge, who then cast the tie-breaking vote, warrants exercise of this Court’s supervisory authority, where that judge failed to disclose that his law firm had an active attorney-client relationship with the victim of the alleged crime involved in the case.

PARTIES TO THE PROCEEDINGS

The caption of the Petition lists all parties to the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

Petitioners Christopher Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel and Jessica Uchtman respectfully petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the Court of Appeals' holding in *Veneklase, et al. v. City of Fargo*, No. 98-2147 (February 13, 2001) (*en banc*).

OPINIONS BELOW

The decision of the *en banc* United States Court of Appeals for the Eighth Circuit in *Veneklase, et al. v. City of Fargo*, No. 98-2147 (2001 U.S. App. LEXIS 2249), dated February 13, 2001, is not yet reported. It appears as Appendix A to the Petition. The Judgment of the *en banc* Eighth Circuit, filed February 13, 2001, appears as Appendix B.

The Eighth Circuit's Order Denying Appellants' Motion for Rehearing *En Banc* of the Memorandum and Order Concerning Plaintiff's Motion to Recuse, dated January 17, 2001, appears as Appendix C hereto; and the Order Denying Appellants' Motion for Reconsideration of Memorandum and Order Concerning Plaintiffs' Motion to Recuse, dated January 12, 2001, appears as Appendix D. These orders are unreported. Circuit Judge Bye's Memorandum and Order Concerning Plaintiffs' Motion to Recuse, dated December 13, 2000, is reported at 236 F.3d 899 (8th Cir. 2000), and appears as Appendix E. The Eighth Circuit Court of Appeals' unreported Order Vacating April 11, 2000 Submission, Announcing Participation of Hon. Kermit E. Bye and Directing Further Briefing appears as Appendix F.

The Order Granting Petition for Rehearing *En Banc*, dated February 16, 2000, is unreported, and appears as Appendix G hereto. The vacated second decision of the Eighth Circuit panel in *Veneklase v. City of Fargo*, issued December 30, 1999, is reported at 200 F.3d 1111 (8th Cir. 1999), and appears as Appendix H. The first panel opinion, which was entered on August 30, 1999, but subsequently vacated by the panel on reconsideration, is not reported and does not appear in the Appendix to this Petition. Its content is fully encompassed within the second panel opinion entered on December 30, 1999, and appears therein at pages H3-H12 of the Appendix (*see* explanatory footnote * at pages H1-H2).

The Judgment in a Civil Case issued August 26, 1997, in *Veneklase v. City of Fargo*, No. A3-93-156, by the United States District Court for the District of North Dakota (Southeastern Division), *as revised March 31, 1998 for an award of attorneys' fees and costs*, is unreported. It appears as Appendix I. The District Court's Order Granting Plaintiffs' Motion for Partial Summary Judgment, dated April 10, 1997, is unreported and appears as Appendix J.

This Court's October 7, 1996 order denying certiorari from the Eighth Circuit's first decision in this case is reported as *Veneklase v. City of Fargo*, 519 U.S. 867 (1996). The Eighth Circuit's first decision, entered on March 6, 1996, reversing the denial of qualified immunity to Fargo's police officers and remanding the case for consideration of claims against Respondent, is reported as *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996). The first order of the United States District Court for the District of North Dakota on cross motions for summary judgment, dated February 17, 1995, is reported as *Veneklase v. City of Fargo*, 904 F.Supp. 1038 (D.N.D. 1995).

STATEMENT OF JURISDICTION

Review is sought from the *en banc* decision of the United States Court of Appeals for the Eighth Circuit entered on February 13, 2001. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

The City of Fargo Residential Picketing Ordinance, No. 2190 (1985), is set forth as Appendix K hereto. Set forth in Appendix O are UNITED STATES CONST. AMEND. I, 42 U.S.C. § 1983, 28 U.S.C. § 455(a), and Rule 36 of the Federal Rules of Civil Procedure ("F.R.C.P.").

STATEMENT OF THE CASE

I. SUMMARY OF THE CASE

In *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court reviewed a Brookfield, Wisconsin ordinance which banned "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." The lower courts found the ordinance to be a total ban on residential picketing and struck it down for unconstitutional overbreadth. All nine justices of this Court agreed that the Brookfield ordinance was overbroad as written, but a majority of the Court saved it by applying the "well-established principle that statutes be interpreted to avoid constitutional difficulties." 487 U.S. at 483. The Court accepted representations of Brookfield's counsel about how the ordinance would be enforced and upheld its facial validity with this narrowed

constitutional construction:

General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this Ordinance. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.

Id.

On October 10, 1991, more than three years after *Frisby* was decided, the City of Fargo arrested Petitioners under a City of Fargo ordinance enacted in 1985, which was held to be "virtually identical" to the *Frisby* ordinance. *Veneklase v. City of Fargo*, 78 F.3d 1264, 1267, n.4 (8th Cir. 1996). Respondent's policymaker and police officers, however, were completely unaware of the *Frisby* decision and of this Court's narrowing construction essential to saving the ordinance. Consequently, Fargo enforced its ordinance as a total ban on residential picketing and arrested Petitioners for walking a six to eight house route nearly 400 feet in length. The arrests were subsequently approved by Fargo's law enforcement policymaking official, who understood and intended the ordinance to ban any picketing route, no matter how expansive, so long as at least one "targeted" residence was on the route. In other words, Fargo enforced its *Frisby*-style ordinance as if *Frisby* did not exist.

Yet, a six to five majority of the *en banc* Eighth Circuit has upheld Fargo's enforcement of the ordinance directly, contrary to *Frisby's* "narrowing construction that avoids constitutional

difficulties." *Frisby*, 487 U.S. at 482.¹ For a federal appellate court to order the dismissal of Petitioners' claims by reasoning that *Frisby* permits what it actually forbids not only undermines this Court's authority and represents serious constitutional error, it also invites other cities in the Eighth Circuit and elsewhere to enact and enforce *Frisby*-style ordinances in an unconstitutional manner anytime they want to eliminate residential public sidewalks as a public forum for unpopular views.

Finally, the role of Judge Kermit Bye in casting the tie breaking vote against Petitioners has created a serious appearance of judicial impropriety which taints this case. Prior to joining the Eighth Circuit last year, Judge Bye was a long-time partner in the law firm which represented the abortion clinic director (Jane Bovard) who is at the center of this case and who testified against Petitioners during trial. "Does the deck seem stacked? You bet." *Hill v. Colorado*, 530 U.S. 703, 764 (2000) (Scalia, J., dissenting). Judge Bye's role in casting the *tie-breaking vote* in this case against his client's political adversaries lends a whole new dimension to that observation.

II. STATEMENT OF FACTS

A. Respondent's Residential Picketing Ordinance: Intended as a Total Ban and Targeted to Anti-abortion Protesters.

¹ As Judge Richard Arnold wrote in his powerful dissent, "If the First Amendment permits a city to criminalize marching up and down a residential street, with persuasive intent, in front of thirty or even a hundred houses, provided only that the picket goes past one targeted residence in the course of the march, then it is hard to imagine what kind of 'constitutional difficulties' the *Frisby* court could have had in mind." *Veneklase v. City of Fargo, Slip Op.* at 36, 37, App. at A25.

On January 29, 1985, Respondent City of Fargo, North Dakota passed a residential picketing ordinance (later amended and recodified as Fargo Municipal Ordinance 10-0802) which stated:

No person shall engage in picketing the dwelling of any individual in the City of Fargo.

App. at K1. Fargo's City Attorney explained the origins and goal of Fargo's ordinance:

The City of Fargo did not have a residential picketing ordinance until 1985. The adoption of the ordinance at that time was an outgrowth of actual and anticipated residential picketing of individuals employed at the Women's Health Organization, a local abortion provider which had been established in the mid-1980's.

There was considerable public debate on the ordinance and needless to say, deep division of opinion on the issue of abortion. However, it was my impression that the consensus was that protests of that nature were not appropriate in residential areas.

Affidavit of Wayne O. Solberg dated September 29, 1997, paras. 3-4. App. at N2.

B. Petitioners Arrested for Walking in Silent Prayer on Residential Sidewalks in Front of an Entire Block of Houses.

On October 10, 1991, Petitioners Chris Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel and Jessica Uchtman, along

with ten to fifteen other individuals, decided to engage in silent prayer in the residential neighborhood of Jane Bovard, the administrator of Fargo's only abortion clinic. Petitioners had no intention of targeting Bovard's residence with their presence and gave no emphasis to Bovard's residence or to any other residence. Petitioners stayed on the public sidewalk, did not block access to or from private property, moved continually in front of a block of six to eight houses, did not carry signs, and remained silent until approached by Fargo Police Officers responding to Bovard's complaint. App. at P1-P2, P4.

The Fargo police had observed Petitioners and those with them walking and praying for approximately ten minutes. The police reports describe Petitioners walking north and south on the public sidewalk. They appeared to be praying or meditating; some of them were holding rosary beads or had their hands folded. App. at P1-P2. Finally, Fargo police officer Jon Holman approached and talked with Petitioner Chris Veneklas. Holman stated that Petitioners were violating the Fargo ordinance and would be arrested if they did not leave. Veneklas was familiar both with Fargo's ordinance and with *Frisby v. Schultz* at the time and insisted that the group was not even picketing. Holman repeated to Veneklas that group members would be arrested if they did not leave, offering no alternative for how they could remain lawfully in Bovard's neighborhood. When Petitioners remained and continued to pray silently, they were arrested and subsequently prosecuted for violations of the ordinance. See Affidavit of Christopher Martin Veneklas, paras. 6-9, App. at L2-L4. The criminal charges were later dismissed by the state trial court on the ground that Petitioners' conduct was protected under *Frisby v. Schultz*. App. at J3.

C. Fargo Policymaker Ratified Officer Holman's Decision To Arrest.

Officer Holman's only guide for enforcing the ordinance was the text of the ordinance itself. *Veneklase v. City of Fargo*, 904 F.Supp. 1038, 1057 (D.N.D. 1995) (citing testimony of Chief of Police Raftevold). Ronald Raftevold was Respondent's Chief of Police and top policymaking official both with respect to the enforcement of City ordinances and the instruction, training and discipline of the City of Fargo's police officers. *Id.* Chief Raftevold testified that, to the best of his knowledge, there were no policies, procedures or guidelines for the enforcement of the ordinance. *Id.* At the time of his deposition in April 1994, Raftevold still had no knowledge of *Frisby*, had sought no guidance from the City Attorney on how it applied to Fargo's ordinance, and had not instructed Fargo's police officers regarding enforcement. *Id.* Based on the police reports filed after Petitioners were arrested (App. P), Chief Raftevold believed the arresting officers had probable cause to arrest Petitioners. Raftevold further believed that the Ordinance would have been properly enforced against a single individual picketing in front of thirty or even one hundred residences. *Slip. Op.* at 32-33 (Arnold, R., J., dissenting), citing J.A. at 243-45. App. at A22-A23. Consistent with Chief Raftevold's approval of Officer Holman's application of the ordinance, Respondent made admissions under F.R.C.P. 36 that the arresting officers acted pursuant to (i) the City's official policies, customs, practices and procedures, and (ii) their training and instruction as Fargo police officers, when they arrested Petitioners. *See* App. M. Additional relevant facts will be presented below in the context of the issues discussed.

III. THE COURSE OF PROCEEDINGS

On October 8, 1993, Petitioners filed a complaint in the United

States District Court for the District of North Dakota, seeking damages pursuant to 42 U.S.C. §1983 from Respondent City of Fargo and four Fargo police officers for violations of Petitioners' federal constitutional rights.

On February 17, 1995, the District Court denied qualified immunity to the defendant police officers and granted summary judgment to Petitioners on their constitutional claims against the City and the officers.

The police officers filed an interlocutory appeal to the United States Court of Appeals for the Eighth Circuit, which reversed the District Court and granted qualified immunity to the officers. *See Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996) ("*Veneklase I*"). Rehearing *en banc* was denied on April 24, 1996, 1996 U.S. App. LEXIS 9467, and a Petition For A Writ Of Certiorari was denied by this Court on October 6, 1996. 519 U.S. 867 (1996).

After remand, the District Court granted summary judgment to Petitioners and against Respondent City of Fargo based upon the facial unconstitutionality of Fargo's ordinance.² In August 1997, a jury awarded \$2,431.00 in damages to Petitioners, after which the

² The theory of liability on which Petitioners prevailed in the District Court - facial unconstitutionality due to the content-based nature of Fargo's picketing definition - was governed by the holding of *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996). Petitioners defended the District Court judgment on that basis to the Eighth Circuit but also pursued the other theories presented in this Petition. After this Court decided *Hill v. Colorado*, 530 U.S. 703 (2000), *Kirkeby's* content neutrality holding was reversed by the *en banc* Eighth Circuit, which devoted most of its opinion to that issue. Petitioners disagree with *Hill* and believe that the *Kirkeby* analysis of content neutrality is correct. However, they do not present it as an issue in this Petition.

District Court awarded Petitioners \$50,025.25 in attorney fees and \$2,178.00 in litigation costs on March 31, 1998. App. I. The City of Fargo appealed.

On August 30, 1999, a three judge panel again reversed the District Court. The panel granted rehearing and subsequently issued another opinion again reversing the judgment of the District Court. 200 F.3d 1111 (8th Cir. 1999), vacated, 2000 U.S. App. LEXIS 2255. App. H. The Eighth Circuit granted rehearing *en banc* on February 16, 2000, *id.*, App. G, and held oral argument before ten judges on April 11, 2000.

On September 7, 2000, the Eighth Circuit gave notice that newly confirmed Judge Kermit E. Bye would join the *en banc* court for this case. App. F. Petitioners promptly filed a motion requesting that Judge Bye recuse himself because of his position as a partner during his firm's attorney-client relationship with Jane Bovard, who is a central figure in this case as the perceived victim of the alleged picketing crime. After Judge Bye entered an order denying the recusal motion, 236 F.3d 899, App. E, Petitioners sought reconsideration both from Judge Bye and from the *en banc* court. Both requests were denied. Apps. C and D.

On February 13, 2001, the Eighth Circuit entered its *en banc* decision reversing the judgment of the District Court by a vote of six to five. App. A. Judge Bye cast the tie-breaking vote for the majority. Judge Richard Arnold wrote a dissent joined by four other judges, including Chief Judge Roger L. Wollman. App. at A19.

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI SHOULD BE GRANTED TO ENSURE UNIFORMITY OF DECISIONS APPLYING *FRISBY V. SCHULTZ* THROUGHOUT THE UNITED STATES.

A. The Eighth Circuit Court of Appeals Decision Completely Vitiates the Right to Non-Focused Residential Picketing *Frisby v. Schultz* Protects.

A bare majority of a closely divided *en banc* Eighth Circuit has aggressively cast aside the narrowed construction devised by this Court to save the residential picketing ordinance reviewed in *Frisby v. Schultz*, 487 U.S. 474 (1988). The *en banc* majority has decided that Fargo's "virtually identical" ordinance will have a contrary meaning.

Two important principles were applied in *Frisby*: (1) that residential streets and sidewalks, regardless of the legitimate residential privacy interest, are traditional public fora for free speech; and (2) that although the unique nature of a residential setting may permit different restrictions than would be appropriate for other public fora, the standard of "reasonable time, place and manner" restrictions still applies. *Id.* at 480-81.

Thirteen years later, the Eighth Circuit has violated *Frisby*'s unambiguous holding by approving precisely what all nine members of the *Frisby* Court rejected as unconstitutional: Fargo's *de facto* ban on all residential picketing. The *en banc* majority reasoned that, first:

Because the picketing prohibited by the ordinance is speech directed not to the general public but primarily at those who are presumptively unwilling to receive it, the City has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample channels of communication.

Slip Op. at 13, App. at A13. Second, the court concluded, “an individual engaged in an activity that is directed at a specific occupant of a dwelling falls within the legitimate sweep of the ordinance.” *Slip Op.* at 14, App. at A15. Doing its best to portray *Frisby*-style reasoning, the *en banc* majority has actually created a head-to-head confrontation with *Frisby*. The court has equated a non-focused, silent prayer line passing by five to eight houses, with focused picketing “taking place solely in front of a particular residence.” This expansive notion of the “legitimate sweep of the ordinance” conflicts with the holding of *Frisby* and its application by at least three other circuit courts, *see discussion post*.

When citizens acting in good faith compliance with a Supreme Court decision can be arrested anyway, with no adverse consequences for a municipality whose officials are completely unaware of such precedent and intend to enforce the law contrary to that precedent, something has gone gravely wrong with the rule of law. Certiorari should be granted to reestablish clarity in this important First Amendment area, so that other innocent citizens are not forced to bet their liberty every time they desire to speak, protest or walk in silent prayer in a residential area.

B. Facial Overbreadth and the Merits of Judge Arnold's Dissent.

The argument for finding Respondent’s ordinance facially overbroad absent a proposed limiting construction is presented accurately and conclusively in Judge Richard S. Arnold's dissenting opinion. Each of the four Justices who wrote opinions in *Frisby* stated concerns about the overbreadth of the ordinance as written. The dissenting opinions rejected the reasoning of the *Frisby* majority not in favor of according greater protection to the

residential privacy interest, but in favor of striking down the ordinance altogether. 487 U.S. at 496. The concurring opinion of Justice White foreshadowed Fargo's enforcement:

In my view, if the ordinance were construed to forbid all picketing in residential neighborhoods, the overbreadth doctrine would render it unconstitutional on its face....

487 U.S. at 491 (White, J., concurring).

"In evaluating the facial challenge, we must look not only at how the ordinance has actually been enforced, but, more importantly, at what sort of enforcement it authorizes." J. Arnold dissent, *Slip Op.* at 22, n.2., App. at A23. A federal court must determine what a statute authorizes before it can judge its facial unconstitutionality. *Broadrick v. Oklahoma*, 413 U.S. 601, 617 (1973). A facial overbreadth analysis requires the Court to "consider the actual text of the statute as well as any limiting constructions that have been developed." *Boos v. Barry*, 485 U.S. 312, 329 (1988). "In evaluating [a] facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it." *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 132 (1992). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989) ("Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis . . . in evaluating a facial challenge.")

Judge Arnold's dissent, therefore, properly delineated the startling sweep of the City of Fargo's ordinance in light of Fargo's intended application. The testimony of Chief Raftervold removes any doubt about the overbreadth of Fargo's ordinance and highlights the Eighth Circuit's direct conflict with *Frisby*:

Q. In front of thirty dwellings. He goes back and forth in front of thirty dwellings, but he only knows one person who lives in one of those dwellings and his message is very much directed at that person and to all the neighbors.

A. I would say there was probable cause that he was in violation of that ordinance.

Q. Okay. And if we expand that same fact from thirty to a hundred houses.... would that change the applicability of the ordinance?

A. I don't believe so.

Arnold dissent, *Slip Op.* at 22-23, App. at A22-A23.

According to the *en banc* majority, focused picketing banned under *Frisby* includes any expressive activity in a residential area "directed at a specific occupant of a dwelling." *Slip Op.* at 14, App. at A15. Applying Chief Raftervold's testimony to the reasoning of the *en banc* majority, Fargo can ban a picketing route nearly two miles long if an identifiable or (as in this case) perceived "target" resides anywhere along the route. The extent of the route and the peacefulness of the protestors are irrelevant to the *en banc* majority, which effectively permits cities to ban all picketing in residential areas if the police can perceive a target.

Because Fargo's "impermissible applications of the law [100+ houses] are substantial when judged in relation to the statute's plainly legitimate sweep [one house]," *Broadrick v. Oklahoma*, 413 U.S. at 615, its ordinance is facially unconstitutional. Certiorari should be granted to address the Eighth Circuit's radical departure from *Frisby*.

C. Unconstitutionality of the Fargo Ordinance as Applied to Petitioners: Banning Silent Prayer on Public Sidewalks Absent Any Significant Countervailing

Interest.

Further, Respondent's ordinance was unconstitutionally overbroad (*i.e.*, not narrowly tailored) as applied to Petitioners in light of *Frisby* because Petitioners' non-invasive conduct did not implicate the countervailing "privacy" interest articulated in *Frisby*.

The singular justification for *Frisby's* narrow construction of Brookfield's ordinance was the legitimate interest in protecting the privacy of the home. The factual backdrop of *Frisby* included protesters who shouted offensive slogans (*e.g.*, "baby killer"), entered onto the abortionist's property, tied ribbons on his shrubbery, placed a protest sign at his front door, and allegedly prevented his family from leaving the property. *Schultz v. Frisby*, 619 F.Supp. 792, 795 (E. D. Wis. 1985). Construing the Brookfield ordinance to protect any resident from such focused behavior is legitimate and understandable.

Nothing remotely similar happened in this case. The District Court's first opinion granting summary judgment to Petitioners on an "as applied" basis balances the competing interests with skill and clarity:

In this case, defendants gave undue emphasis to Fargo residents' privacy at the expense of plaintiffs' First Amendment rights.... The court recognizes the state's substantial interest in protecting residential privacy and acknowledges that plaintiffs' conduct might have invaded the privacy of the residents on Edgewood Drive.... However, the court also finds that the degree of [plaintiffs'] intrusiveness was minor. Plaintiffs were silent. Their presence would have gone unnoticed unless the neighborhood residents looked out their windows or left their homes. Furthermore, there is no evidence in the

record indicating that plaintiffs blocked access to a residence or interfered with domestic tranquility in any other manner. Accordingly, the court finds that the Fargo residential picketing ordinance as applied in this case eliminated more than the exact source of evil the city legislators sought to remedy.

Plaintiffs' picketing extended well beyond one residence and they placed no particular emphasis on any individual dwelling. Furthermore, the manner in which they conducted their demonstration was as accommodating to residential privacy interests as any picket could be. *Construing the Fargo ordinance to constitutionally prohibit plaintiffs' conduct would essentially render a citizen's right to picket in a Fargo residential neighborhood meaningless.*

Veneklase v. City of Fargo, 904 F. Supp. at 1050 (emphasis supplied).

As the District Court suggested, if silent prayer along an entire block of houses on public sidewalks impermissibly invades the privacy of the home, then residential sidewalks are no longer public fora, and *Frisby* is no longer good law. Clarification from this Court on this issue will provide valuable guidance to cities drafting ordinances and demonstrators trying to abide by them.

D. The Eighth Circuit's Holding is in Direct Conflict with the Sixth Circuit and Conflicts in Principle with at Least Two Other Circuits.

In *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995), the Sixth Circuit accepted *Frisby* for its plain meaning:

“*Frisby* could not be more clear: “[O]nly focused picketing taking place solely in front of a particular residence is prohibited.” 43 F.3d at 1107, citing *Frisby*, 487 U.S. at 483. Thus, “Any linear extension [of a picketing ban] beyond the area ‘solely in front of a particular residence’ is at best suspect, if not prohibited outright.” 43 F.3d at 1105 (footnote omitted). This direct conflict between the Sixth and Eighth Circuits is by itself solid ground for granting the writ. Supreme Court Rule 10(a).

At least two other circuits have likewise accepted *Frisby's* narrowing construction for protecting a particular residence. In *Lucero v. Trosch*, 121 F.3d 591 (11th Cir. 1997), the Eleventh Circuit Court of Appeals applied *Frisby* and this Court's further discussion of it in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), to "conclude that [a] 200-foot no approach residential buffer zone does not simply proscribe activities directly in front of the staff's residences, but rather operates as a generalized restriction on protesting and thus is unconstitutional." *Lucero*, 121 F.3d at 606.

On remand from this Court in *Schultz v. Frisby*, 877 F.2d 6, 7 (7th Cir. 1989), the Seventh Circuit rejected the argument that "the ordinance does not have the meaning the Town gave it in the Supreme Court." The Court stated: "[A]s far as this case is concerned, the meaning of the ordinance is what the Supreme Court said it means..." *Id.* Cf. *Murray v. Lawson*, 138 N.J. 206, 649 A.2d 1253 (1994) (remanded from the Supreme Court, 513 U.S. 802 (1994)), *cert. den.*, 515 U.S. 1110 (1995) (“A buffer of 100 feet is required [from abortion provider’s residence] because it places the border of the zone *approximately one-and-one-half lots away* from the [provider’s] residence”).

II. A WRIT OF CERTIORARI SHOULD BE GRANTED TO ENSURE UNIFORMITY OF DECISIONS DETERMINING

MUNICIPAL LIABILITY FOR AN UNCONSTITUTIONAL ARREST.

A. Certiorari should be Granted to Clarify that a Municipality may still be Liable for Unconstitutional Arrests even if the Arresting Officers are entitled to Qualified Immunity.

After erroneously concluding that Fargo's ordinance was facially constitutional, the *en banc* majority committed clear error by converting the Eighth Circuit's earlier holding in *Veneklase I* on qualified immunity – that no "clearly established" rights had been violated – into the very different (and erroneous) holding that Petitioners' rights had not been violated at all. *Veneklase I* stated:

Whether the protestors may, consistent with the *Frisby* holding, include houses adjacent to the targeted dwelling on the picketing route, is an issue which we need not resolve today, yet it is a significant question which lingers after *Frisby*.

Veneklase I, 78 F.3d at 1268. The *en banc* majority erroneously extended that qualified immunity decision to a ruling on the "as applied" constitutional issues, stating:

The "as-applied" argument fails because this court held in the first appeal, *Veneklase I*, "that the arrest of plaintiffs by the defendant officers was objectively reasonable in light of the legal rules in existence at the time the action occurred." *Veneklase I*, 78 F.3d at 1269. This ruling became the law of the case.

Slip Op. at 15, App. at 15. A16.

This was clear error, as it is well established that municipal liability may still be imposed for a constitutional violation even when police officers enjoy immunity. *Leatherman v. Tarrant County Narcotics Intelligence*, 507 U.S. 163, 166 (1993) (“municipalities do not enjoy immunity from suit - either absolute or qualified - under § 1983”).

Judge Arnold in dissent stated the law correctly. "A municipality faced with a §1983 action cannot plead qualified or absolute immunity, nor is the good faith of its officers a sufficient defense." *Slip Op.* at 25, App. at A26, citing *Owen v. City of Independence*, 445 U.S. at 622, 638 (1980). *See also City of Sacramento v. Lewis*, 523 U.S. 833, 859 (1998) (Stevens, J., concurring) (municipalities have "a risk of exposure to damages liability even when individual officers are plainly protected by qualified immunity").

The Eighth Circuit's patently erroneous conversion of the qualified immunity defense into a shield against municipal liability warrants certiorari review standing alone. Moreover, the Eighth Circuit's decision on this point conflicts with the explicit (and correct) conclusions of at least four other circuits. "While it would be improper to allow a suit to proceed against the city if it was determined that the officers' actions did not amount to a constitutional violation, there is nothing anomalous about allowing such a suit to proceed when immunity shields the individual defendants." *Watson v. City of Kansas City*, 857 F.2d 690, 697 (10th Cir. 1988). *See also Prue v. City of Syracuse*, 26 F.3d 14, 19 (2d Cir. 1994); *Leatherman v. Tarrant County Narcotics Intelligence*, 28 F.3d 1388, 1398, n. 15, (5th Cir. 1994); *Doe v. Sullivan County, Tenn.*, 956 F.2d 545, 554 (6th Cir. 1992). The Eighth Circuit's position is alarmingly out of line with the teachings of this Court as well as the holdings in other circuits. Certiorari should be granted to correct this unprecedented and unfortunate

misstatement of the law of municipal liability.

B. There are Multiple Grounds Justifying Municipal Liability in this Case Should a Facial or an As-Applied Constitutional Violation be Established.

Because of its misapplication of the qualified immunity doctrine to effectively bestow a novel form of immunity on the City of Fargo in this case, the *en banc* majority failed to address the several compelling bases for municipal liability under principles first enunciated in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). In *Monell*, this Court stated:

[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983.

Id. at 694. *Monell* established that cities can be liable for money damages where "the action that is alleged to be unconstitutional implements or executes," *inter alia*, an "ordinance, regulation or decision officially adopted and promulgated by that body's officers." *Id.* at 690 (emphasis supplied). The undisputed evidence in this case presents three independent grounds for *Monell* liability, "assuming, arguendo, that the arrests were unconstitutionally made." *Slip Op.* at 15. App. at A16.

First, Respondent's ordinance "was unquestionably the 'moving force' behind the police officers' arrest of plaintiffs for their picketing activities." App. at J10. Officer Holman testified that he had no prior training of any kind for enforcing the ordinance, and that the text of the ordinance was his sole guide when determining

probable cause for the arrest. 904 F.Supp. at 1057.

Second, Respondent provided Rule 36 admissions that the arresting officers acted pursuant to (i) the City's official policies, customs, practices and procedures, and (ii) their training and instructions as City of Fargo police officers, when they arrested Petitioners. App. M. The *en banc* majority briefly discussed the City's admissions only to the extent of repeating the District Court's earlier misstatement of Petitioners' position. *Slip Op.* at 24, 25, App. at A16-A17. A Rule 36 admission is not dependent on a separate ratification theory - it stands alone as conclusive proof unless withdrawn.

A third ground for imposing *Monell* liability is the explicit ratification of and continuing support for every act of the arresting officers by Respondent's authorized policymaker. When policymakers approve a subordinate's decision and the basis for it, their ratification is chargeable to the municipality because their decision is final. *Praprotnik v. City of St. Louis*, 485 U.S. 112, 153 (1988) (plurality opinion). Ratification of unconstitutional conduct has been recognized consistently in the other federal circuits as a basis for *Monell* liability because it is powerful evidence for city policy and custom. See *Grandstaff v. City of Borger, TX*, 767 F.2d 161, 171 (5th Cir. 1985); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1248 (6th Cir. 1989), *Sherrod v. Barry*, 812 F.2d 195, 205 (7th Cir. 1987); *Bennett v. Slidell*, 728 F.2d 762, 769 (5th Cir. 1984) (*en banc*).

In this case, the arrests executed City policy: a complete residential picketing ban consistent with the literal text of the ordinance and fully approved by the policymaker after the fact. If this Court is moved to grant certiorari on the First Amendment issues presented in this petition, such review will not be in vain. There is ample ground for finding municipal liability in this case if the ordinance is determined to have been unconstitutionally applied to

Petitioners' conduct.

III. CERTIORARI SHOULD BE GRANTED TO ADDRESS THE STANDARD FOR RECUSAL UNDER 28 U.S.C. §455(a) AND TO ESTABLISH THAT NO JUDGE SHOULD DECIDE A CASE WHERE A FORMER CLIENT IS THE VICTIM OF THE ALLEGED CRIME.

On October 10, 1991, at the same time Jane Bovard was calling the Fargo police to have Petitioners arrested for praying in her neighborhood, her abortion clinic was being represented by attorney Kermit Bye's Fargo law firm in two different cases involving abortion. Bovard later testified in the trial of this action as the victim of the alleged picketing crime.

After this case had been argued and submitted to the *en banc* court, and shortly after Judge Kermit Bye was confirmed, Judge Bye elected to join the *en banc* court and, without disclosing his prior relationship with Bovard to the parties in this case, ultimately proceeded to cast the tie-breaking vote against Bovard's political adversaries. Asserting his ability to be fair in this case, Judge Bye perceived no appearance of impropriety. App. at E4. The Eighth Circuit apparently lacks any procedures for reviewing a judge's self-assessment on such sensitive matters. *See* App. C.

A judge is obligated to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a). "The very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988). The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact. *Id.* at 869-70 (citation omitted). *See also Liteky v. United States*, 510 U.S. 540 (1994).

The appearance of impropriety in this case is patent. As Petitioners pointed out in their recusal motion, Judge Bye's vote would only matter as a six to five tie-breaker. For him to participate anyway and swing the case against Bovard's pro-life adversaries looks like the proverbial "stacked deck."

Setting aside the passion that is inherent in any dispute between pro-life and abortion rights organizations, however, it should be clarified that a potential conflict is strongly suggested when a judge participates in a case where a former client is postured (and testifies) as the victim of a purportedly criminal act. Judge Bye essentially dismissed this suggestion by saying, in essence, that there was no controlling legal authority which required his recusal. In view of the potential damage an appearance of conflict may inflict upon the public's trust in the judicial system, however, the recusal statute should be clarified to require judges to err on the side of caution in these circumstances.

CONCLUSION

For the reasons stated herein, Petitioners respectfully request that this Court grant their petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and consider the question presented herein.

Respectfully submitted,

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