No. 09-314 SEP 10 2009

In The
Supreme Court of the United States

CITY OF VIRGINIA BEACH,

Petitioner,

v.

BRADLEY S. TANNER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a noise ordinance which proscribes "unreasonably loud, disturbing and unnecessary noise" – applying a reasonable person standard – impermissibly vague under the Due Process Clause of the United States Constitution?

LIST OF PARTIES TO THE PROCEEDING

Petitioner:

City of Virginia Beach

Respondents:

Bradley S. Tanner

Eric Alexander Williams

BAE Ventures, Inc. t/a The Peppermint Beach Club

RULE 29.6 STATEMENT

The City of Virginia Beach is not a publicly held corporation and does not have a parent or publicly held company owning 10% or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Mark D. Stiles, City Attorney for the City of Virginia Beach, on behalf of the City of Virginia Beach ("the City"), respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The Circuit Court of Virginia Beach, Virginia denied facial and "as-applied" challenges to the Virginia Beach Noise Ordinance by letter opinions dated August 13, 2007 and April 8, 2008, respectively. These opinions are reprinted at App. 26a,[1] and App. 17a. The Supreme Court of Virginia's Opinion reversing the circuit court is reported as Tanner v. The City of Virginia Beach, 277 Va. 432, 674 S.E.2d 848 (2009), and is reprinted at App. 1a. The Supreme Court of Virginia denied The City of Virginia Beach's Petition for Rehearing on June 12, 2009. (App. 30a).

INTRODUCTION

The Supreme Court of Virginia struck down as unconstitutional the entire Virginia Beach Noise Ordinance, City Code § 23-47 ("the Ordinance"). The Ordinance prohibits "unreasonably loud, disturbing and unnecessary noise in the city or any noise of such character, intensity and duration as to be

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[1] References to the Appendix contained in the Petition for Writ of Certiorari will be denoted "(App.__)."

detrimental to the life or health of persons of reasonable sensitivity or to disturb or annoy the quiet, comfort or repose of reasonable persons." (App. 70a). The Ordinance incorporates a "reasonable person" standard that law enforcement officers must apply before issuing a citation for violating the Ordinance. (App. 70a).

The Virginia Supreme Court found that the Ordinance is impermissibly vague under the Due Process Clause of the United States Constitution because it does not contain "ascertainable standards." (App. 9a). Rather, the court reasoned, "the determinations required by the ordinance can only be made by police officers on a subjective basis." (App. 11a). In so finding, the court concluded that the words "loud, disturbing and unnecessary," as used in this Ordinance, "are inherently vague because they require persons of average intelligence to guess at the meaning of those words." (App. 10a).

This Court has already held that the adjectives "loud" and "disturbing"—when read in context—pass constitutional muster in a vagueness challenge. Thus, the Virginia court's opinion conflicts with jurisprudence from this Court. And, the Virginia court's opinion is a marked departure from the existing case law from both federal and state courts that have reviewed similar noise ordinances. More importantly, though, this case raises the jurisprudentially significant question whether inclusion of the established and familiar "reasonable person" standard in a noise ordinance satisfies constitutional due process requirements, or whether noise ordinances must contain

mathematically precise standards such as decibel ranges or distance parameters in order to survive constitutional scrutiny.

These reasons compel this Court's review under Rule 10 of the Rules of the Supreme Court of the United States.

STATEMENT OF JURISDICTION

The Supreme Court of Virginia issued its decision on April 17, 2009, and denied Petitioner's request for Rehearing on June 12, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

> nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

2. The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

3. Virginia Beach City Code § 23-47 states:

> It shall be unlawful for any person to create, or allow to be created any unreasonably loud, disturbing and unnecessary noise in the city or any noise of such character, intensity and duration as to be detrimental to the life or health of persons of reasonable sensitivity or to disturb or annoy the quiet, comfort or repose of reasonable

persons. The following acts, among others, are declared to be loud, disturbing and unnecessary noise in violation of this section, but such enumeration shall not be deemed to be exclusive:

(1) The playing of any television set, radio, tape player, phonograph or any musical instrument in such a manner or with such volume as to annoy or disturb the quiet, comfort or repose of reasonable persons.

(2) The keeping of any animal which, by causing frequent or long-continued noise, shall disturb the quiet, comfort or repose of the neighborhood to such an extent as to constitute a nuisance.

(3) The creation of any excessive noise on any street adjacent to any school, institution of learning or court, while the same is in session, or adjacent to any building used as a place of public worship, while being so used or adjacent to any hospital, which unreasonably interferes with the workings of such school, institution or court or the services being conducted in such place of public worship or which disturbs or unduly annoys patients in such hospital.

> (4) The shouting and crying of peddlers, hawkers and vendors which disturbs the peace and quiet of the neighborhood.
>
> (5) The use of any drum, loudspeaker or other instrument or device for the purpose of attracting attention, by creation of noise, to any performance, show or sale or display of merchandise.

STATEMENT OF THE CASE

A. Proceedings in the Circuit Court

On June 22, 2007, Bradley S. Tanner, Eric Alexander Williams, and BAE Ventures, Inc. t/a the Peppermint Beach Club (hereinafter, "Tanner," "Williams," or collectively "the Peppermint,") filed a Complaint in the Circuit Court of the City of Virginia Beach, Virginia seeking declaratory and injunctive relief against the enforcement of the Ordinance. (App. 59a).

The City filed a demurrer[2] contending that the Ordinance was facially valid. (App. 38a). In a letter opinion dated August 13, 2007, the circuit court sustained the demurrer in part, holding that the Ordinance was facially valid. The circuit court relied upon a prior circuit court opinion which had found

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[2] A demurrer tests the legal sufficiency of a pleading. Thompson v. Skate America, Inc., 261 Va. 121, 128, 540 S.E.2d 123, 126 (2001). Therefore, the circuit court did not consider evidence in ruling on the Peppermint's facial challenge.

that the Ordinance was "not facially vague or overbroad and does not, as written, violate any due process" rights under the Virginia Constitution. (App. 28a-29a). The circuit court dismissed the facial challenge, (App. 23a), and subsequently denied the Peppermint's motion to reconsider this ruling. (App. 14a, 19a).

Following a hearing on July 11, 2007, the circuit court denied the Peppermint's request for preliminary injunction, largely on grounds that the Peppermint could not "show a likelihood of success on the merits." (App. 28a).

By Order entered *nunc pro tunc* September 7, 2007, the circuit court overruled the City's demurrer as to the "as applied" challenge. (App. 23a-25a). A trial on the "as-applied" claim, as well as the selective enforcement claim, was held on February 26, 2008.

The Peppermint is a nightclub located in the 1800 block of Atlantic Avenue. (App. 1a, 47a). City police officers have repeatedly warned the Peppermint's owners, Tanner and Williams, that the music emanating from the interior of their establishment was unreasonably loud. (App. 2a, 48a). Failing to heed these warnings, on several occasions Tanner and Williams received Class 4 misdemeanor citations for unreasonably loud, disturbing and unnecessary noise, in violation of the Ordinance. (App. 2a-3a, 48a).

In a letter opinion dated April 8, 2008, the circuit court denied the Peppermint's "as-applied"

challenge. (App. 20a-22a). With regard to the facial challenge, the circuit court again noted that it had dismissed this claim on a demurrer, and held that it would not reverse its earlier ruling. (App. 19a).

Although the original Complaint purported to challenge the constitutionality of the Ordinance pursuant to the Constitution of Virginia, in its letter opinion issued on April 8, 2008, the trial court addressed the issue of constitutionality pursuant to the United States Constitution. Specifically, the trial court based its analysis upon the Equal Protection Clause contained in the United States Constitution and the case law regarding same. (App. 20a).

The circuit court entered a final order on April 21, 2008. (App. 13a).

B. Proceedings in the Supreme Court of Virginia

The Peppermint appealed to the Supreme Court of Virginia, arguing that (1) the circuit court erred in denying the facial challenge, (2) the ordinance is facially unconstitutional, (3) "as-applied" the ordinance is unconstitutional, and (4) the circuit court erred in denying relief given the specific finding of uneven enforcement. The Supreme Court of Virginia awarded the Peppermint a writ on October 30, 2008.

On April 17, 2009, the Supreme Court of Virginia issued an opinion reversing the circuit court. It found that the Ordinance as written

violated the Due Process Clause.[3] (App. 9a). Specifically, the court determined that the Ordinance fails to give "fair notice" -- as required by the Due Process Clause -- because the words "loud, disturbing and unnecessary" are inherently vague.[4] The Supreme Court of Virginia declined to address the per-se violations contained in the Ordinance, and did not reach the "as applied" selective enforcement claim.

The court refused the City's Petition for Rehearing. (App. 30a).

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[3] As the Supreme Court of Virginia was reviewing the facial validity claim on the trial court's resolution of the City's demurrer, it was limited to review of the Complaint. E.g., Thompson v. Skate America, Inc., 261 Va. 121, 124, 540 S.E.2d 123, 124 (2001) ("Our review is governed by the well-settled principle that when we consider the trial court's sustaining of a demurrer 'we look solely at [the plaintiff's] allegations in his motion for judgment to determine whether he stated a cause of action.'") (quoting Perk v. Vector Resources Group, Ltd., 253 Va. 310, 312, 485 S.E.2d 140, 142 (1997)).

[4] Although the court did not expressly articulate whether its holding was based upon federal or state principles, the court relied primarily upon jurisprudence from this Court interpreting the United States Constitution.

REASONS FOR GRANTING CERTIORARI

I. The Virginia Supreme Court's Opinion Conflicts with this Court's Due Process Jurisprudence and Misinterprets and Misapplies the Law Regarding the Reasonable Person Standard.

The Supreme Court of Virginia's ruling that the Ordinance is vague under the Due Process Clause and thus unconstitutional, conflicts with this Court's prior holdings that the words "loud" and "disturbing" in a criminal statute—when read in a limited context—withstand a vagueness challenge under the Due Process Clause. The Virginia Court's opinion also conflicts with this Court's established reliance on the "reasonable person standard" in criminal cases. Finally, its opinion departs from the jurisprudence from federal courts and other state supreme courts addressing the issue whether the "reasonable person" standard saves an otherwise unconstitutional noise or similar ordinance.

A. This Court has held that the reasonable person standard in a criminal law provides sufficient standards to satisfy the Due Process Clause.

The Supreme Court of Virginia erred in finding that the Ordinance did "not contain ascertainable standards." (App. 9a). The Virginia court found the "reasonable person" standard contained in the Ordinance to be constitutionally

deficient, requiring instead a standard that sets forth "what noise levels are prohibited." (App. 11a). Because the City's Ordinance contains an objective, ascertainable standard by which a noise violation is measured – the "reasonable person" standard – it satisfies the Due Process Clause.

The Due Process Clause is not as demanding as the Supreme Court of Virginia found. Contrary to the Virginia court's holding, the Due Process Clause does not require municipalities to adopt bright-line rules or mathematical formulas in penal laws. See Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language.") Rather, an ordinance may allow for flexibility and reasonable breadth, and need not be drafted with meticulous specificity so long as it is clear what the ordinance as a whole prohibits. See generally Grayned, 408 U.S. 104; Kovacs v. Cooper, 336 U.S. 77, 79 (1949); Cameron v. Johnson, 390 U.S. 611, 616 (1968).

The Due Process Clause does not require a noise ordinance to define impermissible noise levels in decibel ranges or other mathematical parameters. Grayned, 408 U.S. at 112 (upholding a noise ordinance even though "the prohibited quantum of disturbance is not specified" and it lacked mathematical precision). Here, prohibited disturbances are easily measured by their impact on the familiar "reasonable man." Id. Thus, the Virginia court's insistence on legislatively drafted noise levels impermissibly rewrites this Court's Due Process law.

Equally important, the Virginia Supreme Court's rejection of the "reasonable person" standard as a reasonably certain and definite standard for determining proscribed conduct under the Due Process Clause stands in stark contrast to this Court's jurisprudence. In Cameron, the petitioner argued that the addition of "unreasonably" to a criminal picketing statute made the statute impermissibly vague. 390 U.S. at 616. However, this Court held that the word "unreasonably" "is a widely used and well understood word and clearly so when juxtaposed with obstruct and interfere. . . [T]he statute clearly and precisely delineates its reach in words of common understanding." Id.

Similarly, this Court has held that so long as an ordinance's construction contains an "ascertainable standard" such as "the sensitivity of a hypothetical reasonable man," the ordinance is not unconstitutionally vague. See Coates v. City of Cincinnati, 402 U.S. 611, 613-614 (1971) (emphasis added). Where this Court ascribes sufficient clarity to the "reasonable person" standard to survive a vagueness challenge under the Due Process Clause —even when used to define specific criminal conduct—an opinion from the Virginia Supreme Court cannot have the opposite result.

B. The "reasonable person" standard permeates this Court's jurisprudence.

The reasonable person standard permeates this Court's jurisprudence. In the context of federal prosecution for mailing obscene materials, this Court

held that two prongs of a three prong test to determine whether the material is obscene are issues of fact for the jury to determine applying contemporary community standards. See Smith v. United States, 431 U.S. 291, 301 (1977) (discussing the first and second prongs, appeal to prurient interest and patent offensiveness). This Court then carefully crafted the third prong, stating "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." Id. Thus, for the third prong the relevant question is "whether a reasonable person would find ... value in the material, taken as a whole." Ashcroft v. ACLU, 535 U.S 564, 579 (2002) (emphasis added).

In the context of Section 1983 claims against government employees, this Court has held that the defense of "qualified immunity" requires courts to enter judgment in favor of a government employee unless the employee's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

In addressing the interplay between prison regulations and the First Amendment, this Court "adopted a standard of review that focuses on the reasonableness of prison regulations: the relevant inquiry is whether the actions of prison officials were reasonably related to legitimate penological interests." Turner v. Safely, 482 U.S. 78, 89 (1987)

(emphasis added). In other words, in order to survive a constitutional challenge, a prison regulation that burdens fundamental rights must be "reasonably related" to legitimate penological objectives. Id. This Court reasoned that "such a standard is necessary if prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations." Thornburgh v. Abbott, 490 U.S. 401, 409 (1989) (internal citations omitted). This Court also noted that this standard is not "toothless." Id. at 414.

And in the context of Fourth Amendment seizures, the law is well settled that "law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." U.S. v. Drayton, 536 U.S. 194, 200-201, 122 (2002) (citing Florida v. Royer, 460 U.S. 491, 497 (1983)). Instead, if a reasonable person would feel free to terminate the encounter, then he or she has not been seized. Id. (emphasis added).

In a myriad of criminal law settings, this Court recognizes that the "reasonable person" standard is ascertainable and readily evident to the common man.

C. This Court has held that the words "loud" and "disturbing" are not vague in the context of other noise ordinances.

The Supreme Court of Virginia found the words "loud, disturbing and unnecessary" to be unconstitutionally vague. (App. 10a). This holding departs from settled, controlling law.

In Kovacs, this Court addressed whether the terms "raucous" and "loud" were so vague as to be unenforceable. 336 U.S. at 79. In rejecting the vagueness claim, Justice Reed opined:

> The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. The objection centers around the use of words "loud and raucous." While these are abstract words, they have through daily use acquired a content that conveys to an interested person a sufficiently accurate concept of what is forbidden.

Id. Thus, the words "loud" and "raucous" were not unconstitutionally vague.

Like the ordinance in Kovacs, the City's Ordinance prohibits "loud" noises, but only those that are unreasonably loud. The Ordinance is therefore narrower than the one upheld in Kovacs,

and gives fair notice of the proscribed conduct as required by the Due Process Clause.

Although the Virginia Supreme Court found that the words "unreasonably loud and disturbing" are vague and allow for subjective police enforcement, this Court has concluded that the use of the word "loud" and other "abstract words" which "have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden," is sufficient to save a statute from a vagueness challenge under the Due Process Clause. Kovacs, 336 U.S. at 79.

Similarly, in Grayned, this Court held that an ordinance prohibiting noise that "disturbs or tends to disturb" was not impermissibly vague under the Constitution. 408 U.S. at 109. This Court rejected a vagueness challenge under the Due Process Clause, writing that

> [c]ondemned to the use of words, we can never expect mathematical certainty from our language. The words of the Rockford ordinance are marked by flexibility and reasonable breadth, rather than meticulous specificity, but we think it is clear what the ordinance as a whole prohibits.

Id. at 108.

The Grayned Court noted that "although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's

announced purpose that the measure is whether normal school activity has been or is about to be disrupted." Id. at 112. The "particular context"—i.e., the statute when read in its entirety—gives "fair notice to those to whom (the ordinance) is directed." Id.

Like the statute in Grayned, the Ordinance prohibits noise which disturbs, but limits what constitutes a criminal offense to only "unreasonably loud, disturbing and unnecessary noise" and noise of such character as "to disturb or annoy the quiet, comfort, or repose of reasonable persons." Additionally, the reasonable person standard, and the *per se* violations contained in the body of the Ordinance, provide the context for the words "unreasonably loud, disturbing and unnecessary" to sufficiently warn what conduct it prohibits.

Finally, unlike the ordinance upheld in Kovacs, the City's Ordinance places an additional restriction on what constitutes a criminal noise violation—i.e., that the noise must be loud, disturbing, and unnecessary to a reasonable person. As discussed, this Court has identified the "reasonable person" standard as providing an ascertainable standard, enabling a person of common intelligence to identify what conduct the statute prohibits. See generally Coates, 402 U.S. at 614. Taken together, where the reasonable person standard as well as the specific words "loud" and "disturbing" have all been found by this Court to be sufficiently definite to defeat a vagueness challenge under the Due Process Clause, the Virginia Supreme

Court's opinion unquestionably conflicts with jurisprudence from this Court.

II. Federal Courts of Appeal and State Supreme Courts Have Upheld Noise Ordinances Similar to the One Struck Down by the Supreme Court of Virginia.

Several noise ordinances similar to the City's Ordinance have survived constitutional scrutiny. While many courts have acknowledged that the challenged ordinances contain abstract or imprecise adjectives, those courts have also held that, when read in the context of a statute containing the reasonable person standard, those ordinances nonetheless survive a vagueness challenge. Thus, although none of these cases is binding on this Court, they underscore the dangerous conflict created by the Supreme Court of Virginia's decision, as the following summary demonstrates.

A. Federal Cases

Howard Opera House Associates v. Urban Outfitters, Inc., 322 F.3d 125, 128 (2d Cir. 2003)

> ("The argument that the Burlington noise ordinance is unconstitutionally vague is effectively precluded by our decision in Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir.1994), where we held that an injunction prohibiting 'excessively loud sound' that 'injures, disturbs, or endangers the health or safety' of

> others is sufficiently clear to withstand a vagueness challenge. Here, we have an ordinance that prohibits 'loud or unreasonable noise,' with 'unreasonable' noise defined as that which 'disturbs, injures or endangers the peace or health of another or ... endangers the health, safety or welfare of the community. . . .' [W]e find that the differences between the Schenck injunction and the Burlington noise ordinance are minor at best, and hold that the portion of the Burlington noise ordinance here applied passes constitutional muster.") (internal citations omitted);

Reeves v. McConn, 631 F.2d 377, 386 (5th Cir. 1980)

> ("The Supreme Court has approved the use of the word 'unreasonably' in similar statutes that are otherwise precise and narrowly drawn. The Court has also approved the terms 'loud' and 'raucous' as standards of prohibited sound amplification. Though these words are abstract, 'they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden.' We approve the words 'jarring' and 'nuisance' on the same grounds, even though they fall short of providing "mathematical certainty.' 'Flexibility

and reasonable breadth, rather than meticulous specificity,' is acceptable in this area.") (internal citations omitted);

B. State Cases

City of Beaufort v. Baker, 432 S.E.2d 470, 474 (S.C. 1993).

> ("In similar fashion, we here apply normal meanings to words of common understanding and conclude that speech that is so unreasonably loud as to unreasonably intrude on the privacy of a captive audience may be punished. We hold that the words 'loud and unseemly,' so construed, give sufficient notice of what conduct is penalized. 'Unseemly' modifies 'loud' and means 'unreasonably loud in the circumstances.' That is clear enough. The objective 'reasonable' test is used in many areas of the law as an appropriate determinant of liability and thus a guide to conduct.")(internal citations omitted);

City of Madison v. Baumann, 470 N.W.2d 296, 302 (Wis. 1991)

> ("[T]he word, reasonably, saves the ordinance from the infirmity of vagueness. The reasonable-person standard is one that has been relied upon in all branches of the law for

> generations. . . . The reasonable person is a reasonable person in the circumstances. . . . In the instant case, the circumstances are adequately spelled out. They are simply what a reasonable person would conclude would disturb the peace and quiet of the vicinity. The test for a possible violator is simply the time honored and time validated reasonable person test, *i.e.*, what effect will my conduct [] have upon persons in the vicinity under the circumstances.");

Eanes v. State, 569 A.2d 604, 616 (Md. 1990)

> ("In similar fashion, we here apply normal meanings to words of common understanding and conclude that speech that is so unreasonably loud as to unreasonably intrude on the privacy of a captive audience may be punished. We hold that the words loud and unseemly, so construed, give sufficient notice of what conduct is penalized. Unseemly modifies loud and means unreasonably loud in the circumstances. That is clear enough. The objective reasonable test is used in many areas of the law as an appropriate determinant of liability and thus a guide to conduct.");

Earley v. State, 789 P.2d 374, 376 (Alaska App. 1990)

("A statute is not vague merely because a fact finder must determine questions of reasonableness. Having examined AS 11.61.110(a) and (b), we are satisfied that the statute gives reasonable notice of the conduct it prohibits and that the phrase unreasonably loud noise as defined is not unconstitutionally vague.");

Harlem Yacht Club v. New York City Environmental Control Bd., 40 A.D.3d 331, 332, (N.Y. 2007)

> ("Nor is the ordinance, which bans 'unreasonable noise,' defined as 'any excessive or unusually loud sound that disturbs the peace, comfort or repose of a reasonable person of normal sensitivities, injures or endangers the health or safety of a reasonable person of normal sensitivities or which causes injury to plant or animal life, or damage to property or business' (Administrative Code § 24-203[62]), impermissibly vague.");

Lutz v. City Of Indianapolis, 820 N.E.2d 766, 769 (Ind. App. 2005)

> ("The myriad of noises that the Ordinance in the instant case prohibits is exactly the reason that it is unconstitutionally vague. Indiana's disorderly conduct statute is narrowly tailored to prohibit 'unreasonable' noise made only after an individual has been warned about his conduct. The

> Ordinance in the instant case, however, does not include an objective test; instead, Lutz correctly notes that it prohibits *any* noise that is 'loud,' 'unnecessary,' or 'unusual,' or that annoys or disturbs others.");

People v. Lord, 796 N.Y.S.2d 511, 511 - 512 (N.Y. 2005)

> ("It is well settled that an ordinance may penalize 'unreasonable' noise under circumstances as defined in the ordinance at issue and that 'unreasonableness' is an objective standard of evaluation. There is no constitutional requirement that a decibel meter or other such device be used to determine whether a noise level will be considered illegal. By employing a reasonableness standard, which can be interpreted on the basis of common life experience, the ordinance provides greater comprehensible notice of prohibited behavior and better implements the legislative intent behind such an ordinance.") (internal quotations and citations omitted);

State v. Dorso, 446 N.E.2d 449, 452 (Ohio 1983)

> ("[W]e construe the Cincinnati ordinance at issue to prohibit the playing of music, amplification of sound, etc., in a manner which could be

> anticipated to offend the reasonable person, *i.e.*, the individual of common sensibilities. Specifically, we find the ordinance to proscribe the transmission of sounds which disrupt the reasonable conduct of basic human activities, *e.g.*, conversation or sleep. Our construction of the ordinance does not permit the imposition of criminal liability upon a party whose conduct disturbs only the hypersensitive. Thus, the standard hereby adopted vitiates the claimed vagueness of the ordinance.");

State v. Friedman, 697 A.2d 947, 950 (N.J. 1997)

> ("Neither the Law Division Judge nor the Municipal Court Judge considered the reasonableness of the Friedmans' conduct in determining whether their dog's barking violated the anti-noise ordinance. A purely subjective standard of behavior was utilized to determine whether the dog's barking constituted a disturbance of the peace; such a standard is unconstitutionally vague.");

State v. Holcombe, 187 S.W.3d 496, 499 –500 (Tex. Crim. App. 2006)

> ("We agree with the State that the Bedford noise ordinance contains objective criteria for determining what conduct is prohibited and therefore does

> not permit arbitrary enforcement. The ordinance clearly establishes an objective reasonable-person standard by referring to neighboring persons of ordinary sensibilities and banning noise that unreasonably disturb[s] or interfere[s] with the peace, comfort and repose of such persons. These words describe noise of the type or volume that a reasonable person would not tolerate under the circumstances.") (internal quotations omitted);

State v. Johnson, 542 P.2d 808, 810 (Ariz. 1975)

> ("In order to determine whether the noise made by appellant was loud and unusual, it must be evaluated in terms of a reasonable man standard. Our inquiry must determine whether the noise would disturb a person of ordinary sensitivities; that is, the language or conduct is to be adjudged to be disorderly, not merely because it offends some supersensitive or hypercritical individual, but because it is, by its nature, of a sort that is a substantial interference with (our old friend) the reasonable man.") (internal quotations omitted);

Town of Baldwin v. Carter, 794 A.2d 62, 68 (Me. 2002)

> ("We interpret the Town's ordinance in this case to mean that continuous or repeated dog barking that is unnecessary is actionable only if it is unreasonable. . . . Reasonableness is a well defined concept under the common law. Reasonable compliance is not an unconstitutionally vague concept. If it were, most tort law doctrines and a host of other legal standards would be invalid-the reasonable person, beyond reasonable doubt, reasonable good faith efforts, etc.") (internal citations and quotations omitted);

Township of Plymouth v. Hancock, 600 N.W.2d 380, 382-83 (Mich. 1999)

> ("The people argue the use of the reasonable person standard in the ordinance saves the ordinance from being impermissibly vague. We agree. The ordinance plainly states that the type of conduct that is prohibited is that which tends 'to *unreasonably* annoy or disturb the quiet, comfort and repose of persons in the vicinity.' (Emphasis added.) . . . .We believe the reasonable person standard serves to provide fair notice of the type of conduct prohibited, as well as preventing abuses in application of the ordinance. The reasonable person standard assures that 'the person of ordinary intelligence [has] a reasonable opportunity to know

> what is prohibited, so that he may act accordingly.'") (internal citations omitted).

Given the conflict created by the decision of the Supreme Court of Virginia regarding the constitutionality of noise ordinances under the Due Process Clause, and in particular, those which contain a limiting and objective reasonable person standard, this Court's guidance is necessary to clarify this important issue. Specifically, the City respectfully submits that this Court should find that a noise ordinance prohibiting any "unreasonably loud, disturbing and unnecessary noise" – as measured under the familiar "reasonable person standard" – does not violate the Due Process Clause of the United States Constitution.

III. The Decision Below is Grounded on Authority Which does not Support the Conclusion the Supreme Court of Virginia Reached.

In holding that the Ordinance's use of the "reasonable person" standard does not save it from a vagueness challenge under the Due Process Clause, the Virginia Supreme Court relies on Thelen v. State, 526 S.E.2d 60, 62 (Ga. 2000). In Thelen, the Georgia Supreme Court held that a noise ordinance prohibiting "any ... unnecessary or unusual sound or noise which ... annoys ... others in the county" failed to provide the requisite clear notice of the prohibited conduct. Id. Specifically, the court held that "[t]he adjectives unnecessary and unusual modifying the noun noises are inherently vague and elastic and

require men of common intelligence to guess at their meaning. The same may be said of the verb annoys." Id. (internal citations and quotations omitted). Thus, the court found the ordinance to be unconstitutional.

The noise ordinance in Thelen did not have a "reasonable person" standard by which the prohibited conduct could be measured. Rather, the ordinance resorted to "others in the county" to determine what noise was prohibited. The Thelen court found the ordinance unconstitutional because, in order to comply with or enforce the ordinance, an individual would be required to apply a "completely subjective standard." Id.

As further proof that the absence of an objective "reasonable person" standard doomed the Georgia ordinance, the Thelen court compares its holding with that set forth in State v. Garren, 451 S.E.2d 315, 318-319 (N.C. 1994). In Garren, the Court of Appeals of North Carolina upheld a portion of the noise ordinance at issue because the ordinance included the "objective" standard of "reasonable persons of ordinary sensibilities." Id. In other words, implicit in Thelen's holding is that a "reasonable person standard" could have saved the ordinance from being declared vague and thus unconstitutional. Because the noise ordinance in Thelen lacked the objective, reasonable person standard found in the City's Ordinance, the Supreme Court of Virginia's reliance on Thelen is misplaced.

Similarly, the Supreme Court of Virginia holding is not supported by Nichols v. City of

Gulfport, 589 So.2d 1280 (1991), because the Gulfport ordinance did not employ a "reasonable person" standard. In Nichols, the Supreme Court of Mississippi held that an ordinance which prohibited "unnecessary or unusual noises ... which either annoys, injures or endangers the comfort, repose, health or safety of others ..." was unconstitutionally vague. Because the ordinance in Nichols makes no reference to a reasonable person standard, the Supreme Court of Virginia's reliance on Nichols is misplaced.

Nor does the decision in People v. New York Trap Rock Corp., 442 N.Y.2d 1222, 1224 (N.Y. 1982), support the Virginia court's decision that a "reasonable person" standard is impermissibly vague in a noise ordinance. In that case, the Court of Appeals of New York held that a noise ordinance stating, "[n]o person shall make . . . any unnecessary noise" including, among other things, "any excessive or unusually loud sound or any sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a person." As in Thelen and Nichols, the ordinance in New York Trap Rock did not contain a reasonable person standard, nor did the court address the question whether such a standard would cure the vagueness of the statute.

The Supreme Court of Virginia also relied heavily on this Court's decision in Grayned, although the Grayned Court actually found that the Rockford noise ordinance was not impermissibly vague, and survived constitutional scrutiny. It is particularly difficult to reconcile the Virginia court's opinion with

Grayned, which found the following noise ordinance sufficiently definite to satisfy the requirements of the Due Process Clause: "any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class." In short, Grayned, like the other cases on which the Virginia court justified its conclusion, neither compels nor particularly supports the result. To the contrary, under this Court's Due Process jurisprudence, the City's Ordinance is constitutional.

CONCLUSION

This Petition for Writ of Certiorari presents an important question of federal constitutional law. This Court should grant certiorari to address and clarify the constitutional vagueness standards applicable to noise ordinances which explicitly include a "reasonable person" standard. And, this Court should grant certiorari to reverse the Supreme Court of Virginia's erroneous interpretation and application of both this Court's jurisprudence and the Due Process Clause.

Respectfully submitted,

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