No. 09-314

In The
Supreme Court of the United States

CITY OF VIRGINIA BEACH, VIRGINIA,

Petitioner,

v.

BRADLEY TANNER, *et al.*,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

The City of Virginia Beach files this reply to identify several analytical flaws in Respondents' Brief in Opposition. These flaws not only expose the constitutional error in the decision below, but also underscore the importance of this Court's review.

I. This is Not a First Amendment Case.

Though Respondents continually direct this Court to jurisprudence involving vagueness and overbreadth challenges to statutes which inhibit free speech, the case before this Court does not implicate the First Amendment.

Respondents press this Court to adopt a more strict application of the standard for unconstitutional vagueness which courts apply in contexts involving First Amendment concerns.[1] See Connally v. General Construction Co., 269 U.S. 385, 391 (1926). However, the City's ordinance does not infringe upon constitutionally protected speech, and this Court should decline Respondent's invitation to rely upon the more stringent First Amendment standard.

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[1] Among others, Respondents cite Saia v. New York, 334 U.S. 558, 561-61 (1948) (finding an ordinance forbidding the use of sound amplification without the permission of the Chief of Police as **violative of the right to free speech**)(emphasis added)) and Reeves v. McConn, 631 F.2d 377, 386 (5th Cir. 1980) (employing the more stringent vagueness standard to asses a noise ordinance which included limitations on amplified sound and **implicated First Amendment concerns**)(emphasis added)).

Rather, this Court should adhere to the traditional standard for determining if the City's noise ordinance survives a vagueness challenge, specifically "whether the terms of [the] statute are so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application." Id. (internal citations omitted). The City's ordinance survives Respondents' vagueness challenge under this well-settled standard.

II. Respondents' Recited Cases are Not Analogous and Do Not Provide This Court with Guidance Regarding the Vagueness Challenge.

While seemingly on point, Respondents artfully disguise the reality that the case law upon which they rely is readily distinguishable and/or inapplicable to the case at bar.

Respondents cite Chicago v. City of Morales for the proposition that there are two independent reasons for invalidating a statute for vagueness, specifically lack of fair notice and susceptibility of arbitrary enforcement. 527 U.S. 41, 56 (1999). Brief in Opp. 11. Respondents assert that because the City's ordinance is not evenly enforced, the ordinance is unconstitutional. Brief in Opp. 13-14.

Respondents fail to point out that the second test for vagueness requires both arbitrary *and* discriminatory enforcement. See Chicago, 527 U.S. at 56. While Respondents quickly assert facts regarding arbitrary enforcement, there simply are no facts to support any assertion of discriminatory

enforcement. In ruling on the Respondents' as-applied challenge, the trial court found as fact that the City did not discriminatorily enforce the noise ordinance. This factual finding defeats Respondents' "arbitrary enforcement" argument.

Respondents also take issue with the City's "across the street guideline" which officers *may* use to determine whether noise is unreasonably loud. Brief in Opp. 11, 13. Citing Deegan v. City of Ithaca, 444 F.3d 135 (2006), Respondents contend that the facts are strikingly similar to the case at bar, and assert that pursuant to the analysis set forth therein, the City's ordinance is likewise unconstitutional.

Again, Respondents misinterpret Deegan. Unlike the present case, Deegan involved an as-applied challenge. The court found that given the facts, the prohibition of noise that can be heard 25 feet away restricted more noise than was necessary —particularly protected speech—and thus the ordinance implicated First Amendment concerns. In addition, the court found that officers used the 25-foot guideline as the sole method of determining the reasonableness of noise, including speech, and did not take into consideration the other factors set forth in the statute. In contrast to Deegan, officers for the City take into consideration several factors, including the "across the street guideline," in determining whether the potential violation meets the reasonable person threshold. Accordingly, Deegan is distinguishable.

III. Respondents Misconstrue the Authority Cited by the City.

Contrary to Respondents' assertion, the Supreme Court of Virginia's reliance on Thelen v. State, 526 S.E.2d 60 (Ga. 2000) and People v. Trap Rock, 442 N.E.2d 1222 (N.Y. 1982) was not appropriate. Respondents incorrectly identify the existence of underlying complaints as a crucial factor in Thelen and Trap. However, neither court relied upon the existence of a third-party complaint as a factor in its vagueness analysis.

Instead, Trap Rock noted the difficulty in narrowing the context of a noise enforcement ordinance and acknowledged that ordinances which place a limitation on enforcement usually survive a vagueness challenge. 442 N.E.2d at 1226. The court also noted that on the other hand, those ordinances in "which vague words could not take on a reasonable degree of definitiveness have not survived." Id. The words "unreasonably loud, disturbing and unnecessary" have been upheld in certain contexts as withstanding a constitutional vagueness challenge. See Grayned v. City of Rockford, 408 U.S. 104 (1972)(holding that terms "disturbs" or "tends to disturb" were not unconstitutionally vague in the challenged noise ordinance); Kovacs v. Cooper, 336 U.S. 77, 79 (1949)(holding that the terms loud and raucous were not unconstitutionally vague). Thus, with the added protection of the *objective* reasonable person standard, the City's noise ordinance is sufficiently limited to survive a constitutional challenge.

The Thelen court reiterates the fundamental rule of law that a statute is unconstitutionally vague if it depends upon the individualized sensitivity of each complaint. 526 S.E.2d at 62. The court notes that the insertion of a reasonable person standard removes the subjectivity from enforcement, and in many instances, saves the ordinance from infirmity. Id. at 63. Thus, Thelen repudiates the Respondents' contention that enforcement of the City's noise ordinance should be triggered only by a complaint. By relying on a subjective complaint, the Respondents' approach is the antithesis of the objective standard necessary to implement enforcement.

IV. Because this Is a Facial Challenge to the Ordinance, the Facts Are Immaterial.

Interestingly, Respondents focus on facts which ultimately provide little or no value to answering the question before the Court, specifically, is the City's noise ordinance facially void for vagueness.

Respondents repeatedly refer to facts in the record—particularly the lack of a third party complaint and the existence of the across the street guideline—to support their assertion that the Supreme Court of Virginia correctly held that the City's statute was void on its face. However, Respondents (and the Supreme Court of Virginia) ignore the fact that the trial court sustained the City's demurrer with respect to the facial challenge, deciding the issue on the pleadings. Simply put, the

trial court did not consider any of Respondents' facts when it determined that the City's ordinance survived the facial challenge. Thus, the testimony upon which Respondents rely only relates to the as-applied challenge, an issue the Supreme Court of Virginia did not even address.

V. Respondents Misinterpret the Reasonable Person Standard.

Respondents erroneously tout the Supreme Court of Virginia's misguided interpretation of the long-standing reasonable person standard and take great pains to point out the contextual differences between the City's noise ordinance and other situations in which the law imposes a reasonable person standard. However, this argument fails to consider that regardless of the context, the standard itself remains unchanged.

Courts have gone to unusual pains to emphasize that the reasonable person is

> [an] abstract and hypothetical character []. He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful man, who is always up to standard. Nor is it proper to identify him even with any member of the very jury who are to apply the standard; he is rather

> a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.

Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1544 n.3 (6th 1992) (internal citations omitted).

Thus, applied in the context of the City's noise ordinance, the court does not ask whether there is "*any* person who could find" the noise loud and disturbing, "whether *some* people" may be disturbed by the noise, or "whether *some* reasonable person *might* think" the noise is unreasonably loud and disturbing." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995) (citing Americans United, 980 F.2d at 1544, which discusses the hypothetical reasonable person in the context of the Establishment Clause). Instead, the court must ask whether *the reasonable person* would find the noise unnecessary, loud and disturbing. Id.

Interestingly however, in the context of the City's noise ordinance, Respondents and the Supreme Court of Virginia apply the reasonable man standard as a subjective one. Respondents contend that because the ordinance does not call for an actual third party complaint, the reasonable person standard is not sufficient to save it from constitutional infirmity.

There are two problems with Respondents' logic. First, and quite simply, a third party complaint does not exist in this case because the constitutionality of the statute was before the trial

court on Respondents' motion for declaratory judgment and injunctive relief. A complaint was not a predicate to such an action.

Second, and more importantly, Respondents take the reasonable person standard and turn it on its head. In essence, Respondents are suggesting to this Court that a *subjective* third party complaint must be the trigger for an *objective* review of the alleged violation. This is exactly backwards. That a single person—who may or may not be a reasonable person—is disturbed by the noise is not a sufficient basis upon which to warrant issuance of a citation. However, when an officer determines that the noise when compared with a threshold for enforcement action would disturb a reasonable person, then there is a sufficient objective basis upon which to issue the citation.

It is certainly true that with every potential violation, an officer must make a decision based upon the facts and determine whether the facts taken together would meet the reasonable person threshold. See Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) ("As always, enforcement requires the exercise of some degree of police judgment, "but when confined, "that degree of judgment . . . is

permissible.").[2] However, because the officer must make such an informed decision does not mean the standard—i.e., *the objective reasonable person standard*—changes as a matter of law.

VI. The Supreme Court of Virginia Relied upon Federal Law and its Holding Was Not a Narrow Interpretation Limited to the Virginia Constitution.

Respondents do not outright assert that this Court lacks jurisdiction to entertain Petitioners' writ, but instead contend that the Supreme Court of Virginia rendered an opinion on the construction of a local law under the Virginia Constitution, and thus

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[2] The City agrees with Respondents that Grayned upheld the noise ordinance in question based upon the limited context of the statute in question. 408 U.S. 104, 112 (1972). However, Grayned does not mandate that noise ordinances contain a scienter or "willfullness" requirement nor does Grayned require that a noise ordinance be limited to a specific context such as the school context. Rather, Grayned simply requires that a noise ordinance not be so vague as to "punish[] for the expression of an unpopular point of view," and that the ordinance "contains no broad invitation to *subjective* or *discriminatory* enforcement." Id. at 113 (emphasis added).

Contrary to Respondent's assertion, the reasonable person standard—which was not part of Rockford's anti-picketing statute, thus necessitating other contextual limitations—places a significant limitation on the ability of police officers to enforce the City's ordinance. Moreover, while Respondents make much ado about the uneven enforcement of the ordinance between outdoor and indoor entertainment venues, Respondents fail to acknowledge the trial court's holding—albeit in the context of the as-applied challenge—that there was no discrimination in the manner of enforcement.

the issue should be of little or no importance to this Court.

By failing to address the issue of jurisdiction head on, Respondents have conceded that the Supreme Court of Virginia rendered its opinion based upon federal precedent. See United States Supreme Court Rule 10(c). Moreover in limiting their assertion to state that "the suit was *litigated below on state law grounds*," Respondents implicitly admit that the Supreme Court of Virginia's decision itself rested instead on the U.S. "Due Process Clause" and supporting federal jurisprudence from this Court and federal courts of appeal. Clearly this Court has jurisdiction to entertain this appeal.

VII. The Supreme Court of Virginia's Holding Has Far-Reaching Significance.

Respondents mistakenly assert that the Supreme Court of Virginia's holding is of "no broad importance." The reality remains that as a result of the holding, dozens of jurisdictions within the Commonwealth of Virginia either have changed or will need to change their reasonable person-based noise ordinances. In many instances, those localities replaced their noise ordinances with decibel or distance-based ordinances which, in and of themselves, may have constitutional implications. See, e.g., U.S. Labor Party v. Pomerleau, 557 F.2d 410 (4th Cir. 1977)(holding unconstitutional a noise ordinance which regulated amplified speech, utilized a subjective method to measure decibel levels and resulted in uneven enforcement).

In addition, a Delaware trial court has stayed the matter of Walsh v. Town of Bethany Beach, 4733-VCN (Sept. 25, 2009), in which the plaintiff challenges Bethany Beach's noise ordinance. As in the present case, Bethany Beach's noise ordinance contains a reasonable person standard. More importantly, however, than the ramifications to municipalities within the Commonwealth and across the nation, the Supreme Court of Virginia's holding has called into question the meaning of the reasonable person standard which permeates this Court's jurisprudence.

Respondents also assert that because the City has enacted a new ordinance, the Supreme Court of Virginia's opinion should not be reviewed by this Court. However, the City prefers the reasonable person-based ordinance, and because the ordinance before this Court has not been repealed, Respondents' contention that the holding has little significance is without merit.

CONCLUSION

The City respectfully requests this Court review the Supreme Court of Virginia's holding in Tanner v. City of Virginia Beach and hold that the court erred in finding the City of Virginia Beach's noise ordinance void for vagueness.

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