IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

MICHAEL MARCAVAGE, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 5:10-cv-114**
CITY OF WINCHESTER, VIRGINIA, et al.,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs, Michael Marcavage and Repent America, by and through their attorney, and present this Memorandum in Support of Their Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

STANDARD

Rule 56 provides that judgment should be rendered as a matter of law where the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986); Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 817-18 (4th Cir. 1995).

THE WINCHESTER NOISE ORDINANCE

The pertinent provisions of the Winchester noise ordinance are as follows:

> (a) It shall be unlawful for any person to make, continue, or cause to be made or continued any excessive, unnecessary, or unusually loud noise, or any noise which unreasonably annoys, disturbs, injures or endangers the comfort, health, safety, welfare, or environment of others within the corporate limits of the City.

(b) Acts declared unlawful by this section shall include, but not be exclusively limited to, the following:

...

(2) To play, operate, or permit the operation or playing of any radio, television, phonograph, tape player, drum, musical instrument, sound amplifier or similar device which produces, reproduces, or amplifies sound in such a manner as to create a noise disturbance within any nearby dwelling unit or across a real property boundary.

(3) The making by any person of unreasonably loud or unnecessary noise including, but not limited to, that made by the human voice in public places so as to annoy or disturb unreasonably the comfort, health, welfare, environment, peace or safety of persons in any office, dwelling, hotel or other type residence, or of any person in the vicinity.

Winchester City Code, Chapter 17, §§ 17-6(a), (b)(2) and (3).

STANDING

While Defendants have sought to have Plaintiffs' claims dismissed based on a novel argument that Plaintiffs lack the prerequisite Article III standing, a brief review of the relevant caselaw and undisputed facts[1] on the record exposes this argument as a classic red herring that threatens to divert the Court's attention from issues of monumental significance.

The law governing standing in this case is summarized as follows:

> Under the relaxed First Amendment standing doctrine, a plaintiff may meet the injury in fact requirement if she can make one of two showings. First, she may satisfy the injury in fact requirement if she has alleged an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the statute, and there exists a credible threat of prosecution." Second, she may also satisfy the requirement if she can demonstrate that she "is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences."

[1] Plaintiffs submit that the events of May 1, 2010, are irrelevant to the issue of Plaintiffs' standing to bring their facial challenges to the ordinances, because even pre-enforcement challenges are allowed where laws chill protected expression. However, the events of May 1 are likely relevant to the standing determination for Plaintiffs' as-applied claims.

Rock for Life – UMBC v. Hrabowski, 594 F. Supp. 2d 598, 605 (D. Md. 2009)(citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S. Ct. 2301 (1979); N. H. Right to Life PAC v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996)). Where one of these two showings can be made, a plaintiff will be found to have standing not only to bring claims on his own behalf, but even to assert the First Amendment rights of third parties not before the court. Id. at 605.

Citizens need not expose themselves to actual prosecution as a prerequisite to vindicate their fundamental rights. See Steffel v. Thompson, 415 U.S. 452, 459 (1974)(petitioner had standing because a real threat of prosecution existed when he had been warned to stop handbilling and told that if he disobeyed he would be prosecuted); Babbitt, supra, (when fear of prosecution under allegedly unconstitutional law is not imaginary or wholly speculative, a plaintiff need not first expose himself to actual arrest or prosecution to be entitled to challenge the law).

Plaintiffs can clearly satisfy not only one (although one would be sufficient), but both of these tests. Plaintiffs desire to travel to Winchester in the future to engage in expressive activities protected under the First Amendment. (Complaint, ¶ 34; Marcavage Affidavit, ¶ 17; Marcavage Deposition (Excerpts of which are attached hereto as Exhibit A), p. 3.). Plaintiffs are chilled from engaging in protected expression in Winchester because they are uncertain as to how, when, or why the ordinance will be enforced to prohibit the use of the sound amplification devices that they believe are necessary to effectively communicate their message. (Marcavage Affidavit, ¶ 12, 17, 18; Marcavage Deposition, pp 50-52). Undisputed facts on the record demonstrate that Plaintiffs did, in

fact, cease effectively communicating for a period of 45 (forty-five) minutes in an effort to avoid prosecution. (Marcavage Deposition, pp 50-52; Answer, ¶ 29).

Defendants appear to believe that the recent Fourth Circuit decision in Benham v. Chandler, 2011 U.S. App. LEXIS 2890 (4th Cir. 2011), represents a sea change in the way courts analyze standing in First Amendment cases. This belief is mistaken. Upon careful examination, it becomes apparent that Benham is readily and markedly distinguishable from the case at bar and is entirely consistent with the Court's well-established First Amendment standing doctrine. In Benham, the challenged ordinance was a permit requirement for public assemblies. Id., at *3. The plaintiffs were informed that the ordinance did not require them to obtain a permit in order to conduct their planned event. Id., at *6-7. Rather, they were allowed to hold their desired event without a permit as a matter of right. Id. They conducted said event, and were not troubled in any way by officers seeking to enforce the challenged ordinance (for, as we have said, the ordinance did not require anything of the plaintiffs). Id., at *8. So, Benham involved an ordinance that did not, on its face, apply to the plaintiffs in that case, and was not, in fact, applied to them as they conducted their event.

In the case at bar, on the other hand, the ordinance, on its face, clearly outlaws Plaintiffs' expression in Winchester. Indeed—it brazenly outlaws any "unnecessary" expression that occurs in that city. Moreover, the ordinance was, in fact, applied to Plaintiffs on May 1, 2010, by virtue of Lt. Danielson instructing Plaintiffs to turn off their amplification device based on the text of the ordinance. (Joint Stipulation; Complaint, ¶ 23; Danielsen Affidavit, ¶ 2; Marcavage Affidavit, ¶ 3, 5; Marcavage Deposition, pp 47-49).

Despite Defendants' best efforts to contrive a standing problem, a careful review of the caselaw plainly reveals that any such problem is one of Defendants' imagining. While it is plain to see why a standing deficiency was present in Benham, it is just as easy to see why no standing deficiency exists in the case at bar.

PLAINTIFFS' FACIAL CLAIMS

There is no genuine issue as to any material fact bearing upon Plaintiffs' facial challenges to the City's noise ordinance. While Defendants certainly dispute the constitutionality of the challenged provisions, this dispute is wholly one of legal interpretation and the application of precedent to the ordinance in question, and is decidedly *not* a dispute about facts. Therefore, Plaintiffs respectfully submit that these claims should be decided by the Court as a matter of law.

A. The Ordinance, On Its Face, Violates the First Amendment to the United States Constitution and Va. Const. Art. I, § 12.[2]

To the extent that the ordinance applies in traditional public forums such as the public sidewalk where Plaintiffs were engaging in free expression during the 2010 Apple Blossom Festival, it goes far beyond the scope of permissible government regulation. It is well-established that in a traditional public forum such as a public street or sidewalk, the government is limited to reasonable regulations of time, place and manner, and any restrictions based on the content of the speech must be narrowly tailored to serve a compelling government interest. See Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132 (2009)(quoting Perry Ed. Assn. v. Perry Local Educators' Assn., 40 U.S. 37, 45 (1983))(internal citations omitted).

[2] Because the protections of free speech provided by Virginia's Constitution are co-extensive with those of the First Amendment, Plaintiffs have consolidated the analysis. See Key v. Robertson, 626 F.Supp.2d 566 (E.D. Va. 2009).

Although the ordinance in question purports to be a "noise ordinance," its proscriptions are in no way limited to sounds that are objectionable because of their volume. Rather, it completely prohibits the making of any "unnecessary" noise *or* any noise which "unreasonably annoys" the "comfort" of others within the City. There is no limitation as to what reasons for annoyance (i.e., volume or content) are cognizable under the ordinance. (See Ordinance, § 17-6(a)). The Ordinance goes on to specifically prohibit the making by any person of any "unnecessary noise including, but not limited to, that made by the human voice in public places so as to annoy or disturb unreasonably the comfort . . . [or] peace of . . . any person in the vicinity." Ordinance, § 17-6(b)(3). The Winchester noise therefore cannot be considered a "time, place, or manner" restriction, as it does not relate solely to the time, place, or manner of expression, but rather bans an entire categories of expression—that which can be considered "unnecessary" by the officers enforcing the ordinance, and that which results in the annoyance or disturbance of any other person for any reason.

In fact, a thoughtful consideration of the ban on "unnecessary noise" reveals that this is a content-based restriction. This is because the only way one can reach the subjective determination of whether or not expression is "necessary" is to consider its content. For instance, while an individual's shout to warn others of "Fire!" might escape the ordinance's prohibition because it would arguably be deemed "necessary" to protect public safety, we know this only because we consider the content of the communication to relate to an emergency. On the other hand, an officer faithfully applying the ordinance might legitimately consider Plaintiffs' religious expression to be "unnecessary," depending upon the officer's own theological persuasion.

Because the Ordinance allows speech to be prohibited based solely on its "unnecessary" or "annoying" content, it is subject to strict scrutiny and may only be sustained if it is the least restrictive means of serving a compelling government interest. See Pleasant Grove City, supra; United States v. Am. Library Ass'n, 539 U.S. 194, FN3 (2003)("[W]e require the Government to employ the least restrictive means only when the forum is a public one and strict scrutiny applies."). The City of Winchester may well have a compelling interest in implementing true time, place and manner regulations that protect its citizens from noise of such volume as to exceed some reasonable, objectively ascertainable standard. However, this Ordinance is clearly not the "least restrictive means" of serving such an interest. It neither limits its focus to the volume of noise nor contains standards to ensure viewpoint-neutrality of its application.

In Coates v. Cincinnati, 402 U.S. 611 (1971), the United States Supreme Court struck down a Cincinnati ordinance that prohibited groups of three or more people from conducting themselves "in a manner annoying to persons passing by..." The Court explained:

> The *First and Fourteenth Amendments* do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is "annoying" because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens. . . . The ordinance before us makes a crime out of what under the Constitution cannot be a crime.

Coates, 402 U.S. at 615-16. Just as our Constitution does not countenance the conditioning of the First Amendment right to assemble on the requirement that

bystanders not be "annoyed" by it, so the right to free speech in a traditional public forum cannot be prohibited for that reason.

Finally, it is important to note with regard to all of Plaintiffs' facial claims that **Defendants have not cited a single case in which an ordinance prohibiting "unnecessary" noise was upheld.** Neither have they cited any case upholding an ordinance that prohibited "annoying" or "disturbing" noise without regard to **why** it was considered annoying or disturbing. Rather, the cases upon which Defendants seek to rely dealt with ordinances that addressed fighting words (Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766 (1942)); noise that is objectionable based specifically on its volume or duration (World Wide Street Preachers' Fellowship v. Reed, 2006 U.S. Dist. LEXIS 47635 (M.D. Pa. 2006))[3]; (Jim Crockett Promotion, Inc. v. City of Charlotte, 706 F.2d 486 (4th Cir. 1983))[4]; (Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980)); sound trucks (Kovacs v. Cooper, 336 U.S. 77, 69 S. Ct. 448 (1949)); the use of City-owned concert facilities (Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746 (1989)); demonstrations outside school buildings (Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294 (1972)). In the remaining case, Asquith v. City of Beaufort, 139 F.3d 408 (4th Cir. 1998), the state's highest court had limited the construction of the ordinances so as to cure the otherwise unconstitutional language.

Thus, in each of the cases relied upon by Defendants, the challenged regulations were (or were construed to be) true time, place and manner regulations that did not leave

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[3] Note that in this case the ordinance was held to be overbroad with regard to all but one of its challenged provisions. Id. at pp 16-19.

[4] In this case, the Fourth Circuit upheld the finding that the use of the word "unnecessary" in the ordinance was unconstitutionally vague. Id. at 489. The effect of the remainder of the ruling was simply to lift the preliminary injunction on provisions that had not yet been ruled upon. It appears that no overbreadth challenge was raised.

room for content- or viewpoint-based discrimination against expression. While it is certainly legitimate and acceptable for municipalities to limit the volume of noises to which citizens are exposed, the United States Supreme Court has required that ordinances be narrowly drawn to achieve this purpose.

> Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas ... Annoyance at ideas can be cloaked in annoyance at sound.

Saia v. New York, 334 U.S. 558, 562, 68 S. Ct. 1148 (1948).

The Winchester noise ordinance is not a mere time, place or manner regulation, but rather an outright prohibition of unnecessary noise **and** an outright prohibition of noise that "annoys" any person in the vicinity. It is not the least restrictive means of serving any compelling government interest, is not narrowly tailored to achieve the City's purported objective, and it is therefore facially invalid under the First Amendment to the United States Constitution and Article I, § 12 of the Virginia Constitution.

B. The Ordinance, On Its Face, Is Unconstitutionally Vague

The challenged provisions of the Winchester noise ordinance, on their face, are unconstitutionally vague because they fail to provide citizens fair warning of what conduct is proscribed, they delegate an impermissible degree of discretion to those charged with enforcing them, and they create an unacceptable chilling effect on citizens' fundamental freedoms. See Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972); Tanner v. City of Virginia Beach, 277 Va. 432, 439, 674 S.E.2d 848, 852 (2009).

In Coates, supra, the United States Supreme Court explained the infirmity of a city ordinance's use of the term "annoying" to describe prohibited conduct. The Court held:

> In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct. Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."

402 U.S. at 614 (quoting Connally v. General Construction Co., 29 U.S. 385, 391 (1926)). Even though the Winchester ordinance may encompass a variety of types of conduct within the City's power to prohibit due to the associated volume or other features, it "cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." Id.

In another case involving a vagueness challenge to a city noise ordinance, the Fourth Circuit held that the law was unconstitutionally vague and overbroad despite the fact that it employed decibel measurements to assess the volume of expression. U.S. Labor Party v. Pomerleau, 557 F.2d 410 (4th Cir. 1977). The court held that Baltimore's noise ordinance, which did not provide clear direction as to the point from which police officers should take the decibel measurements, was invalid because it penalized speakers who failed to correctly guess where the investigator would take the measurement. Id. at 412. "Because a violation depends on the subjective opinion of the investigator," the

court explained, "the speaker has no protection against arbitrary enforcement of the ordinance." Id.

Plaintiffs submit that if a noise ordinance is repugnant to the Bill of Rights because it requires citizens to guess as to where decibel levels will be measured, an ordinance is *a fortiori* invalid if it requires citizens to guess as to (1) whether others in the vicinity will be annoyed or disturbed by the expression for any reason and (2) whether a responding police officer will believe, based solely on his subjective sensibilities, that the expression is unnecessary or annoying.

Significantly, Defendants do not dispute that the enforcement of the challenged provisions turns entirely on precisely those two factors. (Sanzenbacher Deposition (Excerpts of which are attached hereto as Exhibit B), pp 9-12, 18, 35-36; Sanzenbacher Interrogatories (Attached hereto as Exhibit C), #4). No objective criteria are set forth in the ordinance to guide or limit the exercise of the officer's discretion. Thus, a citizen desiring to engage in core First Amendment expression in the City of Winchester is armed with nothing but his own imagination as he attempts to lawfully exercise those fundamental rights that are the bedrock of our society. It is, in effect, impossible to understand how, when or why a person exercising his right to verbal expression will be cited for violating the ordinance in the event that any other person complains. The ordinance is therefore repugnant to the concepts of free speech and due process.

As Plaintiffs have explained at length in their Motion for Judgment on the Pleadings and supporting Memoranda, the Supreme Court of Virginia struck down a noise ordinance remarkably similar to Winchester's in Tanner v. City of Virginia Beach, 277 Va. 432, 674 S.E.2d 848 (2009). The Supreme Court of Virginia concluded that the

Virginia Beach noise ordinance failed to comport with due process requirements of "fair notice" because it employed unascertainable standards. Id., at 440. The prohibited conduct depended in each case on the subjective tolerances, perceptions, and sensibilities of the particular listener. Id. The court held that, "As employed in this context, such adjectives are *inherently* vague because they require persons of average intelligence to guess at the meaning of [the words "loud, disturbing and unnecessary]." Id. (emphasis added)(citing Thelen v. State, 526 S.E.2d 60, 62 (Ga. 2000); Lutz v. City of Indianapolis, 820 N.E.2d 76, 79 (Ind. Ct. App. 2005); Nichols v. City of Gulfport, 589 So.2d 1280, 1283 (Miss. 1991)).

Again, it is important to note that the Winchester noise ordinance challenged here is considerably *more* vague than the Virginia Beach ordinance struck down in Tanner. First, the Virginia Beach ordinance used the terms, "unreasonably loud, disturbing and unnecessary" in conjunction, prohibiting only noise that can be characterized by all three terms. By contrast, the Winchester ordinance prohibits any "unnecessary" noise and any noise that can be considered "annoying" by another person. The prohibition is not limited in any way to noise of an objectionable volume. Second, while the Virginia Beach ordinance at least attempted to employ a modicum of objectivity by including a "reasonable person" standard, the Winchester ordinance prohibits "unnecessary" noise that "annoys unreasonably" the "peace" of "any person in the vicinity"—regardless of that person's particular sensitivities. (Winchester City Code, § 17-6(b)(3)).

While no factual record is necessary to substantiate Plaintiffs' facial challenge to the ordinance, the factual record in this case only highlights the confusion surrounding the ordinance's prohibitions and enforcement. Plaintiff Marcavage—who is clearly better-versed in First Amendment law than the average citizen—diligently attempted to understand the meaning and scope of the ordinance, first, as he was making his plans to travel to Winchester to preach at the Festival, and then again after he was instructed to turn off his amplifier. (Marcavage Deposition, pp 39-41; 50-61). While Chief Sanzenbacher initially assured Marcavage that he did not foresee any problem with the use of amplification (Marcavage Deposition, p. 41; Sanzenbacher Deposition, p. 15), on the day of the Festival he warned Marcavage that he could be cited for violating the ordinance if a person complained about Marcavage's activities (Marcavage Deposition , pp 50-51; Sanzenbacher Deposition, pp 23-24).

Neither Marcavage nor Chief Sanzenbacher could have possibly predicted whether Marcavage would be cited—or ultimately arrested—for violating the noise ordinance, because violation of the ordinance is premised solely on the response of third parties to a citizen's verbal expression and the subsequent exercise of unguided discretion by the responding police officer. Due to the vagueness of the ordinance, neither Defendant Danielson nor Defendant Sanzenbacher could direct Plaintiff Marcavage as to how he might have adjusted his use of the amplifier—whether by time, place or manner—so as to be assured of the lawfulness of his using it. (Marcavage Affidavit; ¶ 12; Danielson Interrogatories (attached hereto as Exhibit D); #5-6; Sanzenbacher Interrogatories, #6; Sanzenbacher Deposition, pp 24-27). For these reasons, the

challenged provisions of the noise ordinance are facially unconstitutional under the United States Supreme Court's vagueness doctrine.

The United States Supreme Court has warned government officials that, "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433 (1963)(citing Cantwell v. Connecticut, 310 U.S. 296, 311 (1940)). The Winchester noise ordinance comes nowhere near the level of specificity required of regulations so closely touching the precious freedom of speech that is the heritage of every American.

C. The Ordinance, On Its Face, Is Unconstitutionally Overbroad

Even if the conduct prohibited by the Winchester ordinance were described with sufficient specificity to survive a vagueness challenge, the ordinance is nevertheless unconstitutionally overbroad because its prohibitions encompass protected conduct. See Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Karlan v. City of Cincinnati, 416 U.S. 924, 925-26 (1974). The showing that a law punishes a substantial amount of protected free speech along with speech or conduct that may legitimately be prohibited suffices to invalidate all enforcement of that law until and unless a limiting construction or partial invalidation so narrows it as to remove the threat to constitutionally protected expression. Virginia v. Hicks, 539 U.S. 113, 119 (2003)(citing Broadrick v. Oklahoma, 413 U.S. 601, 613-15 (1973)). Only the Virginia Supreme Court can adopt such a limiting construction. Karlan v. City of Cincinnati, 416 U.S. 924, 927, 94 S.Ct. 1922, 40 L.Ed. 2d 280 (1974)(Douglas, J., dissenting)(quoting United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971)).

Again, the ordinance in question prohibits the making of any "unnecessary" noise *or* any noise which "unreasonably annoys" the "comfort" of others within the City. See Ordinance, § 17-6(a). The Ordinance goes on to specifically prohibit the making by any person of any "unnecessary noise including, but not limited to, that made by the human voice in public places so as to annoy or disturb unreasonably the comfort . . . [or] peace of . . . any person in the vicinity." (Ordinance, § 17-6(b)(3)). Under this formula, *any* verbal expression, spoken at *any* volume might be prohibited.

The First Amendment rights of every person in the City of Winchester lie at the mercy of others, whose mere "annoyance" at the ideas expressed, the tone of the speaker's voice, or the use of bad grammar are sufficient to render the speaker's expression unlawful. Thus, by the terms of the ordinance, verbal expression that is clearly constitutionally protected is swept up for prohibition along with noise that the City may legitimately prohibit due to its time, place or manner. If this ordinance is not unconstitutionally overbroad, then the Supreme Court's overbreadth doctrine is dead.

PLAINTIFFS' AS-APPLIED CLAIM

Because there is no genuine issue as to any material fact with respect to Plaintiffs' as-applied claim, Plaintiffs respectfully submit that this claim, too, is ripe for judgment as a matter of law.

The United States Supreme Court has recognized that "[l]oud-speakers are today indispensible instruments of effective public speech." Saia, supra, at 561. The record is replete with evidence that Plaintiffs made heroic efforts to conform their use of the amplification to the City's laws. First, out of a desire to ensure his ability to effectively communicate at the Festival, Plaintiff Marcavage contacted Defendant Sanzenbacher

prior to the Festival. (Complaint, ¶ 16; Answer ¶ 16.). Plaintiffs were advised that the noise ordinance would permit their intended use of amplification during the Festival. (Sanzenbacher Affidvait, ¶ 2.).

Having arrived in Winchester, Plaintiffs and others with them preached for some time without the aid of amplification to gauge their ability to effectively communicate in that fashion. (Marcavage Deposition, p. 43.). And upon concluding that amplification was, in fact, necessary, Plaintiffs were careful to set the volume at a level that they—and others with them—believed to be reasonable. (Marcavage Deposition, pp 65-66; Nathan Magnusen Deposition (Excerpts of which are attached hereto as Exhibit E), p. 36-37; Mary Magnusen Deposition (Excerpts of which are attached hereto as Exhibit F), p. 20.). For, as Plaintiff Marcavage and others with him that day have explained, it would be counterproductive for them to "annoy" or "disturb" others by the *volume* of their message. Id. To cause such annoyance at a superficial aspect of their expression would preclude their ability to persuade passersby of the merits of the critical *content* of their expression.

Despite the best efforts of Plaintiffs and those ministering with them to understand and comply with the City's ordinances as they expressed their religious beliefs at the Festival, Defendant Danielson informed Plaintiffs that because one citizen had complained about the street preachers, they must turn off their amplification device. (Danielson Affidavit, ¶ 2; Joint Stipulation).

In a video recording of Plaintiff Marcavage's conversation with Lieutenant Danielson on May 1, 2010, Lieutenant Danielson can be heard to say to Plaintiff Marcavage:

- "That gentleman [pointing at a third party] just said he's not comfortable with what's going on. That's a violation of our City Code."
- "You can talk all you want, you just can't use this system."

A true and accurate copy of this video recording is on file with the Clerk, having been attached as Exhibit A to Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunction.

It is undisputed that Defendant Danielson instructed Plaintiffs to turn off their amplification device and that Plaintiffs complied with this order for approximately 45 (forty-five) minutes. (See Joint Stipulation; Complaint, ¶ 23; Answer, ¶ 23; Marcavage Affidavit, ¶ 5-6; Danielson Affidavit, ¶ 2). It is undisputed that, because of this order, issued under color of an ordinance that Plaintiffs have argued is facially unconstitutional, Plaintiffs' efforts were diverted from their religious expression to engaging first Defendant Danielson, and then Defendant Sanzenbacher, in a series of conversations aimed at clarifying Plaintiffs' rights and duties under the ordinance and the First Amendment. (Complaint, ¶ 29-32; Marcavage Affidavit, ¶ 6-14; Marcavage Deposition, pp 50-52). Plaintiff Marcavage's phone records from May 1, 2010, a true and accurate copy of which is attached to the Marcavage Affidavit, show the series of phone calls made and received between 2:47 p.m. and 3:17 p.m. as Plaintiff Marcavage attempted to clarify the meaning of the noise ordinance and to understand its potential to be used against him.

The fruit of Plaintiff Marcavage's conversations with Defendant Sanzenbacher was greater confusion concerning the applicability and enforcement of the noise ordinance. Defendant Sanzenbacher avowed his belief that the ordinance was lawful and

would be enforced if any citizen complaints were made about the street preachers. (Sanzenbacher Affidavit, ¶ 3; Sanzenbacher Deposition, pp 23-24, 26-27). After taking some time to consider the situation, Plaintiffs decided to risk citation—and possible arrest—under the ordinance in the interest of continuing to effectively communicate their vital message. (Marcavage Deposition, pp 59-60). Plaintiffs and those with them believed that this risk was substantial, in light of their understanding that their message is inherently "annoying" and "disturbing" to those who disagree with it. (Marcavage Deposition, p. 65; Nathan Magnusen Deposition, pp 37-38; Mary Magnusen Deposition, p. 21).

Upon being ordered by law enforcement to cease using amplification to express their sincerely-held religious beliefs on the public streets and sidewalks of Winchester, Plaintiffs were faced with the choice of either abandoning the effective communication of their message to passersby or being cited for violating the City's noise ordinance. While Defendants have emphasized that violation of the noise ordinance is not an offense for which a citizen can be arrested, it is undisputed that if Plaintiffs had violated the direct order of Defendant Danielson to turn off the amplification device, they could have been arrested. (Sanzenbacher Deposition, p. 33; Marcavage Deposition, pp 56-58).

Ultimately, Plaintiffs were deprived of their right to effectively communicate at the Festival for a period of approximately forty-five (45) minutes due to Defendant Danielson's subjective determination that in setting the volume of the amplification, Plaintiffs had simply made a bad guess as to what would be considered unnecessary, annoying or disturbing to others. Significantly, Defendant Danielson did not at any point propose that Plaintiffs simply reduce the volume of the amplification device. (Complaint,

¶ 28; Marcavage Affidavit, ¶ 5; Danielson Interrogatories, #5). Neither did Defendant Sanzenbacher offer any assurance to Plaintiffs that they might legally continue to use the device by reducing the volume to a particular level. (Sanzenbacher Interrogatory, #5).

Defendants have attempted throughout this litigation to make much of the uncontested fact that Plaintiffs were forced to abandon the use of their amplification for "only" 45 minutes. Indeed, they have boldly alleged that their denial of Plaintiffs' right to use the amplification to communicate their message for a period of 45 minutes does not constitute a violation of Plaintiffs' constitutional rights. (Answer, ¶ 42). However, the United States Supreme Court's First Amendment jurisprudence makes it abundantly clear that the violation of First Amendment rights that has occurred in this case is constitutionally significant and demands correction.

The loss of First Amendment rights, for even minimal periods of time, "unquestionably constitutes irreparable injury." Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 520 (4th Cir. 2002), see also Elrod v. Burns, 427 U.S. 347, 373 (1976); Newsom ex rel. Newsom v. Albemarle County School Bd., 354 F.3d 249, 261 (4th Cir. 2003); Legend Night Club v. Miller, 637 F.3d 291, 303 (4th Cir. 2011). And from Plaintiffs' perspective, each individual person who passed by during that time period when Plaintiffs were required to cease use of the amplification, and who consequently was unable to hear Plaintiffs' essential message, was a person whose soul might be eternally lost due to Defendants' interference. (Marcavage Deposition, pp 35-36). The injury incurred is no slight matter to Plaintiffs.

Plaintiffs respectfully request that the Court enter judgment as a matter of law in favor of Plaintiffs on Plaintiffs' claims that the Winchester noise ordinance, as applied to

Plaintiffs on May 1, 2010, violated Plaintiffs' rights under the First Amendment to the United States Constitution and Article I, § 12 of the Virginia Constitution.

PLAINTIFFS' CLAIM UNDER VIRGINIA'S RELIGIOUS FREEDOM RESTORATION ACT

Virginia's Religious Freedom Restoration Act, Va. Code § 57-2.02, forbids local governments' imposition of substantial burdens on an individual's religious exercise—even if those burdens result from rules of general applicability—unless the application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest.

By requiring Plaintiffs to turn off their amplification device at the 2010 Apple Blossom Festival and thereby precluding Plaintiffs from effectively witnessing the Gospel of Jesus Christ to passersby, Defendants have substantially burdened Plaintiffs' religious exercise. As argued above, this action was certainly not the least restrictive means of furthering any compelling government interest. Even assuming that the City's interest in protecting citizens from noise that is objectionable due to its volume is a "compelling" interest, said interest can be furthered by simply forbidding noise that exceeds a certain decibel level. By requiring, instead, that Plaintiffs turn the amplifier off completely, Defendants have violated Virginia's Religious Freedom Restoration Act.

CONCLUSION

The City of Winchester's noise ordinance goes far beyond the scope of permissible regulation for a traditional public forum. The ordinance constitutes an outright prohibition of certain verbal expression without any reference to objective characteristics of that expression, such as volume, and it does so through the use of vague terms and unascertainable standards. For the reasons set forth herein, Plaintiffs hereby

request that the Court grant their Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure as to each and every one of Plaintiffs' claims; that the Court permanently enjoin the Defendants, their officers, and agents from enforcing the Ordinance against Plaintiffs; that the Court award Plaintiffs nominal and compensatory damages in an amount to be determined by the Court; that the Court order Defendants to pay Plaintiffs' attorney fees pursuant to 42 U.S.C. § 1988, together with the costs of this litigation; and that the Court grant Plaintiffs any and all such other and further relief as the Court may deem proper.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2011, I have electronically filed this document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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