

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

MICHAEL MARCAVAGE,)	
)	
and)	
)	
REPENT AMERICA,)	
an unincorporated association,)	
by and through its Director, Michael)	
Marcavage,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Case No. 5:06at99999
)	
CITY OF WINCHESTER, VIRGINIA,)	
a body politic and corporate,)	
KEVIN SANZENBACHER,)	
individually and in his official capacity)	
as Police Chief of the City of Winchester,)	
)	
and)	
)	
J. M. DANIELSON, individually and in)	
his official capacity as Police Officer of)	
the City of Winchester,)	
)	
<i>Defendants.</i>)	
)	

COMPLAINT

COME NOW the Plaintiffs, Michael Marcavage and Repent America, by and through their attorney, and allege and aver as follows:

Introduction

1. Plaintiffs seek relief pursuant to 42 U.S.C. § 1983 for redress of the deprivation under color of state law of rights secured to them by the First and Fourteenth Amendments to the United States Constitution and Va. Const. Art. I, § 12.

2. Plaintiffs are entitled to immediate injunctive and declaratory relief preventing Defendants from enforcing an unconstitutional ordinance that violates Plaintiffs' fundamental rights under the Constitutions of the United States and Virginia.

3. Plaintiffs further seek relief pursuant to VA. CODE ANN. § 57-2.02, concerning political subdivisions of the Commonwealth that act to substantially burden a person's free exercise of religion.

Jurisdiction and Venue

4. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343, as it is an action seeking redress under the laws and statutes of the United States for the deprivation of rights secured by the Constitution and laws of the United States.

5. This Court has jurisdiction to enter a declaratory judgment in favor of the Plaintiffs under 28 U.S.C. §§ 2201-2202.

6. Pursuant to 28 U.S.C. § 1367(a), this Court has supplemental jurisdiction over Plaintiffs' claims arising under the Virginia Constitution and VA. CODE ANN. § 57-2.02, as said claims are so related to Plaintiffs' claims arising under the United States Constitution as to form part of the same case or controversy.

7. Venue properly lies in the Western District of Virginia under 28 U.S.C. § 1391(b), as the Defendants reside within this District within the Commonwealth of Virginia, and a substantial part of the events giving rise to this action occurred within this District. Venue is proper in this division pursuant to Loc. Civ. R. 2(a)(5).

Parties

8. Plaintiff Michael Marcavage is an adult citizen and resident of the State of Pennsylvania.

9. Plaintiff Repent America is an unincorporated association located in the State of Pennsylvania and having its principle business address at P.O. Box 30000, Philadelphia, PA 19103.

10. Defendant City of Winchester is a body politic and corporate created and existing under the laws of the Commonwealth of Virginia. In all respects set forth in this Complaint, Defendant City of Winchester acted under color of the law of the Commonwealth of Virginia.

11. Defendant Police Chief Kevin Sanzenbacher is the Police Chief of the City of Winchester. He is sued in his individual and official capacities. In all respects set forth in this Complaint, Defendant Sanzenbacher acted under color of the law of the Commonwealth of Virginia.

12. Defendant JM Danielson is a police lieutenant for the City of Winchester. He is sued in his individual and official capacities. In all respects set forth in this Complaint, Defendant Danielson acted under color of the law of the Commonwealth of Virginia.

Factual Allegations

13. Plaintiff Michael Marcavage is the director of Repent America, an evangelistic and Christian liberties organization based in Philadelphia, Pennsylvania. Repent America, by and through its director and members, regularly engages in free speech activities on sidewalks and streets as an expression of its members' sincerely-held religious beliefs.

14. Plaintiff Michael Marcavage's sincerely-held religious beliefs compel him to proclaim the Gospel of Jesus Christ and preach the Word of God to the masses.

15. Prior to May 1, 2010, Plaintiff Marcavage read the City of Winchester's noise ordinance in an effort to determine whether he might legally use the aid of an amplification device to proclaim his religious beliefs on the sidewalks and streets of the City of Winchester during the 2010 Apple Blossom Festival.

16. Prior to May 1, 2010, Plaintiff Marcavage contacted Defendant Police Chief Kevin Sanzenbacher by telephone to explain his intended activities during the 2010 Apple Blossom Festival and to ensure that said activities would be in compliance with the City's ordinances.

17. During the course of Plaintiff Marcavage's phone conversation with Defendant Sanzenbacher prior to May 1, 2010, Defendant Sanzenbacher indicated to Plaintiff Marcavage that Plaintiff Marcavage's intended activities during the 2010 Apple Blossom Festival, as described, would be in compliance with the City's ordinances.

18. Plaintiff Marcavage, along with another member of Plaintiff Repent America, traveled from Philadelphia, Pennsylvania to Winchester, Virginia to engage in free speech activities during the 2010 Apple Blossom Festival as an expression of their sincerely-held religious beliefs. Other members of Plaintiff Repent America from the Commonwealth of Virginia joined them in Winchester for the same purpose.

19. On May 1, 2010, Plaintiff Marcavage and other members of Plaintiff Repent America engaged in free speech and free exercise activities by proclaiming their religious beliefs to passersby on the sidewalks and streets of the City of Winchester during the 2010 Apple Blossom Festival.

20. Because of the ambient noise and commotion associated with the 2010 Apple Blossom Festival, Plaintiff Marcavage employed an amplification device (a

handheld microphone connected to one small speaker) to facilitate the communication of his message to passersby.

21. At all times Plaintiff Marcavage and those accompanying him acted in an orderly manner and kept their sound at a reasonable volume appropriate to the surroundings and circumstances.

22. As Plaintiff Marcavage was engaging in free speech and free exercise activities on the public sidewalk in a commercial zone of the City of Winchester, he was approached by Defendant Lieutenant JM Danielson, an officer of the City of Winchester Police Department and an agent of the City of Winchester, along with two other unidentified police officers.

23. Defendant Danielson and the other two police officers explained to Plaintiff Marcavage that because they had received a “complaint” from an individual who was reportedly “uncomfortable” with Plaintiff Marcavage’s activities, Plaintiff Marcavage must cease and desist using his amplification device.

24. Upon being told to cease and desist using his amplification device, Plaintiff Marcavage retrieved a copy of the City of Winchester noise ordinance and stated his belief that his activities were within the requirements of said ordinance.

25. After reviewing the City’s ordinance for some time, Defendant Danielson indicated to Plaintiff Marcavage that his use of the amplification device to communicate his message on the public sidewalk could be prohibited pursuant to Winchester City Code Chapter 17, § 17-6(b)(2) and (3).

26. Winchester City Code Chapter 17, §§ 17-6(a), (b)(2) and (3) (hereinafter “the Ordinance”) provide:

(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, in its entirety, is attached hereto as Exhibit A and incorporated herewith by reference).

27. Defendant Danielson stated to Plaintiff Marcavage that because a certain gentleman had reported himself to be uncomfortable with Plaintiff Marcavage's activities, Plaintiff Marcavage's activities constituted a violation of the Ordinance.

28. At no time did Defendant Danielson or the other two police officers suggest that Plaintiff Marcavage might comply with the noise ordinance by reducing the volume of the amplification device, nor did they request that he do so.

29. Plaintiff Marcavage and those accompanying him complied with Defendant Danielson's order to cease and desist use of the amplification device in communicating their message.

30. After complying with Defendant Danielson's order, Plaintiff Marcavage telephoned Defendant Police Chief Kevin Sanzenbacher to relate to him the events that

had just transpired and to seek assistance in regaining his rights to communicate his message effectively by using the amplification device.

31. During the course of the phone call, Defendant Sanzenbacher upheld Defendant Danielson's order and affirmed that under the City of Winchester's noise ordinance, a single complaint justified the police in requiring an individual to cease and desist using a sound amplification device to communicate a message.

32. By directly threatening Plaintiff Marcavage with arrest and/or citation for allegedly violating the Ordinance, Defendants Danielson and Sanzenbacher coerced Plaintiff Marcavage to abandon his use of the amplification device to express his sincerely-held religious beliefs on the streets and sidewalks of the City of Winchester during the 2010 Apple Blossom Festival.

33. Due to the ambient noise and commotion of the 2010 Apple Blossom Festival, Plaintiff Marcavage was precluded from effectively communicating his message during the Festival by the Defendants' requirement that he cease and desist using his sound amplification device.

34. Plaintiff Marcavage and other members of Plaintiff Repent America plan to attend The Apple Blossom Festival in future years for the purpose of proclaiming their sincerely-held religious beliefs to passersby on the public streets and sidewalks of the City of Winchester with the aid of sound amplification devices.

35. On or about May 14, 2010, Plaintiff Marcavage sent a letter to Mr. Anthony Williams, City Attorney for the City of Winchester, advising Mr. Williams of the events expounded herein, explaining pertinent caselaw and requesting that the Ordinance be amended to comport with the First Amendment. Said letter further

requested written confirmation that the City of Winchester would provide adequate training to its police officers to prevent future violations of the First Amendment and requested payment of the sum of \$2,000 in damages for the violation of Plaintiffs' First Amendment rights. Said letter is attached hereto as Exhibit B.

36. Having received no response from Mr. Williams, in August, 2010 Plaintiffs attached the May 14th letter to an e-mail and sent it to Winchester City Manager Jim O'Connor and several members of the Winchester City Council.

37. To date Plaintiffs have received no response from either Mr. Williams or any member of the Winchester City Council.

38. On October 6, 2010, The Rutherford Institute sent, by electronic mail, a letter to Mr. Anthony Williams, City Attorney for the City of Winchester, informing him of the Institute's involvement in the case and requesting the City's compliance with the demands outlined in Plaintiffs' May 14, 2010 letter. The Rutherford Institute's letter is attached hereto as Exhibit C.

39. To date, The Rutherford Institute has received no response from Mr. Williams.

First Cause of Action

The Ordinance, as applied, violates the U.S. Const. Amend. 1 – 42 U.S.C. § 1983

40. Plaintiffs reallege and incorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

41. Plaintiffs' proclamation of their religious beliefs to passersby on a public sidewalk in the City of Winchester constitutes speech and expression that is protected by the First Amendment to the United States Constitution.

42. Plaintiffs' proclamation of their religious beliefs to passersby on a public sidewalk in the City of Winchester constitutes the free exercise of religion that is protected by the First Amendment to the United States Constitution.

43. The public streets and sidewalks of the City of Winchester constitute traditional public forums.

44. Defendants' application of the City of Winchester's noise ordinance to require Plaintiffs to cease and desist using their sound amplification device to communicate their message at the 2010 Apple Blossom Festival violated the First Amendment to the United States Constitution in the following particulars, including but not limited to:

- a. Defendants' requirement that Plaintiffs cease and desist use of their sound amplification device was not the least restrictive means of furthering a compelling government interest.
- b. Because Defendants' requirement that Plaintiffs cease and desist use of their sound amplification device was based solely on another individual's complaint of being "uncomfortable" with Plaintiffs' activities, the ordinance was not applied in a viewpoint-neutral fashion.
- c. Defendants' application of the ordinance to require Plaintiffs to cease and desist use of their sound amplification device failed to provide reasonable alternative avenues for Plaintiffs' expression.

45. In adopting and enforcing the Ordinance against Plaintiffs, the

Defendants have acted and continue to act under the color of the law of the Commonwealth of Virginia.

46. The Ordinance is the official policy of Defendants.

47. Plaintiffs are entitled to relief under 42 U.S.C. § 1983 for the deprivation of their First Amendment rights caused by the Defendants.

Second Cause of Action

The Ordinance, on its face, violates the U.S. Const. Amend. 1 – 42 U.S.C. § 1983

48. Plaintiffs reallege and incorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

49. Portions of the Ordinance, including, but not limited to § 17-6(a); § 17-6(b)(2); and § 17-6(b)(3), on their face, violate the First Amendment to the United States Constitution in the following particulars, including but not limited to:

- a. These portions of the Ordinance create a chilling effect on expression that is protected by the First Amendment to the United States Constitution.
- b. These portions of the Ordinance are overbroad, allowing for the prohibition of constitutionally protected expression as well as expression that may be constitutionally proscribed.

50. The Ordinance is the official policy of Defendants.

51. Plaintiffs are entitled to relief under 42 U.S.C. § 1983 for the deprivation of their First Amendment rights caused by the Defendants.

Third Cause of Action

The Ordinance, on its face, violates the U.S. Const. Amend. 14 – 42 U.S.C. § 1983

52. Plaintiffs reallege and incorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

53. Portions of the Ordinance, including, but not limited to § 17-6(a); § 17 6(b)(2); and § 17-6(b)(3), violate the Fourteenth Amendment to the United States Constitution in the following particulars, including but not limited to:

- a. Said portions of the Ordinance are unconstitutionally vague, failing to provide adequate notice as to what expressive conduct is prohibited.
- b. Said portions of the Ordinance vest unfettered discretion in City police officers to make decisions concerning enforcement of the Ordinance absent sufficient objective guidelines.

54. The Ordinance is the official policy of Defendants.

55. Plaintiffs are entitled to relief under 42 U.S.C. § 1983 for the deprivation of their Fourteenth Amendment rights caused by the Defendants.

Fourth Cause of Action

The Ordinance, on its face and as applied, violates Va. Const. Art. I, § 12.

56. Plaintiffs reallege and incorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

57. Plaintiffs' proclamation of their religious beliefs to passersby on a public sidewalk in the City of Winchester constitutes speech and expression that is protected by Va. Const. Art. I, § 12.

58. The public streets and sidewalks of the City of Winchester constitute traditional public forums.

59. The Ordinance, on its face, violates Article I, § 12 of the Constitution of Virginia in the following particulars, including but not limited to:

- a. Portions of the Ordinance, including, but not limited to § 17-6(a); § 17-6(b)(2); and § 17-6(b)(3) create a chilling effect on expression that is protected by the First Amendment to the United States Constitution.
- b. Portions of the Ordinance, including, but not limited to § 17-6(a); § 17-6(b)(2); and § 17-6(b)(3), are overbroad, allowing for the prohibition of constitutionally protected expression as well as expression that may be constitutionally proscribed.

60. Defendants' application of the City of Winchester's noise ordinance to require Plaintiffs to cease and desist using their sound amplification device to communicate their message at the 2010 Apple Blossom Festival violated Va. Const. Art. I, § 12, in the following particulars, including but not limited to:

- a. Defendants' requirement that Plaintiffs cease and desist use of their sound amplification device was not the least restrictive means of furthering a compelling government interest.
- b. Because Defendants' requirement that Plaintiffs cease and desist use of their sound amplification device was based solely on another individual's complaint of being "uncomfortable" with Plaintiffs' activities, the ordinance was not applied in a viewpoint-neutral fashion.

- c. Defendants' application of the ordinance to require Plaintiffs to cease and desist use of their sound amplification device failed to provide reasonable alternative avenues for Plaintiffs' expression.

61. Plaintiffs are entitled to relief for the deprivation of their rights caused by the Defendants.

Fifth Cause of Action

Injunctive Relief

62. Plaintiffs reallege and incorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

63. The actual and threatened enforcement of the Ordinance against the Plaintiffs has prevented and will prevent the Plaintiffs from exercising their rights to free speech under the Constitutions of the United States and Virginia.

64. The restriction on the Plaintiffs' exercise of their constitutional rights constitutes irreparable harm.

65. Plaintiffs request that this Court enjoin the Defendants from enforcing the Ordinance.

Sixth Cause of Action

Declaratory Judgment Under 28 U.S.C. §§ 2201-2202

66. Plaintiffs reallege and incorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

67. There presently exists between Plaintiffs and Defendants an actual, justiciable controversy over whether Plaintiffs may use an amplification device to express their sincerely-held religious beliefs on the public streets and sidewalks of the City of

Winchester where other individuals may complain or feel uncomfortable and whether the Ordinance is unconstitutional on its face.

68. The Court should declare the respective rights and liabilities of Plaintiffs and Defendants regarding Plaintiffs' right to engage in constitutionally protected expression and the constitutionality of the Ordinance.

69. A judgment should be entered under 28 U.S.C. § 2201 declaring that the Ordinance is unconstitutional on its face and/or as applied to Plaintiffs and that Plaintiffs have the right to express their sincerely-held religious beliefs using an amplification device on the public streets and sidewalks of the City of Winchester under circumstances including, but not limited to, those described herein.

Seventh Cause of Action

Violation of Virginia's Religious Freedom Restoration Act, VA. CODE ANN. § 57-2.02.

70. Plaintiffs reallege and incorporate herein the foregoing paragraphs of this Complaint as if repeated verbatim.

71. By requiring Plaintiffs to cease effective communication of their sincerely-held religious beliefs at the 2010 Apple Blossom Festival, Defendants substantially burdened Plaintiffs' religious exercise under VA. CODE ANN. § 57-2.02.

72. Defendants' actions in substantially burdening Plaintiffs' religious exercise at the 2010 Apple Blossom Festival were not the least restrictive means of furthering any compelling government interest.

73. Plaintiffs are entitled to declaratory and injunctive relief under VA. CODE ANN. § 57-2.02.

Prayer for Relief

WHEREFORE, Plaintiffs pray judgment be entered against Defendants as follows:

- a) That a declaratory judgment be entered pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., declaring that the Ordinance is unconstitutional on its face and as applied to Plaintiffs under the First and Fourteenth Amendments to the United States Constitution;
- b) That a preliminary injunction be entered forbidding the Defendants, their officers and agents from enforcing the Ordinance against Plaintiffs;
- c) That an order be entered permanently enjoining the Defendants, their officers, and agents from enforcing the Ordinance against Plaintiffs;
- d) That this Court award Plaintiffs nominal and compensatory damages in an amount to be determined at trial;
- e) That this Court order Defendants to pay Plaintiffs' attorney fees pursuant to 42 U.S.C. § 1988, together with the costs of this litigation; and
- f) Any and all such other and further relief as this Court may deem proper.

Dated: November 3, 2010

s/ **Rita M. Dunaway**
Virginia Bar Number 46821
Attorney for Plaintiffs
On Point Legal Consulting, L.L.C.
(in cooperation with THE RUTHERFORD
INSTITUTE)
P.O. Box 7482
Charlottesville, VA 22906-7482
Telephone: (540) 830-2767
Fax: (434) 978-1789
E-mail: rita.dunaway@gmail.com