VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

CITY OF VIRGINIA BEACH	)	
	)	
v.	)	
	)	Docket No. CR04002305
MILES STEPHEN SMITH,	)	
	)	
Defendant.	)	
	)	

BRIEF *AMICUS CURIAE* OF
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC.

Comes now *amicus curiae* American Civil Liberties Union of Virginia, Inc., by counsel, and submits the following in support of defendant Miles Stephen Smith:

Mr. Smith is charged under Virginia Beach's disturbing the peace ordinance, Code Sec. 23-10. which forbids "any person to disturb the peace of others by violent, tumultuous, offensive or obstreperous conduct or by threatening, challenging to fight, assaulting, fighting or striking another." The basis of this charge is certain alleged speech by Mr. Smith in a local store. This case should be dismissed for at least two reasons: First, the disturbing the peace ordinance is unconstitutionally vague on its face. Second, even if the ordinance were not unconstitutionally vague, it would be overbroad as it applies to speech.

Numerous statutes and ordinances indistinguishable from the one at issue here have been struck down by state and federal courts on overbreadth and vagueness grounds. *See, e.g., Cox v. Louisiana*, 379 U.S. 536 (1965) (invalidating ordinance providing that "[w]hoever . . . under circumstances such that a breach of the peace may be occasioned thereby . . . crowds or congregates with others . . . [in a public place] . . and who fails or refuses to disperse and . . move on . . when ordered so to do by any law enforcement officer . . . shall

be guilty of disturbing the peace"); *Gooding v. Wilson*, 405 U.S. 518 (1972) (striking statute providing that any "person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor"); *Pritikin v. Thurman*, 311 F.Supp. 1400, 1402 (D.C. Fla. 1970) (invalidating ordinance that prohibited "offensive conduct," "offensive carriage," or "offensive language"); *State v. Indrisano*, 640 A.2d 986, 997 (Conn. 1994) (invalidating statute that prohibits "by offensive or disorderly conduct, annoy[ing] or interfere[ing] with another person"); *Marks v. City of Anchorage*, 500 P.2d 644 (Alaska 1972) (Holding that portions of ordinance prohibiting 'threatening," "tumultuous behavior," "unreasonable noise," "offensively coarse utterance, gesture, or display" and "addressing abusive language to any person present" are unconstitutionally overbroad)

In determining the facial constitutionality of the statute, the defendant's particular conduct is irrelevant. Even if the defendant's own conduct could constitutionally be proscribed by an appropriately narrow ordinance, he still has standing to challenge the ordinance under which he is charged as unconstitutionally vague or overbroad. *Coleman v. City of Richmond*, 5 Va. App. 459, 463, 364 S.E.2d 239, 42 (Va. App. 1988).

A. The Ordinance Is Unconstitutionally Vague On Its Face.

A law is unconstitutionally vague if "men of ordinary intelligence must necessarily guess at its meaning." *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Vague laws violate the due process clause of the Fourteenth Amendment. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). In general, the danger of vague laws is twofold: They fail to give citizens reasonable notice of what conduct is prohibited, and thus "trap the innocent by not providing fair warning," and

they vest unfettered discretion in the police, giving rise to a likelihood of arbitrary enforcement. *Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)*; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Accordingly, Virginia courts have employed a "two pronged test" in evaluating vagueness challenges: "First, the language of the statute must provide a person of average intelligence a reasonable opportunity to know what the law expects from him or her. Second, the language must not encourage arbitrary and discriminatory selective enforcement of the statute." *Gray v. Commonwealth*¸ 30 Va. App. 725, 732, 519 S.E.2d 825, 828 (1999).

The dangers of lack of notice and arbitrary enforcement are multiplied where, as here, the statute potentially encroaches on free speech. "Where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Grayned*, 408 U.S. at 109 (citations and internal quotations omitted). *See also U.S. Labor Party v. Pomerleau*, 557 F.2d 410, 412 (4th Cir. 1977) ("The principal vice of a vague or overbroad ordinance regulating street sounds is its deterrence of constitutionally protected speech"). Thus, "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Hynes*, 425 U.S. at 620; *See also Smith v. Goguen*, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts); *Jackson v. W.*, 14 Va. App. 391, 403, 419 S.E.2d 385, 392 (1992) ("[I]f a law interferes with the right of free speech or of association, a more stringent

vagueness test should apply." (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 498 (1982)).

The Virginia Beach ordinance is unconstitutional under both prongs of the vagueness test. First, the ordinance fails to give adequate notice as to what conduct is prohibited. For example, the ordinance prohibits "offensive" conduct. The word "offensive" means "disagreeable to the senses" (as an offensive odor) or "causing anger, displeasure, resentment, or affront" (as an offensive gesture). *The American Heritage Dictionary of the English Language*, Fourth Ed., Houghton Mifflin (2000) ("*American Heritage*"). The word is inherently subjective, as no person can be sure what might be offensive to another. In this way, the ordinance resembles one invalidated in *Coates v. Cincinnati*, 402 U.S. 611 (1971). The ordinance there prohibited "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to . . . persons passing by. . ." The Court observed that "[c]onduct that annoys some people does not annoy others." 403 U.S. at 614. An ordinance that prohibited "annoying" other people required one to guess what might be annoying to total strangers.

In this regard, there is no distinction between "annoying" and "offensive":

> The term 'offensive' is subjective, capable of multiple interpretations, and, therefore, while certain conduct, language, or carriage may be offensive to some, thus disturbing the tranquility of the community, it may not be offensive to others. The constitutional infirmity is that a resident of the community, not made sufficiently aware of what he may or may not do, is subject to criminal prosecution simply because some of his neighbors have no self-control and cannot refrain from violent reaction to conduct, language, or carriage they deem offensive.

Pritikin v. Thurman, 311 F.Supp. 1400, 1402 (D.C. Fla. 1970) (invalidating ordinance that prohibited, *inter alia*, "offensive conduct," "offensive carriage," or "offensive language"). *See also State v. Indrisano*, 640 A.2d 986, 997 (Conn. 1994) (Holding statute that proscribes

conduct that "by offensive or disorderly conduct, annoys or interferes with another person" unconstitutionally vague on its face, and noting that "[c]onduct that is 'offensive' to . . . some people would not be so considered by others.").

The same could be said for other words in the Virginia Beach ordinance. "Obstreperous" means "noisily and stubbornly defiant" or "aggressively boisterous." *American Heritage*. Similarly, "[t]he phrase 'tumultuous behavior' . . . might encompass conduct ranging from actual violence to speaking in a loud and excited manner. . ." *Marks v. City of Anchorage*, 500 P.2d 644, 653 (Alaska 1972). A reasonable person cannot be expected to know when his conduct passes from merely irritating or pestering to "obstreperous" and "tumultuous."

For much the same reasons, the ordinance is also unconstitutional under the second prong of the vagueness test: it "encourage[s] arbitrary and discriminatory selective enforcement of the statute." The ordinance leaves it to the individual law enforcement officers to determine, based on their own subjective perceptions, whether a person's conduct is "offensive," "tumultuous," or "obstreperous." As the Supreme Court has put it, a city "cannot constitutionally [preserve the peace] through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is [offended]." *Coates*, 402 U.S at 614. "Where the legislature fails to provide . . minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358 (U.S. 1983) (internal quotation marks and citation omitted).

B. As Applied to Speech, the Ordinance is Unconstitutionally Overbroad

"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). A criminal statute is overbroad under the First Amendment if it prohibits a "substantial amount of constitutionally protected conduct." *City of Houston v. Hill*, 482 U.S. 451 (1987). Thus, for example, in *Coleman v. City of Richmond*, 5 Va. App. 459, 364 S.E.2d 239 (1988), the Court of Appeals invalidated an ordinance prohibiting a person from being in a public place "under circumstances manifesting the purpose of" engaging in or soliciting prostitution. The ordinance provided that such purpose could be manifested by "beckoning to" or "repeatedly attempt[ing] to engage in conversation with passersby or individuals" or by "or attempt[ing] to stop motor vehicle operators by hailing, waving arms, or other bodily gestures." The court noted that if such acts were sufficient to show the requisite intent, "[a] hitchhiker could be arrested and convicted because she waved and beckoned to cars though she said not a word regarding solicitation or prostitution." 5 Va. App. at 466, 364 S.E.2d at 243. Because it prohibited such constitutionally protected conduct, the ordinance violated the First Amendment.

The Virginia Beach disturbing the peace ordinance is similarly overbroad. Speech is "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). A great deal of protected speech that is protected by the First Amendment may be described as "offensive," "obstreperous," and "offensive." *See, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (First Amendment protects vulgar cartoon depicting famous minister having sexual relations

with his mother); Texas v. Johnson 491 U.S. 397 (1989) (burning of American flag is protected by the First Amendment); *Cohen v. California*, 403 U.S. 15 (1971) (First Amendment protects jacket bearing the words "F--- the Draft").

The Virginia Beach ordinance, as applied to speech, goes well beyond the "well-defined and narrowly limited classes of speech," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942), that may constitutionally be prohibited. For example, a city may enforce a narrowly drawn ordinance prohibiting fighting words—"those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971). But the disturbing the peace ordinance is not limited to direct, face-to-face confrontations or to words that provoke violence. Nor is the ordinance limited to unprotected intimidation and "true threats" – "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

Admittedly, Virginia beach is entitled to prohibit some of the conduct enumerated in the ordinance, namely "threatening, challenging to fight, assaulting, fighting or striking another." But the city has a perfectly serviceable assault and battery ordinance that bans all of this behavior. *See* Code § 23-11. The disturbing the peace statute aims to prohibit something more – and that "something more" is unconstitutionally overbroad as it pertains to speech.

CONCLUSION

The ordinance under which the defendant is charged is unconstitutionally vague and overbroad. *Amicus* therefore respectfully urges the Court to dismiss the charges against the defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rebecca K. Glenberg hereby certify that a true and correct copy of the foregoing document was served by U.S. mail, postage prepaid, to:

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