Record No. 07-1808

In the
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORFOLK 203, LLC, t/a Have a Nice Day Cafe, *et al.*,

Plaintiffs-Appellees,

v.

ESTHER H. VASSAR, in her official capacity as Chair of the Virginia Department of Alcoholic Beverage Control, *et al.*,

Defendants-Appellants.

BRIEF OF *AMICI CURIAE* THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION and AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC. IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. The Center has as its sole mission the protection of freedom of speech and press from threats of all forms. The Center pursues that mission through research, educational programs, and intervention on behalf of the right of free expression. Since its founding in 1990, the Center has actively participated in state and federal court cases that raise important free expression issues.

The American Civil Liberties Union of Virginia, Inc. is a non-profit Virginia corporation affiliated with the American Civil Liberties Union (ACLU), the oldest and largest citizen membership organization devoted to preservation and furtherance of Constitutional rights in the United States. The ACLU of Virginia has over 9000 members in the Commonwealth of Virginia. The ACLU of Virginia has appeared frequently before the state and federal courts of Virginia both as *amicus* and direct counsel in constitutional cases. One of the ACLU's core commitments is the protection of the First Amendment freedom of speech.

All parties have consented to the filing of this Brief *Amicus Curiae*.

STATEMENT OF ISSUES

Amici adopt the Statement of Issues set forth in the Brief of Appellees.

STATEMENT OF FACTS

Amici adopt the Statement of Facts set forth in the Brief of Appellees.

SUMMARY OF ARGUMENT

The central issue in this case is whether state government may use its authority over the sale of alcoholic beverages to impose upon protected expression standards and restrictions that would be unacceptably imprecise and overbroad in any other context. This Court several years ago, in *Giovani Carandola, Ltd. v. Bason, 303 F.3d 507 (4th Cir. 2002) ("Carandola I"),* gave an unambiguously negative answer to that very question. As the District court properly recognized, that ruling fully governs the instant case, and amply justifies the injunction which that court entered. Amici respectfully urge the affirmance of that order.

Such a conclusion would be beyond doubt were it not for several issues which the Commonwealth has raised in its brief before this Court.

That brief candidly concedes that certain parts of the current Virginia regulatory scheme "are constitutionally problematic insofar as they lack an exception for artistic performances that benefit from First Amendment protection." Appellants' Opening Brief, p. 2. The Commonwealth, however, urges forbearance because of potential changes in those provisions that are under consideration at both legislative and administrative levels. Amici would surely welcome the prospect of such modification and mitigation. But until and unless such changes are effected and become legally binding, the constitutional rights of parties who are currently subject to such regulation are diminished not the least by such a welcome prospect. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Child Evangelism Fellowship of South Carolina v. Anderson School District 5,* 470 F.3d 1062, 1074 (4th Cir. 2006) (First Amendment rights cannot "be made to depend solely upon the good faith of state officials.") Moreover, the apparent commitment of both the General Assembly and the Alcoholic Beverage Control Board to effect such changes goes far to undermine the Commonwealth's plea that the existing laws should be construed more narrowly, as though they already contained the very exemption for artistic expression that is the focus of such revision.

Good intentions surely merit commendation, but do not warrant a retrospective recasting of unambiguous regulatory provisions. To the contrary, such laudable efforts reinforce the soundness of the district court's ruling.

The challenged provisions of the Virginia Code suffer, as the district court held, from the twin vices of overbreadth and vagueness. As with the North Carolina statute which this Court invalidated in *Carandola I*, the scope of Virginia's prohibitions far exceeds the Commonwealth's legitimate regulatory interests, sweeping within that ban much expressive activity that claims First Amendment protection. The absence of an explicit exemption for artistic expression proved fatal in *Carandola I*, and should be no less disabling in the present case.

Finally, the challenged Virginia Code provisions suffer from a degree of vagueness that this Court did not find in the North Carolina laws that were involved in *Carandola I.* Most especially, the terms "noisy" and "lewd" cannot constitutionally support serious governmental sanctions on expressive activity. Neither term is defined or clarified in any of the applicable statutes or regulations. Nor could either word be considered a legal term of art. While a dictionary definition of "noise" might offer limited guidance were that the regulatory term, such clarification would do

little to elucidate the meaning of the actual statutory language, apart from any evidence the General Assembly contemplated such reliance. While the Virginia Administrative Code does offer limited guidance in understanding "lewd and disorderly conduct," the examples offered for that purpose are clearly not exclusive or exhaustive. Thus the Virginia ABC Board retains vast discretion in applying the challenged statutory provisions – a discretion which clearly contravenes such Supreme Court judgments as *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) and relevant rulings of this Court – *e.g. Child Evangelism Fellowship of South Carolina v. Anderson School District 5,* 470 F.3d at 1068-69; *David Lytle, et. al. v. City of Norfolk, et. al.,* 326 F.3d 463, 468-69 (4th Cir. 2003) – which demand specificity and particularity in the regulation of protected expression. In the absence of such clarity and precision, amici urge affirmance of the district court's invalidation of the challenged provisions.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ENJOINED VIRGINIA'S UNCONSTITUTIONALLY OVERBROAD RESTRICTIONS ON THE FREEDOM OF SPEECH.

A. The Restrictions at Issue are Unconstitutionally Overbroad.

The First Amendment issues in this case are controlled by *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002) ("*Carandola I*"),

which struck down North Carolina restrictions on entertainment at establishments licensed to serve alcoholic beverages. Among other things, the statute at issue in *Carandola I* prohibits "[a]ny entertainment that includes or simulates sexual intercourse or any other sexual act," and "[a]ny other lewd or obscene entertainment or conduct, as defined by the rules of the [Alcoholic Beverage Control] Commission." 303 F.3d at 510. In turn, administrative regulations prohibited the simulation of various sexual acts, "the touching, caressing or fondling the breasts, buttocks, anus, vulva or genitals," and "the display of the pubic hair, anus, vulva or genitals." *Id.*

The Court noted that the restrictions on expression "sweep far beyond bars and nude dancing establishments":

> the plain language of the restrictions prohibits on licensed premises any entertainment that "simulate [s]" sexual behavior, even if performers are fully clothed or covered, and even if the conduct is integral to the production-for example, a political satire, a Shakespeare play depicting young love, or a drama depicting the horrors of rape.

Id. at 516.

The laws challenged here are **indistinguishable** from those in *Carandola I*. Virginia statutes prohibit licensees from conducting "lewd" entertainment on the premises. Va. Code §§ 4.1-225, 4.1-226. ABC regulations interpret this language as prohibiting the "real or simulated" performance of sexual acts and the "real or simulated" caressing or exposure

of various body parts. 3 VAC 5-50-140. Like the North Carolina restrictions, the Virginia laws apply as much to serious dramatic and artistic expression as to erotic dancing. *Carandola I* compels the conclusion that the Virginia is unconstitutional on its face.

B. The Restrictions Are Not Susceptible to a Limiting Construction.

The Commonwealth insists that the Court should save the Virginia law by reading in an exception for "matters that have literary, artistic, or political merit." Appellants' Br. at 15. But the Commonwealth merely asserts this exception; it provides no support for it, other than its desire to continue enforcing the statute and regulations.

As this Court recognized in *Carandola I*, a court may adopt a limiting construction only if the statute is "readily susceptible" to such a construction. 303 F.3d at 517 (citing *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 397 (1988) and *Erznoznik v. Jacksonville,* 422 U.S. 205, 216, (1975); *see also Reno v. ACLU*, 521 U.S. 844, 884 (1997). As in *Carandola I*, the statutes and regulations contain "no word or phrase that admits of a saving construction." 303 F.3d at 517. Courts may not "rewrite a state law to conform it to constitutional requirements." *American Booksellers*, 484 U.S. at 397.

Because the statutes and regulations are unconstitutionally overbroad, "'any enforcement' of the regulation at issue is 'totally forbidden.'" *Carandola I*, 303 F.3d at 512. The district court's injunction is appropriate.

II. THE CHALLENGED STATUTES AND REGULATIONS ARE UNCONSTITUTIONALLY VAGUE.

The district court properly ruled that the statutory prohibition of "noisy" conduct was unconstitutionally vague, while limiting its concerns about the validity of several other imprecise terms to the overbreadth analysis discussed in part I of this brief. Amici urge the affirmance at least of that portion of the decree that enjoined enforcement of the "noisy" conduct ban – noting that none of the currently proposed revisions in regulatory language would in the least mitigate this concern. Should this Court reach a different conclusion with regard to the overbreadth issue, amici would then respectfully urge careful consideration of appellees' challenges to the vagueness of several other key terms in the regulatory structure on which the district court had no occasion to rule – notably the terms "lewd" and "lustful," in the interpretation of which the statute offers no clearer guidance than it offers with respect to "noisy."

The United States Supreme Court has consistently demanded a high level of clarity and precision in the regulation of protected expression. As

early as *Niemotko v. Maryland*, 340 U.S. 268 (1951), the Justices recognized the need for government to afford adequate guidance to those whose expressive activity is subject to potential sanctions. Much later, in *Forsyth County*, the high Court struck down a Georgia county ordinance because, as applied to speech, it lacked "narrowly drawn, reasonable and definitive standards." 505 U.S. at 133. Such a law could not survive judicial scrutiny because it "contains more than the possibility of censorship through uncontrolled discretion." *Id.* Moreover, as the Court has cautioned on other occasions, lack of statutory precision precludes effective judicial review of administrative actions – specifically, making it "difficult to distinguish between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power." *City of Lakewood v. Plan Dealer Publishing Co*., 486 U.S. 750, 758 (1988). Indeed, as the Court added in *Lakewood*, "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech . . . ." *Id.* at 757. Such concerns warrant constitutional intervention "even if the discretion and power are never actually abused." *Id.*. Thus a pattern of inconsistent or aberrant application of imprecise language is not an essential pre-requisite for such a ruling; the mere possibility of such variant interpretation, and the consequent lack of guidance afforded to those who

are subject to such vague regulatory language is sufficient to compel such a constitutional ruling. This Court's recognition of the need for clarity and precision in the regulation of expressive activity has been no less consistent or conscientious. *E.g., Lytle,* 326 F.3d at 468-69.

The one challenged provision that evoked such a ruling on vagueness grounds was the ban on "noisy" conduct. That key term is nowhere defined in the statutes or regulations, nor could it be considered in any sense a legal term of art with a generally accepted meaning to be found outside the Virginia Code. An available dictionary definition of related terms like "noise" affords no guidance whatever to persons subject to these laws. There is no basis on which to infer the General Assembly's design that a dictionary definition of "noise" should control interpretation of "noisy." Equally problematic, the resulting language – "noise [is defined as] loud, confused, or senseless shouting or outcry; din or uproar of persons" is no clearer or more precise than the statutory term itself. The cure, in short, is not a bit better than the disease.

The Commonwealth also cites in its brief an unpublished Virginia Court of Appeals decision which summarily rejected a challenge to several provisions, "noisy" among them, on the wholly unexplained basis that these "terms . . . have well established meanings" and that "the statute is

sufficiently definite to avoid arbitrary and discriminatory enforcement and is [therefore] not unconstitutionally vague." *Supermarket Express, L.L.C. v. Department of Alcoholic Beverage Control*, 2005 Va. App. LEXIS 118, at *7 (2005). Such sole and unreasoned authority should not serve to refute or undermine the district court's ruling that "noisy" as applied to expressive activity lacks the requisite clarity or precision.

The Commonwealth also reasons by analogy to certain contexts in which the Supreme Court has condoned apparently imprecise language that governs sound-level regulation, *e.g., Kovacs v. Cooper*, 336 U.S. 77 (1948). There and in other cases such as *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the issue was not whether vague or imprecise regulatory language might serve to restrict or constrain the *content* of expression, as is the concern here, but solely whether comparable clarity is required in the regulation of the time, place and manner of speech (as the Court has consistently held that it is not.) The analogy offers no guidance in the resolution of the current issue, where the focus is on the content of expression and the universally recognized need for precision in regulation of such content.

For these reasons, amici respectfully urge the affirmance of the district court's injunction against enforcement of the statutory ban on

"noisy" conduct. Licensees and others who may be subject to a constraint cannot be expected to know with clarity or precision what the General Assembly envisioned as unacceptable behavior or activity and, for that reason, the challenged language fails to pass constitutional muster.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the ruling of the district court be affirmed.

Respectfully submitted:

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