IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

DON E. KARNS and NATHAN MAGNUSEN,	)	
Plaintiffs,	)	
v.	)	**Case No.: 4:15-cv-86**
CITY OF HAMPTON, VIRGINIA, *et al.*	)	
Defendants.	)	

PLAINTIFFS' RESPONSIVE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

COME NOW the Plaintiffs, Don E. Karns and Nathan Magnusen, by and through the undersigned counsel, and submit pursuant to Loc. Civ. R. 7(F), their Responsive Brief in Opposition to the Defendants'[1] Motion to Dismiss the Complaint.

I. STATEMENT OF FACTS

The operative facts for purposes of the Defendants' motion to dismiss are set forth in the Plaintiffs' Complaint (Doc. 1). The Plaintiffs Don E. Karns (Karns) and Nathan Magnusen (Magnusen) are itinerant evangelists who, in conformity with their sincerely-held religious beliefs, regularly proclaim the Gospel of Jesus Christ and preach the Word of God on sidewalks and streets (Doc. 1, ¶¶ 14-15). On or about September 16, 2013, the Plaintiffs were engaged in sharing their Christian faith within the Defendant City of Hampton, at an event known as

[1] The Motion (Doc. 5) and Brief in Support (Doc. 6) by their terms reply on behalf of Defendants City of Hampton, Terry Sult, and Wade Taplin, but not on behalf of Defendant Jim Forbes.

Hampton Bay Days, an event for which a Special Event Permit had been issued by the City of Hampton (Doc. 1, ¶ 20). In connection with their preaching, the Plaintiffs were using small amplifiers that moderately increased the volume of their voices to a reasonable, non-disruptive level so that their voices could be heard and as required for the effective communication of their message to persons who were nearby (Doc. 1, ¶ 16). Defendants Jim Forbes and Wade Taplin, officers with the City of Hampton Police Department (Doc. 1, ¶¶ 12-13), approached the Plaintiffs and ordered the Plaintiffs to cease using the amplifiers or the Plaintiffs would be arrested and issued a citations for violation of an ordinance of the City of Hampton. When the Plaintiffs failed to comply with the officers' orders, they were arrested and charged with violating City Code § 26-29 (Doc. 1, ¶ 17). Eventually, the charges against the Plaintiffs were nolle prossed on appeal to the Circuit Court for the City of Hampton (Doc. 1, ¶ 18).

On September 5, 2014, Plaintiff Magnusen was engaged in sharing his Christian faith within the City of Hampton at the Hampton Bay Days, again using a small amplifier that moderately increased the volume of his voice to a reasonable, non-disruptive level and as necessary for the effective communication of his message (Doc. 1, ¶ 22). He was again ordered by City of Hampton police officers to stop using the amplifier, and when he failed to comply with this order he was issued a summons (Doc. 1, ¶ 23). The charge was again nolle prossed while pending in the General District Court of the City of Hampton (Doc. 1, ¶ 24).

Hampton City Code § 26-29 provides as follows:

> Radios, tape players, compact disc players, loud speakers or other devices used for the amplification of sound, shall not be operated in any of the city's public parks or recreation areas, unless pursuant to a permit obtained from the director of parks and recreation for a live band performance as provided in section 26-28. City or city sponsored activities and events are exempt from this section.

(Doc. 6-1). Under Hampton City Code § 26-28(b) provides that an application for a live band performance permit shall be made upon a form provided by the director of parks and recreation and "must agree to abide by all terms and conditions promulgated by the director, to which the permit shall be subject." (Doc. 6-1). The process also requires that the permit applicant deposit with the director $500.00 "to defray the costs of police supervision and of necessary repair or cleanup operations occasioned by the performance." (Doc. 6-1). For purposes of City Code § 26-29, "the term 'public park and recreation area' shall include public streets, public rights of way and the ground of all public buildings in the city when they are subject to a Special Events Permit." Sections 26-28, -29 and -38 of the City of Hampton Code were adopted as part of Ordinance No. 12-0036 ("Ordinance") adopted by the City Council of the City of Hampton on August 8, 2012 (Doc. 6-1).

The Plaintiffs' Complaint sets forth eight causes of action. The First and Second allege, respectively, that the Ordinance violates the First Amendment as applied and on its face (Doc. 1, ¶¶ 3040-42). The Third Cause of Action alleges that the requirements of the Ordinance restricting the use of any amplifiers and requiring a permit are unconstitutionally vague and overbroad (Doc. 1, ¶¶ 46-48). The Fourth and Fifth Causes of Action allege, respectively, that the Ordinance violate Va. Const. Art. I, § 12 on its face and as applied to the Plaintiffs. The Sixth and Seventh Causes of Action seek, respectively, injunctive and declaratory relief (Doc. 1, ¶¶ 62, 66), and the Eighth Cause of Action alleges that the actions taken against the Plaintiffs requiring them to cease their preaching violated their rights under the Virginia Religious Freedom Restoration Act, Va. Code § 57-2.02 (Doc. 1, ¶¶ 67-70).

II. MOTION TO DISMISS STANDARDS

It is well-established that in deciding a Rule 12(b)(6) motion, this Court must accept all well-pleaded allegations of the Complaint to be true and must view all facts in the light most favorable to the plaintiff. *Raub v. Bowen*, 960 F. Supp. 2d 602, 604 (E.D. Va. 2013). Under the Rule 12(b)(6) standard, which is decidedly deferential to plaintiffs, the Court must construe the complaints allegations in his favor, giving the plaintiff the benefit of all reasonable inferences. *Id.* at 612 (citing *T.G. Slater & Son, Inc. v. Donald P. & Patricia A. Brennan LLC*, 385 F.3d 836, 841 (4th Cir. 2004). A Rule 12(b)(6) motion to dismiss "should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief." *T.G. Slater & Son, Inc.*, 385 F.3d at 841.

III. ARGUMENT

A. Defendant Taplin is subject to this lawsuit under 42 U.S.C. § 1983

Initially, the Motion to Dismiss asks for dismissal of any claim for injunctive or declaratory relief against Defendant Taplin for lack of jurisdiction based on an affidavit attesting that Defendant Taplin is no longer employed by the Defendant City of Hampton (Doc. 6-2). While the Plaintiffs concede that Defendant Taplin would not be subject to an order by this Court respecting enforcement of City ordinances restricting speech activities, Defendant Taplin is still properly a party to this lawsuit with respect to the Plaintiffs' claims for damage under 42 U.S.C. § 1983. The Complaint properly alleges that on September 6, 2013 he deprived the Plaintiffs of their First Amendment rights and did so under color of state law.

B. The Complaint states a claim against Defendant Sult for declaratory and injunctive relief

The motion also seeks dismissal of Defendant Sult arguing that the Complaint's allegations fail to state a claim against him. However, the Defendants focus solely on the damages aspect of the Plaintiffs' claims and ignore the Plaintiffs' request for declaratory and injunctive relieve against the enforcement of the Defendant City's restrictions on speech. Thus, the Complaint requests injunctive relief enjoining enforcement of the Ordinance (Doc. 1, ¶¶ 59-62) and requesting a declaration of the parties' rights and liabilities with respect to the Ordinance (Doc. 1, ¶¶ 63-66). Defendant Sult is the current Chief of Police of the City of Hampton (Doc. 1, ¶ 11), and as such is charged with the enforcement of City ordinances and with supervising City police officers in that respect. *See* Va. Code § 15.2-1701 ("When a locality provides for a police department, the chief of police shall be the chief law-enforcement officer of that locality."). Defendant Sult is a necessary and proper party defendant for purposes of the injunctive and declaratory relief sought by the Plaintiffs and the Complaint states a valid claim against him for such relief. *See Wallace v. King*, 650 F.2d 529, 531 (4th Cir. 1981) (police chief included in order granting declaratory and injunctive relief against unconstitutional conduct by county police officers) and *Contemporary Arts Center v. Ney*, 735 F. Supp. 743, (S.D. Ohio 1990) (police chief was proper party to action under 42 U.S.C. § 1983 seeking injunction against threatened violation of First Amendment by police).

C. Defendant Sult is not protected by qualified immunity from the claims for injunctive and declaratory relief

Defendant Sult also seeks his dismissal from this lawsuit on the basis of qualified immunity. But qualified immunity only protects defendants sued in their individual capacities

from § 1983 claims for *damages*. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (qualified immunity shields public officials from liability for "civil damages"). Qualified immunity is not a defense to an action seeking injunctive or declaratory relief. *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n. 5 (1998); *Bever v. Gilbertson*, 724 F.2d 1083, 1086 (4th Cir.), *cert. denied*, 469 U.S. 948 (1984), *abrogated on other grds.*, *Young v. Lynch*, 846 F.2d 960 (4th Cir. 1988); *Johnson v. Pearson*, 316 F. Supp. 2d 307, 313 (E.D. Va. 2004). *See also Guercio v. Brody*, 911 F.2d 1179, 1189 (6th Cir. 1990) (an official is not entitled to qualified immunity from claims seeking injunctive or declaratory relief). Thus, Defendant Sult is not entitled to dismissal from this lawsuit.

D. Officer Taplin is Not Immune From Liability Because the Ordinance is Clearly Unconstitutional

The Defendants' Motion to Dismiss also claims that Officer Taplin should be granted immunity from any liability in light of the decision in *Michigan v. DeFillippo*, 443 U.S. 31 (1979), and the doctrine of qualified immunity. However, *DeFillippo* is not a blanket authorization to police to enforce statutes and ordinances that are on the books and have not been declared unconstitutional. Thus, the Supreme Court there recognized an exception when "a law [is] so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.* at 38. As discussed, *infra*, the Ordinance and City Code § 26-29 in particular a plainly and facially unconstitutional because it imposes and outright prohibition on the use of amplification of the voice in a public forum; such amplification has long been held to be constitutionally protected by the First Amendment. *Saia v. New York*, 334 U.S. 558 (1948).

The Sixth Circuit applied this exception to a similar case in *Leonard v. Robinson*, 477 F.3d 347, 359 (6th Cir. 2007). There, the plaintiff sued a police officer under § 1983, alleging

that the officer retaliated against him on the basis of speech in violation of the First Amendment and violated his Fourth Amendment rights by arresting him at township board meeting after he uttered phrase "God damn." The *Leonard* court found that the statutes in question were flagrantly unconstitutional because they clearly violated established precedent: "…to the extent that § 750.167(f) is intended to regulate speech, we hold that its language is so free of limitation and so closely tracks that of § 750.337 that it is flagrantly unconstitutional." *Robinson*, 477 F.3d at 359. Moreover, the *Leonard* court ruled, because of the flagrant unconstitutionality of the statute involved, that the officer involved was not shielded from liability: "viewing the facts in the light most favorable to the plaintiff, no reasonable police officer would believe that any of the three other Michigan statutes relied upon by the district court are constitutional as applied to Leonard's political speech during a democratic assembly." *Id.* The officer was not entitled to the protection qualified immunity as a matter of law because the evidence supported the view that he had violated the plaintiff's clearly established constitutional rights.

For the same reasons, Defendant Taplin is not entitled to dismissal of the § 1983 claims against him. As discussed below, the law has been clearly established for over 50 years that citizens are allowed to employ amplification devices in connection with engaging in First Amendment protected activity in traditional public fora. Any reasonable officer should and would have known this. To the extent the Ordinance purported to extinguish that right, it is flagrantly unconstitutional and Defendant Taplin had no right to rely upon it. Thus, neither *DeFillippo* nor the doctrine of qualified immunity are applicable as a matter of law and Defendant Taplin is not entitled to dismissal on those grounds.

E. The Ordinance As Applied Violates the Guarantees to Freedom of Speech Set Forth in the First Amendment and Va. Const. Art. I, § 12

The Second and Fifth Causes of Action of the Complaint (Doc. 1, pp. 6-7, 12) assert that the Ordinance as applied to the Plaintiffs violates their rights to freedom of speech contained in U.S. Const. amend. I and Va. Const. Art. I., § 12.[2] The Defendants' Brief in Support of their Motion to dismiss does not assert that the activities of the Plaintiffs is not speech protected by the constitutional guarantees to freedom of speech. Indeed, it is clear that the Plaintiffs' preaching on the streets, sidewalks and public parks of the City of Hampton constitutes the exercise of their First Amendment rights to speech and free exercise of religion in traditional public forums where the constitutional protections of speech are at their zenith. *Deegan v. City of Ithaca*, 444 F.3d 135, 141-42 (2d Cir. 2006). The Defendants' argument is that the Ordinance is a reasonable time, place and manner regulation of speech that does not offend the constitution.

However, the Ordinance cannot be considered constitutional, particularly as to the preaching activities of the Plaintiffs, in light of the fact that it is a total prohibition on the use of voice amplification within traditional public forums. The Plaintiffs were arrested and charged under City Code § 26-29, which provides that "devices used for the amplification of sound, shall not be operated in any of the city's public parks or recreation areas, unless pursuant to a permit obtained from the director of parks and recreation for a live band performance as provided in section 26-28." (Doc. 6-1, p. 2; emphasis added). A "live band performance" is defined in City Code § 26-28 as

[2] The protection afforded speech by Article I, § 12 of the Constitution of Virginia is coextensive with the free speech provisions of the federal First Amendment. *Key v. Robertson*, 626 F. Supp. 2d 566, 583 (E.D. Va. 2009) (citing *Elliot v. Commonwealth*, 267 Va. 464, 593 S.E.2d 263, 269 (2004).

> the playing of any amplified musical instrument or any radio, tape recorder, tape deck and like or similar instrument to which an accessory speaker or amplification equipment is attached; the amplification of the voice when singing; or the organized playing of any instrumental ensemble whether amplified or not; but such term shall not include the playing of a single unamplified instrument.

(Doc. 6-1, p. 1; emphasis added). Thus, a permit to use any amplification device (even if the amplification is modest) can only be obtained "for a live band performance", but a "live band performance" does not include amplification of the voice for speaking as was done by the Plaintiffs in this case. The Ordinance operates as an absolute ban on the use of amplification for Plaintiffs' preaching.

As the Defendants acknowledge in their Brief, the Fourth Circuit has ruled that the First Amendment protects the right to amplify speech and that the use of amplification is an indispensable instrument of effective communication. *U.S. Labor Party v. Parmerleau*, 557 F.2d 410, 412 (4th Cir. 1977) (citing *Saia v. New York*, 334 U.S. 558 (1948) and *Kovacs v. Cooper*, 336 U.S. 77 (1949)). Thus, *Saia*, 334 U.S. at 559, the Supreme Court struck down an ordinance that forbade the operation of any sound amplification device except with the permission of the chief of police. "[T]o allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. The police need not be given the power to deny a man the use of his radio in order to protect a neighbor against sleepless nights." *Id.* at 562. The Ordinance at issue in this case goes even further than the one struck down in *Saia* because the Ordinance bans all use of amplification for spoken voice, and does not even offer the chance of obtaining permission from a city official. The Ordinance plainly is unconstitutional as applied to the Plaintiffs' preaching under *Saia* and the Defendants' motion to dismiss this challenge to the Ordinance must be rejected. *See also U. S. Labor Party v.*

Rochford, 416 F. Supp. 204, 207 (N.D. Ill. 1975) (city ordinance forbids "any noise of any kind" when made on a public way by an amplifier violated the First Amendment).

Even under the time, place and manner test articulated in the Defendants' brief, the Ordinance and its restriction on any use of an amplifier for preaching of the kind engaged in by the Plaintiffs is unconstitutional. The government may impose reasonable time, place and manner restrictions on speech and expression so long as (1) the restriction is justified without reference to the content of the regulated speech, (2) the restriction is narrowly tailored to serve a significant governmental interest, and (3) the restriction leaves open ample alternative channels for communication of the information the speaker wishes to communicate. *Hassay v. Mayor & City Council of Ocean City, Md.*, 955 F. Supp. 2d 505, 519 (D. Md. 2013) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The government bears the burden of showing that the regulation satisfies this test. *Deegan*, 444 F.3d at 142.

Even if the Ordinance is not content-based, it fails this test because it is not narrowly tailored to serve the government interest the Defendants offer here, i.e., to limit excessive noise. The Ordinance, and in particular City Code § 26-29, forbids <u>any</u> use of an amplifier in areas that are traditional public forums. Indeed, in this case the prohibition applied to areas covered by the permit for the Hampton Bay Days festival (Doc. 1, ¶¶ 20-21), which included many streets, sidewalks and other public places deemed traditional public fora for First Amendment purposes. (Doc. 1, ¶¶ 27-29). *See Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (streets, sidewalks and parks are "archetype of a traditional public forum."). As noted above, it is settled that use of an amplifier is protected by the First Amendment. To satisfy the test of narrow tailoring, a time, place, or manner regulation may not burden substantially more speech than is necessary to further the government's legitimate interests. "Government may not regulate expression in such a

manner that a substantial portion of the burden on speech does not serve to advance its goals," or is "substantially broader than necessary to serve the governmental interest." *Ward*, 491 U.S. at 799.

In this case, the total ban on use of amplified speech, regardless of the sound level produced by the amplifier, is not narrowly-tailored because it suppresses considerably more speech than is necessary to eliminate excessive noise. Thus, in *Reeves v. McConn*, 631 F.2d 377 (5th Cir. 1980), the court struck down a city ordinance that prohibited the use of amplifiers in the city's downtown district on Sunday afternoons. Although the court acknowledged the city had an interest in protecting against disruptions and distractions caused by excessive noises,

> but the blanket prohibition by which it seeks to achieve those ends is far too broad. Not every amplified sound at every time except Sunday afternoon will disrupt the normal business activity of the downtown district or make the streets unsafe. Precisely because the downtown district is already a busy and noisy place, reasonably amplified free speech is guaranteed a broad right to equal participation in these aspects of modern urban life. As the Court stated in *Grayned* [*v. City of Rockford*, 408 U.S. 104 (1972)], "the nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' ... The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned*, 408 U.S. at 116. By this standard, there is probably no more appropriate place for reasonably amplified free speech than the streets and sidewalks of a downtown business district.

Reeves, 631 F.2d a 384. As a result, it found the city had not narrowly tailored its restriction on us of amplifiers.

Similarly, in *Hassay v. Town of Ocean City*, the court ruled that an ordinance limiting any sounds on a bustling, tourist town boardwalk that could be heard within 30 feet was not a narrowly tailored regulation on speech as applied to a musician who performed on the boardwalk. Pointing out that the regulation effectively prohibited the use of any musical instrument or sound amplification system, the court noted that such total bans on a medium of expression pose a

readily-apparent danger to freedom of expression by suppressing too much speech. *Hassay*, 955 F. Supp. 2d at 524. Because the restriction banned expression and speech that was no louder than the normal sounds of human activity in the area, it was not appropriately targeted at the evil it sought to suppress and failed the narrow-tailoring requirement. *Id.* at 525. *See also Deegan*, 444 F.3d at 143-44 (city ordinance which restricted noise by, *inter alia*, forbidding any amplified sound that could be heard within 25 feet was not narrowly tailored as applied to a street preacher who sought to preach at a public forum bustling with the sounds of recreation, celebration, commerce, demonstration, rallies, music, poetry, speeches, and other expressive undertakings).

The Ordinance at issue here similarly fails the narrow-tailoring test as applied in this case. As the Complaint points out, due to the ambient noises of the Hampton Bay Days festival, the modest amplification they used was necessary for the effective communication of their religious message and was not disruptive or unreasonable (Comp. ¶¶ 16, 22) The City's prohibition on any and all amplification in these public areas is clearly substantially broader than necessary. At the very least, the Defendants are not entitled at this stage of the proceedings to a ruling that the Ordinance is narrowly tailored, a matter upon which they shoulder the burden of proof, and the motion to dismiss must be denied.

Additionally, it cannot be said at this stage of the proceedings that the Ordinance and its prohibition on voice amplification leaves open ample alternative channels for communication of the information the speaker wishes to communicate. Although the Defendants recite a host of other ways the Plaintiffs could convey their religious message, the available channels must be within the forum in question. *Hassay*, 955 F. Supp. 2d at 525 (citing *Heffron v. Int'l Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981). Thus, the fact that the Plaintiffs could

use the mail or other media to spread their message does not constitute an alternative channel because it is not within the traditional public fora at issue here.

The Supreme Court has held that "[t]he First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Heffron,* 452 U.S. at 655 (1981) (quoting *Kovacs v. Cooper,* 336 U.S. 77, 87 (1949)). "[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 163 (1939). The right to speech includes the right to a mode of speech that is effective in reaching the desired audience. *Saia*, 334 U.S. at 561. *See also Student Against Apartheil Coalition v. O'Neil*, 660 F. Supp. 333, 339-40 (W.D. Va. 1987) (students stated First Amendment claim to construct shanties as symbols of protest; fact that other forms of protest were available did not demonstrate alternative channels were available to reach university leadership).

The Defendants have not carried their burden of demonstrating that ample alternative channels are available for the Plaintiffs to effectively reach their intended audience within the public fora covered by the Ordinance. The Complaint alleges that, due to the ambient noise in these areas, amplification is necessary to be heard and the inability to use amplification denies them the ability to effectively communicate their message (Doc. 1, ¶¶ 16, 30). Assuming that is true, as must be done in connection with the Defendants' motion, then it cannot be said that the Ordinance allows ample alternative channels of communication. *See Hassay*, 955 F. Supp. 2d at 525-26 (boardwalk noise restriction which effectively prevented use of amplification by musicians did not offer musicians ample alternative channels of communicating with the public).

Under the facts alleged in the Complaint and the venerable case law protecting use of amplification devices in public fora, the Complaint plainly states a claim that the Ordinance is unconstitutional as applied to the preaching engaged in by the Plaintiffs. The Defendants argue that Plaintiffs may only prevail on their as-applied challenge to the law if they show viewpoint or content-based discrimination. But that is not the test for as-applied challenges, which involve challenges to the law as it is or has been applied to a specific person. *Educational Media Co. at Virginia Tech v. Insley*, 731 F.3d 291, 298 n. 5 (4th Cir. 2013). As discussed above, the challenge here is to the Ordinance as it is and was applied to the Plaintiffs' preaching (as opposed to some other form of expression that would fall within the definition of a "live band performance"), and the restriction on speech caused by the Ordinance requires that the Defendants' motion to dismiss those claims must be denied.

F. The Ordinance Violates the First Amendment On Its Face

The Complaint also states a claim that the Ordinance violates the First Amendment on its face. A facial challenge may involve either showing (1) that no set of circumstances exists under which the law would be valid, or that the law lacks any plainly legitimate sweep, or (2) that the law is overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep. *Education Media Co. at Virginia Tech, Inc.*, 731 F.3d at 298.

For many of the reasons discussed *supra*, the Ordinance fails under the second aspect of a facial challenge because it acts as a total ban on the use of amplifiers for speaking in all City parks and other traditional public fora. Thus, in *Saia*, 334 U.S. 559-60, the Supreme Court held that a prohibition on use of amplifiers in public was held to be unconstitutional on its face.

Again, the Ordinance at issue here is even more restrictive than the ordinance at issue in *Saia*, which at least allowed the possibility that the preacher who challenged the law could obtain a permit to use the amplification device for delivering his religious message. *See also Lilly v. City of Salida*, 192 F. Supp. 2d 1191, 1194 (D. Colo. 2002) (city ordinance that operated as an outright ban on any amplified speech was unconstitutional on its face) and *Dowd v. City of Los Angeles*, 2013 WL 4039043, * 11 (C.D. Cal. Aug. 7, 2013) (ban on amplified sound in a public forum was unconstitutional on its face in violation of the First Amendment).

Even if a person wishing to only use an amplifier for speech (as opposed to singing) was eligible for a permit under the "live band performance" provision of the Ordinance, City Code § 26-28, the Ordinance would still be unconstitutional on its face because the Ordinance sets forth no standards to guide the director of parks and recreation in determining whether to grant the permit and gives the director unfettered discretion in determining what terms and conditions the permittee will be subject to. City Code § 26-28(b) provides that a live band performance may occur in any public park or recreation area only after a permit is obtained from the director, "and the applicant must agree to abide by all terms and conditions promulgated by the director, to which the permit shall be subject." This part of the Ordinance allows the director to decline a permit for any or no reason and gives the director similar unfettered discretion to restrict the permittee in exercising his or her First Amendment rights.

Laws vesting such discretion with the permitting official are facially violative of the First Amendment. In *Saia*, 334 U.S. at 560-61, the Court struck down the permit requirement for using amplifiers pointing out that "[t]he right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which

can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine." And in *Lilly*, the court wrote:

> Additionally, the permit system constitutes an impermissible prior restraint on speech because the ordinance fails to prescribe any standard for the exercise of official discretion in issuing a permit and there are no procedural safeguards limiting the discretion of City Council or providing for prompt judicial review of a denial decision.

Lilly, 192 F. Supp. 2d at 1194. *See also Child Evangelism Fellowship of MD, Inc. v. Montgomery Cnty. Pub. Sch*., 457 F.3d 376, 386 (4th Cir. 2006) (the government violates the First Amendment when it gives a public official unbounded discretion to decide which speakers may access a traditional public forum).

Another constitutional vice of the requirement that a speaker obtain a permit is that it prevents one from spontaneously exercising his or her First Amendment right to speak in a public forum using reasonable amplification. This problem was identified by the Supreme Court in *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002), where the court struck down an ordinance that required persons who wished to canvass from door-to-door to first obtain a permit from village officials. The Court there wrote:

> [T]here is a significant amount of spontaneous speech that is effectively banned by the ordinance. A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit. Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission. In this respect, the regulation is analogous to the circulation licensing tax the Court invalidated in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). In *Grosjean*, while discussing the history of the Free Press Clause of the First Amendment, the Court stated that "'[t]he evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.'" *Id.*, at 249-250 (quoting 2 T. Cooley, Constitutional Limitations 886 (8th ed.1927)); *see also Lovell v. City of Griffin*, 303 U.S. 444 (1938).

Watchtower Bible & Tract Society, 536 U.S. at 166.

Thus, there are numerous grounds apparent on the face of the Ordinance which render it vulnerable to a challenge that it is unconstitutional on its face. The Defendants' motion to dismiss those claims should be denied.

G. Dismissal of the Plaintiffs' Virginia Religious Freedom Restoration Act Claim is Unwarranted

The Defendants also request that the Plaintiffs' Eighth Cause of Action under Va. Code Ann. § 57-2.02 be dismissed. To the extent the Defendants premise this request on the basis that the Court lacks supplemental jurisdiction under 28 U.S.C. § 1367(a) over this state law claim, the request for dismissal should be denied because the Plaintiffs have stated claims under federal law. The discretionary authority the Defendants request this Court exercise is inapplicable because claims under federal law, specifically 42 U.S.C. § 1983, remain in this case for the reasons set forth *supra*.

Va. Code § 57-2.02(B) provides:

> No government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that 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.

In seeking dismissal of the Plaintiffs' claim under this statute, the Defendants first appear to argue that because the Ordinance, and specifically City Code § 26-29, is not aimed at religious practices or expression, the religious freedom statute is inapplicable. However, the very purpose of this statute, like other religious freedom statutes adopted in the wake of the Supreme Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), was to protect conduct that citizens engage in as an exercise of their religious beliefs against

neutral and generally-applicable laws that might forbid or limit that conduct. *Gonzalez v. O Centra Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (discussing purpose of the federal Religious Freedom Restoration Act). Indeed, Va. Code § 57-2.02 (B) provides that the statute applies "even if the burden results from a rule of general applicability." Thus, the Defendants argument that the Ordinance does not specifically target religious activities is of no moment.

The Defendants argument that the Plaintiffs "effective" exercise of their religious beliefs is not protected by the Virginia statute is refuted by the terms of the statute which defines "substantially burden" as "to inhibit or curtail religiously motivated practice." Va. Code § 57-2.02(A). The Complaint alleges that the application of the Ordinance clearly inhibited their ability to communicate their religious beliefs with the public, which is a religiously motivated practice. See Doc. 1, ¶ 16 ("Amplification of their voice is required for the effective communication of their message due to the ambient sound of the festival atmosphere."). Thus, the Complaint sets forth a substantial burden on Plaintiffs' religious practices in violation of the statute.

H. The Claim for Compensatory Damages is Not Subject to Dismissal

The Defendants go on to request dismissal of the Plaintiffs' request for compensatory damages, but cite no case holding that the grounds for compensatory damages must be pleaded with specificity. *Carey v. Piphus*, 435 U.S. 247 (1978), holds only that an award of compensatory damages must be supported by evidence offered at trial, not that the complaint must set forth with specificity the evidence supporting the claim. The Defendants' argument runs contrary to Fed. R. Civ. P. 8(a) which requires that a complaint be a short, plain statement

of the grounds for jurisdiction and basis for the claim and a demand for relief. Only "special damages" need be pleaded with specificity under Fed. R. Civ. P. 9(g). *See Carnell Const. Corp. v. Danville Redevelopment and Housing Auth.*, 745 F.3d 703, 725 (4th Cir. 2014) ("special damages" are those that are not the ordinary result of the conduct alleged).

In any event, the Complaint does set forth circumstances showing that the Plaintiffs' suffered harm that may be the subject of an award for compensatory damages. Emotional and mental distress are separately recoverable element of damages in a claim for deprivation of constitutional rights under 42 U.S.C. § 1983. *Carey*, 435 U.S. at 264; *Smith v. Rector & Visitors of the Univ. of Virginia*, 115 F. Supp. 2d 680, 686 (W.D. Va. 2000). The Complaint alleges that the Plaintiffs were accosted in public by police officers and told to cease their First Amendment activities and then required to appear in court on the charges against them under the Ordinance. Moreover, Plaintiff Magnusen was subjected to a custodial arrest as a result of the 2013 incident (Doc. 1, ¶¶ 17-18, 22-24). Plaintiffs are entitled to recover for mental and emotional distress and embarrassment caused by such police actions which are found to deprive them of a constitutional right. *Guerrero v. Deane*, 2012 WL 3834907, *5 (E.D. Va. Sept. 4, 2012).

To the extent that this Court deems the Complaint insufficient on this point, dismissal of the claim for damages is unwarranted. Instead, the Plaintiffs request leave to amend to cure any deficiency.

I. The Request for Injunctive Relief Should Not Be Dismissed

The Defendants finally request dismissal of the Plaintiffs' request for injunctive relief asserting that as phrased the request is improper.[3] They cite no case supporting the view that a claim for injunctive relief is improper if it does not include a request on behalf of other similarly situated parties. Indeed, the Complaint does request a declaration that the Ordinance is unconstitutional which would inure to the benefit of other persons. To the extent the Court considers the Complaint insufficient on this basis, the Plaintiffs request leave to amend to correct any deficiency.

CONCLUSION

For the reasons set forth above, the Plaintiffs respectfully request that this Court deny the Defendants' Motion to Dismiss in all respects.

Respectfully submitted

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[3] Although the Prayer for Relief by its terms requests an injunction only against enforcement against the Plaintiffs, the Sixth Cause of Action provides that "Plaintiffs request that this Court enjoin the Defendants from enforcing the Ordinance." (Doc. 1, ¶ 62).