IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

BRADLEY S. TANNER, et al.,	:	
	:	
Appellants,	:	
	:	
v.	:	Record No. 080998
	:	
THE CITY OF VIRGINIA BEACH	:	
	:	
Appellee.	:	

BRIEF *AMICI CURIAE* IN SUPPORT OF THE APPELLEE
BY THE LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC.
AND THE VIRGINIA MUNICIPAL LEAGUE

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES
OF THE SUPREME COURT OF VIRGINIA:

The Local Government Attorneys of Virginia, Inc. (the "LGA") and the Virginia Municipal League ("VML"), by counsel, submit this brief *amici curiae* in support of the Appellee in this matter, the City of Virginia Beach (the "City" or "Virginia Beach").

I. Interest of the Amicus Curiae

The LGA is a nonprofit professional corporation created to promote the continuing legal education of local government attorneys,

furnish information to local government attorneys and their offices that will enable them to better perform their functions, offer a forum through which LGA members may meet and exchange ideas of import to Virginia local government attorneys, and initiate, support, or oppose legislation and litigation that, in the judgment of the LGA, is significant to Virginia local governments. The LGA was founded in 1975, and its members represent 71 counties, 39 cities, and 55 towns of the Commonwealth. The LGA regularly is asked by the Virginia General Assembly and agencies of the Commonwealth to offer legal advice on matters of state policy and to recommend knowledgeable attorneys to serve on legislative study committees and commissions.

VML is an association of political subdivisions of the Commonwealth, currently consisting of 39 cities, 156 towns, and 11 urban counties, formed and maintained pursuant to § 15.2-1303 of the Code of Virginia for the purpose of promoting the interest and welfare of its members as may be necessary or beneficial. VML is an instrumentality of its member political subdivisions.

As an organization of attorneys who are charged with the responsibility of protecting the legal interests of Virginia's local governments, the LGA is well qualified to recognize matters of

general importance impacting local government law that may be presented to this Court. Similarly, VML is uniquely qualified to express the interests of cities and towns and many counties throughout Virginia with respect to matters of common concern that come before this Court. The LGA and VML therefore are well situated to provide assistance to the Court with respect to local government issues that may impact not only the present litigants but all Virginia local governments and their citizens. The LGA and VML previously have filed *amicus curiae* briefs in cases before this Court that implicate issues of special importance to Virginia's local governments.

II. Summary of Argument

This appeal squarely raises an issue of first impression before this Court – whether a criminal noise ordinance can utilize the objective "reasonable person" standard without being vague and therefore facially unconstitutional. Given the enormous amount of case law support in the affirmative, the use of this standard in the majority of Virginia locality noise ordinances, in numerous state criminal statutes, and even in the constitution itself, LGA and VML

urge the Court to uphold the Virginia Beach Circuit Court and join the majority of state and federal courts across the country that have upheld noise ordinances using the "reasonable person" standard.

A Virginia Supreme Court ruling to the contrary would harm the citizens of the Commonwealth, and the state and local governments significantly. Most Virginia localities that have adopted a noise ordinance have chosen to regulate noise through the use of a "reasonable person" standard for many legal and practical reasons. But the harm would not stop there. This common use of the "reasonable person" standard is echoed in the General Assembly's criminal statutes, state and federal criminal procedure and even in the federal constitution itself. A ruling against Virginia Beach in this case would likely lead to future defense challenges in all these areas.

Most courts across the country, state and federal, to consider this question have allowed the regulation of noise using the "reasonable person" standard. Here, the trial court followed this majority view, and correctly ruled that the Virginia Beach noise ordinance utilizing the law's familiar "reasonable person" standard was, on its face, not unlawfully vague, and therefore held the

ordinance to be consistent with the constitutional guarantee of due process.

Perhaps to avoid this overwhelming approval of the "reasonable person" standard in noise ordinances and in other criminal statutes and contexts, the Appellants' *amici curiae*, ACLU of Virginia and Thomas Jefferson Center for the Protection of Free Expression, ask the Court to impose strict standards of review inappropriate for a content-neutral regulation, or to second guess the legislature in defining the crime at issue. These attempts must be rejected as the ordinance is presumed constitutional unless vague in all possible constructions, and it is the province of the legislature, not the courts, to define the crime when faced with various lawful options.

In this case, the Court should (i) uphold the trial court, which adopted the majority view on this issue across the country; (ii) uphold the use of the objective "reasonable person" standard in regulating noise and in other criminal statutes and ordinances; and (iii) decline the invitation by the Appellants' *amici curiae* in their Brief of Amici Curiae (the "ACLU Brief") to apply far stricter constitutional standards reserved for content-based regulations to this facially content-neutral

regulation of noise, and reject the opportunity to second guess the lawful drafting choices made by the legislature in defining this crime.

The trial court properly upheld the facial constitutionality of the Virginia Beach City ordinance § 23-47. Since the use of the "reasonable person" standard is lawful and appropriate, the LGA and VML urge the Court to uphold the constitutionality of the Virginia Beach ordinance.

III. Statement of the Case

The LGA and VML adopt the Statement of the Case submitted by the City in its Brief.

IV. Statement of the Facts

The LGA and VML adopt the Statement of the Facts submitted by the City in its Brief.

V. Standard of Review

The LGA and VML adopt the statement setting forth the appropriate Standard of Review submitted by the City in its Brief.

VI. Argument

The LGA and VML will solely address the Appellants' first assignment of error, its facial challenge to City ordinance § 23-47. Further, the LGA and VML will address only those issues in this case that we think have the most general applicability in localities across the Commonwealth of Virginia. The absence of argument regarding other matters raised by the Appellants herein (the "Appellants" or "Peppermint Beach Club"), or by their *amici curiae* does not indicate that we acquiesce in their views concerning those matters, but merely reflects our intention as *amici curiae* to focus on those matters of greatest general significance to our respective memberships.

A. The Trial Court's opinion is well-supported by cases in other states and in the federal courts, the significant majority of which support the constitutionality of the "reasonable person" standard in local noise ordinances.

The trial court's opinion here follows authority of the U.S. Supreme Court, other federal courts including the Fourth Circuit, and other states. The leading noise ordinance cases in this area are well-described in the Virginia Beach Appellee's Brief. In many different contexts, whether involving a noise ordinance or not, "[t]he use of

variations of the term “reasonable” has been found not to deny due process even in defining prohibited conduct.” *Harris v. Lukhard,* 733 F.2d 1075, 1080 (4th Cir. 1984); *citing United States v. Ragen*, 314 U.S. 513, 523-24, 62 S. Ct. 374, 378-79, 86 L. Ed. 383 (1942); *Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 489 n. 3 (4th Cir. 1983) (upholding ordinance prohibiting “unreasonably loud” and “disturbing” noise).

Not surprisingly, then, the significant majority of courts that have considered the issue before this Court have affirmed the facial validity of noise ordinances using some version of the “reasonable person” standard. *E.g., Sharkeys, Inc. v. City of Waukesa*, 265 F. Supp. 2d 984 (E.D. Wis. 2003) (stating “anti-noise ordinances that incorporate a reasonableness standard have generally withstood constitutional scrutiny” and listing cases); *Howard Opera Associates v. Urban Outfitters*, 322 F.3d 125, 128 (2d Cir. 2003) (upholding ordinance prohibiting “unreasonable” noise which “disturbs, injures or endangers the peace or health of another or … endangers the health, safety or welfare of the community”); *Sterling v. State*, 701 So. 2d 71, 75 (Ala. Crim. Ct. 1997) (conviction under statute prohibiting the making of “unreasonable noise” upheld); *State v. Linares*, 655 A.2d

737, 743, 232 Conn. 345, 356 (Conn. 1995) (ordinance prohibiting "unreasonable noise" was not vague because the term "unreasonable" denoted objectivity based upon the circumstances); C*ity of Madison v. Bauman*, 470 N.W.2d 296, 302, 162 Wis.2d 660, 677 (Wis. 1991) (the word "reasonably" saves the noise ordinance from the infirmity of vagueness); *Eanes v. State of Maryland*, 569 A.2d 604, 616, 318 Md. 436, 461 (Md. 1990), *cert. denied*, 496 U.S. 938 (1990) (upholding statute that prohibits making "loud and unseemly noises" because the term "unseemly" was akin to "unreasonable"); *Earley v. State of Alaska*, 789 P.2d 374, 376 (Alaska Ct. App. 1990) (upholding statute that prohibited making "unreasonably loud noise"); *Blanco v. State of Texas*, 761 S.W.2d 38, 40-41 (Tex. 1988) (upholding prohibition against making "unreasonable noise"); *People v. Fitzgerald*, 573 P.2d 100, 102-103 194 Colo. 415, 417-419 (Colo. 1978) (upholding an ordinance prohibiting "unreasonable noise in a public place or near a private residence he has no right to occupy" because a standard more specific than unreasonable noise would be impractical); *State v. Holland*, 331 A.2d 626, 132 N.J.Super. 17 (N.J. Super. Ct. 1975) (ordinance prohibiting "any unreasonably loud, disturbing or

unnecessary noise" upheld as valid); *see* also *City of Everett v. Everett Dist. Court*, 641 P.2d 714, 31 Wash.App. 319 (Wash. App. 1982) (in applying a noise ordinance that included some decibel levels, the court made the common sense observation that an ordinance setting an unreasonable level of noise is more easily understood by the common man than decibel levels in determining what conduct is unlawful).

The cases adopting the minority view and finding non-decibel meter noise ordinances vague appears well-represented by *Lutz v. City of Indianapolis*, 820 N.E.2d 766 (Ind. Ct. App. January 18, 2005). The court there held invalid the local noise ordinance which prohibited any noise that is "loud," "unnecessary," or "unusual," or that annoys or disturbs others. In rejecting the city's argument that the ordinance was similar to others that had been upheld in many cases across the country, the *Lutz* court noted that the general language used lacked an objective "reasonableness" standard, and contrasted the noise ordinance from the state disorderly conduct statute, which did not. The court noted, "Indiana's disorderly conduct statute … validly prohibited "unreasonable" noise only after an individual has been warned about his conduct. The [invalid Noise]

Ordinance in the instant case, however, does not include an objective [reasonableness] test…." *Lutz*, 820 N.E.2d at 769.

As in the *Lutz* case, cases which do hold a noise ordinance is void for vagueness – including the ones cited by the Appellants and their *amici curiae* -- almost uniformly lack the expressly objective "reasonable person" standard found in the Virginia Beach ordinance, are worded differently and/or the courts fail to imply a rule of objective reasonableness in their interpretation of the ordinance's words. Importantly, in order to be held facially unconstitutional, an ordinance must be vague in ***all*** its possible applications. *Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 492 (4th Cir. 1983) (quoting *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497, 495 n.7 (1982).

For this reason, even when noise ordinances lack the express "reasonable person" standard found in the Virginia Beach ordinance, courts commonly interpret the terms used using a "reasonableness" standard to save the ordinance from infirmity. *See City of Cleveland v. Vento*, 2002 WL 1041747, at *1 (Ohio Ct. App. May 23, 2002) (giving deference to the "reasonableness" interpretation previously given a Cleveland noise ordinance); *Hernandez v. Richard*, 772

So.2d 994, 997 (La. Ct. App. 2000) (construing noise ordinance to proscribe only objectively unreasonable noises to overcome constitutional infirmity of being vague); *State v. Taylor*, 128 N.C. App. 616, 618-19, 495 S.E. 2d 413, 415 (1998) (noise ordinance that contained such general terms as “annoy” and “disturb” was upheld as valid as the courts utilize an objective standard); *Asquith v. City of Beaufort,* 139 F.3d 408, 411-412 (4th Cir. 1998) (upholding Beaufort, S.C. ordinance prohibiting “loud and unseemly” noise, where the South Carolina Supreme Court had interpreted “unseemly” to mean “unreasonably loud under the circumstances”); *State v. Friedman*, 697 A.2d 947, 950, 304 N.J.Super. 1, 8 (N.J. Super. Ct. App. Div. 1997) ("As numerous decisions regarding such [noise] ordinances make clear, such general language is permissible so long as courts utilize a reasonableness standard when applying it"); *State of Arizona v. Singer*, 945 P.2d 359, 190 Ariz. 48 (Ariz. Ct. App. 1997) (upholding noise ordinance prohibiting “disturbing the peace and quiet of any person” by applying a “presumption that such person be a reasonable one.”); *State v. Garren*, 451 S.E.2d 315, 117 N.C.App. 393 (N.C. App. 1994) (ordinance prohibiting “loud, raucous noises” upheld as an objective standard for measuring what noise is prohibited); *City of*

Beaufort v. Baker, 432 S.E. 2d 470, 474, 315 S.C. 146, 152-153 (S.C. 1993) (ordinance prohibiting "loud and unseemly noises" upheld because "'unseemly' modifies 'loud' and means 'unreasonably loud in the circumstances.'"); *State of Ohio v. Dorso*, 4 Ohio St.3d 60, 446 N.E.2d 449 (1983) (Cincinnati ordinance prohibiting disturbing "the quiet comfort and repose of other persons" not vague because a "reasonable person" standard should be applied in interpreting the ordinance); *State of New Hampshire v. Chaplinsky*, 18 A.2d 754, 91 N.H. 310 (N.H. 1941) (applying a reasonable person standard to a noise ordinance to save it from vagueness challenge).

Of course, in the case of Virginia Beach City ordinance § 23-47, the language is *expressly* subject to the "reasonable person" standard, and therefore objective and not vague as a matter of law. Even if it were not, the Court should apply a rule of reasonableness in the terms used as done in the cases above, and therefore uphold its validity as an objective standard.

In the face of the overwhelming body of law upholding noise ordinances using the "reasonable person" standard, the Appellants cite only four cases. Brief of Appellants, at 23-26. Three of these cases interpret noise ordinances that do not contain an express

"reasonable person" standard like the Virginia Beach ordinance, and the remaining case is otherwise plainly distinguishable as a factual matter (*i.e.*, an Omaha disorderly conduct ordinance that used the term "unreasonable" noise without any other description).

The Appellants' *amici curiae* spend most of the ACLU Brief discussing cases that presented First Amendment issues, absent here. ACLU Brief at 6-9. Otherwise, the Appellants' *amici curiae* cite cases that are just as easily distinguishable as the Appellants' four cases. In the cases cited by those *amici curiae*, the ordinances similarly do not expressly contain a "reasonable person" standard, contain distinguishable wording, and/or the court failed to interpret the terms using a reasonableness standard. ACLU Brief at 10.

Based on this shallow reading of just a few cases, the Appellants and their *amici curiae* ask this Court to adopt the minority position on the question of whether or not a "reasonable person" noise ordinance violates the Constitution on its face. The Virginia Supreme Court should instead follow the overwhelming body of authority and uphold the Virginia Beach ordinance because it is subject to and limited by the objective "reasonable person" standard.

B. An adverse ruling would effectively rule unconstitutional most local noise ordinances in the Commonwealth, which use a 'reasonable person" standard and for many practical reasons, do not use a decibel standard.

A Court ruling that the Virginia Beach ordinance is void for vagueness would seriously harm the citizens of the Commonwealth and the ability of local governments to protect them. Most Virginia localities that have adopted a noise ordinance have chosen to regulate noise through the use of a "reasonable person" standard, either expressly, as with Virginia Beach, or through language (such as "breach of the peace") which courts routinely interpret as a "reasonableness" standard. A partial listing of such localities not relying solely upon a decibel standard is attached to this Brief.

For this reason, a ruling against Virginia Beach in this appeal would, in effect, declare dozens of noise ordinances across the Commonwealth illegal. These localities would be forced to either allow noise to go unregulated or adopt ordinances measuring noise by decibel meter.

Most localities' preference for the "reasonable person" standard over a decibel standard is a practical one. "Reasonable person" noise ordinances are far simpler and easier for the common citizen

and law enforcement officials to apply than one involving decibel measurements. Most decibel-based ordinances set decibel levels based upon zoning district. As an example, an ordinance might prohibit sound pressure levels above 75 decibels in a commercial or industrial zoning district. However, the average person likely has no idea whether a sound exceeds 75 decibels and may have no idea what zoning district they are standing in. However, they have a fair idea what an "unreasonably loud, disturbing and unnecessary" noise means under the circumstances. *See City of Everett v. Everett Dist. Court*, 641 P.2d 714, 31 Wash.App. 319 (Wash. App. 1982) (in applying a noise ordinance that included both decibel levels and a "reasonable person" standard, the court stated that a description of an "unreasonable" level of noise is more easily understood by the common man than decibel levels in determining what conduct is unlawful).

Decibel standards in noise ordinances have been shown across the country to be reliant upon availability of equipment and training, and dependent on varying conditions that make such an ordinance very difficult to draft and enforce. In the latter ordinance, a properly-functioning decibel meter and trained personnel must be present to

know if a violation is occurring. The results are subject to varying wind, atmospheric conditions, background noise and dozens of other factors. For these reasons, they are difficult to draft and to enforce. A witness has no real idea if a noise violation is occurring. Neither does a law enforcement official, unless the proper device, training and opportunity for measurement occur simultaneously. Even then, conditions such as ambient noise levels and weather can affect the result of the test.

LGA and VML ask the Court not to strike down Virginia localities' noise ordinances based on the "reasonable person" standard. Such a ruling would deny localities this important legal and practical tool used to protect the citizens from unreasonable noise detrimental to their citizens' health, safety and welfare.

C. A ruling that Virginia Beach's noise ordinance is void for vagueness would place in question the constitutionality of many state criminal statutes and criminal procedures that also use the "reasonable person" standard.

Virginia's law enforcement community applies the "reasonable person" standard in their fight against crime every day. The "reasonable person" standard is used in the criminal context in both

misdemeanor and felony statues, in which the penalty can be severe. *E.g.*, Virginia Code §§ 18.2-46.3 (“reasonable apprehension of death or bodily injury” in Class 6 felony statute), 18.2-60 (“reasonable apprehension of death or bodily harm” in Class 6 felony statute), 18.2-60.3 (“reasonable fear of death, criminal sexual assault, or bodily injury” in Class 1 misdemeanor statute), 18.2-286.1 (“reasonable apprehension of injury or death” in Class 5 felony statute), 18.2-423.01 (“reasonable fear or apprehension of death or bodily injury” in Class 6 felony statute), 46.2-861 (“a reasonable speed under the circumstances” used in determination of what constitutes reckless driving, a Class 1 misdemeanor or a Class 6 felony if it involves the death of another). *Compare* Virginia Beach City ordinance § 23-47(b) (“A person who violates the provisions of this section shall be guilty of a class 4 misdemeanor.”). Police officers, prosecutors, the courts and the public have no trouble understanding and applying these state statutes because they describe an objective standard.

The “reasonable person” standard is also used in statutes describing the criminal procedure by which a person’s guilt or innocence is determined. By way of example, it is used in the

universally-applied “beyond a reasonable doubt” standard. *E.g.*, Virginia Code §§ 19.2-327.5, 19.2-327.13, 46.2-341.26:4, among others. It is used in determining a prisoner’s freedom in a criminal writ of habeus corpus proceeding, involving the Sixth Amendment’s guarantee of effective assistance of counsel. *Lewis v. Warden,* 274 Va. 93, 111-113, 645 S.E.2d 492, 502-504 (2007), *citing Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (petitioner first must show that “counsel's representation fell below an objective standard of reasonableness.”). It is used in determining whether probable cause exists for arrest – a loss of freedom. *Giant of Virginia, Inc. v. Pigg*, 207 Va. 679, 684, 152 S.E.2d 271, 275 (1967) (“Probable cause is knowledge of such a state of facts and circumstances as to excite the belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected.“).

Perhaps most significantly, the “reasonable person standard is found in the U.S. Constitution itself, i.e., the prohibition of an “unreasonable search and seizure” in the Fourth Amendment. U.S. Const., amend. XIV. The framers themselves used the “reasonable person” standard to express one of our basic rights as citizens. It is

illogical to argue that the Constitution itself uses an unconstitutional standard!

Moreover, courts have consistently interpreted the Fourth Amendment using a “reasonable officer” or “reasonable person” standard, and have recognized its proper use as an objective test by law enforcement officials in a criminal setting. *E.g., Harris v. Commonwealth,* 276 Va. 689 080437, 668 S.E.2d 141 (2008) *citing Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (“[A]n officer's subjective characterization of observed conduct is not relevant to a court's analysis concerning whether there is a reasonable suspicion [to stop a vehicle] because the Court's review of whether there was reasonable suspicion involves application of an objective rather than a subjective standard.”); *James v. Commonwealth*, 22 Va. App. 740, 745, 473 S.E.2d 90, 92 (1996) (“Reasonableness is judged from the perspective of a reasonable officer on the scene allowing for the need of split-second decisions and without regard to the officer's intent or motivation.”), *quoting Scott v. Commonwealth,* 20 Va. App. 725, 727, 460 S.E.2d 610, 612 (1995) (*citing Graham v. Connor,* 490 U.S. 386, 396-97 (1989)).

Essentially, the Appellants assert that the mere use by Virginia Beach of the "reasonable person" standard in defining this class 4 misdemeanor is void for vagueness. If accepted by the Court, this precedent would undoubtedly lead to challenges to many of the Commonwealth's criminal laws and procedures that are applied throughout the state on a daily basis. The Virginia Beach noise ordinance is a class 4 misdemeanor, punishable by up to a $100 fine. City ordinance § 23-47; Virginia Code § 18.2-11. It can be no more facially unconstitutional for failing to make clear to what standard the public's conduct is held than various state statutes by which prosecutors' evidence is judged or defendants' guilt, innocence or freedom are determined every day.

D. In this facial challenge to a content-neutral ordinance, the Court must not use a stricter standard of review more appropriate to an "as applied" challenge or a facial challenge to a content-based regulation.

The Appellants and their *amici curiae* suggest that the use of the "reasonable person" standard turns an otherwise proper ordinance into one that is fraught with subjective law enforcement

discretion which will lead to discrimination. This argument is legally untenable for many reasons.

First, the "reasonable person" standard is an objective standard as a matter of law, even in a criminal setting. *McCain v. Commonwealth,* 275 Va. 546, 552, 659 S.E.2d 512, 516 (2008) ("Review of the existence of probable cause or reasonable suspicion involves application of an objective rather than a subjective standard", citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

Second, the fact that a law enforcement officer or a prosecutor is required to apply a complex set of facts to an objective standard is not basis for a lack of constitutionality. This is the way the criminal law is enforced every day. *See id.*

Third, any challenges of discrimination against the Virginia Beach police in their manner of enforcement of the ordinance should be considered solely in the appellant's argument that the ordinance is unconstitutional "as applied" – which this brief does not address. Perhaps due to a general weakness in their appeal on the facial attack, the Appellants and their *amici curiae* interweave the facial attack with allegations of discriminatory application. See, *e.g.*, Brief

of Appellants, at 15-16 (then going on describe their as-applied challenge as a “backup” argument); ACLU Brief at 6-11.

This asserted chance of possible discrimination – some of which would be present no matter how the ordinance was written – apparently leads the Appellants’ *amici curiae* to assert that the Court use a stricter standard of review similar to those used to review *content-based* regulations against a First Amendment challenge should be extended and used in this case. ACLU Brief at 6-11(describing cases and hypothetical examples with viewpoint-specific discriminatory concerns such as preachers and politically unpopular speakers).

However, the Virginia Beach ordinance contains on its face only *content-neutral* regulations. The Virginia Beach ordinance regulates all “unreasonably, loud, disturbing and unnecessary noise” without regard to its content. The same standard applies to the screeching of car tires, the barking of dogs, the shouting of a streetwalker and, yes, music from a bar, regardless of message or lack thereof. The Virginia Beach ordinance provides examples to guide enforcement of this standard, but it does not regulate differently based on viewpoint. See City ordinance § 23-47.

Therefore, the proper standard of review here is heavily deferential. As a legislative act, the Virginia Beach City ordinance § 23-47 is presumed constitutional. In applying this strong presumption, the Court must "resolve any reasonable doubt" in favor of the validity of the ordinance's constitutionality. *Wayside Restaurant v. Virginia Beach*, 215 Va. 231, 236, 208 S.E.2d 51, 55 (1974). Moreover, in order to be held facially unconstitutional, an ordinance must be vague in ***all*** its possible applications, not just a potential select few as argued by Appellants and their *amici curiae*. *Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 492 (4th Cir. 1983) (quoting *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497, 495 n.7 (1982).

E. The Court should not second guess drafting choices made by the legislature in drafting the ordinance and defining the crime in question.

Finally, the Appellants' *amici curiae* essentially that this Court should second guess the drafting choices made by the legislature in adopting Virginia Beach City ordinance § 23-47. They assert that where an alleged means exists to define criminal conduct more specifically, the legislature should be constrained to adopt it. They

propose regulating noise by decibel levels is the only appropriate method because they allege it is more specific and exacting. Essentially, they argue that the mere existence of a more specific way to define the crime voids the legislature's enactment. ACLU Brief at 11-15.

This is not the law, and never has been. This Court has routinely recognized that in a legislative enactment, it is the province of the legislature, not the courts, to make choices between various lawful options and define the crime. *Gray v. Commonwealth,* 274 Va. 290, 312, 645 S.E.2d 448, 462 (2007) ("[In various statutes, the] General Assembly has distinguished between criminal defendants based on both the age of the defendant and the span in age between a victim and the defendant. Such choices are peculiarly within the province of the legislature."); *Muhammad v. Commonwealth,* 269 Va. 451, 498, 619 S.E.2d 16, 43 (2005) (where defendant pointed out the fact that the General Assembly could have more specifically defined certain phrases in an anti-terrorism statute, this Court disagreed that this rendered the statute unconstitutionally vague); *Willis v. Mullett,* 263 Va. 653, 661, 561 S.E.2d 705, 711 (2002) (Court will not "second guess" the legislature's judgment in crafting medical malpractice

statute, even if it causes some inequality or discrimination); *Gregory v. Board of Supervisors,* 257 Va. 530, 538-539, 514 S.E.2d 350, 354-355 (1999) (it is the province of legislature to choose between two competing reasonable zoning classifications).

The federal courts likewise recognize the ability of the legislature to make legitimate choices in legislative drafting without judicial interference. *See Clark v. Arizona,* 548 U.S. 735, 766 (2006) (discussing the variety of means used by state legislatures to describe the *mens rea* required to be proven for particular offenses, from general descriptions like "malice" to more detailed crime-specific descriptions); *Miller v. Cunningham,* 512 F.3d 98, 110 (4th Cir. 2007) (Wilkinson, Cir. Judge, dissenting) (noting the legislature's "traditional and historical power to choose between forms of primaries" without judicial interference); *United States v. Webster,* 639 F.2d 174, 182 (4th Cir. 1981) ("[A]lthough it might have been preferable for Congress to have used language somewhat more specific than "substantial income or resources," the unconstitutional-vagueness argument has been consistently rejected.").

Moreover, even if the Court did accept the invitation to rewrite the balance of powers between the judiciary and legislature in

Virginia, a noise ordinance with a decibel standard is not necessarily clearer, more specific, or more easily understood than an ordinance with a "reasonable person" standard. *See* B, above; *see City of Everett v. Everett Dist. Court*, 641 P.2d 714, 31 Wash. App. 319 (1982) (court observed that the ordinance's prohibition of an "unreasonable" level of noise was more easily understood by the common man than its use of decibel levels).

Conclusion

The trial court properly upheld Virginia Beach's noise ordinance, and should be affirmed.

Most courts considering this issue have upheld the use of the "reasonable person" standard against a "void for vagueness" challenge. Indeed, most localities in Virginia have chosen to adopt noise ordinances using some version of the "reasonable person" standard, many of which are quite similar to City ordinance § 23-47. A ruling against Virginia Beach on this issue will strike them all down and leave them without a preferred and effective means to address noise problems in their communities. Similarly, state criminal statutes, criminal procedures and even the Fourth Amendment itself,

utilize the "reasonable person" standard. A ruling that City ordinance § 23-47 is void despite its use of the objective "reasonable person" standard will likely lead to challenges in all of these areas.

To avoid the general approval and adoption of the "reasonable person" standard by courts, localities, the General Assembly and even the federal government, even in the criminal setting, the Appellants and their *amici curiae* ask this Court to adopt heightened standards of review that should only be applied in "as applied" constitutional challenges or facial attacks of a content-based regulation. These standards do not even apply where, as here, the Court is considering a facial attack on a content-neutral ordinance.

Similarly, the Court must reject *amici curiae's* request that the ordinance be stricken because an arguably more specific means was available to the legislature in defining the crime. Where, as here, there are multiple lawful options available in crafting a legislative enactment, it is the province of the legislature, not the courts, to decide between them.

Accordingly, the LGA and VML respectfully urge this Court to affirm the judgment of the trial court, and issue final judgment in favor of the Appellee, City of Virginia Beach.

LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC.

VIRGINIA MUNICIPAL LEAGUE

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Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I certify that twelve copies of the foregoing Brief *Amicus Curiae* were filed with the Clerk of the Supreme Court of Virginia by hand delivery, and that three copies were mailed by first class mail, postage prepaid, to counsel for the Appellants, Kevin E. Martingayle, Esquire, STALLINGS & BISCHOFF, P.C., 2101 Parks Avenue, Suite 801, Post Office Box 1687, Virginia Beach, Virginia 23451, and to counsel for the Appellees, Christopher S. Boynton, Esquire, OFFICE OF THE CITY ATTORNEY, Virginia Beach Municipal Center, Building One, 2401 Courthouse Drive, Virginia Beach, Virginia 23456, and to counsel for *amici curiae* in support of the Appellants, Rebecca K. Glenburg, Esquire, ACLU of Virginia, 530 E. Main Street, Suite 310, Richmond, Virginia 23219, and J. Joshua Wheeler, Esquire, Thomas Jefferson Center for the Protection of Free Expression, 400 Worrell Drive, Charlottesville, Virginia 22911, on this 5th day of January, 2009.

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Andrew R. McRoberts