

IN THE SUPERIOR COURT IN AND FOR MARICOPA COUNTY,
IN THE STATE OF ARIZONA

STATE OF ARIZONA,

Appellee

VS.

RICK PAINTER,

Appellant

COMPLAINT NUMBER:

20089045235-01, 02

APPELLANT'S MEMORANDUM

(Oral Argument Requested)

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STATEMENT OF FACTS

Bishop Rick Painter, Pastor of Cathedral of Christ the King in Phoenix was sentenced to ten days in jail and three years of probation because his Church rings bells. *See* Sentencing Order of June 3, 2009. The Municipal Court also ordered that the Church bells may only be played at certain times of the day and only on certain religious holidays in spite of the Church's testimony that it rings bells to worship and glorify God. *Id.*

Christ the King Cathedral ("CKC" or "Church") is an Anglican church that is located at 2929 West Greenway Road in the City of Phoenix. (T.5, 6, 101).¹ CKC relocated their church to the Greenway Road property from a property on Bell Road. (T.101, 118, 131). After moving in to the Greenway property, the Church Council for CKC, which is the governing body of the Church, made the decision to install an electronically amplified bell system on the roof of the church building, and begin to ring bells. (T. 126, 127). The bell system was purchased by CKC in either 1994 or 1995 and was set up on its previous property at Bell Road. (T. 130-31). No one ever complained about the bell system operating at the Bell Road property. (T. 131).

On Palm Sunday, March 16, 2008, CKC began to ring bells from its electronic system. (T.102). The bells initially began to ring from 7:00 a.m. to 9:00 p.m., tolling the time every half hour, with the addition of a short song playing at 9:00 a.m., 12:00 p.m., 3:00 p.m., 6:00 p.m. and 9:00 p.m. (T. 102, 139).

On Monday, March 17, 2008, Detective Cook from the Phoenix Police

¹ References to the Transcript in this case will be to T.____.

Department visited the Church and spoke with Deacon James Lee, an employee of CKC, about the bells, notifying him that he was following up on a neighborhood complaint about the bells. (T.4, 104). Detective Cook notified Deacon Lee that no laws were being violated by playing the bells. (T. 105). No citation was issued to CKC for playing the bells. *Id.*

The following day two of the Church's neighbors spoke to Deacon Lee and complained about the bells. (T.106). In an attempt to explain the Church's position and hopefully foster peace in the neighborhood, the Church held a meeting on March 21, 2008, at the Church with Bishop Rick Painter and three of the neighbors who had complained about the bells. (T. 29, 45, 53, 120, 138). During the meeting, Bishop Painter attempted to explain the religious meaning behind ringing the bells and to see if there was a compromise that could be reached with the neighbors. (T. 120; 138). One of the neighbors got angry during the meeting, said he did not need to hear the Bishop's explanation, got up, and walked out of the meeting. (T. 138).

CKC plays the bells to glorify and worship God. (T. 104, 122, 129). CKC rings the bells as part of the exercise of its religion. (T. 127). The ringing of church bells as a way of worshipping God is a centuries-old tradition for churches. (T. 123, 129). CKC rings bells to "honor God as creator and sustainer of all that is.... That He has created time, lives outside of time, and time is for our convenience." (T. 129). Bishop Painter testified that, "The bells are there to say there's a God that's over all of us, we're all accountable. If you need hope, you need help, you want to pray, here's a place. We'll help you, we'll pray with you, you can go in our church and pray yourself. The whole

purpose of bells is glorifying God and evangelizing.” (T. 172).

The decision to ring the Church’s bells was made by the Church Council which is the governing body of the Church. (T. 128-29). Bishop Painter does not have control over the decision whether to ring the bells. (T. 129). Bishop Painter could not stop ringing the bells without defying the Church Council and placing his job as Pastor in jeopardy. (T. 142-43).

After meeting with the neighbors, CKC voluntarily changed the bell-ringing so that the bells began to ring every hour (instead of every half hour) with a short hymn played during the noon hour. (T. 108, 136). The bells that ring every hour start with a 16-beat Angelus taken from Handel’s *Messiah* prior to the tolling of the hour. (T. 136). At the noon hour, after the hour tolls, CKC plays a short version of a hymn from church history, such as Martin Luther’s hymn *A Mighty Fortress is our God*, or John Newton’s hymn *Amazing Grace*. (T. 136).

The Church has made several attempts to mitigate the effect of the noise on the neighbors. (T. 108, 122-23, 139-41). The frequency of the bells was reduced so that they played between 8:00 a.m. and 8:00 p.m.. *Id.* Instead of chiming every half hour, the bells were reduced to chiming every hour. *Id.* Instead of playing five songs during the day, the Church only played one song at the noon hour. *Id.* The Church installed a two inch Styrofoam buffer on the side of the speakers where the neighbors were located and also pointed the speakers more directly up in the air in an attempt to mitigate the noise level on the neighbors. *Id.*

On May 12, 2009, Bishop Painter was convicted of violating Phoenix Municipal

Noise Ordinance §23-12. The Ordinance states, "Subject to the provisions of this article, the creating of any unreasonably loud, disturbing and unnecessary noise within the limits of the City is hereby prohibited." Phoenix Municipal Ordinance §23-12 attached hereto as Appendix "A". The Phoenix Noise Ordinance sets forth a list of non-exclusive examples of what type of noise violates §23-12 and also sets forth a list of noises exempted from §23-12. *See* Phoenix Municipal Ordinance §§23-14, 23-15, Appendix "A". The only decibel level standard contained in the ordinance allows for the use of amplifiers and speakers from vehicles such as ice-cream trucks as long as the noise measures less than 70 decibels at a distance of fifty feet. *See* §23-15(d).

Testimony at trial revealed that the Noise Ordinance contains no objective standards for enforcement. Detective Cook testified that, in his opinion, the bells violated §23-12 but said that his opinion was not based on any objective measurement and rather was just his own personal preference and was based on the complaints of the neighbors. (T. 17-18, 18-19, 22). Detective Cook never took any decibel readings to determine how loud the bells were. (T. 10, 21). Detective Min Moss from the Phoenix Police Department testified that he does not know whether the City of Phoenix even has the ability to take decibel level readings and also testified that he never took decibel readings of the bells in this case. (T. 61, 62-63).

The neighbors testified that they had not taken decibel readings of the bell noises either and that it was just their personal opinion that the bells were too loud. (T.37, 49, 57). One neighbor attempted to testify that he had taken decibel readings of the bells but could not remember specifically when he took them, what equipment he used, where he

took the readings and what the specific readings were. (T. 87-88). He also testified that he did not know how loud the bells actually were and presented no evidence to substantiate any decibel readings. (T. 92).

In contrast, CKC took its own decibel readings of the bells on July 18, 2008. (T. 109). The peak decibel readings of the bells measured between 65.6 to 67.6 decibels at the property line of the neighbors closest to the Church. (T. 112-115). The noise level of the bells measured by the Church is less than the noise level allowed for ice-cream trucks at 70 decibels. *See* §23-15(d).²

STATEMENT OF LAW

I. THE PHOENIX NOISE ORDINANCE IS UNCONSTITUTIONAL BOTH ON ITS FACE AND AS-APPLIED.

A. The Noise Ordinance is Unconstitutionally Vague.

The Phoenix Noise Ordinance is unconstitutional on its face and as applied in this case because it is vague. The Noise Ordinance prohibits the “creating of any unreasonably loud, disturbing and unnecessary noise within the limits of the City....” Phoenix Municipal Noise Ordinance §23-12. The terms “unreasonably loud,” “disturbing,” and “unnecessary” are nowhere defined in the Ordinance and are unconstitutionally vague.

“An unconstitutionally vague statute is one that defines the prohibited conduct in

² The exact distance between the speakers of the bell system at CKC and the neighbor’s property line has not been measured. Testimony from Alfred Brooks, one of the Church’s neighbors, stated that his fence line was 40 feet from the building where the speakers were located. (T. 34). However, even at 40 feet, the decibel level of the bells is less than that allowed of ice-cream trucks at a distance of 50 feet.

such indefinite terms that a person of common intelligence must guess at its meaning.” *State v. Martin*, 847 P.2d 619, 622 (Ariz. Ct. App. 1993). The vagueness doctrine ensures that “all be informed as to what the state commands or forbids.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). A law cannot be “so vague that men of common intelligence must necessarily guess at its meaning and differ in its application.” *Smith v. Goguen*, 415 U.S. 566, 577 (1974) (quoting *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926)). The prohibition against overly-vague laws protects citizens from having to voluntarily curtail their First Amendment activities because of fear that those activities could be characterized as illegal. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). The Supreme Court has enunciated the standards under the vagueness doctrine:

The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement....Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine “is not actual notice, but the other principle element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement.” Where the legislature fails to provide such 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, 357-358 (1983) (internal citations and footnote omitted). While it is true that mathematical certainty is not required of language in a statute or ordinance, it is also true that an ordinance must not impermissibly delegate “basic policy matters to policemen, judges, and juries for resolution on an ad hoc and

subjective basis, with the attendant dangers of arbitrary and discriminatory application.”
See Grayned, 408 U.S. at 109, 110.

In this case, the Phoenix Noise Ordinance suffers from both of the infirmities identified by the Supreme Court. The Ordinance contains terms that are so vague that the ordinary citizen must guess as to what is prohibited. What is an “unreasonably loud” or “disturbing” or “unnecessary” noise? These terms are not defined anywhere in the Noise Ordinance and are not susceptible to meaningful, objective definition that would protect against infringement on constitutionally protected speech by notifying individuals what conduct the Ordinance prohibits and by protecting against arbitrary and subjective enforcement of the Ordinance.

Other courts that have addressed the exact same language as found in the Phoenix Noise Ordinance have found such language to be unconstitutionally vague. In *Dupres v. City of Newport*, 978 F. Supp. 429 (D.R.I. 1997), the court found a noise ordinance that prohibited “unreasonably loud, disturbing or unnecessary noise” to be unconstitutionally vague. The Court stated that the noise ordinance provisions

do not adequately delineate their proscriptions. Instead they set forth standards of conduct which are impermissibly broad and lacking objectivity.... Under the Newport ordinance, the legality of a person’s conduct is judged solely by the subjective characteristics assigned to it by anyone exposed to it.

Id. at 433-34. Similarly, the court in *Dae Woo Kim v. City of New York*, 774 F. Supp. 164 (S.D.N.Y. 1991), declared unconstitutional a noise ordinance that prohibited any “unnecessary noise.” The court there stated that the ordinance “does not provide any standard to aid in determining when particular noise is ‘unnecessary.’” *Id.* at 170.

“Because it provides only this subjective standard, the conduct barred by [the noise ordinance] will vary with the listener. [The ordinance’s] broad terms and lack of objective standards invite the arbitrary and discriminatory enforcement that the vagueness doctrine is designed to avoid.” *Id.* Likewise the federal district court in *Fратиello v. Mancuso*, 653 F. Supp. 775 (D.R.I. 1987), declared a noise ordinance unconstitutional that prohibited “unnecessary noises or sounds... which are physically annoying” because the ordinance did not “provide the requisite clear notice of what is prohibited.” *Id.* at 790. The court also stated that, “Attempts to comply with or to enforce the ordinance require application of a completely subjective standard.” *Id.*

Provision of clear and explicit standards to guide law enforcement officers and triers of fact in their application of the ordinance are necessary to prevent arbitrary and discriminatory enforcement. [The noise ordinance] subordinates the exercise of First Amendment freedoms to a police officer’s entirely subjective determination of whether an actor’s speech is “unnecessary” and “annoying”. The grant of such unbridled discretion invites the suppression of ideas. The ordinance provides a means of preventing discussion of unpopular, controversial or unorthodox views. “Annoyance at ideas can be cloaked in annoyance at sound.”

Id. at 790; *see also Nichols v. City of Gulfport*, 589 So. 2d 1280, 1283 (Miss. 1991) (“The adjectives ‘unnecessary’ and ‘unusual’ modifying the noun ‘noises’ are inherently vague and elastic and require men of common intelligence to guess at their meaning.”); *Thelen v. State*, 526 S.E. 2d 60, 62 (Ga. 2000) (“By prohibiting ‘any... unnecessary or unusual noise which... annoys... others,’ the ordinance here fails to provide the requisite clear notice and sufficiently definite warning of the conduct that is prohibited.”). As the Supreme Court of Mississippi stated:

If beauty is in the eye of the beholder, whether a noise is “unnecessary,” “unusual” or “annoying” certainly depends upon the ear of the listener. A statute is unconstitutionally vague when the standard of conduct it specifies is dependent upon the individualized sensitivity of each complainant.

Nichols, 589 So. 2d at 1283. Just as these cases demonstrate, the Phoenix noise ordinance is unconstitutionally vague.

The Ordinance also provides no guidelines to govern enforcers of the law. This allows the Ordinance to be enforced in a selective or arbitrary manner based solely on the personal preferences of the enforcer. This aspect is plainly seen in the facts of this case. Detective Cook testified that, in his opinion, the bells violated §23-12 but said that his opinion was not based on any objective measurement. Instead, it was based on his own personal preference and the complaints of the neighbors. (T. 17-18, 18-19, 22). Detective Cook never took any decibel readings to determine how loud the bells were. (T. 10, 21). Detective Min Moss from the Phoenix Police Department testified that he does not know whether the City of Phoenix even has the ability to take decibel level readings and also testified that he never took decibel readings of the bells in this case. (T. 61, 62-63). As this testimony demonstrates, these police officers believed that the bells were in violation of the Noise Ordinance, but only based on their personal predilections. There was no objective standard used in this case to determine whether the Ordinance was violated because the Ordinance does not contain any objective standard. The way this Ordinance is drafted would allow a policeman to believe that CKC’s bells were in violation of the Ordinance, but that some other amplification was not in violation even though it was the same noise level. There is no way to determine whether different noises that are at the

same noise level violate the Ordinance other than the personal preferences of the officer who happens to be enforcing the Ordinance. Does a backyard neighborhood party violate the Ordinance, or an outdoor wedding, or a garage band that practices weekly? In short, there is no way to determine what conduct violates the Ordinance and what does not. The vague terms allow for arbitrary and subjective enforcement so the Ordinance is unconstitutionally vague.

B. The Noise Ordinance Violates the Free Exercise Clause of the First Amendment to the United States Constitution.

The Phoenix Noise Ordinance violates the Free Exercise Clause because it provides categorical exemptions to the Ordinance for enumerated conduct, but not religious conduct. The bells played by CKC are part of the religious exercise of the Church. (T. 104, 122, 123, 127, 129, 172).

A law that is neutral and generally applicable may burden religious exercise without being subject to strict scrutiny by a court. *See Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). However, laws that are not neutral or generally applicable are subject to strict scrutiny and must be justified by a compelling governmental interest that is advanced in the least restrictive means available. *See Smith*, 494 U.S. at 878; *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). A law will be found to be not neutral or generally applicable if it provides for a categorical exemption for secular conduct but fails to provide a similar exemption for religious exercise. In *Fraternal Order of Police Newark Lodge v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), the court considered a police policy that prohibited officers from

