NEW YORK STATE COURT OF APPEALS

TOWN OF DELAWARE,

Plaintiff-Respondent,

vs.

IAN LEIFER, individually and d/b/a THE CAMPING TRIP,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

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STATEMENT OF RELATED LITIGATION AS OF DATE COMPLETED

There is currently no related litigation.

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I. THE TOWN FAILED TO MEET ITS BURDEN OF PROOF AS TO NARROW TAILORING

The standard applied in determining whether a content-neutral time, place and manner regulation comports with the First Amendment requires that the ordinance be both narrowly tailored to serve a significant governmental interest and one which allows for alternative channels for communication. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct 3065, 82 L.Ed.2d 221(1984); Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); Deegan v. City of Ithaca, 444 F.3d 135, 142 (2d. Cir., 2006).

In Deegan v. City of Ithaca, supra, which involved a First Amendment challenge to a noise ordinance and an amplified sound rule, the Second Circuit Court of Appeals stated that:

> "In a First Amendment challenge, the government bears the burden of showing that its restriction of speech is justified under the traditional 'narrowly tailored' test" United States v. Doe, 296 U.S. App.D.C. 350, 968 F.2d 86, 90 (D.C.Cir. 1992). The entity that enacted a challenged regulation has the burden to demonstrate that the interest served justifies the restriction imposed. See Eastern Connecticut Citizens Action Group v. Powers 723 F.2d 1050,1052 (2d.Cir. 1983). The District Court erred when it assigned the burden to Deegan". Id., at 142

In discussing whether the City of Ithaca's noise ordinance passed the "narrow tailoring" prong of the First Amendment analysis, the Second Circuit stated that "the content-neutral means of furthering the City's interest in protecting its citizens from unreasonable noise must avoid unnecessary intrusion on Deegan's freedom of expression. See Ward at 788-89. The 'narrowly tailored' standard does not tolerate a time, place or manner regulation that may burden substantially more speech than necessary to achieve its goal, nor does it require that the least restrictive alternative available be used". Deegan v. City of Ithaca, 444 F.3d at 143.

Under this burden of proof, it is clear that in the case at bar, the Town of Delaware has made no such showing. Indeed, the Respondent herein incorrectly argues that Appellant bears the burden of proof beyond a reasonable doubt, in an obvious attempt to shift the burden to the Appellant. (Respondent's Brief pgs. 4-5).

The Respondent's argument as to narrow tailoring is revealing as it focuses solely on the second prong of the analysis, noting that theaters are allowed in other districts within the Town. This argument goes to the "alternative channels" prong. At no point in the Respondent's brief does the Town explain how the theater prohibition is narrowly tailored to prevent outdoor amplified music from dusk-to-

dawn except to point out that the Zoning Law "allows the use in some districts, albeit not in the RU-Rural District where Appellant's premises happen to be located". (Respondent's Brief pg. 8).

In this light, it is clear that the Town of Delaware's theater prohibition, it its effort to prevent dusk-to-dawn amplified music, burdens substantially more speech than necessary to achieve its goal, by its prohibition of musical presentations which are either indoors or outdoors, amplified or not amplified, and during daytime or nighttime, regardless of the level of sound.

Similarly, the Town of Delaware has failed to meet its burden of proof as to the "alternative channels" prong of the analysis by failing to identify the percentage of area within the town in which theaters are allowed, leaving this Court to have to speculate whether there is sufficient alternative channels to allow for free speech activity.

The Respondent also points to the Appellate Division's reference to the Town's interest in preventing excessive noise as part of preserving the character of the rural district. However, there is no evidence in the record whatsoever that the prior "Camping Trips" conducted by Mr. Leifer were excessively loud, or engendered complaints from the neighbors. Furthermore, the Town put forth no

evidence whatsoever to establish how a weekend gathering in the woods was damaging to the character of the rural district in any significant way. For instance, the Town failed to put forth any evidence to establish the degree to which it would anticipate the secondary effects of such a gathering - e.g., traffic and parking effects, would damage the character of the rural district. In this regard, the Respondent has failed to meet its burden of proof to demonstrate the justification for its infringement of the rights protected by the First Amendment.

II. RESPONDENT IDENTIFIES A NEW SIGNIFICANT GOVERNMENTAL INTEREST FOR FIRST TIME

In its attempt to justify the theater prohibition, the Town of Delaware introduces for the first time on this appeal a new significant governmental interest to which the theater prohibition is purportedly aimed– the health, safety and welfare concerns of a gathering of people over three days and two nights in a rural area. Until this point, the only significant governmental interest identified by Respondent was the prevention of outdoor dusk-to-dawn electronically amplified music. The applicability of this newly identified interest and the manner in which the theater prohibition is narrowly tailored to achieve same has not been previously analyzed nor argued in this action. This Court has held that it does not review questions raised for the time first time on appeal. Bingham v. N.Y. City Transit Auth., 99 N.Y.2d 355, 359, 756 N.Y.S.2d 129, 786 N.E.2d 28 (2003).

Unlike the Appellate Division, the Court of Appeals lacks jurisdiction to review unpreserved issues in the interest of justice. Id. In Bingham, this Court stated "...this Court best serves the litigants and the law by limiting its review to issues that have first been presented to and carefully considered by the trial and intermediate appellate courts". Id. See also, JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 767, 16 N.Y.S.3d 222, 37 N.E.3d 725

(2015); Elezaj v. Carlin Constr. Co., 89 N.Y.2d 992, 994, 657 N.Y.S.2d 399, 679 NE2d 638 (1997).

This newly identified governmental interest should not be considered at this stage of the litigation.

III. THE INJUNCTION NEED NOT APPLY TO BAR RELIGIOUS GATHERINGS

The injunction issued by Supreme Court applied to bar the Sabbath observance from Friday at sundown until Saturday at sundown, during which no music is allowed. The religious observance which was enjoined by the Supreme Court is not a musical presentation and does not fall within the definition of theater, as that term is defined in the Zoning Law. Thus, it was and remains overbroad in its terms. Appellant contends herein that the injunction should be modified to simply prohibit the establishment of a "theater", and no more. There is no need for the injunction to prohibit camping or the service of food as this is not prohibited by the theater prohibition of the Zoning Law. Appellant also objects to the vague and expansive language about "other events of the same kind, nature and/or description" as this language provides no precise standard for enforcement.

V.CONCLUSION

Based upon the arguments made in the brief and herein, the Town of Delaware's theater prohibition should be declared unconstitutional. In the alternative, the terms of the injunction should be modified to enjoin only the establishment of a "theater"

Dated: February 8, 2019

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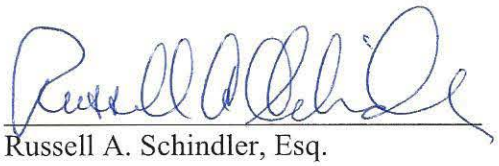
WORD COUNT CERTIFICATION

Pursuant to §500.13(c)(1) of the Rules of the Court of Appeals, the undersigned certifies that there are 1213 words in this brief.



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