To be argued by
Russell A. Schindler,
Esq. please allow 30
minutes

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 BRIEF

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STATEMENT OF RELATED LITIGATION AS OF DATE COMPLETED

There is no related litigation.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES

STATE CONSTITUTIONAL PROVISIONS

FEDERAL CONSTITUTIONAL PROVISIONS

STATEMENT OF THE QUESTIONS PRESENTED

I. Is the "theater" prohibition narrowly tailored to address the state purpose of prohibiting amplified music from dusk to dawn?

The Appellate held that it is narrowly tailored.

II. Is the "theater" prohibition unconstitutionally void for vagueness on its face?

The Appellate Division held that it was not void for vagueness.

III. Is the "theater" prohibition void for vagueness as applied?

The Appellate Division held that it was not void for vagueness.

IV. Is the "theater" prohibition overbroad, in violation of the First Amendment?

The Appellate Division held that it was not overbroad.

V. Is the language of the injunction broader that what the "theater" prohibition actually prohibits?

The Appellate Division upheld the injunction without modification.

JURISDICTIONAL/PRESERVATION STATEMENT

Jurisdiction for this appeal is provided by Civil Practice Law and Rules Section 5601(b)(1), as an appeal as of right regarding a substantial constitutional issue.

The constitutional issues raised herein were asserted by Defendant-Appellant in Supreme Court in the form of a cross-motion. (R189-217). Mr. Leifer raised the following issues:

1. That the "theater" prohibition is not narrowly tailored to achieve a substantial governmental interest. (R199-200).

2. That the "theater"prohibition is unconstitutionally void for vagueness on its face. (R196-198).

3. That the "theater"prohibition is unconstitutionally void for vagueness as applied. (R196-198).

4. That the "theater prohibition is overbroad in violation of the First Amendment. (R198-199).

5. That the Supreme Court's injunction is itself overbroad in that it enjoined the entire event, including the Sabbath observance during which no music is played, rather than merely prohibiting the presentation of music, which is the portion of the event which allegedly constitutes a "theater". (R43, 48-49, 200).

STATEMENT OF THE NATURE OF THE CASE

Defendant-Appellant, Ian Leifer, has previously held (R113-114) and had planned to hold, on August 4-6, 2017, a gathering of people on his 68 acres of land in the Town of Delaware to observe the Shabbat Nachamu (Sabbath of Comfort), (R115-117) which is a Jewish observance of the first Sabbath following the observance of the destruction of the ancient temples in Israel. Mr. Leifer's event features a Sabbath observance from Friday at sundown until Saturday at sundown during which no music is played. (R117). Before and after the Sabbath observance, the event features several musical performances with attendant singing and dancing. The website indicates that the event is "an exclusive, invite-only event". (R115-116).

The Town of Delaware brought this action seeking to enjoin the entire event, claiming that the event constitutes a violation of the Town of Delaware Zoning Law provisions which prohibit "theaters" in the RU-Rural district, wherein Mr. Leifer's property is situated. (Town of Delaware Zoning Law, Schedule of District Regulations, 220 Attachment 1:4). (R142). The Zoning Law defines a "theater" as: "Any building or room, or outdoor facility, for the presentation of plays, films, other dramatic performances, or music". (Zoning Law §220-5, formerly §202). (R88). The combination of these sections of the Town of Delaware Zoning Law is referred to hereafter as the "theater" prohibition.

The Zoning Law is a criminal statute, as a first violation is punishable as a misdemeanor, with penalties of a fine of $350.00 or imprisonment for up to 6 months, or both such fine or imprisonment, with increasing penalties for subsequent violations. Town of Delaware Zoning Law §1004.1.

Mr. Leifer's land contains a single family residence. (R87). Since the remainder of Mr.

Leifer's undeveloped, wooded parcel does not contain a permanent structure, such as an amphitheater or fanshell, the Town's position is that the phrase "outdoor facility" as used in Zoning Law §220-5, includes the performance of music on the undeveloped property itself.

As noted in Plaintiff-Respondent's complaint, at Paragraph "5" thereof, the Town Board of the Town of Delaware advised Mr. Leifer **"that pursuant to the Zoning Law, outdoor musical events are not allowed to occur in the zoning district where the Premises are located"**. (Emphasis added). (R88). The Plaintiff's complaint sought, in the prayer for relief, an order that Defendant be: "permanently enjoined from continuing to advertise, sell tickets to and from holding or permitting to be held the outdoor music festival hereinabove described or any other such events on the premises". (R90).

The Order and Judgment issued by Supreme Court (R13-15) permanently enjoins the Appellant:

> **"... from continuing to advertise, sell tickets to and from holding or permitting to be held upon the premises consisting of two (2) contiguous parcels of land encompassing approximately 68.04 acres of land located in the Town of Delaware... an outdoor festival heretofore styled as "The Camping Trip", inclusive of it's associated outdoor performances of electronically amplified musical acts and multiple food services, and/or any other events of the same kind, nature and description on the premises, provided that nothing contained herein shall be construed to prohibit uses consistent with the single family residence situate on the Premises". (R14-15).**

Defendant-Appellant had cross-moved in the Supreme Court for an order declaring the "theater" prohibition unconstitutional in violation of the First Amendment of the U.S. Constitution, as made applicable to the States by operation of the Fourteenth Amendment, and in violation of Article I, Sections 3 and 8 of the NY State Constitution. (R189-217).

Defendant-Appellant also objected, pursuant to CPLR §3212(f), to the Town of Delaware's summary judgment motion proceeding to decision prior to Mr. Leifer's counsel being able to take the depositions of the Town Supervisor and Code Enforcement Officer. (R203-204, 215-216). These depositions were timely noticed pursuant to the Court's Discovery Stipulation and Order. (R213). These depositions were noticed to take place on February 14, 2017. At the request of Kenneth C. Klein, Esq. , attorney for the Town of Delaware, the depositions were adjourned to March 31, 2017. (R203). Mr. Klein filed his motion for summary judgment on March 29, 2017, (R72) thereby staying the proceeding.

Without the benefit of the depositions to which the Defendant-Appellant was entitled, he was relegated to assume from the Town of Delaware's motion papers that the significant governmental interest protected by the "theater" prohibition was to prohibit electronically amplified music from dusk to dawn. (Paragraph 16 of the affirmation of Kenneth C. Klein, Esq.).(R82).

Supreme Court below decided the summary judgment motion rather than holding the motion in abeyance while allowing Defendant-Appellant to conduct the depositions. Supreme Court rejected all of the Defendant-Appellant's contentions and granted the permanent injunction. (R16-70). Mr. Leifer then took his appeal to the Appellate Division of the Supreme

Court, Third Judicial Department.

The Appellate Division considered the "theater"prohibition to be content-neutral and, thus, analyzed whether it is narrowly tailored to serve a significant governmental interest and whether it leaves open ample alternative channels for communication. The Appellate Division identified the significant governmental interest as preserving the character of the Rural District which is intended to preserve areas "conducive to the mutual existence of agricultural and low-density residential uses as well as certain unobtrusive commercial activities". (Citing to Code of Town of Delaware §220-9). (R7).

The Appellate Division found that the Town of Delaware has a "substantial governmental interest in preserving the character of the area and preventing threats to that character, such as excessive noise". (R7).

This differs somewhat from the substantial governmental interest actually identified by counsel for the Town of Delaware, which was to prohibit "outdoor electronically amplified music from dusk to dawn". (R82).

The Appellate Division found that the term "presentation" in the definition of the "theater" prohibition applied not to any typical residential presentation of movies, plays or music, but only to cultural presentations brought before the public (R7-8) and, therefore, is narrowly tailored to the substantial governmental interest that they identified, "even if one could postulate a still narrower way to do so". (R8). The Appellate Division further held that the wording of the "theater" prohibition was not overbroad as it "legitimately seeks to limit public cultural presentations to areas where they would not have a damaging impact", (R8); and, thus, "does not facially prohibit a real and substantial amount of expression guarded by the First Amendment so

as to have a chilling effect". (R8).

The Appellate Division also rejected the Defendant-Appellant's claim that the "theater" prohibition was void for vagueness, holding that its wording "invites neither misunderstanding by a person of ordinary intelligence nor arbitrary enforcement by [plaintiff]". (R8).

Finally, the Appellate Division found Mr. Leifer's remaining contentions to be without merit and affirmed the judgment of Supreme Court without any modifications to the injunction. (R9). This appeal ensued.

ARGUMENT

I. MR. LEIFER'S EVENT IS PROTECTED FIRST AMENDMENT ACTIVITY

Mr. Leifer's event, as described by his affidavit (R202) and which is not factually contested by Plaintiff-Respondent, is a 3 day event which includes a Jewish religious observance of the Sabbath, the gathering or association of people on private property, and the playing of live music by various bands. The event does not feature any music during the Sabbath, from Friday at sundown until Saturday at sundown, as this time is used for religious observance. (R117, 202).

The First Amendment shields more than political speech and verbal expression, its protections extend to entertainment, Winters v. New York, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840(1948), theater, Southeastern Promotions, Ltd. v.Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448(1975); and music, without regard to lyrics, Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989). It also goes without question that Defendant's Sabbath observance is protected under the Free Exercise Clause of the First Amendment. See generally, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

The First Amendment also includes the protection for "expressive association", the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends". Boy Scouts of America v. Dale, 530 U.S. 640, 647,120 S.Ct. 2446, 147 L.Ed.2d 554 (2000); U.S. v. Estrada-Tepal, 57 F.Supp.3d 164,172 (EDNY 2014). See also, Sanitation & Recycling Industry v. City of New York , 107 F.3d. 985, 996 (2d Cir., 1997), wherein the U.S. Second Circuit Court of Appeals stated that "expressive association" "protects the right of individuals to associate for purposes of engaging in activities protected by the First

Amendment, such as speech, assembly, the exercise of religion or petitioning for the redress of grievances".

II. THE "THEATER" PROHIBITION IS NOT NARROWLY TAILORED TO ACHIEVE ITS PURPOSE

The zoning power of municipalities is not infinite and unchallengeable, it "must be exercised within constitutional limits". Moore v. East Cleveland, 431 U.S.494, 514, 97 S.Ct. 1932, 1943, 52 L.Ed.2d 531 (1977)(Stevens, J., concurring in judgment); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68, 101 S.Ct. 2176, 2182, 68 L.Ed.2d 671 (1981).

Where a zoning law impinges upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial governmental interest. Schad v. Borough of Mt. Ephraim, 452 U.S. at 68, 101 S.Ct. at 2182. Such a regulation must "be narrowly drawn to avoid unnecessary intrusion on freedom of expression". U.S. v. O'Brien, 391 U.S. 367, 376-377, 88 S. Ct. 1673, 1678, 20 L.Ed.2d 672 (1968).

A content-neutral time, place and manner regulation must be "narrowly tailored to serve a significant governmental interest". 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, 790, 109 S.Ct. 2746, 2756, 105 L.Ed.2d 661 (1989); Grayned v. City of Rockford, 408 U.S.104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972); Carew-Reid v. MTA, 903 F.2d 914, 917 (2d.Cir.,1990).

The "theater" prohibition, in order to achieve the identified governmental interest of preventing overnight amplified music, criminalizes the presentation of films, plays and music at all hours of the day and night, whether amplified or not, and whether indoors or outdoors, and without regard to the level of noise produced. The "theater" prohibition applies equally to loud music as it does to silent films and mime acts.

This governmental interest could have been achieved by simply enacting a noise ordinance. As currently written and as reflected in the permanent injunction, the "theater" prohibition enjoins all aspects of Mr. Leifer's gathering, not just the amplified music. It enjoins the Sabbath observance during which no music is played. It enjoins the exercise of the right to expressive association protected by the First Amendment. It enjoins the playing of daytime non-amplified music, the singing of songs and dancing.

The Appellate Division found that by limiting the "theater" prohibition to public cultural presentations, the law is narrowly tailored to the significant governmental interest in preventing excessive noise. The Appellate Division held that it was narrowly tailored "even if one could postulate an even narrower way to do so". (R8). Appellant contends that the Appellate Division failed in this regard to consider that, as a noise control device, the "theater" prohibition does not at all "avoid unnecessary intrusion on freedom of expression". U.S. v. O'Brien, 391 U.S. at 376-377, 88 S. Ct. 1678, 20 L.Ed.2d 672 (1968).

In Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), the U.S. Supreme Court struck down, as not narrowly tailored, an ordinance intended to prohibit nude dancing by prohibiting all live entertainment in the zoning district. The "theater" prohibition in this case is tailored very similarly. In Schad, the Court recognized its obligation to assess the substantiality of the justification offered for a regulation that significantly impinged on freedom of speech. Id, at 69, 101 S.Ct. at 2183; citing to Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

In Schad, the Court also cited to Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 637, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) wherein it was

emphasized that the Court must not only assess the substantiality of the governmental interests asserted but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment. Id., at 70, 101 S.Ct. at 2183.

While the Town of Delaware no doubt has the power to prohibit excessive noise, including overnight amplified music, the "theater" prohibition fails the "narrow tailoring" test because it prohibits much First Amendment expression without regard to the level of noise, or whether same is indoors or outdoors, or whether it is daytime or nighttime. As such, the "theater" prohibition is not a valid time, palce and manner regulation and should be declared to be unconstitutional.

III. THE SELLING OF TICKETS DOES NOT CONVERT FIRST AMENDMENT ACTIVITY INTO A COMMERCIAL ACTIVITY

It is well established that the "sale of protected materials is also protected" by the First Amendment. Bery v. City of New York, 97 F.3d 689, 695 (2d Cir., 1996); Lakewood v. Plain Dealer Pub. Co., 486 U.S.750,756 n.5, 768, 108 S.Ct. 2138, 2143 n.5,2150, 100 L.Ed.2d 771 (1988). Bery v. City of New York, supra, involved an attempt by the City of New York to require permits to sell visual art on the streets of Manhattan. The Second Circuit held that the sale of the visual art was not transformed from protected speech into a commercial activity. "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak". Id., at 696, quoting from Riley v. National Federation of Blind of No. Caro., 487 U.S.781, 801, 108 S. Ct. 2667, 2680, 101 L.Ed.2d 669 (1988).

The U.S. Supreme Court has held that the solicitation of funds does not transform a protected activity into a "merely commercial activity". Murdoch v. Pennsylvania, 319 U.S.105, 63 S.Ct. 870, 87 L.Ed.2d 1292(1943), wherein the Supreme Court held that the sale of religious literature was not a commercial enterprise. In doing so, the Supreme Court overturned the convictions of Jehovah's Witnesses who went door to door distributing literature and soliciting people to purchase certain religious books and pamphlets in violation of a city ordinance which required such persons to first obtain a license.

Thus, the fact that Mr. Leifer sells tickets and solicits funds on a "Go Fund Me" website does not transform his First Amendment activities into a commercial transaction which can then be regulated or, as here, prohibited within the RU-Rural District.

The Town of Delaware has conceded this point during oral argument and does not take the position that the event can be regulated or prohibited as a commercial activity. (R46).

IV. THE "THEATER" PROHIBITION IS UNCONSTITUTIONALLY VOID FOR VAGUENESS ON ITS FACE

The Fourteenth Amendment of the US Constitution provides that no state shall "deprive any person of life, liberty or property without due process law". A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law". Connally v. Gen. Constr. Co., 296 U.S. 385, 391, 46 S.Ct 126, 70 L.Ed.2d 322 (1926); Farrell v. Burke, 449 F.3d 470, 485 (2d.Cir., 2006); Copeland v. Vance, 230 F.Supp.3d 232, 247 (S.D.N.Y. 2017).

The vagueness doctrine is a component of the right to due process, but vagueness in the law is particularly troubling when First Amendment rights are involved. Farrell v. Burke, 449 F.3d 470, 485 (2d.Cir., 2006). "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts". Smith v. Goguen, 415 U.S. 566, 573, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). A "statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement". Farrell v. Burke, 449 F.3d at 485, quoting from Hill v. Colorado,, 530 U.S. 703, 732, 120 S.Ct 2480, 147 L.Ed.2d 597 (2000).

Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) involved a successful void for vagueness as applied challenge to a Massachusetts statute which criminally penalized "treating contemptuously" the flag of the United States with a fine or imprisonment up to one year,

or both. Affirmed by the U.S. Supreme Court therein was the District Court's holding that the words "treats contemptuously" failed to provide a "readily ascertainable standard of guilt". Id., at 571, 94 S.Ct. 1242, 39 L.Ed.2d 605; quoting from Goguen v. Smith, 343 F.Supp. 161, 167 (Dist.Ct. MA, 1972).

In this context, Defendant-Appellant contends that the "theater" prohibition of the Town Zoning Law is unconstitutionally void for vagueness on its face.

Section 220-5 defines a "theater" as "[a] building or room, or outdoor facility, for the presentation of plays, films, other dramatic performances, or music". "Theaters" are not allowed at all within the RU-Rural District. (R142).

The Town Zoning Law is a criminal statute, as a first violation of the Zoning Law is punishable by a fine of $350.00 or imprisonment for up to 6 months, or both such fine or imprisonment, with increasing penalties for subsequent violations. Town of Delaware Zoning Law §1004.1.

The United States Supreme Court has held that "perhaps" the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interfered with the right of free speech or of association, a more stringent vagueness text should apply. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); Holder v. Humanitarian Law Project, 561 U.S. 1, 19, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010); U.S. v.Williams, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).

A literal reading of the "theater" prohibition fails to give a person of ordinary intelligence an opportunity to understand what conduct it prohibits. See, Farrell v. Burke, 449 F.3d 470, 485 (2d

Cir., 2006); Hill v. Colorado,, 530 U.S. 703, 732, 120 S.Ct 2480, 147 L.Ed.2d 597 (2000).

Under a literal reading of Section 220-5 of the Town Zoning Law, it is a crime to perform music or plays in any room or house within the RU-Rural District; it is a crime to invite one's friends to watch movies in one's living room; it is a crime to sing songs around a campfire; it is a crime to play music during a backyard party or backyard wedding; it is a crime for people to sing in prayer according to their religion.

Nothing in the statutory language of the "theater" prohibition restricts its application to the staging of cultural performances. Counsel for the Town of Delaware claimed that no person of ordinary intelligence would read the "theater" prohibition to prohibit activities such as outlined above. (R223). This statement by counsel reveals that the law does not mean what a literal reading thereof conveys. This law criminalizes so much obviously protected behavior that it cannot mean what it literally says.

This is much like the situation which occurred in Dickerson v. Napolitano, 604 F.3d 732 (2d Cir., 2010). The statue in question criminalizes possession of "any uniform, shield, buttons, wreaths, numbers or other insignia or emblem in any way resembling that worn by members of the police force", would so obviously criminalize so much innocent behavior (such as children playing "cops" in a game of cops and robbers), that "it is difficult to conclude that a reasonable person would think that the statute means what it says". Id., at 746. The Second Circuit stated that "were the plaintiffs in a position to raise a facial challenge, they might for this reason succeed," (Id., at 746) but they had not raised their vagueness argument pursuant to the First Amendment, (Id., at 742-743). Mr. Leifer's vagueness challenge is, on the other hand, raised pursuant to the First Amendment, and thus it should succeed.

The plaintiffs in Dickerson argued that "the fact that the literal meaning of the words [of the challenged statute] would also criminalize conduct that cannot conceivably actually be criminal would give an ordinary person a reason to believe that the conduct at issue in this case was not criminal either". Id., at 746. Likewise, the fact that the "theater" prohibition would also criminalize conduct which cannot conceivably be criminal, renders the "theater" prohibition void for vagueness, as the presentation of movies, music or plays in any room, building or outdoor facility cannot conceivably be criminal.

The decision of the Appellate Division holds that the "theater restriction is unambiguously limited to efforts to facilitate the "presentation of plays, films, other dramatic performances, or music" (Code of Delaware §220-5) and "to present" means "to bring (something, such as a play) before the public". (R7-8). Excluded from the "theater" prohibition by the Appellate Division's decision are the "uses customarily conducted entirely within a dwelling and carried on by the inhabitants residing therein", which indoor, private activities "constitute permitted home occupation in the Rural District". (R8).

Having found that the "theater" prohibition excluded private, indoor First Amendment activity, the Appellate Division then found that the "theater restriction only prevents a property owner in the same zoning district from setting up facilities for a cultural presentation, such as an outdoor music festival where hundreds of paid ticket holders enter onto his or her land to take part in it". (R8). Having so limited its construction of the "theater" prohibition, the Appellate Division resolves the vagueness issue by holding that "the theater restriction is limited by its language to indoor and outdoor facilities where cultural performances are staged, and its wording "invites neither misunderstanding by a person of ordinary intelligence nor arbitrary enforcement by [plaintiff]".

(citations omitted). (R8). This narrowing construction does not cure the vagueness problem for the following reason.

Bery v. City of New York, supra, involved the attempt by New York City to regulate, through the issuance of licenses, the sale of art on the streets of the city. The District Court had accepted the City's argument that the regulation did not impinge upon the artists' "expression", but only the sale of their art. The City argued that the sale of art is "conduct", and in order to be constitutionally protected, the sale of protected material must be "inseparably intertwined with a "particularized message". Young v. NY City Transit Authority, 903 F.2d 146, 153 (2d.Cir., 1990), quoting Spence v. Washington, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). The City further argued that the artists were free to display their artwork publicly without a license, they simply cannot sell it.

The Second Circuit rejected those arguments because the sale of protected materials is likewise protected. Bery v. City of New York, 97 F.3d at 695-696; see also, Lakewood v. Plain Dealer Pub. Co., 486 U.S.750,756 n.5, 768, 108 S.Ct. 2138, 2143 n.5,2150, 100 L.Ed.2d 771 (1988).

The narrowing construction given to the "theater" prohibition does not cure the vagueness issue because the Appellate Division ruling creates a distinction based upon the sale of tickets to the public to distinguish between protected residential backyard music and prohibited public cultural presentations. This distinction violates the First Amendment principal that the sale of protected material is also protected, leaving the remaining distinction as private presentations versus public presentations as the vagueness problem.

Thus, the "theater" prohibition ultimately is void for vagueness because there is no viable way to distinguish between those "friends and family" attending a backyard wedding or a Fourth of July celebration from the "public". These are indistinguishable from each other. As an example,

assume Mr. Leifer held a large Fourth of July celebration in his backyard and invited everyone in town. Are these invitees any different from those people who might be invited to a backyard wedding? If a person in the zoning district invited an entire graduating class to celebrate graduation in their backyard, would that be public or private? Nonetheless, Mr. Leifer's website indicates that the event is "an exclusive, invite-only event", and thus is not "public" in the sense used by the Appellate Division.

An enforcement officer would have to decide whether to charge Mr. Leifer or not charge Mr. Leifer based upon whether the attendees qualify as "friends and family" or just members of the community identified by the Appellate Division as "the public". As these groups of attendees are virtually indistinguishable, the "theater" prohibition fails to provide a "readily ascertainable standard of guilt" and remains void for vagueness on its face, and thus should be declared unconstitutional.

V. THE "THEATER" PROHIBITION IS VOID FOR VAGUENESS AS APPLIED

Defendant contends that the "theater" prohibition of the Zoning Law is unconstitutionally void for vagueness as applied. A party making an as-applied challenge must show that the statute in question provided insufficient notice that his or her behavior at issue was prohibited. Farrell v. Burke, 449 F.3d 470, 490 (2d Cir., 2010). Thus, Mr. Leifer must demonstrate that the "theater" prohibition failed to provide notice that his religious gathering, with live musical performances, on his vacant land was prohibited.

In this regard, Mr. Leifer contends that the term "outdoor facility" is too vague to be enforced as against unimproved vacant land featuring portions which are wooded and portions which are fields. No reasonable person would ever consider the use of a backyard for a party, a wedding or other celebration the type of "outdoor facility" for the performance of music as would be considered a "theater", and, thus prohibited under a zoning ordinance.

Nonetheless, the Town of Delaware has chosen this "backyard" event as one which is completely prohibited under the terms of the "theater" prohibition. Nothing in the statute gives notice that it would or could be applied to unimproved land. The prohibition applies to any "building or room or outdoor facility". Mr. Leifer has not constructed an amphitheater or fanshell. This event is no more an "outdoor facility" for the presentation of music than a campfire is. for Thus, the "theater" prohibition is void for vagueness as applied for failing to provide adequate notice as to what was prohibited on undeveloped vacant land under the first prong of the vagueness doctrine.

Furthermore, the "theater" prohibition is void for vagueness as applied because of the vagueness of the "private/public" presentation construction given to the term "presentation", as discussed above.

The standard is an objective standard in which the court asks "whether the law presents an ordinary person with sufficient notice" that his or her behavior is prohibited. Dickerson v. Napolitano, 604 F.3d. 732,745-46 (2d Cir., 2010).

Here, Mr. Leifer's website indicates that the event is an "exclusive, invite-only event. Nonetheless, the Appellate Division considered this a "public" cultural presentation because of the sale of tickets and the event being attended by hundreds of guests.

There is no clarity as to what constitutes a presentation of music to the public. If it is based upon the sale of tickets, that violates the principle that the sale of protected First Amendment speech is still protected. If it is based upon the nature of how the event is advertized, or who has been invited, then there is no "readily ascertainable standard of guilt".

The "theater" prohibition is, therefore, void for vagueness as applied to this event.

VI. THE "THEATER" PROHIBITION IS OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT

Even if the Court finds that the "theater" prohibition is not void for vagueness, the statute is nonetheless ridiculously overbroad and, thereby, unconstitutional in violation of the First Amendment.

A party alleging overbreath claims that, even if the statute is not violative of his or her own First Amendment rights, it would nonetheless violate the First Amendment rights of hypothetical third parties if applied to them. See, Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Overbreath and vagueness are different doctrines, as a "clear and precise enactment may nevertheless be overbroad if, in its reach, it prohibits constitutionally protected conduct". Grayned v. City of Rockford, 408 U.S. 104, 114, 92 S.Ct. 2294, 33 L.Ed.2d 222(1972); Farrell v. Burke, 449 F.3d 470, 499 (2d.Cir.,2006).

The "theater" prohibition of the Zoning Law curtails the expressive rights of all persons in the RU-Rural District to perform music, plays or show films in their "rooms", "buildings"(homes) or in their backyards ("outdoor facility"). Outlawed, under penalty of imprisonment, are such simple, innocent protected behaviors as playing musical instruments, singing songs around a campfire, displaying films in one's living room, rehearsing a school play, singing "happy birthday" at a birthday party, having a band play in a backyard party, having a band play at an outdoor wedding, and having religious observances where singing or music are a part of the observance.

The "theater" prohibition of the Zoning Law must be held to be overbroad as it so clearly criminalizes a large amount of protected expression. See, Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65-66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). The statute in Schad was held to be overbroad because, in an effort to prohibit nude dancing, the statute prohibited all live entertainment in the

Borough of Mt. Ephraim. The "theater" prohibition of the Zoning Law is similar in that, in an attempt to prevent the playing of amplified music from dusk to dawn, it prohibits nearly all expressive activity within the RU-Rural District.

This case presents a situation very much akin to that of the Schad case. In an effort to prevent electronically amplified music throughout the night, the "theater" prohibition makes illegal all presentations of music, whether indoors or outdoors, during daytime or nighttime, and amplified or not amplified, in the entire RU-Rural district. As such, this portion of the Town of Delaware's Zoning Law is overbroad in violation of the First Amendment.

VII. THE INJUNCTION GRANTED IS TOO EXPANSIVE

Supreme Court's injunction (R13-15) enjoined the entire event, including the Sabbath observance which does not involve the playing of any music. The language of the injunction prohibits Mr. Leifer from "continuing to advertise, sell tickets to and from holding or permitting to be held upon the premises...an outdoor festival heretofore styled as "The Camping Trip", inclusive of its associated outdoor performances of electronically amplified music acts, overnight camping and multiple food services, and/or any other events of the same kind, nature and/or description...". (R14-15).

The Town of Delaware brought this action to enforce it's "theater" prohibition. Nothing in the "theater" prohibition, if upheld herein, prevents people from gathering to observe the Sabbath. Nothing in the "theater" prohibition prevents people from camping out on Mr. Leifer's property, nor does it prevent any service of food nor even "multiple food services". This language greatly exceeds that which is prohibited as a "theater" under the Zoning Law and should not be a part of the permanent injunction.

Defendant-Appellant contends that, if upheld, the injunction should simply prohibit the establishment of a "theater" as defined in the law- a "building, room or outdoor facility, for the presentation of plays, films, other dramatic performances, or music". The injunction should not prohibit camping, nor the service of food as this is not a part of the "theater" prohibition, nor should broad vague language about "other events of the same kind, nature and/or description" be employed therein, as this vague language may be applied to prevent completely lawful gatherings and activities in the future.

VIII. CONCLUSION

For the reasons set forth above, the Town of Delaware's "theater" prohibition should be declared to be unconstitutional; or alternatively, if upheld, the injunction's language should be limited to prohibiting the establishment of a "theater", along with such other and further relief, as to the Court, may seem just and proper.

Dated: December 6, 2018
Kingston, NY

Respectively submitted,

_s/_____
Russell A. Schindler, Esq.

WORD COUNT CERTIFICATION

Pursuant to §500.13(c)(1) of the Rules of the Court of Appeals, the undersigned certifies that there are 6,390 words in this brief.

__s/_____
Russell A. Schindler, Esq.