

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CASE NO. 06-3010

HUGH GAUGHAN and THOMAS RADDELL,

Plaintiffs-Appellants,

v.

CITY OF CLEVELAND,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio

APPELLANTS' PETITION FOR REHEARING EN BANC

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F.R.A.P. 35(B) STATEMENT

This case is appropriately subject to en banc rehearing for the reason it involves three questions of exceptional importance, which in this case are interwoven—for the substantive constitutional issues presented in the case have been skirted by the panel by use of two significant procedural errors. These errors call for instructive answer by this Court, in order to rectify the absence of explicit guidance in this Circuit on the point of the panel’s procedural departures. The issues of exceptional importance are as follows.

1) Whether this Court should clearly identify the boundary line between the forbidden narrowing construction of a state statute by a federal court, and the permitted extrapolation of the meaning of a state statute by a federal court, as this question presents itself in a case wherein a panel appears to have improperly stepped over that line in attempt to construe away a First Amendment challenge to vague and overbroad municipal sound ordinances.

2) Whether a court-imposed “reasonableness” construction is capable of remedying statutory terms which are inherently vague and overbroad, or whether such terms (as are found in the City’s sound ordinances) are in need of complete redefinition to be salvaged as constitutional.

3) Whether this Court should rule explicitly what is now only implicit in this Circuit, that the general rule which gives a Court of Appeals discretion to

disregard an argument not raised in the court below does not have application to the context of an appeal from a decision granting a 12(b)(6) motion to dismiss.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mr. Hugh Gaughan was twice charged criminally with violating a provision in the City of Cleveland's noise ordinances for his use of a portable cassette player, while on a public sidewalk outside of an abortion clinic, to play the content of a 911 call placed by the abortion clinic owner in which the owner relates that he had lacerated the uterus of a client. Both of the criminal charges leveled against Mr. Gaughan for his public advocacy through a sound device resulted from complaints lodged by an employee of the clinic, who alleged that Mr. Gaughan's use of his cassette player was, *inter alia*, annoying.

Plaintiffs have on First Amendment grounds challenged the vague and overbroad provisions of the Cleveland sound ordinances which criminalize use of a sound device which "annoys," is "unseemly," or "unnecessary." Plaintiffs also challenge the as-applied vagueness of ordinance § 683.01(a), which directs its prohibitions to the indoor use of a sound device but which nonetheless was twice enforced against Mr. Gaughan's outdoor use on public property. Plaintiffs additionally challenge on overbreadth grounds the portion of 683.01(a) which criminalizes indoor use of sound which is "plainly audible" to persons nearby.

The panel affirmed the dismissal of Plaintiffs' complaint, erring thereby in a way giving rise to three matters of exceptional importance requiring this Court's review. First, Plaintiffs argue that this Court need offer a definitive statement on

the permitted extent to which a federal court may “extrapolate” the meaning of a state law without encroaching into the forbidden territory of “construing” it, so guarding against the error presented by the panel which did not have the benefit of explicit guidance hereon from this Circuit.

Secondly, Plaintiffs argue that the inherently vague and overbroad terms contained in the challenged City sound ordinances cannot be rescued from constitutional defect (as the panel attempted) by the facile imposition of a “reasonableness” qualifier on such terms, for this ostensive narrowing construction contributes nothing to the repair of the imprecision in the words so modified. Only a redefinition of the terms will serve this end, a point needing Court elaboration.

Thirdly, it is maintained by Plaintiffs that the general policy against hearing new arguments on appeal has no application to an appeal from a 12(b)(6) dismissal, that this conclusion is implicit in all relevant policy considerations, and in the interest of consistency and justice this Court should make this rule explicit.

ARGUMENT

- I. **This Circuit needs to identify clearly the boundary between the narrowing construction of state statutes forbidden of a federal court, and the extrapolation of meaning of state statutes permitted to a federal court, as the panel, being without the benefit of such explicit guidance in this Circuit, departed from settled statutory construction rules and mishandled a Supreme Court ruling in its attempt to justify this departure, while seeking to evade Appellants’ First Amendment claims.**

In attempt to dispense with Plaintiffs' constitutional challenges to the Cleveland sound ordinances, and sidestepping the ample sum of case law which demonstrates that the text of the Cleveland ordinances is unconstitutionally vague and overbroad, the panel stipulated that the various texts of the challenged ordinances (which had never been construed by a state court) do not mean just what they say, but rather mean what the Ohio Supreme Court had construed another statute to mean (in the case of *State v. Dorso*¹), though this other statute is dissimilar in text, purpose and operation.

In *Dorso*, the Ohio Supreme Court had crafted a statutory interpretation of a Cincinnati ordinance which prohibited noises by those in restaurants and other public gathering establishments that disturb the peace and quiet of the neighborhood. Plaintiffs have identified above (p. 1) the terms of the Cleveland ordinances which they challenge in this lawsuit. *None* of these provisions are found in the Cincinnati ordinance the *Dorso* court interpreted. Moreover, beyond these glaring textual differences and the dissimilarity of the prohibitions, the nature of the triggering standard of each city's ordinance is different. The Cincinnati ordinance is objective in its orientation (triggered by a neighborhood-appropriate volume level consideration, with no provision made for subjective complaints of

¹ 446 N.E.2d 449 (Ohio 1983).

individuals);² the Cleveland ordinance is subjective (its application is triggered only by the reactions of annoyed individuals, with no focus given to an objective area-appropriate sound level). The two laws are fundamentally different, yet the panel assured they are similar. It then offered a narrowing construction of portions of the Cleveland ordinances having no cognate in the Cincinnati ordinance.

Plaintiffs propose that the panel was forbidden to narrow the Cleveland ordinances for at least two reasons. First of all, it is a long-settled interpretive rule that federal courts are prohibited to prescribe narrowing constructions of state statutes. The federal courts do not have the power to narrow a state law by disregarding plain language in the statute just to preserve it from constitutional attack. *Wilson v. Stocker*, 819 F.2d 943, 948 (10th Cir.1987).

A federal court must always be aware of the federalism concerns that arise whenever it deals with state statutes. The principles of federalism forbid a federal appellate court to arrogate the power to rewrite a municipal ordinance. Federal courts lack authority and power to give a limiting, narrowing construction to a state statute.

Eubanks v. Wilkinson, 937 F.2d 1118, 1125 (6th Cir. 1991) (internal quotation marks and citations omitted). As the Fifth Circuit explained:

[W]e lack the power to tailor this city ordinance to a constitutional fit. Federal courts do not sit as a ‘super’ state legislature, [and] may not impose [their] own narrowing construction onto the ordinance if the state courts have not already done so.

² The “reasonableness” interpretation the Ohio Supreme Court gave to the Cincinnati ordinance is thus understandable, in light of this characteristic.

Hill v. City of Houston, 789 F.2d 1103, 1112 (5th Cir. 1986).³

A second relevant and equally well-established rule of statutory construction is that the court must accord definitive significance to the text of the ordinance under consideration. The text may not be disregarded, as if the legislating body did not intend that the words it chose to include in the ordinance have meaning. *Platt v. Union Pac. R. Co.*, 99 U.S. 48, 58-59 (1878) (meaning is to be accorded, if possible, to every word in a statute); *Williams v. Taylor*, 529 U.S. 362, 364 (2000) (cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute, and give independent meaning to all portions of thereof).

Yet the panel in disregard of both of these standards narrowed the interpretation of the Cleveland ordinances, as if their challenged texts (which have no cognates in the compared Cincinnati ordinance) are “similar,” so as to accommodate an ostensibly salvaging presentation. The panel then made appeal to the Supreme Court’s decision in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), as if that case served as authorization for its method.

³ See also *Hynes v. Oradell*, 425 U.S. 610, 622 (1976) (“we are without power to remedy the defects by giving the ordinance constitutionally precise content”); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (vague phrase in statute was “devoid of a narrowing state court interpretation at the relevant time in this case. We are without authority to cure that defect”); *Grayned v. City of Rockford*, 408 U.S. 104, 111 (1972) (“it is not within our power to construe and narrow state laws”); *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) (facially overbroad statute that state has not construed may not be given narrow construction by federal court).

A review of the *Grayned* decision shows that it does not justify the panel's divergent course, but instead reproves it. The panel's mishandling of the *Grayned* case calls for a remedial intervention by this Court, for while the inferences from settled principles demonstrate the impropriety of the panel's conduct, an explicit elucidation on just this issue is not found in Circuit case law, and at the intersection of authorization and prohibition of interpretive methods there is room for confusion if guidance is not presented.⁴

In the portion of *Grayned* relevant to this discussion, the Supreme Court authorized (while reiterating the prohibition on federal court narrowing constructions) that interpretive guidance may be drawn from state court interpretations of "analogous" statutes. In *Grayned*, the Supreme Court cited *Gooding v. Wilson*, 405 U.S. 518 (1972) as authority for its statement of this rule and as an instance of use of an "analogous" statute in state statutory interpretation. *Grayned*, 408 U.S. at 110, and n. 12.

Looking to the illustrative *Gooding* opinion, we find that the Supreme Court was there seeking state court interpretive guidance for the phrase "breach of the peace," and looked to an authoritative Georgia Appellate Court construction of that

⁴ The potential for confusion on this point was alluded to in *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 926 (6th Cir. 1980), *vacated*, 456 U.S. 968 (1982), where the court observed the fine line between permitted "extrapolation" and prohibited "construction," as found in the United States Supreme Court's *Grayned v. City of Rockford* decision.

very phrase as found in a different Georgia state statute. 405 U.S. at 527. That the identical text was found in the other statute served as the basis for the Court's use of the state case law interpreting it.

In the *Grayned* case as well, the Supreme Court applied its "analogous statute" extrapolation rule by following the example of *Gooding*, making use of an Illinois Supreme Court interpretation of a statute with nearly identical text to that which the Supreme Court was adjudicating. 408 U.S. at 111. Accordingly, both cases demonstrate that the "analogous statute principle" of extrapolation is effectuated through analysis of a state court construction of *the very text at issue in the challenged statute*.

In the case *sub judice*, the panel gave no regard to the relevant text of the Cleveland ordinances so as to identify identical text in "analogous statutes." Plaintiffs have challenged as vague and overbroad the ordinances' prohibitions on sounds which "annoy" persons, and are "unseemly" and "unnecessary," and also challenge the prohibition on indoor sound device uses which are "plainly audible to persons other than those who are in the room and who are voluntary listeners thereto." Conspicuously, none of this text is found in the Cincinnati ordinance construed by the Ohio Supreme Court in the *Dorso* case, nor are there even prohibitions comparable to these found in the compared ordinance. The panel nonetheless imposed the *Dorso* construction onto the challenged portion of the

Cleveland ordinances, after comparing aspects of the Cincinnati and Cleveland statutes unrelated to the challenged texts. This method constitutes forbidden narrowing construction, not permitted extrapolation, and is a significant departure from the Supreme Court’s admonition and example in *Grayned* (which the panel purported to be following). The panel’s misrepresentation of the import of the Supreme Court’s *Grayned* rule on state law interpretation should be rectified, with clarifying instruction from this Court to prevent further confusion in this relatively unelaborated area of the law.

II. The imposition of a “reasonableness interpretation” cannot remedy the vagueness and overbreadth of inherently problematic statutory provisions, such as those found in the subject ordinances.

It is clear from the panel’s opinion that it viewed Plaintiffs’ constitutional claims to have been extinguished as a result of the narrowing construction it imposed on the ordinances Plaintiffs challenge (*see, e.g.*, Panel Dec. at *11, *14 and n. 9). However, the panel for all its awkward effort to deliver this result for the challenged ordinances did not actually reach the goal it set to accomplish, for the ordinances even as so construed remain unconstitutional. The infringement of First Amendment rights is not cured if the law remains excessively sweeping even as narrowed. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

The panel announced that it adopted a “reasonable person standard” for § 683.01(a). (Panel Dec. at *8.) It explained, “we interpret § 683.01(a) as

preventing the playing of sound on a sound device in such a manner or at such a volume as to *annoy* or disturb the quiet, comfort or repose of a reasonable neighboring inhabitant. (Panel Dec. at *10, emphasis added.) What the panel did not do was to explain how this reasonableness construction salvaged the problematic terms of the ordinances.

In *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), the United States Supreme Court invalidated a criminal statute that made it a crime for three or more individuals to assemble on public sidewalks and to conduct themselves in a manner “annoying to persons passing by.” *Id.* at 612 n. 1. The Court found the word “annoy” inherently vague:

Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that *no standard of conduct is specified at all*. As a result, “men of common intelligence must necessarily guess at its meaning.”

Id. at 614. The Court further explained that the ordinance was constitutionally infirm because the State may not make criminal the exercise of First Amendment rights simply because the “exercise may be ‘annoying’ to some people.” *Id.* at 615.

If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is “annoying” because their

ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.

Id. at 615-16. Note here that the message of the Supreme Court is that even democratically majoritarian annoyances (*i.e.*, those “resented by a majority of their fellow citizens”)—which by definition would be “reasonable” annoyances—are not able to trump the exercise of constitutional rights. Otherwise stated, “reasonable annoyance” is not a concept available to remedy this unconstitutional portion of § 683.01(a).

Indeed, further refuting the panels’ conclusion, in *State v. Dorso* the Supreme Court of Ohio discussed the *Coates* decision and acknowledged that the reason the U.S. Supreme Court struck down the ordinance’s use of the term “annoying” was due to “the state court’s failure to interpret the word ‘annoying’ in a fashion that endowed it with *the requisite specificity.*” *Dorso*, 4 Ohio St.3d at 63. Yet the Ohio Supreme Court in *Dorso* had no occasion, and made no attempt to present this “requisite specificity”—nor has it done so any time since. As a result, the term “annoying” remains as the Supreme Court in *Coates* described it: no standard at all. *See City of Houston v. Hill*, 482 U.S. 451, 465 (1987); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

On this point, an instructive contrast is found in the Supreme Court’s decision in *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 573 (1942), where the State Supreme Court had construed the prohibition on “annoying” words

(among others) to be limited only to “fighting words.” That is, a narrowing *redefinition* of the word was necessary to avoid constitutional infirmity. A “reasonableness” lens would not have served.

The panel similarly discarded Plaintiffs’ challenges to the ordinances’ prohibitions on “unseemly” and “unnecessary” sounds. The panel dispensed with all the case law supporting Plaintiffs’ claims hereon by announcing that none of these case decisions involved an ordinance that had been narrowed by a judicial interpretation. (Panel Dec. at *14.) But this, again, simply begs the question. The panel makes no effort to demonstrate that applying a “reasonableness” narrowing gloss onto the statute solves the constitutional problem with vague classifications like “unseemly” and “unnecessary”; the panel simply asserts it. This is insufficient. When terms are inherently subjective, nothing short of a *Chaplinsky*-like re-definition is able to preserve a statute from constitutional condemnation.

Likewise, the panel’s “reasonableness” narrowing construction has no ability to eliminate the facial challenge to the patently overbroad second clause of § 683.01(a) (a cause of action the panel fails to even mention) which criminalizes use of a sound ordinance which is “*plainly audible* to persons other than those who are in the room ... and who are voluntary listeners thereto.” Loud sound or bothersome sound is not prohibited here, but rather “audible sound.” That this

inexplicable prohibition is overbroad, and is not repaired by the panel's reasonable person narrowing construction, requires no elaboration.

III. This Court should correct the panel's error and hold explicitly what is now only implicit in this Circuit's case law: that the general rule permitting the court to disregard new arguments raised for the first time on appeal has no application to an appeal from a dismissal for failure to state a claim under Rule 12(b)(6).

Mr. Gaughan argued the vagueness of subsection (a) of § 683.01 as it has been applied to him, for that section by its terms directs its prohibitions only to the indoor use of a sound device, yet was twice imposed against Mr. Gaughan for his outdoor use thereof on public property. (It is the text of subsection (b), rather than subsection (a), that speaks to outdoor use. But significantly, it is only subsection (a) that contains the elusive prohibition on "annoying" sound for which Mr. Gaughan was arrested.) The panel refused to entertain this argument in defense of this claim in the Complaint, for it had not been raised in the court below.

The general rule, as stated by this Court in *In re Morris*, 260 F.3d 654, 663 (6th Cir. 2001), is that "appellate courts do not consider any issue not passed upon below" (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). In *Singleton*, the Supreme Court announced this general rule in a procedural context having not the slightest legitimate comparison to that presented in this case, nor even finding a corresponding policy concern (but rather involved a Court of Appeals adjudicating

an entire case on appeal, when all that had taken place below had been a jurisdictional dismissal on standing grounds). *Id.* at 119-120.

In *Singleton*, the Supreme Court explained the justification for the rule on avoiding new arguments as follows (notably hereby further distancing it from application to the 12(b)(6) context):

[the policy] is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues and in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Id. at 120. When appealing from a 12(b)(6) dismissal, however, in the nature of the case there can be no “surprised litigant” having missed out on its opportunity to develop an evidentiary record. Furthermore, the arguments presented by a party in the district court do not necessarily exhaust the analysis in a motion to dismiss context in any event, for the district court is under an obligation to independently determine whether there exists in the complaint any viable claim before dismissing the lawsuit under Fed.R.Civ.Proc.12(b)(6). *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (dismissal is proper “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”); *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995) (“the court should deny the motion unless it is clear that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief”). The Court of Appeals has

the obligation to conduct this same evaluation *de novo*. *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998). Moreover, “where the question is simply the proper interpretation and application of the [relevant] statute, requiring no new or amplified factual determination, ... the fact that the argument was not raised below is immaterial.” *U.S. v. Slone*, 411 F.3d 643, 646 (6th Cir. 2005) (citation omitted).

As such, it is without justification for the panel to have refused to give attention to an argument that is instructive on whether the pleading contains a viable claim. As the Court of Appeals is obliged to pursue a *de novo* review of the complaint, it is inconsonant for the panel to have announced its refusal to entertain an analysis of the pleadings except on those points argued below.

Of course, the general rule on avoiding newly presented arguments is not jurisdictional, but is a rule of procedure and remains discretionary with the Court of Appeals. *In re Morris*, 260 F.3d at 664. This Circuit has identified certain circumstances in which it is particularly appropriate that the Court of Appeals avoid the general rule, and instead entertain the new argument. These exceptions seem to only further demonstrate the inapplicability of the policy behind the general rule to an appeal of a dismissal for failure to state a claim. In *Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir. 1988), this Court explained that it should address an issue for the first time on appeal “to the extent the issue is presented with sufficient clarity and completeness and its resolution

will materially advance the progress of ... litigation.” *Id.* at 1461. This Court has “typically applied the ‘*Pinney Dock* exception’ when the issue raised for the first time on appeal involves a question of law that requires no additional factual development.” *In re Morris*, 260 F.3d at 664. Stronger still, this Court has stated that “we *should* address an issue presented with sufficient clarity and requiring no factual development if doing so would promote the finality of litigation.” *Id.* See also *McFarland v. Henderson*, 307 F.3d 402, 407 (6th Cir. 2002) (same).

From this we might conclude that the *Pinney Dock* exception provides for review of new arguments on appeal of a 12(b)(6) dismissal *in every instance*. But the better reading is that this exception need not be invoked, for the general rule on avoiding new arguments has no application to arguments in the context of an appeal of a 12(b)(6) dismissal in the first place.

As a matter of Circuit policy, it would be well for this Court to make explicit this conclusion, for it is compelled by the applicable standard of review, is required by due process considerations, and finds no countervailing policy consideration in the justification for the general rule itself.

CONCLUSION

For the reasons set forth above, Plaintiffs-Appellants respectfully request the Court to grant their petition, and undertake en banc review of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 17th day of January, 2007, a true and accurate copy of the foregoing was sent by U.S. Mail, first class postage prepaid, to:

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