IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
(Eastern Division)

ANTHONY MIANO and NICHOLAS ROLLAND,

Plaintiffs,

v.

THOMAS MILLER, in his official capacity as Attorney General of Iowa; and JANET LYNESS, in her official capacity as Johnson County Attorney,

Defendants.

Case 3:18-cv-110

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs Anthony Miano and Nicholas Rolland submit this memorandum of law in support of their motion for a preliminary injunction.

Dated this 27th day of November 2018.

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I. INTRODUCTION

Plaintiffs bring a pure question of law: whether Iowa Code § 723.4(2), which makes it a misdemeanor to make "loud and raucous noise in the vicinity of any residence or public building which causes unreasonable distress to the occupants thereof," is unconstitutionally vague and overbroad on its face and as applied to Plaintiffs. Section 723.4(2) sweeps too many forms of protected speech within its coverage and can be wrongly used to silence speech that someone objects to based on a "heckler's veto." Also, § 723.4(2) does not explain at what point (decibel level, duration, etc.) noise becomes "loud and raucous" and does not define "vicinity," "public building," or "unreasonable distress." As such, the statute fails to give proper notice to citizens as to what *exactly* the law prohibits, and it also lends itself to arbitrary enforcement.

Plaintiffs are individuals who, compelled by their sincerely-held religious beliefs, exercise their freedom of speech on public property within the Court's jurisdiction, specifically within Johnson County, Iowa. Their constitutional rights have been violated and their speech has been chilled by this vague and overbroad law.

Plaintiff Anthony Miano has been irreparably harmed as he has been arrested, prosecuted, and convicted under § 723.4(2) for exercising his freedom of speech on a public sidewalk in Johnson County. Moreover, both he and Plaintiff Nicholas Rolland have incurred irreparable harm in that they fear prosecution under this statute based on the threatened enforcement of the statute as a result of the exercise of their constitutionally-protected freedom of speech in traditional public forums in Johnson County.

Plaintiffs ask this Court to declare § 723.4(2) unconstitutional and to enjoin Defendants, and those acting at their direction or on their behalf, from enforcing the statute against Plaintiffs and others not before this Court.

II. STATEMENT OF FACTS

Plaintiffs Miano and Rolland are pro-life individuals who, both independently and together, exercise their right to free speech on the public sidewalks outside of abortion clinics in Johnson County. Doc. 1, Verified Complaint, at ¶ 25. Plaintiff Miano's ministry to those entering and leaving the clinics includes reading aloud from the Bible, conversing with them, and distributing literature. *Id.* at ¶ 26. He does not use a voice amplifier. *Id.* at ¶ 29. Likewise, Plaintiff Rolland's free speech and expressive activities include reading aloud from the Bible, open-air preaching, speaking with individuals leaving and entering the clinics, and literature distribution. *Id.* at ¶ 28. He, too, does not use a voice amplifier. *Id.* at ¶ 29. Neither Plaintiff obstructs individuals on the sidewalk or those entering or leaving the clinics. *Id.* at ¶¶ 2, 4.

On May 30, 2017, Plaintiffs Miano and Rolland were conducting their ministry on the public sidewalk adjacent to the Planned Parenthood Iowa City Health Center in Johnson County. *Id.* at ¶ 30. Plaintiff Miano was reading aloud from the Bible. Plaintiff Rolland was nearby holding a sign displaying a pro-life message and speaking with people going in and out of the clinic. *Id.* Neither Plaintiff was blocking passage along the public sidewalk or into the clinic. *Id.* at ¶ 2, 4.

Plaintiff Miano was approached by a Johnson County police officer who informed him that a telephone call had been placed to the police station stating that Plaintiff Miano's preaching was causing distress to the occupants of the clinic. *Id.* at ¶ 31. Plaintiff Miano was issued a field citation for disorderly conduct under Iowa Code § 723.4(2). *Id.* at ¶ 32. Plaintiff Miano was released from custody with a warning that should he and Plaintiff Rolland continue their free speech activities, additional citation or arrest may result. *Id.* at ¶ 33. Plaintiffs continued their activities as planned without incident and Plaintiff Rolland was not cited. *Id.* at ¶ 32.

At trial on or about January 9, 2018, Plaintiff Miano was convicted of disorderly conduct,

fined $200, given a 30-day suspended sentence and a one-year probation which included a prohibition on conducting his free speech activities outside of any Planned Parenthood clinic during that time. *Id.* at ¶ 36.

Both before and after Plaintiff Miano's arrest and conviction under § 723.4(2), Plaintiffs have been threatened by police officers with enforcement of that statute while they have been conducting their free speech activities in traditional public forums outside Johnson County abortion clinics. *Id.* at ¶ 38.

Since January 2018, Plaintiff Miano has continued to conduct his outreach less frequently than he would like and only at one location: the Emma Goldman Clinic in Johnson County. *Id.* at ¶¶ 39–40. Plaintiff Rolland has, since that time, decreased the frequency of his outreach at the Planned Parenthood Iowa City Health Center. *Id.* at ¶ 39. He has rarely conducted his First Amendment activities at the Emma Goldman Clinic in that time. *Id.* at ¶ 41. Plaintiffs are motivated by their sincerely-held religious convictions to engage in their outreach despite fear of arrest and prosecution pursuant to the unconstitutionally vague and overbroad § 723.4(2). *Id.* at ¶ 59. They seek this Court's intervention so they may freely exercise their First Amendment rights in the traditional public forums outside abortion clinics without fear of arrest and prosecution under § 723.4(2). *Id.*

III. ARGUMENT

A. PLAINTIFFS HAVE STANDING TO BRING THIS FACIAL AND AS-APPLIED CHALLENGE TO SECTION 723.4(2).

Both Plaintiffs have standing to bring this action. When examining a request for injunctive relief within the First Amendment context, as here, the traditional rules of standing are lessened: instead of requiring a plaintiff to show injury-in-fact, the aggrieved party may show that the mere threat of prosecution under the allegedly unlawful statute may have a "chilling" effect on an

individual's protected activity. *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984); *see also Duhe v. City of Little Rock*, 2018 U.S. App. LEXIS 25130, *9 (8th Cir. 2018) (where the Eighth Circuit found that plaintiffs had standing to challenge a state statute after arrest under the statute and a showing of an allegation of fear of future arrest and a chilling effect on their protected speech). This chilling effect alone, illustrated by "harm to reputation or threat of criminal prosecution" serves as cognizable injury. *Mo. Roundtable for Life v. Carnahan*, 676 F. 3d 665, 673 (8th Cir. 2012). Plaintiffs must demonstrate that said injury is "fairly traceable to the challenged conduct of the defendant" and "will likely be redressed by a favorable decision." *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 956 (8th Cir. 2015) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Plaintiffs have suffered injury and continue to incur the threat of repeated injury. Plaintiff Miano has been arrested, convicted, and sentenced under this statute. What is more, he has been outright prohibited from exercising his First Amendment rights outside of the Planned Parenthood Iowa City Health Center for the period of one year. Plaintiff Miano's injury-in-fact is apparent and has surpassed the cognizable injury threshold required by requests for injunctive relief in First Amendment matters.

Moreover, both Plaintiff Miano and Plaintiff Rolland easily meet the requirement that their *prospective* injury is immediate and capable of repetition. Plaintiffs have been threatened by police officers that they may be arrested under Iowa Code § 723.4(2) for exercising their First Amendment rights. The evidence that Plaintiff Miano has been arrested under this statute shows that this is no empty threat on the part of Johnson County police officers. The statute has already been used to shut down Plaintiff Miano's free speech, and it stands to reason it will likely happen again. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (plaintiff permitted to make

constitutional challenge to trespass statute after being warned to stop First Amendment activity); *see also Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 392–93 (1988) (explaining that a plaintiff has standing based on some threatened or actual injury resulting from illegal action); *Duhe*, 2018 U.S. App. LEXIS 25130 at *9 (explaining that the possibility of future arrest and consequent chilling of protected speech established standing); *Dolls, Inc. v. City of Coralville*, 425 F. Supp. 2d 958, 974 (S.D. Iowa 2006) (explaining that "a 'real and immediate threat of repeated injury'" is sufficient to meet the injury-in-fact requirement) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (citations omitted)).

The injury and threatened injury experienced by Plaintiffs has chilled their speech. *See Lyons*, 461 U.S. at 101. As a result of Plaintiff Miano's conviction under § 723.4(2) and the additional threats of its enforcement, both Plaintiffs have reduced the number of times they engage in their free speech and expressive activities. Doc. 1 at ¶¶ 8, 38–41. This showing, however, is beyond what is required to establish a cognizable injury. Plaintiffs' speech has been chilled simply because there is a *threat* of prosecution for the exercise of their rights. *See Republican Party of Minn. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004). The injury threshold has been met.

Moreover, Defendants are the parties responsible for the enforcement and prosecution of violations of § 723.4(2). As such, Defendants are responsible for Plaintiffs' injuries as the threat of prosecution – and actual prosecution – under the statute has caused Plaintiffs harm. And, Plaintiffs' injuries will be remedied by this Court's enjoining of § 723.4(2), which will allow Plaintiffs and others not before the Court to conduct their lawful First Amendment activities without fear of prosecution and without being chilled in the exercise of those rights.

Even without the threat of arrest and prosecution under § 723.4(2), Plaintiffs may bring a facial challenge to the statute. As the Supreme Court has explained,

> [i]t has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

Broadrick v. Oklahoma, 413 U.S. 601, 611–12 (1973). As a result, the Court altered its traditional standing rules to allow, in the First Amendment context, "'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Id.* at 612 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* On its face, § 723.4(2) impermissibly restricts a broad range of protected speech, and Plaintiffs have standing to challenge it on its face.

B. PLAINTIFFS SATISFY THE STANDARD FOR INJUNCTIVE RELIEF

The success of a motion for preliminary injunction is dependent upon the Court weighing four factors: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys. v. C L Sys.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc); *see also Bank One, N.A. v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999). When it comes to a challenge to a State statute, as here, the Eighth Circuit has explained that,

> a court must "make a threshold finding that [the plaintiff] is likely to prevail on the merits." "*When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied*."

Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 870 (8th Cir. 2012) (emphasis added) (quoting *Phelps-Roper v. Troutman*, 662 F.3d 485, 488 (8th Cir. 2011) (per curiam)). Plaintiffs satisfy each factor warranting the issuance of a preliminary injunction.

1. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Iowa Code § 723.4(2) is unconstitutionally overbroad. It sweeps within its coverage speech that is guaranteed protection by the First Amendment. Further, the statute, imposing criminal penalties, is unconstitutionally vague because a person of ordinary intelligence must guess at what activities are proscribed by it, it gives too much discretion to law enforcement in its application, and violation of it turns on the reaction of a third party listener.

a. PLAINTIFFS' SPEECH ACTIVITIES ARE PROTECTED BY THE FIRST AMENDMENT

Commenting on matters of public concern, such as abortion, through the spoken word, prayer, and the distribution of literature is speech that lies at the heart of the First Amendment's protections. This speech – whether others consider it to be agreeable or disagreeable – is given the greatest protection from government infringement on public sidewalks and public streets, prototypical examples of traditional public forums. *See*, *e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2528–29 (2014) (recognizing First Amendment right to engage in pro-life leafleting and sidewalk counseling). Thus, the prayer, speech, and association engaged in by Plaintiffs and similarly-situated persons on the public sidewalks outside of abortion clinics are classic examples of First Amendment activity in a traditional public forum that receives heightened protection from government infringement. This prohibition against government infringement applies to the States

through the Fourteenth Amendment.[1] *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

b. IOWA CODE § 723.4(2) IS OVERBROAD

"[T]he overbreadth doctrine allows [] facial challenges to a statute that restricts free speech because it may be applied unconstitutionally to parties not before the court. . . . The rationale is that overbroad statutes may chill protected speech." *Duhe*, 2018 U.S. App. LEXIS 25130 at *12 (citation omitted). The standard for invalidating an overbreadth challenge is if the statute is found to be "substantially overbroad relative to its 'plainly legitimate sweep.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The Court, therefore, is required to "find 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'" *Phelps v. Powers*, 63 F. Supp. 3d 943, 953 (S.D. Iowa 2014) (quoting *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988) (citations omitted)); *see also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (explaining that when a realistic danger exists that a statute "will significantly compromise recognized First Amendment protections of parties not before the [c]ourt," it must be declared unconstitutionally overbroad).

Upon this finding, the offending statute should be invalidated, in whole or in part, to end the threat to protected speech. *Phelps*, 63 F. Supp. 3d at 953 (citing *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). In sum, the purpose of "[o]verbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech." *Hicks*, 539 U.S. at 119.

[1] In First Amendment cases, the government carries the burden of establishing the constitutionality of its actions once a plaintiff shows that a law burdens the plaintiff's constitutional rights. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000).

This Court has explained that an overbreadth challenge consists of three steps:

> The first step in analyzing an overbreadth challenge is to construe the challenged statute because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). The second step is to determine whether the statute criminalizes a "substantial amount" of expressive activity in relation to its legitimate applications. *See id*. at 297. If so, the Court must determine "whether the statute is 'readily susceptible' to a limiting construction which would render it constitutional." *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1158 (8th Cir. 2014) (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)).

Phelps, 63 F. Supp. 3d at 953.[2]

i. Construing The Statute

Iowa Code § 723.4(2) makes it a misdemeanor for an individual to "[m]ake[] loud and raucous noise in the vicinity of any residence or public building which causes unreasonable distress to the occupants thereof." It is plain from the text, its application in Plaintiff Miano's criminal conviction, and its threatened enforcement against both Plaintiffs, that fully-protected First Amendment speech is within the purview of the statute as written. There is no language limiting the statute's application to speech that is unprotected by the First Amendment. To the contrary, the broad language of the provision ensures that it may be enforced to criminalize *any* speech.

ii. Iowa Code § 723.4(2) Criminalizes A Substantial Amount Of Expressive Activity.

A facial overbreadth challenge against a statute can be successful in the First Amendment context if it is found that "a substantial number of its applications are unconstitutional, judged in

[2] *Contra Duhe*, 2018 U.S. App. 25130 at *13–14 (upholding an Arkansas disorderly conduct statute as not substantially overbroad under the analysis for a content-neutral time, place, or manner restriction where it was found to be sufficiently narrowly tailored to satisfy the significant governmental interest *because it contained objective* mens rea *elements*). As discussed *infra*, Section 723.4(2) lacks any *mens rea* elements, and violation of the statute depends wholly upon the reaction of the hearer of the speech at issue and the subjective determinations of law enforcement.

relation to its plainly legitimate sweep." *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 685 (8th Cir. 2012) (quoting *United States v. Stevens*, 559 U.S. 460 (2010)).

As written, Section 723.4(2) encompasses – and makes criminal – any speech by Plaintiffs (and others) that causes distress to someone in a nearby residence or public building. The law intentionally casts a wide net, including all manner of constitutionally-protected speech. There is no shortage of persons who would consider certain passages from a variety of political documents, religious texts, and classic books to be "disturbing," and subject to suppression under the plain language of Section 723.4(2), and yet the First Amendment strongly protects the right to distribute or discuss such material on public sidewalks.

Section 723.4(2) includes no intent element, nor does it carve out any safeguard for constitutionally protected speech that happens to annoy someone nearby. At its worst, the statute allows for a "heckler's veto," empowering an annoyed listener to silence a message with which he disagrees by claiming arbitrary, and undefined, "distress." *See Lewis v. Wilson*, 253 F.3d 1077, 1081–82 (8th Cir. 2001) (noting that a heckler's veto is not a constitutional basis to restrict speech); *see also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.").

The extent to which the statute, as written, threatens constitutionally protected expression is virtually limitless. For example, Section 723.4(2) could be used to charge fans in a football stadium with disorderly conduct should someone in a nearby residence or public building claim to be distressed by their (subjectively-determined) loud and raucous noise while rooting for their team. Workers picketing and chanting on a public sidewalk outside their place of employment can be stifled under Section 723.4(2) by their employer who claims the chanting is causing him and

his customers distress. Likewise, imagine that students from the University of Iowa gather to walk the streets of Iowa City in support of abortion rights, and in so doing, chant slogans and sing songs as they march down the public streets. While civil protests such as these clearly involve protected speech, *see United States v. Grace*, 461 U.S. 171, 176 (1983), the statute could be used to cite each and every protester for disorderly conduct should the protest cause "distress" to someone in a nearby residence or public building.

Undoubtedly, Iowa Code Section 723.4(2) criminalizes more speech than is constitutionally permissible and can be arbitrarily enforced against people based on the whims of a listener who wants to silence their speech due to its content or viewpoint.

iii. Iowa Code § 723.4(2) Should Be Invalidated To Protect Plaintiffs' And Others' First Amendment Rights.

Section 723.4(2) must be stricken so that individuals' constitutional rights can be protected. Given the sheer breadth of this statute and the lack of any *mens rea* element within the text of the statute, there is no reasonable limiting construction that can be offered to save it. Additionally, "[f]ederal courts do not sit as a super state legislature, and may not impose their own narrowing construction if the state courts have not already done so." *United Food & Commercial Workers Int'l Union, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422, 431 (8th Cir. 1988). Rather, the Court should enjoin the enforcement of the statute by all Defendants against Plaintiffs and others not before the Court. The legislature would be free to consider enacting new legislation that would pass constitutional muster.

c. IOWA CODE § 723.4(2) IS VOID FOR VAGUENESS

A court can invalidate a law when its vague language violates the due process clauses of the Fifth and Fourteenth Amendments. *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1997). Supreme Court Justice Neil Gorsuch recently summed up one of the many

problems caused by ambiguous statutes: "Today's vague laws . . . can invite the exercise of arbitrary power . . . by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-24 (2018) (Gorsuch, J., concurring).

A criminal statute's most basic requirement is to provide "fair notice" of what activity is proscribed. *Id*. at 1212 (citing *Connally v. Gen. Constr. Co.*, 269 U. S. 385, 391 (1926)). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). As the Eighth Circuit reiterated recently, "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; *but rather the indeterminacy of precisely what that fact is*." *Duhe*, 2018 U.S. App LEXIS 25130 at *9-10 (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008) (emphasis added)).

The standard of review for vague laws is especially stringent when "the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *See Colautti v. Franklin*, 439 U.S. 379, 390–91 (1979). Laws that "make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983)).

i. Section 723.4(2) Fails To Define With Adequate Specificity What Is Proscribed Under The Law.

Section 723.4(2) provides virtually no notice of what is prohibited; a man of "ordinary intelligence" could not determine, by reading the statute, what activity would be considered disorderly conduct. *See Grayned*, 408 U.S. at 108–09. The statute does not explain at what point (decibel level, length of time, etc.) noise becomes "loud and raucous," does not define "public

building,"[3] does not illustrate how close or far away one can stand to be within the building's "vicinity," and does not illustrate what it means for a listener to suffer "unreasonable distress."

Specifically, with regard to the prohibition on "loud and raucous" speech, it is unclear based on the jurisprudence of the Eighth Circuit whether this qualifier – without more specification – provides adequate notice so that a reasonable person will understand what kind of noise is prohibited. In the seminal case on the restriction of loud and raucous speech, *Kovacs v. Cooper*, the Supreme Court found that restricting "sound truck[s]" and other "sound amplifier[s]" from emitting a "loud and raucous noise[]" while on city streets and alleys was constitutional. The Court held that while the words "loud and raucous," "are abstract . . . they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." 336 U.S. 77, 79-80 (1949) (per curiam). The Court importantly noted, however, that "there is no restriction upon the communication of ideas or discussion of issues *by the human voice* . . . ." *Id*. at 89 (emphasis added). That noise ordinance was specifically applied to *amplified* sound, which, naturally, is likely to be louder and/or more raucous than unamplified sound, as is at issue in Plaintiffs' situation.

In *Pine v. City of West Palm Beach*, the Eleventh Circuit found that a sound ordinance governing noise surrounding a health clinic was not unconstitutionally vague where the ordinance stated that "no person, within 100 feet of a health care facility's property line, 'shall shout' or

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[3] The lack of a definition of "public building" is one aspect of Section 723.4(2)'s vagueness. The law has been applied against Plaintiff Miano and threatened against both Plaintiffs while they have been exercising their First Amendment rights in a traditional public forum outside abortion clinics, which are *not* government buildings. Yet, under Iowa Supreme Court case law "public building[s]" may only encompass government buildings. *E.g.*, *Miller v. Marshall Cnty.*, 641 N.W.2d 742 (Sup. Ct. Iowa 2002) (stating that Iowa Code § 331.441 defines the purchase of a public building as a government expense); *Holding v. Franklin Cnty. Zoning Bd. of Adjustment*, 565 N.W.2d 318, 320 (Sup. Ct. Iowa 1997) (discussing the question of whether records must be kept in a public building, such as a courthouse).

produce any amplified sound, including a loudspeaker, drum, radio . . . or other electronic audio instrument or device that produces or reproduces amplified sound." 762 F.3d 1262, 1270 (11th Cir. 2014). Crucially, the statute at issue in *Pine* narrowed greatly the location and context ("within a health care facility quiet zone") regarding when the prohibition would apply. *Id*. at 1276. *See also Grayned*, 408 U.S. at 107-08 (where the court specified the time and location in which free speech activities could occur). Other federal and state courts across the country have reviewed other anti-noise ordinances with varying results.[4] It appears that is the *context* of a statute that may save it from a vagueness challenge; a statute may indeed be found constitutional if the prohibition on loud and raucous speech is tailored with enough specificity (albeit "mathematical certainty from our language" is not required). *Grayned*, 408 U.S. 110. Here, however, no qualifiers or modifiers exist, leaving the restriction entirely – and unconstitutionally – vague.

The critical danger of Section 723.4(2) is not *simply* that the statute prohibits "loud and raucous" noise; the danger is that no clarifying information is given as to when, where, or in what manner speech otherwise protected by the First Amendment may yet be permissible while still maintaining peace and good order. Indeed, "where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. *Uncertain*

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[4] *E.g.*, a clearly defined decibel level restraint within an ordinance was constitutional, *Dupres v. City of Newport*, 978 F. Supp. 429, 433 (D.R.I. 1997); a prohibition on noise found to be physically annoying was unconstitutionally overbroad and lacked requisite notice, *Fratiello v. Mancuso*, 653 F. Supp. 775, 790 (D.R.I. 1987); a city ordinance that prohibited noise that annoyed another was vague and overbroad because the standard was too subjective, *Dae Woo Kim v. City of New York*, 774 F. Supp. 164, 170–71 (S.D.N.Y. 1991); a prohibition on "loud or boisterous" noise was found constitutional when accompanied by the phrase "disturb the public peace and quiet" where "culpability necessarily depends on all the surrounding facts and circumstances," *City of Lansing v. Hartsuff*, 213 Mich. App. 338, 345 (1995); an ordinance containing the terms "loud, disturbing and unnecessary" failed to give fair notice and was found to be vague, *Tanner v. City of Va. Beach*, 277 Va. 432 (2009); and an ordinance was found not to be unconstitutionally vague where it prohibited noise that unreasonably disturbed others because it relied on the reasonable person standard, *City of Madison v. Baumann*, 162 Wis. 2d 660, 678 (1991).

meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (alteration in original) (citations omitted) (emphasis added).

ii. Section 723.4(2) Arbitrarily Leaves To Subjective Third Parties And Law Enforcement The Responsibility Of Determining When A Violation Has Occurred.

Moreover, violation of Section 723.4(2) principally depends on the reaction of the listener, *not* on the action of the person causing the noise. That is the very definition of an unconstitutional "heckler's veto." *See Lewis*, 253 F.3d at 1081–82 ("[T]he mere possibility of a violent reaction to . . . speech is simply not a constitutional basis on which to restrict [the] right to speak. . . . The first amendment knows no heckler's veto."); *see also Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) ("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 comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."). In short, the determination of when Section 723.4(2) is violated is improperly left to those responsible for enforcing the law, based on the subjective reaction of a third party. "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Smith v. Goguen*, 415 U.S. 566, 575 (1974); *see also Kolender*, 461 U.S. at 360 (finding a statute unconstitutionally vague where it "entrust[ed] lawmaking to the moment-to-moment judgment of the policeman on his beat" (citations omitted)); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) (finding a law vague when "judges and jurors [are] free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case").

In *Stahl v. City of St. Louis*, the Eighth Circuit struck down an ordinance because it "criminalize[d] speech if it ha[d] the consequence of obstructing traffic, but the speaker [did] not know if his or her speech was criminal until *after* such an obstruction [had] occurred." 687 F.3d. 1038, 1041 (8th Cir. 2012). Essentially, the "violation of the ordinance did not hinge on the state of mind of the potential violator but instead on the reactions of third parties. That a person only violated the ordinance if his or her action evoked a particular response from a third party was 'especially problematic because of the ordinance's resulting chilling effect on core First Amendment speech.'" *Duhe v. City of Little Rock*, 2017 U.S. Dist. LEXIS 64043, at *31-33 (E.D. Ark. 2017) (discussing the holding in *Stahl*, 687 F.3d 1038), *aff'd*, *Duhe v. City of Little Rock*, 2018 U.S. App. LEXIS 25130 (8th Cir. 2018).

Moreover, the ordinance in *Stahl* "lacked a *mens rea* requirement . . . ." *Duhe*, 2018 U.S. App. LEXIS 25130 at *10 (*aff'ing Stahl*, 687 F.3d at 1039). The ordinance was found vague not because of its language, but because it "does not provide people with fair notice of when their actions are likely to become unlawful." *Stahl*, 687 F.3d 1041. Section 723.4 likewise lacks a *mens rea* element and, therefore, fails to provide fair notice of when the actor is in violation of it, turning solely on the reaction of a third party. This is unconstitutional. *See Duhe*, 2018 U.S. App. LEXIS 25130 at *11 (holding that a "disorderly conduct conviction cannot be based solely on the reactions of third parties; the offender must intend to cause public inconvenience, annoyance, or alarm by obstructing traffic or making unreasonable or excessive noise, or must recklessly disregard the risk of doing so.")

A statute criminalizing expression must be carefully crafted so that it does not allow a biased hearer to determine the legality of the noise at issue and, furthermore, provides notice to the actor of when his actions will violate it. For the attorneys prosecuting the law, the police

officers enforcing the law, the judges adjudicating the law, and citizens following the law, it should be clear to all what actions are prohibited so that no one needs to guess at the law's application. Section 723.4(2) falls far short of this constitutional command. It must be invalidated to protect not only Plaintiffs' interests, but those of others not before the Court.

d. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT AN INJUNCTION

A "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Grayned*, 408 U.S. at 109; *Powell v. Ryan*, 855 F.3d 899, 904 (8th Cir. 2017); *Johnson v. Minneapolis Park & Recreation Bd*., 729 F.3d 1094, 1101–02 (8th Cir. 2013). This occurs, for example, when a party has been chilled from exercising his rights, or has foregone expression to avoid prosecution. *Dolls, Inc.*, 425 F. Supp. 2d at 979-80. Courts have set a low bar for establishing irreparable harm due to the importance of the First Amendment rights at issue. Here, Plaintiffs' speech has been chilled by the enforcement, and threat of future enforcement, of Iowa Code § 723.4(2) as they have consequently limited the frequency and location of their religiously-motivated First Amendment activities. Doc. 1 at 10. As such, both Plaintiffs have suffered irreparable harm. *See Dombrowski*, 380 U.S. at 487.

2. AN INJUNCTION WILL NOT CAUSE SUBSTANTIAL HARM TO OTHERS

Plaintiffs request an injunction to protect the constitutional rights of themselves and others not before the Court. Defendants will suffer no injury should this Court grant Plaintiffs' request, nor is it apparent that any other individuals will suffer substantial harm. Plaintiff Miano has, as of late, conducted his First Amendment activities at the Emma Goldstone Clinic, albeit on a much more limited basis than he desires, due to his fear of the enforcement of Section 723.4(2), and has

not caused any individuals any harm in doing so. Likewise, Plaintiff Rolland has had to conduct his First Amendment activities on a more limited basis since Plaintiff Miano's conviction; he too has not caused any individuals harm.

Conversely, there is no legitimate or compelling governmental interest that would be furthered by the unconstitutional application of a statute against citizens to chill their free speech. To the contrary, the public's right to receive information is harmed by the enforcement of unconstitutional speech restrictions. The harm of chilling Plaintiffs' free speech outweighs any purported harm in opposing the injunction and striking down the statute.

3. AN INJUNCTION WILL HAVE NO NEGATIVE IMPACT ON THE PUBLIC INTEREST

"[I]t is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (*overruled on other grounds by Phelps-Roper v. City of Manchester*, 697 F.3d 678). Allowing Plaintiffs to exercise their First Amendment freedoms without fear of infringement based on an unconstitutionally vague and overbroad statute will serve the public interest. Granting Plaintiffs their requested relief will ensure that they and others will be able to communicate their messages and continue their ministry without prosecution – threatened or actual – under Section 723.4(2). Defendants' interests, including preserving the safety and welfare of the citizens of Johnson County and Iowa, will not be impaired; countless other laws already exist that can be enforced to address harmful speech or conduct that is not constitutionally protected. The issuance of a preliminary injunction will not harm the public interest.

C. NO BOND SHOULD BE REQUIRED

If this Court grants Plaintiffs their requested injunction, this Court should exercise its discretion and not impose any bond under Fed. R. Civ. P. 65(c). Any bond requirement would

harm Plaintiffs' constitutional rights by causing them to have to pay to defend and assert their rights. Enjoining the enforcement of Iowa Code § 723.4(2) and allowing Plaintiffs to exercise their First Amendment rights will not impose any monetary requirements on Defendants. *See generally Curtis 1000 v. Youngblade*, 878 F. Supp. 1224 (N.D. Iowa 1995) (discussing the court's ability to waive the security for a preliminary injunction motion) (citing *Bukaka, Inc. v. Cnty. of Benton*, 852 F. Supp. 807, 813 (D. Minn. 1993), where the court waived the bond requirement because the plaintiff raised First Amendment questions and no harm to defendants was apparent).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs Miano and Rolland respectfully request that this Court grant the relief requested in their motion for a preliminary injunction.

Dated November 27, 2018.

Respectfully submitted,

/s/Michelle K. Terry

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2018, a true and correct copy of the foregoing was filed electronically via the Court's ECF system and mailed via First Class Mail to Defendants at the addresses below:

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Defendant Janet Lyness
Johnson County Attorney
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/s/Michelle K. Terry
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