IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

ANTHONY MIANO, and NICHOLAS ROLLAND, Plaintiffs, v. THOMAS MILLER, in his official capacity as Iowa Attorney General; and JANET LYNESS, in her official capacity as Johnson County Attorney, Defendants.	Case No. 3:18-cv-00110-RGE-HCA **RESISTANCE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND SUPPORTING BRIEF**

COME NOW Defendants Thomas Miller and Janet Lyness and resist Plaintiffs' Motion for Preliminary Injunction. In support of this resistance, Defendants state as follows:

INTRODUCTION

Plaintiffs ask this Court to declare a simple misdemeanor disorderly conduct statute—Iowa Code section 723.4(2)—unconstitutional and enjoin its enforcement. While seeking only prospective relief, this action arose in part from Plaintiff Miano's arrest and conviction for disorderly conduct in May of 2017. Plaintiff Miano, Plaintiff Rolland, and others were engaged in protests outside a Planned Parenthood clinic in Iowa City on that day. Plaintiff Rolland and others displayed signs and conversed with persons entering and exiting the clinic. Plaintiff Miano began shouting loudly from a step ladder over a six-foot tall privacy fence. His shouting caused distress to persons inside the clinic, who reported

the loud and raucous noise to police. Plaintiff Rolland and the others were not shouting and were not warned or cited for disorderly conduct.

In this action, Plaintiffs argue that continued enforcement of section 723.4(2) will chill them and others from engaging in constitutionally protected expressive activity, namely reading aloud from the Bible, distributing literature, and conversing with persons entering and exiting abortion clinics in Johnson County. They also argue that section 723.4(2) is unconstitutionally void and overbroad both on its face and as applied to them. Because Plaintiffs lack standing and because they have failed to prove that they are entitled to an injunction, the motion should be denied.

PLAINTIFFS LACK STANDING

"It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshhold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). The United State Supreme Court has described the following as the "irreducible minimum" for constitutional standing:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-61 (1992) (internal quotation and citation marks omitted) (alteration marks omitted).

Plaintiffs are required to "establish First Amendment injury in fact through factual allegations setting out a concrete and particularized injury." *Missouri Roundtable for Life v. Carnahan*, 676 F.3d 665, 673 (8th Cir. 2012). Prospective injury "can exist for standing purposes even if the plaintiff has not engaged in the prohibited expression as long as the plaintiff is objectively reasonably chilled from exercising his First Amendment right to free expression in order to avoid enforcement consequences." *Republican Party of Minn., Third Congressional Dist. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004). But First Amendment activity is only "objectively reasonably chilled" if there exists a credible threat of prosecution. *Id.* (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979)).

Plaintiffs argue that the First Amendment activities at issue include reading the Bible aloud without voice amplification, conversing with persons entering or exiting the clinic, and distributing literature. *See* Memorandum of Law in Support of Pl.'s Motion P.2 (Doc. No. 13-1). But they cannot show that they face a credible threat of prosecution for their exercise of those First Amendment activities because section 723.4(2) does not prohibit them. Plaintiff Miano argues that because he was cited for disorderly conduct in May of 2017, he credibly fears prosecution under the statute for future expressive activity. But past enforcement alone is not sufficient to show a present case or controversy when the plaintiff seeks only prospective relief, *Lyons*, 461 U.S. at 102, and Plaintiff Miano was not cited for engaging in the allegedly chilled First Amendment conduct.

Plaintiff Miano was cited after Iowa City police responded to a call about a man yelling loudly outside a Planned Parenthood clinic. Nehring Aff. ¶ 4. According to the criminal complaint, the volume of Plaintiff Miano's yelling caused unreasonable distress

to persons inside the clinic. Nehring Aff. ¶ 4. Security at the clinic took a video of Plaintiff Miano yelling while standing on a step stool in front of a six-foot tall fence outside the clinic. Nehring Aff. ¶¶ 5. Officers explained the statute to Plaintiff Miano and told him that his yelling was too loud and that it was disrupting to persons inside the clinic. Nehring Aff. ¶ 6. When asked if he had also been yelling, Plaintiff Rolland told officers that he had not, but that he had been conversing with persons entering and exiting the clinic. Nehring Aff. ¶ 7. Plaintiff Rolland was not cited for disorderly conduct. Nehring Aff. ¶ 7. Plaintiffs cannot establish standing using chilling of their ability to engage in the First Amendment activity that they have identified because they do not face a credible threat of prosecution for that activity. Section 723.4(2) does not proscribe it and neither plaintiff was cited for it.

The *Republican Party of Minn.* case is instructive. In that case, a political party brought a First Amendment overbreadth challenge to a Minnesota statute criminalizing making a false campaign statement about a political opponent. 381 F.3d at 788. The lawsuit followed the prosecution of a candidate for the non-partisan position of Hennepin County Commissioner after the candidate falsely identified himself as "the only Republican candidate in the race," even though one of his opponents was also a party member. *Id.* The party sought an injunction against then-Hennepin County Attorney Amy Klobuchar. It alleged that the statute "chills [the Party] from engaging in party discussions regarding membership determinations and chills its members from repeating those determinations." *Id*. at 792. The Eighth Circuit held that the Party lacked standing for the First Amendment challenge because:

> although the Party has alleged an intention on behalf of itself and its members to engage in a course of conduct arguably

> affected with a constitutional interest, such course of conduct (i.e., determining party membership and publishing party membership determinations) is not proscribed by § 211B.06, subdivision 1. There is nothing in the statute which prevents a political party from deciding who is and is not one of its members. Moreover, there is nothing in the statute which prevents a member of a political party from repeating a membership determination of that party. Finally, § 211B.06, subdivision 1 contains no language which can even arguably be construed to prohibit a political party from endorsing a particular political candidate. Therefore, neither the Party nor its members are subject to "a credible threat of prosecution" under § 211B.06, subdivision 1 for engaging in the conduct for which the Party invokes First Amendment protection.

Id. at 792-93. Likewise in this case. Section 723.4(2) does not prohibit reading aloud from the Bible, conversing with persons entering or exiting the clinic, or distributing literature. With respect to the allegedly chilled First Amendment activity, Plaintiffs cannot demonstrate a credible threat of prosecution and they lack standing. *See also Fort Des Moines Church of Christ v. Jackson*, 215 F. Supp. 3d 776, 787 (S.D. Iowa 2016) ("In order for the party to face 'a credible threat of prosecution,' the allegedly chilled course of conduct must be proscribed by the challenged statute.").

PRELIMINARY INJUNCTION STANDARD

A district court considering a motion for a preliminary injunction must evaluate "the movant's likelihood of success on the merits, the threat of irreparable harm to the movant, the balance of the equities between the parties, and whether an injunction is in the public interest." *Powell v. Ryan*, 855 F.3d 899, 902 (8th Cir. 2017) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). "The burden of establishing the propriety of a preliminary injunction is on the movant." *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994) (citing *Modern Computer Sys., Inc.*

v. Modern Banking Sys., Inc., 871 F.2d 734, 737 (8th Cir. 1989) (en banc)). It is important to note that Plaintiffs do not seek an injunction to maintain the status quo, but rather to alter it by declaring unconstitutional a presumptively valid act of the legislature. *See Turner Broadcasting System, Inc. v. F.C.C.*, 507 U.S. 1301, 1302-03 (1993) (Rehnquist, C.J., in chambers).

DISCUSSION

I. Plaintiffs are Not Likely to Succeed on the Merits

In a challenge to a state statute, Plaintiffs must make a threshold showing that they are likely to succeed on the merits. *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 731-33 (8th Cir. 2008) (en banc). The standard is more rigorous in this type of challenge than it is when an injunction is sought to prevent something other than government action based on reasoned democratic processes. *Id.* The more rigorous standard "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Id.* (quoting *Able v. United States*, 44 F.3d 128, 131 (2nd Cir. 1995)).

Plaintiffs seek to enjoin enforcement of Iowa Code section 723.4(2). Under section 723.4(2), a person commits a simple misdemeanor when he "[m]akes loud and raucous noise in the vicinity of any residence or public building which causes unreasonable distress to the occupants thereof." They argue that section 723.4(2) is unconstitutionally vague and overbroad.

a. Section 723.4(2) is Not Overbroad

Section 723.4(2) is a content-neutral time, place, or manner restriction that is "justified without reference to the content of the regulated speech." *Duhe v. City of Little Rock*, 902 F.3d 858, 865 (8th Cir. 2018) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The government has a significant interest in ensuring that citizens safe in their homes and that buildings open to the public are free from disruption by intentionally loud and raucous conduct. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989) (upholding sound ordinance against First Amendment challenge by rock concert association). Section 723.4(2) achieves that interest by prohibiting loud and raucous noises that cause unreasonable distress to citizens in their homes or public buildings. Nevertheless, a statute that achieves a significant government interest may offend the due process clause if it is "substantially overbroad relative to its plainly legitimate sweep." *Id.* (internal quotation omitted). But the overbreadth doctrine is "strong medicine" that should be employed "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Section 723.4(2) is not substantially overbroad and the Court should feel no need to employ this "last resort" remedy.

Plaintiffs argue that section 723.4(2) criminalizes any speech "that causes distress to someone in a nearby residence or public building." *See* Memorandum of Law in Support of Pl.'s Motion P.10 (Doc. No. 13-1). It does not. It criminalizes "loud and raucous" noises made intentionally near a residence or public building. Plaintiffs argue that section 723.4(2) includes no intent element. That is also not accurate. Iowa law requires at least a "general criminal intent" for every criminal offense:

> To commit a crime a person must intend to do an act which is against the law. While it is not necessary that a person

> knows the act is against the law, it is necessary that the person was aware [he] [she] was doing the act and [he] [she] did it voluntarily, not by mistake or accident. You may, but are not required to, conclude a person intends the natural results of [his] [her] acts.

Iowa Model Criminal Jury Instruction 200.1. In order to violate section 723.4(2), a person must intend to make a loud and raucous noise in the vicinity of a residence or a public building. Plaintiffs further argue that section 723.4(2) prohibits "all manner of constitutionally protected speech" if it risks causing distress, such as "certain passages from a variety of political documents, religious texts, and classic books," *see* Memorandum of Law in Support of Pl.'s Motion P.10 (Doc. No. 13-1). But recitation of "certain passages from a variety of political documents, religious texts, and classic books," does not violate the statute unless a person intentionally shouts them in a loud and raucous manner near a residence or public building.

Section 723.4(2) likewise does not create a "heckler's veto." *See* Memorandum of Law in Support of Pl.'s Motion P.10 (Doc. No. 13-1). To the contrary, it allows every speaker to engage freely in any expressive activity communicating all messages and viewpoints subject only to the narrow prohibition on communication through loud and raucous noises outside of a residence or public building. *See Hill v. Colorado*, 530 U.S. 703, 734 (2000) (no "heckler's veto" where state prohibited approaching within eight feet of a person entering or exiting a health care facility because the speaker could still communicate the same message from greater than eight feet away). The picketing workers and the singing student protestors described in Plaintiffs' memorandum of law cannot be "silenced" by any occupant of a nearby residence or public building so long as they are not

making loud and raucous noises. *See* Memorandum of Law in Support of Pl.'s Motion P.10-11 (Doc. No. 13-1).

The government has a substantial interest in preventing excessive noise. *Duhe*, 902 F.3d at 865. It is not constitutionally required to enact the least restrictive means of achieving that substantial interest. *Id.* Because section 723.4(2) requires a loud and raucous noise that causes unreasonable distress, it is not substantially overbroad compared to its legitimate sweep. Plaintiffs are free to read the Bible, converse with persons entering and exiting the clinic, or distribute literature—and much more besides—without running afoul of section 723.4(2). Plaintiff Rolland did exactly that and was not cited.

b. Section 723.4(2) is Not Void for Vagueness

A state statute is unconstitutionally vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or it "encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732. That said, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language" *Grayned v. City of Rockford*, 408 U.S. 104, 109-110 (1972). A criminal statute is not vague solely because close cases may exist under its requirements. *Duhe*, 902 F.3d at 864. "That problem is addressed by requiring proof of a specific violation beyond a reasonable doubt, not by invalidating the statute for facial vagueness." *Id.* "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." *United States v. Williams*, 553 U.S. 285, 306 (2008).

Nearly seventy years ago in *Kovacs v. Cooper*, the United States Supreme Court explained that the words "loud and raucous," while abstract, "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 (1949). Plaintiffs nevertheless argue that these terms, along with "vicinity," "public building," and "unreasonable distress," are insufficiently clear to satisfy the requirement of due process. But "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Rather, the question is whether a person of ordinary intelligence in Plaintiffs' position is on fair notice that his conduct violates the statute. *Powell*, 855 F.3d at 903. When the meaning of its terms are common and generally accepted or where they can be fairly ascertained by reference to a dictionary, a statute is not vague. *Cyclone Sand and Gravel Co. v. Zoning Bd. of Adjustment of City of Ames*, 351 N.W.2d 778, 782 (Iowa 1984).

The terms "vicinity" and "public building" have a common and generally accepted meaning. The dictionary defines "vicinity" as "the quality or state of being near." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/vicinity. The term has been repeatedly held not to be vague by other courts. *See, e.g.*, *Alcalde v. State*, 74 P.3d 1253, 1259-60 (Wyo. 2003); *People v. Moore*, 88 Cal. Rptr. 2d 914, 919 (Cal. Ct. App. 1999); *State v. D'Amico*, 293 A.2d 304, 306 (R.I. 1972) *State v. Williams*, 377 P.2d 513, 514 (N.M. 1962). While Plaintiffs suggest in a footnote that "public building" could refer exclusively to a government building, the more natural reading of the term in the context of the disorderly conduct statute suggests a building that is open to the public. Section 723.4(1) refers to a "public place" and section 723.4(7) refers to a "public way." A person of reasonable intelligence would understand that those terms refer to a building

that is open to the public, not government property. "Distress" also has a common and generally accepted meaning.

As explained in section I.a. herein, while the disorderly conduct statute does specify that the defendant must cause unreasonable distress, it is not a heckler's veto. Unlike in *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971), violation of the statute does not depend on the idiosyncrasies of the occupants. A "biased hearer" does not get to "determine the legality of the noise at issue" as Plaintiffs claim. *See* Memorandum of Law in Support of Pl.'s Motion P.16 (Doc. No. 13-1). Rather the defendant must actually cause the distress and it must be unreasonable. Qualifying that the distress must be "unreasonable" suggests, albeit awkwardly, that the level of distress is not determined by the idiosyncrasies of the occupant but must rise to a level that society finds unacceptable. When a person intentionally makes a loud and raucous noise in the vicinity of a residence or public building, he accepts the risk that his conduct will be criminal if he causes unreasonable distress to its occupants in the same way that a person who drives recklessly accepts the risk that his conduct will become a felony—rather than a misdemeanor—if he unintentionally causes a death. *See* Iowa Code §§ 321.277, 708.6A(2)(a). Moreover, a person intentionally makes a loud and raucous noise in the vicinity of a residence or public building is on fair notice that his conduct may cause unreasonable distress to its occupants. *See Powell*, 855 F.3d at 904 ("A person standing continuously on a sidewalk used for pedestrian traffic outside an entrance to the Fairgrounds is on fair notice that he could be cited for impeding traffic."). The statute is not unconstitutionally vague.

II. Plaintiffs Will Not Suffer Irreparable Harm

To obtain a preliminary injunction, Plaintiffs must show that they will be irreparably harmed in its absence. Failure to establish irreparable harm is itself sufficient grounds to deny a preliminary injunction. *Dataphase*, 640 F.2d at 114 n.9. Plaintiffs must prove that "the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Powell*, 855 F.3d at 907 (Shepherd, J., concurring) (quoting *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011)). Defendants concede that the loss of First Amendment freedoms constitutes irreparable harm. *See Id.* at 904 (citing *Johnson v. Minneapolis Park & Recreation Board*, 729 F.3d 1094, 1101-02 (8th Cir. 2013)). But the continued enforcement of section 723.4(2) does not chill Plaintiffs' exercise of their First Amendment rights. Reading aloud from the Bible, distributing literature, and conversing with persons entering and exiting abortion clinics are not prohibited by the statute. None of the allegedly chilled expressive activity constitutes disorderly conduct. The Plaintiffs have not shown irreparable harm. *See Id*. at 907 (Shepherd, J., concurring) (Plaintiff did not establish irreparable harm where he would not be chilled as he alleged).

III. An Injunction is Not in the Public Interest

Iowa's disorderly conduct statute protects its citizens from unreasonable distress caused by persons intentionally making loud and raucous noise near their homes and public buildings. It is a content-neutral time, place, or manner restriction. It does not prohibit the exercise of First Amendment rights. The government has a significant interest in ensuring the safety of its citizens at home and at work, while shopping or dining, and certainly while visiting health clinics. Enjoining enforcement of section 723.4(2) on its face removes that

protection for disorderly conduct. Because the statute prohibits only loud and raucous noise—not reading, distributing literature, conversing, or any other number of acceptable means of expression—the balance of harm falls heavily on the public if the statute is enjoined on its face. It is not necessary to enjoin the statute as applied to Plaintiffs, because the First Amendment activity they identify is legal.

CONCLUSION

A preliminary injunction is an extraordinary equitable remedy, especially when one is sought to block a duly-enacted statute. Likelihood of success on the merits is a threshold determination and Plaintiffs bear the burden of proof. They simply have not met their burden. Defendants respectfully request that Plaintiffs' Motion for Preliminary Injunction be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2018, a true and correct copy of the foregoing was filed electronically via the Court's ECF system which will notify each of the following participants:

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