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** **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION (Doc. 13)**

Defendants' Resistance is a model of misdirection. It generally overlooks Plaintiffs' arguments and cited cases and attempts to rewrite Section 723.4(2) to cure the statute's flaws. Yet, the statute should be examined as it is written – *not as Defendants wish it were written* – and as it has been, and is threatened to be, applied. Plaintiffs' motion should be granted. Doc. 13.

I. PLAINTIFFS HAVE STANDING

Plaintiff Miano has experienced past arrest and prosecution and both Plaintiffs have received credible threats of future arrest and prosecution under Section 723.4(2). Plaintiffs have also conducted their speech and expressive activities less often because of their fear of prosecution. Defendants have largely ignored these facts and the numerous cases Plaintiffs cited that establish the particular threshold for standing when a First Amendment right is threatened and how Plaintiffs meet that threshold to establish their standing to bring this action. *See Eclkes v. City of Corydon*, 341 F.3d 762, 767 (8th Cir. 2003) (to establish standing, a party must show a "specific present objective harm or a threat of specific future harm."); *281 Care Comm. v. Arneson*, 766 F.3d 774, 780 (8th Cir. 2014) ("Self-censorship can itself constitute injury in fact.") (citation omitted).[1]

II. DEFENDANTS MISCONSTRUE PLAINTIFFS' ARGUMENTS AND ATTEMPT TO REWRITE THE STATUTE

Defendants focus on the interest of the State to "ensur[e] that citizens [are] safe in their homes and that buildings open to the public are free from disruption by intentionally loud and raucous conduct." Doc. 19 at 7. Plaintiffs have no qualms with that interest. The issue in *this* case, however, is that the State is attempting to accomplish its goal through a statute that can be used –

[1] Defendants' reliance on *Repub. Party of Minn. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004), is misplaced. Doc. 19 at 3–5. Defendants assert that Plaintiffs' activities – except for "yelling" – are protected and suffer no risk of prosecution. What Defendants misunderstand, however, is that even loud speech is protected speech, as discussed herein, and that the statute provides no clarity when protected speech becomes unprotected. Credible threats of prosecution under Section 723.4(2) have reasonably chilled Plaintiffs' First Amendment activity.

and has been threatened to be used – to (1) silence constitutionally protected speech, (2) on the basis of a third party's reaction to the speech, (3) where the speaker does not know at the time he is speaking whether his speech is protected. *See Clary v. City of Cape Girardeau*, 165 F. Supp. 3d 808, 820-21 (E.D. Mo. 2016) (ordinance held unconstitutional where the speaker learned "he has disturbed others nearby only after yelling, shouting, hooting, whistling, or singing, at which point he has already committed the crime").

Tellingly, instead of rebutting Plaintiffs' arguments, Defendants attempt to impart meaning into the statute to save it. But the statute should be examined as written: "the plain meaning of the text controls, and the legislature's specific motivation for passing a law is not relevant, so long as the provision is neutral on its face." *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 688 (8th Cir. 2012) (en banc) (citation omitted). For example, Defendants attempt to find an intent element in the statute – and offer a pattern jury instruction as justification – to assert that the statute applies "[w]hen a person *intentionally* makes a loud and raucous noise in the vicinity of a residence or public building . . . ." *See* Doc. 19 at 7, 8, 11, 12 (emphasis added). *This is not what the statute says.* Because the statute contains no intent element, consequently, it is not Plaintiffs' actions that determine violation of the statute, it is the reaction of the listener. Thus, the statute fails for its overbreadth. Plaintiffs highlight this fatal flaw with the support of the binding decisions in *Stahl v. City of St. Louis*, 687 F.3d 1038 (8th Cir. 2012), and *Duhe v. City of Little Rock*, 2018 U.S. App. LEXIS 25130 (8th Cir. 2018). Doc. 13-1 at 16. Defendants' failure to rebut Plaintiffs' application of these pivotal decisions underscores the weakness of their argument.[2]

[2] As the Supreme Court has explained, "[w]e will not rewrite a . . . law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain . . . ." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (citations omitted). Defendants desire a rewriting of Section 723.4(2), "not just reinterpretation." *Id*.

III. DEFENDANTS IGNORE THE POWER OF THE HECKLER'S VETO

Defendants attempt to gloss over the portion of the statute that bases violation of it on a listener's "unreasonable distress." Doc. 19 at 7–8. Defendants propose that the listener is a nebulous member of "society," and the speech must be distressing according to the general public's sensibilities. *Id*. at 11. In reality, however, violation of the statute actually turns on the reactions of a listener *inside the very building where the speech occurs*.[3]

The person to whom a protest or demonstration is directed will naturally be critical of what is said. Protests and demonstrations are inherently rooted in disagreement, no matter their nature; for example, labor protests against a dictatorial boss, women's marches against a sexist system, or wartime protests against an authoritarian government:

> [A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (citations omitted). Allowing a biased listener to determine the constitutionality of speech or expression due to his comfort level with what is said is "so inherently subjective that it would be inconsistent with our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (citation omitted). Although the government may regulate speech and expression, it must do so constitutionally. "[U]nder our Constitution the public

[3] Defendants' concede Section 723.4(2) is *awkwardly* written. Doc. 19 at 11. If the Attorney General of Iowa and the Johnson County Attorney find the statute's language "awkward," it is wholly unreasonable to expect a layman to nonetheless find it straightforward and its prohibitions "clearly marked." *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). Allowing a listener who is unhappy with a person's speech to then silence him unequivocally constitutes a heckler's veto.

IV. LOUD SPEECH IS STILL PROTECTED SPEECH

Defendants attempt to distract the Court from the core of Plaintiffs' arguments. Defendants narrowly focus on the volume of Plaintiffs' speech, contending that as long as the speech is not "loud and raucous,"[4] it will not run afoul of the statute. Likewise, Defendants repeatedly assert that Plaintiffs' First Amendment activities such as Bible reading, conversing with persons coming and going from the clinic, and distribution of literature are not subject to prosecution because "section 723.4(2) does not prohibit them." *See* Doc. 19 at 2–3, 5, 9, 12. The prohibition kicks in, according to Defendants, once Plaintiffs start "yelling." *Id*. at 3. Therefore, as long as Plaintiffs do not raise their voices, Defendants' claim, there is no credible threat of prosecution.

But protest and debate are traditionally – and purposefully – attention-drawing, vocal activities. It cannot stand to reason that the First Amendment applies only when one keeps his or her voice down and engages in a polite protest. *See Edwards v. South Carolina*, 372 U.S. 229, 233, 235 (1963) (holding that arrests for "boisterous, loud, and flamboyant conduct" when protestors were singing loudly, stomping feet, and clapping hands violated their First Amendment rights); *Cox v. La*, 379 U.S. 536, 546 n.9–550 (1965) (holding that noise from a group protest described as "a shout, a roar," that included cheering, speeches, prayers, and clapping did not breach the peace). Defendants' insistence that Plaintiffs would have no issue with the statute if it were not for

[4] Defendants attempt to use *Kovacs v. Cooper*, 336 U.S. 77 (1949), to show that "loud and raucous" has a plain meaning. Doc. 19 at 9–10. Yet, as Plaintiffs' explained in their brief – and Defendants did not refute – the restriction at issue in *Kovacs* applied to *amplified noise and sound trucks*. The restriction *did not* apply to "the human voice." Doc. 13-1 at 13.

the "yelling" falls flat. Public protest, demonstration, and dissemination of ideas and beliefs are no less protected by the First Amendment simply because they may be loud. *Id*.

Moreover, even if "yelling" were the bright line between protected and unprotected speech, which it is not, *Section 723.4(2) is not instructive as to when speech crosses that line.*[5] "Yelling," according to one officer or speaker, may otherwise be classified as passionate conversing, speaking from a distance, singing, cheering, or giving a speech, to another. The statute provides no guidance – for speakers or law enforcement – to answer this subjective question. Therefore, Plaintiffs have no way of knowing when their actions – even those purportedly innocuous activities listed by Defendants – might turn criminal. Section 723.4(2) is unconstitutionally vague. *See FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012) ("A fundamental principal in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . [Due process] requires the invalidation of laws that are impermissibly vague.") (citations omitted).

V. DEFENDANTS CONCEDE OTHER ARGUMENTS MADE BY PLAINTIFFS

Defendants do not address, and therefore concede, Plaintiffs' arguments (1) that the harm to Plaintiffs for denying the injunction outweighs any harm to Defendants in granting it, and (2) that no bond should be required of Plaintiffs if the injunction issues. Doc. 13-1 at 17–19.

CONCLUSION

This Court should grant Plaintiffs' motion for a preliminary injunction. Doc. 13.

[5] "Yelling," of course, is not what causes a violation of Section 723.4(2), despite Defendants attempt to rewrite the statute. A violation of Section 723.4(2) turns on the reaction of a third party to the speech being uttered.

Dated: December 18, 2018.

Respectfully submitted,

/s/ Michelle K. Terry

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2018, a true and correct copy of the foregoing was filed electronically via the Court's ECF system. Electronic service was therefore made upon all counsel of record on the same day through the ECF system.

/s/ Michelle K. Terry
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