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 **DEFENDANTS' TRIAL BRIEF**

I. 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 fence. His shouting caused distress to persons inside the clinic. Security personnel reported the loud and raucous noise to police. Plaintiff Rolland was not shouting and was 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 Court should enter a verdict in favor of Defendants.

II. FACTUAL BACKGROUND

Plaintiffs Anthony Miano and Nicholas Rolland are ministers who reside in Scott County, Iowa. Joint Statement ¶ 2-3. As part of their ministry, Plaintiffs engage in protests outside abortion clinics in Iowa. Joint Statement ¶ 1. Plaintiffs' protest activities include reading from the Bible, carrying signs, and conversing with persons entering and exiting the clinics. Joint Statement ¶ 1. Neither Plaintiff had been cited for disorderly conduct for their pro-life activities prior to May 30, 2017. Joint Statement ¶ 19. Plaintiff Rolland has never been cited for disorderly conduct as a result of his protests. Plaintiff Miano has been cited only once.

On May 30, 2017, Plaintiffs were protesting abortion at the Planned Parenthood clinic in Iowa City. Joint Statement ¶ 15-16. Plaintiff Rolland was holding a sign and speaking with persons entering and exiting the clinic. Plaintiff Miano was standing on a step-ladder that elevated his head and shoulders above a six-foot privacy fence outside the clinic. Joint Statement ¶ 16. He was yelling loud enough that his voice was audible inside the clinic. Joint Statement ¶ 17. Planned Parenthood security called Iowa City police. The officers who responded to the scene told Plaintiff Miano that his yelling was too loud and was distressing the occupants of the clinic. Joint Statement ¶ 16, 33, 35, 37. Plaintiff

Miano was cited for disorderly conduct. Joint Statement ¶ 15-16. Plaintiff Rolland, who was not yelling, was not cited. Joint Statement ¶ 16.

Defendants expect that Plaintiffs will rely on paragraphs 30-42 of the Joint Statement of Undisputed Facts to argue that the disorderly conduct statute was or will be used to silence Plaintiffs' pro-life message. Defendants acknowledge that the district court referred to the content of Plaintiff Miano's speech during sentencing. Nevertheless, Plaintiffs seek only prospective relief in this action. Even if Plaintiff Miano's prosecution had been motivated by a desire to silence his pro-life message—Defendants firmly maintain, and the undisputed facts show that it was not—such prosecution does not affect the constitutionality of the underlying criminal statute. The district court's opinion about Plaintiff Miano's message is not material to any of the claims in this action and this Court need not consider it.

III. APPLICABLE LAW

Iowa Code section 723.4(2) makes it a simple misdemeanor to "make[] a loud and raucous noise in the vicinity of any residence or public building which causes unreasonable distress to the occupants thereof."

The First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The freedom of speech and religious exercise guaranteed by the First Amendment are incorporated against the states through the due process clause of the Fourteenth

Amendment according to United States Supreme Court decisions in *Gitlow v. New York*, 268 U.S. 652 (1925), and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The Fourteenth Amendment to the United States Constitution provides, among other things, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The due process clause protects against laws that are unduly vague, *see, e.g.*, *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), or overbroad, *see, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

Where a suit is brought pursuant to 42 U.S.C. section 1983, Plaintiffs bear the burden of proof throughout the trial. *Clark v. Mann*, 562 F.2d 1104, 1117 (8th Cir. 1977). "When reviewing a statute alleged to be vague, courts must indulge a presumption that it is constitutional, and the statute must be upheld unless the court is satisfied beyond all reasonable doubt that the legislature went beyond the confines of the Constitution." *United States v. Saffo*, 227 F.3d 1260, 1270 (10th Cir. 2000) (quoting *Brecheisen v. Mondragon*, 833 F.2d 238, 241 (10th Cir. 1987)); *see also United States v. Ghane*, 673 F.3d 771, 777-78 (8th Cir. 2012).

IV. 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 they are chilled from engaging in pro-life activities including reading aloud from the Bible, open-air preaching, speaking to individuals as they walk to and from abortion clinics, literature distribution, and sign-holding. Joint Statement ¶ 21, 26-29. But they cannot show that they face a credible threat of prosecution for their exercise of those 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 pro-life 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.

In *Lyons*, the plaintiff sought to enjoin Los Angeles police officers from employing an illegal chokehold to restrain city residents. The plaintiff alleged that he had been injured by such a chokehold and that he "justifiably fears that any contact he has with Los Angeles police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse." *Id.* at 99. Moreover, he alleged that his fear of such police tactics impaired his rights under the First, Fourth, Eighth, and Fourteenth Amendments. *Id.* The United States Supreme Court rejected the claim for prospective relief because the plaintiff could not show, simply based on his past injury, a likelihood of future harm. It explained:

> That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.

Id. at 106.

The undisputed facts in this case show that Plaintiff Miano was not cited for disorderly conduct because he was reading aloud from the Bible, open-air preaching, speaking to individuals as they walk to and from abortion clinics, distributing literature, or

holding a sign. He was cited because he was yelling while standing on a step stool in front of a six-foot tall fence outside the clinic. Joint Statement ¶ 16. 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. Joint Statement ¶ 16. Plaintiff Rolland was engaged in pro-life activities but was not yelling. Plaintiff Rolland was not cited for disorderly conduct. Joint Statement ¶ 16. Plaintiffs do not face a credible threat of prosecution for reading aloud from the Bible, open-air preaching, speaking to individuals as they walk to and from abortion clinics, distributing literature, or holding a sign. Section 723.4(2) does not proscribe that conduct and neither plaintiff was cited for it. Plaintiffs were—and continue to be—free to communicate their pro-life message through those means.

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, distributing literature, or sign-holding—the conduct "for which [Plaintiffs] invoke First Amendment protection." Plaintiffs engage in such pro-life activity with some regularity and, except for May 30, 2017, have never been cited under the statute. With respect to the allegedly chilled 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.").

V. FIRST AMENDMENT OVERBREADTH CLAIM

Plaintiffs challenge the disorderly conduct statute as overbroad. "Ordinarily, a party may not facially challenge a law on the ground that it would be unconstitutional if applied to someone else." *SOB, Inc. v. Cty. of Benton*, 317 F.3d 856, 864 (8th Cir. 2003). The First Amendment overbreadth doctrine provides an avenue "whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559

U.S. 460, 473 (2010) (*quoting Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). "[T]he facial overbreadth doctrine 'is a departure from traditional rules of standing,' such that a party whose own expressive conduct may be unprotected is allowed to assert the First Amendment rights of others not before the court...." *Republican Party of Minn. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004) (citation omitted) (*quoting Alexander v. United States*, 509 U.S. 544, 555 (1993)). 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.

The disorderly conduct statute is a content-neutral time, place, or manner regulation because it is "justified without reference to the content of the regulated speech." *Clark v. Cmty. for Creative Non-Violence*¸468 U.S. 288, 193 (1984). It is narrowly tailored to achieve a significant government interest and permits ample alternative channels for communication. *Duhe v. City of Little Rock*, 902 F.3d 858, 865 (8th Cir. 2018). The government has a substantial interest in preventing excessive noise. *Id*. It is not constitutionally required to enact the least restrictive means of achieving that substantial interest. *Id.* Because section 723.4(2) prohibits only 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). Indeed, Plaintiffs had been conducting their pro-life activities for some time prior to May 30, 2017, without incident. On the day that Plaintiff Miano was cited for yelling

over the fence, Plaintiff Rolland was himself demonstrating the ample alternative means of communicating the same message. He was not cited.

In their memorandum in support of their request for a temporary injunction, 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 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 other words, section 723.4(2) does not prohibit accidentally dropping an armful of pots and pans outside a residence or public building, even if it startles the occupants. To violate section 723.4(2), a person must intend to make a loud and raucous noise near a residence or a public building. A reasonable juror could conclude from the evidence presented at Plaintiff Miano's criminal trial that he intended as much. *See* Joint Statement ¶ 18.

Plaintiffs further argued in support of a temporary injunction 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. And even then, it is the loud and raucous shouting, not the message, that the statute prohibits. Section 723.4(2) no more prohibits "all manner of constitutionally protected speech" than does closing a public park at nightfall. The government is allowed to regulate the time, place, and manner of expressive conduct to further legitimate safety and other interests.

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 in support of a temporary injunction cannot be "silenced" by any occupant of a nearby residence or public building so long as they are not singing or chanting in a loud and raucous manner. *See* Memorandum of Law in Support of Pl.'s Motion P.10-11 (Doc. No. 13-1).

VI. DUE PROCESS VAGUENESS CLAIM

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 is common and generally accepted or where it 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). "Distress" also has a common and generally accepted meaning.

While the disorderly conduct statute does specify that the defendant's conduct 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's conduct must cause the distress and it must be unreasonable. Qualifying that the distress must be "unreasonable" suggests 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 near a residence or public building, he accepts the risk that his conduct will be criminal if he causes unreasonable distress to its occupants. Moreover, a person who intentionally makes a loud and raucous noise near 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.

Defendants expect that Plaintiffs will argue that the disorderly conduct statute is written in such a way as to allow the government to wield a conviction as a sword against

messages with which it disagrees. The undisputed material facts show that this is not the case. Plaintiffs have engaged in pro-life messaging outside abortion clinics in Iowa City and elsewhere since 2016. Except for Plaintiff Miano's citation for disorderly conduct on May 30, 2017, neither Plaintiff has been cited under the statute. Plaintiff Rolland, who was communicating the same message on the day of Plaintiff Miano's citation but was doing so without yelling, was not cited. The First Amendment does not provide Plaintiff Miano or anyone else a license to communicate his message through whatever means he pleases. The State has a responsibility to protect the rights of all its citizens. It has done no more than that with the disorderly conduct statute.

VII. CONCLUSION

This Court should enter a verdict in favor of Defendants.

Respectfully submitted,

/s/ Jeffrey S. Thompson
JEFFREY S. THOMPSON
Solicitor General of Iowa

/s/ Thomas J. Ogden
THOMAS J. OGDEN
Assistant Attorneys General
Iowa Department of Justice
[redacted]

ATTORNEYS FOR DEFENDANT
THOMAS MILLER

/s/ Robert Livingston

ROBERT LIVINGSTON
Stuart Tinley Law Firm
[redacted]

ATTORNEY FOR DEFENDANT JANET LYNESS

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2019, 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:

Kenneth R. Munro
MUNRO LAW OFFICE, P.C.
[redacted]

Francis J. Manion
Geoffrey R. Surtees
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Edward L. White III
Erik M. Zimmerman
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Michelle K. Terry
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

/s/ Thomas J. Ogden