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' TRIAL BRIEF**

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Plaintiffs, by and through counsel, respectfully submit this Trial Brief to demonstrate the constitutional infirmities of Iowa Code § 723.4(2), on its face and as applied to Plaintiffs. The parties have filed separately a Joint Statement of Undisputed Facts, Dkt. 30, to reflect the entirety of the factual evidence in this matter. The parties agree that no other genuine issues of material fact remain.

INTRODUCTION

Plaintiff Miano and Rolland engage 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 while Plaintiffs are on the public sidewalks outside abortion clinics in Iowa. Joint Statement of Undisputed Facts, Dkt. 30, Undisputed Material Facts, ¶ 1. Plaintiffs view the exercise of their pro-life activities on the public sidewalks outside these clinics as a religious ministry and calling. *Id.*, Undisputed Facts ¶¶ 30–31. Plaintiffs' pro-life activities are protected by the First Amendment to the Constitution of the United States and are conducted in traditional public forums. *See infra*, Section II.

Plaintiff Miano has been subjected to prosecution for disorderly conduct under Iowa Code § 723.4(2), and he and Plaintiff Rolland have been subjected to threatened enforcement of Section 723.4(2) as a result of their pro-life activities. Accordingly, Plaintiffs fear citation and prosecution under Iowa Code § 723.4(2) for the future pro-life activities they intend to conduct outside of the Planned Parenthood Iowa City Health Center and the Emma Goldman Clinic, located in Johnson County, Iowa. Dkt. 30, Undisputed Material Facts, ¶¶ 6, 7.

Plaintiffs seek a declaratory judgment declaring Section 723.4(2) overbroad and vague on its face, and as applied to them, and they also seek a permanent injunction enjoining Defendants and those acting in concert with them from enforcing Section 723.4(2) against Plaintiffs and others

not before this Court while they are exercising their protected freedoms of speech and expression in the traditional public forums outside abortion clinics in Iowa.

UNDISPUTED MATERIAL FACTS

Plaintiffs hereby incorporate by reference the Undisputed Material Facts listed in the parties' Joint Statement of Undisputed Facts, Dkt. 30, as though fully set forth herein.

UNDISPUTED FACTS

Plaintiffs hereby incorporate by reference those Undisputed Facts listed in the parties' Joint Statement of Undisputed Facts, Dkt. 30, that are cited and referenced herein. The parties agree that the listed facts are undisputed concerning their truth and accuracy but disagree on their materiality to this case. Plaintiffs maintain that the facts set forth in this brief from the listed "Undisputed Facts" of the Joint Statement are relevant and material to this case, as they relate to the issues defined by the pleadings, will aid in the Court's understanding of the background of this case, will assist the Court in determining this action, *see* Fed. R. Evid. 401–402, and are not facts generally excluded, *see* Fed. R. Evid. 403.

CONTESTED FACTS

None.

EXHIBIT LIST

None.

WITNESS LIST

None.

LEGAL ISSUES

The legal issues to be decided by the Court are:

1. Whether Plaintiffs have standing to bring facial and as-applied challenges to Iowa Code § 723.4(2);

2. Whether Iowa Code § 723.4(2) on its face and/or as applied to Plaintiffs, violates the freedoms of speech and expression that are protected by the First Amendment to the United States Constitution;

3. Whether Iowa Code § 723.4(2) is impermissibly vague, both facially and as-applied to the Plaintiffs, contrary to the constitutional right to due process guaranteed by the Fourteenth Amendment;

4. Whether Defendants, their officers, agents, employees, and successors in office, the prosecutors Defendants and their offices supervise, and those acting in concert with them should be permanently enjoined from enforcing Iowa Code § 723.4(2) against Plaintiffs and others not before this Court, through arrest, charge, or prosecution, while they are exercising their protected freedoms of speech and expression within the State of Iowa;

5. Whether Defendants should be required to provide public notice of the unconstitutionality of Iowa Code § 723.4(2) to all law enforcement entities under their supervision;

6. Whether Plaintiffs should be awarded the costs of this action and reasonable attorneys' fees; and

7. Whether Plaintiffs should be awarded any other and further relief that this Court deems equitable and just.

LEGAL CONTENTIONS

I. PLAINTIFFS HAVE STANDING TO BRING THEIR FACIAL AND AS-APPLIED CHALLENGES TO IOWA CODE § 723.4(2).

Plaintiffs seek prospective relief based on actual threats of enforcement of Iowa Code § 723.4(2) against them for their pro-life activities. Dkt. 30, Undisputed Material Facts, ¶ 1. Plaintiffs challenge the statute (on its face and as applied to their intended conduct) as unconstitutionally overbroad and vague, in violation of the First and Fourteenth Amendments to the United States Constitution. Plaintiff Miano has experienced past citation and prosecution under the statute, Dkt. 30, Undisputed Material Facts, ¶ 15, and both Plaintiffs have received credible threats of arrest and prosecution under Section 723.4(2) on multiple occasions, both before and after Plaintiff Miano's citation. Dkt. 30, Undisputed Material Facts, ¶¶ 20, 22–25. Plaintiffs have also conducted their speech and expressive activities less often because of their fear of prosecution. Dkt. 30, Undisputed Material Facts, ¶ 21.[1]

To establish standing, a plaintiff "must have suffered an 'injury in fact' . . . . [that is] 'fairly traceable to the challenged action of the defendant . . . . [and] 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, 560–61 (1992) (internal citations omitted). Plaintiffs' claims clearly meet this standard, and Defendants' assertion that Plaintiffs lack standing to seek redress from this Court for the violation of their constitutional rights is without merit.

A plaintiff who challenges the constitutionality of a criminal statute must show that he or she intends, or wishes, to engage in conduct to which the statute applies. 15 *Moore's Federal*

[1] Plaintiffs further adopt herein their motion for a preliminary injunction, Dkt. 13, their memorandum of law supporting that motion, Dkt. 13-1, and their reply brief supporting that motion, Dkt. 21.

Practice – Civil § 101.40[4][e][ii] (citing, *inter alia*, *Duhe v. City of Little Rock*, 902 F.3d 858, 866–67 (8th Cir. 2018), *cert. denied*, 203 L. Ed. 2d 200, 2019 U.S. LEXIS 1290 (2019)). However, "if the statute is being challenged on the ground of vagueness, the plaintiffs don't necessarily have to allege a specific intent to violate the statute. It is enough to allege their intended behavior might be perceived to do so." *Id*. In First Amendment cases, "two types of injuries may confer Article III standing to seek prospective relief." *Missourians for Fiscal Accountability v. Klar*, 830 F.3d 789, 794 (8th Cir. 2016) (citations and quotation marks omitted). First, a plaintiff can show "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder[,]' . . . [or] [s]econd, . . . by alleging that it self-censored." *Id*. (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)) (citation omitted). Where there is a credible threat of enforcement, a plaintiff "suffers from an ongoing injury resulting from the statute's *chilling effect* on his desire to exercise his First Amendment rights." *Id*. (internal quotations omitted); *see also Int'l Ass'n of Firefighters, Local 2665 v. City of Ferguson*, 283 F.3d 969, 975 (8th Cir. 2002) (stating that "certainty of injury is not necessary, at least in the First Amendment context.").

The actual, threatened, and likely enforcement of the statute has injured Plaintiffs in the past, continues to injure them at present, and will continue to injure them in the future, thus necessitating adjudication of their claims by this Court. Dkt. 30, Undisputed Material Facts, ¶¶ 15, 20–29. Plaintiff Miano has been cited, convicted, and sentenced under this statute, and both Plaintiffs have been threatened by law enforcement that they may be arrested under Iowa Code § 723.4(2) while conducting their pro-life activities. Dkt. 30, Undisputed Material Facts, ¶¶ 15, 20–29. Moreover, both Plaintiff Miano and Plaintiff Rolland easily meet the requirement that their *prospective* injury is immediate and capable of repetition.

The threats of enforcement are genuine, and Plaintiff Miano's citation and conviction under Section 723.4(2) unequivocally establishes their weight. The statute – and its enforcement – 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); *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*, 902 F.3d at 863 (explaining that the possibility of future arrest and consequent chilling of protected speech established standing).

Furthermore, Plaintiffs' speech has been chilled by the threat of enforcement of Section 723.4(2) against them by Defendants and those acting in concert with or employed by them. The Eighth Circuit has stated: "there can be little doubt that 'being arrested for exercising the right to free speech would chill a person of ordinary firmness from exercising that right in the future.'" *Hoyland v. McMenomy*, 869 F.3d 644, 657 (8th Cir. 2017) (quoting *Clary v. City of Cape Girardeau*, 165 F. Supp. 3d 808, 826 (E.D. Mo. 2016)). Because of Plaintiff Miano's citation and conviction, along with the warnings of enforcement of Section 723.4(2) that both Plaintiffs have received, Plaintiffs have diminished the frequency of their ministry out of fear of retribution. Dkt. 30, Undisputed Material Facts ¶ 21. The threat that this statute may be applied to Plaintiffs in the future is actual, and Plaintiffs' speech has been chilled because of those threats. *See Republican Party of Minn. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004). In fact, the chilling of Plaintiff Miano's pro-life activities (and those who intend to engage in similar expression) *was the intended result* that the district court sought in handing down Miano's sentencing at his criminal trial for prosecution under Section 723.4(2). In making his decision, the district court pondered what

sentence would "get [Plaintiff Miano's] attention not to do this type of activity again." Dkt. 30, Undisputed Facts, ¶ 42. The district court issued a suspended sentence, expressly hoping that it would serve as a "threat of jail, that hammer over [Mr. Miano's] head" warning him not to repeat his pro-life activities. Dkt. 30, Undisputed Facts, ¶ 42. As this Court has acknowledged, injury can occur simply by "*hesitating* to exercise [one's] First Amendment rights." *Roe v. Milligan*, 479 F. Supp. 2d 997, 1002 (S.D. Iowa 2007) (emphasis added); *see also 281 Care Comm. v. Arneson*, 766 F.3d 774, 780 (8th Cir. 2014) ("Self-censorship can itself constitute injury in fact.") (citation omitted). Plaintiffs have established facts beyond what is required to satisfy the injury-in-fact aspect of constitutional challenge to Iowa Code § 723.4(2).

It is worth emphasizing that Plaintiffs *do not* allege that past events (*e.g.*, Plaintiff Miano's citation and conviction), standing alone, establish their standing to sue; rather, the past events, coupled with *Plaintiffs' clear intention to continue to exercise their constitutional rights* in a manner likely to lead to future threats of arrest, arrests, and convictions clearly establishes their standing. *Cf.* 15 *Moore's Federal Practice - Civil* § 101.40[4][d] ("[E]vidence of past wrongs is by no means irrelevant to whether there is a real and immediate threat of repeated injury."); *Mosby v. Ligon*, 418 F.3d 927, 933 (8th Cir. 2005) ("a plaintiff seeking prospective relief against future conduct of defendants who caused injury in the past must show that she faces 'a real and immediate threat that she would again suffer similar injury in the future'") (citation omitted).

While Plaintiff Miano's citation and conviction under Iowa Code § 723.4(2) is illustrative of the application of this statute to conduct protected by the First Amendment, Plaintiffs could have brought a facial and as-applied challenge to the statute even if Miano had never been cited or convicted. A plaintiff who has been threatened with enforcement of a statute against him need not make himself susceptible to prosecution to bring a challenge in court against that statute. "Instead,

when government action . . . is challenged by a party who is a target or object of that action, . . . there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Monson v. DEA*, 589 F.3d 952, 958 (8th Cir. 2009) (internal citations and quotation marks omitted).

Finally, it is telling that Defendants *have not* argued that the officers who have repeatedly threatened both Plaintiffs with arrest, or the district court who convicted Miano, erred in their interpretation or application of the statute. *See* Dkt. 17, 19. Where, as here, the government fails to disavow an intent to enforce the statute in the manner feared by the plaintiff, that is strong evidence that the plaintiff has standing. *281 Care Comm. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011) ("It is only evidence—via official policy or a long history of disuse—that authorities actually reject a statute that undermines its chilling effect."); *see also Babbitt*, 442 U.S. at 302; *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1173 (9th Cir. 2018); *United States v. Supreme Court*, 839 F.3d 888, 901–02 (10th Cir. 2016); *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 696 (6th Cir. 2015); 15 *Moore's Federal Practice - Civil* § 101.40[e][iii]. Defendants cannot seriously claim that Plaintiffs have no reason to fear *future* threats, citations, or prosecutions if they engage in the very activities that have actually led to threats, a citation, and a prosecution *in the past*.

The final two elements of standing—causation and redressability—are clearly present in this case. Defendants are the parties responsible for the enforcement and prosecution of violations of Section 723.4(2). *See* Dkt. 1, ¶¶ 19-20, Dkt. 17, ¶¶ 19-20. 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 would be remedied by this Court's enjoining Section 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. In sum, Plaintiffs have standing to bring this facial and as-applied challenge to Iowa Code § 723.4(2).

II. 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 a First Amendment right to engage in pro-life leafleting and sidewalk counseling); *United States v. Grace*, 461 U.S. 171, 180 (1983) (recognizing sidewalks to be "considered, generally without further inquiry, to be public forum property"); *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (acknowledging publics sidewalks as traditional public fora "held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). 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.[2] *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

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

Furthermore, the protections offered by the First Amendment encompass speech that might be considered by some individuals to be loud. The Supreme Court has stated, "Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). Protest and debate are traditionally—and purposefully—attention-drawing, vocal activities, done in pursuit of a specific objective. Plaintiffs do not conduct their pro-life activities in order to create a ruckus or cause distress, but to offer "peace," and to tell people "that there [is] hope for them in Jesus Christ." Dkt. 30, Undisputed Facts, ¶¶ 30–31, 39. Plaintiffs seek to offer this hope to those passing by and to those within the nearby clinics; they aim to express their message of hope where it may be most effective. Dkt. 30, Undisputed Material Facts, ¶¶ 7–10, 16–18, Undisputed Facts, ¶¶ 30–31, 39.

It does not stand to reason that the First Amendment applies only when one keeps his or her voice down and engages in "polite" discourse. *See Edwards v. South Carolina*, 372 U.S. 229, 233, 235 (1963) (holding that arrests for "boisterous, loud, and flamboyant conduct" violated protesters' First Amendment rights when they were singing loudly, stomping feet, and clapping); *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). As the Supreme Court has stated:

> 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*. There is no room under our constitution for a more restrictive view.

Terminiello, 337 U.S. at 4 (internal citations omitted; emphasis added). Public protest, demonstration, and dissemination of ideas and beliefs are no less protected by the First Amendment simply because they may be loud. *Id.* Plaintiffs' pro-life activities, including their intended loud speech, are protected by the First Amendment.

III. IOWA CODE § 723.4(2) IS UNCONSTITUTIONALLY OVERBROAD.

Iowa Code § 723.4(2) violates the freedoms of speech and expression guaranteed by the First Amendment and thereby deprives Plaintiffs, and others not before this Court, of their constitutionally protected ability to exercise those rights while in a traditional public forum. Section 723.4(2) is unconstitutionally overbroad as it sweeps within its coverage speech that is guaranteed protection by the First Amendment. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) (recognizing a type of facial challenge "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.'" (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n.6 (2008)).

To invalidate a statute, 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)). Indeed, 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 (emphasis in original).

This Court has explained that analysis of 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.[3]

a. Construing The Statute

Iowa Code § 723.4(2) provides: "Disorderly Conduct. A person commits a simple misdemeanor when the person does any of the following: . . . (2) Makes a 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*—not just "noise"—is within the purview of the statute as written. There is no limiting construction given that would bind the statute's application to speech that is unprotected by the

[3] *Contra Duhe*, 902 F.3d 858 at 864–65 (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, both of which lead to the statute being unconstitutional.

First Amendment. To the contrary, the broad, undefined language of the provision ensures that it may be enforced to criminalize any speech.[4]

b. 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 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 someone subjectively considers to be loud and raucous and which subjectively causes unreasonable distress to someone in a nearby residence or public building. The law manifestly casts a wide net, including all manner of constitutionally-protected speech. But there is no shortage of persons who would consider certain passages from a variety of political documents, religious texts, and classic books to be "distressing," and subject to suppression under the plain language of Section 723.4(2), yet the First Amendment strongly protects the right to distribute or discuss such material on public sidewalks.

Likewise, the prohibition of a "loud and raucous" noise, without more, is unduly broad. As one court has explained,

> "Loud and raucous noises" traditionally fall within the common-law definition of disorderly conduct, but neither volume level nor type of sound are singly determinative. . . . Thus, courts have found that loud noise amounts to disorderly conduct (1) when it occurs in the middle of the night in a residential neighborhood, . . . (2) when it is amplified, . . . or (3) when it is "raucous" and accompanied by "boisterous, drunken behavior." . . .

[4] Notably, neither Section 723.4(2) nor Chapter 702 of Title XVI, Subtitle 1 of the Iowa Code (§§ 702.1 to 702.25) define the term "loud and raucous noise" or explain at what decibel level noise becomes "loud and raucous" or "unreasonabl[y] distress[ing]," or define the terms "vicinity," "in the vicinity," "public building," or "unreasonable distress."

> No precedent suggests a person may not speak loudly in a commercial district during daytime.

Johnson v. City of Rock Island, No. 4:11-cv-04058-SLD-JEH, 2014 U.S. Dist. LEXIS 126948, at *31-33 (C.D. Ill. Sept. 11, 2014) (citations omitted). By contrast, Section 723.4(2) is *not* limited to nighttime, or residential areas, or amplified sound, or noises that are accompanied by drunken or boisterous behavior, or a specified minimal decibel level. Rather, in Defendants' view, the statute does, in fact, dictate that "a person may not speak loudly in a commercial district during daytime." *See id.* Section 723.4(2) violates Plaintiffs' rights.

It is noteworthy that Section 723.4(2), in defining a criminal misdemeanor, includes no intent element, nor does it carve out any safeguard for constitutionally protected speech that happens to annoy someone nearby based on the *content* or *viewpoint* of that speech. 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."). In this way, violation of Section 723.4(2) actually turns on the reactions of a listener inside the very building where the speech is heard. But the Supreme Court has made clear that objectionable speech—even that which is directed at unwilling listeners—continues to receive protection from the First Amendment:

> "[W]e are often 'captives' outside the sanctuary of the home and subject to objectionable speech." The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. *Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections*.

Cohen v. Cal., 403 U.S. 15, 21 (1971) (quoting *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970)) (emphasis added).

The person to whom a protest or demonstration is directed will naturally be critical of what is said: examples are a labor protest against a dictatorial boss, a women's march against a sexist system, or a wartime protest 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." *Terminiello*, 337 U.S. at 4 (citations omitted). Allowing a biased listener to determine the constitutionality of speech or expression due to his "distress" over 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 does have limited authority to regulate speech and expression, it must do so objectively and constitutionally. "[U]nder our Constitution the public 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); *Cohen*, 403 U.S. at 22 (holding that individuals, when "captive" in their own homes—"powerless to avoid" offensive conduct—have protections that "unwilling 'listeners' in a public building" do not have). Allowing a listener who is unhappy with a person's speech to then silence him unequivocally constitutes a heckler's veto.

The extent to which the challenged 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 Grace*, 461 U.S. at 176, 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. Indeed, it already has been used in this way, as Plaintiffs' pro-life activities have been chilled, and threatened with further punishment in the future, by enforcement of Section 723.4(2) against them because of complaints coming from individuals within a nearby building occupied by *people who hold opposing viewpoints from Plaintiffs*. Dkt. 30, Undisputed Material Facts, ¶¶ 16, 18, 20, Undisputed Facts ¶¶ 32, 33, 35, 37, 39.

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 (or prosecutor) who wants to silence the unwelcome speech because of its content or viewpoint.

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

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). Because the statute contains no intent element, it is consequently not Plaintiffs' actions that determine violation of the statute, it is the reaction of the listener. Thus, the statute fails for its overbreadth. *See Stahl v. City of St. Louis*, 687 F.3d 1038 (8th Cir. 2012), and *Duhe v.*

City of Little Rock, 902 F.3d 858 (8th Cir. 2018).

The Legislature intentionally chose to set the *mens rea* bar much lower for the type of disorderly conduct challenged herein than for other types of disorderly conduct. While most of the subsections of Iowa Code § 723.4 expressly include specific intent requirements for various types of disorderly conduct, *Section 723.4(2) fails to include such a requirement*. To illustrate:

- Section 723.4(3) requires that the defendant "*knows or reasonably should know*" that his abusive epithets or threatening gestures are likely to provoke a violent reaction.
- Section 723.4(4) requires that the defendant engage in conduct "*intended* to disrupt" a lawful assembly or meeting.
- Section 723.4(5) requires that the defendant *knew* that his report or warning of a fire or other catastrophe was false or baseless.
- Section 723.4(6) requires that the defendant "*knowingly*" use a flag of the United States, with an *intentional* disrespectful act (*e.g.*, defacing, mutilating), "with the *intent or reasonable expectation*" that the use will provoke or encourage another to commit trespass or assault.
- Section 723.4(7) requires that the defendant have the "*intent to prevent or hinder*" lawful use of a public way by others.

By stark contrast, Section 723.4(2) includes no specific intent requirement. Rather, one is guilty of disorderly conduct under Section 723.4(2) if he is adjudged to have made "loud and raucous noise in the vicinity of any residence or public building which causes unreasonable distress to the occupants thereof." As Defendants have conceded, there is no requirement that the person charged with violation of Section 723.4(2) (1) *intended* that a listener would be unreasonably distressed, (2) *knew* that a listener would be unreasonably distressed, or (3) *should have known* that a listener would be unreasonably distressed. *See* Dkt. 19, at 8. This, along with the fact that a complainant's alleged "distress" upon hearing a noise may be caused by disagreement with the content or viewpoint of a speaker's expression, illustrates that Section 723.4(2) allows for a heckler's veto.

Additionally, there is no requirement that the person charged with violation of Section 723.4(2) *intended* to commit disorderly conduct, nor is there a requirement that the person *knew, or should have known*, that the noise that he was making would be subsequently deemed by a listener, police officer, prosecutor, judge, or jury to be "loud and raucous." So long as the person did not accidentally cause the noise (*e.g.*, by stumbling into a ladder that causes a loud crash), but rather intended the act that caused the noise (*e.g.*, by speaking), he may be convicted under Section 723.4(2), even in the complete absence of any intention to unreasonably disturb anyone.[5]

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 specific intent element, 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 declare the statute unconstitutionally overbroad and violative of the First Amendment rights of Plaintiffs and others not before this Court. The Legislature would be free to consider enacting new legislation that would pass constitutional muster and, in the interim, Defendants have other mechanisms within state and local codes and ordinances to maintain the peace within Johnson County and throughout Iowa. *See generally* Iowa Code (2019); Iowa City, City Code (2018).

[5] Previously, Defendants attempted to find an intent element in Section 723.4(2)—offering 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* Dkt. 19 at 7–8, 11–12 (emphasis added). *That, however, is not what the statute says*. Furthermore, focusing on the "loud and raucous noise" aspect of Section 723.4(2) ignores the key fact that there is no intent requirement for *causing unreasonable distress to a listener*. Consequently, it is not Plaintiffs' actions that determine violation of the statute; it is, instead, the reaction of the listener. Thus, the statute fails for its overbreadth, as Plaintiffs' have argued and as the Eighth Circuit's *Stahl* and *Duhe* decisions support. *See also, infra*, Section IV.a.

IV. IOWA CODE § 723.4(2) IS UNCONSTITUTIONALLY VAGUE.

Iowa Code § 723.4(2) violates the right to due process as it fails to provide adequate notice to enable ordinary citizens to understand what precise conduct it prohibits and, through its lack of precision, authorizes arbitrary and discriminatory enforcement. Section 723.4(2), 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.[6]

a. Iowa Code Section 723.4(2) Arbitrarily Leaves to Subjective Third Parties and Law Enforcement the Responsibility of Determining When a Violation has Occurred.

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."). Here, before those responsible for enforcing the law can determine whether Section 723.4(2) has been violated, they must decide whether the subjective reaction of a third party has ascended to some arbitrary, undefined standard. "Statutory language of such a standardless sweep allows policemen,

[6] Defendants concede Section 723.4(2) is *awkwardly* written. Dkt. 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).

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").[7]

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*, 902 F.3d 858 (8th Cir. 2018)). It is undisputed here that Plaintiffs' speech has been chilled because of prior enforcement and future threatened enforcement of Section 723.4(2) against them while conducting their pro-life activities. Dkt. 30, Undisputed Material Facts, ¶ 21.

Moreover, the ordinance in *Stahl* "lacked a *mens rea* requirement . . . ." *Duhe*, 902 F.3d at 864 (*aff'ing Stahl*, 687 F.3d at 1039). The ordinance was found vague not because of its

[7] The police officer himself, who cited Plaintiff Miano on May 30, 2017, for violating Section 723.4(2), acknowledged that what the law prohibits is "[s]ubjective, yeah . . ." Dkt. 30, Undisputed Facts, ¶ 33.

language—which made "fairly clear that speech and activities that actually cause a pedestrian or traffic obstruction are prohibited"—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 fails to provide fair notice of when the actor is in violation of it, turning instead on the reaction of a third party. This is unconstitutional. *See Duhe*, 902 F.3d at 864 (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").[8]

Iowa Code Section 723.4(2) fails to provide fair notice to Plaintiffs and others not before this Court as to whether their free speech activities on any given day will constitute a violation of the statute, as the threshold for violation is not determined until a third party reacts to Plaintiffs', or others', speech. Further troubling is the justification stated by the district court for the sentencing given to Plaintiff Miano for violating Section 723.4(2), when the court examined the *content* of

[8] Contrast Iowa Code § 723.4(2) with Iowa Code § 708.1, which defines Assault. The Code's definition for Assault contains a *mens rea* element: "an assault as defined in this section is a general intent crime." Iowa Code § 708.1(1). Iowa Code § 723.4(2) fails to provide any *mens rea* element. Furthermore, the Code's definition of Assault, similar to that of Disorderly Conduct, prohibits a person's actions as they relate to "another," but the determination of whether one has committed assault *does not hinge upon that other person's reaction*. What is more, one might be charged and convicted for assault even if the third party to whom the actor directs his activity is wholly unaware of those actions. In short, violation of the statute prohibiting assault depends solely on the behavior of the *actor*, whereas violation of Iowa Code § 723.4(2) for disorderly conduct turns entirely on the reaction of the *listener*. In fact, the actor is veritably unaware whether he has violated this code section until after he, or a law enforcement officer, learns of the reaction of a third party and finds it to constitute unreasonable distress (yet another subjective barometer). Section 723.4(2) fails to provide any fair notice to Plaintiffs and others as to when their actions may be punishable.

Plaintiff Miano's speech for the purpose of finding a sentence that would "get [Plaintiff Miano's] attention to not do this type of activity again." As the district court stated,

> And, you know, you weren't just standing there, . . . with a placard, you were standing there, . . . doing it in such a way that you can direct your words towards the people in Planned Parenthood, even so far as to try and talk people into not going in, and telling them that they should turn their lives over to Christ. . . . [P]eople that are going into Planned Parenthood, okay, you don't have to drop an F-bomb or you don't have to call them other curse words . . . ; but essentially telling them that they're sinners and that they should seek forgiveness for their sins, I could certainly see where that would be equally as offensive to people. . . . I'm not sure I distinguish the two, necessarily. I think some people would rather be called certain curse words than be told they're a sinner, that they should seek forgiveness for whatever they're doing.

Dkt 30, Undisputed Facts, ¶¶ 40–42. Plaintiffs are not before this Court to challenge Plaintiff Miano's past criminal conviction but do note that he was convicted without the State calling any witness who claimed to have been unreasonably distressed by his pro-life activities. Dkt. 30, Undisputed Facts, ¶ 38. Instead, Plaintiffs offer the context of Plaintiff Miano's citation, conviction, and sentencing to illustrate that the vagueness of the statute creates a real threat to, and imposes a real chilling effect upon, Plaintiffs and others not before this Court. They may well be prosecuted in the future under Section 723.4(2) without any advance warning as to what is actually proscribed, and what evidence may be weighed to determine their guilt or the gravity of their sentencing—*even including the very content of their speech*.

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

Plaintiffs' interests, and the interests of those not before the Court. *See Clary*, 165 F. Supp. 3d at 820–21 (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").

b. 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," 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."

i. Loud and Raucous Noise

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 there, 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 artificially

amplified sound, which, naturally, is likely to be substantially louder and/or more raucous than the unamplified sound at issue in Plaintiffs' situation. *See* Dkt. 30, Undisputed Material Facts, ¶ 13.

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 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.[9] It appears that it 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

[9] *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).

or modifiers exist in Section 723.4(2), leaving the restriction entirely—and unconstitutionally—vague.

Defendants have hinged their argument on the assertion that it is the volume of Plaintiffs' speech which is the linchpin for violation of the statute; according to Defendants, if Plaintiffs simply will not "yell," they should have no concern that Section 723.4(2) will be used against them. Dkt. 19. However, even if "yelling" were the line between protected and unprotected speech, which it is not, *Section 723.4(2) is not instructive as to when speech crosses that line.*[10] "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 intended law-abiding actions might turn criminal.

Indeed, although Plaintiff Miano admittedly used *loud* speech on the day he was cited while conducting his pro-life activities so that his message of peace and hope could be heard by those he sought to reach with his message, Dkt. 30, Undisputed Material Facts, ¶ 18, the stipulated record does not show, nor do the facts support, that Plaintiff Miano's activities were *raucous*. To the contrary, Plaintiff Miano, in his outreach to people inside and outside of the clinic, seeks not to create a ruckus or stress any individual but to "bring them peace," "bring them hope," and tell them "that there [is] hope for them in Jesus Christ." Dkt. 30, Undisputed Facts, ¶ 39. Plaintiff offers a message of peace and hope, *id*., does not physically impede ingress or egress from the clinic, *id*., Undisputed Material Fact ¶ 12, and uses no vulgar or swear words, *id*., Undisputed Fact ¶ 41. The word "raucous" conjures up images of drunken and boisterous revelry, not one seeking

[10] "Yelling," is not what causes a violation of Section 723.4(2). A violation of Section 723.4(2) turns on the reaction of a third party to the speech being uttered as discussed *supra*.

to share a message of peace and hope, and yet Plaintiff Miano was convicted under the statute, *id*., Undisputed Material Fact ¶ 15, even though the State did not call any witness who claimed that he or she was unreasonably distressed by Plaintiff Miano's pro-life activities, *id.*, Undisputed Fact ¶ 38. Plaintiffs and others are, as a result, left wondering whether the statute means what it says, that speech that is loud *and raucous* is prohibited, or whether it is only the volume of one's speech—and how a third party receives it—that actually matters. The statute fails to provide the fair notice required by the Constitution.

In fact, in the citation and prosecution of Plaintiff Miano for disorderly conduct, several varying reasons were given for his citation. At different points during the entirety of that process, it was asserted that Plaintiff Miano was cited because of one or more of the following various reasons:

- Plaintiff Miano had been warned about his pro-life activities before, Dkt. 30, Undisputed Facts, ¶ 34;
- Plaintiff Miano's voice crossed property lines and could be heard within [the nearby building's] walls, Dkt. 30, Undisputed Facts, ¶ 33;
- because of the "manner and effect of [Plaintiff Miano's] words and volume" on occupants of nearby buildings (determined without the enforcing officer testifying as to ever having spoken with anyone who claimed to be unreasonably distressed), Dkt. 30, Undisputed Facts, ¶ 37;
- Plaintiff Miano's voice was louder than an admittedly "subjective," yet somehow "reasonable" noise level, Dkt. 30, Undisputed Facts, ¶ 33;
- Plaintiff Miano had been given "previous warnings for loud, disruptive, and disturbing noise," Dkt. 30, Undisputed Facts, ¶ 36; and/or
- he was yelling too loudly, Dkt. 30, Undisputed Facts, ¶ 32.

One is unable to look at the stipulated record in this matter and determine with particularity why Plaintiff Miano was actually cited, and how he and others not before the Court should conduct themselves in the future—short of silencing their speech altogether—to prevent future prosecution.

In short, one is unable to define with particularity *what disorderly conduct is* under Section 723.4(2).

The vagueness of Section 723.4(2) is further illustrated by comparing the Eighth Circuit's holding in *Small v. McCrystal*, 708 F.3d 997 (8th Cir. 2013), with Defendants' position here. In *Small*, the Eighth Circuit held that "a reasonable officer would not have believed he had probable cause to arrest [plaintiff] Small for disorderly conduct" under Iowa Code § 723.4, noting that "[*h*]*e did not make a loud or raucous noise* or direct any abusive epithets; while *some witnesses heard him shout an obscenity* in general derogation of the County law enforcement, others heard nothing." *Small*, 708 F.3d at 1004 (emphasis added). In other words, the fact that the individual's "shout[ing]" was so loud that it was heard by multiple witnesses, who were able to understand that his shouting constituted "an obscenity," *did not* make his obscene shouting unlawful disorderly conduct, or even provide probable cause to believe that disorderly conduct had occurred. *See id.*

Here, by contrast, Defendants' position appears to be that (1) all audible shouting or yelling is *per se* "loud and raucous" (since Defendants have not given—and the code does not provide—any criteria for distinguishing between shouting that is loud and raucous and shouting that is not), and (2) an allegation that a person's audible shouting has caused someone else unreasonable distress provides a sufficient basis for a disorderly conduct arrest, charge, and prosecution (leaving the judge or jury to decide whether the distress caused was "unreasonable"). *See generally* Dkt. 19 at 1–4, 8 & Dkt. 19-1, at 1–2. This reading of Section 723.4(2) directly conflicts with *Small*. A person of ordinary intelligence is left to guess when Section 723.4(2) does and does not prohibit audible shouting that someone asserts is disturbing to themselves or someone else. *See also Powell v. Ryan*, 855 F.3d 899, 904 (8th Cir. 2017) (drawing a distinction between *Stahl*, in which the ordinance was unconstitutionally vague "because a violation depended on the reactions of third

parties," and the case before that court, where it was abundantly clear that the rules at issue categorically prohibited plaintiff's proposed conduct).

The critical danger of Section 723.4(2) is not *simply* that the statute prohibits "loud and raucous" noise without more; the danger is also 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 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. Public Building

The lack of a definition of "public building" is another 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 privately-owned buildings. Yet, under Iowa Supreme Court case law "public building[s]" may truly 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); *Ballentine's Law Dictionary* (3d ed.) (defining public building as "[a] building owned by a public body, particularly if it is used for public offices or for other public purpose").

Furthermore, it is widely understood by use of common vernacular that a public building

is one owned and operated by a governmental body: *e.g.*, public school, public library, and public art museum. *Cf. Black's Law Dictionary* (10th ed.) (defining "public place," as "[a]ny location that the local, state, or national government maintains for the use of the public, such as a highway, park, or *public building*.") (emphasis added). A plain reading of the statute leads one to understand that it applies to noise made outside residences, to be sure, and otherwise to government-owned places where the public is typically welcome. *See Ferezy v. Wells Fargo Bank, N.A.*, 755 F. Supp. 2d 1010, 1014–15 (S.D. Iowa 2010) (discussing the court's use of plain language and dictionaries to understand common meanings of words for statutory interpretation); and *McGill v. Fish*, 790 N.W.2d 113, 119 (Iowa 2010) ("Generally, we presume words used in a statute have their ordinary and commonly understood meaning. We rely on the dictionary as one source to determine the meaning of a word left undefined in a statute.") (citations omitted). The term "public building"—especially when viewed in light of Plaintiff Miano's citation and threats of citation made against Plaintiffs outside of a private building—is unconstitutionally vague.

iii. Unreasonable Distress

As previously stated, violation of Section 723.4(2) turns on whether a third party experiences "unreasonable distress," but the statute provides no additional explanation or definition as to what constitutes such distress. The caselaw is sparse: in *State v. Sinclair*, the Court of Appeals of Iowa found that a victim suffered unreasonable distress when an individual tried to enter the victim's residence without permission. 2013 Iowa App. LEXIS 774 (Iowa Ct. App. 2013). By contrast, in *Small v. McCrystal*, the Eighth Circuit found no evidence of unreasonable distress when the actor did not fight, display violent behavior, make "a loud or raucous noise or direct any abusive epithets," and "[a]ny gesture he made was not threatening." 708 F.3d at 1004. The term as written, and as applied, is unduly vague.

Additionally, Defendants' claim that Section 723.4(2) is not vague because the "unreasonable" qualifier means that the listener's "distress" "must rise to a level that society finds unacceptable," Dkt. 19 at 11, overlooks *the chilling impact, and prior restraint effect,* that the statute has on expression. Critically, a speaker who desires to exercise his constitutional rights while staying within the confines of the law has no basis for determining, *at the time of his or her expression*, whether his speech will, or will not, put him at risk of arrest, prosecution, and/or conviction due to a subsequent determination that a (then-hypothetical) complainant's purported distress level is one that "society finds unacceptable." Speakers may very well self-censor their expression in light of the unclear, vague line that Section 723.4(2) draws between what is permissible and what is criminal. *See, e.g.*, Dkt. 30, Undisputed Material Facts, ¶ 21 ("Plaintiffs Miano and Rolland have decreased the frequency of their pro-life activities on the public sidewalks outside abortion clinics in Johnson County . . . out of fear of future arrest and prosecution under Section 723.4(2).").

Also inapposite is Defendants' attempt to compare Section 723.4(2) to laws that prohibit reckless driving. Dkt. 19 at 11. Drivers are subject to many *specific, clear* requirements: a 60 MPH sign means that you cannot exceed 60 miles per hour, a double yellow line means that you cannot pass another driver, a red sign that says "STOP" means that you must come to a complete stop, etc. An individual can greatly reduce, or virtually eliminate, his or her risk of a conviction for reckless driving by simply following the well-defined rules of the road. By contrast, a more accurate comparison to Section 723.4(2) would be if the entirety of the traffic code consisted of one provision stating that one is guilty of engaging in reckless driving if he drives in "a fast manner that causes unreasonable risk to another person," with no MPH or STOP signs posted anywhere and no double yellow lines painted anywhere. Drivers would be left to self-regulate their own

actions under a cloud of uncertainty, without the ability to know in advance what types of behavior would be considered to be permissible or criminal by a prosecutor, judge, or jury, just as Section 723.4(2) leaves speakers in the position of having to guess about the degree to which they should self-censor their expression in order to minimize (but not eliminate) the risk of a disorderly conduct arrest, charge, or conviction.

As a whole, Section 723.4(2) is unconstitutionally vague and must be invalidated. *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. PLAINTIFFS SATISFY THE STANDARD FOR INJUNCTIVE RELIEF

Plaintiffs satisfy the elements for a permanent injunction to enjoin Defendants—and those acting at their direction or on their behalf—from enforcing Iowa Code § 723.4(2) against Plaintiffs and others not before this Court. "The standard for granting a permanent injunction is essentially the same as for a preliminary injunction, except that to obtain a permanent injunction the movant must attain success on the merits." *Bank One, Nat'l Ass'n v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999) (citing *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987)). The three other factors for the Court to weigh, common to both a preliminary and permanent injunction, are: "the threat of irreparable harm to the movant; [] the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; . . . and [] 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.*, 190 F.3d at 847. Plaintiffs have thoroughly addressed the merits of this action, *supra*,

and herein establish Plaintiffs' interests regarding the remaining three factors, warranting the issuance of a permanent injunction.

a. An Injunction Will Not Cause Substantial Harm

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. Since his conviction under Section 723.4(2), Plaintiff Miano has conducted his pro-life activities on a much more limited basis than he desires, due to his fear of future enforcement of the statute against him, Dkt. 30, Undisputed Material Facts, ¶ 21, 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, Dkt. 30, Undisputed Material Facts, ¶ 21; 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, including Plaintiffs. *See Elrod v. Burns* 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparably injury.") To the contrary, the public's right to receive information is harmed by the enforcement of unconstitutional speech restrictions. Notably, Defendants, in their resistance to Plaintiffs' motion for preliminary injunction, Dkt. 13-1 at 17–19, did not address, and therefore conceded, that the harm of chilling Plaintiffs' free speech outweighs any purported harm in opposing an injunction and striking down the statute.

b. 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 an injunction will not harm the public interest.

VI. CONCLUSION

The contention that Iowa Code § 723.4(2) will only be used against Plaintiffs again if they begin to yell while conducting their pro-life activities "reflects an 'undifferentiated fear or apprehension of disturbance which is not enough to overcome the right to freedom of expression.'" *Cohen*, 403 U.S. at 23 (quoting *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 508 (1969)). The statute sweeps protected speech into its ambit and has been enforced, and threatened to be enforced, against Plaintiffs while conducting their pro-life activities that include speech and expression protected by the First Amendment. The statute, additionally, fails to provide fair notice to Plaintiffs and others not before this Court as to what action is prohibited under its purview, and gives unfettered discretion to law enforcement and third parties to determine when violation has occurred. The Court should invalidate Iowa Code § 723.4(2), as it does not pass any measure of

constitutional muster, and grant Plaintiffs the relief sought in their Verified Complaint. Dkt. 1 at 12-13.[11]

Dated: April 10, 2019.

Respectfully submitted,

/s/ Michelle K. Terry

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[11] Among the relief this Court may grant Plaintiffs as the prevailing parties is an award of attorneys' fees and costs, *e.g.*, 42 U.S.C. § 1988; Dkt. 1, ¶ 15; Dkt. 17, ¶ 15, and Defendants should be required to provide public notice of the unconstitutionality of Section 723.4(2) to the law enforcement entities under their supervision to protect Plaintiffs' rights and those of others not before this Court across the State, Dkt. 1, ¶¶ 19-20, Dkt. 17, ¶¶ 19-20.

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. 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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