IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT 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.	**No. 3:18-cv-00110-RGE-HCA** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ENTRY OF JUDGMENT**

I. INTRODUCTION

To express their pro-life views, Plaintiffs Anthony Miano and Nicholas Rolland read aloud from the Bible and preach on public sidewalks outside abortion clinics, sometimes at high volumes. Under Iowa Code § 723.4(2), a person commits the misdemeanor of disorderly conduct when the person "[m]akes loud and raucous noise in the vicinity of any residence or public building which causes unreasonable distress to the occupants thereof." Fearing prosecution under this statute, Plaintiffs seek a declaratory judgment that Iowa Code § 723.4(2) is unconstitutionally vague—both on its face and as applied—and unconstitutionally overbroad. They also move to permanently enjoin Defendants Iowa Attorney General Thomas Miller and Johnson County Attorney Janet Lyness from enforcing the statute. The Court concludes Iowa Code § 723.4(2) is unconstitutionally vague on its face and as applied. Accordingly, the Court declares Iowa Code § 723.4(2) unconstitutional.

II. BACKGROUND

A. Procedural History

In November 2018, Plaintiffs filed a complaint alleging Iowa Code § 723.4(2) is unconstitutionally overbroad (Count I) and unconstitutionally vague (Count II), both on its face and as applied to them. Compl., ECF No. 1. Plaintiffs seek a declaratory judgment that Iowa Code § 723.4(2) violates their First and Fourteenth Amendment rights, a permanent injunction preventing Defendants from enforcing Iowa Code § 723.4(2), an order that Defendants must provide public notice of the unconstitutionality of § 723.4(2), and an award of costs and reasonable costs and attorneys' fees. *Id.* ¶ 67. Plaintiffs have separately moved for a preliminary injunction, which Defendants resist. Pls.' Mot. Prelim. Inj., ECF No. 13; Pls.' Br. Supp. Mot. Prelim. Inj., ECF No. 13-1; Defs.' Resist. Pls.' Mot. Prelim. Inj., ECF No. 19; Pls.' Reply Br. Supp. Mot. Prelim. Inj., ECF No. 21. With the consent of the parties, the Court consolidated Plaintiffs' motion for a preliminary injunction with a bench trial on the merits. *See* Scheduling & Trial Setting Order, ECF No. 26; *see also* Fed. R. Civ. P. 65(a)(2).

On April 24, 2019, the Court presided over a bench trial to resolve Plaintiffs' claims. *See* Bench Trial Mins., ECF No. 33; *see also* Defs.' Trial Br., ECF No. 31; Pls.' Trial Br., ECF No. 32; Bench Trial Tr., ECF No. 34. Attorneys Michelle Terry, Edward White, and Geoffrey Surtees appeared for Miano and Rolland. ECF No. 33. Assistant Attorney General for the State of Iowa Thomas Ogden appeared on behalf of Miller. *Id.* Attorney Robert Livingston appeared on behalf of Lyness. *Id.* The parties submitted this case on a stipulated record and agreed every fact set out in their joint statement is true, accurate, and undisputed. *See* Joint Statement Undisputed Facts, ECF No. 30.

B. Findings of Fact

Because there are no facts in dispute, the Court adopts the parties' joint statement of facts as its factual findings for the purpose of adjudicating Plaintiffs' claims. *See* ECF No. 30.

Plaintiffs are Iowa residents who engage in "pro-life activities" on public property outside abortion clinics in Iowa. ECF No. 30 ¶¶ 2–3, 7–8. Their activities include reading aloud from the Bible and open-air preaching. *See id.* ¶ 1.[1] They do not physically impede individuals from entering or leaving the clinics. *Id.* ¶ 12. And they do not use sound amplification. *Id.* ¶ 13.

Law enforcement officers have threatened to cite Plaintiffs under § 723.4(2) for reading or preaching too loudly on public sidewalks outside abortion clinics. *Id.* ¶¶ 22–25. That section of the Iowa Code provides: "A person commits a simple misdemeanor when the person . . . [m]akes loud and raucous noise in the vicinity of any residence or public building which causes unreasonable distress to the occupants thereof." Iowa Code § 723.4(2). Defendants Thomas Miller, Attorney General of the State of Iowa, and Janet Lyness, County Attorney for Johnson County, Iowa, are tasked with enforcing § 723.4(2), as they are all provisions of the Iowa Code. *See* Iowa Code §§ 13.2(1)(b), (g), 331.756(1); ECF No. 1 ¶¶ 19–20; Answer ¶¶ 19–20, ECF No. 17.

Miano has also been cited, prosecuted, and convicted under § 723.4(2) in Johnson County, Iowa. On May 30, 2017, Miano was reading aloud from the Bible with a raised voice on the public sidewalk outside of the Planned Parenthood Iowa City Health Center. ECF No. 30 ¶ 16. He was

[1] Plaintiffs' broadly define "pro-life activities" to include "reading aloud from the Bible, open-air preaching, speaking to individuals as they walk to and from the clinics, literature distribution, and sign-holding." *See* ECF No. 30 ¶ 1. But the only activities § 723.4(2) even arguably reaches are reading aloud from the Bible and open-air preaching. Accordingly, the Court construes the parties' arguments as limited to Plaintiffs' activities of reading aloud from the Bible and open-air preaching.

standing on a step-ladder that elevated his head and shoulders above the six-foot tall fence outside the clinic. *Id.* While Miano was reading from the Bible, a law enforcement officer arrived and told Miano he was yelling too loudly and disrupting people inside the clinic. *Id.* ¶ 32. Miano asked the officer if a "particular noise level" was prohibited. *Id.* ¶ 33. The officer replied, "It's reasonable, so . . . if it's disrupting or causing, I think, distress to the occupants in the building, it's crossing property lines and all that stuff." *Id.* ¶ 33 (omission in original). When Miano asked the officer if it was a somewhat subjective standard, the officer responded, "Subjective, yeah. . . . It has to be reasonable, correct. . . . If you're yelling so that it's . . . they can hear it within their walls, then it is crossing property lines and causing distress to the occupants of the building, okay.'" *Id.* (omissions in original). The officer then cited Miano for disorderly conduct under § 723.4(2). *Id.* ¶¶ 16, 32–34. The officer did not cite Rolland, who was also present but not standing on a ladder or speaking with a raised voice. *Id.* ¶ 16.

Miano was tried before a jury in the Iowa District Court for Johnson County. *See id.* ¶¶ 15, 18. At trial, attorneys with the Johnson County Attorney's Office called a senior manager of the clinic who testified patients at the clinic could hear Miano's yelling from inside the clinic and appeared distressed by it. *Id.* ¶ 35. Prosecutors also called the citing officer, who testified he issued Miano the citation based on Miano's statements, statements from security personnel at Planned Parenthood, previous warnings issued to Miano for loud, disruptive, and disturbing noise, and the manner and volume of Miano's words and their effect on occupants of nearby buildings. *Id.* ¶¶ 36–37. The officer did not identify anyone who claimed to have suffered unreasonable distress, and prosecutors did not call a witness to testify to his or her unreasonable distress. *Id.* ¶¶ 35, 37. The jury found Miano guilty of violating § 723.4(2). *See id.* ¶¶ 15, 18; ECF No. 1 ¶ 35–36.

At sentencing, Miano emphasized he had not used any swear words or abusive epithets. ECF No. 30 ¶ 41. The sentencing judge responded that Miano was telling people entering the clinic they were sinners, which "would be equally as offensive to people." *Id.* The judge imposed a suspended sentence, telling Miano the suspended sentence would serve as a "threat of jail, that hammer over [Miano's] head" so that Miano would "not do this type of activity again." *Id.* ¶ 42. Since Miano's prosecution and conviction, Defendants have threatened to enforce § 723.4(2) against Plaintiffs while Plaintiffs were open-air preaching and reading aloud from the Bible outside of abortion clinics in Johnson County. *Id.* ¶¶ 24–25.

Miano did not appeal his conviction and disavows any attempt to challenge it here. *See* ECF No. 32 at 22. Instead, Miano and Rolland have sued Defendants under 42 U.S.C. § 1983 for prospective relief against future enforcement of § 723.4(2). *See* ECF No. 1.

Additional facts are set forth below as necessary.

III. CONCLUSIONS OF LAW

The Court first concludes Plaintiffs have standing to bring their claims. The Court then turns to Plaintiffs' claim that Iowa Code § 723.4(2) is unconstitutionally vague on its face and as applied to them. The Court concludes § 723.4(2) is unconstitutionally vague on its face and as applied to Plaintiffs. In light of this conclusion, the Court does not decide Plaintiffs' overbreadth claim, which seeks the same relief as Plaintiffs' vagueness claim.

A. Standing

At the outset, Defendants challenge Plaintiffs' standing to bring their claims, contending Plaintiffs have not suffered a cognizable injury because they do not face a credible threat of prosecution for their conduct. ECF No. 31 at 4–8. To establish standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct

of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The parties primarily dispute whether Plaintiffs have demonstrated an injury in fact. "To establish injury in fact, a plaintiff must show he suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

"In the First Amendment context, 'two types of injuries may confer Article III standing to seek prospective relief.'" *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (quoting *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003)). First, a plaintiff can establish standing by demonstrating "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." *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014) ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law."). Second, a plaintiff "can establish standing by alleging that [the plaintiff] self-censored." *Missourians for Fiscal Accountability*, 830 F.3d at 794.

Defendants argue Plaintiffs cannot demonstrate they are chilled from reading aloud from the Bible or open-air preaching because Iowa Code § 723.4(2) does not prohibit those activities. ECF No. 31 at 5–8. It is true that § 723.4(2) does not specifically prohibit reading aloud from the Bible or open-air preaching. It is also true that Plaintiffs have not specifically articulated an intent to make any "loud and raucous noise in the vicinity of any residence or public building which causes unreasonable distress to the occupants thereof." Iowa Code § 723.4(2). But a plaintiff need

not demonstrate his conduct is certainly prohibited by the statute he challenges; he need only demonstrate his conduct arguably falls under the statute's scope or that, even if it does not, he faces a nontrivial probability of prosecution under the statute. *See Schirmer v. Nagode*, 621 F.3d 581, 587 (7th Cir. 2010) (reasoning a plaintiff may demonstrate standing to challenge a statute that does not on its face cover the plaintiff's conduct if the plaintiff nonetheless shows a nontrivial probability of prosecution); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (reasoning a plaintiff will establish standing if "the plaintiff's intended speech arguably falls within the statute's reach"); *cf. Republican Party of Minn. v. Klobuchar*, 381 F.3d 785, 792–93 (8th Cir. 2004) (reasoning a plaintiff cannot demonstrate standing if the challenged statute does not contain language that can be arguably construed to prohibit plaintiff's conduct).

The facts in this case demonstrate Plaintiffs' conduct is arguably prohibited by § 723.4(2) and Plaintiffs credibly fear prosecution for that conduct. While engaging in open-air preaching and reading aloud from the Bible, Plaintiffs have been warned about possible future enforcement of § 723.4(2). ECF No. 30 ¶ 20. Miano has also been prosecuted and convicted under § 723.4(2) for loudly reading from his Bible. *Id.* ¶ 15–16. Granted, past prosecution and conviction do not automatically confer standing—Plaintiffs must also show that they face "a real and immediate threat" they will "again suffer similar injury in the future." *Frost v. City of Sioux City*, 920 F.3d 1158, 1161 (8th Cir. 2019) (quoting *Mosby v. Ligon*, 418 F.3d 927, 933 (8th Cir. 2005)); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 107 (1983) (reasoning a defendant's past conduct cannot provide standing for a plaintiff's claims for prospective relief absent an indication the defendant was likely to engage in the same conduct in the future). But Plaintiffs have made this showing. Plaintiffs intend to continue engaging in activities that could lead to prosecution

under § 723.4(2) and they have been threatened with enforcement since Miano's prosecution. *See* ECF No. 30 ¶¶ 24–29. Another judge in this District has previously concluded that similar facts—a history of enforcement coupled with indications law enforcement officers intend to enforce the statute in the future—established standing to challenge flag desecration and misuse statutes. *See Phelps v. Powers*, 63 F. Supp. 3d 943, 950–51 (S.D. Iowa 2014) (Pratt, J.).

And Defendants have not disavowed the prior warnings or otherwise shown that Plaintiffs would not be warned, cited, or prosecuted under Iowa Code § 723.4(2) for continuing to engage in the same activities that resulted in warnings, a citation, a prosecution, and a conviction in the past. *Cf. 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."). Thus, Plaintiffs face at least a nontrivial likelihood their conduct will be treated as unlawful in the future. *Cf. Schirmer*, 621 F.3d at 587.

Moreover, Plaintiffs have decreased the frequency of their Bible readings and open-air preaching out of fear they will be arrested and prosecuted for violating § 723.4(2). ECF No. 30 ¶ 21. Their decision to reduce the frequency of these activities is an objectively reasonable response to being warned their conduct violates the statute. That self-censorship is also sufficient to establish standing. *See Missourians for Fiscal Accountability*, 830 F.3d at 794–95.

Finally, Plaintiffs have also demonstrated the other elements of standing—traceability and redressability. Defendants enforce Iowa Code § 723.4(2). *See* Iowa Code §§ 13.2(1)(b),(g), 331.756(1); *see generally* ECF No. 1 ¶¶ 19–20; ECF No. 17 ¶¶ 19–20. And declaratory or injunctive relief would redress Plaintiffs' injury by preventing Defendants from enforcing Iowa Code § 723.4(2) against them in the future.

For these reasons, Plaintiffs have standing to bring this suit.

B. Vagueness (Count II)

The Court next turns to the merits of Plaintiffs' vagueness claim. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause guarantees the "fundamental principle in our legal system" that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Accordingly, the Due Process Clause "requires the invalidation of laws that are impermissibly vague." *Id.*

A 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.'" *Duhe v. City of Little Rock*, 902 F.3d 858, 863 (8th Cir. 2018) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). Requiring a statute to provide such notice "addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox*, 567 U.S. at 253.

The requirements of due process are especially stringent when statutes regulate speech and carry criminal penalties. "When speech is involved, rigorous adherence to [due process] requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* at 253–54; *see also Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) ("[W]here a statute imposes criminal penalties, the standard of certainty is higher."); *Stahl v. City of St. Louis*, 687 F.3d 1038, 1041 (8th Cir. 2012) (alterations in original) (noting "[a] law's failure to provide fair notice of what

constitutes a violation is a special concern where laws 'abut[] upon sensitive areas of basic First Amendment freedoms.'" (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972))); *cf. Powell v. Ryan*, 855 F.3d 899, 902–03 (8th Cir. 2017).

To succeed on a facial vagueness challenge, the plaintiff must demonstrate that the law is "impermissibly vague in all of its applications" or that it reaches "a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982); *see also Kolender*, 461 U.S. at 358 n.8. In determining whether a statute is facially vague, the "plain meaning of the text controls." *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 688 (8th Cir. 2012) (internal quotation omitted); *see also United States v. Stevens*, 559 U.S. 460, 474–75 (2010) (reasoning words "should be read according to their ordinary meaning"). But because "[t]he inherent uncertainty of language often will impart some degree of vagueness to a statute . . . . [r]ecourse to additional sources like dictionaries or judicial opinions may provide sufficient warning." *Neely v. McDaniel*, 677 F.3d 346, 350 (8th Cir. 2012). A federal court reviewing a facial challenge to a state law must also "consider any limiting construction that a state court or enforcement agency has proffered." *Ward v. Rock Against Racism*, 491 U.S. 781, 795–96 (1989) (quoting *Village of Hoffman Estates*, 455 U.S. at 494 n.5).

Further, a law may be unconstitutionally vague if it criminalizes conduct based on the unpredictable reactions of third parties. In *Coates v. City of Cincinnati*, for example, the Supreme Court struck down as unconstitutionally vague a city ordinance that made it a criminal offense for "'three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by.'" 402 U.S. 611, 611 (1971) (omissions in original) (quoting Code of Ordinances of the City of Cincinnati § 901—L6 (1956)). Because "[c]onduct that annoys some people does not annoy others," the Court found the ordinance failed to specify

an ascertainable standard, leaving potential violators to guess at its meaning. *Id.* at 614.

Criminal prohibitions that hinge on the reactions of third parties are especially vulnerable when they lack a mens rea requirement. In *Stahl*, for example, the Eighth Circuit struck down a city ordinance that prohibited certain conduct including speech "on any street . . . [the] consequence[] of which . . . is such a gathering of persons or stopping of vehicles as to impede either pedestrians or vehicular traffic." 687 F.3d at 1039 (quoting St. Louis, Mo., Code § 17.16.270). The Court held the statute failed to "provide people with fair notice of when their actions are likely to become unlawful" because "the speaker does not know if his or her speech is criminal until after" traffic has been obstructed. *Id.* at 1041. These concerns were compounded by the ordinance's lack of a mens rea requirement. *Id.* As the Court noted, "violation of the ordinance does not hinge on the state of mind of the potential violator, but the reaction of third parties." *Id.* This lack of notice was "especially problematic because of the ordinance's resulting chilling effect on core First Amendment speech." *Id.*

Turning to Iowa Code § 723.4(2), the Court finds it suffers from the same defects as the ordinance in *Stahl*. As in *Stahl*, a precondition to violating § 723.4(2) is the unpredictable reaction of a third party—here, "unreasonable distress to the occupants" of a nearby public building or residence. And like the ordinance in *Stahl*, § 723.4(2) has no mens rea requirement. A person could violate § 723.4(2) without intentionally, knowingly, or recklessly causing anyone distress. Indeed, a violation does not even require knowledge that nearby structures were occupied. In these circumstances, potential violators are left guessing what conduct violates the statute. *See Coates*, 402 U.S. at 614. These defects are especially acute because § 723.4(2) regulates core First Amendment activity. Defendants concede that "loud and raucous" speech is protected by the First Amendment. *See* ECF No. 34 at 26:3–5; *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753,

772–73 (1994). And § 723.4(2) criminalizes all "loud and raucous" speech that takes place in the vicinity of public buildings or residences, subject only to the unknowable reactions of a third parties. Without any mens rea tying a violation to these third-party reactions, § 723.4(2) threatens a significant "chilling effect on core First Amendment speech." *Stahl*, 687 F.3d at 1041.

Defendants resist this conclusion for three primary reasons. First, Defendants argue § 723.4(2) has a mens rea because Iowa courts read a general intent requirement into statutes that have no express mens rea. *See* ECF No. 31 at 10; ECF No. 34 at 33:9–17. The Court recognizes that under Iowa law "offenses which have no express intent elements may be characterized as general intent crimes." *Eggman v. Scurr*, 311 N.W.2d 77, 79 (Iowa 1981); *see also State v. Schultz*, 50 N.W.2d 9, 11 (Iowa 1951) (noting that for the Iowa legislature to eliminate intent requirements from a statute it must make a clear statement to that effect); *accord* Iowa Model Criminal Jury Instrs. § 200.1 (2018). But a general intent mens rea does not save § 723.4(2). Applied to § 723.4(2), a person acts with general intent so long as he or she voluntarily makes a "loud and raucous noise" in the vicinity of a public building or residence. *See Eggman*, 311 N.W.2d at 79–80. Even with this general intent requirement, a violation of § 723.4(2) requires no intent, knowledge, or recklessness as to the "unreasonable distress" that noise produces. *See id.* In *Stahl*, the Court did not fault the St. Louis ordinance for punishing involuntary actions. Rather, the ordinance was unconstitutional because it contained no mens rea as to the *result* of those actions (impeding traffic), which triggered a statutory violation. *See Stahl*, 687 F.3d at 1041. Here too, § 723.4(2) has no mental state requirement as to the "unreasonable distress" element. Reading a general intent requirement into the statute does not alleviate this problem.

Second, Defendants argue the word "unreasonable" creates an objective standard that distinguishes § 723.4(2) from laws that hinge on the unpredictable reactions of third parties.

See ECF No. 31 at 13. Specifically, Defendants contend the word "unreasonable" ensures that "the level of distress is not determined by the idiosyncrasies of the occupant but must rise to a level that society finds unacceptable." *Id.* "Unreasonable" is not an inherently vague term. In *Duhe*, for example, the Eighth Circuit upheld Arkansas's disorderly conduct statute, which prohibited making "unreasonable or excessive noise" "with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk of public inconvenience, annoyance, or alarm." 902 F.3d at 862–64 (quoting Ark. Code Ann. § 5-71-207(a)(2)). In doing so, the Court rejected the argument that "unreasonable or excessive noise" was unconstitutionally vague, reasoning that "unreasonably" is a "widely understood restriction[]" which "require[s] no guess[ing]." *Id.* at 864 (third alteration in original) (internal quotation omitted). The reasoning in *Duhe* does not salvage § 723.4(2). Notably, the statute in *Duhe* had a mens rea requirement. Indeed, the plaintiff in *Duhe* argued the Arkansas statute was unconstitutionally vague under *Coates* and *Stahl*, but the Eighth Circuit disagreed "primarily because [the statute] contains a *mens rea* requirement." *Id.* at 864.

More generally, the problem with Iowa Code § 723.4(2) is not its use of imprecise terms. Rather, § 723.4(2) is unconstitutionally vague because it criminalizes conduct based on the reactions of third parties and requires no mens rea as to those reactions. In *Stahl*, the Court noted the St. Louis ordinance was "not vague in the traditional sense that its language is ambiguous." 687 F.3d at 1041. Instead, "the problem is that the ordinance does not provide people with fair notice of when their actions are likely to become unlawful." *Id.* Here, the word "unreasonable" may place an objective constraint on third-party reactions and mitigate the potential for a "heckler's veto." But it does not alleviate the fundamental problem that "the speaker does not know if his or her speech is criminal until after [the third-party reaction] occurs." *Id.* And it was this defect, rather than the potential for a heckler's veto, that drove the Court's decision in *Stahl*.

See Stahl, 687 F.3d at 1041–42.

Third, Defendants argue a person who intentionally makes a loud and raucous noise in the vicinity of a residence or public building is on notice, by virtue of engaging in such conduct, that he or she may cause "unreasonable distress to the occupants thereof." ECF No. 31 at 13. Defendants rely on *Powell v. Ryan*, where the Eighth Circuit rejected a vagueness challenge to state fairground rules that prohibited "activity" that "impede[d] the flow of people into, out of, or within the Fairgrounds" and bringing to the fair "a sign . . . attached to any kind of pole or stick." 855 F.3d at 901–02. The Court held the plaintiff was on clear notice that his conduct—carrying and displaying signs on poles on sidewalks outside fair entrances—violated the rules. *Id.* at 903. The Court distinguished the plaintiff's conduct in *Stahl*—displaying a sign from an overpass—as follows:

> 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. If Stahl had been standing in the highway rather than on an overpass, then his case would have been quite different.

Id. at 904.

The Court finds *Powell* is of little relevance here. *Powell* was an as-applied challenge involving specific "activity" that was clearly prohibited under the state fair rules. *See id.* at 903–04. It also dealt with rules that carried no civil or criminal penalties—a context where "due process requires less precision." *Id.* at 903. To the extent *Powell* does apply here, it further illustrates why *Stahl* governs. As Defendants note, *Powell* suggests a person holding a sign on a pole and standing on a sidewalk outside a fair entrance during a fair knows by virtue of his conduct that he is violating rules barring signs on poles and "imped[ing] the flow of people into, out of, or within the Fairgrounds." *See id* at 901–02, 904. But as *Powell* recognized, a person

displaying a sign on an overpass—as opposed to standing in the highway—does not always know if his conduct will obstruct traffic. *See id.* at 904. In *Stahl* itself, the Eighth Circuit noted "there are certainly times when a speaker knows or should know that certain speech of activities likely will cause a traffic problem," but "in many situations such an effect is difficult or impossible to predict." 687 F.3d at 1041. The same is true for someone making a "loud and raucous noise in the vicinity of a public building or residence." In some circumstances—*e.g.*, loudly protesting at 3 a.m. in a residential neighborhood—the speaker should know "unreasonable distress" to the residential occupants is likely. But in many other circumstances—*e.g.*, loudly protesting in the middle of the day in a public square—the speaker may be left guessing whether the conduct violates § 723.4(2).

This uncertainty also expands the potential for arbitrary and discriminatory enforcement. *See Fox*, 567 U.S. at 253. When conduct unquestionably falls within a rule or statute, as in *Powell*, the existence of a violation is not subject to discretion. *See Powell*, 855 F.3d at 904. But when conduct may or may not fall within a statute, the risk of selective enforcement is higher. *See Coates*, 402 U.S. at 615–16 (noting statute created "an obvious invitation to discriminatory enforcement"); *cf. Stahl*, 687 F.3d at 1041 ("[R]egulations that do not provide citizens with fair notice of what constitutes a violation disproportionately hurt those who espouse unpopular or controversial beliefs."). Here, Iowa Code § 723.4(2) does not establish when "loud and raucous" noise causes "unreasonable distress." Although the distress must be "unreasonable," this standard provides little shelter for a speaker who does not know who, if anyone, is listening. And this uncertainty provides the potential for third parties and law enforcement officers to invoke § 723.4(2) based on the content of speech, rather than its volume. *See Stahl*, 687 F.3d at 1041.

Defendants also point to Iowa's reckless driving and vehicular homicide laws to support

their argument that violators of § 723.4(2) are on notice, by virtue of creating loud and raucous noise, that they may cause unreasonable distress. ECF No. 19 at 11. Defendants note that reckless driving, which is normally a misdemeanor, becomes a felony if the driver unintentionally causes death. *Id.*; *see* Iowa Code §§ 321.277, 707.6A(2)(a). Defendants argue Iowa's disorderly conduct statute, § 723.4(2), similarly operates to criminalize conduct based on its effect on third parties. ECF No. 19 at 11; *see also* ECF No. 34 at 39:6–41:10 (making a similar argument for laws that increase penalties based on serious bodily injury).

The Court does not find Iowa's reckless driving and vehicular homicide laws analogous to § 723.4(2)—chiefly because those laws have a mens rea requirement. A driver commits reckless driving when he or she "drives any vehicle in such manner as to indicate either a willful or a wanton disregard for the safety of persons or property." Iowa Code § 321.277. Only a driver with this mental state can be liable for unintentionally causing a homicide. Iowa Code § 707.6A(2)(a). If Iowa's disorderly conduct statute required persons making loud and raucous noise to act with "either a willful or a wanton disregard" for the distress of nearby occupants, it would likely be constitutional. *See Duhe*, 902 F.3d at 864 (distinguishing *Stahl* and holding statute was not unconstitutionally vague because it required intent or recklessness as to reactions of third parties). But § 723.4(2) does not contain this—or any—mens rea.

Finally, the Court notes Defendants have not provided a limiting construction from Iowa courts that would save § 723.4(2). Federal courts will normally defer to state court decisions on the meaning of state statutes. *See Grayned*, 408 U.S. at 111. But Defendants do not cite—and the Court does not find—any published Iowa cases interpreting Iowa Code § 723.4(2). In the absence of a limiting construction from Iowa courts, the Court relies on the plain language of the statute. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a

narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine [of vagueness] demands a greater degree of specificity than in other contexts."); *accord Clary v. City of Cape Girardeau*, 165 F. Supp. 3d 808, 819 (E.D. Mo. 2016) (reasoning that a lack of textual definition or state court guidance on the terms "annoy" and "disturb the quiet, comfort or repose" contributed to a city ordinance's unconstitutional vagueness).

For these reasons, the Court concludes § 723.4(2) is unconstitutionally vague on its face. Given this conclusion, the Court only briefly addresses Plaintiffs' as-applied challenge. As noted earlier, Plaintiffs are not challenging Miano's conviction, which he did not appeal. ECF No. 32 at 22. Instead, Plaintiffs ask the Court to look to Miano's prosecution as an example of how Defendants apply § 723.4(2) and to hold that application unconstitutional. *See id.*; ECF No. 1 ¶ 67; *cf. Deegan v. City of Ithaca*, 444 F.3d 135, 140–41 (2d Cir. 2006) (holding ordinance unconstitutional as applied to plaintiff based on parties' stipulation as to how enforcement authorities interpreted and applied ordinance).

The undisputed facts of Miano's prosecution demonstrate that Johnson County authorities apply § 723.4(2) to speech like Plaintiffs' preaching and reading in a way that provides insufficient notice as to when loud speech runs afoul of the statute. The officer who cited Miano did not identify any individual who experienced distress and did not explain to Miano why that distress was unreasonable. *See* ECF No. 30 ¶¶ 32–33. Rather, he suggested any speech crossing property lines and subjectively distressing occupants of nearby buildings was a violation of § 723.4(2). *See id.* At Miano's trial, the prosecution did not call a witness who testified to experiencing distress. *Id.* ¶ 35. Instead, Planned Parenthood's senior manager for safety and security testified he could hear Miano's yelling from inside the clinic and noticed that other occupants "appeared to be

distressed by it." *Id.* Without learning who was distressed and why that distress was unreasonable, a speaker in Miano's position cannot know when, if ever, he can engage in loud speech that does not violate the statute. *Cf. Deegan*, 444 F.3d at 146 ("Defendants' unpredictable construction and application of the ordinance . . . deprived [plaintiff] of his right to understand what conduct violated the law.").

Moreover, the absence of a standard for determining when loud speech causes unreasonable distress opens the door for arbitrary or discriminatory enforcement. Miano's prosecution demonstrates the risk that building occupants in Johnson County can call the police when they hear loud speech they dislike, and the speaker may be subject to citation, prosecution, and conviction so long as the grievant says someone inside experienced distress. The sentencing judge's remarks further illustrate the potential for discriminatory enforcement. In addressing Miano's argument that he did not swear or use abusive epithets, the judge responded Miano was calling people in the clinic "sinners," which would be "offensive" to those people. ECF No. 30 ¶ 41. But "speech cannot be restricted simply because it is upsetting or arouses contempt." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). For these reasons, Iowa Code § 723.4(2) is also unconstitutionally vague as it is applied to loud speech like Plaintiffs' open-air preaching and Bible readings.

C. Facial Overbreadth (Count I)

Plaintiffs also assert Iowa Code § 723.4(2) is facially overbroad. ECF No. 32 at 11–18. The Free Speech Clause of First Amendment to the United States Constitution, incorporated against the states by the Fourteenth Amendment, forbids governmental entities from "abridging the freedom of speech." U.S. Const. amend. I. Recognizing that "free expression may be inhibited almost as easily by the potential or threatened use of power as by the actual exercise of that

power," an individual may challenge the facial overbreadth of a statute under the First Amendment. *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988).

Facial overbreadth and vagueness are "logically related and similar doctrines." *Kolender*, 461 U.S. at 358 n.8. To succeed on a facial overbreadth challenge, "the plaintiff must demonstrate that the challenged law either 'could never be applied in a valid manner' or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.'" *N.Y. State Club Ass'n, Inc.*, 487 U.S. at 11 (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984)); *accord Stevens*, 559 U.S. at 472–73.

Because the Court finds § 723.4(2) unconstitutionally vague, the Court need not consider Plaintiff's overbreadth claim. Plaintiffs seek the same relief on each Count, and the Court's conclusion on vagueness entitles Plaintiffs to this relief. *See, e.g., Hill v. McDermott*, No. 16–03804 (SRN), 2017 WL 4736714, at *7 (D. Minn. Oct. 19, 2017) ("A court need not reach issues that would be redundant or unnecessary to its ultimate determination."), *aff'd sub nom. Hill v. Snyder*, 919 F.3d 1081 (8th Cir. 2019); *cf. Stahl*, 687 F.3d at 1039, 1042 (holding ordinance unconstitutionally vague and not reaching First Amendment challenge).

D. Relief

Having concluded Iowa Code § 723.4(2) is unconstitutionally vague, the Court turns to the appropriate remedy. Plaintiffs request declaratory and injunctive relief and a requirement that Defendants provide notice of Iowa Code § 723.4(2)'s unconstitutionality to law enforcement entities under their supervision. *See* ECF No. 1 ¶ 67.

The Court grants Plaintiffs' request for declaratory relief and declares Iowa Code § 723.4(2) unconstitutionally vague on its face and as applied. The Court declines, however,

to issue any injunctive relief because it assumes Iowa prosecutorial authorities and their agents will give full credence to the Court's holding that Iowa Code § 723.4(2) is unconstitutionally vague on its face. *See, e.g.*, *Phelps*, 63 F. Supp. 3d at 958 (declining to grant injunctive relief with the assumption the relevant authorities would give full credence to the Court's decision); *accord Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 97 (1992) (White, J., concurring). The Court further assumes Defendants will provide notice of this Court's holding to law enforcement entities under their supervision.

Plaintiffs also request attorneys' fees and costs. ECF No. 1 ¶ 67. Plaintiffs have succeeded on significant issues in the litigation—namely, their facial and as-applied vagueness challenges. They are therefore entitled to reasonable attorneys' fees and costs under 42 U.S.C. § 1988(b). *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Plaintiffs are ordered to submit a bill of costs and the amount of requested attorneys' fees within fourteen days of the entry of this order for a judicial determination of reasonableness. Fed. R. Civ. P. 54(d)(2); *see also* LR 54; LR 54A.

V. CONCLUSION

Plaintiffs Anthony Miano and Nicholas Rolland have been told their conduct runs afoul of Iowa Code § 723.4(2). They credibly face prosecution, as it is plain they plan to continue engaging in the same conduct. Accordingly, they have standing to bring their claims.

On the merits, Iowa Code § 723.4(2) is unconstitutionally vague on its face because it subjects speakers to criminal punishment based on the reactions of third parties, while requiring no mens rea on the part of the speaker. It is also vague as applied because Defendants enforce the statute in a way that gives Plaintiffs insufficient notice of when their speech violates the statute. Thus, the Clerk of Court is directed to enter judgment in favor of Plaintiffs Anthony Miano and Nicholas Rolland on Count II with regards to Plaintiffs' facial and as-applied vagueness

challenges.

It is the order of the Court that:

Plaintiffs' request for declaratory relief as to their facial and as-applied vagueness challenges is **GRANTED**.

It is **DECLARED** that Iowa Code § 723.4(2) is unconstitutionally vague both on its face and as applied to Plaintiffs.

Plaintiffs' request for costs and reasonable attorneys' fees is **GRANTED**. Plaintiffs are awarded costs and reasonable attorneys' fees. Plaintiffs are ordered to submit a bill of costs and the amount of requested attorneys' fees within fourteen days of the entry of this order.

Plaintiffs' other requests for relief are **DENIED**.

IT IS SO ORDERED.

Dated this 26th day of September, 2019.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE