IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

RAVEN WOLF C. FELTON JENNNINGS II, RAYMOND DOUGLAS Plaintiffs, v. CITY OF UNIVERSITY CITY, MISSOURI Defendant.	)	Case No. 4:20-cv-00584

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

Since last summer, University City has systematically and unconstitutionally suppressed the public performance of music in the Delmar Loop (the "Loop"). While musicians were once a fixture on the sidewalks in the Loop, Defendant University City has effectively prohibited musicians from playing outdoors on either public or private property in the Loop by: (1) enforcing an unconstitutionally broad and vague ordinance prohibiting conduct that obstructs or "tend[s]" to obstruct public places (the "Ordinance"); (2) creating a new policy that musicians playing on or adjacent to public sidewalks may not stand still; and (3) requiring that musicians may play on private property adjacent to public sidewalks only with the City's permission. The Ordinance and policies prohibit constitutionally protected musical expression and violate the First and Fourteenth Amendments.

A preliminary injunction is warranted because Plaintiffs are likely to prevail on the merits of their First Amendment and Due Process challenges to the obstruction ordinance and Defendant's policies. First, the Ordinance violates the First Amendment because it burdens substantially more speech than is necessary for Defendant to achieve a legitimate government

interest and fails to leave ample alternative channels for communication. Second, the Ordinance is facially unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment because: (1) it lacks a *mens rea* requirement; (2) its prohibition on conduct "tending to hinder or impede" the free passage of pedestrians or vehicles fails to provide fair notice of the conduct that is prohibited; and (3) it fails to establish minimal guidelines to govern law enforcement. Third, Defendant's Musician Non-Stationary Policy violates the First Amendment because it burdens substantially more speech than is necessary for Defendant to achieve a legitimate government interest. Specifically, the Musician Non-Stationary Policy: (1) is not narrowly tailored to serve a significant government interest; and (2) fails to provide ample alternative channels for communication. Fourth, Defendant's Musician Non-Stationary Policy is facially unconstitutional as it is void-for-vagueness in violation of the Due Process Clause of the Fourteenth Amendment. Fifth, Defendant's Conditional Use Permit Policy violates the First and Fourteenth Amendments because it is an unconstitutional prior restraint.

II. Facts

Plaintiffs Raven Wolf C. Felton Jennings II and Raymond Douglas are musicians who play music on or adjacent to the public sidewalks in the Loop. Exhibit A, Declaration of Raven Wolf C. Felton Jennings II, at ¶ 2; Exhibit B, Declaration of Raymond Douglas, at ¶¶ 4-5. Neither Mr. Jennings nor Mr. Douglas uses any amplification while performing. Ex. A at ¶¶ 11, 17, 27, 37, 42; Ex. B at ¶¶ 9, 17, 31. The sidewalks and pedestrian passageways where they perform in the Loop range from 12 feet wide to more than 26 feet wide. Exhibit C, Declaration of Megan Ferguson, at ¶¶ 4-11. Mr. Jennings and Mr. Douglas, who perform solo, do not obstruct the sidewalks or impede the free passage of pedestrians. Ex. A at ¶¶ 12, 18, 28, 38, 43; Ex. B at ¶¶ 10, 18, 32.

Since approximately June 2019, Mr. Douglas and Mr. Jennings have been repeatedly informed by University City and its officers and agents that they may not play music on the Loop while standing still. Ex. A at ¶¶ 6-7; Ex. B at ¶¶ 7, 12, 34. University City police officers have also ordered both Plaintiffs to stop playing music unless they have permits or the businesses they play in front of have permits. Ex. A at ¶¶ 6-7, 9, 19-21, 29-31, 39, 40, 44; Ex. B at ¶ 25.

A. Plaintiff Raymond Douglas

Mr. Douglas has played acoustic guitar in the Loop for approximately eight years. Beginning in June 2019, University City police officers have repeatedly stopped Mr. Douglas from playing music. Ex. B at ¶ 7. On June 28, 2019, a University City police officer approached Mr. Douglas while he was playing his acoustic guitar and singing on the public sidewalk near Fitz's restaurant in the Loop. *Id.* at ¶ 8. The police officer informed him that he cannot play music while stationary—only while moving. *Id.* at ¶ 12. During this encounter, the police officer suggested city hall may be giving out permits for musicians to perform; however, a city hall employee informed Mr. Douglas that University City does not provide permits for musicians. *Id.* at ¶¶ 14-15. Approximately one week later, a similar incident occurred at the same location. *Id.* at ¶ 16. After playing for around 45 minutes, a University City police officer informed both Mr. Douglas and another musician playing at the nearby Chuck Berry statue that they could not play music on the public sidewalk and had to move along. *Id.* at ¶¶ 19-21.

A third incident occurred between Mr. Douglas and University City police approximately one week later. *Id.* at ¶ 22. While playing his acoustic guitar and singing in FroYo's outdoor dining area on the Loop with the manager's permission, Mr. Douglas was approached by a University City police officer and informed that he could not play music in the outdoor dining area unless FroYo's outdoor dining permit specifically allowed musicians

to perform. *Id.* at ¶¶ 22-25. After this third incident, Mr. Douglas avoided performing in the University City portion of the Loop. *Id.* at ¶ 28.

On November 24, Sergeant Lott of the University City Police Department approached Mr. Douglas while he was playing his acoustic guitar and singing on the public sidewalk in front of Emporium, which is in the Loop near the boundary between the City of St. Louis and University City and which Mr. Douglas believed to be in the City of St. Louis. *Id.* at ¶¶ 29, 33. Sergeant Lott informed Mr. Douglas that he was, in fact, in University City and that he could not play on the sidewalk while stationary and needed to move. *Id.* at ¶¶ 34-36. Mr. Douglas asked Sergeant Lott whether he would be cited if he refused. *Id.* at ¶ 37. Sergeant Lott responded that he would not be cited but would be arrested and taken to jail. *Id.* Mr. Douglas relocated to an area within the city limits of the City of St. Louis. *Id.* ¶ 38.

B. Plaintiff Raven Wolf C. Felton Jennings II

Mr. Jennings has played music in the Loop for more than 25 years. Since 2009, he has performed under the marquee of Vintage Vinyl with the consent of Vintage Vinyl's owner, Tom Ray. Ex. A at ¶ 3. Vintage Vinyl and University City agree that the pedestrian passageway under the marquee is within Vintage Vinyl's property line. Exhibit H, July 12, 2019 Internal University City Email Acknowledging Vintage Vinyl's Marquee is Within Vintage Vinyl's Property Line. Since July 2019, University City police officers have repeatedly stopped Mr. Jennings from playing music. Ex. A at ¶ 6.

On July 5, 2019, Mr. Jennings was playing under the marquee of Vintage Vinyl when University City police asked him if he had a permit to play. *Id.* at ¶¶ 10, 13. On July 6, 2019, Mr. Jennings performed under the marquee of Vintage Vinyl and was ordered by University City police to stop playing until he had a permit. *Id.* at ¶¶ 16, 20. Mr. Jennings went to University City's city hall, where Linda Schaeffer, University City's Secretary to the City Manager, provided him with a Block Party Permit Request Form. *Id.* at ¶¶ 22-23. Mr. Jennings

completed and returned the form on July 11, 2019, along with a letter from Mr. Ray requesting that Mr. Jennings "be allowed to continue performing" in front of Vintage Vinyl. *Id.* at ¶ 25 & attached Exhibits 1 & 2 thereto. On approximately July 17, 2019, Ms. Schaeffer informed Mr. Ray that Vintage Vinyl needed a Conditional Use Permit, rather than a Block Party Permit, for Mr. Jennings to play under the marquee. Exhibit E, July 17, 2019 Email Correspondence between T. Ray and C. Cross, pp. 1-3. Mr. Clifford Cross, University City's director of planning and development, also informed Mr. Ray on July 17 that Vintage Vinyl would need a Conditional Use Permit. *Id.*, pp. 1-2.

On September 13, Mr. Jennings performed under Vintage Vinyl's marquee and was ordered by University City police officers to stop playing until Vintage Vinyl had a permit. Ex. A at ¶¶ 26, 30. Between approximately September 13 and approximately November 21, 2019, Mr. Jennings did not play music in the Loop to avoid trouble with the police. *Id.* at ¶ 32. On November 29, Mr. Jennings performed under Vintage Vinyl's marquee and was again ordered by University City police officers to stop playing until Vintage Vinyl had a permit. *Id.* at ¶¶ 36, 39-40. On November 30, Mr. Jennings performed under Vintage Vinyl's marquee and was again ordered by University City police officers to stop playing. *Id.* at ¶¶ 41, 44.

C. The Ordinance and Policies

University City employs the Ordinance and City Policies to regulate performances by musicians on both public and private property in the Loop through a two-step approach: first, University City enforces the Ordinance to apply to any stationary musicians performing in the Loop, regardless of whether the musicians are actually obstructing any pedestrians. Ex. A at ¶¶ 12, 18, 28, 38, 43; Ex. B at ¶¶ 7, 10, 18, 32. Second, the City has implemented a "no stationary musicians" policy that states: "Musicians are only permitted who are not stationary." Exhibit F, July 22, 2019 Letter from L. Tucker. In addition, the City has applied its conditional

use permit policy to require businesses in the Loop to acquire a conditional use permit before a musician may perform on private property adjacent to public sidewalks. *Id.*

University City Ordinance § 215.720: **Obstructing Public Places** states, in part:

> A. Definition. The following term shall be defined as follows: **PUBLIC PLACE** Any place to which the general public has access and a right of resort for business, entertainment or other lawful purpose, but does not necessarily mean a place devoted solely to the uses of the public. It shall also include the front or immediate area of any store, shop, restaurant, tavern or other place of business and also public grounds, areas or parks.
>
> B. It shall be unlawful for any person to stand or remain idle either alone or in consort with others in a public place in such manner so as to:
>
> 1. Obstruct any public street, public highway, public sidewalk or any other public place or building by hindering or impeding or tending to hinder or impede the free and uninterrupted passage of vehicles, traffic or pedestrians; . . . .
>
> C. When any person causes or commits any of the conditions in this Section, a Police Officer or any Law Enforcement Officer shall order that person to stop causing or committing such conditions and to move on or disperse. Any person who fails or refuses to obey such orders shall be guilty of a violation of this Section.

Exhibit G, University City Ordinance § 215.720.

Since at least June 2019 it has been the custom, policy, or practice of University City and its officers and agents to enforce the Ordinance against stationary musicians in the Loop, thereby effectively preventing musicians from performing in the Loop. Between June and November 2019, University City police officers repeatedly ordered Mr. Jennings and Mr. Douglas to stop playing music while stationary. Ex. A at ¶¶ 6-7; Ex. B at ¶ 7. On July 22, Libbey M. Tucker, University City's assistant to the city manager, wrote a letter stating that University City does not offer permits to musicians and that musicians are only permitted when not stationary. Ex. F. While prohibiting musicians from remaining stationary on the sidewalks, however, University City allows businesses to block the sidewalks with a range of physical obstructions, including dining tables and chairs (both in use or simply in storage on sidewalks) and standing signs. Exhibit D, Declaration of Elliot Rosenwald & exhibits attached thereto.

University City extends its efforts to regulate musicians to private property adjacent to the public sidewalk through a stated policy that: "If the business owner engages and supports a performer on their own private property, not in the right of way, they may contact the City Manager's office for approval." Ex. F. To this end, it has been the custom, policy, and practice of University City and its officers and agents since at least June 2019 to require musicians to have a business obtain a permit in order for the performer to play on that business's private property adjacent to the public sidewalk. *Id.* University City has, at various times, stated that the required permit for a musician to play music adjacent to the public sidewalk is a Block Party Permit or a Conditional Use Permit. Ex. A at ¶ 8. A Conditional Use Permit application requires twelve copies of an exacting memo detailing the applicants' historical information, reasoning for venue location, and the estimated impact of the conditional use such as usual traffic volumes at the location and surrounding areas and how the conditional use will affect traffic flow and volume. Exhibit I, Conditional Use Permit Requirements, p. 2.[1] It also requires twelve copies of an accurate site plan, survey, or diagram drawn to scale containing substantial site details. *Id.* The application must be submitted 28 days in advance of the once-a-month meeting of the Plan Commission and requires a $250.00 non-refundable fee. *Id.*, pp. 4, 7.

III. Argument

A. Standard for Preliminary Injunction

In considering a motion for preliminary injunction, this Court must determine: (a) whether the Plaintiffs are likely to prevail on the merits; (b) if there exists a threat of irreparable harm to the Plaintiffs absent the injunction; (c) the balance between this harm and the injury that the injunction's issuance would inflict upon defendant, and (d) what is in the public interest. *See Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc).

[1] This document is also available at https://www.ucitymo.org/DocumentCenter/View/8739/Conditional_Use_Permits_website_Nov_2015?bidId

"When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (en banc) (citation omitted).

B. Plaintiffs Are Likely to Prevail on the Merits

1. The Ordinance Violates the First Amendment Because It Burdens Substantially More Speech Than Is Necessary for Defendant to Achieve a Legitimate Government Interest.

University City's Ordinance unconstitutionally restricts free expression both on its face and as applied. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."). The sidewalks in the Loop are among the traditional public forums "so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Carey v. Brown*, 447 U.S. 455, 460 (1980). "Consistent with the traditionally open character of public streets and sidewalks . . . the government's ability to restrict speech in such locations is 'very limited.'" *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983)). "'In these quintessential public forums' . . . [t]he government may 'enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *Langford v. City of St. Louis*, No. 4:18CV2037 HEA, 2020 WL 1227347, at *6 (E.D. Mo. Mar. 5, 2020) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)) (holding that a City of St. Louis ordinance that broadly prohibited "impeding and interfering with vehicular and pedestrian traffic" and "include[d] no exception for expressive activity" violated the First Amendment on its face and as applied to plaintiff).

Here, although University City may have an interest in allowing the free flow of pedestrians on its sidewalks, the Ordinance is not narrowly tailored to advance this interest and burdens substantially more speech than necessary. Like the St. Louis ordinance held unconstitutional just last month by this Court in *Langford*, the University City Ordinance applies broadly "at all times and in all public places," to "obstructions, hindrances, or delays of any length of time," and to any number of people, and it fails to include any "exception for expressive activity." *Langford*, 2020 WL 1227347, at *8-9. And, like the ordinance in *Langford*, the University City Ordinance as interpreted by Defendant "does not require that any . . . pedestrian traffic actually be impeded or interfered with . . . for a violation to occur." *See id.* at 8. Indeed, Mr. Douglas and Mr. Jennings were ordered to move along even though they were not actually impeding the passage of any pedestrians. At all locations where Mr. Douglas was ordered to stop playing, the sidewalk is at least 12 feet wide. Ex. C at ¶¶ 5-11. The area for pedestrians to pass where Mr. Jennings played, which includes both the public sidewalk and private property beneath the marquee, is approximately 26 feet wide. *Id.* at ¶ 4.

The Ordinance also fails to leave open ample alternative channels of communication. This inquiry is closely related to the question whether the Ordinance is narrowly tailored. *See Phelps-Roper v. City of Manchester*, 697 F.3d 678, 695 (8th Cir. 2012) (en banc). As discussed above, the Ordinance is not narrowly tailored and does not leave open ample alternative channels of communication because it "broadly prohibits all activities that might impede or interfere" with pedestrians on University City sidewalks "at any time, for any reason, for any length of time, and by any number of people, and thus it prohibits a substantial amount of protected speech in traditional public forums." *Langford*, 2020 WL 1227347 at *14. There is no mechanism for persons who wish to engage in constitutionally protected expression on the Loop to avoid enforcement of the Ordinance.

Alternatively, to the extent the Ordinance is a regulation of conduct with an incidental effect on expression, the Ordinance fails the applicable four-part test of *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *Ward*, 491 U.S. at 798 (explaining there is "little, if any" difference between the *O'Brien* test and the "time, place, and manner" test used to evaluate content-neutral regulations). Under *O'Brien*, a regulation that restricts speech incidentally may be upheld only if:

> "(1) it is within the constitutional power of . . . the legislature to enact it, (2) it furthers an important or substantial governmental interest, (3) the regulation is unrelated to suppressing free expression, and (4) its restriction of speech is 'no greater than is essential to the furtherance of that interest.'"

Republican Party of Minn. v. White, 416 F.3d 738, 749 n.4 (8th Cir. 2005) (en banc) (quoting *O'Brien*, 391 U.S. at 377). The "no greater than essential" prong is virtually identical to the "narrow tailoring" prong of the test applied to content-neutral laws that regulate speech directly. *See McCullen*, 573 U.S. at 486 (defining "narrowly tailored" as "not burden[ing] substantially more speech than is necessary to further the government's legitimate interests" (internal quotation marks omitted)).

Here, even assuming the Ordinance withstands the first two prongs of the *O'Brien* test, it fails the third and fourth prongs. As explained above, the Ordinance cannot satisfy the fourth *O'Brien* prong because it restricts more speech than is necessary to further the City's interest. See *Ward*, 491 U.S. at 799 (holding that, to be "no more restrictive than necessary," a law may not "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals"). The Ordinance, on its face and as applied by University City, applies to people performing on and adjacent to sidewalks where no pedestrians are trying to pass. *See McCullen*, 573 U.S. at 494 (holding that the sidewalk buffer zone around abortion clinics burdened more speech than necessary where the state "ha[d] available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate").

The Ordinance also fails the third prong of the *O'Brien* test because it is not "unrelated to suppressing free expression." "A wide range of First Amendment activities traditionally occurs on streets, sidewalks, and other public places." *Langford*, 2020 WL 1227347, at *10. As in *Langford*, the University City Ordinance thus "regulates persons' abilities to engage in some of the purest and most protected forms of speech and expression." *Id.* Moreover, it is clear that the Ordinance is applied by University City to target expression. While Mr. Jennings and Mr. Douglas have been directed that they may not play music on or adjacent to the sidewalks because of purported concerns about "obstruction," University City at the same time allows businesses to block the sidewalks with a whole range of obstructions, including dining tables, chairs, and standing signs. Ex. D. University City cannot claim its Ordinance is not targeted at expression when it allows furniture and signs to obstruct large portions of the sidewalk but forbids a single musician from playing on or adjacent to the sidewalk.

2. The Ordinance Is Facially Unconstitutional Because It Is Void-for-Vagueness in Violation of the Due Process Clause of the Fourteenth Amendment.

To satisfy the requirements of due process, an ordinance must "give fair warning that the allegedly violative conduct was prohibited." *Stahl v. City of St. Louis*, 687 F.3d 1038, 1040 (8th Cir. 2012) (citation omitted). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted). "A 'more stringent vagueness test' applies when a law implicates First Amendment rights." *Langford*, 2020 WL 1227347, at *16 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010)). "This is because '[s]peech is an activity particularly susceptible to being chilled, and regulations that do not provide citizens with fair notice of what constitutes a

violation disproportionately hurt those who espouse unpopular or controversial beliefs.'" *Id.* (quoting *Stahl*, 687 F.3d at 1041) (alteration in original).

The Ordinance is unconstitutionally vague for three reasons. First, it does not include a *mens rea* requirement. Second, the phrase "tending to hinder or impede" fails to define what is prohibited in a way that people can understand and encourages arbitrary enforcement. Third, the Ordinance fails to establish minimal guidelines to govern law enforcement.

a. The Ordinance Does Not Include a *Mens Rea* Requirement.

The Eighth Circuit has recognized that an ordinance that fails to include a *mens rea* requirement does not "provide people with fair notice of when their actions are likely to become unlawful" and thus cannot withstand constitutional scrutiny. *Stahl*, 687 F.3d at 1041 (holding an ordinance restricting demonstrations "in consequence of which there is such a gathering of persons or stopping of vehicles as to impede either pedestrians or vehicular traffic" on or near a street was unconstitutionally vague); *see also Langford*, 2020 WL 1227347 at *18 (concluding an ordinance did not provide fair notice where the lack of a *mens rea* requirement compounded the defect of not "sufficiently defin[ing] the conduct that it proscribes when measured by common understanding and practices"). Where a "violation of the ordinance does not hinge on the state of mind of the potential violator, but the reaction of third parties," the requirements of due process are not satisfied. *Stahl*, 687 F.3d at 1041-42; *see also Clary v. City of Cape Girardeau*, 165 F. Supp.3d 808, 822 (E.D. Mo. 2016) (holding a noise ordinance that "contain[ed] no *mens rea* requirement" unconstitutionally vague (italics added)).

Here, the Ordinance contains no *mens rea* requirement. Indeed, a person—regardless of the person's intent—violates the Ordinance whenever the person "stand[s] or remain[s]" "in a public place," in such a manner so as to "obstruct" public places "by hindering or impeding or tending to hinder or impede the free and uninterrupted passage of vehicles, traffic or pedestrians." Ex. G. Whether a violation has occurred depends not on the alleged violator's

state of mind, but on a police officer's subjective judgement of whether the passage of vehicles, traffic or pedestrians is hindered or impeded.

b. "Tending to Hinder or Impede" Is Unconstitutionally Vague.

The Ordinance is also unconstitutionally vague because it prohibits "[o]bstruct[ing] any public street, public highway, public sidewalk or any other public place or building" by "*tending to* hinder or impede the free and uninterrupted passage of vehicles, traffic or pedestrians." Ex. G, University City Code § 215.720(B) (emphasis added).

"A fundamental principle in our legal system is 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). An ordinance is unconstitutionally vague if it leaves "wide open the standard of responsibility, so that it is easily susceptible to improper application." *Gooding v. Wilson*, 405 U.S. 518, 528 (1972) (internal quotation marks omitted). Laws that forbid conduct "tending to" cause a result are particularly concerning because such language creates additional uncertainty about what is prohibited. *See id.* at 519-20 (holding that statute prohibiting the use of "opprobrious words or abusive language, *tending to cause* a breach of the peace" was unconstitutionally vague (emphasis added)); *Gregory v. City of Chicago*, 394 U.S. 111, 119 (1969) (Black, J., concurring) (explaining that "the boundaries of an offense including any 'diversion *tending to* a breach of the peace'" are "infinitely more doubtful and uncertain" (emphasis added)).

In enjoining an obstruction ordinance with language nearly identical[2] to the University City Ordinance, the United States District Court for the Middle District of Florida concluded that the phrase "behavior tending to" "has no established meaning, and is not comprehensible

[2] The relevant part of the ordinance stated it was unlawful to "stand or remain idle, either alone and/or in consort with others, in a public place in such manner so as to . . . [o]bstruct or hinder the movement of traffic on any public street, public highway, public sidewalk, or any other public place or building by hindering or impeding, or tending to hinder or impede, the free and uninterrupted passage of vehicles, traffic or pedestrians." *Minahan*, 2014 WL 7177998, at *1.

to persons of ordinary intelligence." *See Minahan v. City of Fort Myers*, 2014 WL 7177998, at *5 (holding that the due process challenge to the portion of the ordinance prohibiting conduct "tending to hinder or impede . . . passage" was likely to succeed on merits). Similarly, the United States District Court for the District of Vermont declared an ordinance that made it unlawful to "remain idle" in a public place "so as to . . . [o]bstruct any public street, public highway, public sidewalk or any other public place or building by . . . tending to hinder or impede the free and uninterrupted passage of vehicles, traffic or [pedestrians]" to be "so indefinite that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application,'" and thus unconstitutionally vague. *Derby v. Town of Hartford*, 599 F. Supp. 130, 135 (D. Vt. 1984) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). The court noted that the ordinance gave no guidance as to how long someone could "remain idle" before violating the ordinance, and there was "confusion and wide divergence of opinion as to definitions of key terms" among enforcing officers. *Id.* at 135-36.

c. The Ordinance Fails to Establish Minimal Guidelines to Govern Law Enforcement.

A law may be void for vagueness if it is susceptible to discriminatory or arbitrary enforcement. *Kolender*, 461 U.S. at 357. The Supreme Court has emphasized that "the more important aspect of vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 357-58 (internal quotation marks omitted). Here, as in *Langford*, the text of the Ordinance "is so broad" that it "is undoubtedly violated every day by ordinary activities that could subject persons to arrest for its violation, within the complete discretion of police officers." *Langford*, 2020 WL 1227347, at *11. The University City Ordinance empowers law enforcement officers to order dispersal when a single person stands or remains idle in public place for any length of time and regardless of whether the person is actually obstructing any pedestrians or traffic. The Ordinance fails to provide minimal guidelines to govern law enforcement, and its violation may entirely depend upon a

police officer's whim. It contains no "standards to tie [its] application to conduct that realistically presents public health, safety, or traffic concerns" and "allows an unrestricted delegation of power which in practice leaves the definition of its terms to law enforcement officers, and thereby invites arbitrary, discriminatory, and overzealous enforcement." *Id.* (quoting *Bell v. Keating*, 697 F.3d 445, 463 (7th Cir. 2012)).

3. Defendant's Musician Non-Stationary Policy Violates the First Amendment Because It Burdens Substantially More Speech Than Is Necessary for Defendant to Achieve a Legitimate Government Interest.

The Musician Non-Stationary Policy directly restricts speech in traditional public forums, as it specifically restricts musicians' performance on sidewalks. Assuming it is content-neutral, it may only be upheld if it is "narrowly tailored to serve a significant government interest" and "leave[s] open ample alternative channels of communication." *Perry Educ. Ass'n*, 460 U.S. at 45. University City's Musicians Non-Stationary Policy fails this test.

a. The Musician Non-Stationary Policy Is Not Narrowly Tailored to Serve a Significant Government Interest.

University City's generalized interest in the flow of pedestrian traffic is insufficient to justify its Musician Non-Stationary Policy. It is "not enough for [a governmental body] to recite an interest that is significant in the abstract; there must be a genuine nexus between the regulation and the interest it seeks to serve." *See Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1099 (8th Cir. 2013) (reversing district court's denial of a preliminary injunction against a content-neutral regulation that banned plaintiff from distributing Bibles in certain areas of a fairground). This Court has recognized that the state interest in maintaining order on sidewalks is not sufficient to apply a blanket rule which restricts the First Amendment rights of people exercising their First Amendment rights peacefully. *Abdullah v. Cty. of St. Louis*, 52 F. Supp.3d 936, 947 (E.D. Mo. 2014) (holding "an unwritten policy . . . instructing [officers] to order people to keep moving whenever the officers thought it was appropriate to do so" unconstitutional).

Here, the Policy burdens substantially more speech than is necessary to achieve any legitimate goals the City may have in regulating pedestrian traffic because it forbids any musician from playing music while standing still, regardless of the actual impact the musician has on pedestrian traffic. The Policy applies to a musician who is stationary for any length of time, to a single musician standing still, and regardless of how wide the sidewalk is. The sidewalks where Mr. Douglas and Mr. Jennings were stopped from playing, for example, range from twelve feet across to more than twenty-six feet across. Ex. C at ¶¶ 4-11. Furthermore, there appears to be no genuine nexus between the Policy requiring musicians to keep moving and the purported interest in allowing the passage of pedestrians. The Policy, for example, forbids a solo musician standing at the edge of a 12-foot-wide sidewalk, but would not restrict a marching band slowly moving down the sidewalk.

b. University City Does Not Provide Alternative Channels for Communication.

University City's Musician Non-Stationary policy fails to "leave open ample alternative channels for communication of the information." *See Ward*, 491 U.S. at 791; *see also Abdullah*, 52 F. Supp. 3d at 947 (noting that government was required to provide an "adequate alternative forum" when it implemented a "keep moving" policy forbidding peaceful assembly on public sidewalks). Indeed, University City offers no alternative forum whatsoever for musicians to perform in the Loop. Moreover, the City has shut down attempts by performers to find alternative forums in the University City section of the Loop by giving move-along orders to Mr. Douglas and Mr. Jennings when they were performing on private property with the permission of local businesses.

4. Defendant's Musician Non-Stationary Policy Is Unconstitutionally Vague and Violates the Due Process Clause of the Fourteenth Amendment.

This Court has recognized that a policy that fails to provide citizens with sufficient notice of the conduct that is prohibited and leaves police officers with the unfettered discretion

to enforce the policy in an arbitrary manner violates the Due Process Clause. *See Abdullah*, 52 F. Supp.3d at 946 (holding policy "requiring peaceful demonstrators and others to walk, rather than stand" unconstitutional). A policy that "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat" fails constitutional standards of due process. *See id.* (quoting *Kolender*, 461 U.S. at 360).

The enforcement of University City's policy that musicians may not be "stationary" is left to the unfettered discretion of University City officers who enforce the policy in an arbitrary manner. The Policy provides no guidance to Plaintiffs or to Defendant's officers regarding how long a musician must stand in one spot to be considered "stationary" and thus subject to the policy. Musicians have no notice of precisely what conduct is prohibited, and instead University City police officers may enforce the Policy in an arbitrary manner, regardless of the actual impact that a musician has on pedestrian or vehicular traffic.

5. Defendant's Musician Permit Policy Violates the First and Fourteenth Amendments Because It Is an Unconstitutional Prior Restraint

University City's requirement that musicians may only play on private property if pre-approved by the City is an unconstitutional prior restraint on speech. *See Bowman v. White*, 444 F.3d 967, 980 (8th Cir. 2006). Prior restraints face "a heavy presumption against their validity." *Pence v. City of St. Louis*, 958 F. Supp. 2d 1079, 1083 (E.D. Mo. 2013) (citing *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992)). Once it is established that Plaintiffs engage in expression protected the First Amendment, which cannot be disputed here, the burden is on the proponent of laws or policies that restrict the right to speak freely. *Phelps-Roper v. Koster*, 713 F.3d 942, 949 (8th Cir. 2013).

University City has identified no significant governmental interest in regulating the performance of unamplified music by musicians on private property. Although the government may have an interest in maintaining the safety and traversability of *public* sidewalks, the requirement that businesses obtain a permit in order to have a musician play on their own

private property does not serve that interest. University City has identified no interest in requiring business to secure a permit to have a musician play unamplified music on private property without obstructing the public sidewalk. Indeed, the pedestrian passageway where Mr. Jennings performed is approximately 26 feet wide. Ex. C at ¶ 4.

Moreover, "the Eighth Circuit has expressed doubt as to the nexus between the licensure of small groups and the governmental interest in managing public spaces." *See Pence*, 958 F. Supp. 2d at 1085 (citing *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996) (expressing, as described in *Pence*, "concern about the application of a permit requirement to groups of ten persons")); *see also Berger v. City of Seattle*, 569 F.3d 1029, 1039 (9th Cir. 2009) (en banc) ("[W]e and almost every other circuit . . . have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum." (citations omitted)). Given that is it doubtful that the City could constitutionally enforce its licensing scheme on *public* property, it certainly cannot demonstrate the required nexus between permitting and any interest of the City in regulating unamplified music on *private* property.

a. University City's Permit Policy Affords Too Much Discretion to Government Officials.

In instances where a permit scheme is permissible, it may not delegate overly broad licensing discretion to a government official. *Forsyth Cty.*, 505 U.S. at 130. The Supreme Court has long held that a permit policy must contain adequate standards to guide the official's decision. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002); *see also Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) (holding "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."). The University City permitting process provides no standards or guidance by which decisionmakers evaluate whether a permit will or will not be approved. It also fails to place limits on the time within which University City must issue their decision about the permit.

Furthermore, the permit policy is enforced arbitrarily in practice. The city officials have instructed Plaintiffs to obtain different kinds of permits at different times. Initially, Mr. Jennings was provided with a block party permit on July 10, 2019, when he inquired about permit forms. Ex. A at ¶¶ 22-23. On July 22, Libbey Tucker, Assistant to the City Manager, presented a letter saying the business owners "may contact the City Manager's office for approval" if they "engage[] and support[] a performer on their own private property." Ex. F. Later, on November 11, 2019, Mr. Jennings was told Vintage Vinyl should apply for a conditional use permit. Ex. A at ¶¶ 33-34. As to Mr. Douglas, the police officer informed him that city hall may be giving out permits for musicians to perform; however, a city hall employee informed him that University City does not provide permits for musicians. Ex. B at ¶¶ 14-15. When he performed in FroYo's outdoor dining area with the manager's permission, Mr. Douglas was informed that he could not play music in the outdoor dining area unless FroYo's outdoor dining permit specifically allowed musicians to perform. *Id.* at ¶¶ 24-25.

b. The Application Process Is Burdensome and Restricts Speech During The Application Period.

The application requires a $250.00 fee, the approval committee meets once a month, and the application must be submitted 28 days in advance. Ex. I, pp. 4, 7. This lengthy, costly, and demanding permitting process restricts Plaintiffs' free expression during the application and waiting period, which takes at least 28 days. Even if Plaintiffs' permit applications were approved each time they applied, their speech would be restricted in the period between when they wished to play music and when they received the permit.

C. Remaining *Dataphase* Factors

When a plaintiff has shown a likely violation of his First Amendment rights, the other preliminary injunction requirements "are generally deemed to have been satisfied." *Swanson*, 692 F.3d at 870; *accord Phelps-Roper v. Cty. of St. Charles*, 780 F. Supp. 2d 898, 900-01 (E.D. Mo. 2011). There is no basis for departing from the general rule here.

Plaintiffs have already been harmed. They have been harmed by foregoing the opportunity to engage in constitutionally protected expression in the Loop. It is settled law that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Plaintiffs will continue to suffer irreparable harm if this Court does not issue an injunction, because Plaintiffs will continue not to be able to perform in the Loop. Where such an injury is threatened and occurring at the time of motion for preliminary injunction and the movant has shown a sufficient probability of success, a preliminary injunction is appropriate. *Lane v. Lombardi*, No. 2-12-cv-4219-NKL, 2012 WL 5873577, at *6 (W.D. Mo. Nov. 15, 2012) (quoting *Elrod*, 427 U.S. at 374 (plurality opinion)).

"The balance of equities . . . generally favors the constitutionally-protected freedom of expression." *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 (8th Cir. 2012) (en banc). Issuance of a preliminary injunction will cause no harm to University City, which has no significant interest in the enforcement of the Ordinance, the Musician Non-Stationary Policy, and Permit Policy since they are likely unconstitutional.

Finally, "it is always in the public interest to protect constitutional rights." *Nixon*, 545 F.3d at 690. The public interest is served by preventing the likely unconstitutional enforcement of the Ordinance and policies while this case is considered on the merits. The public interest supports an injunction that is necessary to prevent a government entity from violating the Constitution. *Doe v. South Iron R-1 School Dist.*, 453 F. Supp. 2d 1093, 1103 (E.D. Mo. 2006).

IV. Conclusion

For the forgoing reasons, Plaintiffs respectfully request that this Court enter a preliminary injunction enjoining University City from enforcing its Ordinance, Musician Non-Stationary Policy, and Permitting Policy.

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Respectfully Submitted,

s/ Lisa S. Hoppenjans
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon defendant by hand delivery at the following address:

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/s/ Lisa S. Hoppenjans