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

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

MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs, two street musicians, sue the City of University City ("City") claiming it has infringed upon their First Amendment rights through the enforcement of an Ordinance designed to keep City streets and sidewalks open and available for movement of the general public. Plaintiffs claim the Ordinance is constitutionally invalid. The lawsuit also seeks to enjoin the enforcement of an alleged, but non-existent, policy that they not perform while standing still on the public sidewalk. Plaintiffs also challenge a requirement that they or the owner of private property on which they perform must obtain a conditional use permit in order to perform.

The City has advised Plaintiffs it will not enforce the Ordinance in the objected-to manner, that there is no such policy, and that conditional use permits will not be required. It has also taken note of their concerns, and while it may not agree with them, the City Manager intends to present an amendment to the Ordinance to the City Council that would maintain the City's important obligation to secure safe, unobstructed movement on its streets and sidewalks, while addressing Plaintiffs' concerns that they, and others like them, may engage in expressive activities subject to

reasonable time, manner and place restrictions. Given these unequivocal representations and the City's agreement to be bound to them, Plaintiffs can claim no prospective threat or harm to their First Amendment rights, and their motion for preliminary injunction enjoining the City from enforcing the Ordinance is unnecessary and should be denied.

FACTS

At this early point in the proceedings, the City is not in a position to specifically dispute certain facts stated in Plaintiffs' Motion, Memorandum and the Affidavits accompanying them,[1] except that it disputes any allegation of a policy requiring that street musicians not be stationary and must keep moving. (Declaration of Greg Rose ("Rose Decl.") ¶ 6 – attached as Exhibit 1 hereto). No such policy exists. The document on which Plaintiffs rely for that claim was unsigned and unauthorized. (*Id.*). Admittedly, the City Manager did state the following:

> Street musicians, protestors, and any other group legally exercising their right of freedom of speech are not prohibited in University City's Delmar Loop. However, individuals conducting these activities cannot be stationary for an unreasonable amount of time while in the public rights of way. University City' (sic) Loop is diverse and welcoming, in which we will continue to balance the rights of all our citizens while maintaining a safe environment for people to recreate.

(*Id.*).

Further, in a letter dated June 4, 2020, the City Manager clarified and advised Plaintiffs:

- The playing of unamplified music on private property adjacent to a public sidewalk in the Delmar Loop does not require a conditional use or other permit from University City, including private property at 6610 Delmar (Vintage Vinyl) and 6329 Delmar (FroYo).

- The obstructing public places ordinance (Municipal Code Section 215.720) ("Ordinance"), only applies where there is an *actual* instance of obstruction of vehicles, traffic or pedestrians. Further, only where a person causing or committing

[1] For instance, given the current Covid-19 crisis (including recent infections of twelve City employees) and recent Black Lives Matter protests, the City has not been able to ascertain and interview the unnamed law enforcement personnel that allegedly confronted Plaintiffs asking them to cease performing to determine whether and to what extent Plaintiffs may have been creating undue congestion or impacting pedestrian movement.

such conditions knowingly fails or refuses a police officer's order to cease such activity will the Ordinance be violated. The City Manager as the City's chief administrative officer having the power to enforce all laws and ordinances of the City pursuant to City Charter, Section 19, has so instructed the police.

- There is and never has been a no "Musician Non-Stationary Policy" forbidding musicians from playing in the Delmar Loop unless they are not stationary. The unsigned document (Cmplt. Ex. 1) dated July 22, 2019 and addressed to "Whom it May Concern," on letterhead from then-Director of Economic Development Libbey M. Tucker was not a policy issued or authorized by the City Manager and was not based on any ordinance or other law.

- The City Manager has agreed to recommend to the City Council (which has final authority) an amendment to the existing Ordinance to remove the reference to "tending to" and add "knowingly" before "fails or refuses to obey such orders."

- The City will consider comments and suggestions from Plaintiffs' counsel, and other interested parties, to the proposed amendments to the existing Ordinance to address the issues raised in the present lawsuit in an attempt to resolve all issues.

(Rose Decl. ¶ 3 and Ex. A).

ARGUMENT

I. THE CITY'S AGREEMENT NOT TO ENFORCE THE ORDINANCE IN THE OBJECTED-TO MANNER OBVIATES ANY NEED FOR A PRELIMINARY INJUNCTION.

The City is mindful of Eighth Circuit precedent holding that a where a plaintiff has shown a likely violation of First Amendment rights, the elements of (i) irreparable harm absent injunctive relief; (ii) balancing the hardships; and (iii) considering the public interest are generally deemed satisfied. Absent from the cases cited by Plaintiffs for this proposition, but present here, however, are clear representations that the City will not engage in the actions alleged to violate Plaintiffs' First Amendment rights. While the City may not agree with Plaintiffs' claims of infringement, it has agreed to refrain from the objected-to conduct. Thus, there is no need for injunctive relief.

Even assuming past First Amendment infringements (which the City disputes), there is no present or future threat of irreparable harm. Plaintiffs, and other performers, will be free to do exactly what they claim they were prevented from doing in the past – expressing themselves

through their music in a way that is not *actually* obstructing pedestrian traffic and free from City action unless they are presenting *actual* impediments to the free flow of pedestrian traffic and only after *knowingly disregarding* a law enforcement officer's warning to cease such obstruction. Plaintiff presents no grounds for believing that the City is not making these representations in good faith. As stated by Judge White in *Weed v. Jenkins*:

> While the United States Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," the Court noted that preliminary injunctive relief was warranted *where the injury was threatened and occurring at the time of the motion*, and the respondents demonstrated a probability of success on the merits. *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976).

2015 WL 6555413, at *4 (E.D. Mo. 2015), aff'd 873 F.3d 1023 (8th Cir. 2017) (emphasis added). Given the City's representations, the alleged injury is not presently threatened or occurring. As such, irreparable harm cannot be presumed.

Moreover, not only is there no continuing threat of irreparable harm, under the circumstances there is no basis for any finding that the balance of hardships or public interest is served by an injunction. Plaintiff seeks an injunction that would prevent the City from enforcing the Ordinance in any way. (*See* Mot. For Prelim. Inj., Doc. #: 4, at 1). If such an injunction were issued, a performer could set up a bandstand blocking an entire sidewalk. A drumline could monopolize the entire area surrounding the City's Walk of Fame or Harry Weber's venerable Chuck Berry statue. The City could conceivably be barred from doing anything to stop such conduct without facing potential sanctions. While this undoubtedly is not what Plaintiffs intend, it is a potential consequence if the City is enjoined from enforcing the Ordinance under Plaintiffs broad request.

Here, unlike those cases wherein courts have dispensed with the other criteria for issuance of injunctive relief pending final disposition on the merits, the City has provided in good faith a

clear pronouncement in writing that it will not enforce the Ordinance in the manner to which Plaintiffs have objected. Such agreements have sufficed in other instances to moot requests for preliminary injunctions. *See, e.g.,* Minute Entry Order in *Blitch v. City of Slidell*, Case No. 16-17596 (January 10, 2017), final opinion found at 260 F. Supp. 3d 656, 661 (E.D. La. 2017) (ACLU agreed to dismiss as moot a request for preliminary injunction where a city "agreed not to enforce the ordinance pending this Court's final judgment."). Moreover, the City has advised that it is seriously considering amending the Ordinance to eliminate the points of Plaintiffs' concern. *C.f. Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011) (Repeal of challenged ordinance followed by a superseding amendment usually, but not always, moots a request for injunctive relief.). Under the circumstances, the present motion needlessly expends judicial resources and serves no purpose other than providing a potential tactical advantage to one of the litigants. *See, e.g., Marcus v. Iowa Pub. Television*, 97 F.3d 1137, 1140 (8th Cir. 1996) ("motions such as this can be used to gain an unfair advantage over the other party litigant.").

II. THE COURT SHOULD NOT ENTER A PRELIMINARY INJUNCTION RESTRICTING ENFORCEMENT OF THE ORDINANCE.

"Plaintiffs seek a preliminary injunction prohibiting [the] City … from enforcing or threatening to enforce [the Ordinance], including [its] policy prohibiting stationary musicians and its policy requiring a conditional use permit before musicians may perform on private property adjacent to public sidewalks." (Mot. For Prelim. Inj., Doc. #: 4 at 1).

A. The Ordinance is not Unconstitutional on its Face.

As stated above, the City's representations moot any suggestion that without a preliminary injunction the Ordinance would be applied to prevent Plaintiffs from their musical performances. Plaintiffs, however, challenge the Ordinance, claiming not only that it has been applied in the past in an unconstitutional manner, they also claim that the Ordinance is invalid on its face. They claim

the Ordinance is overbroad, not narrowly tailored, burdens substantially more speech than necessary and is unconstitutionally vague. The City here addresses only the facial challenge to the Ordinance because any "as applied" challenge is mooted for the reasons explained in the prior argument. Even assuming Plaintiffs' rights to perform music on the Delmar Loop were constitutionally infringed previously (which the City disputes), that is no longer the case.

The Ordinance provides in pertinent part:

> 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.

On its face, the Ordinance is designed to ensure the free and unimpeded flow of pedestrian traffic on City sidewalks – something the City has the unquestionable right and obligation to do. *See Stahl v. City of St. Louis, Mo.*, 687 F.3d 1038, 1040 (8th Cir. 2012); *Frye v. Kansas City Mo. Police Dep't.*, 375 F.3d 785, 791 (8th Cir. 2004); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) ("The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct.").

Contrary to Plaintiffs' suggestions that the Ordinance on its face substantially restricts expression and is therefore overbroad (P. Mem at 8-10), that is not the case. The law is clear that to support a facial challenge, the "overbreadth … must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *see also Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905,

912 (8th Cir. 2017). "[E]ven where a fair amount of constitutional speech is implicated, [a court] will not invalidate the statute unless significant imbalance exists." *U.S. v. Brune*, 767 F.3d 1009, 1018 (10th Cir. 2014), cert. den.135 S.Ct. 1469 (2015). Plaintiffs cannot meet that burden.

In *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90–91 (1965), the Supreme Court addressed an ordinance that criminalized loitering that obstructed the free flow of pedestrian traffic on city streets and sidewalks. While noting that such a statute could be subject to as-applied constitutional challenges, the Supreme Court held that ordinance was not facially unconstitutional. Such is the case here. Plaintiffs' facial challenge should fail. *See also Cameron v. Johnson,* 390 U.S. 611, 616 (1968); *Duhe v. City of Little Rock*, 902 F.3d 858, 864 (8th Cir. 2018), cert. denied sub nom. *Duhe v. City of Little Rock, Ark*., 139 S. Ct. 1178 (2019); *Agnew v. Gov't of the D.C.,* 920 F.3d 49, 60-61 (D.C. Cir. 2019); *Frye v. Kansas City Mo. Police Dep't*, 375 F.3d 785, 790-91 (8th Cir. 2004); *Burbridge v. City of St. Louis*, 430 F. Supp. 3d 595, 624 (E.D. Mo. 2019) (each rejecting facial challenges to ordinances similar in nature and purpose).

Much of Plaintiffs' challenge is based on Judge Autrey's holding in *Langford v. City of St. Louis, Missouri*, 2020 WL 1227347 (E.D. Mo. 2020), invalidating a St. Louis ordinance. That holding – to the extent it upholds a facial challenge – expands First Amendment precedent beyond prior precedent. Moreover, it contradicts another holding in this District upholding the exact same ordinance, something Plaintiffs never address or even mention. *See Burbridge v. City of St. Louis*, 430 F. Supp. 3d 595. Though Judge Autrey in *Langford* at least mentioned and briefly distinguished the holding in *Burbridge* as "not persuasive," there is a clear conflict in the two holdings, and both cases are presently on appeal to the Eighth Circuit. That fact alone warrants some caution before facially invalidating a content-neutral Ordinance where complaints about how it has been applied have been rendered moot.

In *Burbridge v. City of St. Louis*, Judge Clark rejected a facial challenge to the very same ordinance invalidated in *Langford*, stating:

> St. Louis City Ordinance 17.16.275 (the "Impeding Traffic Ordinance") was amended in 2013, after the Eighth Circuit invalidated a prior version. *See Stahl*, 687 F.3d at 1041. In invalidating the earlier version of the Impeding Traffic Ordinance, the Eighth Circuit declared, "So long as the ordinance is clear and provides fair notice as to what conduct is deemed likely to cause a traffic problem, these regulations do not offend due process." *Id*. The Court finds that the current version of the Impeding Traffic Ordinance is clear and provides fair notice as to what conduct is proscribed. The ordinance provides in relevant part:
>
> > No person, or persons congregating with another or others, shall stand or otherwise position himself or herself in any public place in such a manner as to obstruct, impede, interfere, hinder or delay the reasonable movement of vehicular or pedestrian traffic.

Id. at 624.

1. The absence of "an exception for expressive activity" does not make a content neutral law of general applicability facially invalid.

Plaintiff cites Judge Autrey's holding invalidating the St. Louis ordinance in *Langford* for the proposition that it is facially invalid because it does not include any "exception for expressive activity." (P. Mem at 8-11). But other than this abstract statement in *Langford*, Plaintiffs cite no case wherein a content-neutral law of general applicability and unrelated to expression (as this one is[2]) has been invalidated because it failed to include specific reference excepting expressive activity. *See, e.g., Frye v. Kansas City Mo. Police Dep't*, 375 F.3d at 790-91 (upholding enforcement of statute of general applicability designed to foster unimpeded and safe travel on roadways); *see also Duhe v. City of Little Rock*, 902 F.3d at 864 (upholding Arkansas disorderly

[2] A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted); *see also Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks,* 864 F.3d at 914.

conduct law prohibiting obstruction of traffic). Indeed, virtually any law of general applicability could be criticized for lacking an exception for expressive activity, but that is not a sufficient basis for finding it facially invalid. *See Arcara v. Cloud Books, Inc*., 478 U.S. 697, 706 (1986) ("every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities.").

2. The Ordinance is sufficiently and narrowly tailored to advance the City's legitimate interest in the free flow of pedestrian traffic and does not substantially burden expression.

Plaintiffs claim that the Ordinance, on its face, is not narrowly tailored to advance the City's interest in regulating the flow of traffic on its sidewalks and walkways because it applies at all times and places for any length of time and to any number of people, citing *Langford.* (P. Mem. at 9). Plaintiffs apparently expect a definition of obstruction that specifies metes and bounds, time limits, and numbers of people. Such restrictions would be unwieldly and impractical to apply considering the broad spectrum of streets and sidewalks in an urban setting. Such detailed parameters are not required of a law neutral on its face.

Moreover, the word "obstruct," is a term which is "widely understood" and "require[s] no guess[ing]." *Duhe v. City of Little Rock*, 902 F.3d at 864; *see also Agnew v. Gov't of the D.C.,* 920 F.3d at 60 ("Individuals need not vacate the public space altogether, they must simply stop blocking the use of the way or place at issue."); *Cameron v. Johnson,* 390 U.S. at 616 (Rejecting a facial attack on a Mississippi statute prohibiting "picketing … in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any … courthouses," holding "[t]he terms 'obstruct' and 'unreasonably interfere' plainly require no 'guess(ing) at (their) meaning.'").

Related to their claim that the Ordinance is not narrowly tailored, Plaintiffs also claim that the Ordinance burdens substantially more speech than necessary. The Ordinance on its face does

not even mention expressive activity. It regulates conduct. Ordinarily, a reasonable person would not consider standing, walking or sitting on a sidewalk as expression, and ordinarily obstructing someone from walking is not expression; in fact, it is possibly unlawful even if intended as expression. *See Cameron v. Johnson,* 390 U.S. at 612 n.1, 615 (Upholding a law that prohibited "engag[ing] in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free use of public streets, sidewalks, or other public ways ….").

In that regard, the present case is very similar to *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996), as amended on denial of reh'g and reh'g en banc (Sept. 17, 1996), which rejected a facial challenge to a Seattle ordinance that prohibited siting or laying on city sidewalks. Several plaintiffs, including a street musician, claimed the ordinance was facially invalid. *Id.* at 302. The Ninth Circuit held that the city had a legitimate basis for the ordinance and that its impact on expression was sufficiently minimal so as to not conflict with First Amendment rights. As for the street musician who claimed it was "impossible for him to play his keyboard instrument without sitting," the court noted the performer "*might have a claim that the ordinance is unconstitutional as applied to him*," but that "the district court nevertheless correctly held that [the performer's] unusual predicament was an insufficient basis for striking down the ordinance on its face." *Id.* at 304 n. 7 (emphasis added); *see also Agnew v. Gov't of the D.C.,* 920 F.3d at 60-61 (noting that allegations that a city's obstruction ordinance was applied in a racially discriminatory manner could bolster an as-applied challenge, but they did not suffice to support a facial challenge).

Plaintiffs here are like the street musician in *Roulette*, but their "as applied" challenge has now been rendered moot. The notion that an Ordinance serving the legitimate purpose of maintaining free movement on walkways or roadways substantially burdens speech and should be stricken as facially invalid is without merit.

3. The Ordinance is Not Unconstitutionally Vague.

Plaintiffs also challenge the Ordinance claiming it is void for vagueness, asserting a number of grounds, each refuted below.

(a) *Mens Rea*

First, Plaintiffs argue the Ordinance is void because it lacks a *mens rea* requirement, again relying largely on the holding in *Langford*. (P. Mem. at 12). But that is not true.

A person of ordinary intelligence can understand what it means to obstruct pedestrian traffic, and is going to know that he or she is doing so. There is nothing unconstitutionally vague or unclear about the word "obstruct," a term which is "widely understood" and "require[s] no guess[ing]." *Duhe v. City of Little Rock*, 902 F.3d at 864; *see also Cameron v. Johnson,* 390 U.S. at 616 (holding that "[t]he terms 'obstruct' and 'unreasonably interfere' plainly require no 'guess(ing) at (their) meaning.'"); *Agnew v. Gov't of the D.C.,* 920 F.3d at 58 ("The statutory text [barring crowding, obstructing, or incommoding the use of a sidewalk or street] read with a dose of common sense, confirms that a violation occurs only when a person effectively appropriates more than his fair share of a public area or walk, in conflict with the prerogatives of other people also seeking to use that space.").

But even if a person obstructing pedestrians on a City sidewalk is oblivious to the impediment he or she is creating, and as such lacks a culpable mind, the Ordinance provides that a violator is not subject to arrest until he or she receives a warning from a law enforcement officer and disregards it. Specifically, the Ordinance provides:

> 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.

Thus, as in *Weed v. Jenkins*, 2015 WL 6555413, at *3, the Ordinance "is clear and provides notice that a person commits a misdemeanor when he or she willfully resists or opposes a member of the patrol in the proper discharge of his duties." Like the obstruction ordinance upheld in *Agnew*, "because any arrest or other criminal consequence of the anti-obstructing statute can only follow the arrestee's receipt and disobedience of a well-founded 'move on' directive," *mens rea* is required for any violation. 920 F.3d at 61. While the words "knowingly," intentionally," or willfully are not contained in the Ordinance, common sense dictates that the failure to heed a warning as required under the Ordinance is equivalent to a knowing violation.

Finally, under the facts as alleged, neither Plaintiffs, nor anyone else has suffered any penalty without their knowledge of a violation, and given the City's assurances that only actual obstructions following and persisting after a warning will be sanctioned, Plaintiffs need not feel threatened when they perform their music.

(b) "Tending to Hinder or Impede"

Plaintiffs also claim the Ordinance is facially invalid and vague based on the language "tending to hinder or impede," citing a Florida District Court case, *Minahan v. City of Fort Myers,* 2014 WL 7177998 (M.D. Fla. 2014). Interestingly, while *Minahan* helps support Plaintiffs' argument based on the "tending to hinder or impede" language, it otherwise refutes the rest of Plaintiffs' contentions and much of the holding in *Langford*. The court in *Minahan* said:

> According to Plaintiffs, the fact that the Ordinance does not specify how long the hindrance must last or the degree to which passage must be obstructed constitutes a lack of enforcement standards such that the Ordinance is subject to arbitrary or discriminatory enforcement. The Court agrees in part, but only as to the portion of the Ordinance that prohibits behavior "tending to hinder or impede" traffic."

Id. at *5. So, while the holding in *Minahan* lends support to Plaintiffs' challenge to the "tending to" language of the Ordinance, it refutes every other aspect of Plaintiffs' facial challenge.

Minahan's "tending to" holding, however, is subject to question. There is nothing confusing or ambiguous about acting in a way tending to cause an occurrence which the City has a right to prevent. In fact, the Supreme Court has acknowledged the viability of claims that a statute prohibiting conduct tending harm may pass constitutional muster. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), Justice Thurgood Marshall held that a City anti-noise ordinance prohibiting a person while on grounds adjacent to a school while it is in session from willfully making a noise or diversion that disturbs or *tends to disturb* the peace or good will of the school was not unconstitutionally vague given that, with fair warning, it prohibited only actual or imminent, and willful, interference with normal school activity, and was not a broad invitation to discriminatory enforcement. The Court noted that while it was troubled in the abstract "by the imprecision of the phrase 'tends to disturb,'" that phrase was acceptable because state courts interpreted it "to prohibit only actual or imminent interference with the 'peace or good order' of the school." *Id.* at 111-12. Here, the City has agreed enforcement will be limited to actual instances of obstruction.

Other courts, too, have upheld such language in the face of vagueness challenges. *See United States v. Agront*, 773 F.3d 192, 193 (9th Cir. 2014) (holding that a Veteran's Administration regulation prohibiting the creation of loud, boisterous, and unusual noise that would tend to disturb normal operations was not unconstitutionally vague); *United States v. Renfro,* 2015 WL 428577 at *1 (N.D. Fla. 2015) (rejecting facial challenge to same regulation); *United States v. Fentress*, 241 F. Supp. 2d 526, 530 (D. Md. 2003), aff'd, 69 F. App'x 643 (4th Cir. 2003) (same); *Sharkey's, Inc. v. City of Waukesha*, 265 F. Supp. 2d 984, 992 (E.D. Wis. 2003) (Content-neutral noise ordinance which prohibited bars from having noises "tending to unreasonably disturb" persons in the area was not so vague as to violate due process.); *How v. City of Baxter Springs, Kan.*, 369 F. Supp. 2d 1300, 1306 (D. Kan. 2005) (Criminal defamation ordinance proscribing communication

of false information "tending to expose another living person to public hatred, contempt or ridicule, tending to deprive such person of the benefits of public confidence and social acceptance, or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends," was not unconstitutionally vague); *Thomas v. City of Baxter Springs, Kan*., 369 F. Supp. 2d 1291, 1297 (D. Kan. 2005) ("tending to" language not unconstitutionally vague).

(c) Guidelines for Enforcement

Plaintiffs claim the Ordinance is unconstitutionally vague because it lacks minimal guidelines for law enforcement. But just as persons exercising a reasonable dose of common sense are able to know when they are obstructing, law enforcement officers have the same ability. *Duhe v. City of Little Rock*, 902 F.3d at 864; *Agnew v. Gov't of the D.C.,* 920 F.3d at 60; *Frye v. Kansas City Mo. Police Dep't*, 375 F.3d at 790. If the obstructor is capable of comprehending his or her actions, so is the law enforcement officer who acts to stop them.

B. <u>There is No Stationary Policy and the City has Made Clear that No Such Policy will be Enforced.</u>

As for the request to enjoin the policy, as addressed above, any directives Plaintiffs may have received regarding stationary performances were in error. What the City Manager advised is that:

> Street musicians, protestors, and any other group legally exercising their right of freedom of speech are not prohibited in University City's Delmar Loop. However, individuals conducting these activities cannot be stationary for an unreasonable amount of time while in the public rights of way. University City' (sic) Loop is diverse and welcoming, in which we will continue to balance the rights of all our citizens while maintaining a safe environment for people to recreate.

(Rose Decl. ¶ 6). Clearly, this is not the same as "creating a new policy that musicians playing on or adjacent to public sidewalks may not stand still." (Mot. For Prelim. Inj., Doc. #: 4, at 1). Street

performers can stand still but should not monopolize the area for an unreasonable period so as to cause an unlawful obstruction. To the extent "unreasonable amount of time" is vague or leaves too much discretion to City officers, the point is moot in light the City Manager's letter and Declaration clarifying there will be no enforcement of such time constraints on standing or performing in one spot unless there is actual obstruction and only after warning is given.

C. Permits Will Not Be Required for Plaintiffs to Perform.

As for the request to enjoin the requirement of a permit for Plaintiffs to perform, the City has acknowledged that there is no requirement in the ordinances that a permit be obtained to perform on public or private property. As such, any injunction is unnecessary.

CONCLUSION

In sum, even assuming the City's application of the Ordinance infringed Plaintiffs' First Amendment rights in the past (which the City disputes), the City has advised Plaintiffs it will not enforce the Ordinance in the objected-to manner and there is no permit requirement for them to perform. No injunctive relief is needed. The Ordinance on its face is a valid exercise of the City's police power which is not overbroad, which does not substantially burden expression and which leaves open ample alternatives for expression. The motion for preliminary injunction should be denied.

Respectfully submitted,

LEWIS RICE LLC

Dated: June 23, 2020

By: */s/ John M. Hessel*

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2020, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system, and that notice of this filing will be sent to counsel of record for the parties by operation of the Court's electronic filing system to:

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