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

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

**REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

On June 23, 2020, University City told this Court its intervention was unnecessary to protect Plaintiffs' First Amendment rights in light of purported voluntary changes by the City. These promised changes, made solely in response to this lawsuit and in an effort to avoid injunctive relief, included assurance that while this suit is pending, "street performers and street musicians are allowed to perform in the Delmar Loop and will not be asked to cease doing so or to move to another location unless they are actually obstructing pedestrian traffic or otherwise violating a City ordinance." Opp'n to Mot. Prelim. Inj. ("Opp."), Doc. 16-1, at 3.

Six days later, on June 29, 2020, a University City police officer again stopped Plaintiff Raymond Douglas from playing music on the sidewalks of the Delmar Loop. Ex. J,[1] Supp. Declaration of R. Douglas. Though he obstructed no one, Mr. Douglas was told he could not play music on the sidewalk. This was not one rogue officer; after Mr. Douglas explained the representations made by the City in this case, the officer checked with his supervisor, but Mr. Douglas was still required to leave. These events are consistent with a pattern, extending back more than a year, of the City unconstitutionally suppressing the speech of individuals who wish to engage in protected expression on or adjacent to the public sidewalks.

[1] Plaintiffs continue the consecutive exhibit lettering from their memorandum in support.

Those barred from exercising their constitutional rights include musicians like Mr. Douglas and Mr. Jennings, individuals wishing to share their religious faith, children sharing a street dance performance as part of a non-profit arts camp, and supporters of a presidential candidate. These individuals, like Mr. Douglas and Mr. Jennings, were all informed they could not engage in expression without obtaining a permit. The City persisted in its unconstitutional suppression of speech even after it was put on notice that its conduct violated the First Amendment in August 2019 by an attorney for an individual who was stopped from sharing his religious beliefs. Ex. K, Declaration of R. Pei, Exhibit 1. And it continued after undersigned counsel met with city officials in January 2020 to identify constitutional problems with the city's Ordinance and practices and notify city officials of their intent to file a lawsuit on behalf of their clients if the City continued its unlawful conduct. Opp., Ex. 1-B.

The City's repeated violations of the First Amendment—even after it told this Court it had ceased the objected-to conduct—demonstrate that a preliminary injunction is required to stop University City's unconstitutional Ordinance and practices and to protect the rights of Plaintiffs and all others who wish to exercise their First Amendment rights in the Delmar Loop.

## FACTS

While the City now claims it never had a policy that musicians may not perform while stationary, the uncontested declarations of Mr. Jennings and Mr. Douglas show its police officers enforced exactly such a rule. This was not just the experience of Plaintiffs, but numerous other speakers who were told they could not engage in expression on or adjacent to the public sidewalks. In response to the City's claims that the Ordinance applies only to actual obstruction, there was no policy requiring that musicians not be stationary, and the City has voluntarily ceased the objected-to conduct, Plaintiffs offer the following additional facts.

On June 22, 2019, a University City police officer cited the Ordinance to prevent Ruowen Pei from sharing his religious beliefs in the Delmar Loop. Ex. K, Declaration of R.

Pei, ¶¶ 1-2, 6. Mr. Pei had been sharing his religious beliefs with passersby near the Chuck Berry statue for approximately an hour when the officer informed he could not do so because of a city ordinance. *Id.* ¶¶ 2-6. The officer suggested Mr. Pei might be able to share his beliefs on the public sidewalk in the future if he had a permit. *Id.* ¶ 7. When Mr. Pei later asked the police department about the ordinance, a sergeant told him the obstruction ordinance applied to his religious speech, but he may be able to get a permit to share his beliefs on the public sidewalk. *Id.* ¶¶ 11-13. In an August 30, 2019 letter, an attorney from the Center for Religious Expression informed the City its restriction of Mr. Pei's speech violated the First Amendment. Ex. K, Ex. 1, at 3. The letter explained the Ordinance was "not narrowly tailored" to "prevent[] obstruction," the ordinance did not "leave open ample alternatives for . . . expression," and any "permit requirement" compounded these constitutional violations. *Id.* at 3-4. Though the letter requested assurance the City would no longer ban Mr. Pei from sharing his religious beliefs on the sidewalk, the City never provided such assurance. Ex. K, ¶¶ 18-19.

On August 9, 2019, a University City police officer stopped a group of children from engaging in a street dance performance in the public plaza by the Chuck Berry statue. Ex. L, Declaration of A. Brown, ¶¶ 6, 11. The children, who were participating in a day camp run by a non-profit dance company, were not obstructing the passage of any pedestrians and had been performing for less than five minutes when the officer directed them they could not perform without a permit. *Id.* ¶¶ 2-12. The officer allowed an adult supervising the group to call City Hall to attempt to obtain a permit, but the employee at City Hall responded that the group had to request permits well in advance of any performance. *Id.* ¶ 13. In February 2020, the group's director contacted University City to attempt to obtain a permit for a performance on August 7, 2020. *Id.* ¶ 17. An employee at City Hall, however, told the director that there was no permit that would allow her students to perform along Delmar Boulevard. *Id.* ¶ 19.

On December 21, 2019, supporters of then-Presidential candidate Elizabeth Warren were stopped from engaging with voters in the Delmar Loop by a University City police officer. Ex. M, Declaration of D. Kuehnert, ¶¶ 2-3, 10. Approximately seven supporters who called themselves the "Warren Warblers" were standing in a public plaza adjacent to a public sidewalk and singing carols with lyrics that had been re-written to express support of Sen. Warren and her policies. *Id.* ¶¶ 3-6. Although the group was not obstructing the passage of any pedestrians and did not receive any complaints, the officer told the group they were not allowed to perform while standing in one place without a permit. *Id.* ¶¶ 8-10.

On January 16, 2020, Plaintiffs' counsel met with University City's mayor, city manager, and city attorney to ask the City to cease the constitutional violations associated with the Ordinance and policies and to notify the City of counsel's intent to file a lawsuit on behalf of their musician clients unless the City addressed these violations. Opp., Ex. 1 (Declaration of G. Rose), Ex. B (June 8, 2020 Letter). On April 28, 2020, after several months without word from the City that it intended to change its Ordinance or policies, Plaintiffs filed their lawsuit and motion for preliminary injunction. On June 23, 2020, in its opposition to Plaintiffs' motion, the City told this Court that an injunction was unnecessary because the City was taking voluntary action to address the objected-to Ordinance and policies.

Less than a week later, on June 29, 2020, Mr. Douglas went out to play his guitar on the sidewalk near the intersection of Delmar Boulevard and Leland Avenue. Ex. J, ¶¶ 6-7. Although he was not obstructing the passage of any pedestrians, Mr. Douglas was approached by a University City police officer after approximately 30 to 35 minutes and told he could not play there. *Id.* ¶¶ 8-10. Mr. Douglas showed the officer a text message from his attorney reflecting that the City Manager had instructed his department heads, including the chief of police, to allow musicians to perform while this lawsuit was pending and that musicians would only be asked to stop performing if they were actually obstructing pedestrian traffic. *Id.* ¶ 12.

The officer then called his lieutenant, who told the officer he had not heard anything about musicians being permitted to play. *Id.* ¶¶ 13-15. The officer told Mr. Douglas he could not play music in University City, but could play across the city line in St. Louis. *Id.* ¶ 16.

Finally, the City claims Libbey Tucker's letter stating the policy that musicians could not perform while stationary was "unsigned and unauthorized." Opp. at 2. The City provided Plaintiffs' counsel with the letter that was Exhibit F to Plaintiffs' motion in response to a November 12, 2019 public records request. The letter was an attachment to a July 22, 2019 email from Ms. Tucker to Chief of Police Larry Hampton, attached hereto as Exhibit N. Ms. Tucker's email plainly states that she provided the letter to a musician who had been directed to City Hall by a police officer to obtain a (non-existent) permit. Ex. N. A copy of the letter as signed by Ms. Tucker and provided to that musician is attached hereto as Exhibit O. Ms. Tucker stated she "wanted [Chief Hampton] to be aware" of the letter and asked him to "let [her] know if [she] should have handled it differently." Ex. N. Chief Hampton responded that same day with a comment that the permit needed by musicians is the permit for Loop businesses to get special events approved. *Id.* He told Ms. Tucker to "direct them to the businesses for them to get sponsored." *Id.* Chief Hampton did not correct or otherwise object to Ms. Tucker's statement that "Musicians are only permitted who are not stationary." *Id.*

## ARGUMENT

### I. A PRELIMINARY INJUNCTION IS REQUIRED BECAUSE THERE IS AN ONGOING THREAT TO PLAINTIFFS' FIRST AMENDMENT RIGHTS.

The City has provided no reason to deviate from the established precedent that "[w]hen 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," *Phelps–Roper v. Troutman*, 662 F.3d 485, 488 (8th Cir. 2011). Despite its knowledge of repeated constitutional violations, the City has only belatedly represented that it will cease to violate Plaintiffs' First Amendment rights, and only after Plaintiffs filed this

motion. Moreover, contrary to its representations, the City has continued the same conduct that violates Plaintiffs' First Amendment rights. Plaintiffs face ongoing and irreparable harm.

"[I]t is the duty of the court to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit." *Roark v. S. Iron R-1 Sch. Dist.*, 540 F. Supp. 2d 1047, 1055 (E.D. Mo. 2008), *aff'd in relevant part*, 573 F.3d 556 (8th Cir. 2009). It is well established that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice," including when considering preliminary injunctive relief. *Abdullah v. Cty. of St. Louis, Mo.*, 52 F. Supp. 3d 936, 947 (E.D. Mo. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000)). The court must evaluate a defendant's conduct to determine the likelihood that the defendant will "return to [its] old ways." *See Roark*, 540 F. Supp. 2d at 1055-56.

This was the case, for example, when this Court in 2014 enjoined St. Louis County and other defendants from enforcing a requirement that protestors in Ferguson must "keep moving." *Abdullah*, 52 F. Supp. 3d at 948. Although the defendants "assert[ed] that they stopped using the keep-moving strategy," the court issued an injunction because the evidence was conflicting about whether the policy was still in effect and there was no assurance it wouldn't be implemented again. *Id.* at 947. Noting that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," the court held the Plaintiff had shown that he would suffer irreparable harm. *Id.* at 948 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

The City relies on *Weed v. Jenkins*, No. 4:15-cv-140 RLW, 2015 WL 6555413, at *4 (E.D. Mo. October 28, 2015), to claim Plaintiffs cannot show a threat of irreparable harm, but *Weed* provides no basis for denying relief here. In *Weed*, the plaintiff was arrested for violating a law that forbid willfully opposing an order of a state trooper after the plaintiff refused a

trooper's order to move his protest away from an interstate overpass for safety reasons. *Id.* at *3. The plaintiff, however, continued to protest on the same overpass and other overpasses *for 17 months without incident* before filing his lawsuit. *Id.* at *4 n.3. The evidence further reflected that the statute at issue had been used "in the context of protestors on a single occasion," the date of plaintiff's arrest. *Id.* at 13. The court reached the unremarkable conclusion that where "[n]othing in the facts indicates that Plaintiff's fear of arrest for protesting is legitimate," the plaintiff could not show a need for injunctive relief. *Id.* at *4.

Here, there is ample evidence of irreparable harm to Plaintiffs' First Amendment rights. Plaintiffs were repeatedly prevented from playing music on or adjacent to the public sidewalks in University City over the last year. Others engaging in protected expression on or adjacent to the sidewalks were likewise told they could not do so. Although the City claims it has ceased the objected-to conduct, the June 29, 2020 incident involving Mr. Douglas demonstrates the City has already returned to (or never left) its old ways. Moreover, while the City states it is "considering" amending its obstruction ordinance, Opp. at 5, the unconstitutionally vague and overbroad Ordinance remains in effect. And the City provides no reason to believe that even the contemplated change to the Ordinance would alter its custom of chasing off musicians.

The balance of hardships and public interest also support injunctive relief. "[T]he public interest favors protecting core First Amendment freedoms." *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999). The City points to its interest in preventing sidewalk obstruction, but courts have repeatedly concluded the public's interest in protecting First Amendment rights is sufficient to support a preliminary injunction despite competing government interests. *See Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (upholding a preliminary injunction against an anti-littering law); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (finding "it is always in the public interest to protect constitutional rights" and "[t]he balance of equities . . . generally favors the constitutionally-protected freedom of

expression"), *overruled on other grounds by Phelps-Roper v. City of Manchester*, 697 F.3d 678, 692 (8th Cir. 2012) (en banc). The City provides no evidence of incidents reflecting the hypothetical obstructions (e.g., "a bandstand blocking an entire sidewalk") it says could occur, Opp. at 4, and as such has provided no actual evidence of hardship. The City also continues to businesses to obstruct large portions of the public sidewalk. *See* Doc. 6-1, Ex. D. Finally, even with the preliminary injunction, the City can enforce its other ordinances and state law if faced with truly unlawful activity on its sidewalks.

## II. THE CITY'S ORDINANCE AND POLICIES ARE UNCONSTITUTIONAL.

The City does not make an effort to dispute that the Ordinance is unconstitutional as applied to Plaintiffs, instead claiming no preliminary injunction is required because the Plaintiffs' "as applied" challenge is purportedly mooted. As explained in Part I, *supra*, this is incorrect. But Plaintiffs are not only entitled to an injunction prohibiting the City from applying the Ordinance to them. Rather, the Plaintiffs are entitled to entitled to an injunction because the Ordinance is also unconstitutionally vague and overbroad on its face.

### A. The Ordinance is Unconstitutionally Overbroad and Unconstitutionally Vague.

#### 1. The Ordinance is Overbroad in Violation of the First Amendment.

The Ordinance is overbroad in violation of the First Amendment because it restricts a substantial amount of protected conduct relative to any legitimate application. The Ordinance restricts anyone who pauses on the sidewalk—a traditional public forum—for any length of time, to engage in any type of protected expression, from playing music to supporting a presidential candidate to sharing religious beliefs. It applies regardless of whether there is actual obstruction and even when there is no intent to obstruct.

The cases relied on by the City do not involve similar ordinances and do not support upholding the broad Ordinance here. The ordinance in *Shuttlesworth* was not only limited by its terms to conduct that actually "obstruct[ed] free passage" along the street or sidewalk, but

was also subject to a binding and "explicitly narrowed [state judicial] construction" that required "'[t]here must . . . be a showing of the accused's blocking free passage.'" *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 88, 92 (1965) (citing *Middlebrooks v. City of Birmingham*, 170 So.2d 424, 426 (Ala. Ct. App. 1964)). The Court explained, "[*a*]s *so construed*, we cannot say that the ordinance is unconstitutional though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied." *Id.* at 91 (emphasis added); *id.* at 92 (reversing defendant's conviction because the state court provided the narrowing construction in a separate case *after* defendant's trial).

The other cases cited (Opp. at 7) likewise did not involve "similar" ordinances, but instead addressed laws that restricted only actual obstruction. *See Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (ordinance forbid picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses") (alteration in original); *Duhe v. City of Little Rock*, 902 F.3d 858, 862 (8th Cir. 2018) (statute prohibited "obstruct[ing] vehicular or pedestrian traffic" "with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk of public inconvenience, annoyance, or alarm," where purposely is defined as "when it is the person's conscious object to engage in conduct of that nature or to cause the result" and recklessly is defined as "consciously disregard[ing] a substantial and unjustifiable risk that . . . [a] result will occur" and disregarding the risk "constitutes a gross deviation from the standard of care that a reasonable person would observe"); *Agnew v. Gov't of the District of Columbia*, 920 F.3d 49, 52, 58 (D.C. Cir. 2019) (statute made it unlawful to "crowd, obstruct, or incommode . . . the use of" specified public places and continue such activity after being instructed to cease by an officer and the court determined "the use of" language required that the statute was only violated by "actual or imminent obstruction of another person"). Three of the decisions did not involve a First Amendment substantial overbreadth challenge at all. *Agnew*, 920 F.3d at

54 (operative complaint challenged statute only on "arbitrary and discriminatory enforcement prong" of vagueness doctrine); *Frye v. Kansas City Missouri Police Dept.*, 375 F.3d 785, 788 (8th Cir. 2004) (upholding grant of qualified immunity to police officers, finding they reasonably interpreted a loitering ordinance that made it unlawful to obstruct a public street "'by hindering or impeding the free and uninterrupted passage of vehicles, traffic, or pedestrians'"); *Burbidge v. City of St. Louis*, 430 F. Supp. 3d 595, 623-24 (E.D. Mo. 2019) (rejecting a "fair notice" due process challenge to ordinance restricting standing in a public place "in such a manner as to obstruct, impede, interfere, hinder or delay the reasonable movement of vehicular or pedestrian traffic").[2]

The City also urges this Court to reject Judge Autrey's recent decision in *Langford*, claiming it conflicts with *Burbridge*. *Burbridge*, as Judge Autrey noted, is distinguishable for the simple reason that it did not involve a First Amendment facial overbreadth challenge. *Langford v. City of St. Louis*, No. 4:18CV2037 HEA, 2020 WL 1227347, at *21 (E.D. Mo. Mar. 5, 2020). Moreover, *Burbridge*'s analysis is faulty. As Judge Autrey explained: "The *Burbridge* court did not construe the Ordinance or provide any analysis to support its summary conclusion that the text provides fair notice. Nor did it address the effect of the Ordinance's lack of a *mens rea* requirement[.] . . . As a result, it is not persuasive and the Court respectfully declines to follow it." *Id.*[3]

More fundamentally, however, the City's reliance on *Burbridge* and its other cited cases fails because the Ordinance, both by its terms and as interpreted by the City, is not limited to

[2] The Eighth Circuit distinguished *Frye* in a case, like this, seeking prospective relief on the basis of First Amendment violation. *Stahl v. City of St. Louis, Mo.*, 687 F.3d 1038, 1040 fn.1 (8th Cir. 2012). The Eighth Circuit's distinctions apply with equal force here.

[3] While the City suggests the fact that both *Burbridge* and *Langford* are on appeal before the Eighth Circuit "warrants some caution," Opp. at 7, the appeal in *Burbridge* is an interlocutory appeal of the district court's denial of summary judgment on defendants' assertion of qualified immunity as to some claims and does not involve the facial challenge to the ordinance. *Burbridge v. City of St. Louis*, No. 20-1029 (8th Cir. Jan. 6, 2020).

actual obstruction and applies even when there is no intent to obstruct. Because the Ordinance does not require *actual* obstruction, but merely conduct that "tends to" hinder or impede, it is not narrowly tailored to advance any interest in allowing the free flow of pedestrian traffic and burdens substantially more speech than necessary. The City does not explain any interest in regulating expressive activity that does not actually obstruct pedestrians. Its cited cases reflect the unremarkable point that it is possible to draft a constitutional obstruction ordinance, not that that the City has done so here.

Nor is this case, as the City claims, similar to *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996). In *Roulette*, the Ninth Circuit rejected a facial challenge to an ordinance that (with a number of exceptions) prohibited sitting or lying on the sidewalk. *Id.* at 302 n.1. The court concluded "sitting or lying on the sidewalk" was not "integral to, or commonly associated with, expression." *Id.* at 304. In considering the scope of the ordinance's restriction on speech, the court noted the range of expression that remained permissible: "[H]omeless people remain free to beg on Seattle's sidewalks . . . . Voter registrars may solicit applications for the franchise. Members of the Freedom Socialist Party may doggedly pursue petition signatures and donations, or distribute educational materials. And the National Organization for Women may hold rallies or demonstrations." *Id.* The City's broad Ordinance, however, restricts *exactly* this type of expression. Indeed, it has already been used to prohibit playing music, dancing, distributing religious literature, and expressing support for a presidential candidate.

**2. The Ordinance Is Void-for-Vagueness in Violation of the Due Process Clause.**

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

The Eighth Circuit is clear that "any statute that chills the exercise of First Amendment rights must contain a knowledge element." *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992). The City does not dispute that an ordinance without a *mens rea* requirement fails to provide "people with fair notice of when their actions are likely to become

unlawful." *Stahl*, 687 F.3d at 1041. Instead, it claims the Ordinance contains an implied *mens rea* requirement because the word "obstruct" is clear. Opp. at 11. While the City cites cases offering common understandings of "obstruct," it ignores that the Ordinance is not limited to any such common understanding. Rather, it states that one "obstructs" not only by "hindering or impeding," but also by "tending to hinder or impede." §215.720(B)(1). (As discussed below, this language is unconstitutionally vague.) But even if, counterfactually, the ordinance was limited to actual obstruction, it still lacks a *mens rea* requirement because a person can violate it without a culpable mind. "Mere standing in one place for a matter of seconds would fall within the ordinance's broad terms." *See Derby v. Town of Hartford*, 599 F. Supp. 130, 135 (D. Vt. 1984) (holding unconstitutionally vague a nearly identical ordinance that made it unlawful to "stand or remain idle so as to "[o]bstruct any . . . public place").

The City also claims the Ordinance contains an implicit *mens rea* requirement because disobeying "a well-founded 'move on' directive" from a police officer is required for a violation. Opp. at 12. The Ordinance does not, however, require a police officer's directive to be well-founded because there are no guidelines as to when a move on directive should issue. Such unguided discretion "necessarily invites arbitrary and discriminatory treatment that cuts across established due process precepts." *Derby*, 599 F. Supp. at 136. Even if, as the City contends, "the failure to heed a warning as required under the Ordinance is equivalent to a knowing violation," Opp. at. 12, the Ordinance presents the "hazard of being prosecuted for knowing but guiltless behavior" because of a lack of guidelines to govern law enforcement, *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964).

Finally, the City claims that "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." Opp. at. 12. Despite the City's assurances, police officers stopped Mr. Douglas from performing on June 29, 2020. Ex. J, ¶¶ 6, 16.

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

The City relies on the Supreme Court's decision upholding a municipal anti-noise ordinance using the phrase "tending to disturb" to broadly claim "[t]here is nothing confusing or ambiguous" about the phrase "tending to." Opp. at 13 (citing *Grayned v. City of Rockford*, 498 U.S. 104 (1972)). In *Grayned*, however, the Court relied on the fact that the ordinance applied only in the specific, narrow context of disturbing the peace of a school session. The Court noted the ordinance was not "a vague, general 'breach of the peace' ordinance, but a statute written specifically for the school context, where the prohibited disturbances [were] easily measured." *Grayned*, 408 U.S. at 112. The Court also specifically based its holding on the conclusion that the phrase would be narrowly interpreted by the state high court. Noting a prior Supreme Court of Illinois decision narrowly construing a similar phrase, the Court concluded the "Supreme Court of Illinois would interpret the Rockford ordinance to prohibit only actual or imminent interference." *Id.* at 111–12. Indeed as the City concedes, the Supreme Court "was troubled in the abstract 'by the imprecision of the phrase 'tends to disturb.'"" Opp. at 13 (quoting *Grayned*, 408 U.S. at 111 (1972)).

*Grayned* is thus inapplicable for two reasons. First, the Ordinance is not limited to a specific, narrow context where prohibited disturbances are easily measured, but rather applies broadly to any "public place." Second, Defendant's non-binding promise that it will limit enforcement of its Ordinance—which it has already failed to honor—neither carries the force of law nor protects Plaintiffs and others who wish to exercise their First Amendment rights. *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly"). For the same reasons, the City's other cited decisions do not support upholding the Ordinance here. *United States v. Agront*, 773 F.3d 192, 196 (9th Cir. 2014) (rejecting a vagueness challenge

because the regulation "applie[d] only in fixed locations, 'property under the charge and control of VA'"); *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) (ordinance specifically "target[ing] [liquor] licensed premises" was not void for vagueness).

Indeed, in *Gooding v. Wilson*, 405 U.S. 518, 528 (1972), decided the same year as *Grayned*, the Supreme Court held a Georgia statute with the phrase "tending to cause a breach of peace" was unconstitutionally vague because state appellate courts had not construed the statute "so as to avoid all constitutional difficulties." It is undisputed that Missouri courts have not interpreted Defendant's Ordinance "so as to avoid all constitutional difficulties." The Ordinance "leaves wide open the standard of responsibility, so that it is easily susceptible to improper application," and in doing so, it is unconstitutionally vague. *See id.*

**c. The Ordinance Lacks Minimal Guidelines for Enforcement.**

The City claims individuals and officers with "common sense" know when someone is obstructing, but again ignores that the Ordinance defines obstructing to include standing or remaining idle in a way that "tend[s] to hinder or impede." Opp. at 14. The City has offered no explanation of this phrase, nor explained how it guides officers as to when someone is acting unlawfully. In reality, neither the alleged obstructers nor the police officers can understand this unconstitutionally vague language. As previously explained, "[t]he language of the [O]rdinance is so indefinite that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Derby*, 599 F. Supp. at 135.

**B. University City May Not Prohibit Musicians from Performing While Stationary.**

University City does not defend its policy that musicians may not perform while stationary on public sidewalks, because it cannot. It instead claims that Plaintiffs do not face harm because there was never any such policy according to the City Manager. The facts reflect,

however, that Assistant to the City Manager and Director of Economic Development Libbey Tucker, Chief of Police Larry Hampton, and the city's police officers all understood that musicians could not play on or adjacent to the public sidewalks while stationary. Ex.N: Ex. O; *see also, generally*, Exs. A, B, J, K, L and M. Whether or not the "no stationary musicians" rule was an official policy need not be resolved for this Court to enjoin it because it is clear that at the very least, this rule was a "'custom or usage' with the force of law" for which the City may be held liable. *Ware v. Jackson Cty., Mo.*, 150 F.3d 873, 880 (8th Cir. 1998) ("A plaintiff may establish municipal liability under § 1983 by proving that his or her constitutional rights were violated by an 'action pursuant to official municipal policy' or misconduct so pervasive among non-policymaking employees of the municipality 'as to constitute a 'custom or usage' with the force of law.'") (quoting *Monell v. Department of Soc. Serv.*, 436 U.S. 658, 691 (1978)). There is no dispute that the policy or custom of preventing musicians from playing while stationary violates the First Amendment, that officers continue to enforce this rule, and that Plaintiffs are entitled to injunctive relief.

**C. The City May Not Require Conditional Use Permits for Plaintiffs to Perform.**

The City likewise does not defend its requirement that a musician may play on private property with the owner's permission only if the business obtains a conditional use permit allowing the performance. While the City claims there is "no requirement in the ordinances," Opp. at 15, it does not dispute that the City imposed such a requirement against Plaintiffs and others, either as a matter of policy or as a custom. The City has provided no evidence or guarantee that it will not require a conditional use permit in the future and no reason for this Court to deviate from the established rule that a preliminary injunction is appropriate when Plaintiffs have established a violation of their First Amendment rights.

DATED: July 7, 2020

Respectfully Submitted,

s/ Lisa S. Hoppenjans
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**CERTIFICATE OF SERVICE**

I certify that on July 7, 2020, a copy of the foregoing was electronically filed with the Court using the CM/ECF system, which sent notification to counsel of record.

/s/ Lisa S. Hoppenjans