IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

DAN McGHEE,

Plaintiff,

v.

CITY OF WESTLAND, *et al.*,

Defendants.

Case No. 2:17-cv-13191-AC-EAS

Hon. Avern Cohn

[Fed. R. Civ. P. 65]

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PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

ISSUE PRESENTED

Whether the City's Disturbing the Peace Ordinance, facially and as applied to Plaintiff's expressive religious activity, deprives Plaintiff of his rights protected by the First and Fourteenth Amendments, thereby causing irreparable harm sufficient to warrant preliminary injunctive relief.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Steffel v. Thompson, 415 U.S. 452 (1974)

Tanner v. City of Va. Beach, 277 Va. 432 (2009)

I. Defendants' Standing Argument Is without Merit.

Defendants' standing argument is not proper because Defendants have failed to present the argument and instead direct this Court to a separately filed motion.[1] (Defs.' Opp'n at 9 [incorporating standing arguments from separately filed motion to dismiss]). Plaintiff will provide a full-throated response to Defendants' motion to dismiss. In the meantime, Plaintiff's standing is easily established here. As the record shows, Plaintiff has engaged, and will in the future engage, in a course of conduct that Defendants claim violates the ordinance.[2] As stated in his declaration:

> Northland is located in a commercial district along Ford Road in Westland, Michigan. At this location, Ford Road is a very busy five lane road (two lanes east bound, two lanes west bound, and a center turn lane). The vehicle traffic on this road is very loud, and *it can be heard from more than 50 feet away*. Consequently, in order to effectively express our pro-life Gospel message, *the other pro-lifers and I must raise our voices to be heard over the traffic and other noise that is customary in a commercial area and that is particular to this area*. *Also, because we cannot trespass on Northland property, we must raise our voices so we can be heard by our intended audience, many of whom are 50 feet or more away from us*.[3]

(McGhee Decl. ¶ 5 [emphasis added]; *see also* Compl. ¶¶ 32, 33, 41). After arresting Zastrow, Defendant Gatti warned Plaintiff that he too would be subject to

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[1] *See* LR 7.1(d)(1)(A) ("[A] motion must be accompanied by a single brief.").

[2] Defendants claim that Zastrow was properly arrested because his preaching could be heard "***from more than 50 feet away, even next to a busy road***." (Defs.' Opp'n at 20). This application of the ordinance is squarely before the Court.

[3] For similar reasons, Defendants' argument that Plaintiff's as-applied challenge fails "because he has not pled what allegedly prohibited conduct he intends to engage in, and therefore, the ordinance has not been 'applied' to him" (Defs.' Opp'n at 22-23) is factually and legally wrong.

arrest under the challenged ordinance *if he engaged in speech activity similar to Zastrow's activity*, which Defendants claim violates the ordinance. (McGhee Decl. ¶¶ 8-14, 18; Defs.' Opp'n at 20). Consequently, Plaintiff has standing to advance this challenge. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (holding that a plaintiff need not first expose himself to arrest to be entitled to challenge a law that he claims deters the exercise of his constitutional rights).

II. Plaintiff's Evidence Is Properly Before this Court.

Defendants object to the incriminating recording of City police officers making disparaging comments about the pro-life demonstrators shortly after arresting Zastrow. (Defs.' Opp'n at 15). Defendants' objection is without merit. As set forth in the Mersino declaration, the recording of these officers *was provided by the City* as discovery in Zastrow's criminal case. (Mersino Decl. ¶ 6 [Doc. No. 11-3]). Attorney Mersino was co-counsel in that case. There is nothing that prohibits her from authenticating this recording under the circumstances. She is not a percipient witness; she is simply providing the necessary foundation and authentication for an exhibit. Similarly, Defendants' objection to the transcript of the recording of Defendant Gatti's warning is without merit. (Defs.' Opp'n at 8 n.3 [claiming that "the transcript . . . has not been authenticated, and erroneously makes it appear as if the same officer that arrested Zastrow also warned the Plaintiff"). The City's police report confirms that Defendant Gatti was an arresting

officer. (McGhee Decl., Ex. A ["Ofc Plear and I then arrested Zastrow for disturbing the peace."]). Plaintiff was a party to the conversation, and he authenticated the video recording and the transcript. Plaintiff also properly authenticated the recording of Officer Bristol's comments as Plaintiff was present for that conversation as well. (McGhee Decl. ¶¶ 12, 13).

III. Plaintiff Is Subject to Arrest for Exercising His Right to Free Speech.

Here, we have the benefit of video, a police report written by an arresting officer, a release agreement signed by the City, and Defendants' concession in its opposition (Defs.' Opp'n at 20) that affirm Plaintiff's argument as to how Defendants enforce the challenged ordinance. Because the City may prevent loud music coming from a bar, people fighting in an apartment, and a car alarm/horn honking incessantly does *not* justify criminalizing speech that a police officer deems disturbing. As stated in *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971),

> It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. . . . It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. . . . It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.

Consider further the fact that the City would only dismiss the criminal charge against Zastrow *if he entered into an agreement with the City in which he promised not to sue the City for violating his constitutional rights*. (Mersino Decl.

¶ 5, Ex. B). This is a tacit admission that this action was unconstitutional. Yet, Defendants have done nothing to disavow this application of the ordinance, nor have they enacted a more precise law. Instead, they have doubled down, insisting that it is lawful to criminalize Plaintiff's speech activity. (Defs.' Opp'n at 20 [asserting that Zastrow's arrest was proper because his preaching could be heard "***from more than 50 feet away, even next to a busy road***"]). As the evidence establishes, Zastrow was arrested because he "could be heard from over 50 [feet] away yelling *about babies being murdered*."[4] (McGhee Decl. ¶ 10, Ex. A). Moments after arresting Zastrow, Defendant Gatti warned Plaintiff, "[S]creaming and yelling within 50 feet where we can hear you, that is disturbing the peace. That's what he found out today." (McGhee Decl. ¶ 12, Exs. B, C). And the "screaming and yelling" referred to is Zastrow's preaching "about babies being murdered"[5] while standing in a public forum adjacent to a busy and loud road outside of an abortion clinic—conduct that Plaintiff also engages in at this location.

[4] Contrary to Defendants' claim (Defs.' Opp'n at 19), there is undisputed evidence before this Court that the vehicles on Ford Road ("normal human activity") can be heard from more than 50 feet away. (McGhee Decl. ¶ 5).

[5] Per the police report, the officer deemed it "disturbing" that Zastrow was audibly preaching about "babies being murdered" and "accusations of murder" on the public sidewalk outside of an abortion clinic. Accordingly, Defendants justified the restriction ***with*** reference to the content of Zastrow's speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that "in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech") (internal quotations omitted).

(McGhee Decl. ¶ 5). Thus, Defendants' ordinance "makes a crime out of what under the Constitution cannot be a crime." *Coates*, 402 U.S. at 616.

IV. The Challenged Ordinance Is Unconstitutional.

The case law overwhelmingly supports the conclusion that <u>*this*</u> ordinance, facially and *as applied to the speech at issue*, is unconstitutional.[6] *See Tanner v. City of Va. Beach*, 277 Va. 432 (2009), *cert. denied*, 130 S. Ct. 1137 (2010) (striking down an ordinance that prohibited, *inter alia*, any "unreasonably loud, disturbing and unnecessary noise" as "impermissibly vague");[7] *Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 489 (4th Cir. 1983) (finding phrase "unnecessary noise" unconstitutionally vague); *see also Dupres v. City of Newport, R.I.*, 978 F. Supp. 429, 433–34 (D.R.I. 1997) (striking down noise ordinance on vagueness grounds); *Dae Woo Kim v. City of N.Y.*, 774 F. Supp. 164, 170 (S.D.N.Y. 1991) (same); *Norfolk 302, LLC v. Vassar*, 524 F. Supp. 2d 728, 740 (E.D. Va. 2007) (same); *State v. Immelt*, 173 Wash. 2d 1, 267 P.3d 305 (2011) (holding that a county noise ordinance prohibiting the honking of a vehicle horn except for a public safety purpose was impermissibly overbroad). Here, the City's

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[6] Defendants' "ample alternative avenues" argument is without merit. *NAACP v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984) ("[L]aws regulating public fora cannot be held constitutional simply because they leave potential speakers alternative fora for communicating their views."); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 607 (6th Cir. 2005).

[7] *Tanner* is the most persuasive case on the constitutionality of the ordinance. Understandably, Defendants dismiss it, citing to an unpublished Kentucky state court case that did not expressly rely on it for its holding. (Defs.' Opp'n at 20 n.5).

ordinance is hopelessly vague and overbroad,[8] and as this case demonstrates, it invites arbitrary enforcement and allows a police officer to make a subjective determination as to what speech activity is or is not unlawful.

Defendants' contrary arguments and reliance on the unpublished decision in *Gaughan v. City of Cleveland*, 212 F. App'x 405, 412 (6th Cir. 2007), are misplaced. To begin, the ordinances at issue in *Gaughan* only regulated the projection of sound from sound devices. *Id*. at 416. The ordinance at issue here regulates the spoken word in a traditional public forum. And the Cleveland ordinances were not facially vague precisely because they were narrowed by judicial interpretation. *See id.* at 409-13. That was the basis for the Sixth Circuit distinguishing several of the cases relied upon by Plaintiff in this case. *See id*. at 414 n.9. There is no such judicial narrowing of the ordinance at issue here. The

[8] Vagueness and overbreadth are two distinct, but overlapping concepts. "[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). "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. . . . The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972)). And when making an overbreadth challenge under the First Amendment, Plaintiff is <u>not</u> required to show that the law is invalid "in each of its applications," (*Contra* Defs.' Opp'n at 16 [quoting *Speet v. Schuette*, 726 F.3d 867, 871 (6th Cir. 2013)]), *see id*. at 872 (noting First Amendment exception); *see also Lewis v. New Orleans*, 415 U.S. 130, 134 (1974) (stating that because the challenged ordinance "is susceptible of application to protected speech, the section is constitutionally overbroad and therefore is facially invalid").

language of the ordinance permits a police officer to restrict the spoken word if he deems it "unreasonably loud, disturbing or unnecessary." *See Coates*, 402 U.S. at 613 (holding that a city ordinance was impermissibly vague because it "did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man"). Nonetheless, the *application* of this ordinance to Plaintiff's speech activity at issue is unlawful. *See Deegan v. City of Ithaca*, 444 F.3d 135, 143 (2d Cir. 2006) (holding that it is unlawful to restrict speech that could be heard from 25 feet away in a public square because it would prohibit "the sounds that typify the [area] and the activities it is meant to facilitate"); *United States v. Doe*, 968 F.2d 86, 91 (D.C. Cir. 1992) (holding that it is unreasonable to restrict noise exceeding 60 decibels at 50 feet in a park "exposed to every form of urban commotion-passing traffic, bustling tourists, blaring radios, performing street musicians, visiting schoolchildren").

CONCLUSION

Plaintiff respectfully requests that the Court grant his motion.

Respectfully submitted,

/s/ *Robert J. Muise*
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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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