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 MOTION FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT

Plaintiff Dan McGhee ("Plaintiff"), by and through undersigned counsel, hereby moves this Court for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure and E.D. Mich. LR 65.1 in order to prevent irreparable injury to his fundamental rights and interests.

In support of this motion, Plaintiff relies upon the pleadings and papers of record, as well as his brief and exhibits filed with this motion.

For the reasons set forth more fully in his brief, Plaintiff hereby requests that this Court preliminarily enjoin Defendants from enforcing Section 62-99 of the City of Westland's Code of Ordinances (hereinafter also referred to as the "City's Disturbing the Peace Ordinance"). This criminal ordinance has had, and continues to have, a chilling effect on Plaintiff's speech, and its enforcement has caused Plaintiff irreparable harm sufficient to warrant injunctive relief

Pursuant to E.D. Mich. LR 7.1, on October 12, 2017, a meet-and-confer was held in which Plaintiff's counsel sought concurrence from Defendants' counsel in the relief sought by this motion. After multiple discussions and written communications between counsel, on October 20, 2017, Defendants' counsel informed Plaintiff's counsel that Defendants would not concur in the relief sought, thereby prompting the filing of this motion.

WHEREFORE, Plaintiff hereby requests that this Court grant this motion for a preliminary injunction.

Respectfully submitted,

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PLAINTIFF'S BRIEF 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 AND MOST APPROPRIATE AUTHORITY

Allen v. Wright, 468 U.S. 737 (1984)

Bible Believers v. Wayne Cnty., 805 F.3d 228 (6th Cir. 2015)

Elrod v. Burns, 427 U.S. 347 (1976)

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

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

Terminiello v. City of Chi., 337 U.S. 1 (1949)

INTRODUCTION

This case challenges the constitutionality of the City's Disturbing the Peace Ordinance facially and as applied to restrict Plaintiff's pro-life expressive activity on the public sidewalks and medians adjacent to the Northland Family Planning Center, an abortion facility located adjacent to Ford Road in the City of Westland, Michigan.

The City has enforced, and will continue to enforce, this ordinance to prevent pro-life demonstrators, including Plaintiff, from preaching their pro-life Gospel message on public fora adjacent to Northland.

The City's Disturbing the Peace Ordinance is unconstitutional facially and as applied to Plaintiff's speech. This criminal ordinance has had, and continues to have, a chilling effect on Plaintiff's speech, and its enforcement has caused Plaintiff irreparable harm sufficient to warrant injunctive relief.

STATEMENT OF FACTS[1]

Plaintiff Dan McGhee is the Senior Pastor of the Harvest Bible Church located in Westland, Michigan. Plaintiff is a Christian, and he opposes abortion based on his sincerely held religious belief that abortion is an intrinsic evil. Plaintiff engages in expressive religious activity in opposition to abortion as part of

[1] The Declaration of Dan McGhee with supporting exhibits is filed as Exhibit 1 in support of this motion, and the Declaration of Attorney Erin Mersino with supporting exhibits is filed as Exhibit 2 in support of this motion.

his religious exercise. More specifically, Plaintiff protests abortion by engaging in prayer, preaching, worship, including singing worship songs, and holding pro-life signs on the public sidewalks surrounding facilities where abortions are performed, including on the public sidewalks and public medians surrounding the Northland Family Planning Center, an abortion facility located on Ford Road in Westland, Michigan (hereinafter referred to as "Northland"). (McGhee Decl. ¶¶ 1-3).

On June 24, 2017, Plaintiff and several other pro-life demonstrators, including Mr. Calvin Zastrow, went to the public fora adjacent to Northland to protest abortion, to preach the Gospel, and to convince those who visit and work at Northland, the City police officers who respond to Northland's overzealous complaints about the pro-life demonstrators, and those who are passing by the facility along Ford Road that abortion is an intrinsic evil that results in the murder of an innocent human life and is thus contrary to God's law. Plaintiff and the other pro-life demonstrators want to impact the hearts and minds of those who visit and work at Northland to inspire them to repent and to stop killing unborn babies through abortion. Plaintiff is compelled by his sincerely held religious beliefs to engage in his pro-life speech activity. (McGhee Decl. ¶ 4).

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 their pro-life Gospel message, Plaintiff and the other pro-lifers must raise their voices to be heard over the traffic and other noise that is customary in a commercial area and that is particular to this area. (McGhee Decl. ¶ 5).

The City has in place a disturbing the peace ordinance, Section 62-99 of the City's Code of Ordinances, which states as follows:

> Sec. 62-99. Unreasonably loud, disturbing or unnecessary noise or disturbances.
>
> (a) It shall be a misdemeanor for any person to create, assist in creating, permit, continue, or permit the continuance of any unreasonably loud, disturbing, or unnecessary noise, which disturbs the comfort, repose, health, peace or safety of others within the limits of the city.
>
> (1) The following acts, among others, are declared to be unreasonably loud, disturbing or unnecessary noises in violation of this section, but said enumeration shall not be deemed to be exclusive:
>
> a. The sounding of any horn or signal device on any automobile, bus, truck, or other vehicle, except as a danger signal, so as to create any loud or harsh sound plainly audible within any dwelling unit or residences, or, so as to be plainly audible within 50 feet or more from such device. This section shall not apply to emergency vehicles or those vehicles emitting a warning sound necessary for the protection of public safety.
>
> b. The playing or operation of any device designed for sound amplification including but not limited to, any radio, television sets, musical instruments, phonograph, or loud speaker, in such a manner or with such volume to be plainly audible, either:

> 1. in any dwelling unit or resident which is not the source of the sound, or
> 2. so as to be plainly audible 50 feet or more from such device.
>
> (2) For the purpose of this section, a plainly audible sound is any sound of which the information content is unambiguously communicated to the listener such as, but not limited to, understandable spoken speech, or comprehensible musical rhythms.
>
> (b) It shall be a misdemeanor for any person to make or excite any disturbance or contention in any tavern, store, grocery, manufacturing establishment, office or any other business place, or in any street, lane, alley, highway, public building, grounds or park, or at any election or other public meeting where citizens are peaceably and lawfully assembled.

(hereinafter "City's Disturbing the Peace Ordinance"). (McGhee Decl. ¶ 6; Mersino Decl. ¶ 2).

While at Northland on June 24, 2017, Plaintiff and a few other pro-life demonstrators were preaching, singing worship songs, displaying pro-life signs, and handing out Christian literature on the public sidewalk and the public grassy median area adjacent to Northland and Ford Road. (McGhee Decl. ¶ 7).

While Mr. Zastrow was holding a pro-life sign and preaching on the public median next to the sidewalk, Defendant Gatti and Officer Deandre Plear arrested him for allegedly violating the City's Disturbing the Peace Ordinance. Plaintiff witnessed the arrest of Mr. Zastrow, which was captured on video. Plaintiff was present on the public sidewalk when the arrest occurred. (McGhee Decl. ¶ 8; *see also* ¶ 12, Ex. B).

Defendant Gatti and Officer Plear placed Mr. Zastrow in handcuffs. Mr. Zastrow was then transported via a police vehicle to the City's police department and held in the City's detention cell until Plaintiff could arrive at the police station and post a $500 bond to secure Mr. Zastrow's release. (McGhee Decl. ¶ 9).

According to the City's police report, which was drafted by Defendant Gatti:

> Upon arrival [officers] parked their patrol vehicles in the center of the [Northland] facility's parking lot and could immediately could (*sic*) hear a protestor, Calvin Zastrow, yelling from the easement on Ford [Road]. Zastrow could be heard from over 50 [feet] away *yelling about babies being murdered*. Zastrow's actions were gaining the attention of people passing by and drawing the attention of employees at the location attempting to conduct business. . . . [Officer Gatti] advised Zastrow that he was being too loud and the yelling had to stop or he could be arrested for disturbing the peace. As [Officer Gatti] walked away Zastrow accused [him] of trying to intimidate him and continued to yell and stated that [Officer Gatti] was assisting in the murdering of babies. [Officer Gatti] returned to the parking lot where Zastrow continued to *yell quotes of scripture and accusations of murder*. [Officer] Plear and [Officer Gatti] then arrested Zastrow for disturbing the peace.

(McGhee Decl. ¶ 10, Ex. A; Mersino Decl. ¶ 3, Ex. A) (emphasis added). In other words, Mr. Zastrow was arrested for engaging in pro-life speech activity.

Immediately following the arrest of Mr. Zastrow, Defendant Gatti approached Plaintiff and another pro-life demonstrator and stated that Mr. Zastrow was arrested because he could be heard from more than 50 feet away, warning that the same could happen to them. More specifically, Defendant Gatti, who was video recorded, admonished and warned the pro-lifers as follows: "Stay on the

sidewalk and keep moving. That's the rules. Okay. Not on the grass. Keep the signs in your hand and keep moving. Sidewalk only. Okay. Is there anything you guys don't understand about that? And screaming and yelling within 50 feet where we can hear you, that is disturbing the peace. That's what he found out today. He was given a warning and he didn't abide by it." (McGhee Decl. ¶ 12, Exs. B, C).

Plaintiff was also present during a conversation with City police officers Defendant Gatti and Bristol in which the officers demonstrated their bias against Plaintiff and his fellow pro-life demonstrators in favor of Northland. This conversation took place shortly before Mr. Zastrow was arrested, and it was video recorded. (McGhee Decl. ¶ 13, Ex. D).

As a direct result of Mr. Zastrow's arrest, the existence of the City's Disturbing the Peace Ordinance, the City's demonstrated bias against Plaintiff and his fellow pro-life demonstrators, and Defendant Gatti's threat that Plaintiff would also be subject to arrest for engaging in similar expressive activity, Plaintiff has not returned to Northland for fear that he too will be arrested and subjected to prosecution for engaging in his speech activity. (McGhee Decl. ¶ 14).

Mr. Zastrow was criminally charged with violating the City's Disturbing the Peace Ordinance, which is a misdemeanor. He appeared in the Eighteenth Judicial District Court to answer the criminal charge. (McGhee Decl. ¶ 15; Mersino Decl. ¶¶ 1, 2, 4).

On September 6, 2017, the City agreed to dismiss the criminal charge against Mr. Zastrow in exchange for Mr. Zastrow signing an agreement that released the City, its elected officials, officers, and employees of any liability arising from his June 24, 2017 arrest and subsequent criminal charge. In this "Dismissal and Release Agreement of Potential and Disputed Claims," the City expressly disavowed all liability and thus any wrongdoing. (McGhee Decl. ¶ 16; Mersino Decl. ¶ 5, Ex. B).

The City has no intention of changing or modifying the City's Disturbing the Peace Ordinance (*see* Mersino Decl. ¶ 5), which has a chilling effect on Plaintiff's expressive activity (McGhee Decl. ¶¶ 14, 18). And Defendants have demonstrated a bias against the pro-lifers and their speech activity. (McGhee Decl. ¶ 13, Ex. D). In fact, immediately following the arrest of Mr. Zastrow, City police officers were captured on their vehicle recording devices criticizing and denouncing the pro-life demonstrators, claiming, *inter alia*, that the pro-lifers' arguments against abortion were "invalid." (McGhee Decl. ¶ 17; Mersino Decl. ¶ 6, Ex. C). And, as noted previously, prior to the arrest of Mr. Zastrow, City police officers were captured on video admitting their bias against the pro-lifers in favor of Northland. (McGhee Decl. ¶ 13, Ex. D).

Due to Defendants' credible threat to arrest pro-life demonstrators who can be heard beyond 50 feet preaching the Gospel against abortion on public fora

outside of Northland, Plaintiff will not return to Northland to engage in his expressive activity, thereby causing him irreparable harm. (McGhee Decl. ¶ 18).

ARGUMENT

The standard for issuing a preliminary injunction is well established:

> In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998)*; Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (same). Typically, the reviewing court will balance these factors, and no single factor will necessarily be determinative of whether or not to grant the injunction. *Connection Distributing Co.*, 154 F.3d at 288. However, because this case deals with a violation of Plaintiff's First Amendment right to freedom of speech, the crucial and often dispositive factor is whether Plaintiff is likely to prevail on the merits. *Id.*

I. Plaintiff Has Standing to Advance this Constitutional Challenge.

Before addressing the preliminary injunction factors, Plaintiff pauses here to address the threshold question of standing. In an effort to give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). "The doctrine of standing gives meaning to these

constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* (internal quotations and citation omitted).

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Consequently, to invoke the jurisdiction of a federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). In *National Rifle Association of America v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997), the court stated that a plaintiff has standing to seek declaratory or injunctive relief if he can "show actual present harm or a significant possibility of future harm."

In the First Amendment context, the standing requirements are appropriately relaxed. *See Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1034 n.18 (5th Cir. 1981) (stating that the injury-in-fact requirement for standing is properly relaxed for First Amendment challenges "because of the 'danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application'") (quotations in original, citations omitted); *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) ("When the First Amendment is in play . . . the Court has relaxed the prudential limitations on standing to ameliorate the risk of washing away free speech protections.").

Consequently, when a challenged restriction chills the exercise of free speech, as in this case, the affected party (and even a third party)[2] has standing to challenge that restriction. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) (recognizing that "a chilling effect on one's constitutional rights constitutes a present injury in fact"). As stated by the Court in *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), "[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."

Here, we have a criminal law that impinges upon protected speech. And not only has the City through its police officers already threatened to enforce this criminal law against Plaintiff's speech, they have in fact arrested and charged one of Plaintiff's pro-life companions for violating this law based on his speech. While that criminal case was eventually dismissed, it was done so pursuant to an

[2] *See, e.g., King Enters. v. Thomas Twp.*, 215 F. Supp. 2d 891, 906 (E.D. Mich. 2002) ("It is important to observe that prudential standing rules are somewhat relaxed in the First Amendment context. . . . [T]he freedom of expression and the unfettered exchange of ideas is considered the lifeblood which sustains a democracy. Thus, where a law regulates speech based on content, contains a prior restraint of protected speech, chills the right of expression of third parties, or restricts the expression of others not before the court, third parties may wage a facial challenge to the offending law based on First Amendment rights.") (internal quotations and citations omitted).

agreement where the arrested party had to release the City of any civil liability and in which the City disavowed any wrongdoing. The challenged law and its chilling effect remain unchanged. Consequently, Plaintiff's standing to advance this challenge to a law that chills the exercise of his rights protected by the First Amendment is well established. We turn now to the substantive legal claims.

II. Plaintiff Satisfies the Standards for Granting the Requested Injunction.

A. Plaintiff's Likelihood of Success on the Merits.

The right to freedom of speech is not simply a right to catharsis. It is the right to have your voice heard so as to change opinions in order to shape public policy. Accordingly, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to *special protection*." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted) (emphasis added). Consequently, Plaintiff's pro-life, religious speech "is entitled to special protection" under the First Amendment, not criminal prosecution under an unconstitutionally vague and overbroad City ordinance. Indeed, expressing a pro-life, religious message in a traditional public forum is protected by the Free Speech *and* Free Exercise Clauses of the First Amendment. *See, e.g., Capitol Square Rev. & Adv. Bd. v Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); *Bd. of Educ. v Mergens*, 496 U.S. 226, 250

(1990) (O'Connor, J.) (observing that "*private* speech endorsing religion" is protected by "the Free Speech and Free Exercise Clauses").

Moreover, the forum in question (a public sidewalk and associated median) is indisputably a traditional public forum. *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) ("[O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliché,' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.' No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.") (internal citation omitted). Traditional public forums "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). This includes public sidewalks adjacent to abortion clinics. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (striking down on First Amendment grounds buffer zone restrictions around abortion clinics).

As stated by the Supreme Court, "[T]he streets are natural and proper places for the dissemination of information and opinion, and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that

it may be exercised in some other place." *Schneider v. N.J.*, 308 U.S. 147, 163 (1939); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (striking down the city ordinance and stating, "Constitutional concerns are heightened further where, as here, the [challenged ordinance] restricts the public's use of streets and sidewalks for political speech"); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 55 (1983) ("In a public forum . . . all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers. . . .").[3]

In *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015), the Sixth Circuit, sitting *en banc*, held that government officials violated the plaintiffs' rights to freedom of speech *and* the free exercise of religion by *threatening* to arrest them

[3] It is no defense to this constitutional challenge that Plaintiff might have alternative ways of communicating his message. *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."); *see also Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 607 ("[B]ecause we have already found that the Ordinance is not narrowly tailored, whether the City of Dearborn has provided ample alternatives of communication is now irrelevant in this case. . . ."). Moreover, there are no adequate alternatives that would permit Plaintiff to reach his intended audience. *See, e.g., Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) ("[A]lternative mode[s] of communication may be constitutionally inadequate if the speaker's 'ability to communicate effectively is threatened' [and a]n alternative is not ample if the speaker is not permitted to reach the 'intended audience.'"); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) ("[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.") (citations omitted).

and thereby preventing them from engaging in religious *expressive* activity. As stated by the court:

> The right to free exercise of religion includes the right to engage in conduct that is motivated by the religious beliefs held by the individual asserting the claim. *Prater v. City of Burnside*, 289 F.3d 417, 427 (6th Cir. 2002). The government cannot prohibit an individual from engaging in religious conduct that is protected by the First Amendment. *Id.*
>
> The Bible Believers' proselytizing at the 2012 Arab International Festival constituted religious conduct, as well as expressive speech-related activity, that was likewise protected by the Free Exercise Clause of the First Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943). Plaintiff Israel testified that he was required "to try and convert non-believers, and call sinners to repent" due to his sincerely held religious beliefs. We do not question the sincerity of that claim. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778, 189 L. Ed. 2d 675 (2014) ("[T]he federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable." (internal parentheses omitted)).
>
> Free exercise claims are often considered in tandem with free speech claims and may rely entirely on the same set of facts. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002); *Rosenberger*, 515 U.S. at 841.

Bible Believers, 805 F.3d at 255-56. Consequently, speech "*about babies being murdered*" and "*quotes of scripture and accusations of murder*" on the public sidewalk outside of Northland and adjacent to Ford Road is fully protected by the First Amendment (Free Speech and Free Exercise Clauses) and thus beyond criminal prosecution under the City's Disturbing the Peace Ordinance.

Controlling precedent leaves no doubt that Plaintiff's expressive activity cannot be criminally punished as a matter of law. In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), for example, the Supreme Court did not allow convictions to stand because the trial judge charged that the defendants' speech could be punished as a breach of the peace "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." *Id.* at 3. In finding such a position unconstitutional, the Court famously stated,

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment. . . . *There is no room under our Constitution for a more restrictive view*.

Id. at 4 (emphasis added); *see also Tx. v. Johnson*, 491 U.S. 397 (1989) (reversing conviction of protestor who burned an American flag while fellow protestors shouted, "America, the red, white, and blue, we spit on you"); *Edwards v. S.C.*, 372 U.S. 229 (1963) (reversing conviction for breach of the peace in a case in which the police advised the petitioners that they would be arrested if they did not disperse within 15 minutes, and instead of dispersing, the petitioners engaged in what the City Manager described as "boisterous," "loud," and "flamboyant"

conduct, which consisted of listening to a "religious harangue" by one of their leaders, and loudly singing "The Star Spangled Banner" and other patriotic and religious songs, while stamping their feet and clapping their hands); *Sandul v. Larion*, 119 F.3d 1250 (6th Cir. 1997) (holding that the plaintiff's conduct, which included shouting "f--k you" and extending his middle finger to a group of abortion protestors, was constitutionally protected speech and could not serve as a basis for a violation of the city's disorderly conduct ordinance); *People v. Pouillon*, 254 Mich. App. 210 (2002) (reversing on free speech grounds a conviction for causing public disorder in a case involving a defendant who was yelling "They kill babies in that Church! Why are you going there?" to mothers who were dropping off their children at a day care operated by the church, and thus causing the children to become frightened and visibly upset); *People v. Boomer*, 250 Mich. App. 534 (2002) (reversing conviction on constitutional grounds in a case involving a defendant who was making a "loud commotion" and using "vulgar language" while canoeing on a river that was crowded with families and children).

Additionally, with regard to the Free Exercise challenge, when a law burdens religious exercise, as in this case, and it provides an exemption for non-religious conduct, as in this case,[4] the government must satisfy strict scrutiny—the

[4] The City's ordinance expressly exempts "emergency vehicles or those vehicles emitting a warning sound necessary for the protection of public safety," City

"most rigorous scrutiny" under the law. *Church of the Lukumi Babalu Aye, Inc v. City of Hialeah*, 508 U.S. 520, 534, 546 (1993) (striking down on Free Exercise Clause grounds an ordinance prohibiting the sacrifice of animals). That is, the City must have a compelling interest to punish Plaintiff for his speech and the reason for punishing him must be narrowly tailored to support that interest. *See id*. at 546 ("To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.") (internal quotations and citations omitted). And when a law restricts conduct protected by the First Amendment and yet permits other conduct that produces substantial or similar harm, the government's interest is not compelling. *See id.* at 546-47. *City of Hialeah* illustrates this axiom of constitutional law. There, the Court struck down on free exercise grounds an ordinance prohibiting the sacrifice of animals that defined sacrifice as the "unnecessary" killing of an animal. *See id.* The law permitted some animal killings as "necessary," but deemed the ritual, religious killing of an animal as unnecessary and thus criminal. By exempting some animal killings but prohibiting animal killings for religious reasons, the ordinance violated the challengers' right to free exercise of religion under the First Amendment. Similarly, the City's ordinance permits non-"disturbing" or "necessary" "noises," but the City has

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Ordinance § 62-99(a)(1)(a), as well as any "noise" that is deemed reasonable, necessary, or not disturbing, *see id.* at § 62-99(a).

deemed Plaintiff's pro-life religious speech "disturbing" and "unnecessary" and thus prohibited. The City's actions cannot withstand the "rigorous" scrutiny demanded by the Free Exercise Clause.

In sum, Plaintiff's protected speech cannot be prohibited by this City ordinance without offending the First Amendment. *See Coates v Cincinnati*, 402 U.S. 611, 616 (1971) ("The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution.").

Moreover, the City's ordinance is unconstitutionally vague and overbroad on its face and as applied to punish Plaintiff's speech. As the Supreme Court stated in *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide *explicit standards* for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-09 (internal punctuation and quotations omitted) (emphasis added);[5] *see Cox v. La.*, 379 U.S. 536, 551-52 (1965) (holding that the breach of the peace statute was unconstitutionally vague in its overly broad scope, for Louisiana defined "breach of the peace" as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet"; yet one of the very functions of free speech "is to invite dispute") (quoting *Terminiello*, 337 U.S. at 4-5). As stated by the Court in *Coates*:

> In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct. . . . 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. 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. 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.

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[5] The Court in *Grayned* ultimately upheld the anti-noise ordinance against a facial challenge. However, its reasons for doing so readily distinguish that ordinance from the vague City ordinance at issue here. Per the Court:

> We do not have here a vague, general "breach of the peace" ordinance, but a statute written *specifically for the school context*, where the prohibited disturbances are *easily measured by their impact on the normal activities of the school*. Given this particular context, the ordinance gives fair notice to those to whom it is directed.

Grayned, 408 U.S. at 112 (internal quotations and punctuation omitted) (emphasis added).

Coates, 402 U.S. at 614; *see also Dombrowski*, 380 U.S. at 479 (striking down under the "vagueness doctrine" the provision of a state law defining subversive organizations because the language was unduly vague, uncertain, and broad and thereby inhibited protected expression).

Consequently, in the First Amendment context, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). The City's ordinance fails to provide the necessary precision to withstand this constitutional challenge. *See also 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).

In *Tanner v. City of Virginia Beach*, 277 Va. 432 (2009), *cert. denied*, 130 S. Ct. 1137 (2010), for example, the Virginia Supreme Court struck down a city noise ordinance based on federal constitutional grounds. The ordinance at issue in *Tanner* is substantively similar to the City's Disturbing the Peace Ordinance at issue here. As stated by the court:

> The ordinance before us prohibits any "unreasonably loud, disturbing and unnecessary noise," noise of "such character, intensity and duration as to be detrimental to the life or health of persons of reasonable sensitivity," or noise that "disturb[s] or annoy[s] the quiet, comfort or repose of reasonable persons." The ordinance also describes various acts that constitute per se violations.

> We conclude that these provisions fail to give "fair notice" to citizens as required by the Due Process Clause, because the provisions do not contain ascertainable standards. . . . Instead, the reach of these general descriptive terms depends in each case on the subjective tolerances, perceptions, and sensibilities of the listener.
>
> Noise that one person may consider "loud, disturbing and unnecessary" may not disturb the sensibilities of another listener. As employed in this context, such adjectives are inherently vague because they require persons of average intelligence to guess at the meaning of those words.

Id. at 440. Relying principally on U.S. Supreme Court precedent, the court observed that the determinations set forth in the challenged ordinance "invite[] arbitrary enforcement." *Id*. at 441. Thus, the court concluded, "Because these determinations required by the ordinance can only be made by police officers on a subjective basis, we hold that the language of the ordinance is impermissibly vague." *Id*. (citing *Grayned*, 408 U.S. at 108-09); *see also Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 489 (4th Cir.1983) (finding phrase "unnecessary noise" unconstitutionally vague); *Dupres v. City of Newport, R.I.*, 978 F. Supp. 429, 433–34 (D.R.I. 1997) (stating that "noise which . . . annoys, disturbs, injures, or endangers the comfort, repose, peace, or safety of any individual" is vague); *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) (holding prohibition on "noisy conduct" impermissibly vague).

The same is true here. The City's ordinance is hopelessly vague and overbroad, and as this case demonstrates, it invites arbitrary enforcement and allows a police officer to make a subjective determination as to what is or is not "*unreasonably* loud, *disturbing*, or *unnecessary* noise" that "disturbs" others.[6]

Moreover, under the circumstances, the application of this ordinance to the free speech activity of pro-life demonstrators on the public sidewalks in this commercial district adjacent to the very busy and noisy Ford Road is unreasonable and thus impermissible. *See Deegan v. City of Ithaca*, 444 F.3d 135, 143 (2d Cir. 2006) (holding that it is unreasonable 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,

[6] It is impermissible as a matter of First Amendment jurisprudence to punish speech which "disturbs." *See, e.g.*, *Terminiello*, 337 U.S. at 4-5; *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (noting that speech cannot be "punished or banned, simply because it might offend a hostile mob"); *Tx. v. Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."); *Street v. N.Y.*, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Edwards*, 372 U.S. at 237 ("The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (stating that "[t]he emotive impact of speech on its audience is not a 'secondary effect'" that would permit regulation).

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").

In the final analysis, Plaintiff has demonstrated a substantial likelihood of succeeding on the merits of his constitutional claims.

B. Irreparable Harm to Plaintiff without the Preliminary Injunction.

Plaintiff will be irreparably harmed without the preliminary injunction. Defendants' criminal prohibition on Plaintiff's speech deprives Plaintiff of his fundamental First Amendment rights to freedom of speech and the free exercise of religion—and this deprivation will continue absent injunctive relief because Plaintiff reasonably fears returning to Northland without Court protection.

It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Connection Distributing Co.*, 154 F.3d at 288. And this injury is sufficient to justify the requested injunction. *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*).

C. Whether Granting the Preliminary Injunction Will Cause Substantial Harm to Others.

In this case, the likelihood of harm to Plaintiff is substantial because Plaintiff intends only to exercise his First Amendment rights in a public forum, and the deprivation of this right, even for minimal periods, constitutes irreparable injury.

On the other hand, if Defendants are restrained from enforcing the City's criminal prohibition on Plaintiff's speech, Defendants will suffer no harm because the exercise of constitutionally protected expression can never harm any of Defendants' or others' legitimate interests. *See Connection Distributing Co.*, 154 F. 3d at 288.

In the final analysis, the question of harm to others as well as the impact on the public interest "generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation. . . ." *Connection Distribution Co.*, 154 F.3d at 288. For if Plaintiff shows that his First Amendment rights have been violated, then the harm to others is inconsequential.

D. The Impact of the Preliminary Injunction on the Public Interest.

The impact of the preliminary injunction on the public interest turns in large part on whether Defendants violated Plaintiff's rights protected by the First and Fourteenth Amendments. As the Sixth Circuit noted, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also*

Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

As noted previously, Defendants' credible threat to criminalize Plaintiff's speech based on the Defendants' hostile reaction to his speech deprives Plaintiff of his fundamental rights protected by the First Amendment and Fourteenth Amendments. Therefore, it is in the public interest to issue the preliminary injunction.

CONCLUSION

Plaintiff respectfully requests that the Court grant his motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 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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