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

MALLORY RUSCH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:21-cv-00029-JMB
	)	
CITY OF ST. LOUIS, MISSOURI,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

On November 2, 2020, the day prior to the general election, Plaintiff Mallory Rusch situated herself within Forest Park so that she could meet with and distribute political literature to volunteers who would themselves further distribute it the next day. Shortly after Rusch's arrival, a park ranger approached and told her that political activity is not allowed in the park, directing her to leave immediately. After Rusch sought out further explanation from the Parks Division of the Department of Parks, Recreation, and Forestry, officials ultimately allowed her to continue distributing literature subject to the condition that she not display signage.

It remains unclear to Rusch why she was required to cease distributing literature in the park and allowed to resume only when she was limited to providing literature to volunteers who were meeting her to obtain it and doing so without any sign identifying herself. Nonetheless, because the broad language of §§ 22.16.070, 22.16.090, and 22.40.030 of the St. Louis Code of Ordinances arguably prohibit her expressive activity and she was, in fact, restricted by officials enforcing the City's ordinances from continuing her expressive activity without interference, Rusch now faces two options: either engaging in political expressive

activity in the City's parks and facing enforcement of the rules prohibiting it, or self-censoring by engaging in the expressive activity somewhere else, or not at all.

Rusch now seeks injunctive and declaratory relief based upon the unconstitutionality of §§ 22.16.070, 22.16.090, and 22.40.030 under the First and Fourteenth Amendments. This Court should grant a preliminary injunction preventing the City from enforcing §§ 22.16.070, 22.16.090, and 22.40.030 because Rusch is likely to succeed on merits of her claims.

CHALLENGED ORDINANCES

The City's official policies related to operation of its parks are codified in Chapter 22 of the City's Code of Ordinances. Verified Complaint, ECF No. 1 at ¶ 19. Section 22.16.070 states that "[n]o person shall deliver any oration, address, speech, sermon or lecture [in a park] without the written consent of the Director of Parks, Recreation and Forestry." *Id*. at ¶ 20. Section 22.16.090 provides that "[a]ll disorderly or indecent conduct, the use of threatening, obscene or profane language, and all games, acts or demeanor calculated or tending to mar or disturb the feelings or enjoyment of the visitors attending public parks, places or squares are prohibited therein." *Id*. at ¶ 21. Because the park regulations in Chapter 22.16 do not assign a penalty, the general penalty provision of § 1.12.010 provides the penalty for a violation of § 22.16.070 or § 22.16.090. *Id*. at ¶ 22. According to § 1.12.010, "[e]very person convicted of a violation of any section of this Code shall be punished by a fine of not less than one dollar nor more than five hundred dollars or by imprisonment for not more than ninety days or by both such fine and imprisonment." *Id*. at ¶ 23.

The City's policies for park assembly permits constitute Chapter 22.40 of the Code. *Id*. at ¶ 24. Section 22.40.010 declares the general assembly permit policy as:

> Individuals, groups or organizations planning assemblies, meetings or gatherings in City parks at which attendance of one

> hundred or more persons is expected or solicited shall apply for a permit for the use of a designated area in the parks. Before issuance of a permit, a bond shall be posted in an amount to be determined by the Director of Parks sufficient to cover the repair of damages to the park fixtures and premises at the location to be utilized, including trees, turf and shrubs, the reasonable cost of cleaning the premises from extraordinary debris and litter, and the expense incurred for additional policing and traffic control. If the park area for which a permit has been granted is left in good condition, ordinary wear and tear excepted, and no abnormal expenses have been incurred by reason of the usage, the bond so posted shall be cancelled and obligations thereunder shall be void, otherwise it shall remain in full force and effect to satisfy damages, expenses or cost of repair or restoration.

Id. at ¶ 25.

Section 22.40.020 asserts that "[t]he bond requirement specified in Section 22.40.010 may be satisfied with the posting of a bond secured from a recognized bonding or insurance company, a cash bond or by the written assurance of at least three responsible persons who jointly or severally agree to pay the reasonable costs of damage, cleaning of debris, and additional policing and traffic control. Such determination of the type of bond required shall be in the discretion of the Director of Parks, Recreation and Forestry." *Id*. at ¶ 26. "Political assemblies, meetings or gatherings shall be permitted in City parks under the same terms and conditions," according to § 22.40.030. *Id*. at ¶ 27.

Unlike Chapter 22.16's park regulations, Chapter 22.40 has its own penalty provision, which provides that "[a]ny individual or individuals or the officers of any organization arranging assemblies, meetings or gatherings in City parks who shall fail to comply with the provisions of this chapter shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than the sum of twenty-five dollars nor more than the sum of five hundred dollars." *Id*. at ¶ 28. Section 22.04.050 charges the Director of Parks, Recreation and Forestry with responsibility "for the supervision and coordination of all activities of the Department of

Parks, Recreation and Forestry" and directs that "[h]e shall also grant all permits to occupy or use portions of any park . . . when the occupancy or use is consistent with the public use thereof and is not inconsistent with any law or general ordinance, and any permit may be revoked by the Director at any time." *Id*. at ¶ 29.

Sections 22.16.070, 22.16.090, and 22.40.030 do not include a *mens rea* requirement. *Id*. at ¶ 30.

The City's ordinances, including those challenged herein, are enforced under color of law. *Id*. at ¶ 31.

FACTS

The City of St. Louis owns and operates 110 city parks under the jurisdiction of its Department of Parks, Recreation, and Forestry.[1] One of the 110 city parks is Forest Park, so named because most of the tracts used for the park were virgin forest land. At 1,371 acres, Forest Park is among the seventy-five largest municipal parks in the United States and, as is often mentioned, bigger that New York's Central Park. In 1864, the Missouri legislature authorized an election for St. Louis voters to approve a centrally located park; however, voters overwhelmingly rejected the proposal. In 1870, real estate developer Hiram W. Leffingwell announced a plan to create a 3,000-acre park extending west of Kingshighway, but, at the time, only the state legislature could establish a park. In 1872, the state legislature established Forest Park; however, the legislature also extended the boundaries of St. Louis and created a special taxing district, residents of which successfully challenged the law as unconstitutional. *State ex rel. Chouteau v. Leffingwell*, 54 Mo. 458 (1873). In 1874, the legislature tried again, this time passing legislation

[1] Except where another citation is provided, general information about St. Louis' parks is from the history of Forest Park maintained on the City's website, https://www.stlouis-mo.gov/archive/history-forest-park/.

to create Forest Park that withstood legal challenges. *St. Louis Cty. Court v. Griswold*, 58 Mo. 175 (1874). Today, the park attracts more than ten million visitors every year. The City's Charter provides for a Department of Parks, Recreation, and Forestry led by a Director appointed by the mayor. St. Louis City Charter, Art. XIV, § 14-B.

On November 2, 2020, Rusch situated herself within Forest Park so that she could meet with volunteers and distribute political literature to them so that they in turn could themselves publicly distribute it the next day. Verified Complaint at ¶ 32. Rusch's purpose in meeting the volunteers was to express her position regarding a ballot measure that would be considered by voters and to provide the volunteers with oral and written information to aid them in spreading this message. *Id*. at ¶ 33. She expected to meet with between forty and fifty individuals. *Id*. at ¶ 34. Rusch did not intend to violate any ordinance. *Id*. at ¶ 35. She was approached by a park ranger, who told her that political activity is not allowed in the park and, thus, she must leave immediately. *Id*. at ¶ 36. Although Rusch did not understand what law prohibited her from meeting and speaking with others in a park to advocate her political message and the ranger could not provide her with a citation to any law, she was concerned that she would be arrested. *Id*. at ¶ 37.

Upon being required to leave by the park ranger, however, Rusch contacted the Parks Division of the Department of Parks, Recreation, and Forestry to seek an explanation. *Id*. at ¶ 38. Although she was aware of § 22.16.070 and § 22.16.090, she did not think herself to be violating either ordinance and was not aware of any other applicable ordinance. *Id*. at ¶ 39. The first official she encountered at the Parks Division reiterated that political activity was not allowed in parks and no workaround was available. *Id*. at ¶ 41. Another ranger arrived and stated that Rusch could remain to distribute literature to volunteers meeting her so long as she

did not have a sign. *Id*. at ¶ 42. Rusch returned to her designated spot in the park and continued her planned expressive activity, except that she did not hold or otherwise display a sign, as she had intended to do before being told that she could not. *Id*. at ¶ 43. Rusch later learned that a permit is required for political assemblies, meetings, or gatherings in park, under § 22.40.030 of the St. Louis Code of Ordinances, but believes the requirement does not apply to her expressive activity. *Id*. at ¶ 40.

Rusch regularly engages in political expressive activity and intends to return to St. Louis parks to do so. *Id*. at ¶ 44. She still does not know why she was required to cease meeting and distributing literature in the park and allowed to resume only when she was limited to providing literature to volunteers who were meeting her to obtain it and doing so without any sign identifying herself. As a result of her experiences on November 2, 2020 and her knowledge of §§ 22.16.070, 22.16.090, and 22.40.030, Rusch must choose between either self-censoring—as she did when initially ceased her expressive activity at the direction of a ranger and later complied with the restriction that she not have or hold a sign when she was allowed to return her meetings and literature distribution—by limiting her expressive activity so as not to attract attention or searching for and using other non-park alternative locations, or facing the risk that the ordinances will be enforced against her in ways she cannot predict and that violate the Free Speech and Due Process Clauses. *Id*. at ¶ 46.

ARGUMENT

A. Standard for Preliminary Injunction

In considering the motion for preliminary injunction, this Court must determine: (a) whether Rusch is likely to prevail on the merits; (b) if there exists a threat of irreparable harm to her absent the injunction; (c) the balance between this harm and the injury that the injunction's issuance would inflict upon the City; and (d) what is in the public interest. *See Dataphase*

Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981) (en banc). In this case, the ordinances should be enjoined because Rusch is likely to succeed on the merits. "When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (en banc) (citation omitted); *accord Free & Fair Election Fund v. Missouri Ethics Comm'n*, 252 F. Supp. 3d 723, 737 (W.D. Mo. 2017).

B. The City should be enjoined from enforcing §§ 22.16.070, 22.16.090 and 22.40.030.

1. Rusch is likely to prevail on the merits.

Rusch is likely to prevail on the merits of her First and Fourteenth Amendment claims regarding §§ 22.16.070, 22.16.090 and 22.40.030. First, Rusch is likely to prevail on the merits of her claim that § 22.16.070 is unconstitutional because it is facially overbroad and an invalid prior restraint. Next, Rusch is likely to prevail as to § 22.16.090 because it fails to provide reasonable notice to those who might violate it and is a content-based restriction on speech that cannot survive strict scrutiny. Finally, Rusch is likely to prevail on her challenge to § 22.40.030 because it is both an impermissible content-based restriction on expressive activity and a prior restraint.

All three ordinances operate in parks, a quintessential traditional public forum, where an individual's freedom of expression is at its zenith. The government's ability to restrict speech is most circumscribed in a traditional public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). "Wherever the title of streets and parks may rest, they 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. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). "Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Id*. Thus, "public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be public forums." *United States v. Grace*, 461 U.S. 171, 177 (1983) (cleaned up). "In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*

a. Section 22.16.070 likely violates the Free Speech Clause of the First Amendment.

Section 22.16.070's demand that "[n]o person shall deliver any oration, address, speech, sermon or lecture" in a park "without the written consent of the Director of Parks, Recreation and Forestry" violates the Free Speech Clause in two ways.[2] It is both facially overboard and a prior restraint that affords a government official unfettered discretion to allow or disallow speech. Although Rusch demonstrates that § 22.16.070 violates the First Amendment, ultimately, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000); *Phelps-Roper v. Koster*, 713 F.3d 942, 949 (8th Cir. 2013) (holding that

[2] "The First Amendment of the Constitution provides: 'Congress shall make no law . . . abridging the freedom of speech.'" *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958). "This freedom is among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action; and municipal ordinances adopted under state authority constitute state action." *Id*.

government bears the burden of proving constitutionality of laws that infringe upon rights to engage in expressive activity).

i. Section 22.16.070 is facially overbroad.

Section 22.16.070 is facially overbroad under the First Amendment. "In the First Amendment context, a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Repub. Party*, 522 U.S. 442, 449 n.6 (2008)); *accord Langford v. City of St. Louis*, 443 F. Supp. 3d 962, 973 (E.D. Mo. 2020). The Eighth Circuit has explained that:

> A three-part test evaluates whether a statute is unconstitutionally overbroad: "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."
> …
> After construing the statute, the second step is to examine whether the statute criminalizes a "substantial amount" of expressive conduct.
> …
> Finally, we must ask whether the statute is "readily susceptible" to a limiting construction which would render it constitutional.

Snider v. City of Cape Girardeau, 752 F.3d 1149, 1158 (8th Cir. 2014) (citations omitted); *accord Willson v. City of Bel-Nor*, 470 F. Supp. 3d 994, 1005–06 (E.D. Mo. 2020). Application of this test to § 22.16.070 demonstrates that it impermissibly criminalizes a substantial amount of expressive conduct.

As to the first part of the test, on its face, § 22.16.070 prohibits a substantial amount of speech occurring in the City's parks. It applies to "any oration, address, speech, sermon or lecture," by any person in any part of any park. With no limits in the ordinance, any somewhat elaborate discourse could constitute "oration," any parent chiding a frolicking child may be delivering a "lecture" or a "sermon," and any person who speaks to anyone else may be

delivering "speech." Indeed, it is difficult to think of any sort of speech that might not be covered by the plain language of the ordinance. By potentially encompassing all speech, the ordinance is easily construed as overbroad.

As to the second part, so construed § 22.16.070 "creates a 'prohibition of alarming breadth.'" *Willson v. City of Bel-Nor*, 924 F.3d 995, 1003 (8th Cir. 2019) (quoting *United States v. Stevens*, 559 U.S. 460, 474 (2010)). Most notably, the ordinance without question would restrict religious sermons in parks in a manner that has been repeatedly prohibited by the Supreme Court. *Niemotko v. State of Md.*, 340 U.S. 268, 269–70 (1951) (holding unconstitutional on First Amendment grounds the convictions of two Jehovah's Witnesses charged for holding "Bible talks" in the city of Havre de Grace's public park without permission); *Saia v. People of State of New York*, 334 U.S. 558, 559–60 (1948) (same as to city of Lockport's ordinance under which a Jehovah's Witnesses minister was convicted for using a loud-speaker or amplifier in park without permission); *see also Kunz v. People of the State of New York*, 340 U.S. 290—91 (1951) (same as to conviction of Baptist minister for violating ordinance by holding a "public religious meeting" on street after having been refused a permit to do so). Whatever justification the City might conjure to restrict pure speech in its parks, it would not justify such a broad restriction on parkgoers' constitutionally protected speech. Thus, the impermissible applications of the ordinance are substantial when judged in relation to any plainly legitimate sweep.

Section 22.16.070 fares no better under the third part because it is not readily susceptible to a narrowing construction. "The showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep' suffices to invalidate all enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally

protected expression.'" *Snider*, 752 F.3d at 1158 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973)). This Court is constrained because "'[l]imiting constructions of state and local legislation are more appropriately done by a state court or an enforcement agency.'" *Willson*, 924 F.3d at 1004 (quoting *Ways v. City of Lincoln*, 274 F.3d 514, 519 (8th Cir. 2001)). Moreover, "[c]ourts 'may impose a limiting construction on a statute only if it is readily susceptible to such a construction.'" *Id*. (quoting *Stevens*, 559 U.S. at 481). And where, as here, the ordinance is not readily susceptible to a limiting construction, a federal "court 'will not rewrite a law to conform it to constitutional requirements.'" *Id*. (quoting *Stevens*, 559 U.S. at 481).

For these reasons, Rusch is likely to succeed on the merits of her claim that § 22.16.070 is facially overbroad under the First Amendment.

ii. Section 22.16.070 is a facially invalid prior restraint.

In addition to being overbroad, § 22.16.070 is a facially invalid prior restraint under the First Amendment. A law that places discretion to allow, or disallow, expression in the hands of a government official constitutes a prior restraint. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). Long ago, the Supreme Court noted that "[i]t is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). Indeed, "[i]t is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not." *Cox v. State of La.*, 379 U.S. 536, 557 (1965). Thus, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without

narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969).

An ordinance establishing a prior restraint on expressive activity may result in censorship and is thus subject to a facial challenge. *Lakewood*, 486 U.S. at 757. Under our constitution, a prior restraint and censorship are "evils [that] engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge." *Id*. Moreover, "there is a heavy presumption against the validity of a prior restraint." *Forsyth Cty v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (quotation omitted); *accord Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 195 F. Supp. 3d 1065, 1075 (E.D. Mo. 2016).

Here, Section 22.16.070 provides that "[n]o person shall deliver any oration, address, speech, sermon or lecture [in a park] without the written consent of the Director of Parks, Recreation and Forestry." This prohibition is consistent with the explanation given to Rusch that she must depart because political activity is not permitted in the park. Rusch was ultimately granted permission to return and continue her expressive activity only with conditional approval. Section 22.16.070 is analogous to *Niemotko,* which overturned convictions for holding "Bible talks" in a public park without permission, 340 U.S. 268, and *Saia*, which invalidated a municipal order that "forbids the use of sound amplification devices except with permission of the Chief of Police," 334 U.S. at 558. As the Supreme Court explained in *Kunz*, at a minimum, a municipality "cannot vest restraining control over the right to speak . . . in an administrative official where there are no appropriate standards to guide his action." 340 U.S. at 295; *see also id*. at 285 (Frankfurter, J., concurring in result) ("Administrative control over the right to speak must be based on appropriate standards;" "[t]he vice to be guarded against is arbitrary action by officials"); *but see id.*, at 297 (Jackson, J., dissenting) ("The contention

which Kunz brings here and which this Court sustains is that such speeches on the streets are within his constitutional freedom and therefore New York City has no power to require a permit"). Here, the ordinance does not provide guidelines for the Director to decide whether to give written consent or a deadline for doing so. Because § 22.16.070 does not provide the Director, whose prior permission must be secured, with narrowly drawn, reasonable, and definite standards for granting or denying it, the ordinance is unconstitutional.[3]

For these reasons, Rusch is likely to succeed on the merits of her claim that § 22.16.070 is a facially invalid prior restraint.

b. Section 22.16.090 likely violates the Free Speech Clause of the First Amendment.

Section 22.16.090's prohibition of "[a]ll . . . indecent conduct, the use of . . . profane language, and all games, acts, or demeanor calculated or tending to mar or disturb the feelings or enjoyment of visitors attending public parks, places or squares" violates the Free Speech Clause because it is a presumptively unconstitutional content-based restriction on expressive activity that is not narrowly tailored to serve a compelling government interest.

"[A] government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quotation omitted) "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.*; *accord Willson*, 924 F.3d at 1000. An ordinance may be "content

[3] Even if the ordinance did provide guidelines, "[t]he Court of Appeals for the Eighth Circuit has expressed doubt as to the nexus between the licensure of small groups and the governmental interest in managing public spaces." *Pence v. City of St. Louis*, 958 F. Supp. 2d 1079, 1085 (E.D. Mo. 2013).

based on its face or when the purpose and justification for the law are content based." *Id.* at 166. A content-based restriction on speech is "subject to the most exacting scrutiny." *Phelps–Roper v. City of Manchester*, 697 F.3d 678, 686 (8th Cir. 2012) (en banc). "This stringent standard reflects the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

Section 22.16.090 is content based in two ways. First, the ordinance specifically targets expression based on content, such as "indecent conduct" and "profane" language. Second, the criminality of expressive activity is determined by the reaction of third parties, with speech becoming unlawful if it is "calculated or tending to mar or disturb the feelings or enjoyment of the visitors attending public parks." § 22.16.090.

First, the prohibition of "indecent conduct" and "profane language" is content based because it "draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163. Accordingly, the Eighth Circuit found a restriction on "indecent behavior" and "profane discourse" to be content based. In assessing Missouri's Worship Protection Act, the Court noted that there, like here, "[t]he meaning of these adjectives is not defined." *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 790 (8th Cir. 2015). The Court further concluded that the content-based prohibition was analogous to *Cohen*, in which the Supreme Court held unconstitutional the prosecution of Cohen for wearing a jacket displaying the phrase "Fuck the Draft" under a California law that prohibited disturbing the peace by "offensive conduct." *Id.* (citing *Cohen v. California*, 403 U.S. 15 (1971)).[4] The Supreme Court

[4] The reliance of *Survivors Network of Those Abused by Priests* on *Cohen* is supported by the Supreme Court's recent holding that "[g]iving offense is a viewpoint" and that a federal statute's denial of registration of trademarks that may disparage others is, thus, "viewpoint discrimination." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

"refused to 'indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.'" *Id.* (quoting *Cohen*, 403 U.S. at 26). The risk is that "[g]overnments might otherwise 'seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.'" *Id*. (quoting *Cohen*, 403 U.S. at 26).

Second, the prohibition of "all games, acts, or demeanor calculated or tending to mar or disturb the feelings or enjoyment of visitors attending public parks, places or squares" is content based because the criminality of speech is determined by the reaction of others. The Supreme Court explained that a law "would not be content neutral if it were concerned with undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech." *McCullen v. Coakley*, 573 U.S. 464, 481 (2014) (cleaned up). That is, where speech "cause[s] offense or [makes] listeners uncomfortable, such offense or discomfort would not give the [government] a content-neutral justification to restrict the speech." *Id*. Section 22.16.090 is content based because it does exactly what the Supreme Court says a content-neutral law cannot do: it is concerned with the "feelings or enjoyment of the visitors attending public parks" and whether their feelings or enjoyment might be marred or disturbed. This is not a content-neutral justification.

Section 22.16.090 cannot overcome the presumption of unconstitutionality assigned to laws that restrict speech based upon its content. "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality . . . is reversed, [and] the Government bears the burden to rebut that presumption." *Playboy Entm't Grp.*, 529 U.S. at 817. Indeed, "[i]t is rare that a regulation restricting speech because of its content will

ever be permissible." *Id.* at 818. Hence, "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories[:] advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called 'fighting words'; child pornography; fraud; true threats and speech presenting some grave and imminent threat the government has the power to prevent." *United States v. Alvarez*, 567 U.S. 709, 717–18 (2012) (citations omitted). With the possible exception of obscene language, the speech restricted by § 22.16.090 does not fall within any of these categories.[5]

For these reasons, Rusch is likely to succeed on the merits of her claim that § 22.16.090 is an unconstitutional content-based restriction on speech.

c. Section 22.16.090 likely violates the Due Process Clause of the Fourteenth Amendment.

Section 22.16.090's prohibition of "all games, acts, or demeanor calculated or tending to mar or disturb the feelings or enjoyment of visitors attending public parks, places or squares" violates the Due Process Clause of the Fourteenth Amendment because it "fails to give ordinary people fair notice of the conduct it punishes," and for the additional reason that it is "so standardless that it invites arbitrary enforcement." *United States v. Davis*, 139 S. Ct. 2319, 2342

[5] A ban on obscene language is content-based under the ordinary test for determining whether a speech restrict is content-based or content-neutral. If this Court disagrees, the prohibition on obscene language is nonetheless likely to be found unconstitutional as overbroad and vague. The ordinance does not define what constitutes obscene language. Obscenity may be restricted without offending the Constitution, but "the permissible scope of such regulation [is limited] to works which depict or describe sexual conduct." *Miller v. California*, 413 U.S. 15, 24 (1973). Moreover, "[t]hat conduct must be specifically defined by the applicable state law, as written or authoritatively construed." *Id.* And "[a] state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* Assuming "obscene language" is a category of speech that can be prohibited based on its content, it is unclear what constitutes "obscene language" for purposes the City's ordinance. Thus, in the alternative, the prohibition on obscene language is overbroad and vague.

(2019) (quotations omitted). "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012); *accord Stahl v. City of St. Louis*, 687 F.3d 1038, 1041–42 (8th Cir. 2012).

The ordinance is unconstitutionally vague in that it criminalizes expressive activity "based primarily on often unpredictable reactions of third parties rather than directly on a person's own actions." *Stahl*, 687 F.3d at 1042; *see also Gooding v. Wilson*, 405 U.S. 518, 528 (1972) (holding that law is unconstitutionally vague if it leaves "wide open the standard of responsibility, so that it is easily susceptible to improper application") (internal quotation marks omitted).[6] Activity that mars or disturb the feelings of third parties or their enjoyment of the park is prohibited. However, it is impossible to predict what expressive activity might "mar or disturb the feelings or enjoyment of visitors," especially in advance. Of course, any speech could upset *someone*.

The vagueness problem is intensified by the inclusion of the phrase "tending to." That is, a speaker need not even *actually* mar or disturb anyone's feelings or enjoyment; it is enough under the ordinance that expressive activity be judged as tending to do so. Laws that forbid conduct "tending to" cause a result are particularly concerning because such language creates additional uncertainty about what is prohibited. *See Gooding*, 405 U.S. at 519—20; *see also Gregory v. City of Chicago*, 394 U.S. 111, 119 (1969) (Black, J., concurring) (explaining that

[6] Although not necessary to find the ordinance unconstitutionally vague here, ambiguity infests the City's ordinances in part because of § 1.08.140, which provides that "'[o]r' may be read 'and,' and 'and' may be read 'or' if the sense requires it." Thus, for example, it is unknowable to a reasonable person whether they must both mar and disturb, or rather either, and whether the object experiences both impaired feelings and diminished enjoyment of the park, or instead either.

"the boundaries of an offense including any 'diversion *tending to* a breach of the peace'" are "infinitely more doubtful and uncertain" (citation omitted, emphasis added)).

"This due process and fair notice infirmity is further demonstrated by the ordinance's lack of a *mens rea* requirement—violation of the ordinance does not hinge on the state of mind of the potential violator, but the reaction of third parties." *Stahl*, 687 F.3d at 1041. Section 22.16.090 contains no *mens rea* requirement on its face. Nor may such a requirement be imported from state statutes or caselaw. *Langford v. City of St. Louis*, 443 F. Supp. 3d 962, 979–80 (E.D. Mo. 2020). A law that contains no *mens rea* requirement and turns on third-party responses infringes on constitutionally protected rights and is subject to facial attack. *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999).

Similarly, § 22.16.090 violates due process because it lacks objective standards, inviting arbitrary enforcement. Such vagueness "may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (cleaned up). This would "allow persons to be punished merely for peacefully expressing unpopular views." *Cox v. State of La.*, 379 U.S. 536, 551 (1965). In the end, liability under the Ordinance depends on the "moment-to-moment judgment of the policeman on his beat," *Kolender*, 461 U.S. at 357, which due process does not permit.

For these reasons, Rusch is likely to succeed on the merits of her claim that § 22.16.090 violates the Due Process Clause.

d. Section 22.40.030 likely violates the Free Speech Clause of the First Amendment.

Section 22.40.030 is unconstitutional under the First Amendment. Section 22.40.030, which governs "political assemblies," appears in the Chapter of the Code entitled "Park Assembly Permits." It states that "[p]olitical assemblies, meetings or gatherings shall be

permitted in City parks under the same terms and conditions." Presumably, "the same terms and conditions" refers to the terms and conditions for permits earlier in the chapter, which include that application for "a permit for use of a designated area in the parks" must be made and,

> [b]efore issuance of a permits, a bond shall be posted in an amount to be determined by the Director of Parks sufficient to cover the repair of damages to the park fixtures and premises at the location to be utilized, including trees, turf and shrubs, the reasonable cost of cleaning the premises from extraordinary debris and litter, and the expense incurred for additional policing and traffic control. If the park area for which a permit has been granted is left in good condition, ordinary wear and tear excepted, and no abnormal expenses have been incurred by reason of the usage, the bond so posted shall be cancelled and obligations thereunder shall be void, otherwise it shall remain in full force and effect to satisfy damages, expenses or cost of repair or restoration.

§ 22.40.010. "[D]etermination of the type of bond required shall be in the discretion of the Director of Parks, Recreation and Forestry." § 22.40.020. The Director must grant permits when the requested "occupancy or use is consistent with the public use [of the park] and is not inconsistent with any law or general ordinance." § 22.04.050.[7] However, "any permit may be revoked by the Director at any time." *Id*.

At first blush, political meetings with fifty individuals like Rusch planned might not seem to require permits because, in general, "individuals, groups or organizations planning assemblies, meetings or gatherings in City parks" need apply for a permit only for an assembly, meeting, or gathering "at which attendance of one hundred or more persons is expected or solicited," § 22.40.010. Nevertheless, whether a permit is required for *all political* assemblies, meetings, or gatherings—regardless of size—turns on the meaning of "permitted"

[7] Chapter 22.04 outlines the duties of the Director.

in § 20.40.030. If "permitted" means "allowed" in the sense that permission is granted for political assemblies, as a general matter, just as for assemblies for any other purpose, then a permit would seem to be unnecessary when there will be fewer than one hundred participants. On the other hand, should "permitted" mean "issued a permit" in the sense that the terms and conditions for a permit— e.g., grounds for granting, bond requirement, and discretionary revocation—are the same, then, unlike other assemblies, political assemblies require a permit regardless of size.

Three reasons suggest that a permit is required for any size of political assembly. First, that is Rusch's experience: she was told that she could not have a political meeting in Forest Park, was required to obtain permission before resuming her political meetings, and is now chilled from having political meetings in city parks without prior permission. Second, Missouri courts "presume every word, sentence or clause in a [law] has effect, and the legislature did not insert superfluous language." *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. 2013). Both § 22.40.010, governing assemblies of one hundred or more, and § 22.40.030, relating to political assemblies, were enacted simultaneously, and if the latter has no meaning separate from the former, it is superfluous. Third, and relatedly, Missouri courts construe laws "under the principle of *lex specialis derogate legi generali,*" *Knight v. Carnahan*, 282 S.W.3d 9, 20–21 (Mo. Ct. App. 2009), meaning that "the more specific treatment prevails over the general," even when there is no direct conflict. *In re Lazarus*, 478 F.3d 12, 18–19 (1st Cir. 2007). This means that the provision on political assembly applies to gatherings that are political in nature while the general assembly provision applies to any other type of gathering.

What matters in this Court, however, is the federal question: whether the interpretation of the ordinances that prohibited Rusch's political meetings violated a provision of the

Constitution. *See Trump v. Wisconsin Elections Comm'n*, No. 20-3414, 2020 WL 7654295, at *3 (7th Cir. Dec. 24, 2020) (holding that federal court may decide "whether [officials'] interpretation of state law violated a provision of the federal Constitution" "despite [the federal question's] anchoring in alleged violations of state law"). The permit scheme for political assemblies is likely unconstitutional as both a content-based restriction on speech and a prior restraint.

Requiring permits for political assemblies of all sizes when permits are required for other assemblies only when they will involve one hundred persons or more is an impermissible content-based restriction on speech. *See United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) (recognizing that the right to assemble and right to free speech "are inseparable") (citation omitted). An ordinance restricting political speech differently is content based and, when political speech is afforded less protection than non-political speech of the same variety, cannot survive strict scrutiny. *Whitton v. City of Gladstone*, 54 F.3d 1400, 1404–05 (8th Cir. 1995). In *Whitton*, illumination and durational restrictions placed on political signs, but not others, were held unconstitutional. *Id*.

Requiring a permit for a political assembly is also an invalid prior restraint. An assembly permit requirement in a traditional public forum is a prior restraint on speech. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). As a prerequisite to the permitting of an assembly, the Director has discretion to establish the amount of bond to be posted. Although the ordinance is not silent as to considerations that should inform the amount of bond required, those considerations include the expected "expense incurred for additional policing and traffic control." § 22.40.010. This type of cost is associated with the public's reaction to the content of the assembly and, thus, is not allowed. *Forsyth Cty.*, 505 U.S. at 134. Moreover, the ordinance

fails to establish a deadline by which a permit must be granted. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990) (plurality) ("a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible"). Furthermore, the Director has unfettered discretion to decide the type of bond required, § 22.40.020, and to revoke a permit, § 22.04.50. *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012) (holding that discretionary power to revoke commercial wedding permits violates First Amendment).

For these reasons, Rusch is likely to succeed on the merits of her claim that § 22.40.030 is an unconstitutional content-based restriction and prior restraint on speech.

2. The remaining Dataphase factors favor entry of a preliminary injunction.

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

"[A] 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1101–02 (8th Cir. 2013) (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion)). In the context of prospective relief, there are two ways to experience First Amendment injuries: first, by intending to engage in arguably constitutional conduct that is proscribed by the challenged law where there is a credible threat of enforcement, or, second, by self-censoring. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016); *Stahl*, 687 F.3d at 1041 ("Speech is an activity particularly susceptible to being chilled"). Both types of injury are present here. As to the first, Rusch intends to return to St. Louis parks to engage in political expressive activity, although her November 2, 2020 encounter with the park

ranger demonstrates that park speech restrictions are enforced. Verified Complaint at ¶ 44. As to the second, Rusch has also self-censored, starting on November 2 when she limited her expressive activity to satisfy the condition placed upon her return and currently when she searches for alternative, less-convenient locations for her expressive activity. *Id.*, at ¶ 43.

"The balance of equities . . . generally favors the constitutionally-protected freedom of expression." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by City of Manchester*, 697 F.3d 678. The City will not be harmed if restrained from enforcing a likely unconstitutional ordinance. It is not apparent what harm will come to third parties, other than perhaps being exposed to expression that they would rather avoid. Nonetheless, expressive activity "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" and is protected "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

Finally, "it is always in the public interest to protect constitutional rights." *Nixon*, 545 F.3d at 690; *accord Fuller v. Norman*, 936 F. Supp. 2d 1096, 1098 (W.D. Mo. 2013). The public interest is served by preventing enforcement of likely unconstitutional ordinances while this case is considered on the merits. The public interest supports an injunction that is necessary to prevent a government entity from violating the Constitution. *Doe v. South Iron R-1 School Dist.*, 453 F. Supp. 2d 1093, 1103 (E.D. Mo. 2006).

C. Bond of $100 is appropriate.

"The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages

sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c); *Ohlensehlen v. Univ. of Iowa*, No. 320CV00080SMRSBJ, 2020 WL 7651974, at *13 (S.D. Iowa Dec. 24, 2020). "The amount of the bond rests within the sound discretion of the trial court." *Stockslager v. Carroll Elec. Co-op. Corp.*, 528 F.2d 949, 951 (8th Cir. 1976). A bond of $100.00 is adequate here, consistent with similar cases. *Ahmad v. City of St. Louis*, No. 4:17 CV 2455 CDP, 2017 WL 5478410, at *18 (E.D. Mo. Nov. 15, 2017) (setting preliminary injunction bond at $100.00 in First Amendment case); *O'Toole v. City of Walnut Grove*, 238 F. Supp. 3d 1147, 1150 (W.D. Mo. 2017) (same); *Abdullah v. Cty. of St. Louis*, 52 F. Supp. 3d 936, 948 (E.D. Mo. 2014) (same); *Traditionalist Am. Knights of Ku Klux Klan v. City of Desloge*, 983 F. Supp. 2d 1137, 1151 (E.D. Mo. 2013) (same); *Traditionalist Am. Knights of Ku Klux Klan v. City of Desloge.*, 914 F. Supp. 2d 1041, 1052 (E.D. Mo. 2012) (same); *see also Pence v. City of St. Louis*, 958 F. Supp. 2d 1079, 1087 (E.D. Mo. 2013) (setting bond at $10.00); *Johnson v. Bd. of Police Comm'rs*, 351 F. Supp. 2d 929, 952 (E.D. Mo. 2004) (declining to require bond for preliminary injunction). In this case, a preliminary injunction bond of $100.00 is appropriate.

Conclusion

For the foregoing reasons, this Court should grant a preliminary injunction preventing enforcement of §§ 22.16.070, 22.16.090, and 22.40.030.

Respectfully submitted,

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I certify that a copy of the foregoing was addressed to the following and placed in the U.S. Mail on January 15, 2021:

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