

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

JOHN TODD NETHERLAND,)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF ZACHARY, LOUISIANA;)
 TROY EUBANKS, officially, and)
 individually,)
)
 Defendants.)
)
)

Civil Action No. 07-409-JJB-CN

PLAINTIFF'S MEMORANDUM
IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION

ALLIANCE DEFENSE FUND LAW CENTER

KEVIN THERIOT*
KS Bar Roll No. 21565
JOEL OSTER*
KS Bar Roll No. 18547
Alliance Defense Fund
Kan. Regional Service Center
15192 Rosewood Dr.
Leawood, KS 66224
913-685-8000
913-685-8001 Facsimile
ktheriot@telladf.org

J. MICHAEL JOHNSON
LA Bar Roll No. 26059
Alliance Defense Fund
La. Regional Service Center
P.O. Box 52954
Shreveport, LA 71135
318-798-8211
318-798-8213 Facsimile
mjohnson@telladf.org

BENJAMIN W. BULL+
AZ Bar Roll No. 009940
Alliance Defense Fund

15333 N. Pima Rd, Suite 165
Scottsdale, AZ 85024
480-388-8051
480-444-0028 Facsimile
bbull@telladf.org

Attorneys for Plaintiff

*Pro Hac Vice Motions submitted
+Pro Hac Vice Motion to be submitted

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STATEMENT OF FACTS¹

The Plaintiff, John Todd Netherland, resides in Baker, Louisiana. He is a professing Christian and desires to share his religious views with others, as part of his sincerely held religious beliefs. One way that Mr. Netherland shares his faith is by speaking in public areas. When he speaks, Mr. Netherland has no intent to physically touch or harass anyone, or to encourage violence, or to express himself in any way other than in a peaceful manner. He also has no intent to encroach upon the private property of any person or entity.

¹ All stated facts in this Motion are taken from the previously filed Verified Complaint and its attached Ex. 1, unless otherwise indicated.

On November 18, 2006, at approximately 9:00 p.m., Mr. Netherland traveled to a public easement (the unpaved shoulder and grassy area separating a local street from the local bar, *Sidelines*) and began to express his religious message. He was positioned about 75-100 feet from the front entrance of *Sidelines*. He expressed his message verbally, without amplification. At no point did he use any equipment to amplify his voice, such as a bullhorn or microphone. Approximately thirty minutes later, two Zachary police officers talked with Mr. Netherland and ran a check on his driver's license, but soon left.

Approximately forty-five minutes after these officers left, Lt. Troy Eubanks of the Zachary Police Department approached Mr. Netherland and told him that he may not speak where he was standing. Lt. Eubanks told Mr. Netherland to instead move to the far side of the public easement, closer to the street. A few minutes later, Lt. Eubanks returned and said that he would arrest Mr. Netherland anyway, for disturbing the peace, if Mr. Netherland continued to express his religious message. Although Mr. Netherland responded that he was not disturbing the peace, Lt. Eubanks confirmed that if Mr. Netherland continued to speak, even in the location Lt. Eubanks had just asked him to relocate to, Mr. Netherland would be arrested for disturbing the peace.

To avoid arrest, Mr. Netherland was left with no option but to yield to Lt. Eubanks' demand. Mr. Netherland nevertheless stated that he would obtain legal counsel and vindicate his right to express his message on the public property. Mr. Netherland then asked for Lt. Eubanks' name. Lt. Eubanks gave Mr. Netherland his business card. Mr. Netherland then ceased speaking on the public easement near *Sidelines* because of Lt. Eubank's threat of arrest and prosecution for the alleged violation of Zachary Code Ordinance § 58-93.2 (hereinafter "Ordinance").

On February 6, 2007, Plaintiff, through his attorneys, mailed a letter to Zachary Police Chief John Herty, informing him of Plaintiff's interactions with Lt. Eubanks and other officers on November 18, 2006, and of Plaintiff's desire to exercise his right to free speech on the public property near *Sidelines*. The letter asked for a reply within two weeks regarding the Department's position on the matter. No reply was made to Plaintiff in any form within two weeks, or thereafter.

Although Mr. Netherland has not returned to speak on the public easement near *Sidelines* due to his fear of arrest and prosecution for violating the Ordinance, he desires to return there to share his religious message. Unless this Court enjoins the Defendants, Plaintiff will continue to suffer irreparable harm to his constitutional rights. Plaintiff requests that this Court enjoin the Defendants' Ordinance and prohibition of Plaintiff's free speech activities on the public easement near *Sidelines* bar. As grounds for this motion, Plaintiff relies upon the following Memorandum in Support, the Verified Complaint, and the Exhibit attached to the Motion.

MEMORANDUM OF LAW

I. Preliminary Injunction Standard

The requirements for a preliminary injunction are well-established. According to the United States Circuit Court of Appeals for the Fifth Circuit, a plaintiff must show that the following four factors are met: (1) a substantial likelihood that the plaintiff will prevail on the merits of his case; (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the plaintiff outweighs the threatened harm to the defendants; and (4) that granting the preliminary injunction will not disserve the public interest. *Canal Auth. of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974); *Maxey v.*

Smith, 823 F.Supp. 1321, 1327-28 (N.D.Miss. 1993). Mr. Netherland is suffering an egregious violation of his constitutional rights and is likely to succeed on the merits. The other factors are met as well.

II. Plaintiff is Likely to Succeed on the Merits Because His First Amendment Rights Are Being Violated

Mr. Netherland is likely to succeed on the merits because Defendants are depriving him of his constitutional rights to free speech, due process of law, and free exercise of religion. First, Defendants have applied the challenged Ordinance to Plaintiff's speech in violation of the First Amendment, as Plaintiff was threatened with arrest for merely engaging in protected speech in a traditional public forum. By utilizing the overly broad language of the Ordinance, Defendants silenced Plaintiff simply because his speech allegedly annoyed some people. Second, Defendants' Ordinance is unconstitutionally vague on its face, as it fails to define speech-related terms with necessary specificity. The Ordinance thus provides police with unfettered discretion in arbitrarily restricting speech. Finally, Defendants have restricted Plaintiff's right to free exercise of religion, having deprived him of both his right to free exercise of religion and free speech, combined.

A. Defendants Are Violating Plaintiff's Right to Free Speech

Because Mr. Netherland is prohibited from engaging in protected speech in a traditional public forum, Defendants have violated and are violating his First Amendment rights. Even though Mr. Netherland expressed his religious message on the public easement along side a local street, the Defendants silenced his speech because it allegedly annoyed some passersby.

In ascertaining the constitutional validity of a state restriction on speech, a court must first assess whether the speech deserves protection, then determine the type of forum involved, and finally decide whether the proffered justification for the state's restriction satisfies the

appropriate standard. See *Cornelius vs. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U. S. 788, 797 (1985).

1. Religious Speech Is Constitutionally Protected

Mr. Netherland’s speech along the public ways of Zachary expressed a religious message. Religious speech is fully protected by the First Amendment. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 US 753, 760 (1995). “Indeed, . . . government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.” *Id.* The First Amendment’s protection encompasses all types of religious speech, including the religious discussion and expression of Mr. Netherland. See e.g., *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (holding that religious groups were to be given equal access to university’s facilities because facilities were generally available to student-registered groups).

2. Plaintiff Utilized a Traditional Public Forum

The second prong of analysis is just as favorable to Plaintiff here because the public easement on which Mr. Netherland expressed his message was a quintessential traditional public forum. It thus enjoys the highest constitutional protection. “‘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). And, “[t]ime out of mind public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.” *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). Mr. Netherland expressed his religious message from the unpaved shoulder of a local street. The unpaved shoulder surrounded a small grassy area which separated the street from the private property of a local bar, *Sidelines*. The portion of property on which Mr.

Netherland stood was public easement, public property belonging to the city but used as a separator between the parking lot of *Sidelines* and the side of a nearby road. The scanned photographs below show the specific property at issue.²

Public easements, such as the one separating *Sidelines* from the street, are appropriately treated as public forums because of the government’s underlying property interest. See *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.* 518 U.S. 727, 828 (1996) (citing *Hague v. Committee for Industrial Org.*, 307 U.S. 496, 515 (1939)). Likewise, the Fifth Circuit recently recognized that “streets and unpaved sidewalks” are examples of the “quintessential

² These scanned photographs show the area where Mr. Netherland spoke. See Affidavit of John Todd Netherland, Ex. 1 to the Motion. He was first positioned on the interior edge of the grassy bank, on the culvert side near the driveway to *Sidelines*. He was told by Zachary police to move to the exterior side of the grassy bank, closer to the street. After he moved, Mr. Netherland was soon threatened with arrest.



public forum.” *Houston Chronicle Pub. Co. v. League City*, 2007 WL 1544645, at *2, *8 (5th Cir. 2007). Mr. Netherland’s location in a traditional public forum is of paramount importance for the Court’s constitutional analysis.

The government may restrict expressive activities in a traditional public forum only in very limited circumstances, and its burden of justification is high. “In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

3. Subject Ordinance Is a Content-Based Restriction on Free Speech

Regarding the third prong of requisite analysis, Defendants’ restriction on Mr. Netherland’s speech is content-based and consequently subject to strict scrutiny. “[Speech-restricting] provisions cannot be viewed as being content-neutral restrictions [when they] proscribe noises that are, inter alia, ‘annoying’ or ‘unnecessary.’ These provisions invite law enforcement and others to make a determination as to whether the ordinance has been violated on purely subjective, content-based criteria.” *Dupres v. Newport*, 978 F.Supp. 429, 435 (D.R.I. 1997). Moreover, the U.S. Supreme Court states, “Listeners’ reaction to speech is not a content-neutral basis for regulation.” *Forsyth Cnty. v. Nationalist Movement* 505 U.S. 123, 134 (1992). Because Defendants’ Ordinance proscribes equivalent terms, whose meaning subjectively depends upon the listener’s opinion, it is a content-based restriction on speech.

The government in Zachary clearly intended to limit speech by content. The language of its Ordinance specifically allows enforcement of content in that the Ordinance restricts speech that may be “annoying” or “offensive” to passersby. Yet, one man’s non-controversial speech

may be subjectively deemed controversial by another. Presumably, in *Zachary*, one could ask a passerby, “How’s the weather?,” but not “Do you believe you’re going to heaven?” Because religious speech is more apt to be labeled “annoying” or “offensive,” it is subject to discretionary enforcement. Therein lies the problem.

Defendant Eubanks threatened Mr. Netherland with arrest not because Mr. Netherland was just speaking on the public property near *Sidelines* bar, nor even because his speech was audible to those entering *Sidelines* bar, but rather because the government did not want the content of Mr. Netherland’s speech to be expressed (speech that the government considered, or thought the public would consider, “annoying” or “offensive”).

i. Strict Scrutiny Applies

As a content-based restriction on speech, the Ordinance can be upheld only if the government can produce a compelling interest that is narrowly drawn. *Perry Educ. Ass’n*, 460 U.S. at 45. “A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby*, 487 U.S. at 485. *Zachary* does not have a compelling interest in proscribing “annoying” and “offensive” speech, and the Ordinance is certainly not narrowly tailored, as it is far too overbroad in its restriction of speech.

ii. The Ordinance Is Overbroad

If *Zachary*’s governmental interest is controlling noise levels and maintaining public order, to be narrowly tailored the Ordinance must only burden that speech which is so noisy it causes disorder. See *Perry Educ. Ass’n*, 460 U.S. at 45. The Ordinance, however, is overbroad because it restricts all speech that may be “annoying” or “offensive” to listeners, regardless of how quiet that speech is. The Ordinance tries to limit speech out of a fear of possible disorder. Such restrictions are not constitutionally valid. See e.g., *Lionhart v. Foster*, 100 F.Supp.2d 383,

387-88 (E.D.La. 1999) (“The city could not broadly prohibit reasonably amplified [loud] speech simply because it feared that disruption might sometimes result.”); see also *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 513 (1969); *Gay Student Services v. Texas A&M Univ.*, 737 F.2d 1317, 1327 (5th Cir. 1984) (stating “unsubstantiated fear or apprehension” that speech will cause disruption is insufficient to justify restriction). “When the government chooses to prohibit sound levels in public places that are not demonstrably disturbing, the courts will reject the regulation as overly broad.” *Id.* The Defendants have not demonstrated that all “annoying” or “offensive” noises on the unpaved shoulder by *Sidelines* bar in Zachary do actually disturb the peace. The Ordinance, therefore, is overbroad.

Moreover, Zachary’s Ordinance does not even specify a decibel or wattage level for noises that disturb the peace. In *Lionhart*, discussed in detail in the next subsection, a statute which specifically defined excessive noises by decibel level was struck down as overbroad. *Id.* at 387-88. Zachary’s Ordinance does not even reach that level of specificity. Its prohibition widely extends to any controversial “noise or exclamation,” speech that may “annoy” or “offend” listeners. Thus, the Ordinance is even more overbroad than the statute struck down in *Lionhart*. Since it is overbroad, it is obvious that a less restrictive means is available to achieve the city’s purpose.

The Eastern District of Louisiana has previously summarized the remedy for cities like Zachary that have enacted overbroad noise ordinances:

As recent history has demonstrated, noise ordinances can be drafted such that the legitimate interests of the residents and business owners . . . in restricting offensive noise can be protected while preserving First Amendment freedoms. The New Orleans City Council has proposed, drafted, and adopted new, more contemporary noise restrictive ordinances, which are narrowly tailored and include time, distance, and decibel restrictions. While the Court cannot compel the City to act similarly with respect to this ordinance, it is certainly the Court’s

hope that such will be done in order to protect the interests of the City and citizens in protection from offensive noise levels.

Mellen v. New Orleans, 1998 WL 614187, at *5 (E.D.La. 1998) (not reported in F.Supp.2d) (granting motion for preliminary injunction). Unlike the New Orleans provisions, Zachary's Ordinance has "permitted persons to be punished for merely expressing unpopular views." *Lionhart*, 100 F.Supp.2d at 389 (quoting *Grayned v. Rockford*, 408 U.S. 104, 113 (1972)).

iii. The Ordinance Is Not Narrowly Tailored

Even if Defendants' restrictions on Mr. Netherland's speech were content-neutral, the restrictions could not pass constitutional muster, as they still fail to be narrowly tailored to any interest in reducing noise and public disorder. Although content-neutral restrictions in a traditional public forum are scrutinized under a less exacting narrow tailoring requirement, see *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989) (referring to reasonable time, place, and manner restrictions), a restriction still must "promote[] a substantial governmental interest that would be achieved less effectively absent the regulation, [where] the means chosen are not substantially broader than necessary to achieve that interest." *Id.* at 782-83.

Under the standard articulated, overbroad restrictions on speech that allow for arbitrary enforcement are not narrowly tailored. "[G]overnment regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Forsyth*, 505 U.S. at 130 (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 649 (1981)). The Defendants' Ordinance, as discussed above, leads to arbitrary enforcement, since it requires the subjective application of words such as "annoying" and "offensive." The Ordinance consequently fails under intermediate scrutiny as well as strict scrutiny.

Even restrictions on speech that were not arbitrary have failed under intermediate scrutiny. In *Lionhart*, street musicians and others challenged a noise-restriction statute creating “quiet zones” near hospitals and churches. The statute read:

No person shall operate or play any sound producing device or sound amplification device in a public street, public park or other public place in a manner likely to disturb, inconvenience, or annoy a person of ordinary sensibilities, if the sound produced is in excess of fifty-five decibels as measured within ten feet of the entrance to [hospitals and churches].

Id. at 385.

Although the district court recognized that the state could articulate an acceptable governmental interest, the court struck down the statute as not being narrowly tailored. *Id.* at 388. The court noted that the state’s “interest in preserving the tranquility of the community against excessive noise is clearly legitimate.” *Id.* at 387 (citations omitted). “However, the importance of First Amendment freedoms necessitates that the state regulate in this area only with narrow specificity. When the government chooses to prohibit sound levels in public places that are not demonstrably disturbing, the courts will reject the regulation as overly broad.” *Id.* The court stated that the crucial question is whether speech is “basically incompatible with the normal activity of a particular place at a particular time.” *Id.* In Zachary’s case, it cannot be legitimately maintained that all (even quiet) “annoying” speech is incompatible with the unpaved shoulder of a street near local businesses. This is an ideal place for those wanting to publicly express such messages.

The *Lionhart* court also emphasized that when First Amendment rights are involved, courts “must place these freedoms in a preferred position.” *Lionhart*, 100 F.Supp.2d at 387 (citing *Grayned*, 408 U.S. at 116). Accordingly, the *Lionhart* court invalidated the statute at issue, even though it contained references to specific decibel levels, because a noise restriction

could not prohibit speech simply because the government “feared that disruption might sometimes result.” *Id.* at 388. This is precisely what Zachary is trying to do. There has been no showing of actual disruption on the unpaved shoulder near *Sidelines* bar.

As can be seen, even statutes that specifically define the decibel level of too-loud noises have failed intermediate scrutiny’s narrow tailoring test. Zachary’s prohibition of any noise which may “annoy” or “offend” a listener is the archetype of overbroad restrictions.

B. Defendants Are Violating Plaintiff’s Right to Due Process of Law

Zachary Code Ordinance § 58-93.2 Subsection (2) is unconstitutionally vague on its face, in violation of due process of law. The subsection contains undefined terms that fail to provide any discernable meaning. In fact, it fails to define the words “annoy,” “annoying,” “offend,” “offensive,” “deride,” and “derisive,” as well as the phrases “noise or exclamation” and “disturb or alarm the public.” As a result, individuals of common intelligence must guess at the meaning of the Ordinance and enforcing government agents must guess at how to properly apply the Ordinance.

An ordinance is void for vagueness under the due process clause of the Fourteenth Amendment “unless it provides fair warning of prohibited conduct and explicit standards for enforcement.” *Lionhart*, 100 F.Supp.2d at 388-89 (citing *Reeves v. McConn*, 631 F.2d 371, 383 (5th Cir. 1980)). “Vague laws violate the principle that the law gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.” *Id.* (citing *Grayned*, 408 U.S. at 108). A regulation is “void on its face when, as a matter of due process, it is so vague that persons ‘of common intelligence must necessarily guess at its meaning and differ as to its application.’” *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F.Supp. 659, 667 (S.D.Tex. 1997) (citation omitted). In addition, the void-for-vagueness

doctrine “also aims at arbitrary and discriminatory enforcement.” *Id.* (citing *Kramer v. Price*, 712 F.2d 174, 176 (5th Cir.1983)).

Subsection (2) of the Ordinance does not clearly define what conduct is impermissible, neither to people in Zachary nor to enforcement officers. Because speech that is considered “annoying” or “offensive” varies by individual opinion, one cannot know what type of speech will be prohibited in the public areas of Zachary, and police may arbitrarily enforce the Ordinance. As the U.S. Supreme Court has emphasized, the government cannot make criminal the exercise of First Amendment rights “simply because the exercise may be ‘annoying’ to some people.” *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971). “[S]uch a prohibition . . . contains an obvious invitation to discriminatory enforcement against those whose association together is ‘annoying’ because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.” *Id.*

Lionhart found the challenged statute in violation of due process, as well as free speech rights. *Lionhart*, 100 F.Supp.2d at 383. The court referenced *Coates*, which struck down a criminal statute that used the word “annoy” to restrict speech:

Coates involved an Ohio law that made it a crime for three or more individuals to assemble on public sidewalks and to conduct themselves in a manner annoying to passersby. The Court found the word “annoy” inherently vague. Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, “men of common intelligence must necessarily guess at its meaning.”

Id. at 389 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)) (citations omitted).

Zachary, nevertheless, is using the same types of terms (including the exact same word “annoy”/“annoying”) that have consistently been struck down for vagueness. Such terms

necessarily call for subjective judgments, rendering them unconstitutionally vague as criminal statutory language. An enforcing officer must rely on his own subjective views of what constitutes “annoying” or “offensive” speech (or consider what he believes others would find “annoying” or “offensive”) and act under the Ordinance in a manner based on his own arbitrary judgment. Under applicable precedent regarding due process of law under the Fourteenth Amendment, Subsection 2 of Zachary Code Ordinance § 58-93.2 Subsection (2) is unconstitutionally vague on its face.

C. Defendants Are Violating Plaintiff’s Right to Free Exercise of Religion

Under *Employment Division v. Smith*, 494 U.S. 872, 878-79 (1990), if a “hybrid” claim of free exercise and another fundamental right is asserted, increased scrutiny is warranted. *Id.* at 881-82. The U.S. Supreme Court expressly mentioned that some cases involve the combination of the right to free exercise of religion with the right to free speech. *Id.* at 882 (“Some of our cases prohibiting compelled expression . . . have also involved freedom of religion.”). While Mr. Netherland’s expression may not find constitutional protection under free exercise precedent alone, it may find protection if another fundamental right, such as free speech, is implicated. See *Smith*, 494 U.S. at 881-82. The rights of free exercise and free speech are both implicated in Mr. Netherland’s case, and he should prevail under the hybrid rights exception to *Smith*.

In *Chalifoux v. New Caney Independent School District.*, 976 F.Supp. 659, 671 (S.D.Tex. 1997), a district court considered whether a public school’s policy of keeping students from wearing rosaries to suppress gang activity was constitutional under free exercise and free speech protections. The court found that the two protections constituted a hybrid claim:

Plaintiffs’ causes of action combine free exercise of religion and free speech claims; accordingly, the heightened level of scrutiny used in hybrid cases applies. Therefore, pursuant to the holding in [*Wisconsin v. Yoder*, 406 U.S. 205 (1972)], this Court must perform a balancing test to determine whether the school’s

regulation places an “undue burden” on Plaintiffs’ religious exercise and whether the regulation bears more than a “reasonable relation” to [the school’s] stated objective.

Id. at 671.

Following this model of analysis, first it is apparent that Zachary has placed an undue burden on Mr. Netherland. In *Chalifoux*, the court noted that because students’ desire to wear rosaries was “a sincere expression of their religious beliefs,” they have suffered an undue burden. *Id.* at 670. By analogy, Mr. Netherland has also suffered such a burden, since he has a sincere religious belief in expressing his views about religion to others in traditional public forums. Depriving him of this opportunity greatly burdens him.

Mr. Netherland’s undue burden certainly outweighs Defendants’ interest in enforcing its Ordinance. The Ordinance does not bear a “reasonable relation” to any governmental interest. In *Chalifoux*, the school had a legitimate interest in suppressing gang activity, but the court concluded that a better means was available to achieve that interest. *Id.* at 671. But here, Zachary has no similar legitimate governmental interest in restricting “annoying” or “offensive” speech. See *Coates*, 402 U.S. at 615. The school’s regulation in *Chalifoux* failed to have a “reasonable relation” to the school’s interest because the regulation was overly vague and not the best means of achieving the interest. *Chalifoux*, 976 F.Supp at 666, 671. Zachary’s Ordinance likewise is unconstitutionally vague and there are certainly less restrictive means to ensure public order, as stated above. Under the required balancing test, therefore, the Defendants’ Ordinance should receive little weight and Mr. Netherland’s fundamental rights of free speech and free exercise should prevail. Mr. Netherland’s undue burden implicates important constitutional protections, outweighing Zachary’s vague and overbroad speech restriction. Thus, as in *Chalifoux*, Mr. Netherland’s hybrid claim should succeed.

III. Plaintiff Continues to Suffer Irreparable Injury

It is well established that “the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury,” justifying the grant of injunctive relief. *Deerfield Med. Ctr. v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir.1981) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Defendants have not removed the threat of arrest against Mr. Netherland and continue to violate his constitutional rights by prohibiting his return to the public property near Sidelines bar to express his message. This threat has prevented Mr. Netherland from exercising his rights for more than six months. As long as this threat remains, the harm suffered by Mr. Netherland only continues to grow.

IV. Threatened Injury to Plaintiff Outweighs Threatened Harm to Defendants

As demonstrated herein, Mr. Netherland is likely to succeed on the merits and is suffering irreparable harm. In the absence of a preliminary injunction, Mr. Netherland will continue to suffer deprivation of his fundamental rights. Conversely, Defendants will suffer no harm in allowing Mr. Netherland an opportunity to speak on public streets and ways, since others in Zachary continuously engage in similar speech activities in traditional public fora. The only difference between Mr. Netherland’s speech and permitted speech is that the government has labeled Mr. Netherland’s religious content as “annoying” and “offensive.” Thus, there can be no harm to Defendants in preventing such content discrimination against Mr. Netherland.

V. Granting the Preliminary Injunction Will Not Disserve the Public Interest

“As to the concern for disservice of the public interest [relevant to motions for preliminary injunction], we note simply that any public interest in allowing [legitimate government activities] does not extend so far as to allow arbitrary and capricious actions that interfere with the exercise of fundamental rights.” *Deerfield Med. Ctr.*, 661 F.2d at 338-39. By

protecting Mr. Netherland's rights, this Court will protect the public domain from the type of government encroachment the First Amendment is designed to prevent.

VI. Conclusion

For reasons discussed herein, this Court should grant Mr. Netherland's motion for preliminary injunction. Mr. Netherland is likely to succeed on the merits. He is suffering irreparable harm, the harm to him outweighs any conceivable harm to Defendants, and the preservation of constitutional rights is always in the best interest of the public.

Respectfully submitted,

s/Kevin Theriot

KEVIN THERIOT*
KS Bar Roll No. 21565
JOEL OSTER*
KS Bar Roll No. 18547
Alliance Defense Fund
Kan. Regional Service Center
15192 Rosewood Dr.
Leawood, KS 66224
913-685-8000
913-685-8001 Facsimile
ktheriot@telladf.org

J. MICHAEL JOHNSON
LA Bar Roll No. 26059
Alliance Defense Fund
La. Regional Service Center
P.O. Box 52954
Shreveport, LA 71135
318-798-8211
318-798-8213 Facsimile
mjohnson@telladf.org

BENJAMIN W. BULL+
AZ Bar Roll No. 009940
Alliance Defense Fund
15333 N. Pima Rd, Suite 165
Scottsdale, AZ 85024
480-388-8051
480-444-0028 Facsimile
bbull@telladf.org

Attorneys for Plaintiff

*Pro Hac Vice Motions submitted

+Pro Hac Vice Motion to be submitted

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum In Support will be served with the previously filed Verified Complaint on the following non-CM-ECF participants (defendants to this cause of action):

Mayor Henry Martinez
City of Zachary
4700 Main Street
Zachary, LA 70791

Lieutenant Troy Eubanks
Zachary Police Department
4510 Main Street
Zachary, LA 70791

s/Kevin Theriot
Kevin Theriot
Kansas Bar No. 21565
Alliance Defense Fund
15192 Rosewood
Leawood, KS 66224
Ph: (913) 685-8000
Fx: (913) 685-8001
ktheriot@telladf.org