UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Jalesha Johnson et al., Plaintiffs, v. Stephan K. Bayens et al.,. Defendants.	Docket No. 20-cv-306 **Plaintiffs' Reply in Support of their Motion for a Preliminary Injunction**

COME NOW Plaintiffs, and submit the following Reply Brief in Support of Plaintiffs' Motion for a Preliminary Injunction.

Argument

Defendants' argument that the State Capitol bans are not prior restraints and are not content discriminatory fall flat, as do their arguments that the bans are likely to survive either strict or intermediate scrutiny. Defendants' arguments primarily go astray in two ways.

First, they muddle forum analysis and the analysis applied to content-based restrictions—although the prior restraint at issue here violates both. While the bans also fail the intermediate scrutiny applied to content-neutral time, place, manner restrictions in traditional public fora, they are subject to strict scrutiny for two reasons. First, they are content-discriminatory, both because they target Plaintiffs' protected expression, and because they are speaker-based distinctions. Second, the bans also fail as prior restraints on First Amendment rights in traditional public fora. The protections against prior restraints sit atop the scrutiny applied to content-based restrictions and restrictions of protected expression on traditional public fora, not instead of those protections.

Second, they confuse Plaintiffs' lawsuit against Defendants with some other lawsuit challenging the Des Moines Police Department (who are not a party in this case) for the validity of Plaintiffs' arrests (which is not at issue in this case). In so doing, Defendants cite cases that are

inapposite to this case, and largely ignore the applicable legal precedent cited by Plaintiffs in their brief.

I. The Capitol Bans are Unconstitutional Prior Restraints Failing Strict Scrutiny.

A. The State Capitol Bans are Prior Restraints.

Defendants cite to *Adderly* in support of their argument that the bans are not prior restraints. Defs. Br. at 7 (citing *Adderly v. State of Fla.,* 385 U.S. 39 (1966)). Specifically, Defendants allege that the state has an unqualified right to ban any citizen from state property just like a private property owner. *Id.* This fails to account for the different constitutional standard applicable to restrictions of First Amendment rights on traditional public fora versus nonpublic fora. Nor did *Adderly* involve a prior restraint. Instead, *Adderly* is about whether people can be arrested for trespass for refusing to leave the non-publicly accessible areas of a county jail, which is unquestionably not a public forum. *Adderly*, 385 U.S. at 41-42.

Speaking to this distinction, the Court expressly notes that the forum in *Adderly* was unlike the forum at issue in two earlier cases, *Edwards* and *Cox*: "In *Edwards* [and *Cox*], the demonstrators went to the [] State Capitol grounds to protest. In this case they went to a jail. Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not."*Adderly*, 385 U.S. at 41 (citing to *Edwards v. South Carolina*, 372 U.S. 299, 237-38 (1963); *Cox v. Louisiana*, 379 U.S. 536, 552, 558 (1965)). Here of course, Plaintiffs, like the plaintiffs in *Edwards* and *Cox*, seek to exercise their protected First Amendment rights at the state capitol.

While this distinction demonstrates the proper forum analysis applicable to the present case, neither *Adderly*, *Edwards*, or *Cox* are prior restraint cases. In *Adderly*, the government did not attempt to ban the demonstrating students from further protest in a traditional public forum. Likewise, as egregious as the states' actions in *Edwards* and *Cox* were, they did not take the

additional step of banning the plaintiffs from using the state capitol grounds for six months and one year, as Defendants have[1]. Thus, even if Plaintiffs were protesting in a nonpublic area of the capitol and Defendants had merely told them to leave immediately, *Adderly* would not support the future ban from the traditional public fora of the capitol.

While not a prior restraint case, the *Cox* opinion explained that a prohibition giving unbridled discretion to local officials to allow or block the public from using the state capitol for expressive activities, like the State Capitol bans, would violate the First Amendment:

> The situation is thus the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the unbridled discretion of the local officials. . . . [A] State or municipality cannot require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be disseminated.
>
> This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. . . . It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely board prohibitory statute.

---

[1] Defendants assert that *named* Defendants "are unaware of any time period prohibiting reentry onto State Capitol grounds other than the six-month period set forth in the [written] notices sent to Plaintiffs." Defs. Br. at 4 (stated in their fact section, but nowhere referenced in their argument.) This implicit acknowledgement that one-year bans' inclusion of the legislative session violates the First Amendment both supports Plaintiffs' motion for a preliminary injunction of the one year bans and undermines Defendants' argument that the six-month ban is permissible. The Constitution no less values the First Amendment rights of the Plaintiffs to assemble, speak, and petition their government before session as during. Further, the assertion as to "named Defendants" is not a dispute of fact as to the unnamed Defendant John Doe, whose identity is already known or easily ascertainable to named Defendants. Short of providing an affidavit from John Doe disavowing the issuance of a one-year ban, there is no factual dispute as to its issuance. Two plaintiffs have independently sworn that the one-year ban was issued. (Johnson Aff. at ¶ 16; Bequeaith Aff. at ¶¶ 16-17.) These Plaintiffs were in a separate group from those issued the six month bans by Defendant Pearston. (*Compare* Johnson Aff. at ¶ 14; Bequeaith Aff. at ¶¶ 15, 17, *with* Penna Aff. at ¶¶ 10-11; Ramus Aff. at ¶¶ 17-19; Dikkers Aff. at 12-14.)

Cox, 379 U.S. at 465-66 (citations and quotation omitted.) *See also* Pl. Br. at 8-11 (establishing that the bans allow unbridled discretion by decisionmakers).

Perplexingly, Defendants also cite *Wright v. City of St. Petersburg, Florida*, 833 F.3d 1291, 1293 (11th Cir. 2016), as persuasive authority that the State Capitol bans are not prior restraints. *See* Defs. Br. at 8-9. But Defendants cite to a part of the *Wright* decision pertaining to Wright's facial challenge to the ordinance—not the part examining Wright's prior restraint claim. *See id.* (citing *Wright*, 833 F.3d at 1293-97)(the court examines the prior restraint claim at 1298-99). In any case, under the Eleventh Circuit's analysis, the Capitol bans should be invalidated as unconstitutional prior restraints because, unlike the *Wright* ordinance, the bans have no First Amendment exception, standards to limit decisionmaker discretion, or right of judicial review.

In rejecting Wright's argument that the challenged ordinance was a prior restraint as applied to him, the court relied on the ordinance's inclusion of a provision allowing people who were banned to nevertheless use the traditional public fora to exercise First Amendment rights. *Id.* at 1293-94; 1299. The record was that Wright used that exception to apply to take part in a rally at the park and the City allowed him to do so. *Id.* at 1294. The challenged ordinance in *Wright* also contained an exception for sidewalks and right of judicial review. *Id.* at 1293-94. These procedural protections were determinative, because the ordinance at issue in *Wright* had been amended to add these protections after the Eleventh Circuit previously invalidated a previous ordinance for lacking these protections. *See Catron v. City of St. Petersburg,* 658 F.3d 1260, 1266-69 (11th Cir. 2011) (deciding that issuing a no-trespass order without notice and a hearing was unconstitutional).

Here, of course, there is no well-crafted ordinance or statute authorizing Defendants' actions. There is no exception for First Amendment use of the Capitol Complex, and no appeal. These essential procedural protections on any prior restraint are absent. *See* Pl. Br. at 8-11.

Also important to the court's reasoning was that Wright pled guilty to the underlying offense, *Wright*, 833 F.3d at 1293, 1297; 1299. Plaintiffs have pled not guilty and have not been convicted of any violation of law—indeed, two Plaintiffs' criminal charges have already been dismissed with prejudice. *See* Exs. A-B. Yet the bans on those Plaintiffs remain. Indeed, while the bans followed Plaintiffs' arrests, they were based on Plaintiffs' asserted "behavior", not convictions or even arrests alleging unlawful conduct. *See* Pl. Br. at 12. But even if Plaintiffs had been convicted, prior unlawful conduct cannot justify a prior restraint. *See* Pl. Br. at 12-13. Defendants in their brief do not even attempt to contend with the caselaw cited by Plaintiffs recognizing that even a conviction does not justify a prior restraint. Defs. Br. *passim*.

B. Defendants' Arguments that the Capitol Bans Pass Strict Scrutiny Fail.

Defendants argue that even if the court finds the bans are prior restraints, they should survive strict scrutiny because arresting officers—who are not defendants in this case—were responding to alleged "aggressive and violent behavior". Defendants have not shown Plaintiffs were engaged in any unlawful behavior; the dismissal of two of the five plaintiffs' charges so far demonstrate that mere arrests don't prove their assertions. Regardless, this argument is a red herring, irrelevant to the strict scrutiny analysis applicable to prior restraints. *See* Pl. Br. at 12-13.

Also insufficient to meet strict scrutiny is Defendants' ad hoc argument that Iowa Admin. Code rule 11-100.2(3) and Iowa Code section 8A.322 gave them legal authority to issue the bans. Defs. Br. at 12. Rule 11-100.2(3) provides that a "[v]iolation of this sub rule is a simple misdemeanor, pursuant to Iowa Code section 8A.322, and *may result in the denial of access to the state building.*" Def. Br. at 12 (citing Iowa Admin. Code r. 11-100.2(3)(emphasis by Defendants). Section 8A.322 in turn provides:

> The director shall establish, publish, and enforce rules regulating and restricting the use by the public of the capitol buildings and grounds . . . The rules when

> established shall be posted in conspicuous places about the capitol buildings and grounds and the of the state laboratories facility, as applicable. Any person violating any rule, except a parking regulation, shall be guilty of a simple misdemeanor. The rules shall prohibit a person, other than a peace officer, from openly carrying a pistol or revolver . . .

Iowa Code § 8A.322(3).

There's a reason Defendants didn't cite to this Rule when then banned Plaintiffs from the Capitol Complex. (Bequeaith Aff. Ex. A; Ramus Aff. Ex. A; Dikkers Aff. Ex. A.) This Rule doesn't authorize the bans for three reasons. First, Defendants didn't deny Plaintiffs' access to "the state building"; they banned them from the entire Capitol complex. Second, Defendants have not charged the Plaintiffs with violating any conspicuously posted rule required by Section 8A.322. Third, even if they had, it's not a reasonable reading of the rule to argue that "denial of access" means anything other than the immediate denial of access to/removal from a state building. Construing the Rule to authorize a prior restraint would expose it to the same infirmity as the Defendants' capitol bans at issue, because the Rule lacks procedural protections and exceptions for First Amendment activities. *See, e.g., In re Guardianship of Kennedy*, 845 N.W.2d 707, 714 (Iowa 2014) ("If fairly possible, a statute will be construed to avoid doubt as to constitutionality.") (quotation and citation omitted).

Below, Plaintiffs address Defendants' arguments that the bans are not content-based and withstand First Amendment intermediate scrutiny. However, regardless of whether they are content-based or content-neutral, the bans *still* must be subjected to the strictest scrutiny because they are prior restraints on First Amendment rights. The bans fail this scrutiny. *See* Pl. Br. at 9-10.

II. The Bans are Content-Discriminatory and Fail Strict Scrutiny.

Defendants attempt to distinguish the capitol bans from the denial of use-permits invalidated in *Southeastern Promotions v. Conrad* by arguing the bans are not content-

discriminatory. Defs. Br. at 7 (citing *Se. Promotions*, 420 U.S. 546, 547 (1975)). As set forth below, the bans are content discriminatory in two ways: (1) they disfavor some speakers over others; and (2) they necessarily and inevitably target protected expressive activity. The fact that *all* Plaintiffs' speech and assembly at the State Capitol is banned is not less harmful, nor less content-discriminatory, than if they were banned in part. The result is an even greater intrusion on the right to speak, to assemble, and to petition the government for redress of grievances.

The bans are content-discriminatory because they disfavor some speakers over others on traditional public fora. Defendants' bans have impermissibly made the Plaintiffs "First Amendment outcasts", *see* Pl. Br. at 12 (citing *United Youth Careers*, 412 F.Supp.2d 994, (S.D. Iowa 2006). Plaintiffs are banned from exercising their protected First Amendment rights on the state capitol grounds, while others are allowed to do so. Defendants don't even address the many cases Plaintiffs cited striking bans from public meetings based on prior behavior. Pl. Br. at 13-14. In public fora, "[r]estrictions that favor or disfavor certain speech based on the speaker rather than the content of the message are still content based." *Surita v. Hyde*, 665 F.3d 860, 870 (7th Cir. 2011).

> Government may not discriminate among speakers. *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 812 (2000); *City of Madison Joint Sch. Dist. No. 8*, 429 U.S. at 176; *First Nat'l Bank of Bos. v. Bellotti,* 435 U.S. 765, 784–85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating ... the speakers who may address a public issue."). "Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *Playboy Entm't Grp.,* 529 U.S. at 812. Just as the government may not favor one speaker over another, *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819 (1995), neither may it disfavor one speaker over another. Although distinctions on the basis of subject matter and identity regarding access to *non*public forums may be inescapable, they are impermissible respecting access to traditional or designated public forums. *See Perry Educ. Ass'n,* 460 U.S. at 49. "The government violates the Free Speech Clause of the First Amendment when it excludes a speaker from a speech forum the speaker is entitled to enter." *Christian Legal Soc'y,* 453 F.3d at 865.

Id. (citation omitted).[2]

The bans are also content-based because they intentionally and directly targeted the protected First Amendment activities of Plaintiffs at the Iowa State Capitol, and arose out of the Plaintiffs engaging in those activities at the Iowa State Capitol. These are no mere "incidental" burdens on protected expression as Defendants assert. Rather, the bans were intended and had the effect of restricting Plaintiffs from the protected expression of assembling and speaking at the state capitol as a punishment for their alleged "behavior." Defendants admit that they recognize that protected First Amendment activities are not incidentally restricted when a person is banned from the Iowa State Capitol Complex, but rather *necessarily* restricted, as intended, because, as they assert "[l]egislative leadership as well as the Defendants in this case intentionally limited the duration of the notices in order to allow those persons back on the State Capitol grounds by the time the legislature reconvened in January of 2021." Defs. Br. at 4. But Defendants aren't allowed to preference this form of protected First Amendment expression over others. Plaintiffs have a First Amendment right to assemble and speak at the Capitol, and to petition the government for redress of grievances, just as they have a right to lobby members of the legislature during the legislative session. Had the bans come with an exception for First Amendment activities at the State Capitol, like in *Wright*, Defendants' assertion that the bans weren't intended to block Plaintiffs from further protests at the State Capitol Complex might be more persuasive. But Defendants assert that they discussed and decided to limit Plaintiffs' First Amendment expression, excepting the legislative session, in banning them. Unlike the analysis of the restrictions at issue in *Wright* and *Arcara* that Defendants point to, (Defs. Br. at 10), here, the bans "ha[ve] the

[2] The cases also find that such restrictions would also be invalid if content-neutral. *See* Pl. Br. at 14. *See also* Part III, *infra.*

inevitable effect of singling out those engaged in expressive activity." *Wright*, 833 F.3d at 1296; *Arcara v. Cloud Books, Inc.*, 478 U.s. 697, 706-07 (1986).

Thus, the bans are content discriminatory in two ways. For the reasons already set forth by Plaintiffs in their main brief, the bans fail strict scrutiny. *See* Pl. Br. at 11-16.

III. The Bans Also Fail First Amendment Intermediate Scrutiny.

Even assuming for the sake of argument that the bans are content-neutral, *see* Defs. Br. at 10, they still violate the First Amendment, because they fail the intermediate scrutiny that applies to content-neutral time, place, or manner restrictions in traditional public fora. "For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)); *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1071 (10th Cir. 2020).[3] A content-neutral time, place, and manner restriction must leave open alternative means of communication. *See McCraw*, 973 F.3d at 1295; *Perry*, 460 U.S. at 45; *Ward*, 491 U.S. at 791; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

In *McCullen*, the Court struck down a Massachusetts "buffer-zone" law that banned knowingly standing on a public sidewalk within 35 feet of the entrance to an abortion clinic. *McCullen*, 573 U.S. at 469. The Court's legal analysis begins by recognizing that the law restricted speech on sidewalks, traditional public fora. *Id.* at 476 ("Thus, even though the Act says nothing about speech on its face, there is no doubt—and respondents do not dispute—that it restricts access

[3] *United States v. O'Brien*, 391 U.S. 367 (1968), cited by Defendants, Defs. Br. at 10, is the Court's first iteration of a First Amendment intermediate scrutiny test, but does not take into account whether the forum is public or nonpublic forum, which the Supreme Court's later formulation expressed in *Ward*, *Perry*, and *McCullen* all do in cases like this one, where speech is regulated in a traditional public forum.

to traditional public fora and is therefore subject to First Amendment scrutiny."). The government's ability to restrict speech in traditional public fora is "very limited." *Id.* at 477 (citing *United States v. Grace*, 461 U.S. 171, 180 (1983)). The Court ultimately decided that the law was not content-discriminatory on its face.[4] *Id.* at 485. However, the Court struck the law down, because it was not "narrowly tailored to serve a significant government interest." *Id.* at 486 (citing *Ward,* 491 U.S. at 796). As the Court explained, "[t]he tailoring requirement does not simply guard against the impermissible desire to censor." *Id.* "By demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrificing speech for efficiency.'" *Id.* (citing *Riley v. Nat'l Fed. Of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). While the restriction "need not be the least restrictive . . . means of serving the government's interests . . . the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* (citations omitted).

In *McCullen*, the state had argued that the law promoted public safety, *id.* at 487, as Defendants do.[5] Also like Defendants' argument, the state argued that the law in *McCullen* did not prevent the petitioners from engaging in protest outside the buffer zones. *Id.* at 490.

The Court found that the law "impose[d] serious burdens on petitioner's speech." *Id.* at 487. It found petitioners' preferred method of communication and message were tied to the area within the buffer zones. *Id.* at 490. The Court placed the burden on the state to show that it "seriously undertook to address the problem with less intrusive tools readily available to it [and] . . . considered different methods that other jurisdictions have found effective." *Id.* at 495. The

[4] As argued *supra*, this is unlike the capitol bans, which favor some speakers over others and target Plaintiffs' speech and assembly directly.

[5] Massachusetts also asserted a governmental interest in patient access to healthcare and free flow of traffic on sidewalks. *McCullen*, 573 U.S. at 490.

Court ultimately determined the "buffer zones burden substantially more speech than necessary" to achieve the state's interest. *Id.* at 490. The Court also rejected the state's argument that the buffer zones were justified to address a substantial public safety risk caused by protesters blocking driveways to clinics, because "[a]ny such obstruction can readily be addressed through existing local ordinances . . . . in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like." *Id.* The Court also pointed to *potential* legislation the state had not adopted but could adopt if it wished to, that would subject violators to civil and criminal penalties for blocking patients' access to clinic entrances. *Id.*

More recently, in *McCraw*, the Sixth Circuit invalidated an Oklahoma ban on standing, sitting, or staying in public medians. *McCraw*, 973 F.3d at 1064-65. The ban was challenged by individual and organizational plaintiffs who variously intended to use the medians to hold political signs, engage in protests, garner signatures, panhandle, and converse with fellow joggers. *Id.* The Court set out the appropriate approach to take in considering a challenge to a restriction of First Amendment rights on a traditional public forum. Plaintiffs are not required to prove that the restriction expressly sets out that its purpose is to limit First Amendment rights, as Defendants urge. Rather, the appropriate questions are first, whether Plaintiffs'

> activities are protected by the First Amendment. If so, a court must identify whether the challenged restrictions affect a public or nonpublic forum; that determination dictates the extent to which the government can restrict First Amendment activities within the forum. Finally, courts must determine whether the proffered justifications for prohibiting speech in the forum satisfy the requisite standard of review.

McCraw, 973 F.3d 1057, 1065-66 (10th Cir. 2020) (citation omitted). Thus the court, having determined that medians are traditional public fora, applied First Amendment scrutiny. *Id.* at 1069. The court assumed for purposes of analysis that the ban was content-neutral, and struck it as

lacking narrow tailoring, following the precedent set out in *McCullen*.[6] *Id.* at 1070. In finding a lack of narrow tailoring, the court in *McCraw* determined that "the City ha[d] not met its burden to show that its recited harms [regarding pedestrian safety on medians] [we]re real" or that the ordinance "w[ould] in fact alleviate these harms in a direct and material way." Like in *McCullen*, the court recognized that "the fact that plaintiffs may still engage in their speech on roadsides, sidewalks, or other medians does not mean that their speech is not burdened by the [ordinance]." *Id.* at 1074.

As argued above, the bans should be struck under strict scrutiny, both because they fail to meet the procedural safeguards required by prior restraints on speech and because they are content discriminatory. However, because the bans prohibit Plaintiffs from engaging in what is undisputed to be protected First Amendment activity on traditional public fora, it is unnecessary for Plaintiffs to additionally show that they are content discriminatory in order to invalidate them. *McCraw*, 973 F.3d at 1067, 1070; *McCullen*, 573 U.S. at 486-87; *Perry Educ. Ass'n v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). The bans cannot survive First Amendment intermediate scrutiny.

Defendants concede that the bans restrict Plaintiffs from engaging in protected First Amendment activities on traditional public fora of the State Capitol Complex grounds, but argue that they were justified in banning Plaintiffs "to protect the public from violent behavior." Defs.

---

[6] The Court recognized that the ban on standing in medians may well not have been content-neutral in light of evidence it was targeted at preventing panhandling, but found it unnecessary to make that ruling, because having failed intermediate scrutiny, the ban necessarily also failed strict scrutiny. *Id.*

McCraw is also instructive on the First Amendment protection that applies to expressive conduct which may or may not touch on matters of public concern in a traditional public forum—such as the Plaintiffs' conversations with other participants in yoga classes they like to attend on the state capitol grounds, or the poetry events at the Capitol that Plaintiff Johnson conducts through her job (Ramus Aff. at ¶ 39; Bequeaith Aff. at ¶ 24; Johnson Aff. at 30)—finding First Amendment protections extended to the conversations of runners who liked to stop on the medians to have personal conversations with jogging buddies. *McCraw*, 973 F.3d at 1066-67.

Br. at 9, 12. Defendants also argue, as did the defendants in *McCullen* and *McCraw*, that Plaintiffs have sufficient alternative channels of communication available, because they "are free to enter and attend any rallies or protests held at other locations around Des Moines." Defs. Br. at 11. Under *McCullen* and *McCraw*, Defendants' arguments fail to meet their burden to show the narrow tailoring required to justify the burden on Plaintiffs' protected First Amendment rights.

The capitol bans' burden on Plaintiffs' First Amendment rights is even more serious and broad than the burdens at issue in these cases, or *Wright*: unlike the medians, the 35 feet around a clinic, or particular park at issue in those three cases, Plaintiffs in this case are banned from the entire State Capitol Complex, a huge area necessary for them to deliver their specific message to their intended audience. (Johnson Aff. at ¶¶ 22-24, 25-27, 32; Bequeaith Aff. at ¶ 25; Penna Aff. at ¶ 15-16; Ramus Aff. at ¶ 36; Dikkers Aff. at ¶¶ 21-22). This principle that the First Amendment protects a speakers' message and ability to reach her intended audience by use of a specific important forum, like the State Capitol Complex, is recognized in *McCullen* and applied in *McCraw*. *McCullen*, 573 U.S. at 490; *McCraw*, 973 F.3d at 1074.

Moreover, while the Courts in those cases rejected the argument that the availability of alternative public fora was sufficient for plaintiffs to engage in their intended speech, they at least had alternatives, inadequate as they were. But there is only one Iowa State Capitol. The special place occupied by the state capitol for the First Amendment rights of speech, assembly, and to petition the government for redress of grievances is such that there are no adequate alternatives.

Further, like in *McCraw*, Defendants have not met their burden of showing that Plaintiffs will pose any threat of violent behavior to the public. Even if Defendants could show that such a threat existed, they have not met their burden of demonstrating that they first tried any of the myriad available alternative, less restrictive means of accomplishing their stated purpose. Like in

McCullen, the goals of protecting public safety may instead be accomplished through the enforcement of the numerous criminal laws enacted for that purpose. *See* Pl. Br. at 17 (providing citations to example laws). The State might also have sought to a protective order through the judicial process, which would have allowed the courts, if it determined that any restriction was necessary, "to tailor a remedy to ensure it restricts no more speech than necessary." *See McCullen*, 573 U.S. at 492. Nor did Defendants attempt to carve out exceptions for the exercise of protected First Amendment rights, as the city did in *Wright*. *See Wright*, 833 F.3d at 1293-94, 1299.

As a result, even if Defendants prevail in arguing the bans are content neutral, the bans fail First Amendment intermediate scrutiny, and Plaintiffs are likely to succeed on the merits.

IV. This case does not challenge the Des Moines Police Departments' arrests of Plaintiffs as a violation of the First Amendment.

Defendants resist Plaintiffs' motion for a preliminary injunction as if Plaintiffs' case were challenging the lawfulness of their arrests. It's not clear why Defendants have submitted the affidavits and videos that that they have, since they are irrelevant to Plaintiffs' prior restraint claim. While Plaintiffs believe all criminal charges against them will be dismissed, as two of the five already have been, (Pl. Exs. A-B), that's not at issue in this case. The Des Moines Police Department is not a party to this case. While they may well do so in the future, Plaintiffs' case here is not challenging the actions of the Des Moines Police Department in arresting them, or the validity of the charges. In *this* case, Plaintiffs challenge the Defendants' imposition of the prior restraint from all protected First Amendment activity at the Iowa State Capitol Complex.

Oddly, other than a single reference to the videos they submitted in arguing that the arrests were lawful, Defs. Br. at 12, their argument actually does not even cite to these materials. And while Defendants have titled their exhibits asserting that they depict the Plaintiffs, Defendants have not identified any Plaintiff in any of the videos. In fact, as far as Plaintiffs can tell, not all

Plaintiffs are even seen in the videos. Nor are the videos in any way proof of unlawful conduct by any Plaintiff, as the dismissals of criminal charges demonstrate. *See* Exs. A-B.

V. The Capitol Bans Constitute Irreparable Harm.

Defendants next argue that the bans do not constitute irreparable harm because they are not permanent or indefinite. Defs. Br. at 13. To the contrary, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Powell v. Noble*, 798 F.3d 690, 702 (8th Cir. 2015)(quotation omitted); *see* Pl. Br. at 16-17.

In a footnote, Defendants also argue that the bans are not irreparable harm given an "almost four months" "delay" in filing suit. Defs. Br. at 13 n. 2 (citing *Benisek v. Lamone*, 138 S.Ct. 1942, 1944 (2018) and *CHS, Inc. v. PetroNet*, 2010 WL 472073 (D. Minn Jan. 21, 2018). This argument is unavailing for three reasons. First, taking only three months[7] to bring a significant constitutional challenge on behalf of multiple plaintiffs against multiple defendants is moving extraordinarily swiftly, by any reasonable account. Second, three months is not comparable to the six-year wait in *Benisek*. *Benisek*, 138 S.Ct. at 1944. Third, Defendants have misread the other case they cite for their assertion, *CHS*, an unpublished district court case. *CHS* is a copyright infringement and trade secrets case between two huge fuel supplier companies and a consulting firm, not a private parties' free speech case against the government. The plaintiff there waited five years to bring its lawsuit, and then waited eight months after it filed suit to bring its motion for a preliminary injunction. The full sentence Defendants quote from is: "*Yet, it did not move for injunctive relief when it filed the Complaint*, instead waiting more than eight months, all while supposedly being 'irreparably harmed,' to ask the Court for an injunction." *CHS, Inc. v. PetroNet*, 2010 WL 472073 at *3

[7] Plaintiffs were verbally banned on July 1, 2020, and banned in writing on July 15, 2020. Plaintiffs filed suit and sought preliminary injunctive relief on October 5, 2020. That is a difference of two and half and three months, respectively—not four months.

(emphasis added to show omitted text). Plaintiffs here waited zero months after filing their Complaint, not eight, to file their Motion for preliminary injunctive relief. Thus, putting aside for a moment that violations of First Amendment rights are always irreparable harm, Defendants' argument fails, because there was no analogous or objectionable delay in this case.

Defendants make a number of additional assertions that are quickly dispensed with below.

Defendants argue that "nearly four of the six months set forth in the notices has already passed and no preliminary injunction issued at this point will allow them to go back in time and attend the rallies they allege the[y] missed as a result of this prohibition." Defs. Br. at 14. To the contrary, the ongoing burdens to Plaintiffs' First Amendment rights over the next two months (for three of the Plaintiffs) and next eight months (for two of the Plaintiffs) are serious constitutional deprivations entitling them to injunctive relief. *See Powell,* 798 F.3d at 702.

Defendants argue that Plaintiffs are not burdened because "not a single Plaintiff has been arrested or cited for criminal trespass or any other offense on the Capitol grounds." D. at 14. To the contrary, Plaintiffs are not required to violate the bans and be arrested in order to show injury to challenge the bans.[8] "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *see also Minnesota Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997).

Last, Defendants argue that "Plaintiffs also fail to identify any events they will be restricted from attending over the next approximately two months as a result of the prohibition." Defs. Br. at 14. This is not the case. Ms. Johnson has detailed that as an organizer of Des Moines BLM, she

[8] Defendants further demonstrate their intent to enforce the bans through their Resistance to Plaintiffs' preliminary injunction motion.

and her organization have moved all their events off the capitol as a result of bans, and would resume multiple events at the capitol each week once the bans are lifted. (Johnson Aff. at ¶¶ 25-27.) The other Plaintiffs plan to attend those protests at the capitol. (Bequeaith Aff. at ¶¶ 22-25; Penna Aff. at ¶¶ 14-16; Ramus Aff. at ¶¶ 33, 40; Dikkers Aff. at ¶ 20.) Plaintiffs would also like to schedule meetings at capitol and engage in other protected expressive activity there. (Johnson Aff. at ¶¶ 30-31; Bequeaith Aff. at ¶¶ 22-25; Penna Aff. at ¶ 16; Ramus Aff. at ¶¶ 37-40; Dikkers Aff. at ¶¶ 21-22.) Defendants also ignore the one-year bans, which encompass the legislative session. Plaintiffs who are subject to the one-year ban wish to lobby legislators and otherwise participate in protected expression at capitol during session. (Johnson Aff. at ¶¶ 30-31; Bequeaith Aff. at ¶ 23). Because these are all protected First Amendment activities prohibited by the bans, Plaintiffs will continue to suffer irreparable harm absent injunctive relief.

VI. The Balance of Hardships Weighs in Favor of a Preliminary Injunction.

Defendants argue that the balance of equities weigh in favor of allowing the bans on Plaintiffs to continue to prohibit all their expressive activities at the Capitol because of "the government interest of preventing violence." Defs. Br. at 14. The government interest in preventing violence generally is satisfied by the remedies of arrest for unlawful conduct. *See* Parts I-III, *supra*. Moreover, a general interest in preventing violence cannot justify a prior restraint. Past conduct cannot justify prior restraint on speech. *Id.*

In support of their argument, Defendants cite an unpublished district court order denying a preliminary injunction. Defs. Br. at 15 (citing *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 2012 WL 4481210, at *8-9 (E.D. Mo. Sept. 28, 2012)). This is not persuasive authority as to the principle for which Defendants cite it, for two reasons:

First, the district court acknowledged that, if it had determined that the plaintiffs were likely to succeed on the merits, that would likely have been dispositive on all remaining *Dataphase* factors, "because it is always in the public interest to protect constitutional rights, and the balance of equities generally favors freedom of expression, in First Amendment cases". *Survivors Network*, 2012 WL 4481210, at 4 (internal citation omitted). Here, because Plaintiffs are likely to succeed on the merits, the public interest is to protect their constitutional rights.

Second, the Eighth Circuit later reversed the district court on summary judgment. *See Survivors Network*, 779 F.3d 785, 794 (8th Cir. 2015). Specifically relevant to rebutting the district court's analysis regarding the balance of hardships inquiry was the Eighth Circuit's determination that "[t]he statute at issue here . . . is not necessary to protect access to any Missouri house of worship since a different section of the Act criminalizes obstructing the entrance to a house of worship." *Id.* As Plaintiffs have shown, Defendants likewise have at their disposal multiple criminal prohibitions against unlawful behavior at protests. Pl. Br. at 17; *s*Part III, *supra*.

Defendants have no legitimate interest in violating Plaintiffs' First Amendment rights, and possess ample alternatives to protect public safety at protests generally. As a result, the balance of hardships weigh in favor of injunctive relief.

VII. The Public Interest Weighs in Favor of Granting a Preliminary Injunction.

Finally, Defendants attempt to justify the prior restraints at issue in this case "because of other protests and daily, imperative government work that occurs on and around the Capitol Complex, along with the numerous individuals that visit the complex simply as members of the public, a preliminary injunction shortening the length of the prohibition to access State Capitol grounds would interfere with all of the above." Defs. Br. at 15. But Defendants have not demonstrated that Plaintiffs specifically either have posed, or would pose in the future, any threat

at all of future unlawful conduct that would interfere with other protesters or government work. As shown above, the ban violates narrow tailoring because the State has other, less speech-intrusive tools available to protect public safety.

In support of their argument, Defendants also cite to *Benisek*. Defendants Br. at 16 (citing *Benisek*, 138 S.Ct. at 1944-45) (reciting principle that election law should not ordinarily be changed just prior to an election). Plaintiffs don't ask this Court to alter any elections proceeding.

The public interest favors the protection of constitutional rights. *Phelps-Roper*, 545 F.3d at 690.

Conclusion

Defendants' straw man arguments about the validity of Plaintiffs' arrests do nothing to defeat Plaintiffs' motion for a preliminary injunction. Because those bans are unconstitutional prior restraints that contain none of the required procedural safeguards and fail the strictest scrutiny the Court applies to such restraints, Plaintiffs are likely to succeed on the merits of their claim. Additionally, Plaintiffs are likely to succeed in defeating the bans under either First Amendment intermediate or strict scrutiny, which apply to content-neutral and content-based restrictions of protected expression on a traditional public forum, respectively. The ongoing deprivation of Plaintiffs' rights to protected First Amendment activities on the State Capitol Complex during the period of the six month and one year bans is irreparable injury. Further, the hardships fall entirely on Plaintiffs. Defendants have no legitimate interest in preventing Plaintiffs from engaging in protected First Amendment activities, whereas Plaintiffs' are suffering an ongoing and severe violation of those rights. Last, because there is no public interest in unconstitutional prior restraints of First Amendment rights, the final factor also weighs in Plaintiffs' favor.

For these reasons, Plaintiffs respectfully ask this court to enter a preliminary injunction as soon as practicable in order to avoid further deprivation of Plaintiffs' First Amendment rights during the pendency of this case.

Respectfully submitted:

/s/ Rita Bettis Austen
Rita Bettis Austen, AT0011558
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: (515) 207-0567
Fax: (515) 243-8506
Email: Rita.Bettis@aclu-ia.org

Shefali Aurora, AT0012874
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: (515) 243-3988
Fax: (515) 243-8506
Email: Shefali.Aurora@aclu-ia.org

Glen S. Downey, AT0012428
The Law Offices of Glen S. Downey, LLC
5214 Ingersoll Avenue
Des Moines, IA, 50312
Telephone: (412) 865-7110
Fax: (515) 259-7599
Email: glen@downey-law.net

Nathan A. Mundy, AT0009065
Mundy Law Office, P.C.
317 6th Ave., Suite 1300
Des Moines, IA 50309
Ph: (515)288-1552
Fax: (515) 598-7591
Email: nathan@mundylawdsm.com

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing paper with the Clerk of Court by using the CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

Date: Nov. 5, 2020

/s/Rita Bettis Austen

Rita Bettis Austen