UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

SALLY NESS,

Plaintiff,

v.

CITY OF BLOOMINGTON; MICHAEL O. FREEMAN, in his official capacity as Hennepin County Attorney; TROY MEYER, individually and in his official capacity as a police officer, City of Bloomington; MIKE ROEPKE, individually and in his official capacity as a police officer, City of Bloomington,

Defendants.

Court File No. _____

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION

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INTRODUCTION

This case challenges Defendants' restrictions on Plaintiff's First Amendment right to film in a public forum information for public dissemination regarding a public controversy. It is a constitutional challenge seeking to preliminarily and permanently enjoin Defendants' enforcement of Minnesota Statute § 609.749 ("Harassment Statute") and provisions of § 5.21 of the City of Bloomington Code ("No Filming Regulations") to restrict Plaintiff's First Amendment activity. It is well established that Plaintiff need not first expose herself to arrest to be entitled to challenge a law that she claims deters the exercise of her constitutional rights. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

Through this motion, Plaintiff requests an Order from the Court temporarily and preliminarily enjoining Defendant Michael O. Freeman, the Hennepin County Attorney, and Defendant City of Bloomington ("City") from enforcing the Harassment Statute against Plaintiff and temporarily and preliminarily enjoining the City from enforcing the No Filming Regulations against Plaintiff while this case proceeds.

As set forth below, Plaintiff has established the factors necessary for this Court to grant the requested Temporary Restraining Order ("TRO") and preliminary injunction.

HARASSMENT STATUTE & NO FILMING REGULATIONS

The challenged Harassment Statute states, in relevant part, as follows:

609.749 HARASSMENT; STALKING; PENALTIES.

> Subdivision 1. **Definition.** As used in this section, "harass" means to engage in intentional conduct which: (1) the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated; and (2) causes this reaction on the part of the victim.

Subd. 1a. **No proof of specific intent required**. In a prosecution under this section, *the state is not required to prove that the actor intended to cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated*, or except as otherwise provided in subdivision 3, paragraph (a), clause (4), or paragraph (b), that the actor intended to cause any other result.

Subd. 2. **Harassment and stalking crimes**. (a) A person who harasses another by committing any of the following acts is guilty of a gross misdemeanor:

* * *

(2) stalks, follows, monitors, or pursues another, whether in person *or through technological or other means*;

* * *

Subd. 3. **Aggravated violations.** (a) A person who commits any of the following acts is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both:

* * *

(5) commits any offense described in subdivision 2 against a victim under the age of 18, if the actor is more than 36 months older than the victim.

* * *

Subd. 5. **Pattern of harassing conduct**. (a) A person who engages in a pattern of harassing conduct with respect to a single victim or one or more members of a single household which the actor knows or has reason to know would cause the victim under the circumstances to feel terrorized or to fear bodily harm and which does cause this reaction on the part of the victim, is guilty of a felony and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both.

* * *

Subd. 7. **Exception.** Conduct is not a crime under this section if it is performed under terms of a valid license, to ensure compliance with a court order, or to carry out a specific lawful commercial purpose or employment duty, is authorized or required by a valid contract, or is authorized, required, or protected by state or federal law or the state or federal constitutions. Subdivision 2, clause (2), does not impair the right of any individual or group to engage in speech protected by the federal

> Constitution, the state Constitution, or federal or state law, including peaceful and lawful handbilling and picketing.

Minn. Stat. § 609.749 (emphasis added).

The No Filming Regulations adopted by the City on October 28, 2019, state, in relevant part, as follows:

> **§ 5.21 REGULATIONS.**
>
> The rules and permits in this section are required to ensure the safety and general welfare of the public and the quiet and orderly use and enjoyment of the city's parks. The City Council may adopt fees and policies pursuant to this section in furtherance of these objectives. The following regulations shall apply to all city parks.
>
> * * *
>
> (11) Commercial use and photography.
> No person shall:
>
> * * *
>
> (B) Operate a still, motion picture, video or other camera for commercial purposes in a park without a permit approved by the city.
>
> * * *
>
> (24) No person shall intentionally take a photograph or otherwise record a child without the consent of the child's parent or guardian.
>
> * * *
>
> **§ 5.22 PENALTY.**
>
> Any person violating § 5.21 (9) or (13) shall be guilty of a misdemeanor, all other violations of this Article III shall be punishable as a petty misdemeanor.

(Ness Decl. ¶ 27, Ex. B (No Filming Regulations)

RELEVANT FACTS

Plaintiff Ness resides in the City. Her home is in the Smith Park neighborhood. For several years, she has been documenting through videotaping and photographing the

public controversy surrounding the Dar al-Farooq mosque and the Success Academy school, which are located in her neighborhood.[1] (Ness Decl. ¶ 2).

This public controversy began in 2011, when Al Farooq Youth and Family Center (later called Dar al-Farooq, or "DAF") applied for a land use permit to renew the existing conditional use on a "quasi-public" site in a residential zone (R-1) located in the Smith Park neighborhood. (Ness Decl. ¶ 3).

During the first five years (2011 to 2016), Plaintiff Ness and her neighbors were so concerned about large overflow events, traffic congestion and violations, noise (basketball sessions late into the night), regular on-street Friday parking, including semi-trucks and buses, meetings scheduled to conclude well after typical neighborhood "quiet time" of 10:00 p.m., continual usage of facilities, and overflowing trash that they presented a petition to the City in 2016 demanding answers. (Ness Decl. ¶ 4).

The City dismissed the petition on procedural grounds, claiming that it failed to meet a codified definition of a "petition" and had no signatures. The City entirely ignored the substance of the complaints despite the fact that the City Council meeting where the petition was presented was well attended by those who supported and shared the concerns expressed in the petition. (Ness Decl. ¶ 5).

The litany of specific abuses permitted by the City include, *inter alia*, excusing a host of unapproved DAF activities, such as operating a university and a restaurant, hosting unpermitted regional events, and operating weekend schools over the permitted

[1] The Dar al-Farooq/Success Academy controversy is described in greater detail in the Complaint filed in this case. (Ness Decl. e.g., ¶¶ 2-12; Compl. ¶¶ 20-46).

amount. The City also failed to enforce the Conditional Use Permit ("CUP") and the Joint Use Agreement ("JUA") with regard to the property by ignoring, *inter alia*, parking and traffic violations and the excessive use of DAF's facilities and public facilities, including the neighborhood park. (Ness Decl. ¶ 6).

Additionally, DAF did not formally act to open the private school described in the CUP. Instead, DAF began the process of opening a charter school (Success Academy) in 2017, without filling out an amendment to the CUP or officially informing the City. When the City learned of the student activity, it initially warned DAF that student count must be 60 per the CUP limits—that Fall DAF had over 80 students. The City ultimately approved a new CUP in August 2018 for 130 students. (Ness Decl. ¶ 7).

A City park playground (Smith Park) was offered to DAF by vote of the City Council for use of its lessee, Success Academy, despite a staff report conclusion that DAF should provide its own playground equipment. (Ness Decl. ¶ 8).

The City has refused to address neighborhood concerns regarding the number of times per day or students per session that the Success Academy may appropriate this City park for its recesses, rendering the park essentially unavailable to the general public, including Plaintiff Ness and her grandchildren. (Ness Decl. ¶ 9).

City staff reports do not provide an analog in the City for a school relying upon a City park playground on City property for recesses. (Ness Decl. ¶ 10).

DAF and the Success Academy have used the playground more than six times per weekday and on weekends for other religious "schools." (Ness Decl. ¶ 11).

The use of the Smith Park by DAF and the Success Academy has severely limited, if not prohibited outright, the public's use of this park. (Ness Decl. ¶ 12).

Plaintiff Ness has been the point person for delivering neighborhood concerns to the City. She also maintains a public blog (https://5yearsofcollectingdata.weebly.com/) and Facebook page (https://www.facebook.com/groups/589133684592349/) that document many developments, observations, and concerns related to the DAF/Success Academy controversy in order to inform the public. (Ness Decl. ¶ 13).

Plaintiff Ness uses photographs and videos, often posted for public view on YouTube, as part of her efforts to disseminate this information to the public. (Ness Decl. ¶ 13).

The City has demonstrated its animosity toward Plaintiff Ness and her efforts to document and report the neighborhood concerns regarding DAF and the Success Academy and the City's malfeasance related to these concerns. For example, Plaintiff Ness would often speak during the public comment periods at City Council meetings regarding the DAF/Success Academy controversy. Councilmembers frequently challenged, interrupted, and admonished her for bringing forward the neighborhood concerns, discouraging her from further participation. City officials have also made derogatory comments about her. (Ness Decl. ¶¶ 14-15).

The final straw was when the City Council required Plaintiff Ness to announce her home address over the public address system prior to her public comments rather than simply enter it on the speaker comment card pursuant to the council's standard practice. Plaintiff Ness refused to publicly announce her home address. She had reason to fear

retaliation from patrons at DAF/Success Academy. On one occasion, DAF/Success Academy patrons surrounded her car, trapping her, while they threatened and jeered her. (*Id*. ¶ 16).

As a result, Plaintiff Ness no longer speaks at City Council meetings. Rather, she collects information regarding the DAF/Success Academy controversy and posts it on her blog/Facebook page for public dissemination. (Ness Decl. ¶ 17). More specifically, Plaintiff Ness collects information for public dissemination of possible CUP and JUA violations by DAF and the Success Academy by videotaping and photographing from public sidewalks, the public park, and while in her vehicle on a public street. On occasion, she would film, with permission, from her neighbors' driveways and from inside their homes. All of the activity she films is in public view. (*Id*. ¶ 18).

In August 2018, a formal complaint was made against Plaintiff Ness for possible violations of the Harassment Statute because of her videotaping and photographing. As usual, she was collecting information for public dissemination of possible CUP and JUA violations by DAF and the Success Academy. In fact, she was filming traffic. (*Id*. ¶ 19).

On or about August 27, 2019, Plaintiff Ness was again collecting information regarding possible CUP and JUA violations by DAF and the Success Academy when she was approached by City police officers, including Defendants Troy Meyer and Mike Roepke. Plaintiff Ness was in her neighbor's driveway when the officers approached. Her neighbor gave her permission to be there. The officers told Plaintiff Ness that they were responding to a harassment complaint against her on account of her videotaping. (Ness Decl. ¶ 20).

During this conversation, the City police officers warned Plaintiff Ness that if she continued with her videotaping and the complainants felt harassed or threatened by it, then she would be subject to arrest under the Harassment Statute regardless of her intentions. (Ness Decl. ¶ 21).

Plaintiff Ness obtained a copy of the official Bloomington Police Department report regarding this incident. A true and correct copy of this report is attached to Plaintiff Ness's declaration as Exhibit A. (Ness Decl. ¶ 22, Ex. A).

Pursuant to the report, Defendant Meyer "spoke with the (sic) Principal Rabeaa and parent Farrah and they stated the following: They both felt intimidated and scared that Ness was filming them and are worried that she may become violent towards them or their school. I spoke with Ness and advised how the Principal and parent felt and *asked her to stop filming*." (Ness Decl. ¶ 23, Ex. A [emphasis added]).

The police report concludes, "*Ness was advised that she could be charged with harassment if the parents and principal felt intimidated by her actions*." (Ness Decl. ¶ 24, Ex. A [emphasis added]).

Plaintiff Ness has never engaged in, nor threatened to engage in, any violent activity. She is a peaceful person, and the DAF and the Success Academy complainants and the City police officers know that she has always acted peacefully. Moreover, the only acts that the complainants and the police officers object to are her photographing and videotaping of public information related to the DAF/Success Academy controversy. (Ness Decl. ¶ 25).

Because of this latest, credible threat by the City, through its police officers (Defendants Meyer and Roepke), to enforce the Harassment Statute against Plaintiff Ness because of her filming activity related to the DAF/Success Academy controversy, she has ceased this activity. Plaintiff Ness reasonably fears that she will be arrested and/or charged with violating the Harassment Statute if she continues filming DAF and the Success Academy. (Ness Decl. ¶ 26).

On October 28, 2019, the City, through the City Council, approved revisions to the City Code to include regulations that would restrict Plaintiff Ness's filming activity. More specifically, the City approved and adopted the No Filming Regulations, which include, *inter alia*, the following restriction: "(24) No person shall intentionally take a photograph or otherwise record a child without the consent of the child's parent or guardian." (Ness Decl. ¶ 27, Ex. B).

Because Plaintiff Ness seeks to expose, *inter alia*, DAF's and the Success Academy's noncompliant and overuse of Smith Park, her information gathering efforts will include, quite necessarily, photographing and videotaping the use of Smith Park by children associated with DAF and the Success Academy. Additionally, Plaintiff Ness has taken pictures of students being dropped off to Success Academy and weekend school to document the noncompliant number of students attending the schools, the unsafe and noncompliant drop off conditions, and the number of students who are tardy. (Ness Decl. ¶ 28).

The enactment of the No Filming Regulations prevents Plaintiff Ness from videotaping or photographing information regarding DAF's and the Success Academy's

noncompliant and overuse of the public park, as well as other noncompliance issues. (Ness Decl. ¶ 29).

Because of the No Filming Regulations, Plaintiff Ness has ceased her filming activity because she does not want to be penalized under the new City regulations. (Ness Decl. ¶ 30).

On October 30, 2019, at the request of Detective Kristin Boomer from the City Police Department, Plaintiff Ness met with Detective Boomer, Detective Tracy Martin, and Community Liaison Officer Caitlin Gokey at Plaintiff Ness's home. (Ness Decl. ¶ 31).

According to Detective Boomer, she requested the meeting because Plaintiff Ness is a suspect in a harassment case as a result of her filming activity related to DAF's and the Success Academy's use of Smith Park. (Ness Decl. ¶ 32).

According to Detective Boomer, she is investigating the matter on behalf of Hennepin County and for the "victims," which she described as the "community center/mosque and school," or words to that effect, referring to DAF and the Success Academy. (Ness Decl. ¶ 33).

Accordingly, Detective Boomer is investigating the matter on behalf of Michael O. Freeman, the County Attorney (https://www.hennepinattorney.org/about) who, upon information and belief, is preparing to prosecute Plaintiff Ness for violating the Harassment Statute. (Ness Decl. ¶ 34).

During this meeting, Detective Boomer confirmed that Plaintiff Ness was under investigation by the County (County Attorney Freeman) for alleged violations of the

Harassment Statute due to her filming of DAF and the Success Academy. (Ness Decl. ¶ 35).

During this meeting, Detective Boomer confirmed that one of the concerns of the investigation is Plaintiff Ness's photographing and/or videotaping of children associated with DAF and the Success Academy. This was one of the complaints from the "victims" of the alleged harassment. (Ness Decl. ¶ 36).

During this meeting, Detective Boomer and Detective Martin suggested that Plaintiff Ness stop using Smith Park and that she should consider taking her grandchildren to another park. (Ness Decl. ¶ 37).

The October 30th meeting with Detective Boomer confirmed Plaintiff Ness's concerns and fears that she will be prosecuted under the Harassment Statute and penalized under the new City regulations because she videotapes or photographs information regarding the DAF/Success Academy controversy. Consequently, Plaintiff Ness has ceased all of her filming activity. (Ness Decl. ¶ 38).

Additionally, because of this October 30th meeting, Plaintiff Ness reasonably believes that an arrest and/or prosecution for allegedly violating the Harassment Statute are/is imminent. (Ness Decl. ¶ 39).

ARGUMENT

The factors to be weighed before issuing a TRO or a preliminary injunction are the same. *See Cent. Valley Ag Coop. v. Leonard*, No. 8:17CV379, 2017 U.S. Dist. LEXIS 178751, at *8 (D. Neb. Oct. 26, 2017) (citing *S.B. McLaughlin & Co. v. Tudor Oaks*

Condo. Project, 877 F.2d 707, 708 (8th Cir. 1989) (discussing with approval a district court's use of the *Dataphase* factors for a TRO)).

"The factors for evaluating whether a preliminary injunction should be issued are: '(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.'" *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1133 (8th Cir. 2019) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc)). "While no single factor is determinative, the probability of success factor is the most significant." *Id*. (internal quotation marks omitted). Indeed, because this case deals with a violation of rights protected by the First Amendment, the crucial and often dispositive factor is whether the plaintiff is likely to succeed on the merits. *See Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). Accordingly, we begin with the probability of success factor.

A. Probability of Success on the Merits.

The First Amendment fully protects Plaintiff's right to videotape and photograph in a public forum information for public dissemination related to a public controversy, as in this case. *See, e.g.*, *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000) (holding that the First Amendment protects the right to gather information through photographing or videotaping); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest"); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (holding that the First Amendment protected the

plaintiff as he videotaped and noting that "[v]ideotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence").

As stated by the Third Circuit, "The First Amendment protects actual photos, videos, and recordings and for this protection to have meaning the Amendment must also protect the act of creating that material. There is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them." *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017) (internal citations omitted); *see also Am. Civ. Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected . . . ."); *Silberberg v. Bd. of Elections of New York*, 272 F. Supp. 3d 454, 479 (S.D.N.Y. 2017) ("The act of taking a photograph, though not necessarily a communicative action in and of itself, is a necessary prerequisite to the existence of a photograph. It follows that the taking of photographs is also protected by the First Amendment."); *Martin v. Evans*, 241 F. Supp. 3d 276, 286 (D. Mass. 2017) ("Among the protected forms of information gathering is audio and audiovisual recording.").

Here, Defendants seek to criminalize Plaintiff's First Amendment activity through the enforcement of the Harassment Statute and the No Filming Regulations. The First Amendment prohibits Defendants from doing so. *See supra; see also Coates v. City of*

Cincinnati, 402 U.S. 611, 616 (1971) ("The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution.").

Moreover, the Harassment Statute and the No Filming Regulations are unconstitutionally vague and overbroad on their face and as applied to punish Plaintiff's First Amendment activity. As the Supreme Court stated in *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

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

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

dispute") (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949)). As stated by the Court in *Coates*:

> In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, *and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct*. . . . It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. . . . *It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed*.

Coates, 402 U.S. at 614 (emphasis added); *see also Dombrowski v. Pfister*, 380 U.S. 479, 479 (1965) (striking down under the "vagueness doctrine" the provision of a state law defining subversive organizations because the language was unduly vague, uncertain, and broad and thereby inhibited protected expression).

Consequently, in the First Amendment context, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Natl. Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963). The Harassment Statute and the No Filming Regulations fail to provide the necessary precision to withstand this constitutional challenge.

More specifically, the Harassment Statute can be enforced, as this case demonstrates, based solely on whether a person is annoyed by or objects to Plaintiff exercising her First Amendment rights. To this end, the statute operates as a "heckler's veto," which is impermissible in the First Amendment context. *See Lewis v. Wilson*, 253

F.3d 1077, 1082 (8th Cir. 2001) ("The First Amendment knows no heckler's veto."); *Bible Believers v. Wayne County, Mich.,* 805 F.3d 228, 248 (6th Cir. 2015) ("The heckler's veto is [a] type of odious viewpoint discrimination."); *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept.,* 533 F.3d 780, 789 (9th Cir. 2008) ("Whether prospectively, as in *Forsyth County*, or retrospectively, as in the case before us, the government may not give weight to the audience's negative reaction."); *see also id*. at 790 (noting that there is no "'minors' exception" to the heckler's veto and stating that "[i]t would therefore be an unprecedented departure from bedrock First Amendment principles to allow the government to restrict speech based on listener reaction simply because the listeners are children"). As expressly stated in the Harassment Statute: "**No proof of specific intent required**. In a prosecution under this section, *the state is not required to prove that the actor intended to cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated . . . .*" Minn. Stat. § 609.749 (emphasis added). Thus, the Harassment Statute empowers DAF and Success Academy patrons (hecklers) to veto the exercise of Plaintiff Ness's First Amendment rights by claiming that they feel threatened by the exercise of those rights. (*See* Ness Decl. ¶ 22, Ex. A (Police Report) ("*Ness was advised that she could be charged with harassment if the parents and principal felt intimidated by her actions*."). The First Amendment does not permit such empowerment, nor does it permit the government to restrict First Amendment activity by the enforcement of such overbroad and vague criminal laws. This statute should be enjoined.

Similarly, the No Filming Regulations expressly state that "(24) No person shall intentionally take a photograph or otherwise record a child without the consent of the child's parent or guardian." Per the regulations, this rule applies in City parks, which are quintessential public forums. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("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."). As noted, this regulation directly prohibits Plaintiff's First Amendment activity. The regulation is overbroad because it proscribes activity protected by the First Amendment, specifically including Plaintiff's First Amendment right to videotape and photograph in a public forum information for public dissemination regarding a public controversy. Indeed, an essential concern regarding this public controversy is DAF's and the Success Academy's noncompliant and overuse of Smith Park. Consequently, Plaintiff's information gathering efforts will often, and quite necessarily, involve photographing and videotaping the use of Smith Park by children associated with DAF and the Success Academy—and the City plainly knows that, which is the likely reason for this newly minted regulation. In sum, the City's regulation prohibiting Plaintiff's First Amendment activity is unlawful and should be enjoined.

Plaintiff satisfies the probability of success factor.

B. Irreparable Harm.

Plaintiff will be irreparably harmed without the TRO/preliminary injunction. Defendants' restrictions on Plaintiff's activity deprive Plaintiff of her fundamental rights

protected by the First Amendment. As noted by the Eighth Circuit, "It is well-settled law that a 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' If [a plaintiff] can establish a substantial likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm as the result of the deprivation." *Phelps-Roper v. Nixon*, 509 F.3d 480, 484-85 (8th Cir. 2007) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (internal citation omitted); *see also Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008) ("'[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod*, 427 U.S. at 373) (internal alteration omitted); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) ("'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod*, 427 U.S. at 373); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*). *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 127 (2d Cir. 1998) (concluding that upon establishing a violation of the First Amendment, the plaintiff "established *a fortiori* . . . irreparable injury").

C. Balance of Harms.

In this case, the likelihood of harm to Plaintiff is substantial because she only intends to exercise her First Amendment right to videotape and photograph in a public

forum public information related to a public controversy, and the deprivation of this right, even for minimal periods, constitutes irreparable injury. *See supra*.

On the other hand, if Defendants are restrained from enforcing the Harassment Statute and No Filming Regulations against Plaintiff, Defendants will suffer no harm because the exercise of constitutionally protected rights can never harm any of Defendants' or others' legitimate interests. *See Connection Distributing Co.*, 154 F. 3d at 288.

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

D. The Public Interest.

The impact of the TRO/preliminary injunction on the public interest turns in large part on whether Plaintiff's constitutional rights are violated by the enforcement of the Harassment Statute and No Filming Regulations. As stated by the Eighth Circuit, "Whether the grant of a preliminary injunction furthers the public interest in [a case vindicating constitutional rights] is largely dependent on the likelihood of success on the merits because the protection of constitutional rights is always in the public interest." *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds,* 530 F.3d 724, 752 (8th Cir. 2008); *Phelps-Roper*, 509 F.3d at 485 ("[T]he determination of where the public interest lies also is dependent on the determination of the likelihood of success on the

merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights."). Indeed, "the potential harm to independent expression and certainty in public discussion of issues is great and the public interest favors protecting core First Amendment freedoms." *Iowa Right to Life Comm., Inc.*, 187 F.3d at 970. Thus, as the Sixth Circuit stated, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

As noted previously, the enforcement of the Harassment Statute and No Filming Regulations directly violate Plaintiff's fundamental rights protected by the First Amendment. Therefore, it is in the public interest to issue the TRO/preliminary injunction.

In the final analysis, Defendants' restrictions on Plaintiff's free speech activity in a public forum violate her fundamental constitutional rights. Plaintiff is presently harmed by Defendants' credible, threatened enforcement of the Harassment Statute and No Filming Regulations, and this harm is irreparable. Without a TRO/preliminary injunction, this harm to Plaintiff's First Amendment freedoms will continue. And it is always in the public interest to prevent the violation of a party's constitutional rights. The TRO/preliminary injunction should issue.

CONCLUSION

Plaintiff respectfully requests that the Court grant this motion.

Respectfully submitted,

Dated: November 12, 2019

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