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.	Case No. 19-cv-2882 (ADM/DTS) Hon. Ann D. Montgomery **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION[1]

Through this motion, Plaintiff Sally Ness requests an Order from the Court preliminarily enjoining the City and County from enforcing the Minnesota Harassment Statute (Minn. Stat. § 609.749) against Plaintiff and preliminarily enjoining the City from enforcing the No Filming Regulations (City Code § 5.21) against Plaintiff for her photographing and videotaping activity while this case proceeds. Consequently, Plaintiff is not asking the Court to make a final ruling on the facial validity of the challenged Minnesota statute[2] or the challenged City ordinance.

[1] In this reply, Plaintiff responds to the arguments advanced by the City Defendants ("City") in their memorandum in opposition (Doc. No. 24) and to the arguments advanced by the County Prosecutor ("County") in his memorandum in opposition (Doc. No. 43).

[2] A Notice of Constitutional Question was filed and served on the Minnesota Attorney

When Plaintiff filed this case, she requested that the Court issue a temporary restraining order ("TRO") *ex parte* because she reasonably (and correctly) believed that the County was pursuing a possible criminal prosecution of her based on an investigation being conducted by City law enforcement personnel. (Mot. for TRO at 2-3 [Doc. No. 2]). This was confirmed during the meeting held on October 30, 2019—a meeting convened at the request of City Detective Kristin Boomer. (*See* City Opp'n at 11 [Doc. No. 24]). The Court declined to issue a TRO *ex parte* and directed counsel to provide notice of Plaintiff's request for preliminary injunctive relief to the City and the County, which counsel promptly did. Additionally, Plaintiff's counsel reached out to opposing counsel and pursuant to Local Rule 7.1, sought to resolve the issues presented by the motion. After some initial exchanges of correspondence, opposing counsel ultimately declined to enter into an agreement or stipulation that would have obviated the need for this motion. (*See* Meet-and-Confer Statement [Doc. No. 18]).

When the County filed its opposition papers on December 18, 2019, Plaintiff learned *for the first time* that the County declined to prosecute her for her filming activity. (Cnty. Opp'n at 8 [Doc. No. 43]; Harris Decl. ¶ 4 [Doc. No. 44]). The City apparently submitted the request for prosecution to the County Prosecutor on or about November 7, 2019.[3] (Harris Decl. ¶ 3 [Doc. No. 44]).

General pursuant to Rule 5.1 of the Federal Rules of Civil Procedure. (Notice [Doc. No. 45]).

[3] The County doesn't tell us *when* the decision was made <u>*not*</u> to prosecute Plaintiff, which is an interesting omission given that the Complaint was filed on November 12, 2019 (Compl. [Doc. No. 1]), and it, along with the original TRO motion, memorandum of law, and Plaintiff's declaration, were promptly served on November 15, 2019 (Aff. of Serv.

Additionally—and this is significant for purposes of this motion—in its opposition papers, the County expressly stated that the challenged Harassment Statute "***does not criminalize the filming and photography in which Ness claims to want to engage***." (Cnty. Opp'n at 2 [Doc. No. 43]) (emphasis added). This is a remarkable admission. Consequently, should counsel for the County confirm this admission during the hearing set for this motion, *preliminary* injunctive relief against the County Prosecutor is no longer necessary.[4]

The City, nonetheless, disagrees with the County, and it doubles down, not only arguing that its newly-minted ordinance prohibits Plaintiff's filming of children in public parks[5] but further arguing that "[e]ven if Hennepin County declines to charge, . . . the Bloomington City Attorney's office will have the opportunity to review the information obtained through the Bloomington Police Department's investigation for possible non-

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[Doc. No. 13]). As of December 16, 2019, the City was apparently unaware of the County's decision not to pursue prosecution of Plaintiff. (*See* Boomer Decl. ¶ 15 [Doc. No. 27]). Had the County disclosed and been willing to stipulate to its position set forth here during the earlier meet-and-confer on this motion, there would have been no need to pursue a preliminary injunction against the County Prosecutor.

[4] Plaintiff named the County Prosecutor, in his official capacity only, for two primary reasons. First, Plaintiff (correctly) understood that the County was considering the City's investigation of her filming activity for possible prosecution under the Harassment Statute. The County Prosecutor has now disavowed any such intent to prosecute, thereby negating the need for a preliminary injunction against him, as noted in the text above. And second, because the County Prosecutor has the statutory authority to prosecute felony offenses under the Harassment Statute (*see* Cnty. Opp'n at 7 n.6 [Doc. No. 43]), and because Plaintiff has alleged that this statute is unconstitutional and should ultimately be enjoined, the County Prosecutor remains a proper party in this lawsuit in his official capacity. (*See* Compl. ¶¶ 16, 17 [Doc. No. 1]).

[5] The timing of the City's enactment of the challenged ordinance strongly suggests that Plaintiff was its intended target.

felony charges." (City Opp'n at 12 [Doc. No. 24]). In other words, even if the County believes that Plaintiff's filming activity is beyond the reach of the Harassment Statute, the City disagrees with that assessment. Consequently, preliminary injunctive relief against the City is still required.

STANDING

To begin, Defendants argue that Plaintiff lacks standing to advance her claims. (*See* City Opp'n at 15-18 [Doc. No. 24]; Cnty. Opp'n at 9-15 [Doc. No. 43]). As stated by the Supreme Court, "[I]t is not necessary that [Plaintiff] first expose [herself] to actual arrest or prosecution to be entitled to challenge a statute that [she] claims deters the exercise of [her] constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). This is precisely the situation presented here.

In the First Amendment context, it is well established that "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). This fundamental principle is echoed throughout the case law. *Minn. Citizens Concerned for Life v. Fed. Election Comm'n.*, 113 F.3d 129, 132 (8th Cir. 1997) ("Sufficient hardship is usually found if the regulation . . . chills protected First Amendment activity."); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) ("[A]n actual injury can exist when the plaintiff is chilled from exercising her right to free expression or foregoes expression in order to avoid enforcement consequences.").

The chilling effect caused by the threatened enforcement of the Harassment Statute by the City (the County has now expressly disavowed any such enforcement, but that does

not change Plaintiff's standing to pursue her facial challenge of the Harassment Statute against the County Prosecutor in his official capacity, *see supra* n.4) *and* the chilling effect caused by the City's recent enactment of the No Filming Regulations (on the heels of complaints about Plaintiff's filming activity) are more than sufficient to confer standing in this case. The City makes the specious argument that because the threat to enforce the Harassment Statute came before the City passed its No Filming Regulations, those regulations cannot be responsible for chilling Plaintiff's speech as Plaintiff was already chilled by the City's prior acts. (City's Opp'n at 15-18 [Doc. No. 24]). This argument is absurd. The City's threatened enforcement of the statute and the City ordinance itself are both responsible for chilling Plaintiff's speech (Ness Decl. ¶¶ 20-38 [Doc. No. 20]) because both *directly target* the speech activity at issue. In fact, the City's opposition makes plain that Plaintiff's filming activity is, and can be, proscribed by the City's new ordinance independent of the Harassment Statute. (City's Opp'n at 19-39 [Doc. No. 24]). The language of the ordinance is clear. Standing is not an issue.

ARGUMENT

While preliminary injunctive relief is generally considered "extraordinary," (*see* City Opp'n at 1 [Doc. No. 24] [citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)]), there is nothing extraordinary about issuing a preliminary injunction to protect fundamental rights protected by the First Amendment. The principal reason for seeking preliminary injunctive relief in the first instance is to avoid irreparable harm while a case proceeds. The U.S. Supreme Court has long held that "[t]he loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury"

sufficient to justify injunctive relief. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis added). The appellate courts follow the Supreme Court's lead, as they must. *See Phelps-Roper v. Nixon*, 509 F.3d 480, 484-85 (8th Cir. 2007) ("It is well-settled law that a 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod*, 427 U.S. at 373); *see also N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 127 (2d Cir. 1998) (same); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*, 427 U.S. at 373).

As the case law demonstrates, the likelihood of success factor is the most significant.[6] *See, e.g., Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1133 (8th Cir. 2019) ("While no single factor is determinative, the probability of success factor is the most significant."). And in the First Amendment context, this factor is typically dispositive since the irreparable harm, balance of harms, and public interest factors fall in favor of protecting First Amendment freedoms. *See Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor."); *Phelps-Roper*, 509 F.3d at 484-85 ("If [a plaintiff] can

[6] "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)).

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."); *N.Y. Magazine,* 136 F.3d at 127 (upon establishing a violation of the First Amendment, the plaintiff "established *a fortiori* . . . irreparable injury"); *Planned Parenthood v. Rounds,* 530 F.3d 724, 752 (8th Cir. 2008) ("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."); *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."). Because there is a substantial likelihood that Plaintiff will prevail on her First Amendment claims, the requested injunctive relief is warranted.

I. Plaintiff's Filming Activity Is Protected by the First Amendment.

Faced with overwhelming case law establishing Plaintiff's First Amendment right to film *in a public forum* information regarding a public controversy for the purpose of public dissemination (*see* Pl.'s Br. at 12-13 [Doc. No. 19] [citing cases]), Defendants suggest that the Eighth Circuit might not recognize such a right, citing *Kushner v. Buhta,* No. 16-cv-2646 (SRN/SER), 2018 WL 1866033, at *9 (D. Minn. Apr. 18, 2018), *aff'd,* 771 F. App'x 714, 715 (8th Cir. June 13, 2019), as their primary support (City Br. in Opp'n at 20 [Doc. No. 24]; Cnty. Br. in Opp'n at 16 [Doc. No. 43]). But *Kushner*, a case which held that "[b]ecause room 25 [a law school classroom where the confrontation at issue occurred] was *a limited public forum* and the University's prohibition on video-recording was a

reasonable and viewpoint neutral restriction, Kushner did not have the right to record interactions between police and protesters at the Halbertal lecture," 2018 U.S. Dist. LEXIS 65266, at *32 (emphasis added), does not apply here at all. Indeed, every news and media outlet in the Eighth Circuit would be surprised to learn that the courts in this circuit might not protect their First Amendment right to film, in public, public controversies. Such a conclusion urged by Defendants is against the great weight of the law and should be summarily rejected. *See also Kaplan v. Cal.*, 413 U.S. 115, 118-19 (1973) (observing that the First Amendment is not limited to "expression by words alone," but it also applies "to moving pictures, to photographs, and to words in books," stating, "[a]s with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection").

Moreover, the City's reliance on cases that upheld restrictions on filming in court rooms, execution chambers, or other places that are open to the public but are *not* public fora (*see* City's Opp'n at 24-25 [Doc. No. 24]) are similarly inapposite. Plaintiff is not seeking to film inside any government facility or other public building. Likewise, the City's attempt to distinguish between filming in public in general and filming police officers or other government officials is of no avail. (City Opp'n at 21-22 [Doc. No. 24]). Whether filming information related to a public controversy is protected by the First Amendment does not turn on whether the controversy involves a police officer. Moreover, the controversy at issue here involves the Success Academy, which is a public school (*see* City Opp'n at 3 n.3 [Doc. No. 24]), and it involves Plaintiff's ongoing complaint that City officials are ignoring violations of their own zoning and other regulations—complaints

which Plaintiff has brought to the attention of City officials with no success. (Ness Decl. ¶¶ 2-18 [Doc. No. 20]). As the City points out in its brief: "[T]he [Supreme] Court has noted, '[f]reedom of expression has particular significance with respect to government because [i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" *Id.* (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 n.11 (1978)). (City Opp'n at 21 [quoting *Mills v. Ala.*, 384 U.S. 214, 218 (1966)]). Similar here, the City has a "special incentive to repress" Plaintiff—a person who has complained repeatedly to City officials about this public controversy involving DAF and the Success Academy and has criticized the City's failure to act on the complaints. (Ness Decl. ¶¶ 2-18 [Doc. No. 20]).

In the final analysis, because a public controversy might be between or among private individuals does not remove the filming of this controversy in public from the protections of the First Amendment, particularly when the filming is done for the purpose of disseminating information about the controversy to the public and to government officials. Plaintiff's filming activity is protected, and Defendants cannot cite to a single Eighth Circuit case saying otherwise.

The City also relies on *Frisby v. Schultz*, 487 U.S. 474 (1988), a case in which the Supreme Court upheld a restriction on the *targeted* picketing of a private residence. (City Opp'n at 28 [Doc. No. 24]). Citing to *Frisby*, the City argues that a minor in a public park is a "captive audience"; therefore, the City's ordinance is permissible. The argument is wrong for many reasons, two of which will suffice here. First, the ordinance at issue in *Frisby* was content neutral. The City ordinance, as discussed further below, is not. And

second, there is no comparison *in fact* between one's private residence and a *public* park or a *public* school. *See id*. at 484-87 (explaining the uniqueness of a private residence and why the law should treat it differently as a matter of fact).

In sum, there is no merit to the argument that Plaintiff's filming activity is not protected by the First Amendment.

II. The City Ordinance Is an Unlawful, Content-Based Prior Restraint on Speech in a Public Forum.

For official acts that infringe First Amendment liberties, the Supreme Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983). And "[e]ven where the protection of children is the object, the constitutional limits on governmental action apply." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 804-05 (2011).

On its face, the challenged ordinance is a content-based restriction on First Amendment activity in a traditional public forum. Moreover, the ordinance operates as a prior restraint in that it requires Plaintiff to receive permission *before* she can engage in her First Amendment activity. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term 'prior restraint' is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.") (internal quotations and citation omitted). As stated by the Supreme Court, "*Any system* of prior restraints of expression comes to this Court bearing a heavy

presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases) (emphasis added).

The City code provision at issue states: "No person shall intentionally take a photograph or otherwise record a child without the consent of the child's parent or guardian." § 5.21(24). A violation of this provision is a "petty misdemeanor." § 5.22. This provision only applies in City parks, which are traditional public forums for purposes of examining the constitutionality of this code provision under the First Amendment. *See Hague v. CIO*, 307 U.S. 496, 515 (1939).

Content-based restrictions on speech in a public forum are subject to strict scrutiny. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). That is, "speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id*. For "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).

To determine whether a restriction is content based, the courts look at whether it "restrict(s) expression because of its message, its ideas, its subject matter, or its content." *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 530, 537 (1980). That is, "[a] rule is defined as a content-based restriction on speech when the regulating party must examine the speech to determine if it is acceptable." *Glendale Assocs. v. NLRB*, 347 F.3d 1145, 1155 (9th Cir. 2003).

On its face, the City's prohibition on filming children in a public park is content based, requiring the City to meet the strict scrutiny standard. The ordinance does not make speaker-based distinctions. Rather, it makes distinctions on the basis of the content of the filming. In order to prosecute a person for violating the City ordinance, a City official would have to examine the content of the film to determine whether the filming was unlawful. If no child appeared on the film, then there would be no violation. This is a content-based regulation requiring *the City to demonstrate* a compelling state interest and to demonstrate that the restriction on First Amendment activity is narrowly drawn to achieve that interest. The City has failed to do so.

Indeed, the City ordinance is underinclusive. The City admits that the ordinance does not "restrict the ability of people to record children without consent if they film from a public street or on private property." (City Opp'n at 34 [Doc. No. 24]). The City's admission constitutes the very definition of a law which is underinclusive. *See, e.g.*, *Brown*, 564 U.S. at 805 ("As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto."). As noted by the Supreme Court, "Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). Moreover, per the Supreme Court, "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves

appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotations and citation omitted).

Per the City's argument, Plaintiff would be committing a "petty misdemeanor" if she filmed children using Smith Park while she was standing in the park. But if Plaintiff took a step or two back onto the public sidewalk (or onto the public street), the very same filming activity is permissible.[7] In short, as a means of pursuing its alleged objectives, the City ordinance "is so woefully underinclusive as to render belief in [its stated] purpose a challenge to the credulous." *Republican Party v. White*, 536 U.S. 765, 780 (2002).

In the final analysis, "[t]he 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." *Coates v. Cincinnati,* 402 U.S. 611, 616 (1971). There is a substantial likelihood that Plaintiff will prevail on her First Amendment challenge to the City ordinance.

III. The Harassment Statute Cannot Be Used to Punish Plaintiff's First Amendment Activity.

As noted in the Introduction, the County has expressly stated that the Harassment Statute "does not criminalize the filming and photography in which Ness claims to want to engage." (Cnty. Opp'n at 2 [Doc. No. 43]). The City disagrees. (*See* Ness Decl. ¶¶ 19-24, 31-39, Ex. A [Doc. No. 20]; Boomer Decl. ¶ 14 [Doc. No. 27]).[8]

[7] (*See* Ness Suppl. Decl. ¶¶ 2-6, Ex. A, at Ex. 1 [setting forth example of videotaping now proscribed by City code]).

[8] Both the City and the County reference an incident involving a pipe bomb being thrown

This conflict between the County's view and the City's view of the reaches of this criminal statute and its application here is direct evidence supporting Plaintiff's claim that the statute is unconstitutionally vague and overbroad. As the Supreme Court warned, a vague law is impermissible because it "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." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). And it is particularly problematic where, as in this case, "a vague statute abuts upon sensitive areas of basic First Amendment freedoms," because "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*.

As the evidence demonstrates without contradiction, the City has halted Plaintiff's First Amendment activity by threatening to arrest and prosecute her under the Harassment Statute. Accordingly, the City wrongfully seeks to make criminal that which is protected by the Constitution. *Coates*, 402 U.S. at 616. In doing so, the City is expressly responding to the reaction of those who oppose Plaintiff's First Amendment activity. (Ness Decl. ¶¶ 21-25, Ex. A [Doc. No. 20]). Contrary to the City's position, this is a heckler's veto, which is prohibited under the First Amendment. *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty.*

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at DAF. (City Opp'n at 5 [Doc. No. 24]; Cnty. Opp'n at 8 [Doc. No. 43]). Noticeably absent from their references is the fact that Plaintiff had absolutely nothing to do with this criminal act. For the City and County to intimate that Plaintiff's peaceful, free speech activity was somehow a cause of this criminal act is not only factually wrong, it is improper in the extreme.

Sheriff Dep't, 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."). And because the "hecklers" are claiming to object on behalf of children is of no moment for First Amendment purposes. *Id*. at 790 ("It would . . . 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").

Additionally, contrary to the County's arguments (which the City incorporated by reference), recent decisions by the Minnesota courts invalidating various state criminal statutes on First Amendment grounds because they are overbroad compel the conclusion that the challenged Harassment Statute should receive a similar fate. *See In re Welfare of A.J.B.*, 929 N.W.2d 840 (Minn. 2019) (hereinafter "*A.J.B.*") (striking down on First Amendment grounds the stalking-by-mail provision, Minn. Stat. § 609.749, subd. 2(6)); *State v. Peterson*, No. A18-2105, 2019 Minn. App. LEXIS 372 (Minn. Ct. App. Dec. 9, 2019) (striking down on First Amendment grounds the stalking-by-telephone provision, Minn. Stat. § 609.749, subd. 2(4)); *see also State v. Casillas*, No. A19-0576, 2019 Minn. App. LEXIS 400 (Minn. Ct. App. Dec. 23, 2019) (striking down on First Amendment grounds Minn. Stat. § 617.261, which makes it a crime to intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed). Most recently (December 23, 2019), the Minnesota Court of Appeals struck down a criminal statute on First Amendment overbreadth grounds "as a result of its lack of an intent-to-harm requirement and its use of a negligence *mens rea*." *Id*. at *1. That is

precisely the situation presented here with the challenged Harassment Statute: there is no intent-to-harm requirement, and it uses a negligence *mens rea*.

In sum, the challenged Harassment Statute is overbroad because "it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights," and the amount of protected speech or expressive conduct that is prohibited is substantial. *State v. Macholz*, 574 N.W.2d 415, 419 (Minn. 1998). We turn now to the relevant overbreadth inquiry.

To determine whether the challenged Harassment Statute is overbroad in violation of the First Amendment, the Court conducts a four-part inquiry. *See A.J.B.*, 929 N.W.2d at 847-48. First, the Court interprets the statute. *Id*. at 847. Second, the Court determines whether the statute's "reach is limited to unprotected categories of speech or expressive conduct." *Id*. Third, if the Court concludes that the statute is not limited to unprotected speech or expressive conduct, then it asks whether a "substantial amount" of protected speech is criminalized. *Id*. And fourth, the Court evaluates whether it is able to narrow the statute's construction or sever specific language to cure its constitutional defects. *Id*. at 848. The recent and slight modifications made to this criminal statute identified by the County (*see* County Opp'n at 3-4 [Doc. No. 43]) do not change the fact that the challenged statute is overbroad in violation of the First Amendment.

"Ordinarily, [Minnesota] laws are afforded a presumption of constitutionality, but statutes allegedly restricting First Amendment rights are not so presumed." *Dunham v. Roer*, 708 N.W.2d 552, 562 (Minn. Ct. App. 2006). We turn now to the language of the challenged statute—the first step of the overbreadth inquiry. Section 609.749, subdivision

2(2) criminalizes, *inter alia*, "monitor[ing] . . . another . . . through any available technological or other means." Minn. Stat. § 609.749, subd. 2(2).[9] Unlike the stalking-by-mail and stalking-by-telephone provisions found unlawful by the Minnesota courts, this "monitoring-by-technology" provision does not have a "repeatedly" requirement. Similar to the stalking-by-mail and stalking-by-telephone provisions, the monitoring-by-technology provision does not require proof of an intent to harm (§609.749, subd. 1a), and it uses a broad negligence *mens rea* (§ 609.749, subd. 1). *See Peterson*, 2019 Minn. App. LEXIS, at *11-13 (discussing similarities between the stalking-by-mail and stalking-by-telephone provisions).

As this case demonstrates, the monitoring-by-technology provision has broad language that restricts protected First Amendment activity: it prohibits filming (*i.e.*, using technology, such as a smart phone or video camera, to "monitor") someone in public (it prohibits filming someone in private as well). It does not criminalize only filming linked to criminal conduct. Similar to the conclusion reached in step two of the inquiry by the Minnesota Appellate Court in *Peterson*:

> Because the [monitoring-by-technology] provision is not limited to prohibiting conduct directly linked to criminal activity, reaches negligent [speech activity such as photographing and videotaping], and allows the state to prove its case by a victim's subjective reaction to the defendant's conduct, [this Court should] conclude that the provision prohibits speech protected by the First Amendment.

Peterson, 2019 Minn. App. LEXIS, at *16-17.

[9] Subdivision 3(5) makes such "monitoring" of a minor a felony offense. Minn. Stat. §609.749, subd. 3(5); (*see* Boomer Decl. ¶ 14 [referring the case to the County Prosecutor for prosecution under subdivision 3(5)] [Doc. No. 27]).

Because the challenged provision does restrict protected speech, we turn now to the third step of the inquiry, whereby the Court must consider "whether the statute prohibits a substantial amount of constitutionally protected speech." *Id*. at *17 (internal quotations and citation omitted). As this case illustrates, on multiple occasions law enforcement personnel have warned Plaintiff that her *entirely peaceful* filming activity subjects her to prosecution under the Harassment Statute. (Ness Decl. ¶¶ 20-25, 31-38 [Doc. No. 20]; *see also* Boomer Decl. ¶ 14 [Doc. No. 27]). As specifically stated in the City's police 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 [Doc. No. 20]). The police report concludes, "Ness was advised that she could be charged with harassment if the parents and principal felt intimidated by her actions." (*Id*. at ¶ 24, Ex. A). As another example, under the challenged statute, a news reporter who was "monitoring" a politician by photographing and videotaping him or his campaign staff to expose the politician's misdeeds, thereby causing the politician or his staff to feel "frightened, threatened, oppressed, persecuted, or intimidated," may be charged with a crime. Indeed, the scenarios one could contemplate whereby this statute would restrict protected activity are too numerous to recount here. *See A.J.B.*, 929 N.W.2d at 853 (discussing hypothetical scenarios demonstrating the statute's substantial overbreadth); *Peterson*, 2019 Minn. App. LEXIS, at *16-18 (same). Consequently, "[d]ue to the substantial ways" in which the monitoring-by-technology provision "can prohibit and chill

protected expression, [this Court should] conclude that the statute facially violates the First Amendment overbreadth doctrine." *See A.J.B.*, 929 N.W.2d at 856.

Finally, for the reasons that the Minnesota courts could not save the stalking-by-mail and stalking-by-telephone provisions, there is no way for this Court to narrow the construction or to sever language to save the monitoring-by-technology provision. *See id.* at 857; *Peterson*, 2019 Minn. App. LEXIS, at *19-21. As stated by the U.S. Supreme Court:

> We will not rewrite a . . . law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain, and sharply diminish [the Legislature's] incentive to draft a narrowly tailored law in the first place.

United States v. Stevens, 559 U.S. 460, 481(2010) (quotations and citations omitted).[10]

In short, there is no way for this Court to separate criminal conduct from conduct protected by the First Amendment. "Doing so would not alter the negligence *mens rea* standard, thus a narrowing construction would not alleviate the statute's chilling effect." *Peterson*, 2019 Minn. App. LEXIS, at *21; *see also Casillas*, 2019 Minn. App. LEXIS, at *35-38 (stating that the "constitutional defect" in the challenged statute "stems from its lack of an intent-to-harm requirement and its use of a negligence *mens rea*" and setting forth reasons for why the court is not able to save it).

In the final analysis, there is a substantial likelihood that Plaintiff will prevail on her constitutional challenge to the Harassment Statute.

[10] "In fact, the Supreme Court has disapproved of the practice by state courts of *rewriting*, rather than adopting a *reasonable* limiting construction of, statutes and ordinances." *State v. Crawley*, 819 N.W.2d 94, 117 n.3 (Minn. 2012) (Stras, J., dissenting).

CONCLUSION

Plaintiff respectfully requests that the Court grant her motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2019, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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