No. 20-2571

In the **United States Court of Appeals**
for the Eighth Circuit

SALLY NESS,

Plaintiff – Appellant,

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 – Appellees

ATTORNEY GENERAL'S OFFICE FOR THE STATE OF MINNESOTA

Intervenor below – Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
HONORABLE ANN D. MONTGOMERY
CASE NO. 19-cv-2882-ADM-DTS

APPELLANT BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case challenges Defendants-Appellees' ("Defendants") restrictions on Plaintiff-Appellant Sally Ness's ("Plaintiff") fundamental, First Amendment right to film *in a public forum* information regarding *a public controversy* for the purpose of *public dissemination*. It is a constitutional challenge to the City of Bloomington ("City") and Hennepin County ("County") Defendants' enforcement of Minnesota Statute § 609.749 and the City Defendants' enforcement of § 5.21 of the City of Bloomington Code to restrict Plaintiff's First Amendment activity. Accordingly, this case presents facial and as-applied challenges to a state criminal statute and a city ordinance that Plaintiff contends violate the First and Fourteenth Amendments by criminalizing her filming.

Oral argument will assist this Court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

Due to the complexity of the case, Plaintiff requests twenty minutes of oral argument before the Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and this Circuit's Rule 26.1A, Plaintiff-Appellant Sally Ness hereby certifies that she is a private person and thus not a subsidiary or affiliate of any publicly owned corporation. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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STATEMENT OF JURISDICTION

On November 12, 2019, Plaintiff filed this action, alleging violations of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (R-1: Compl, App. 11-41). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On February 26, 2020, Defendants filed motions to dismiss. (R-61: Cnty. Mot. to Dismiss; R-66: City Defs.' Mot. to Dismiss). On March 23, 2020, Plaintiff filed a motion for summary judgment. (R-77).

On July 23, 2020, the district court entered a memorandum opinion and order granting Defendants' motions to dismiss and denying Plaintiff's motion for summary judgment. (R-94: Mem. Op. & Order, Add. 1-24). On July 24, 2020, the district court entered judgment in favor of Defendants. (R-95: J., Add. 25).

On July 29, 2020, Plaintiff timely filed a notice of appeal, appealing the district court's order and judgment granting Defendants' motions to dismiss and denying her motion for summary judgment. (R-96: Notice of Appeal, App. 287-88).

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether § 5.21 of the City Code, a "petty misdemeanor offense" which only applies in City parks (traditional public forums) and which provides that "[n]o person shall intentionally take a photograph or otherwise record a child without the

consent of the child's parent or guardian," facially and as applied to restrict Plaintiff's filming, violates the First and Fourteenth Amendments.

Apposite cases and constitutional provisions:

Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011); U.S. Const. amend. I.

II. Whether Plaintiff has standing to challenge Minnesota Statute § 609.749 ("Harassment Statute") when it was objectively reasonable for her to halt her First Amendment activity (filming) based on the multiple and credible threats of enforcement of the statute against her for this activity.

Apposite cases and constitutional provisions:

Steffel v. Thompson, 415 U.S. 452, 459 (1974); *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011); U.S. Const. amend. I.

III. Whether Minnesota Statute § 609.749, facially and as applied to restrict Plaintiff's filming, violates the First and Fourteenth Amendments.

Apposite cases and constitutional provisions:

Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *In re Welfare of A.J.B.*, 929 N.W.2d 840 (Minn. 2019); *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019); U.S. Const. amends. I, XIV.

IV. Whether Defendants Troy Meyer and Mike Roepke enjoy qualified immunity when their actions violated Plaintiff's clearly established constitutional rights of which a reasonable person would have known.

Apposite cases:

Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019); *Chestnut v. Wallace*, 947 F.3d 1085 (8th Cir. 2020).

V. Whether the district court erred by denying Plaintiff's motion for summary judgment when there was no genuine dispute as to any material fact and Plaintiff was entitled to judgment as a matter of law on her constitutional claims.

Apposite cases and authority:

Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); Fed. R. Civ. P. 56.

STATEMENT OF THE CASE

Plaintiff Ness resides in the City of Bloomington, which is located in Hennepin County. Her home is in the Smith Park neighborhood. For several years, Plaintiff has been documenting through videotaping and photographing the public controversy surrounding the Dar al-Farooq mosque and Success Academy school, which are located in her neighborhood.[1] (R-20: Ness Decl. ¶¶ 1. 2, App. 40).

[1] The Dar al-Farooq/Success Academy controversy is described in greater detail in the Complaint. (R-20: Ness Decl. ¶ 2, App. 40). It is not necessary for the Court to decide who is correct with regard to this controversy. Rather, what is material and

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. (R-20: Ness Decl. ¶ 3, App. 41).

During the first five years (2011 to 2016), Plaintiff Ness and her neighbors were so concerned about the disruption to the neighborhood caused by DAF that they presented a petition to the City in 2016 demanding answers to their concerns. The City dismissed the petition on procedural grounds, claiming that it failed to meet a codified definition of a "petition" and had no signatures. (R-20: Ness Decl. ¶¶ 4, 5, App. 41).

The abuses permitted by the City were many, including, *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 amount. The City also failed to enforce the Conditional Use Permit ("CUP") it issued to DAF and the Joint Use Agreement ("JUA") it entered into with DAF 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. (R-20: Ness Decl. ¶ 6, App. 41).

Additionally, DAF did not formally act to open the private school described in

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undisputed is the fact that this public controversy exists. (*See* R-94: Mem. Op. & Order at 2-3, Add. 2-3).

the CUP. Instead, DAF began the process of opening a charter school (Success Academy) in 2017, without seeking an amendment to the CUP or even officially informing the City. When the City learned of the student activity, it initially warned DAF that student count must be no more than 60 per the CUP limits—that Fall DAF had over 80 students. The City ultimately approved a new CUP for DAF in August 2018 for 130 students.[2] (R-20: Ness Decl. ¶ 7, App. 42).

A City park playground (Smith Park) was offered to DAF by vote of the City Council for use of its lessee, Success Academy, despite City staff concluding DAF should provide its own playground equipment. The City has refused to address neighborhood concerns regarding the number of times per day or students per session that Success Academy may appropriate this City park for Success Academy's recesses, rendering the park essentially unavailable to the general public, including Plaintiff Ness and her grandchildren. (R-20: Ness Decl. ¶¶ 8, 9-12, App. 42).

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. Plaintiff Ness uses photographs and videos,

[2] As a recognized charter school, Success Academy is considered a public school. *See* Minn. Stat. § 124E.03, subd. 1.

often posted for public view on YouTube, as part of her efforts to disseminate this information to the public. (R-20: Ness Decl. ¶ 13, App. 42-43).

Because of her efforts to document and report the neighborhood concerns regarding DAF and Success Academy and the City's malfeasance related to these concerns, the City has been hostile toward Plaintiff Ness. (R-20: Ness Decl. ¶¶ 14-16, App. 43). As a consequence, she no longer speaks at City Council meetings. Rather, Plaintiff Ness collects information regarding the DAF/Success Academy controversy and posts it on her blog/Facebook page for public dissemination. (R-20: Ness Decl. ¶ 17, App. 43). More specifically, Plaintiff Ness collects information for public dissemination of possible CUP and JUA violations by DAF and 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 Plaintiff Ness films is in public view. (R-20: Ness Decl. ¶ 18, App. 43-44).

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 Success Academy. In fact, she was filming traffic. (R-20: Ness Decl. ¶ 19, App. 44; *see also* R-27: Boomer Decl. ¶¶ 3-6 [confirming 2018 investigation], App. 64-65).

On August 27, 2019, Plaintiff Ness was again collecting information regarding possible CUP and JUA violations by DAF and 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 based on her videotaping. (R-20: Ness Decl. ¶ 20, App. 44).

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. (R-20: Ness Decl. ¶ 21, App. 44).

Plaintiff Ness obtained a copy of the official Bloomington Police Department report regarding this "incident" at Success Academy. Pursuant to the written 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*." (R-20: Ness Decl. ¶¶ 22, 23, Ex. A [emphasis added], App. 44-45, 52). The police report concludes, "*Ness was advised that she could be charged with harassment if the parents and principal felt intimidated by her actions*." (R-20: Ness Decl. ¶ 24,

Ex. A [emphasis added], App. 45, 52). The threat was clear, and now it was in writing in an official City report. (*See* R-20: Ness Decl. ¶¶ 21-24, Ex. A, App.44-45, 52).

Plaintiff Ness has never engaged in, nor threatened to engage in, any violent activity. She is a peaceful person, and the DAF and 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. (R-20: Ness Decl. ¶ 25, App. 45).

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, she has ceased this activity. Plaintiff Ness fears that she will be arrested and/or charged with violating the Harassment Statute if she continues filming DAF and Success Academy. (R-20: Ness Decl. ¶ 26, App. 45).

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 in public parks. More specifically, the City approved and adopted the City Code, which includes the following restriction *in City parks*: "(24) No person shall intentionally take a photograph or otherwise record a child without the consent of the child's parent or guardian." (R-20: Ness Decl. ¶ 27, Ex. B, App. 45, 54-59).

Because Plaintiff Ness seeks to expose, *inter alia*, DAF's and Success

Academy's noncompliant use 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 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. (R-20: Ness Decl. ¶ 28, App. 46).

The enactment of the City Code prevents Plaintiff Ness from videotaping or photographing information regarding DAF's and Success Academy's noncompliant use and overuse of the public park, as well as other noncompliance issues. (*See* R-20: Ness Decl. ¶ 29, Ex. A, App. 47).

Because of the City Code, Plaintiff Ness has ceased her filming because she does not want to be prosecuted under the new City regulations.[3] (R-20: Ness Decl. ¶ 30, App. 47).

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. (R-20: Ness Decl. ¶ 31, App. 47).

[3] During the October 30, 2019, meeting with the detectives, Detective Martin reinforced the City's concern that the content of Plaintiff Ness's filming included children, asking her, "Were there kids in the photos when you took those?" (R-35: Jones Decl., Ex. 5 at 63, App. 198).

According to Detective Boomer, she requested the meeting because Plaintiff Ness was a suspect in a harassment case as a result of her filming related to DAF's and Success Academy's use of Smith Park. (R-20: Ness Decl. ¶ 32, App. 47).

According to Detective Boomer, she was investigating the matter on behalf of the County and for the "victims," which she described as the "community center/mosque and school," or words to that effect, referring to DAF and Success Academy. (R-20: Ness Decl. ¶ 33, App. 47).

During this meeting, Detective Boomer confirmed that Plaintiff Ness was under investigation for alleged violations of the Harassment Statute due to her filming of DAF and Success Academy. Detective Boomer also confirmed that one of the concerns of the investigation was Plaintiff Ness's photographing and/or videotaping of children associated with DAF and Success Academy. This was one of the complaints from the "victims" of the alleged harassment. (R-20: Ness Decl. ¶¶ 34-36, App. 47-48).

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. (R-20: Ness Decl. ¶ 37, App. 48).

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 Code because she videotapes or photographs

information regarding the DAF/Success Academy controversy. Consequently, Plaintiff Ness has ceased all of her filming. (R-20: Ness Decl. ¶ 38, App. 48).

Lest there be any doubts regarding the City's intent to prosecute Plaintiff Ness, Detective Boomer forwarded the results of her investigation to the County Prosecutor for felony prosecution because Plaintiff's filming involved minors and the City can only prosecute misdemeanors. (R-27: Boomer Decl. ¶ 14, App. 66).

When the County filed its opposition papers on December 18, 2019, Plaintiff learned for the first time that the County declined to prosecute her. (R-43: Cnty. Opp'n at 8, App. 226; R-44: Harris Decl. ¶ 4, App. 228). The City had submitted the request for prosecution to the County on or about November 7, 2019. (R-44: Harris Decl. ¶ 3, App. 227-28). The County never disclosed *when* the decision was made not to prosecute Plaintiff. However, the Complaint was filed on November 12, 2019, and it, along with the original TRO motion, memorandum of law, and Plaintiff's declaration, were promptly served on November 15, 2019. (R-13: Aff. of Serv.). As of December 16, 2019, the City was unaware of the County's decision not to pursue the prosecution. (*See* R-27: Boomer Decl. ¶ 15, App. 67). And in its filings in opposition to Plaintiff's request for a preliminary injunction, the City stated 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-felony charges." (R-

24: City Opp'n at 12, App. 61; R-27: Boomer Decl. ¶ 16, App. 67). In their motion to dismiss, the City Defendants submitted a declaration now stating that they will not pursue prosecution of Plaintiff Ness for her "past conduct." (R-69: Glassberg Decl. ¶ 3, App. 249). In their respective motions to dismiss, both the City Defendants and the County assert that Plaintiff's filming is not shielded from prosecution by the First Amendment (R-68: City Mem. at 10-14, App. 240-44; R-63: Cnty. Mem. at 12-14, App. 236-38), thus leaving Plaintiff exposed to criminal prosecution for her activity.

The Attorney General of Minnesota intervened to defend the constitutionality of the Harassment Statute — a statute which he publicly described as one which "bans harassment by videotaping."[4]

[4] (*See* R-93: Ness Decl. ¶ 2, Ex. A [Att'y Gen. Press Release of Apr. 24, 2020], App. 257, 260-61). The press release makes it clear that Attorney General Ellison, the State's top law enforcement official, believes that the Harassment Statute proscribes Plaintiff's filming at issue here. (*See, e.g., id*. ["Attorney General Ellison intervened in a lawsuit that challenges the law filed by plaintiff Sally Ness, who has videotaped congregants at Dar al-Farooq mosque in Bloomington without their consent, causing those congregants and their children to feel intimidated and afraid."], App. 260). Consequently, he believes that this criminal statute applies to First Amendment activity. The Court can take judicial notice of the facts set forth in the Attorney General's press release. *See* Fed. R. Evid. 201(d) ("The court may take judicial notice at any stage of the proceeding."); *Gustafson v. Cornelius Co.*, 724 F.2d 75, 79 (8th Cir. 1983) ("An appellate court may take judicial notice of a fact for the first time on appeal."); *Bishop v. Jesson*, No. 14-1898 (ADM/SER), 2016 U.S. Dist. LEXIS 31142, at *47 n.12 (D. Minn. Feb. 12, 2016) (taking judicial notice of facts contained in the Minnesota governor's press release). Plaintiff made this request below as well. (*See* R-92: Pl's Resp. to Mem. of Law of Att'y Gen. at 1-2, n.1, App. 254-55). This evidence provides further support for Plaintiff's standing to advance her challenge to the Harassment Statute. *See, e.g., Osborn v. United States*, 918 F.2d

CITY CODE

The challenged City Code, which was adopted by the City on October 28, 2019, states, 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.
>
> * * *
>
> (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.

(R-20: Ness Decl. ¶ 27, Ex. B, App. 54-59).

HARASSMENT STATUTE

The 2019 version of the Minnesota Harassment Statute, provided, in relevant part, as follows:

> **609.749 STALKING; PENALTIES.**

724, 729 (8th Cir. 1990) (agreeing with the majority of circuits that a court has the power to look outside the pleadings when deciding a Rule 12(b)(1) motion challenging jurisdiction).

Subdivision 1. Definition. — As used in this section, "harass" means *to engage in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim regardless of the relationship between the actor and 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. 1c. Arrest. — For all violations under this section, except a violation of subdivision 2, clause (7), a peace officer may make an arrest under the provisions of section 629.34. A peace officer may not make a warrantless, custodial arrest of any person for a violation of subdivision 2, clause (7).

Subd. 2. Harassment crimes. — A person who harasses another by committing any of the following acts is guilty of a gross misdemeanor:

* * *

(2) follows, *monitors*, or pursues another, whether in person or *through any available 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. Stalking.

(a) A person who engages in stalking 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.
>
> (b) For purposes of this subdivision, "stalking" means two or more acts within a five-year period that violate or attempt to violate the provisions of any of the following or a similar law of another state, the United States, the District of Columbia, tribe, or United States territories:
> (1) this section; . . .

Minn. Stat. § 609.749 (2019) (emphasis added).

As noted by the district court, "In March of 2020, the Minnesota legislature amended the Harassment Statute by repealing Subdivisions 1 and 1a and modifying the language of Subdivisions 2 and 3. *See* H.F. No. 4137, Ninety-first Legislature, Ch. 96 (2020). The amendments [took] effect August 1, 2020 and apply to crimes committed on or after that date." (*See* R-94: Mem. Op. & Order at 7 n.1, Add. 7).

The modified language of Subdivisions 2 and 3 include, in relevant part, the following:

> **Subd. 2. Harassment crimes.**
>
> (a) As used in this subdivision, the following terms have the meanings given:
>
> * * *
>
> (4) "*substantial emotional distress*" means mental distress, mental suffering, or mental anguish <u>*as demonstrated by a victim's response to an act*</u> including but not limited to seeking psychotherapy as defined in section 604.20, *losing sleep or appetite*, being diagnosed with a mental-health condition, experiencing suicidal ideation, or having difficulty concentrating on tasks resulting in a loss of productivity.
> (b) A person who commits any of the acts listed in paragraph (c) is guilty of a gross misdemeanor if the person, with the intent to kill, injure, harass, or intimidate another person:

(1) *places the other person in reasonable fear of substantial bodily harm*;
(2) places the person in reasonable fear that the person's family or household members will be subject to substantial bodily harm; or
(3) *causes or would reasonably be expected to cause substantial emotional distress to the other person*.

(c) A person commits harassment under this section if the person:

* * *

(2) follows, *monitors*, or pursues another, whether in person or *through any available 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.

Minn. Stat. § 609.749 (2020) (emphasis added).

On February 26, 2020, Defendants filed motions to dismiss. (R-61: Cnty. Mot. to Dismiss; R-66: City Defs.' Mot. to Dismiss). On March 23, 2020, Plaintiff filed a motion for summary judgment. (R-77).

On July 23, 2020, the district court entered a memorandum opinion and order granting Defendants' motions to dismiss and denying Plaintiff's motion for summary judgment. (R-94: Mem. Op. & Order, Add. 1-24). On July 24, 2020, the district court entered judgment in favor of Defendants. (R-95: J., Add. 25). This appeal follows.

SUMMARY OF THE ARGUMENT

It was clearly established prior to August 27, 2019, that the First Amendment

protects Plaintiff's right to videotape and photograph in a public forum information for public dissemination related to a public controversy. In other words, the First Amendment protects Plaintiff's right to "monitor" the DAF/Success Academy public controversy via "technology" and to videotape and photograph minors in a City park in furtherance of her reporting of this controversy.

The challenged City Code, which prohibits the filming of "a child without the consent of the child's parent or guardian" in any City park, is a content-based restriction on First Amendment activity in a traditional public forum. Accordingly, this restriction must survive strict scrutiny, which it cannot.

Plaintiff has standing to challenge the constitutionality of the Harassment Statute because her decision to cease her First Amendment activity (the filming at issue) was and continues to be objectively reasonable in light of the following facts: (1) Plaintiff was advised by City police officers that she should halt her filming or she could face possible prosecution under the statute; (2) the official City police report of the incident states that a City police officer "spoke with Ness . . . and asked her to stop filming," concluding that "Ness was advised that she could be charged with harassment"; (3) Plaintiff was visited at her home by law enforcement officials and told she was under investigation for allegedly violating the challenged statute; (4) the City detective conducting the investigation of Plaintiff forwarded it to the Hennepin County Prosecutor for prosecution as a felony under the statute since Plaintiff's

filming included minors; (5) the City, in its filings, stated 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-felony charges" under the challenged statute; and (6) the Minnesota Attorney General, who intervened in this case to defend the statute, publicly stated in the context of his intervention that the statute "bans harassment by videotaping." Individually and collectively, these facts have caused, and continue to cause, Plaintiff to halt her filming for fear of prosecution under the challenged statute. Plaintiff's standing in this First Amendment case is easily established.

The Harassment Statute, which Defendants use as a blunt instrument to halt Plaintiff's First Amendment activity, violates the First and Fourteenth Amendments in that it permits a heckler's veto, which is an odious form of content discrimination, and it is unconstitutionally vague and overbroad.

Because Plaintiff's right to film in a public forum information for public dissemination related to a public controversy was clearly established on August 27, 2019, the Defendant police officers' do not enjoy qualified immunity for restricting Plaintiff's right to do so.

Finally, because there is no material dispute of fact, Plaintiff is entitled to judgment as a matter of law on her constitutional claims.

STANDARD OF REVIEW

The Court reviews *de novo* the grant of a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *City of Benkelman v. Baseline Eng'g Corp.*, 867 F.3d 875, 879 (8th Cir. 2017).

The Court also reviews *de novo* a district court's grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Soueidan v. St. Louis Univ.*, 926 F.3d 1029, 1034 (8th Cir. 2019). "To survive a motion to dismiss, the plaintiff must show that [she] is entitled to relief, by alleging sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id*. (internal quotations and citation omitted).

While a denial of a motion for summary judgment based on the finding of a genuine issue of material fact is reviewed for an abuse of discretion, a denial based on purely legal grounds, as in this case, is reviewed *de novo*. *See Wireless Income Props. v. McDonald*, 403 F.3d 392, 395-96 (6th Cir. 2005). Summary judgment is appropriate when there exists no genuine dispute with respect to the material facts and, in light of the facts presented, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

Finally, because this case implicates First Amendment rights, this Court must closely scrutinize the record "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v. Irish-Am. Gay,*

Lesbian & Bisexual Group of Bos., 515 U.S. 557, 567 (1995). Thus, this Court is required to "conduct an independent examination of the record as a whole, without deference to the trial court." *Id.*; *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (same).

ARGUMENT

I. PLAINTIFF'S FILMING IS PROTECTED BY THE FIRST AMENDMENT.

It was clearly established prior to August 27, 2019, that the First Amendment protects Plaintiff's right to videotape and photograph in a public forum information for public dissemination related to a public controversy. In other words, the First Amendment protects Plaintiff's right to "monitor" the DAF/Success Academy public controversy via "technology" — her filming at issue.[5] This legal proposition is overwhelmingly supported by the case law. Indeed, reporters and journalists of "traditional" (television, newspapers, magazines) and "nontraditional" (Internet, blogs, social media) news media in Minnesota who use photographs and video to report on matters of public interest (the recent George Floyd matter comes immediately to mind) would be surprised to learn that their Attorney General does not

[5] In its previously filed motion to dismiss, the County confirms that Plaintiff's filming falls within the proscriptions of the Harassment Statute, asserting that "[t]he word 'monitor' means 'to watch, keep track of, or check usu[ally] for a special purpose" (R-63: Cnty. Mem. at 8, App. 235), which is precisely what Plaintiff is doing here. And she is doing it via "technology"—video recording. The City Defendants have previously adopted the County's arguments regarding the Harassment Statute. (*See* R-68: City Mem. at 29, App. 247).

believe that their filming is protected by the First Amendment. (R-89: Att'y Gen. Mem. at 5 ["[T]he Eighth Circuit has *not* recognized a First Amendment right, much less an absolute one, to engage in the filming activities Plaintiff describes."] [emphasis added], App. 253).

To begin, the Supreme Court long ago affirmed that filming is an activity protected by the First Amendment. *See Kaplan v. Cal.*, 413 U.S. 115, 118-20 (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").

And while this is not a case about filming police officers in a limited or nonpublic forum or while they are performing their duties, this Court recently affirmed the clearly established right to do so, citing the "robust consensus" of cases already decided by other circuits. *See Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020) ("This robust consensus of cases of persuasive authority suggests that . . . the constitution protects one who records police activity . . . .").

Here, Plaintiff is in the very same position as every news organization operating within the County that is filming public information *in a public forum* for public dissemination. Consequently, cases involving filming in nonpublic or limited public forums, such as government buildings, are simply not applicable.

If any doubts linger as to whether Plaintiff's filming was protected by the First Amendment on August 27, 2019, those doubts were cast aside by this Court in *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019).[6]

In *Telescope Media Group*, wedding video producers sought injunctive relief to prevent the enforcement of the Minnesota Human Rights Act ("MHRA") against them on the theory that it was unconstitutional under the Free Speech Clause of the First Amendment. This Court held that "[t]he Free Speech Clause of the First Amendment covers films, . . . so the videos the [wedding video producers] intend to make are 'affected with a constitutional interest.' . . . [Their] videos are a form of speech that is entitled to First Amendment protection." *Telescope Media Grp.*, 936 F.3d at 749-51 (emphasis added); *see also 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").

[6] This case was decided on August 23, 2019, which was prior to when Defendants Meyer and Roepke approached Plaintiff on August 27, 2019, and advised her to stop her filming under threat of arrest/prosecution for violating the Harassment Statute. (*See* R-20: Ness Decl. ¶¶ 20-24, App. 44-45).

As stated by the Third Circuit, "[t]he 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." *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017) (internal citations omitted); *see also ACLU 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."); *Silberberg v. Bd. of Elections of N.Y.*, 272 F. Supp. 3d 454, 479 (S.D.N.Y. 2017) (same); *Martin v. Evans*, 241 F. Supp. 3d 276, 286 (D. Mass. 2017) (same). This Court plainly agrees with this position. *Telescope Media Grp.*, 936 F.3d at 749-51.

Moreover, the argument that Defendants are merely regulating Plaintiff's *conduct* and not her *speech* was explicitly rejected by this Court in *Telescope Media Group*. *Id.* at 752. As this Court noted, accepting the erroneous argument that Defendants are merely regulating Plaintiff's conduct and not her speech would undermine the protections afforded by the First Amendment. As stated by this Court:

> Minnesota's position is that it is regulating the Larsens' conduct [*i.e.* their videotaping], not their speech. To be sure, producing a video requires several actions that, individually, might be mere conduct: positioning a camera, setting up microphones, and clicking and dragging files on a computer screen. But what matters for our analysis is that these activities come together to produce finished videos that are "medi[a] for the communication of ideas." . . . . "*Whether government regulation applies to creating, distributing, or consuming speech makes no difference*."

Telescope Media Grp., 936 F.3d at 752 (citations omitted) (emphasis added).

In this case, Plaintiff engages in her filming for the purpose of disseminating public information regarding a public controversy. Moreover, Plaintiff principally disseminates this information via the Internet. This fact further supports, and enhances, the First Amendment protection afforded to her filming. As stated by the Supreme Court:

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, and social media in particular. . . . In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought."

Packingham v. N.C., 137 S. Ct. 1730, 1735-36 (2017) (citations omitted).

In the final analysis, Plaintiff's filming is *fully* protected by the First Amendment. Consequently, Plaintiff's free speech activity is beyond the reach of the City Code and the Harassment Statute. We turn now to address the constitutionality of the City Code.

II. THE CITY CODE IS AN UNLAWFUL, CONTENT-BASED PRIOR RESTRAINT ON SPEECH IN A PUBLIC FORUM.

The district court concluded that the City Code is a lawful, content-neutral, time, place, or manner restriction. (*See* R-94: Mem. Op. & Order at 19-23, Add. 19-23). The court is wrong.

To begin, 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, "[*a*]*ny 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 has not, nor could it, overcome this "heavy presumption."

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.*; *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.") (citation omitted).

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); *see also Telescope Media Grp.*, 936 F.3d at 753 ("The MHRA also operates in this case as a content-based regulation of the [wedding video producers'] speech, even if, as the Supreme Court has recognized, the MHRA does not, '[o]n its face, . . . aim at the suppression of speech.' . . . A content-based regulation . . . "'exacts a penalty on the basis of the

content of' speech.") (internal citations omitted).

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 Code provision, 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. If Plaintiff was filming squirrels, birds, or trees, as evidenced by the content of her film, she could not be prosecuted for violating the ordinance. Thus, 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. (*Compare* R-94: Mem. Op. & Order at 21 [erroneously concluding that "[t]he Ordinance is content neutral"], Add. 21). The City has failed to do so. And because the ordinance is woefully underinclusive, it is not possible for the City to meet this most exacting scrutiny (or even intermediate scrutiny) under the law.

The City has admitted 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." (R-68: City Mem. at 25, App. 246). The City's admission constitutes the very definition of a law that is underinclusive, thereby ***undermining*** its claimed

interests.[7] *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."); *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) ("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."). 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 Code and the City's arguments in support of it, Plaintiff would be committing a "petty misdemeanor" if she filmed children using Smith Park while she was standing in the park.[8] But if Plaintiff took a step or two back onto the public sidewalk (or the public street), the very same filming is permissible. This fact does

[7] The City's claimed "interest" in protecting children from "intimidation" and from photographers sticking "their cameras in minors' faces" (R-68: City Mem. at 23, 25, App. 245-46) is also undermined by the fact that the ordinance also prohibits *clandestine* filming of children in the City's parks. The ordinance makes no distinctions based on the *method* of the filming. It only makes distinctions based on the *content* of the filming.

[8] (*See* R-47-2: Ness Suppl. Decl. ¶¶ 2-6, Ex. A, at Ex. 1 [setting forth example of videotaping now proscribed by the City Code], App. 230-33).

not counsel in favor of upholding the ordinance—it is fatal to its constitutionality. As a means of pursuing its alleged objectives, the City Code "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). The City Code is unconstitutional facially and as-applied to Plaintiff's First Amendment activity.

We turn now to our challenge to the Harassment Statute. But before addressing its constitutionality, we address the threshold issue of Plaintiff's standing to challenge this criminal law.

III. PLAINTIFF HAS STANDING TO CHALLENGE THE HARASSMENT STATUTE.

The district court held that Plaintiff lacks standing to challenge the Harassment Statute, concluding that "Ness has not shown that her decision to chill her speech due to the existence of the Harassment Statute is objectively reasonable." (R-94: Mem. Op. & Order at 12-16, Add. 12-16). The court is wrong.

In an effort to give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). "The doctrine of standing gives meaning to these constitutional limits by identifying those

disputes which are appropriately resolved through the judicial process." *Id.* (internal quotations and citation omitted).

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Consequently, to invoke the jurisdiction of a federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Plaintiff easily satisfies the standing requirement in this First Amendment case. 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.

This Court further confirms Plaintiff's standing in this case:

> To establish injury in fact for a First Amendment challenge to a state statute, a plaintiff *need not have been actually prosecuted or threatened with prosecution*. *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006). Rather, the plaintiff needs only to establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute. Self-censorship can itself constitute injury in fact. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

281 Care Comm. v. Arneson, 638 F.3d 621, 627 (8th Cir. 2011)[9] (emphasis added).

Here, as set forth in the statement of facts, Plaintiff *has* been "threatened with prosecution." She was told by police officers to halt her speech activity or she could face prosecution. The official police report states that "[Defendant Meyer] spoke with Ness and advised how the Principal and parent felt and asked her to stop filming," concluding that "Ness was advised that she could be charged with harassment if the parents and principal felt intimidated by her actions." Plaintiff was visited at her home by law enforcement officials and told she was under investigation for allegedly violating the challenged statute. The detective conducting the investigation forwarded it to the County Prosecutor for prosecution as a felony since Plaintiff's filming included minors. The City, in its filing in opposition to Plaintiff's request for a preliminary injunction, stated 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-felony charges" under the challenged statute. And finally, the Minnesota Attorney General, who intervened in this case to defend the constitutionality of the challenged statute, publicly stated in the context of his intervention that the challenged statute "bans harassment by videotaping" — the very conduct that Plaintiff has

[9] In *281 Care Committee*, the plaintiff advocacy organizations and their leaders sued the defendants, which included county attorneys, including Defendant Freeman, and the Minnesota Attorney General, alleging that the Minnesota Fair Campaign Practices Act violated the First Amendment. *281 Care Comm.*, 638 F.3d at 621.

allegedly engaged in here.

At a minimum, Plaintiff has established that she "would like to engage in arguably protected speech, but that [she] is chilled from doing so by the existence of the statute." Plaintiff clearly has standing. It was error to conclude otherwise.

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 forgoes expression in order to avoid enforcement consequences.").

The chilling effect caused by the threatened enforcement of the Harassment Statute is more than sufficient to confer standing. The fact that the County has now disavowed pursuing the felony prosecution requested by the City or that the City has now decided not to pursue misdemeanor prosecution for "past" conduct do not change Plaintiff's standing to pursue her challenge to the Harassment Statute against the County Prosecutor in his official capacity as he is the government official responsible

for enforcing the statute.[10] Similarly, Plaintiff has standing to pursue her challenge to this statute against the City, which has authority to arrest (through its police officers) and prosecute misdemeanor violations of this criminal law. In short, standing is not an issue. *See generally Milavetz, Gallop & Milavetz, P. A. v. United States*, 559 U.S. 229, 234, 248–49 (2010) (considering an as-applied pre-enforcement challenge brought under the First Amendment). The Court has jurisdiction to hear and decide this case. In fact, it has the duty to do so. *See, e.g., NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559-60 (2014) ("[I]t is the 'duty of the judicial department' . . . 'to say what the law is,' *Marbury v. Madison*, [1 Cranch 137, 177 (1803)].").

[10] As stated by this Court in a case challenging a state statute in which *Defendant Freeman* was sued in his official capacity because, like here, *he was responsible for enforcing the challenged state law*:

> When a statute is challenged as unconstitutional, the proper defendants are the officials whose role it is to administer and enforce the statute. *Mangual* [*v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003)]. The county attorneys are the parties primarily responsible for enforcing the criminal portion of the statute; enjoining them would redress a discrete portion of plaintiffs' alleged injury in fact. . . . Granting declaratory or injunctive relief against the defendants, would redress a discrete injury to plaintiffs. Thus, we find plaintiffs have standing.

281 Care Comm., 638 F.3d at 631. And while state officials (or county officials enforcing state law) enjoy Eleventh Amendment immunity, they may be sued in federal court for injunctive relief to halt the enforcement of a state law that the plaintiff claims violates the Constitution. *See Ex parte Young*, 209 U.S. 123 (1908); *Nix v. Norman*, 879 F.2d 429, 432 (8th Cir. 1989).

IV. THE HARASSMENT STATUTE, FACIALLY AND AS APPLIED TO RESTRICT PLAINTIFF'S FILMING, IS UNCONSTITUTIONAL.

A. The Harassment Statute Permits a Heckler's Veto.

As stated by the Supreme Court, "listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). In other words, a heckler's veto operates as a content-based restriction. *See, e.g., Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001) ("The First Amendment knows no heckler's veto."); *Bible Believers v. Wayne Cnty.*, 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. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 790 (9th Cir. 2008) (noting that there is no "minors" exception to the heckler's veto). As demonstrated above, the Harassment Statute is not a "time, manner and place restriction." Rather, it is a restriction on Plaintiff's constitutionally protected activity (passively and peacefully filming in a public forum matters in public view involving the public controversy surrounding DAF and the Success Academy for the purpose of disseminating the information to the public via the Internet) based entirely on whether the subject of her filming "feel[s] frightened, threatened, oppressed, persecuted, or intimidated" by it (2019 version) or that the filming was intended to harass or intimidate the subject, thereby causing fear of harm or emotional distress (2020 version), as alleged in this case. (*See, e.g.*, R-94: Mem. Op. & Order at 4-5 [acknowledging that Plaintiff was warned by Defendant Roepke that Plaintiff's

"repeated and extended presence was intimidating to parents and school administration," "suggesting that her repeated and extended presence was 'bordering on a harassment issue,'" that "'if you're doing it [filming] to intimidate them . . . then we're bordering on charges against you,'" stating that Plaintiff "was going 'overboard on [her] oversight of all this, and it is turning into a harassment type issue,'" and noting in the police report that the parents and school administration "'both felt intimidated and scared that Ness was filming them and are worried that she may become violent towards them or their school'"], Add. 4-5). The 2020 version of the statute specifically states that the actionable "harm" caused by Plaintiff's peaceful and passive filming is "*demonstrated by a victim's response to* [*the*] *act*." Minn. Stat. § 609.749, subd. 2(a)(4) (emphasis added).

However, unless Plaintiff is making a "true threat" or engaging in "fighting words" or "incitement" — very limited and well recognized exceptions to First Amendment protections[11] — the government has no basis for restricting the First Amendment in this manner.

[11] *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (recognizing "the few historic and traditional categories of expression long familiar to the bar" that may be restricted based on content, and "[a]mong these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain") (internal punctuation, quotations, and citations omitted); *United States v. Stevens*, 559 U.S. 460, 469-70 (2010) (same).

In *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949), the Court famously stated that:

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment. . . . There is no room under our Constitution for a more restrictive view.

Id. at 4. Accordingly, the government is without authority to criminalize First Amendment activity that might cause another to feel "harassed" or "intimidated" (even if that is what the speaker intended by her First Amendment activity) absent a showing that it falls within one of the narrow, recognized exceptions. In this case, the First Amendment activity (filming in public) is passive and peaceful. No exception applies.

In the final analysis, the Harassment Statute operates as a heckler's veto. It is, therefore, a content-based restriction on Plaintiff's First Amendment activity in a public forum, thereby *requiring the government* to satisfy the strict scrutiny standard. *Reed*, 135 S. Ct. at 2226 ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.") (citation omitted). And "[i]n an as-applied challenge like this one, the focus of the strict-scrutiny test is on the *actual speech being regulated*, rather than how the law might affect others who are not before the

court." *Telescope Media Grp.*, 936 F.3d at 754 (emphasis added). Neither Defendants nor the Attorney General have met this burden, nor could they in this case. The statute (2019 and 2020 versions) is unconstitutional, particularly as applied to Plaintiff's filming.

B. The Harassment Statute Is Unconstitutionally Vague.

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court outlined the rationale for the void-for-vagueness doctrine as follows:

> 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).

In *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court held that the challenged breach of the peace statute was unconstitutionally vague in its overly broad scope because Louisiana defined "breach of the peace" as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." As the Court noted, one of

the very functions of free speech "is to invite dispute." *Id*. at 551-52 (quoting *Terminiello,* 337 U.S. at 4-5).

In *Coates*, the Court stated:

> 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).

In conclusion, the statute is unconstitutionally vague because it permits arbitrary, discriminatory, and subjective enforcement. This is demonstrated by the statute's own terms (*e.g*., "intimidated," "harassed," causing a "victim" to "lose sleep"), which permit the government to prosecute Plaintiff based on the reaction of the subject to her filming ("as demonstrated by a victim's response to an act"). And the statute's vagueness is demonstrated by the way the City police officers, the detectives, the County, and now the Attorney General have exhibited vastly different, subjective, and *ad hoc* views as to how this criminal statute should be enforced. In short, the Harassment Statute impermissibly delegates basic policy matters to

policemen, prosecutors, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. And because it abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms, all in violation of the Fourteenth Amendment.

C. The Harassment Statute Is Overbroad.

Under the Harassment 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 "harass[ed]" or "intimidat[ed]" and thus causing them to "los[e] sleep"' may be charged with a crime. The scenarios one could contemplate whereby this statute would restrict protected activity are too numerous to recount here. *Compare Havlak v. Vill. of Twin Oaks*, 864 F.3d 905, 912 (8th Cir. 2017) ("Havlak presents no allegedly unconstitutional scenarios affected by the Village ordinance beyond her own commercial photography, so we will limit our analysis to the ordinance's application to Havlak.").

As explained by the U.S. Supreme Court:

> Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court. [citing cases]. In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the

statute.

Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980). In other words, even if Plaintiff's activity is properly restricted, courts are willing to *expand* normal standing rules when faced with an overbreadth challenge due to the importance of the First Amendment rights at stake by the existence of a statute that has the possibility of prohibiting protected First Amendment activities. There is no question that Plaintiff has standing to advance this challenge even if her filming could be proscribed under this statute. We turn now to the substantive overbreadth argument.

"When interpreting Minnesota's statutes, [this Court is] bound by the decisions of the Minnesota Supreme Court. . . . Decisions from the Minnesota Court of Appeals are 'particularly relevant' and [the Court] must follow such decisions when they are the best evidence of Minnesota law." *Baribeau v. City of Minneapolis*, 596 F.3d 465, 475 (8th Cir. 2010). Recent Minnesota state court decisions compel this Court to conclude that the Harassment Statute violates the First Amendment. As stated by the Minnesota Court of Appeals, "[o]rdinarily, [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); *see also State v. Casillas*, 938 N.W.2d 74, 79 (Minn. Ct. App. 2019), *review granted* (Minn. Mar. 17, 2020) ("To succeed in a typical facial constitutional

challenge, a challenger must establish that no set of circumstances exists under which the challenged statute would be valid or that the statute lacks any plainly legitimate sweep. . . . *But in the First Amendment context*, the Supreme Court has recognized a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.") (internal citations and quotations omitted) (emphasis added).

Recent decisions by the Minnesota courts invalidating various state criminal statutes on First Amendment grounds compel the conclusion that the Harassment Statute should receive the same fate. As discussed further below, 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).

In *State v. Casillas*, 938 N.W.2d 74 (Minn. Ct. App. 2019),[12] the court invalidated Minn. Stat. § 617.261 on First Amendment overbreadth grounds. The challenged statute made it a crime to intentionally disseminate an image of another

[12] *See also State v. Ahmed*, No. A19-1222, 2020 Minn. App. Unpub. LEXIS 266, at *5 (Apr. 6, 2020) ("[I]n light of our opinion in *Casillas*, the district court did not err by reasoning that section 617.261, subdivision 1, is facially overbroad, unconstitutional, and invalid. Therefore, the district court did not err by granting Ahmed's motion to dismiss.").

person who is depicted in a sexual act or whose intimate parts are exposed. Minn. Stat. § 617.261. The court concluded that the challenged statute was "facially overbroad in violation of the First Amendment as a result of its lack of an intent-to-harm requirement and its use of a negligence *mens rea*. Because it is not possible to remedy those constitutional defects through application of a narrowing construction or by severing problematic language from the statute, we invalidate the statute and reverse appellant's conviction and sentence." *Casillas*, 938 N.W.2d at 77.

The 2019 version of the Harassment Statute lacked an intent-to-harm requirement, and it used a negligence *mens rea*. The 2020 version, while purporting to remedy these defects, did not do so in a way that solves the First Amendment problem. The "intent to . . . harass, or intimidate another person," causing or "would reasonably be expected to cause" a person to "los[e] sleep or appetite" does not meaningfully remedy the criminal statute's First Amendment defects, it only continues them. Indeed, the original complaint against Plaintiff that caused law enforcement to focus on her First Amendment activity was the allegation that her repeated filming was harassing and intimidating, causing the subjects of her filming to fear for their safety. But the "intentional" conduct was filming in a public forum—an activity protected by the First Amendment.

In *State v. Hensel*, 901 N.W.2d 166 (Minn. 2017), the Minnesota Supreme Court held that Minn. Stat. § 609.72, which prohibited disturbing assemblies or

meetings, was facially unconstitutional under the First Amendment because it was substantially overbroad. *Id*. at 169. The Court reasoned in relevant part as follows:

> Rather than prohibiting only intentional conduct, as the State contends, the statute's *mens-rea* element prohibits actions done with knowledge or "reasonable grounds to know" that the act will "tend to" disturb others. Minn. Stat. § 609.72, subd. 1. This means that an individual need only perform an act that is negligent, which allows the statute to reach all types of acts, intentional or not, that have a tendency to disturb others. The statute's inclusion of a negligence standard makes it more likely that the statute will have a chilling effect on expression protected by the First Amendment, the key concern of the overbreadth doctrine. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (noting that the overbreadth doctrine arises "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions"); *State v. Mauer*, 741 N.W.2d 107, 110-11 (Minn. 2007) (discussing the "chilling effect" associated with criminal statutes that require only negligence).

Hensel, 901 N.W.2d at 174. *Hensel* further supports Plaintiff's argument that the revised Harassment Statute violates the First Amendment because the "intent" (or *mens rea*) requirement is meaningless because the "*actus reus*" is constitutionally protected.

Two additional and recent cases decided by the Minnesota courts striking down other provisions of the Harassment Statute compel the same result here. In *In re Welfare of A.J.B.*, 929 N.W.2d 840 (Minn. 2019) (hereinafter "*A.J.B.*"), the Minnesota Supreme Court invalidated on First Amendment grounds the stalking-by-mail provision (Minn. Stat. § 609.749, subd. 2(6)). And in *State v. Peterson*, 936 N.W.2d 912 (Minn. Ct. App. 2019), the Minnesota Court of Appeals invalidated on First

Amendment grounds the stalking-by-telephone provision (Minn. Stat. § 609.749, subd. 2(4)).

As the Minnesota cases demonstrate, 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*. (emphasis added). 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.

Turning to the language of the challenged statute — the first step of the overbreadth inquiry — § 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).[13] Unlike the stalking-by-mail and stalking-by-telephone provisions found unlawful by the Minnesota courts, this "monitoring-by-technology" provision does <u>*not*</u> have a "repeatedly" requirement.

[13] Subdivision 3(5) makes such "monitoring" of a minor a felony offense. Minn. Stat. §609.749, subd. 3(5); (*see* R-27: Boomer Decl. ¶ 14 [referring the case to the County Prosecutor for prosecution under subdivision 3(5)], App. 66).

As this case demonstrates, the monitoring-by-technology provision (2019 and 2020 versions) 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. And it is error to argue that the Harassment Statute merely restricts conduct. (*See supra* § I); *Telescope Media Grp.*, 936 F.3d at 752. 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 [lawful 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, 936 N.W.2d at 920.

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 921 (internal quotations and citation omitted). As this case illustrates, on multiple occasions law enforcement personnel warned Plaintiff that her *entirely peaceful* filming subjects her to prosecution under the Harassment Statute. 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." (R-20: Ness Decl. ¶ 23, Ex. A, App. 44-45, 52). 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). And, as noted previously, under the challenged statute, news reporters who "monitor" politicians or any number of persons of public interest by filming them, their campaign staff members or their public activities to expose misdeeds, thereby causing the subjects of the report to feel harassed or intimidated (and thus losing sleep) may be charged with a crime. Indeed, a reporter from a local television station who was doing an exposé on the City's preferential treatment of DAF and Success Academy and filming the very same activity that Plaintiff films (per the Attorney General: "videotap[ing] congregants at Dar al-Farooq mosque in Bloomington without their consent, causing those congregants and their children to feel intimidated and afraid" [R-93: Ness Decl. ¶ 2, Ex. A, App. 257, 260]) may be charged with a crime. The scenarios 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*, 936 N.W.2d at 921 (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 (or the statute at issue in *Casillas*), 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*, 936 N.W.2d at 921-22. 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. at 481 (quotations and citations omitted).

Here, there is no way for this Court to separate criminal conduct from conduct protected by the First Amendment. Consequently, "a narrowing construction would not alleviate the statute's chilling effect." *Peterson*, 936 N.W.2d at 922.

The Harassment Statute is unconstitutionally overbroad.

V. THE OFFICERS DO NOT ENJOY QUALIFIED IMMUNITY.

To begin, qualified immunity does not protect a defendant against claims for declaratory and injunctive relief, it does not apply to claims against a municipality, nor does it apply to claims against a defendant in his official capacity. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct [or] in an action against a municipality"); *Cannon v. City & Cnty. of Denver*, 998 F.2d 867, 876 (10th Cir. 1993)

("[T]here is no qualified immunity to shield the defendants from claims [for declaratory and injunctive relief]"); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) (same).

Further, the defense of qualified immunity does not shield Defendants Meyer and Roepke from liability for violating Plaintiff's clearly established rights. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court stated the applicable standard as follows: government officials are protected from personal liability and thus enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. And "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted). "The test focuses on the objective legal reasonableness of an official's acts, and the qualified immunity defense fails if the official violates a clearly established right because 'a reasonably competent public official should know the law governing his conduct.'" *Jones v. Coonce*, 7 F.3d 1359, 1362 (8th Cir. 1993) (quoting *Harlow*, 457 U.S. at 818-19). As the Supreme Court noted in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), "officials can still be on notice that their conduct violates established law even in novel factual circumstances."

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court mandated a two-step sequence for resolving government official's qualified immunity claims. First, a court must decide whether the facts alleged or shown by a plaintiff make out a violation of a constitutional right. And second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id*. at 201; *Baribeau*, 596 F.3d at 474; *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1155 (8th Cir. 2014); *see also Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (stating that courts have discretion to "decid[e] which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand").

Consequently, whether a right is "clearly established" is ultimately an *objective*, legal analysis. As stated by the Supreme Court, "By defining the limits of qualified immunity essentially in objective terms, *we provide no license to lawless conduct*." *Harlow*, 457 U.S. at 819 (emphasis added).

As set forth above, the Court should have little difficulty rejecting the officers' qualified immunity defense. Plaintiff's First Amendment right to engage in her filming without government interference was clearly established on August 27, 2019, when the officers exercised their authority under color of law to chill and thus deny Plaintiff of this right. *See, e.g., Telescope Media Grp.*, 936 F.3d at 749-51 (confirming the clearly established right to film under the First Amendment).

In the final analysis, the officers' threats were real; they were credible; and they had the predictable effect of halting Plaintiff's filming, thus depriving Plaintiff of her clearly established right to film under the First Amendment. The officers do not enjoy qualified immunity. *See, e.g.*, *Chestnut*, 947 F.3d at 1090 (denying qualified immunity and noting the "robust consensus of cases of persuasive authority," including cases decided prior to the incident at issue, "suggest[ing that] the constitution protects one who records police activity").

VI. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT.

As set forth above, there is no genuine dispute of material fact and Plaintiff is entitled to judgment on her claims as a matter of law. Fed. R. Civ. P. 56; *Bible Believers*, 805 F.3d at 262 (en banc) (reversing the grant of summary judgment by the district court in favor of the defendants and remanding the case for entry of summary judgment in favor of the plaintiffs).

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court reverse the district court's order granting Defendants' motions to dismiss and denying Plaintiff's motion for summary judgment, remanding the case for entry of judgment in Plaintiff's favor on her constitutional claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 that the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 12,944 words, excluding those sections identified in Fed. R. App. P. 32(f).

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VIRUS CHECK CERTIFICATION

The electronic version of the brief and addendum have been scanned for viruses and are virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eight Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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