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 SUMMARY JUDGMENT**

INTRODUCTION

The facts and law that compel the Court to deny Defendants' motions to dismiss are the same facts and law that compel the Court to grant Plaintiff's motion for summary judgment.[1]

The City and County filed short responses in opposition to Plaintiff's motion for summary judgment (Doc. Nos. 87 & 83, respectively), arguing, in essence, that the Court has before it a factual record and legal arguments sufficient to resolve the pending dispositive motions. Plaintiff agrees. Accordingly, in this reply, Plaintiff similarly

[1] In this reply, Plaintiff responds to the arguments advanced by the City Defendants ("City") in their memorandum in opposition (Doc. No. 87) and to the arguments advanced by the County Prosecutor ("County") in his memorandum in opposition (Doc. No. 83).

incorporates her arguments currently before this Court in response to Defendants' motions to dismiss and in support of her motion for summary judgment. Here, Plaintiff will highlight several essential points by way of rebuttal to Defendants' arguments.

As an initial matter, Defendants fail to demonstrate that there is a genuine dispute as to any *material* fact or that they "cannot present facts essential to justify [their] opposition." *See* Fed. R. Civ. P. 56(d) (requiring "a nonmovant [to] show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition"); *see also Gibson v. Am. Greetings Corp.*, 670 F.3d 844, 852-53 (8th Cir. 2012) (quoting *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (stating that the nonmovant "must come forward with specific facts showing that there is a genuine issue for trial").

For example, in its opposition, the County acknowledges these undisputed facts:

> Ness claims that she collects information about DAF's use of 8201 Park Avenue and Success Academy's use of Smith Park and posts that information on her blog and Facebook page "for public dissemination." (*Id.* ¶ 17.) She collects information "by videotaping and filming from public sidewalks, the public park, and while in my vehicle on a public street," as well as by "film[ing], with permission, from my neighbors' driveways and from inside their homes." (*Id.* ¶ 18.) Ness claims that the activity she films "is in public view." (*Id.*) According to Ness, she has photographed and filmed "the use of Smith Park by children associated with DAF and Success Academy," and she has photographed students arriving at Success Academy. (*Id.* ¶ 28.)

(Cnty. Opp'n at 3 [Doc. No. 83]). Accordingly, this case is ripe for summary judgment. *See* Fed. R. Civ. P. 56(a). And Plaintiff should prevail as a matter of law.

ARGUMENT IN REPLY

I. PLAINTIFF EASILY SATISIFIES THE STANDING REQUIREMENT IN THIS FIRST AMENDMENT CASE.

In their reply brief, the City cites to *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)—a case that Plaintiff argues is dispositive in her favor on the standing question—and quotes it as follows: "plaintiff had been 'warned to stop handbilling . . . and has been told by the police that if he again handbills at the shopping center and disobeys a warning to stop *he will likely be prosecuted*.'" (City Reply at 18 [Doc. No. 82] [emphasis added]). This looks familiar.

As the undisputed record before this Court shows, Plaintiff received a copy of the *official* City police report, which states: 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] [emphasis added]). The 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). The prior-made recording of Plaintiff's conversation with the officers does not undermine the clear threat set out in this official, written police report. This report alone is sufficient to cause an objective, reasonable fear of prosecution. *See Steffel*, 415 U.S. at 459 ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."). But there is more.

Plaintiff's reasonable fear of prosecution was confirmed not only by the police report but also by the undisputed fact that the City forwarded the investigation of her to the County *for felony prosecution under the Harassment Statute*. (Boomer Decl. ¶ 14 [Doc. No. 27]). And when the City did not receive a prompt response back from the County on whether it would pursue the felony prosecution, the City told this Court the following: "Even if Hennepin County declines to charge, at least in theory the Bloomington City Attorney's Office will have the opportunity to review the information obtained through the Bloomington Police Department's investigation for potential non-felony charges." (City Opp'n at 12 [Doc. No. 24] [citing Boomer Decl. ¶¶ 15–16 [Doc. No. 27]).

Additionally, on the heels of the City's investigation, the City passed an ordinance that prohibits filming children in City parks (City Code § 5.21)—thus expressly proscribing this aspect of Plaintiff's First Amendment activity (*see* Ness Suppl. Decl. ¶¶ 2-6, Ex. A, at Ex. 1 [setting forth example of videotaping now proscribed by the City Code] [Doc. No. 47-2])—activity which served as one of the bases for the harassment prosecution (*see* Boomer Decl. ¶ 14 [referring the case under subdivision 3(5) of the Harassment Statute] [Doc. No. 27]).

Defendants want to un-ring these bells in an effort to escape all liability by having this Court dismiss the case on standing grounds. Permitting them to do so would be a clear and reversible error *in this First Amendment case*. (*See* Pl. Opp'n to Cnty. at 11-14 [Doc. No. 72]; Pl. Opp'n to City at 11-14 [Doc. No. 74]). The chilling effect of Defendants' actions is objective, and it is real. Moreover, the City's and County's recent declarations that they are not going to prosecute Plaintiff for her "past" conduct—assertions made only

after this lawsuit was filed—do not defeat Plaintiff's challenge in any way. *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (stating that "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") (emphasis added); *see generally United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (stating that the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case," noting that not only is a defendant "free to return to his old ways," but also the public has an interest "in having the legality of the practices settled"). Plaintiff's standing is well established. (Ness Decl. ¶¶ 29, 30, 38 [Doc. No. 20]).

II. PLAINTIFF'S CLAIMS AGAINST DEFENDANT FREEMAN ARE PROPER.

As noted in the Complaint and argued throughout, Defendant Freeman, the Hennepin County Attorney, is a party in this lawsuit in his official capacity because he is responsible for enforcing the challenged Harassment Statute. (Cnty. Opp'n at 2 ["Freeman, in his official capacity as Hennepin County Attorney, has authority to prosecute felony violations of the statute. *See* Minn. Stat. §§ 388.051, 484.87."] [Doc. No. 83]; *see also* Compl. ¶¶ 16, 17). As the Hennepin County Attorney (who is employed by the County in which Plaintiff resides and in which the operative facts of this case occurred thus giving him jurisdiction—the basis for alleging these facts in the Complaint), he "is responsible for

investigating and prosecuting allegations *of harassment under the Harassment Statute*," and in this capacity, he is "*acting under color of state law*." (*Id*. [emphasis added]).[2]

Consequently, the Complaint makes clear that Plaintiff's claims against the County Attorney in his official capacity are for prospective declaratory and injunctive relief because he is the official responsible for enforcing the challenged state law. When a county official is enforcing a state law, as in this case, he is acting as a state official. *Scott v. O'Grady*, 975 F.2d 366, 371 (7th Cir. 1992); *Echols v. Parker*, 909 F.2d 795, 799 (5th Cir. 1990); *Cady v. Arenac Cty.*, 574 F.3d 334, 343 (6th Cir. 2009). Accordingly, Plaintiff's claims for prospective relief against Defendant Freeman are permitted under *Ex parte Young*, 209 U.S. 123 (1908). *See also Nix v. Norman*, 879 F.2d 429, 432 (8th Cir. 1989). Plaintiff need not show a County policy for Defendant Freeman to be a proper defendant in this case. Plaintiff's claims for declaratory and injunctive relief against him in his official capacity are properly before this Court.[3]

III. PLAINTIFF'S FILMING IS PROTECTED BY THE FIRST AMENDMENT UNDER CLEARLY ESTABLISHED AND CONTROLLING LAW.

Plaintiff's activity in question is her filming *in a public forum* information regarding *a public controversy* for the purpose of *public dissemination*. (Ness Decl. ¶¶ 13, 17, 18 [Doc. No. 20]). This activity is protected by the First Amendment. (*See* Pl. Mem. at 12-

[2] Defendant Freeman asserts that Plaintiff did not advance any claims against him under *Ex parte Young*, 209 U.S. 123 (1908). (Cnty. Opp'n at 14 [Doc. No. 83]). He is wrong.

[3] Plaintiff is not seeking nominal damages against Defendant Freeman. The request for nominal damages is for the past loss of her rights caused by the City. These damages are awarded as a matter of law. (*See* Pl. Mem. at 29 [citing *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984)] [Doc. No. 79]).

15 [citing cases] [Doc. No. 79]). And Defendants' actions deprived (and continue to deprive) Plaintiff of this right. Defendants make the repeated assertion that this right is not "absolute." But the assertion is meaningless. The right exists, and Defendants violated it in this case. Indeed, Defendants employ this "not absolute" argument as an indirect way to argue that Plaintiff's activity receives *no* protection under the First Amendment. Defendants are mistaken.

When this litigation began, Defendants rejected the overwhelming case law establishing Plaintiff's First Amendment right to film. They argued that the Eighth Circuit had yet to join the majority of circuits on this point. (City Opp'n to Mot. for Prelim. Inj. at 20 [Doc. No. 24] ["The Eighth Circuit has not recognized that recording is protected by the First Amendment."]; Cnty. Opp'n to Mot. for Prelim. Inj. at 16 [Doc. No. 43] ["The Eighth Circuit has not recognized a First Amendment right to record."]).

When it came time to respond to the arguments that Plaintiff's First Amendment right to film was not "clearly established" or that her filming was simply "conduct" and thus not protected by the First Amendment, Plaintiff demonstrated the error of these arguments by citing to *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019), which establishes that Plaintiff's filming is protected by the First Amendment and that this right was clearly established prior to her interaction with the City police officers on August 27, 2019. *See id*. at 749-51. Whether this *controlling* precedent was established 4 days or 4 years prior to the officers' actions in this case makes no difference. The qualified immunity inquiry is an *objective* inquiry based on the law in effect on the day in question.

See Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) ("By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct.").

Additionally, as noted, *Telescope Media Group* puts to rest Defendants' erroneous claim that the challenged restrictions on Plaintiff's activity are merely restrictions on conduct and thus do not infringe on Plaintiff's rights protected by the First Amendment. *Telescope Media Grp.*, 936 F.3d at 749-52 (holding that the plaintiffs' filming was protected by the First Amendment and rejecting the government's argument that the statute merely regulated conduct).[4]

In the final analysis, City Code § 5.21 and the Harassment Statute unlawfully restrict Plaintiff's rights under the First Amendment, as demonstrated below.

IV. THE CHALLENGED CITY CODE IS AN UNLAWFUL, CONTENT-BASED RESTRICTION ON THE FIRST AMENDMENT IN A PUBLIC FORUM.

There is no escaping the conclusion that City Code § 5.21 is a content-based restriction on First Amendment activity in a traditional public forum. The challenged Code provision, which only applies in City parks, 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 is a "petty misdemeanor." § 5.22.

City parks are traditional public forums. *Hague v. CIO*, 307 U.S. 496, 515 (1939). Photographing and recording is protected by the First Amendment. *Telescope Media Grp.*,

[4] Plaintiff's right to film under *Telescope Media Group* is not dependent upon whether the *infringement* of this right comes in the form of a law that compels speech (as in *Telescope Media Group*) or one that restricts it, as in this case. (*See* Cnty. Reply at 7 [Doc. No. 81] [attempting to distinguish *Telescope Media Group* on this ground]).

936 F.3d at 749-51. Consequently, the Code provision restricts First Amendment activity on its face. And in order to cite or prosecute a person under this provision, a City police officer or prosecutors must examine the content of the photograph or recording to determine whether it violates the law. *Glendale Assocs. v. NLRB*, 347 F.3d 1145, 1155 (9th Cir. 2003) ("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."); *see also Telescope Media Grp.*, 936 F.3d at 753 ("The MHRA also operates in this case as a content-based regulation of the [plaintiffs'] 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). If the photo or film contains just trees, squirrels, or birds, there is no violation. If the photo or recording contains an image of a child, it violates the Code, "which exacts a penalty on the basis of the content."

Consequently, the Code provision must satisfy strict scrutiny, which it cannot. *See 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).

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." (City Mem. at 25 [Doc. No. 68]). Indeed, it doesn't restrict such recordings at any other location in the City outside of a City park. Accordingly, the Code provision is woefully underinclusive and thus fails strict scrutiny on this basis alone. As stated by the U.S.

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); *see also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011) ("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 . . . diminish the credibility of the government's rationale for restricting speech in the first place.").

Finally, there is no "captive audience" in a public park. In *Frisby v. Schultz*, 487 U.S. 474, 484-87 (1988), the Court was applying this principle to the tranquility one expects in his or her own private home. *Id*. at 484-47. Public parks, on the other hand, "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague*, 307 U.S. at 515. City Code § 5.21 is unlawful.

V. THE HARASSMENT STATUTE IS UNCONSTITUTIONAL.

Defendants' arguments for upholding the Harassment Statute against this challenge are premised on two erroneous legal conclusions: (1) that Plaintiff's filming is mere "conduct" and not activity that enjoys protection under the First Amendment and/or (2) that this protection is somehow less than other "speech" activity protected by the First Amendment. Defendants, of course, are wrong on these points as a matter of law. *See*

Telescope Media Grp., 936 F.3d at 749-52 (holding that the plaintiffs' filming was protected by the First Amendment, rejecting the government's argument that the statute merely regulated conduct, and stating that "[s]peech is not conduct just because the government says it is").[5]

This state criminal law is unlawful, facially and as applied to Plaintiff's filming, for four separate reasons. First, the statute makes a crime out of what under the Constitution cannot be a crime. That is, the statute criminalizes Plaintiff's filming, which is protected by the First Amendment. *See supra.*

Second, the statute is unconstitutionally vague because it permits arbitrary, discriminatory, and subjective enforcement. This is demonstrated by the statute's own terms, which permit the government to prosecute Plaintiff if a "victim" subjectively feels "*frightened, threatened, oppressed, persecuted, or intimidated*" by Plaintiff's filming, and this is true regardless of whether Plaintiff intends to make the victim feel this way. And the statute's vagueness is demonstrated by the way the City police officers, the detectives, and the County have exhibited vastly different (*i.e.*, subjective and ad hoc) views as to how this criminal statute should be enforced. *Grayned v. City of Rockford*, 408 U.S. 104, 108-

[5] Plaintiff films *in a public forum* information regarding *a public controversy* for the purpose of *public dissemination* via the Internet and social media. (*See* Ness Decl. ¶¶ 13, 17, 18 [Doc. No. 20]). Thus, if, as the City asserts, "the Eighth Circuit acknowledged that there is an important difference between what a lens or device captures [' simple recording' per the City], and how the captured product is later used" (City Reply at 9 [Doc. No. 82]), then Plaintiff's filming, which is used for public issue speech, is afforded the highest protection under the First Amendment. *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (citations omitted). We agree with the City on this point.

09 (1972) ("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 [and] where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms.").

Third, the statute is content based because it permits the restriction of Plaintiff's First Amendment activity based on the reaction of others to it—that is, it permits prosecution of Plaintiff if a "victim" feels "*frightened, threatened, oppressed, persecuted, or intimidated*" by Plaintiff exercising her First Amendment right to film. Unless Plaintiff is making a "true threat" or engaging in "fighting words" or "incitement"—very limited and well recognized exceptions to First Amendment protections—the government has no basis for restricting the First Amendment in this manner. *See, e.g., Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949). Consequently, the statute operates as an impermissible heckler's veto of Plaintiff's First Amendment activity. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

And fourth, the statute is unconstitutionally overbroad, as controlling and recent Minnesota state court decisions have demonstrated in challenges to other similar provisions of this criminal statute and to another unrelated, but similar, criminal statute. When reviewing whether the Harassment Statute is overbroad, the Court is compelled to follow these state court decisions. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 475 (8th Cir. 2010) ("Decisions from the Minnesota Court of Appeals are 'particularly relevant' and we

must follow such decisions when they are the best evidence of Minnesota law.") (citation omitted).

In particular, the Court must follow these relevant state court decisions addressing the question of whether a Minnesota criminal law is unconstitutionally overbroad: *In re Welfare of A.J.B.*, 929 N.W.2d 840 (Minn. 2019) (striking down the stalking-by-mail provision, Minn. Stat. § 609.749, subd. 2(6)), *State v. Peterson*, 936 N.W.2d 912 (Minn. Ct. App. 2019) (striking down the stalking-by-telephone provision, Minn. Stat. § 609.749, subd. 2(4)), and *State v. Casillas*, No. A19-0576, 2019 Minn. App. LEXIS 400 (Minn. Ct. App. Dec. 23, 2019) (striking down 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).

Contrary to Defendants' arguments, these decisions compel the conclusion that the "monitor-by-technology" provision at issue here infringes on First Amendment rights, and it does so at least as much as the "stalking-by-mail" and "stalking-by-telephone" provisions found unlawful by the Minnesota courts—and perhaps more so, as "filming" is clearly protected by the First Amendment.[6] (*See supra*). In sum, "[d]ue to the substantial ways" in which the challenged statute "can prohibit and chill protected expression, [this Court

[6] Defendants clearly considered Plaintiff's filming to be "monitoring." According to the City, Defendant Roepke "suggested that [Plaintiff] could film what she wanted to *more quickly* [and] advised her to read up on the harassment statute." (City Reply at 4 [Doc. No. 82] [emphasis added]). Thus, if Plaintiff does not film "quickly" her filming apparently becomes "monitoring." And what exactly is the time restriction imposed on Plaintiff's filming by this criminal statute?

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

CONCLUSION

Plaintiff respectfully requests that the Court grant her motion for summary judgment.

Respectfully submitted,

MOHRMAN, KAARDAL & ERICKSON, P.A.

/s/ *William F. Mohrman*
William F. Mohrman, 168816
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
Tel: (612) 465-0928
Fax: (612) 341-1076
mohrman@mklaw.com

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.* (MI P62849)
PO Box 131098
Ann Arbor, Michigan 48113
Tel: (734) 635-3756
Fax: (801) 760-3901
rmuise@americanfreedomlawcenter.org
*Admitted *pro hac vice*

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2020, 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.

AMERICAN FREEDOM LAW CENTER

/s/*Robert J. Muise*
Robert J. Muise, Esq.

Counsel for Plaintiff