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,

and

ATTORNEY GENERAL FOR THE STATE OF MINNESOTA,

Intervenor.

Case No. 19-cv-2882 (ADM/DTS)

Hon. Ann D. Montgomery

PLAINTIFF'S RESPONSE TO THE MEMORANDUM OF LAW BY THE ATTORNEY GENERAL OF MINNESOTA

INTRODUCTION

The Attorney General of Minnesota ("Attorney General" or "AG") has intervened to defend the constitutionality of the Harassment Statute — a statute which he publicly described as one which "bans harassment by videotaping."[1]

[1] (*See* Ness Decl. ¶ 2, Ex. A [AG Press Release of Apr. 24, 2020], attached to this response as Ex. 1). 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. Consequently, he believes that this criminal statute applies to First Amendment activity. *See infra* § I. The Court can take judicial notice of the facts set forth in the Attorney General's press release. *See Bishop v. Jesson*, No. 14-1898 (ADM/SER),

While the Attorney General is wrong regarding the constitutionality of the Harassment Statute, Plaintiff agrees with him on this point: "The constitutionality of the Harassment Statute is a question of law that can be decided by the Court at this stage [of the proceedings]." (AG Mem. at 4 [Doc. No. 89]).

Similar to the City and County Defendants, the Attorney General asserts that Plaintiff's "planned filming activities are not subject to absolute protection under the First Amendment" (AG Mem. at 2), which, per Defendants and the Attorney General, means that Plaintiff's filming is either accorded no protection or measurably less protection than other speech activity. Also similar to the City and County Defendants, the Attorney General asserts that the regulation of Plaintiff's filming activities is merely a regulation of conduct and not speech protected by the First Amendment. (AG Mem. at 9-13). Both assertions serve as the necessary premises for the Attorney General's arguments, and both assertions are legally and factually wrong.

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

Reporters and journalists of "traditional" news media (television, newspapers, magazines) and reporters and journalists of other "nontraditional" news media (Internet, blogs, social media) in Minnesota who use photographs and video to report on matters of

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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). This is further support for Plaintiff's standing to advance this challenge. *See, e.g., Osborn v. United States*, 918 F.2d 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).

public interest would be surprised to learn that their Attorney General does not believe that their filming is protected by the First Amendment. (AG 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]). Bear in mind that the ***undisputed*** record in this case demonstrates that "the filming activit[y] Plaintiff describes" is filming *in public forums* information that is *in public view* regarding *a public controversy* for the purpose of *public dissemination* via the Internet and social media. (Ness Decl. ¶¶ 13, 17, 18 [Doc. No. 20]). Thus, her filming "will not just be simple recordings," (*compare* AG Mem. at 7-8 [wrongfully attempting to distinguish *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019)]), but filming to report on a public issue.

Consequently, per the Attorney General's argument (one similarly made by the City and County Defendants), filming is only accorded as much protection as the end product or purpose of the filming receives under the First Amendment. (*See* AG Mem. at 7 [claiming that the filming at issue in *Telescope Media Group* was protected by the First Amendment only because "the at-issue wedding videos were speech because they served as a 'medium for the communication of ideas' of the creators"]).

Applying this argument here, there is no dispute that the end product/purpose of Plaintiff's filming is *public interest speech* (*i.e.*, Plaintiff's reporting on the public controversy surrounding DAF and Success Academy to the public via the posting of photographs and video) as a matter of First Amendment jurisprudence. As stated by the U.S. Supreme Court, "[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461

U.S. 138, 145 (1983) (citations omitted). As a result, and in direct opposition to the Attorney General's conclusion, Plaintiff's filming "is entitled to special protection," not less protection, under the First Amendment. Moreover, Plaintiff principally disseminates the public information she gathers via filming on the Internet. This fact further supports, and enhances, the First Amendment protection of 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).

Nonetheless, the Attorney General's narrow reading of *Telescope Media Group* is incorrect. The Eighth Circuit's First Amendment ruling was not as limited as the Attorney General claims. In the court's own words:

> The Free Speech Clause of the First Amendment covers films, *see Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952), so the videos the Larsens intend to make are "affected with a constitutional interest," *Susan B. Anthony List*, 573 U.S. at 159 (citation omitted). The Larsens' desire "to engage in a course of conduct" that includes the production of videos means that their other claims are affected with a constitutional interest too, regardless of the precise legal theory. *Id.* (citation omitted).
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> The Larsens' videos are a form of speech that is entitled to First Amendment protection. The Supreme Court long ago recognized that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." *Joseph Burstyn*, 343 U.S. at 502; *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981). Indeed, "[i]t cannot be doubted that motion pictures are a significant medium for the communication of ideas." *Joseph Burstyn*, 343 U.S. at 501. "They [can] affect public attitudes and behavior in a variety of

> ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Id.*

Telescope Media Grp., 936 F.3d at 749-51 (emphasis added)

Here, the Attorney General creates a strawman, arguing that "Plaintiff has not cited a single case finding an absolute First Amendment right to record private individuals." (AG Mem. at 8; *see also id*. at 9 ["Because Plaintiff's as-applied First Amendment challenge rises and falls on the unsupported theory that her recording activities are entitled to absolute protection, Defendants' motions to dismiss should be granted."]). And what case has the Attorney General cited finding that the very *type of filming at issue here* (filming matters of public interest) can be made a crime by the State? None, because none exists. Plaintiff's activity is protected by the First Amendment.

Not only does the Attorney General incorrectly dismiss the import of *Telescope Media Group*, a case that is controlling here, he incorrectly asserts that "Plaintiff never explains how the rationale from [the cases she cited from other jurisdictions] applies to her" filming. (AG Mem. at 8). In her prior filings with this Court, Plaintiff cited, *inter alia*, the following cases, which overwhelmingly support her claim that her filming is protected by the First Amendment: *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"); *Silberberg v. Bd. of Elections of N.Y.*, 272 F. Supp. 3d 454, 479 (S.D.N.Y. 2017) ("The act of taking a photograph, though not necessarily a communicative action in and of itself, is a necessary prerequisite to the existence of a photograph. It follows that the taking of photographs is also protected by the First Amendment."); and *Martin v. Evans*, 241 F. Supp. 3d 276, 286 (D. Mass. 2017) ("Among the protected forms of information gathering is audio and audiovisual recording.").

Furthermore, Plaintiff clearly explained the *rationale* as to why these cases support her claim that her filming is protected by the First Amendment, and she did so principally by quoting directly from the Third Circuit: "The First Amendment protects actual photos, videos, and recordings and for this protection to have meaning the Amendment must also protect the act of creating that material," *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017) (internal citations omitted), and the Seventh Circuit: "The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected," *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). The Eighth Circuit plainly agrees with this *rationale*, as evidenced by its decision in *Telescope Media Group*. The Attorney General is wrong.

Next, the Attorney General argues that criminalizing Plaintiff's filming via the Harassment Statute is simply a restriction on Plaintiff's *conduct* and not her *speech*.

Therefore, per the Attorney General, the restriction does not implicate Plaintiff's rights under the First Amendment. The Eighth Circuit expressly rejected the Attorney General's argument in *Telescope Media Group*, requiring this Court to do the same here. As stated by the Eighth Circuit:

> 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); *see also id.* ("Speech is not conduct just because the government says it is.").

Moreover, contrary to the Attorney General's claim, the application of the Harassment Statute to *Plaintiff's filming* does not have an "incidental" effect or "incidental" burden on her right to film under the First Amendment (AG Mem. at 9-10) — it bans it. The effect is direct and plenary.

Indeed, by its own terms, the Harassment Statute is not a "time, manner and place restriction." (*See* AG Mem. at 9 [citing cases addressing "time, manner and place restrictions"]). The statute is not a restriction on filming in polling sites or other nonpublic forums — it doesn't reference any specific "place." (*See* AG Mem. at 9 [citing cases]). The statute has nothing to do with the "time" that Plaintiff is permitted to film — it doesn't reference "time." Rather, the statute proscribes Plaintiff's filming (*i.e.,* her First Amendment activity) only if the subject of her filming "feel[s] frightened, threatened,

oppressed, persecuted, or intimidated" by it, Minn. Stat. § 609.749(1), *even if*, *as in this case*, the "*manner*" in which Plaintiff films is entirely passive, nonobstructive, and peaceful. And Plaintiff can be prosecuted under the statute even if she did not intend to make the subject of her filming "feel frightened, threatened, oppressed, persecuted, or intimidated." Minn. Stat. § 609.749(1a). In short, the Harassment Statute does not regulate conduct with only an incidental burden on speech. The statute restricts Plaintiff's First Amendment activity (filming), regardless of its time, place, or manner and based entirely on the reaction of others to it.

In conclusion, Plaintiff's filming is protected by the First Amendment, and it cannot be criminalized under the guise that the Harassment Statute is merely restricting her conduct. The statute "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).

II. THE HARASSMENT STATUTE IS CONTENT BASED BECAUSE IT 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., Bible Believers v. Wayne Cnty.,* 805 F.3d 228, 248 (6th Cir. 2015) ("The heckler's veto is [a] type of odious viewpoint discrimination."). 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.

Unless Plaintiff is making a "true threat" or engaging in "fighting words" or "incitement" — very limited and well recognized exceptions to First Amendment protections[2] — the government has no basis for restricting the First Amendment in this manner.

In *Terminiello v. City of Chi.*, 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.

Terminiello v. City of Chi., 337 U.S. 1, 4 (1949). Accordingly, the government is without authority to criminalize First Amendment activity that might cause another to feel "*frightened, threatened, oppressed, persecuted, or intimidated*" absent a showing that it

[2] *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).

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 criminal statute operates as a heckler's veto. It is 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 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). 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). The Attorney General has not met his burden. (*See* AG Mem. [failing to address the strict scrutiny standard]). The statute is unconstitutional.

III. THE HARASSMENT STATUTE IS UNCONSTITUTIONALLY VAGUE.

In response to Plaintiff's vagueness argument, the Attorney General relies heavily on *State v. Stockwell*, 770 N.W.2d 533 (Minn. Ct. App. 2009). His reliance is misplaced.

In *Stockwell*, the court analyzed the vagueness challenge presented by the appellant and concluded as follows:

> Appellant argues that the statute criminalizes following or pursuing, but does not provide guidance as to what constitutes illegal following or pursuing. Appellant contends that a defendant could be found guilty of stalking 'based upon a single incident when [a defendant] followed another person for a distance of a half a block or less,' and that without further guidance as to the distance that a defendant would have to follow someone in order to be found guilty, the statute is impermissibly vague and encourages arbitrary and discriminatory enforcement. . . .

> The statute, when read as a whole, does not criminalize the mere following of a person. Rather, the statute provides sufficient clarity such that an ordinary person could understand what conduct is prohibited. . . .
>
> Here, appellant's conduct of aggressively pursuing MH in a vehicle for several blocks clearly falls within the statute's prohibitions. Therefore, we conclude that appellant's primary void-for-vagueness argument fails.

Id. at 540-41. Here, the Attorney General asserts that Plaintiff's passive, peaceful filming of the DAF and Success Academy controversy falls within the statute's prohibitions based *entirely* on the *subjective* reaction of those who might be the subjects of her filming. *Stockwell* does not support this assertion.

Moreover, insofar as the Attorney General relies on the negligence *mens rea* of the Harassment Statute as a basis for upholding its constitutionality (*see* AG Mem. at 29 [expressly relying on the "negligence-based mens rea" to argue that the statute is not vague]), the Minnesota Court of Appeals has decided since *Stockwell* that a negligence *mens rea* for a criminal statute such as the Harassment Statute at issue here is unconstitutional.

In *State v. Casillas*, 938 N.W.2d 74 (Minn. Ct. App. 2019), *review granted* (Minn. Mar. 17, 2020), the court concluded that Minn. Stat. § 617.261 violated the First Amendment "as a result of its lack of an intent-to-harm requirement and its use of a negligence *mens rea*."[3] *Id*. at 77. The Harassment Statute similarly lacks an intent-to-harm requirement, and it uses a negligence *mens rea*. Remarkably, nowhere in his

[3] The court in *Casillas* struck down the statute on First Amendment overbreadth grounds. *Casillas*, 938 N.W.2d at 77. Nonetheless, the point here is that the negligence *mens rea* is improper.

memorandum of law (including in his section on overbreadth) does the Attorney General cite, let alone try to distinguish, this 2019 decision from the Minnesota Court of Appeals despite acknowledging that this Court must follow such decisions (*see* AG Mem. at 28-29 [agreeing with Plaintiff that the Court "must follow" decisions from the Minnesota Court of Appeals]) and the fact that Plaintiff has been relying on this case in her filings with this Court, (*see, e.g.,* Pl. Resp. to Cnty. Mot. to Dismiss at 26, 30 [Doc. No. 72]).

In the final analysis, it is precisely this type of a criminal statute (the Harassment Statute) that is void on vagueness grounds. 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." Yet, 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, which permit the government to prosecute Plaintiff if a "victim" subjectively feels "*frightened, threatened, oppressed, persecuted, or intimidated*" by Plaintiff's filming, 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, 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.

IV. THE HARASSMENT STATUTE IS UNCONSTITUTIONALLY OVERBROAD.

The Attorney General agrees with Plaintiff (and the Eighth Circuit), that "[w]hen 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) (emphasis added); (*See* AG Mem. at 28-29). Recent Minnesota state court decisions compel this Court to conclude that the Harassment Statute violates the First Amendment.

Before addressing the specific overbreadth challenge, however, we pause here to address the question of whether Plaintiff can advance such a challenge. Unquestionably, Plaintiff has been threatened with prosecution under the Harassment Statute. (*See* Ness Decl.¶¶ 19-26, 31-38 [Doc. No. 20]; Boomer Decl. ¶ 14 [Doc. No. 27]).). Additionally, the Attorney General argues here that Plaintiff's filming falls within the proscriptions of the criminal statute. (*See, e.g.,* AG Mem at 2, 16 ["The Harassment Statute is content neutral because it applies to Plaintiff's behavior of following, monitoring, or pursuing another. . . ."]; *see also* Ness Decl. ¶ 2, Ex. A [AG Press Release (stating that "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")] at Ex. 1).

Accordingly, at a minimum, if Plaintiff's as-applied challenge fails, there is no basis for Defendants to claim that she lacks standing to challenge the Harassment Statute on its face on overbreadth grounds. As Plaintiff has argued, "under the challenged statute, a news reporter who was 'monitoring' a politician by photographing and videotaping him or his campaign staff to expose the politician's misdeeds, thereby causing the politician or his staff to feel 'frightened, threatened, oppressed, persecuted, or intimidated,' may be charged with a crime. The scenarios one could contemplate whereby this statute would restrict protected activity are too numerous to recount here." (Pl. Resp. to Cnty. Mot. to Dismiss at 29 [Doc. No. 72]); *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, 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 might validly prohibit the litigant's conduct (as the Attorney General certainly argues here in the case of Plaintiff) but nonetheless has the possibility of prohibiting protected First Amendment activities. There is no question that Plaintiff has standing to advance this challenge.

We turn now to the substantive overbreadth argument, and we begin by noting that the Court should not consider Plaintiff's challenge as seeking a "drastic 'last resort' remedy," as the Attorney General suggests. (AG Mem. at 22). Rather, 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 Casillas*, 938 N.W.2d at 79 ("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).

We begin with a case that the Attorney General ignored, as we noted previously, and which is dispositive here. In *State v. Casillas*, 938 N.W.2d 74 (Minn. Ct. App. 2019), *review granted* (Minn. Mar. 17, 2020),[4] 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 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.

Similarly, the Harassment Statute lacks an intent-to-harm requirement and it uses a negligence *mens rea*. Accordingly, per the rationale in *Casillas*, the Court should invalidate this criminal statute on First Amendment grounds.

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

[4] *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.").

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 Harassment Statute violates the First Amendment.

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)).

Remarkably, once again, the Attorney General completely ignores *Peterson* in his memorandum of law, and he seeks to distinguish *A.J.B.* by arguing that "[t]he statute in *A.J.B.* expressly prohibited sending letters, telegrams, messages, and communications.

The Harassment Statute only prohibits following, monitoring, or pursuing another — none of which necessarily or even typically involve (sic) speech or expressive conduct." (AG Mem. at 25-26). He is wrong. Just like the statute at issue in *A.J.B.* didn't prohibit just "sending," the Harassment Statute doesn't prohibit just "following, monitoring, or pursuing" — it prohibits doing so "through any available technological or other means," which includes filming, an activity protected by the First Amendment. As noted, the Attorney General publicly stated that this statute prohibits "video harassment." (Ness Decl. ¶ 2, Ex. A [AG Press Release] at Ex. 1).

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).[5] Unlike the stalking-by-mail and stalking-by-telephone provisions found unlawful by the Minnesota courts, this "monitoring-by-technology" provision does _not_ have a "repeatedly" requirement. Similar to the stalking-by-mail and stalking-by-telephone provisions, the monitoring-by-technology provision does not require proof of an intent to harm (§609.749, subd. 1a), and it uses a broad negligence *mens rea* (§ 609.749, subd. 1). *See Peterson*, 936 N.W.2d at 918-19 (discussing similarities between the stalking-by-mail and stalking-by-telephone provisions).

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

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

Because the challenged provision does restrict protected speech, we turn now to the third step of the inquiry, whereby the Court must consider "whether the statute prohibits a substantial amount of constitutionally protected speech." *Id.* at 921 (internal quotations and citation omitted). As this case illustrates, on multiple occasions law enforcement personnel have warned Plaintiff that her *entirely peaceful* filming activity subjects her to prosecution under the Harassment Statute. As specifically stated in the City's police report, Defendant Meyer "spoke with the (sic) Principal Rabeaa and parent Farrah and they stated the following: They both felt intimidated and scared that Ness was filming them and are worried that she may become violent towards them or their school. I spoke with Ness and advised how the Principal and parent felt and asked her to stop filming." (Ness Decl. ¶ 23, Ex. A [Doc. No. 20])). The police report concludes, "Ness was advised that she could be charged with harassment if the parents and principal felt intimidated by her actions." (*Id.* at ¶ 24). 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, their public activities, etc. to expose misdeeds, thereby causing the subjects of the report to feel "frightened, threatened, oppressed, persecuted, or intimidated," 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" [Ness Decl. ¶ 2, Ex. A]) may be charged with a crime. The scenarios are too numerous to recount

here.[6] *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. 460, 481 (2010) (quotations and citations omitted).

Here, there is no way for this Court to separate criminal conduct from conduct protected by the First Amendment. "Doing so would not alter the negligence *mens rea* standard, thus a narrowing construction would not alleviate the statute's chilling effect." *Peterson*, 936 N.W.2d at 922; *see also Casillas*, 938 N.W.2d at 90-91 (stating that the

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[6] Many may recall the infamous O.J. Simpson chase scene which was "monitored" through "technological means" by numerous news reporters. The endless examples one could cite of persons being "monitored" through "technological means," particularly today where smartphones are so prevalent and social media is employed to report on matters of public interest by posting images and videos from these devices, demonstrate that the sweep of the Harassment Statute on First Amendment activity is exceedingly broad. This sweep is, at a minimum, "substantial."

"constitutional defect" in the challenged statute "stems from its lack of an intent-to-harm requirement and its use of a negligence *mens rea*" and setting forth reasons why the court is not able to save it).

The Harassment Statute is unconstitutionally overbroad.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court deny Defendants' motions to dismiss and grant Plaintiff's motion for summary judgment regarding her challenge to the Harassment Statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 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

EXHIBIT 1

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,

and

ATTORNEY GENERAL FOR THE STATE OF MINNESOTA,

Intervenor.

Case No. 19-cv-2882 (ADM/DTS)

Hon. Ann D. Montgomery

DECLARATION OF PLAINTIFF SALLY NESS

I, Sally Ness, make this declaration pursuant to 28 U.S.C. § 1746 and based on my personal knowledge and upon information and belief.

1. I am an adult citizen of the United States and the plaintiff in this case.

2. Attached to this declaration as Exhibit A is a true and correct copy of a press release issued by the Office of Attorney General Keith Ellison on April 24, 2020. The press release addresses the memorandum filed by Minnesota Attorney General Ellison in this case, and it contains a hyperlink to it. The press release can also be found online at: https://www.ag.state.mn.us/Office/Communications/2020/04/24_VideoHarassment.asp.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on the 1st day of May in Minnesota.

Sally Ness

Sally Ness

EXHIBIT A

Press Release

Attorney General Ellison defends Minnesotans from video harassment

Intervenes to defend constitutionality of state anti-harassment law in federal lawsuit filed by plaintiff who has videotaped congregants at Bloomington mosque that was bombed in 2017

April 24, 2020 (SAINT PAUL) — Minnesota Attorney General Keith Ellison has filed a memorandum in federal court to defend the constitutionality of a Minnesota state law that bans harassment by videotaping and other means. 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. Attorney General Ellison's memorandum supports the motion by the defendants — the City of Bloomington, Hennepin County Attorney Mike Freeman, and two Bloomington police officers — to dismiss the lawsuit, and requests that the court find the state law constitutional and dismiss the plaintiff's claims with prejudice.

Dar al-Farooq was bombed by right-wing extremists in August 2017: two of the suspects have pled guilty and are awaiting sentencing, while the third is awaiting trial.

Plaintiff Ness has filmed and otherwise documented the activities of congregants and school children at Dar al-Farooq without their consent for a number of years. The clear language of the state anti-harassment law defines "harass" as "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." One of the activities prohibited under the law is "follow[ing], monitor[ing], or pursu[ing] another, whether in person or through any available technological or other means."

"It's my job to help all Minnesotans live with dignity and respect. Living with dignity and respect looks like being able to go to any public place you choose, including your house of worship, without the fear or threat that you'll be harassed, intimidated, or persecuted for who you are or whom you pray to. I'm defending the constitutionality of our law that protects Minnesotans of all faiths and backgrounds from that kind of harassment. Minnesotans want everyone to live with the same dignity and respect that they want for themselves."

In the memorandum, Attorney General Ellison argues that contrary to the plaintiff's argument, Minnesota's anti-harassment law "is not unconstitutionally overbroad because any protected speech that may be regulated by the statute is insubstantial when compared with the statute's plainly legitimate regulation of harassing and

stalking conduct," nor is it "void for vagueness in violation of the Fourteenth Amendment because it makes it reasonably clear what conduct falls within its scope."

Because the law regulates conduct, not speech, it does not violate the First Amendment. The law is also content-neutral. This means that it "applies to Plaintiff's behavior of following, monitoring, or pursuing another without regard to the content, topic, or viewpoint of any message Plaintiff intends to convey. For example, if Plaintiff uses a recording device to monitor individuals at Dar al-Farooq in a manner that violates the Harassment Statute it would apply whether she intended to use those recordings to create a blog post about how Dar al-Farooq is violating zoning regulations, a story about the benefits of religious education, or a movie about the history of Bloomington."

In addition, the law provides that in order for conduct to be criminal, it must be conduct "that an objectively reasonable person knew or should have known would cause the victim under the circumstances to feel frightened or threatened." Dar al-Farooq mosque has already been the victim of a violent hate crime — the August 2017 bombing — which alone gives its congregants reason to fear for their safety. "The addition of this objective standard ensures the Harassment Statue is not unconstitutionally vague or applied and enforced subjectively solely based on the reaction of the victim," Attorney General Ellison asserts in the memorandum.

Attorney General Ellison also points out that the Minnesota Court of Appeals in a 2009 decision known as *Stockwell*, "has already concluded the language of the Harassment Statute is not unconstitutionally vague." For this and other reasons, he asks the federal court to reach the same conclusion.

In addition to challenging the state anti-harassment law, plaintiff Ness is also challenging the constitutionality of a City of Bloomington ordinance that makes it illegal to take video of children in public parks. Attorney General Ellison's intervention addresses only the constitutionality of the state law, not the city ordinance. Ness has never been arrested or cited for violating either the law or the ordinance.