**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

Sally Ness,

Plaintiff,

vs.

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.

Civil No. 0:19-cv-02882 (ADM/DTS)

**MEMORANDUM OF LAW BY THE ATTORNEY GENERAL FOR THE STATE OF MINNESOTA IN SUPPORT OF THE CONSTITUTIONALITY OF MINN. STAT. § 609.749**

## INTRODUCTION

Plaintiff Sally Ness brought this lawsuit challenging the constitutionality of Minn. Stat. § 609.749, subd. 2(2) (the "Harassment Statute") which criminalizes harassment and stalking. The Harassment Statute makes it a crime to follow, monitor, or pursue another "whether in person or through any available technological or other means" where the actor knows or has reason to know that this conduct would cause the victim to feel "frightened, threatened, oppressed, persecuted, or intimidated." Although Plaintiff has never been prosecuted under the Harassment Statute, she claims that fear of prosecution

is preventing her from filming activities at the Dar al-Farooq Islamic Center and Mosque that she claims demonstrate, among other things, non-compliance with zoning laws. As a result, Plaintiff brought this lawsuit challenging the constitutionality of the Harassment Statute under the First and Fourteenth Amendments on its face and as applied to her conduct. Defendants have now moved to dismiss Plaintiff's claims and Plaintiff has moved for summary judgment.

Whether analyzed under the rubric of Federal Rule of Civil Procedure 12(b)(6) or Rule 56, Plaintiff's constitutional challenges to the Harassment Statute fail as a matter of law. Plaintiff's challenges misconstrue the plain language of the Harassment Statute and fundamentally ignore or misapply the relevant standards governing First Amendment challenges. Specifically, Plaintiff's as-applied challenge fails because, however construed, her planned filming activities are not subject to absolute protection under the First Amendment. The Harassment Statute passes constitutional muster because it is either a proper regulation of conduct that has, at most, an incidental burden on any protected speech or is a permissible content-neutral regulation that is justified by Minnesota's significant governmental interest in protecting individuals from harassment and stalking.

Plaintiff's facial challenges fare no better. The Harassment Statute 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. Finally, the Harassment Statute is not void for vagueness in violation of the Fourteenth Amendment because it makes it reasonably clear what

conduct falls within its scope. Accordingly, the Attorney General respectfully requests that the Court grant Defendants' motions to dismiss and dismiss Plaintiff's claims in their entirety and with prejudice.

## PROCEDURAL HISTORY[1]

Plaintiff filed her complaint in this case on November 12, 2019, challenging the constitutionality of the Harassment Statute and § 5.21 of the City of Bloomington Code on First Amendment and Due Process grounds. (Dkt. No. 1.) Plaintiff then moved for a preliminary injunction, asking the Court to enjoin Defendants from enforcing the Harassment Statute and the City Code provision. (Dkt. No. 16.) The Court denied Plaintiff's motion, concluding that Plaintiff had not demonstrated a likelihood of success on the merits of her constitutional challenges and had not shown a threat of irreparable harm in the absence of injunctive relief. (Dkt. No. 53 at 10-11.)

Shortly thereafter, the Attorney General filed a notice of intervention pursuant to Federal Rule of Civil Procedure 5.1 to defend the constitutionality of the Harassment Statute. (Dkt. No. 60.)

Defendants have now moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Dkt. Nos. 61, 66.) With respect to the Harassment Statute,

[1] The parties have already thoroughly set forth the background facts from which Plaintiff's complaint arises in connection with briefing on Plaintiff's motion for preliminary injunction, Defendants' motions to dismiss, and Plaintiff's motion for summary judgment. Rather than repeat those facts here, the Attorney General incorporates by reference the Background section of Defendant Michael Freeman's Memorandum in Support of Motion to Dismiss, which sets forth the few undisputed facts that are relevant to resolution of the legal issues regarding the constitutionality of the Harassment Statute. (*See* Dkt. No. 63 at 2-4.)

Defendants argue that Plaintiff's as-applied and facial challenges fail to state a claim because the Harassment Statute does not violate either the First or Fourteenth Amendments. Plaintiff has also moved for summary judgment under Federal Rule of Civil Procedure 56 with respect to each of her claims. (Dkt. No. 77.) The Attorney General submits this brief in support of Defendants' motions to dismiss and in opposition to Plaintiff's motion for summary judgment to the extent those motions address the constitutionality of the Harassment Statute.

## ARGUMENT

Defendants have moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) on the basis that the Harassment Statute is constitutional and Plaintiff has moved for summary judgment under Rule 56 on each of her claims. The constitutionality of the Harassment Statute is a question of law that can be decided by the Court at this stage, under either standard. *See Issaenko v. Univ. of Minn.*, 57 F. Supp. 3d 985, 1001 (D. Minn. 2014) ("Rule 12(b)(6) 'authorizes a court to dismiss a claim on the basis of a dispositive issue of law.'" (quoting *Neitzke v. Williams*, 490 U.S. 319, 326 (1989)); *Booker v. City of Saint Paul*, 762 F.3d 730, 733-34 (8th Cir. 2014) (summary judgment for claims raising constitutional challenges is appropriate only where "there are no genuine issues of material fact . . . and the moving party is entitled to judgment as a matter of law").

## I. The Harassment Statute Does Not Violate The First Amendment As Applied To Plaintiff's Conduct.

The right to speak under the First Amendment "is not unlimited" and may be subjected to permissible regulations. *See E. Coast Test Prep LLC v. Allnurses.com, Inc.*, 167 F. Supp. 3d 1018, 1024 (D. Minn. 2016). Plaintiff's as-applied First Amendment claim[2] fails as a matter of law because it flies in the face of this well-established legal principle. First, the Eighth Circuit has not recognized a First Amendment right, much less an absolute one, to engage in the filming activities Plaintiff describes. Second, to the extent filming is subject to First Amendment protection, the Harassment Statute is a permissible regulation of conduct that has, at most, an incidental burden on protected speech or expression. Finally, even if the Court construes the restriction on following, monitoring, or pursuing another as regulating protected speech, the Harassment Statute is

[2] Plaintiff purports to assert a facial challenge to the Harassment Statute based on her recording activities. (*See, e.g.*, Dkt. No. 1 ¶ 79 (alleging the Harassment Statute "facially and as applied to Plaintiff Ness's expressive activity as set forth in this Complaint, violates the First Amendment").) To succeed on a facial challenge, however, Plaintiff would need to establish "that no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep." *Phelps-Roper v. Ricketts*, 867 F.3d 883, 892-93 (8th Cir. 2017). Here, Plaintiff does not even attempt to dispute that the Harassment Statute can be applied constitutionally in certain circumstances. *See, e.g.*, *State v. Hormann*, 805 N.W.2d 883 (Minn. Ct. App. 2011) (affirming conviction under Harassment Statute where defendant monitored movements of victim by installing a mobile tracking device on her car). Instead, Plaintiff's facial challenge can only properly be characterized as one based solely on overbreadth, which is addressed below. *See Phelps-Roper*, 867 F.3d at 892 ("[A statute] may also be invalidated on a facial First Amendment challenge as overbroad if a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep.").

a content-neutral regulation that is justified by Minnesota's significant governmental interest in protecting individuals from harassment and stalking.

### A. Plaintiff's Claim Fails Because There Is No Absolute First Amendment Right to Videotape and Photograph.

Plaintiff's as-applied First Amendment claim fails because it hinges entirely on her flawed argument that there is an absolute right to videotape and photograph private individuals in public places. Plaintiff asserts that because "filming is protected by the First Amendment" her activities are "beyond the reach" of the Harassment Statute. (Dkt. No. 79 at 15.) As this Court has already explained in denying Plaintiff's motion for a preliminary injunction, the Eighth Circuit has not "fully recognize[d] recording as protected by the First Amendment." (Dkt. No. 53 at 9 (citing *Kushner v. Buhta*, Civ. No. 16-2646, 2018 WL 1866033, at *9 (D. Minn. Apr. 18, 2018), *aff'd*, 771 F. App'x 714, 715 (8th Cir. June 13, 2019); *Johnson v. McCarver*, 942 F.3d 405, 414 (8th Cir. 2019) (Kelly, J., dissenting in part)). The Eighth Circuit has not even recognized "that the First Amendment protects the right to record police officers in public," *Johnson*, 942 F.3d at 414 (Kelly, J., dissenting), a much more limited First Amendment right than the one Plaintiff asks the Court to recognize here. And the Eighth Circuit has certainly never endorsed a blanket protection on all recording activities, as evidenced by case law upholding restrictions on recording against First Amendment challenges. *See, e.g.*, *Rice v. Kempker*, 374 F.3d 675, 678 (8th Cir. 2004) (holding that "the First Amendment does not protect the use of video cameras or any other cameras . . . in the execution chamber").

Plaintiff primarily relies on two Eighth Circuit cases, but neither supports her argument that the Eighth Circuit has recognized a broad First Amendment right to record. First, Plaintiff claims that the Eighth Circuit "recently affirmed" the clearly established right to "film[] police officers in a limited or nonpublic forum or while they are performing their duties." (Dkt. No. 79 at 13 (citing *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020).) But *Chestnut* had nothing to do with filming. In *Chestnut* the court found a clearly established right to "***watch***[ a] police officer perform traffic stops." 947 F.3d at 1087 (emphasis added). In passing, the court cited cases from other jurisdictions regarding recording of police activity, *see id.* at 1090-91, but reached no conclusions regarding such a right.

Second, Plaintiff argues that *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019) recognized that Plaintiff's "filming activity" is protected by the First Amendment. (Dkt. No. 79 at 13.) *Telescope Media* did not, however, recognize general First Amendment protection for all recordings. Instead, the Eighth Circuit found that the at-issue wedding videos were speech because they served as a "medium for the communication of ideas" of the creators. 936 F.3d at 751. In determining that the videos were protected speech, the Eighth Circuit explained that the creators "will exercise substantial editorial control and judgment . . . including making decisions about the footage and dialogue to include, the order in which to present content, and whether to set parts of the film to music." *Id.* Importantly, the court expressly distinguished these videos from precisely the type of recording Plaintiff claims she wants to engage in, explaining that the videos were protected because they "will ***not just be simple***

***recordings***, the product of planting a video camera at the end of the aisle and pressing record." *Id.* (emphasis added).

The cases Plaintiff relies upon from other jurisdictions are equally inapposite. (*See* Dkt. No. 79 at 14.) As an initial matter, most of these cases held only that the First Amendment protects a right to record police officers performing their duties in public places. *See, e.g.*, *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005). Plaintiff has not cited a single case finding an absolute First Amendment right to record private individuals. And Plaintiff never explains how the rationale from these cases—recognizing a narrow First Amendment right associated with the recording of law enforcement officials performing their duties in public places—applies to her recording of private individuals attending mosque and school. Indeed, one of the cases cited by Plaintiff found that the defendants were entitled to qualified immunity with respect to an arrest because the law was not settled regarding the existence of First Amendment protection for recording conversations "among *private* citizens on public streets." (*See* Dkt. No. 79 at 14 (citing *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).)

More fundamentally, none of the cases Plaintiff relies upon—even those that recognize First Amendment protection for certain recording activities—support the proposition that filming is categorically "beyond the reach" of state statutes. (*See* Dkt. No. 53 at 9 (rejecting Plaintiff's argument that "if filming is fully protected by the First

Amendment, then there are no circumstances under which a restriction on filming would be constitutional").) In other words, even where First Amendment protections have been afforded to certain recording or filming activities, courts have uniformly found that such activities may be constitutionally subject to various restrictions and limitations. *See, e.g.*, *Fields*, 862 F.3d at 360 ("The right to record police is not absolute."); *Smith*, 212 F.3d at 1333 (finding plaintiffs "had a First Amendment right, ***subject to reasonable time, manner and place restrictions***, to photograph or videotape police conduct" (emphasis added)); *Silberberg v. Bd. of Elections of N.Y.*, 272 F. Supp. 3d 454, 479 (S.D.N.Y. 2017) (upholding total ban on photography in polling sites). 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.

**B. The Harassment Statute Is a Constitutional Regulation of Conduct.**

Even if the Eighth Circuit would conclude that Plaintiff's recording activities are generally subject to First Amendment protection, the Harassment Statute still passes constitutional muster because it regulates conduct, and any incidental burden on speech is permissible.

"[W]hen speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Jacobsen v. Howard*, 109 F.3d 1268, 1275 (8th Cir. 1997). At the preliminary injunction stage, the Court concluded that Plaintiff had not carried her burden of showing that "the collection

of information through filming is itself expressive conduct, or, if it is a mixture of expressive and nonexpressive conduct, whether the burden imposed by the State Harassment Statute is incidental." (Dkt. No. 53 at 11.) Plaintiff advances the same arguments now. Because these arguments were insufficient to even demonstrate a ***likelihood*** of success on the merits, they certainly fail to demonstrate entitlement to judgment as a matter of law.

**1. Following, Monitoring, or Pursuing Another Person Is Nonexpressive Conduct that Is Not Entitled to First Amendment Protection.**

"[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Instead, only conduct that is "inherently expressive" is entitled to First Amendment protection. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). To determine whether particular conduct is inherently expressive such that it is protected by the First Amendment, courts look to whether the conduct shows an "intent to convey a particularized message" and whether "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Nonexpressive conduct does not acquire First Amendment protection simply because it is combined with another activity that involves protected speech. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 297-98 (1984) (act of camping did not become First Amendment protected speech when demonstrators camped as part of a political demonstration); *Rumsfeld*, 547

U.S. at 66 ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it."). It is Plaintiff's burden, as the person "desiring to engage in assertedly expressive conduct[,] to demonstrate that the First Amendment even applies." *Clark*, 468 U.S. at 295 n.5.

Here, Plaintiff cannot meet that burden because the Harassment Statute is "limited to the conduct of stalking, following, [or] monitoring." *State v. Stockwell*, 770 N.W.2d 533, 539 (Minn. Ct. App. 2009) (explaining an earlier version of the Harassment Statute "focus[ed] ***on conduct***" (emphasis added)); *see also United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) (concluding that statute criminalizing interstate stalking "is directed toward course[s] of conduct, not speech, and the conduct it proscribes is not necessarily associated with speech"). The Harassment Statute has been used to convict defendants for nonexpressive conduct such as following a victim in her car, *see, e.g.*, *Corrigan v. State*, No. A19-0019, 2019 WL 4010308, at *4 (Minn. Ct. App. Aug. 26, 2019), watching and monitoring a victim to determine when she came and left her home, *Fordyce v. State*, No. A19-0648, 2020 WL 54280, at *3 (Minn. Ct. App. Jan. 6, 2020), *review denied* (Mar. 17, 2020), and following a victim throughout the day from her parent's home, to a park, to a public intersection, *State v. Closemore*, No. A13-0806, 2014 WL 4175792, at *7 (Minn. Ct. App. Aug. 25, 2014).

It is irrelevant to the First Amendment analysis that some forms of stalking, following, or monitoring could involve some speech. *See R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against

speech but against conduct."). The Supreme Court has explained, for example, that it is constitutional for Congress to "prohibit employers from discriminating in hiring on the basis of race" even though such a prohibition "will require an employer to take down a sign reading 'White Applicants Only.'" *See Rumsfeld*, 547 U.S. at 62. That the prohibition on discrimination in hiring might incidentally impact some speech "hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Id.* Here too, the state of Minnesota is allowed to regulate stalking conduct, even if some defendants may choose to follow, pursue, or monitor their victims in ways that involve some speech, because the Harassment Statute is aimed at their nonexpressive conduct. *See, e.g.*, *R.A.V.*, 505 U.S. at 385 ("We have long held . . . that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.").

Plaintiff again relies on *Telescope Media Group*, arguing that it "explicitly rejected" a distinction between conduct and speech in the context of videotaping or recording. (Dkt. No. 79 at 14.) Again, *Telescope Media* is distinguishable. In that case, the state argued that it could force plaintiff to choose between making wedding videos of same-sex marriages or not making any wedding videos at all. The state argued it was neutrally regulating "commercial conduct and economic activity," but the court rejected that argument because "[t]he 'commercial conduct' and 'economic activity' to which Minnesota refers is the making of the videos themselves, which . . . are speech." 936

F.3d at 756. The court distinguished this from laws that "actually *do* target conduct" such as "a public-accommodation law requiring a restaurant to serve people of all races, genders, and sexual orientations" that would "have the incidental effect of requiring servers to speak to customers to take their orders." *Id.* at 757. The court explained that such laws were permissible under the First Amendment because "the relevant laws target the *activities* of . . . providing food" which does not "typically constitute[] speech." *Id.* Thus, the relevant focal point, as set forth in *Telescope Media* is not the activity the plaintiff is attempting to undertake, but rather, what activity the state is regulating. Here, the state is plainly regulating the activity of harassing through following, monitoring, or pursuing—conduct which typically does not constitute speech.

**2. Any Incidental Burden the Harassment Statute Places on Protected Speech Is Justified by an Important Governmental Interest.**

Because Plaintiff rests on her assertion that all recording activities are absolutely protected speech, she does not even attempt to argue that any incidental regulations of speech occasioned by the Harassment Statute are unconstitutional. Incidental regulations of speech are constitutional (1) if the regulation is within the constitutional power of the government, (2) if the regulation furthers an important or substantial governmental interest, (3) if the governmental interest is unrelated to the suppression of free expression, and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *United States v. Petrovic*, 701 F.3d 849, 854 (8th Cir. 2012). The Harassment Statute satisfies this standard and Plaintiff offers no argument to the contrary.

First, enactment of criminal laws is within constitutional powers afforded to the Minnesota legislature. *See State v. Lindsey*, 632 N.W.2d 652, 658 (Minn. 2001) ("The legislature has the power to declare what acts are criminal and to establish the punishment for those acts."); *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753, 755 (Minn. 1992).

Second, the Harassment Statute furthers Minnesota's important interest in protecting individuals from harassment and stalking that threatens their safety and privacy. *See State v. Orsello*, 554 N.W.2d 70, 72 (Minn. 1996) (noting Minnesota enacted anti-stalking legislation "amid publicity surrounding incidents of stalking behavior which resulted in murder" and was designed to criminalize conduct "directed at a specific person that actually alarms, annoys, or harasses that person"), *superseded by statute on other grounds as stated in State v. Wilson*, 830 N.W.2d 849 (Minn. 2013); *see also State v. Whitesell*, 13 P.3d 887, 901-03 (Kan. 2000) (finding similar statute constitutional and collecting cases from across jurisdictions finding that stalking statutes "serve[] significant and substantial state interests in providing law enforcement officials with a means of intervention in potentially dangerous situations before actual violence occurs, and it enables citizens to protect themselves from recurring intimidation, fear-provoking conduct and physical violence").

Third, the plain language of the Harassment Statute indicates that it is unrelated to the suppression of free expression. As set forth above, the Harassment Statute on its face is directed at conduct—following, monitoring, or pursuing another—not speech or other expressive conduct. *See United States v. Tebeau*, 713 F.3d 955, 962 (8th Cir. 2013)

(concluding statute that regulated drug use on its face was "unrelated to any incidental impact the law has on music festivals" that might implicate speech or expressive conduct); *United States v. Dinwiddie*, 76 F.3d 913, 924 (8th Cir. 1996) (finding statute constitutional that regulated "only uses of force, threats of force, and physical obstruction").

Finally, any incidental restriction on Plaintiff's alleged expressive activity—recording the activities of private individuals—is no greater than is essential to serve the state's interest in protecting individuals from harassment. Where, as here a regulation "is unrelated to the suppression of expression, [t]he government generally has a freer hand in restricting expressive conduct." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 299 (2000). Thus, a regulation is permissible so long as it does not "significantly compromise" First Amendment rights. *See Tebeau*, 713 F.3d at 962 (finding statute constitutional where prohibition on making premises available for drug use "imposes only an incidental restriction on music festival hosts"). Here, the only punishment Plaintiff could face under the Harassment Statute would be for her nonexpressive conduct of following, monitoring, or pursuing a victim. The Harassment Statute is appropriately narrow because it does not significantly compromise Plaintiff's ability to engage in speech or expressive conduct. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571 (1991) (finding statute constitutional that applied only to "noncommunicative element" of behavior).

### C. In the Alternative, the Harassment Statute Is a Content-Neutral Regulation that Advances the Government's Important Interest in Personal Safety.

Even if the Court concludes that the Harassment Statute regulates speech and expressive conduct, the Harassment Statute still does not violate Plaintiff's First Amendment rights because it is a content-neutral regulation that satisfies intermediate scrutiny.

#### 1. The Harassment Statute Is Content Neutral.

The level of scrutiny applied to a regulation of speech is determined by whether the regulation is content based or content neutral. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). "In determining whether a statute is content based or content neutral, [t]he plain meaning of the text controls." *Phelps-Roper v. Koster*, 713 F.3d 942, 950 (8th Cir. 2013). A statute is content neutral if it regulates people "without regard to speech on any particular topic or viewpoint." *Id.* (finding funeral protest law content neutral because it limited when and where picketing and protest activities could occur regardless of content or viewpoint). "The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message the speech conveys." *Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591, 596 (8th Cir. 2005).

The Harassment Statute is content neutral because 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. *See Dinwiddie*, 76 F.3d at 923 (finding statute content neutral because it applied to "anyone who blockades a clinic to prevent a woman from getting an abortion, regardless of the message expressed by the blockade"). In other words, the Harassment Statute permissibly regulates only the ***manner*** in which Plaintiff speaks (she cannot do so in a way that follows, monitors, or pursues another), not what she chooses to say. *See, e.g.*, *Rew v. Bergstrom*, 845 N.W.2d 764, 776-77 (Minn. 2014) (concluding order for protection did not violate First Amendment because it was based on "unlawful conduct" not "the content of any particular message that the person wishes to express . . . it prohibits him from contacting Rew or the minor children regardless of the content of his speech"); *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't*, 533 F.3d 780, 790-91 (9th Cir. 2008) (noting that speech may be enjoined "if its *manner* caused disruption to the clinic's services, rather than if its *content* upsets the patients or staff").

Plaintiff argues that the Harassment Statute does regulate the content of her speech because it operates as a "heckler's veto." (*See, e.g.*, Dkt. No. 70 at 23-24.) Specifically, Plaintiff contends that the Harassment Statute impermissibly restricts her speech based on the listener's reaction to that speech. "The 'heckler's veto' involves situations in which the government attempts to ban protected speech because it might provoke a violent response." *Roe v. Crawford*, 514 F.3d 789, 796 (8th Cir. 2008); *see Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) ("[I]t is firmly settled that under our Constitution the

public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, . . . or simply because bystanders object to peaceful and orderly demonstrations.").

Plaintiff's reliance on the heckler's veto doctrine is misplaced, however, because whether an individual feels frightened or threatened while they are being monitored by someone with a recording device has nothing to do with speech or any message the recording party may intend to communicate. The cases relied upon by Plaintiff struck down statutes finding they violated the First Amendment where reactions to a speaker's ***message*** provided the basis for regulating speech, as opposed to reactions to a speaker's conduct. *See, e.g.*, *Ctr. for Bio-Ethical Reform*, 533 F.3d at 788 (explaining regulation was not content neutral where it prohibited plaintiff from driving his truck near school grounds that displayed pictures of aborted fetuses based on the reactions of students "to the *message* displayed on Plaintiffs' truck"); *Lewis v. Wilson*, 253 F.3d 1077, 1081-82 (8th Cir. 2001) (state could not prohibit individual from using vanity plate "ARYAN-1" on the basis that the plate could incite road rage because such a regulation would be impermissibly based on the viewer's reaction to the content of the individual's expressive message). In contrast, the Harassment Statute bears no relationship to any message Plaintiff wishes to communicate—it focuses on the victim's reaction to the conduct of being followed, monitored, or pursued.

**2. The Harassment Statute Satisfies Intermediate Scrutiny.**

Content neutral regulations "are tested under intermediate scrutiny, which questions whether the regulations are narrowly tailored to serve a significant government

interest and allow for ample alternative channels for communication." *Phelps-Roper*, 713 F.3d at 950. The Harassment Statute satisfies this test.

First, as set forth above, the Harassment Statute serves the significant government interest of protecting individuals from harassment and stalking that threatens their safety and privacy. *See Orsello*, 554 N.W.2d at 72; *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 692 (8th Cir. 2012) (recognizing significant government interest in protecting the privacy of individuals). Plaintiff does not even attempt to argue that this is not a significant government interest sufficient to satisfy intermediate scrutiny.

Second, the Harassment Statute is narrowly tailored. "The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial interest that would be achieved less effectively absent the regulation and the means chosen does not burden substantially more speech than is necessary to further the [state's] content-neutral interest." *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1219 (8th Cir. 1998). Where "a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Fraternal Order of Police, N.D. State Lodge*, 431 F.3d at 597-98. "[T]he government's choice among the means to accomplish its end is entitled to deference." *Ass'n of Cmty. Orgs. for Reform Now v. St. Louis Cnty.*, 930 F.2d 591, 595 (8th Cir. 1991).

Here, the state's interest in protecting individuals from harassment "is served in a direct and effective way" by prohibiting individuals from following, monitoring, or pursuing another. *See Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). The

Harassment Statute does not apply broadly to all following, monitoring, or pursuing, but is instead narrowly limited to protecting victims against such conduct where the individual engaging in the conduct knows or has reason to know it will cause the victim to feel frightened or threatened. The reach of the Harassment Statute is necessary because the state's interest would be achieved far less effectively if the mere presence of a video camera or recording device would prevent the state from prosecuting harassment crimes and protecting victims. For example, under Plaintiff's argument an individual could follow a victim closely in a car and track the individual's movements in a frightening manner—but so long as the individual was recording the events on her phone, the state would have no recourse to intervene and protect the victim. Thus, the Harassment Statute properly promotes Minnesota's interest in preventing harassment and stalking that could not be achieved absent the statute. *See Krantz*, 160 F.3d at 1219.

Finally, the Harassment Statute leaves open ample alternative channels for Plaintiff to speak. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905, 918 (8th Cir. 2017). Thus, "[t]he requirement that ample alternative channels exist does not imply that alternative channels must be perfect substitutes for those channels denied to plaintiffs by the regulation at hand; indeed, were [courts] to interpret the requirement in this way, no alternative channel could ever be deemed ample." *Id.*

Because the Harassment Statute regulates only the conduct of following, monitoring, or pursuing another in a manner that causes the victim to feel frightened,

threatened, oppressed, persecuted, or intimidated, it leaves open countless alternative channels for Plaintiff to communicate "and report the neighborhood concerns regarding DAF and Success Academy and the City's malfeasance related to these concerns." (Dkt. No. 79 at 4.) For example, in *United States v. Dinwiddie*, 76 F.3d 913, 924 (8th Cir. 1996) the court found that a statute regulating the use of force, threats of force, and physical obstruction outside of abortion clinics left open "ample alternative means for communication" through which opponents of abortion could speak. Here too, Plaintiff is free to communicate her concerns regarding the Dar al-Farooq mosque and the Success Academy school through numerous channels. She can post information on the internet, discuss her concerns with neighbors, write letters to elected officials, or display signs regarding her concerns. And she can even collect information provided she does so without monitoring, following, or pursuing any individuals in a manner she knows or has reason to know will cause them to feel frightened or threatened. *See Pehlps-Roper v. Koster*, 713 F.3d 942, 954 (8th Cir. 2013) (finding statute constitutional where "[s]peakers retain great latitude to express any viewpoint or discuss any topic at nearly any location and nearly any time in the state of Missouri").

## II. Plaintiff's Facial Overbreadth Challenge Fails As A Matter Of Law.

The overbreadth doctrine "permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). Because striking down a statute that also has legitimate applications is a drastic remedy, invalidation on account of overbreadth is

a remedy that should be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *see also State v. Crawley*, 819 N.W.2d 94, 105 (Minn. 2012) (invalidating a statute "is strong medicine that this court does not hastily prescribe"). "Fundamentally, [a] statute should only be overturned as facially overbroad when the statute's overbreadth is substantial," *Dunham v. Roer*, 708 N.W.2d 552, 565 (Minn. Ct. App. 2006), and when "the words of the law simply leave no room for a narrowing construction," *State v. Hensel*, 901 N.W.2d 166, 175 (Minn. 2017). Plaintiff, as the party challenging the Harassment Statute, bears the burden of establishing overbreadth. *See Virginia v. Hicks*, 539 U.S. 113, 122 (2003).

Plaintiff cannot meet her burden to justify the exercise of this drastic "last resort" remedy for at least two reasons. First, Plaintiff lacks standing to bring an overbreadth challenge. Second, because the Harassment Statute does not target expressive conduct and any impact on speech is minimal in comparison to its legitimate reach, the Harassment Statute cannot be deemed unconstitutionally overbroad.

**A. Plaintiff Lacks Standing to Bring a Facial Overbreadth Challenge.**

"For a federal court to entertain a facial challenge pursuant to the First Amendment overbreadth doctrine, [t]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the [c]ourt." *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905, 912 (8th Cir. 2017). To establish standing to bring such a challenge, "the party before the court must identify a significant difference between his claim that the statute is [facially] invalid on overbreadth grounds, and his claim that it is unconstitutional as

applied to his particular activity." *Id.*; *see also Van Bergen v. Minnesota*, 59 F.3d 1541, 1549 (8th Cir. 1995). In other words, "[i]t is inappropriate to entertain a facial overbreadth challenge when the plaintiff fails to adduce any evidence that third parties will be affected in any manner differently from herself." *Josephine Havlak Photographer*, 864 F.3d at 912.

Here, Plaintiff cannot establish standing to bring a facial overbreadth challenge because she has not identified any difference between her claim that the Harassment Statute is facially invalid on overbreadth grounds and her claim that it is unconstitutional as applied to her particular filming activities. In fact, Plaintiff's overbreadth challenge is identical to her as-applied challenge. Specifically, Plaintiff claims that the Harassment Statute is overbroad because "it prohibits filming (*i.e.*, using technology, such as a smart phone or video camera, to 'monitor') someone in public." (Dkt. No. 79 at 27.) This is precisely the reason Plaintiff claims that the Harassment Statute is unconstitutional as applied to her own filming activity. (Dkt. No. 1 ¶ 79.) Because Plaintiff has not identified how third parties would be affected by the Harassment Statute in a manner that would be both unconstitutionally overbroad and different than how the statute impacts her, she lacks standing to bring a facial overbreadth claim. *See Hill v. Colorado*, 530 U.S. 703, 731-32 (2000) (rejecting overbreadth challenge where "[p]etitioners have not persuaded us that the impact of the statute on the conduct of other speakers will differ from its impact on their own sidewalk counseling"); *Josephine Havlak Photographer*, 864 F.3d at 912 (refusing to consider plaintiff's overbreadth challenge because "Havlak

presents no allegedly unconstitutional scenarios affected by the Village ordinance beyond her own commercial photography").

**B. The Harassment Statute Is Not Unconstitutionally Overbroad.**

An overbreadth challenge like Plaintiff's will "[r]arely . . . succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012). Where, as here, a statute is directed "toward 'course[s] of conduct,' not speech" and "the conduct it proscribes is not 'necessarily associated with speech'" courts generally conclude such statutes are not unconstitutionally overbroad in violation of the First Amendment. *See id.* (upholding interstate stalking statute and rejecting overbreadth challenge).

The Minnesota Court of Appeals' decision in *Stockwell* is instructive. In *Stockwell*, the court rejected an overbreadth challenge to a prior version of the Harassment Statute on grounds that are equally applicable here. 770 N.W.2d at 539. The court concluded that the statute properly balanced "the security and privacy rights of the victim against the harasser's right to communicate" based on the presence of three statutory features. First, "[b]ecause the statutory provision is specific as to the forms of conduct proscribed." *Id.* (explaining "the statute focus[es] on conduct" and "the stalking provision is limited to the conduct of stalking, following, monitoring, or pursuing"). Second, "because [the statute] requires that the actor knows [or has reason to know] her conduct will cause fear and causes that reaction." *Id.* Third, "because [the statute] is subject to a limiting construction" via a savings clause that provided the statute "does not

impair the right of any individual or group to engage in speech protected by the federal Constitution, the state Constitution, or federal or state law." *Id.* All of those features are present in the current version of the Harassment Statute that Plaintiff challenges: it punishes conduct of following, monitoring, or pursuing; it contains a *mens rea* element that requires an individual to know or have reason to know her conduct will cause the victim to feel frightened or threatened; and it contains a savings clause identical to that approved by the court in *Stockwell*.

Plaintiff ignores *Stockwell*, which squarely addressed the constitutionality of a virtually identical statute, and instead relies on decisions from Minnesota courts addressing statutes that expressly regulated speech. For example, Plaintiff relies on *Matter of Welfare of A.J.B.*, 929 N.W.2d 840, 849 (Minn. 2019) where the court struck down a prohibition on stalking by repeatedly mailing or delivering "letters, telegrams, messages, packages . . . or any communication made through any available technologies or other objections." The court found that the statute specifically regulated speech and expressive conduct noting that "[f]our of the six items identified in the statute (letters, telegrams, messages, any communications) are purely expressive and the other two items (packages and other objects) may be expressive." *Id.* at 849. Because the statute was "broad in its reach" and "primarily focused on either speech or expressive activity" the court concluded it was unconstitutionally overbroad. *Id.* at 853. The Harassment Statute is readily distinguishable from the statute considered in *A.J.B.* because the Harassment Statute is primarily focused on conduct, not speech. The 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 speech or expressive conduct.

Even if the Harassment Statute does restrict some amount of protected speech, that still does not render the statute unconstitutionally broad. "Rather, such a restriction dictates that [the court] determine whether the restriction is substantially overbroad in relation to the statute's plainly legitimate sweep." *State v. Washington-Davis*, 881 N.W.2d 531, 539 (Minn. 2016). To be unconstitutional, a statute must "prohibit[] a substantial amount of constitutionally protected speech." *Id.* In the absence of a pattern of unconstitutional applications, courts decline to find statutes unconstitutionally overbroad. *See, e.g.*, *Petrovic*, 701 F.3d at 856 ("Because a substantial number of the statute's applications will not be unconstitutional, we decline to use the strong medicine of overbreadth to invalidate the entire [statute].").

Here, as explained above, the Harassment Statute has routinely been applied to conduct unrelated to speech or expression, such as following a victim in her car, *see, e.g.*, *Corrigan*, 2019 WL 4010308 at *4, watching and monitoring a victim to determine when she came and left her home, *Fordyce*, 2020 WL 54280 at *3, and following a victim throughout the day, *Closemore*, 2014 WL 4175792 at *7. Plaintiff has not and cannot demonstrate that an incidental impact on speech is so substantial that it warrants invalidation of this entire, and plainly legitimate, sweep of the Harassment Statute. *See Dunham*, 708 N.W.2d at 567 (concluding any incidental impact on protected speech did not render statute substantially overbroad because harassment laws "place carefully limited restraints on individuals whose conduct . . . causes a substantial adverse effect on

another's safety, security or privacy"). Accordingly, Plaintiff's overbreadth challenge to the Harassment Statute should be rejected.

## III. Plaintiff's Fourteenth Amendment Claim Fails Because The Harassment Statute Is Not Unconstitutionally Vague.

A statute is unconstitutionally vague only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see also Dunham v. Roer*, 708 N.W.2d 552, 568 (Minn. Ct. App. 2006). The touchstone for the fair warning requirement is "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997). It is not necessary, however "that there be mathematical precision in the statement of the conduct required or prohibited." *State v. Simmons*, 158 N.W.2d 209, 211 (Minn. 1968). Simply because a criminal statute could have been written more precisely, does not mean the statute as written is unconstitutionally vague. *See United States v. Powell*, 423 U.S. 87, 94 (1975). The void-for-vagueness doctrine "is based in fairness and is not designed to 'convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.'" *State v. Stockwell*, 770 N.W.2d 533, 540 (Minn. Ct. App. 2009) (quoting *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)).

Plaintiff claims that the Harassment Statute is unconstitutionally vague because whether an act is criminal under the statute is "based solely on whether a person is annoyed by or objects to Plaintiff exercising her First Amendment rights." (Dkt. No. 79 at 21.) Plaintiff's argument is contrary to Minnesota law and misinterprets the plain language of the statute.

As an initial matter, the Minnesota Court of Appeals previously considered and rejected a constitutional vagueness challenge to a prior version of the Harassment Statute that is substantively identical to the version Plaintiff challenges here. In *State v. Stockwell*, a criminal defendant challenged her conviction under a previous version of the Harassment Statute that criminalized stalking, following, monitoring, or pursuing another "whether in person or through technological or other means" and where the actor "knows or has reason to know [the conduct] would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated." 770 N.W.2d at 537. The court concluded that the statute "provides sufficient clarity such that an ordinary person could understand what conduct is prohibited." *Id.* at 541. In particular, the court explained the statute contained the requisite specificity because it required an element of intent – that the actor engaged in intentional 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 that the statute specifically excluded from its reach "protected speech." *Id.*

As Plaintiff herself emphasizes "[d]ecisions from the Minnesota Court of appeals are particularly relevant" and federal courts "*must follow such decisions* when they are

the best evidence of Minnesota law." (Dkt. No. 79 at 24 (quoting *Baribeau v. City of Minneapolis*, 596 F.3d 465, 475 (8th Cir. 2010)).) Because the Minnesota Court of Appeals has already concluded the language of the Harassment Statute is not unconstitutionally vague, this Court should reach the same conclusion here. *See Corrigan v. City of Savage*, Civ. No. 18-2257, 2019 WL 2030002, at *10 n.12 ("To the extent he is arguing that the statute is vague, the Minnesota Court of Appeals has already determined that it is not. . . . This Court agrees. Therefore, Corrigan's due process argument fails."), *report and recommendation adopted*, 2019 WL 1487897 (D. Minn. Apr. 4, 2019), *aff'd*, 786 F. App'x 614 (8th Cir. 2019).

Furthermore, Plaintiff's argument that the Harassment Statute is vague because violation of the statute depends "solely on whether a person is annoyed by or objects to Plaintiff exercising her First Amendment right" is simply incorrect. Although the Harassment Statute does contain the subjective requirement that a victim actually feel frightened or threatened, it also contains a *mens rea* requirement that the actor "knows or has reason to know" that his or her conduct would cause the victim under the circumstances to feel frightened or threatened. This negligence-based *mens rea* requirement uses an objective reasonable person standard. *See W.J.L. v. Bugge*, 573 N.W.2d 677, 681 (Minn. 1998) (applying objective "reasonable person standard" where statute required individual to know or have reason to know); *Florenzano v. Olson*, 387 N.W.2d 168, 174 (Minn. 1986) (negligence is proved by "measuring one's conduct against an objective standard of reasonable care").

Thus, contrary to Plaintiff's unsupported assertion, it is not enough for a conviction under the Harassment Statute that a victim feel "annoyed." In order for conduct to be criminalized under the Harassment Statute it must also be conduct that an objectively reasonable person knew or should have known would cause the victim under the circumstances to feel frightened or threatened. 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. *See, e.g.*, *Stockwell*, 770 N.W.2d at 539 (finding prior version of Harassment Statute constitutional because "the statute requires that the offender both 'knows or has reason to know [the conduct] will cause the victim . . . to feel frightened, threatened, oppressed, persecuted, or intimidated' and actually causes this reaction"); *Smith v. Martens*, 106 P.3d 28, 36 (Kan. 2005) (finding similar statute constitutional because harassment did not depend solely on a determination that the victim was seriously alarmed, annoyed, or tormented "but also upon the additional objective standard of whether a reasonable person would fear for his or her safety"); *Grayned v. City of Rockford*, 408 U.S. 104, 113-14 (1972) (finding anti-noise ordinance constitutional because it "does not permit punishment for expression of an unpopular point of view" and did not allow for "subjective or discriminatory enforcement" because it required "demonstrated interference with school activities"); *O'Brien v. Welty*, 818 F.3d 920, 930-31 (9th Cir. 2016) (finding the fact that the terms "intimidation" and "harassment" "may in some cases entail interpretation is not enough to sustain an overbreadth or vagueness challenge"). Here, the Court should reject Plaintiff's vagueness challenge under the Fourteenth Amendment because "it is clear

what the [Harassment Statute] as a whole prohibits." *See Adam & Eve Jonesboro, LLC v. Perrin*, 933 F.3d 951, 958-59 (8th Cir. 2019).

## CONCLUSION

For all of the foregoing reasons, and the reasons set forth in Defendants' motions to dismiss, the Attorney General respectfully requests that the Court hold that the Harassment Statute is constitutional and dismiss Plaintiff's claims in their entirety and with prejudice.

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Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

s/ **Liz Kramer**
LIZ KRAMER (#0325089)
Solicitor General
CICELY R. MILTICH (#0392902)
Assistant Attorney General

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1010 (Voice)
(651) 282-5832 (Fax)
liz.kramer@ag.state.mn.us
cicely.miltich@ag.state.mn.us

ATTORNEY FOR KEITH ELLISON, ATTORNEY GENERAL FOR THE STATE OF MINNESOTA