Case No. 20-2571

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Sally Ness,

Plaintiff–Appellant,

v.

City of Bloomington; Michael O. Freeman, in his official capacity as Hennepin County Attorney; Troy Meyer, individually and in his official capacity as a police officer, City of Bloomington; Mike Roepke, individually and in his official capacity as a police officer, City of Bloomington,

Defendants–Appellees,

Attorney General's Office for the State of Minnesota,

Intervenor below–Appellee.

Appeal from the United States District Court
for the District of Minnesota
District Court Civil No. 19-2882 ADM/DTS
District Court Judge Ann D. Montgomery

BRIEF OF DEFENDANTS–APPELLEES CITY OF BLOOMINGTON, TROY MEYER, AND MIKE ROEPKE

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SUMMARY OF THE CASE

Plaintiff–Appellant Sally Ness has taken photographs or videos of others' children at play in a public park and of others' children as they arrive at a public school adjacent to the park in the City of Bloomington, Minnesota. Ness sued the City, two City police officers, and the Hennepin County Attorney, challenging the constitutionality of Minnesota's harassment statute and a local ordinance prohibiting a person in a public park from intentionally recording a child without consent. All defendants moved to dismiss Ness's claims under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). Ness moved for summary judgment. The district court granted defendants' motions and denied Ness's motion. This Court should conclude that the individual officers are entitled to qualified immunity and that Ness lacks standing to challenge the laws. If the Court reaches the merits, it should hold that the ordinance and statute do not violate the First Amendment because they satisfy intermediate scrutiny. Appellees jointly request 15 minutes for oral argument, to be divided among them as they see fit.

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STATEMENT OF THE CASE

Defendants–Appellees City of Bloomington, Sergeant Mike Roepke, and Officer Troy Meyer ("the City Defendants") ask this Court to affirm the district court's grant of their motion to dismiss Plaintiff–Appellant Sally Ness's claims and to affirm the district court's denial of Ness's motion for summary judgment. The City Defendants join in the arguments presented in the joint brief of the Minnesota Attorney General and the Hennepin County Attorney.

As a preliminary matter, the Court will notice substantive differences between (1) the facts as Ness presents them and (2) the facts as the City Defendants present them and as the district court presented them in its orders denying Ness's motion for preliminary injunction and granting the City Defendant's motion to dismiss.[1] This is because Ness relies on the allegations in her complaint (and a declaration mirroring those allegations) while ignoring objective evidence in the record. For example, Ness's characterization of her encounters with law enforcement directly contradicts

[1] *See* R-53; Add. 2–10. For purposes of citation, "Add." refers to the Addendum; "App." refers to Ness's Appendix; "S. App." refers to Appellees' Separate Appendix; and "R" refers to the district court record. For example, "R-53" refers to docket number 53.

the video and audio recordings of those encounters in several respects.[2] In determining whether to grant a Rule 12(b)(6) motion,[3] this Court considers—in addition to the allegations in the complaint—matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned.[4] *Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017); *see also Miller v. Redwood Toxicology Lab, Inc.*, 688 F.3d 928, 931 n.3

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[2] A disc containing the recordings can be found at S. App. 23. The transcripts are reprinted at App. 77–220.

[3] In addition, where (as here) a defendant moves to dismiss under Rule 12(b)(1) for lack of standing, "[t]he motion may be supported with affidavits or other documents." *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). In a factual attack on standing, "the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards." *Id.* at 729 n.6 (citation omitted); *see also Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016).

[4] Ness has not challenged the accuracy or authenticity of the materials defendants submitted to the district court in opposing Ness's motion for preliminary injunction and incorporated by reference in their briefing on their motions to dismiss and in opposition to Ness's motion for summary judgment. Nor does Ness argue in her brief to this Court that the district court improperly defined the scope of the record in ruling on the motions to dismiss.

(8th Cir. 2012). This Court should not accept Ness's inaccurate factual allegations.

A. Ness's concerns about Smith Park, Success Academy, and the Dar Al-Farooq Center.

Nearly ten years ago, in 2011, the City of Bloomington, Minnesota, approved a conditional use permit for a school, a day care, and a place of assembly at a building adjacent to a public park (Smith Park). R-39 (Exs. 15–16). The building is used by Success Academy (a public elementary school) and by the Dar Al-Farooq Center (a religious nonprofit organization). R-39 (Exs. 18–20); R-40 (Ex. 21). According to Ness, who lives near Smith Park, ever since the City approved the conditional use permit, she and other (unidentified) persons have been "concerned" about the use of the building. App. 16, 19 ¶¶ 20, 34. Among other things, Ness is concerned by what she perceives as "excessive use" of Smith Park by the children who attend Success Academy and by attendees of the Dar-Al Farooq Center. App. 19–20 ¶¶ 36, 38–39. Despite Ness's allegation that "the public's" use of the park has been impaired (*id.* ¶ 40), the students of Success Academy and persons who visit the Dar-Al Farooq Center are, like Ness, members of the public. The use agreement between the City and the owner of the building provides, among other things, for joint use of certain parking facilities, recreation facilities,

and athletic fields and courts. The use agreement does not regulate the times that anyone can use the playground equipment at Smith Park. R-39 (Ex. 9).

Ness alleges that for several years she has been documenting her concerns by videotaping and photographing perceived violations of the building's conditional use permits and the use agreement between the City and the building's owner, and that she has been posting the resulting videos and photos online for the public to view. App. 19, 21–22, 26 (¶¶ 36, 42, 47, 70, 71); *see also* App. 4–44, 46 (¶¶ 2, 6, 13, 18, 28). Her "information gathering efforts" include recording "the use of Smith Park by children associated with [the Dar Al-Farooq Center] and the Success Academy" and "students being dropped off to Success Academy and weekend school."[5] App. 26 ¶¶ 70–71.

Although Ness alleges that she is a "peaceful person" (App. 23 ¶ 55), others have taken violent action against the Dar Al-Farooq Center. On the morning of August 5, 2017, shortly before a prayer service, a pipe bomb was thrown through a window into the imam's office, where it exploded. R-40 (Exs. 25–26). In January 2019, two men pleaded guilty to various criminal

[5] By "weekend school," Ness is apparently referring to the Dar Al-Farooq Center's education programs. *See* R-39 (Ex. 20).

offenses related to the bombing, and a third man faces trial in Minnesota federal court.[6] R-40 (Ex. 25).

B. Ness's interactions with law enforcement regarding her behavior toward children and her recording activity.

Ness's complaint mentions three instances of her being "threatened" with enforcement of the harassment statute—once in August 2018, once in August 2019, and once in October 2019. *See* App. 22–26 ¶¶ 47–66.

1. Police detectives interview Ness in August 2018 in response to a report about her interactions with several unaccompanied children at a public playground.

On August 22, 2018, Bloomington Police Detective Kristin Boomer, Bloomington Police Detective Tracy Martin, and Caitlin Gokey (a Hennepin County employee) interviewed Ness about a harassment report police had received—not about Ness's filming of traffic, as she alleges, but about her interactions with several unaccompanied children.[7]

Detective Boomer introduced herself, Detective Martin, and Gokey to Ness, and explained that they wanted talk to her about a report that Ness

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[6] *United States v. Hari*, No. 18-cr-150, ECF 210 (D. Minn. Aug. 4, 2020).

[7] Detective Martin recorded this interaction. App. 64–65 (Boomer Decl. ¶¶ 4–5); App. 77–115 (transcript); S. App. 23 (Ex. 32 (audio recording)).

had been filming children in Smith Park on August 17, 2018. App. 77, 83 at 0:13–0:32; 5:11. Ness stated that she "film[s] all the time" and "take[s] pictures all the time" but on the date in question was photographing traffic in the parking lot, not children. App. 77, 82–83 at 0:32, 4:20. Ness acknowledged that she should not be posting photographs of other people's children online. App. 105 at 19:10. Ness admitted that on August 17, 2018, she approached several children who were playing on the playground and talked with them about where one of the children lived. App. 106 at 19:56.

When Ness asked Detective Boomer if it was illegal to take pictures, the detective told her that "the concern is, is that there's juveniles in these pictures . . . [a]nd there—it's not just the pictures that we were concerned about. Um, report was that you were asking the juveniles where they lived and . . . other things like that while the filming was going on." App. 87 at 7:11–7:25. Detective Boomer also stated that the concern was that the "children [were] being photographed without parental permission and the fear that was caused in the parent because of this." App. 89 at 8:30. Ness told Detective Boomer that she was not a stranger to the children or their mother (who was not present at the park during Ness's interaction with the children) because the local community knows Ness. App. 79 at 1:06; App. 90

at 9:10; App. 80 at 2:01 ("They all know I film."). Ness admitted that she had never had a conversation with the children's mother but insisted that "she knows who I am." App. 90–91 at 9:05–9:26.

Detective Martin asked Ness if, hypothetically, Ness would be comfortable with a strange adult speaking to her young children in a park while Ness was not present. App. 108 at 21:39. Ness responded: "Would I be comfortable with it? Yeah. I know I shouldn't be, but I am." *Id.* at 22:06. Detective Martin told Ness that the mother of the children Ness had approached was not comfortable with Ness's approaching the children and engaging with them without the mother's permission. App. 109 at 22:19.

Detective Boomer explained that Ness's conduct "could potentially be a felony" because "they are children. . . . Their family was afraid because of the implications of what, why an adult is asking a child where they live and photographing their child." App. 96 at 13:28. Detective Martin also told Ness that police were considering charging her with a crime because of the incident. App. 115 at 26:07. The investigation was placed on inactive status in September 2018. App. 65 ¶ 6.

2. Police officers speak to Ness in August 2019 about her monitoring of children arriving at Success Academy for the school day.

The second law-enforcement interaction that Ness references in her complaint occurred more than one year later, on August 27, 2019. App. 23 ¶ 50. Ness's claims against the individual defendants, Sergeant Mike Roepke and Officer Troy Meyer, are based solely on this incident. *See* App. 23–24 ¶¶ 50–57. On that occasion, Sergeant Roepke and Officer Meyer responded to a report that Ness was filming children as they arrived at Success Academy. App. 62 ¶ 3; App. 23 ¶¶ 51–52; *see also* App. 44 ¶ 20; App. 50–52. Sergeant Roepke approached Ness, who was on private property (with permission) across the street from Success Academy, and spoke with her.[8] Officer Meyer, who had been speaking with witnesses at the school, arrived and joined the conversation. App. 52; App. 129 at 10:12; App. 63 ¶ 4.

Sergeant Roepke told Ness why police had been called to the scene. App. 117 at 1:14. He explained that the issue was not Ness's taking videos or photographs, but whether she was doing that as a "means to intimidate . . . or to harass," which would be a problem. App. 118 at 1:50. Ness stated that

[8] Sergeant Roepke recorded this interaction. App. 63 ¶ 5; *see also* App. 117–34 (transcript); S. App. 23 (bodycam recording R-33).

she was documenting the safety of the school's pickup and drop-off area and documenting the number of tardy students.[9] App. 118–19 at 2:36–3:17. When Officer Meyer asked Ness if she was filming other schools to monitor compliance with the rules she claimed were being violated, Ness responded: "Um, why would I?" and "No, but why would I?" App. 129–30 at 10:12–10:16.

Sergeant Roepke explained that the situation was "bordering on a harassment issue . . . . Because they're concerned because you're here a lot. And they're taking it as an intimidation kind of thing." App. 126 at 7:17. He informed Ness that "if. . . this behavior type kind of continues and they're viewing it as intimidation and if you're, um, doing it to intimidate them . . . . then we're bordering on—on charges against you . . . ." *Id*. at 7:17–7:45. Sergeant Roepke told Ness it would be fine for her to take pictures for thirty seconds or so, document the issues she wanted to document, and then to "move on." App. 129 at 8:53. He advised Ness that she was "kind of going overboard on [her] oversight of all this, and it's turning into a harassment

[9] Regarding the issue of tardy students, August 27, 2019 was only the second day of the school year for Success Academy (R-40 (Ex. 29)), and Ness admitted that the school buses had arrived on time (App. 127 at 8:27).

type issue." App. 132 at 11:43. He suggested that Ness study the harassment statute to make sure she is not violating it. *Id.*

Contrary to Ness's allegation that law enforcement told her to "stop filming," the bodycam footage proves that Sergeant Roepke told Ness she was *allowed* to film, suggested that she could film what she wanted to more quickly, advised her to study the harassment statute, then left her alone to continue filming and photographing.

3. Police detectives interview Ness and another individual on October 30, 2019.

The third law-enforcement interaction that Ness references occurred on October 30, 2019, when Detective Boomer, again accompanied by Detective Martin and Gokey, interviewed Ness and another person, Larry Frost, as suspects in a criminal investigation regarding interactions with children at the Smith Park playground on September 23, 2019, during a Success Academy recess period. App. 65–66 ¶¶ 7, 10.[10]

[10] Detective Boomer recorded this interaction. App. 66 ¶¶ 11–13; *see also* App. 77–115 (transcript); S. App. 23 (R-36) (bodycam recording of entire meeting); S. App. 23 (R-37) (audio recording of Frost interview); S. App. 23 (R-38) (audio recording of Ness interview).

Detective Boomer interviewed Frost first, separately from Ness. App. 66 ¶ 10; App. 154 at 10:10-10:35. Frost identified himself as Ness's "civil attorney." App. 159 at 12:40–13:02. Frost stated that Ness was concerned about the safety of her grandchildren at Smith Park but did not want to get in trouble for taking photographs, so Frost took photographs instead. App. 162–63 at 14:29–15:37.

Detective Boomer then interviewed Ness. App. 66 ¶ 10. Regarding the September 23, 2019 incident, Ness stated that she was using her phone to make audio recordings of Frost speaking to other people at the park, not to take pictures. App. 216 at 44:06–44:08.

C. Status of criminal investigation

On November 6, 2019, Detective Boomer submitted the information from her investigation to the Hennepin County Attorney's Office for its consideration of felony harassment charges against both Ness and Frost under Minn. Stat. § 609.749, subd. 3(5). App. 66 ¶ 14; App. 227–28 ¶ 3. The Hennepin County Attorney's Office declined to bring any criminal charges against Ness for the reported conduct. App. 228 ¶ 4. The City also declined to prosecute Ness for her past conduct. App. 249 ¶ 4.

D. The Ordinance

On October 28, 2019, the City adopted an ordinance that, among other things, added the following provision ("the Ordinance") to the City's parks and playgrounds regulations: "No person shall intentionally take a photograph or otherwise record a child without the consent of the child's parent or guardian." App. 34–39.[11] The Ordinance does not apply to conduct outside the boundaries of parks or playgrounds. App. 222 (§ 5.21) (provisions in Section 5.21 apply "to all city parks"). A violation of the Ordinance is punishable as a petty misdemeanor. App. 224 (§ 5.22). The Ordinance was part of an omnibus set of amendments to the City's park regulations, many of which involve subjects having nothing to do with recording activity. R-40 (Ex. 30) (request for council action and attachments). The Ordinance was not mentioned by anyone during the October 30, 2019 meeting with law enforcement that Ness claims "confirmed [her] concerns and fears that [she] will be . . . penalized under the new City regulations." App. 25 ¶ 66; *see generally* App. 136–220 (transcript).

[11] The provision at issue was originally Section 5.21(24) but is now Section 5.21(23) due to amendments in June 2020 that did not affect its content. *Compare* App. 38, *with* S. App. 21–22.

E. Ness files suit.

In November 2019, Ness filed this suit against the City Defendants and the Hennepin County Attorney (in his official capacity). App. 11. Ness moved for a preliminary injunction, which the district court denied, holding that Ness had failed to show a likelihood of success on the merits on any of her claims. R-53 at 11. After the order denying the preliminary injunction, the Minnesota Attorney General filed a notice of intervention for the purpose of defending the constitutionality of the harassment statute. R-60. The City Defendants and the Hennepin County Attorney moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) and Federal Rule of Civil Procedure 12(b)(6). R-61; R-66. Ness moved for summary judgment. R-77. On July 23, 2020, the district court granted the motions to dismiss and denied Ness's motion for summary judgment. Add. 24. Judgment was entered on July 24, 2020 (Add. 25), and Ness filed a notice of appeal on July 29, 2020 (App. 287).

SUMMARY OF THE ARGUMENT

The Court should affirm the Rule 12 dismissal of Ness's claims. First, Ness's claims for monetary damages against the individual police officers should be dismissed under the doctrine of qualified immunity. The officers

did not violate Ness's alleged right to record—because they did not stop Ness from recording. In any event, they did not violate any clearly established constitutional right.

Second, Ness lacks standing to challenge the Ordinance (which prohibits a person, in a public park, from recording children without consent) because she has not plausibly alleged that her decision to cease her recording activity was caused by the Ordinance.

Third, Ness's facial challenge to the Ordinance fails because the law satisfies the intermediate level of scrutiny applied to time, place, and manner restrictions. The Ordinance is content-neutral because it does not make distinctions involving the substantive content or message that Ness (or anyone) conveys—it merely restricts where the recorder can be while he or she does the act of recording. The Ordinance is neither underinclusive nor overbroad because it promotes substantial government interests—such as protecting children and coordinating competing uses of the City's park space—that would be achieved less effectively without the Ordinance. And ample alternative channels are open for recorders who wish to record children without consent. As Ness acknowledges, the recorder can merely take "a step or two back" from the park and record from other public

property, such as a street or sidewalk, or from private property with permission.

Fourth, Ness's as-applied challenge to the Ordinance fails for the additional reason that the alleged motivation for a law is irrelevant to its constitutionality so long as the law is neutral on its face, as the Ordinance is here.

Fifth, Ness's constitutional challenge to the harassment statute fails.

Sixth, Ness has failed to adequately brief whether the district court erred in denying her motion for summary judgment, effectively waiving that issue.

STANDARD OF REVIEW

A defendant may move under Rule 12 to dismiss a complaint for lack of subject-matter jurisdiction if the plaintiff lacks standing to sue. Fed. R. Civ. P. 12(b)(1); *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 958 (8th Cir. 2011).

Rule 12 of the Federal Rules of Civil Procedure also provides that a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a pleading must contain "enough facts to state a claim to relief that

is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). The Court need not make unreasonable inferences or accept unrealistic assertions. *Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th Cir. 2010).

ARGUMENT

I. THE INDIVIDUAL OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY.

Ness sued two City police officers in their individual and official capacities, alleging that on August 27, 2019, they "deprived [her] of her right to freedom of speech in violation of the First Amendment." App. 27 ¶ 75. The Court should uphold the dismissal of the claims against the officers, in

their individual capacities, for money damages. *See Burnham v. Ianni*, 119 F.3d 668, 673 n.7 (8th Cir. 1997) (en banc).[12]

Qualified immunity "shields government officials from liability and the burdens of litigation in a § 1983 action unless the official's conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known." *LaCross v. City of Duluth*, 713 F.3d 1155, 1157 (8th Cir. 2013). When a defense of qualified immunity is raised in a Rule 12(b)(6) motion, the Court considers two questions—(1) whether the plaintiff has stated a plausible claim that the government official violated a constitutional or statutory right, and (2) whether that right was clearly established at the time of the alleged misconduct. *Wood v. Moss*, 572 U.S. 744, 757 (2014); *Hager v. Ark. Dep't of Health*, 735 F.3d 1009, 1013 (8th Cir. 2013). Here, the answer to both questions is *no*.

A. Ness has not plausibly alleged that the officers violated her First Amendment rights.

Ness alleges that the officers violated her alleged categorical right "to film matters of public interest." App. 28 ¶ 78. But, as is clear from the

[12] Ness does not assert due-process claims against the individual officers, App. 29–31 ¶¶ 91–105, and any other claims against them fail on the merits.

bodycam footage, the officers *did not stop Ness from recording*. Instead, Sergeant Roepke told Ness she had a "right" to film (from a private driveway with permission), asked her to consider recording the information she wanted to record more quickly, advised her to review the harassment statute, then left Ness alone to continue what she was doing. App. 118 at 1:50; App. 126 at 7:50; App, 132 at 11:43; App. 133 at 11:31. Nothing the officers did or said indicated that Ness was forbidden to film or photograph what she wanted to record.

To the extent Ness alleges that the officers caused her to curtail her recording activity out of fear that she might violate the harassment statute[13] in the future, the Court should reject that premise. The officers did not violate Ness's constitutional rights by telling Ness about the statute's existence and informing her—accurately—that the reaction of the subjects of her recording activity was relevant to whether her conduct might

[13] To the extent that Ness's claims against the individual officers are based on enforcement or potential enforcement *of the Ordinance*, those claims fail. Neither the officers nor Ness mentioned the Ordinance during their interaction—likely because (1) the City Council did not approve the Ordinance until October 2019 (App. 39) and (2) even if the Ordinance had been in effect, it would not prohibit Ness from recording from private property.

constitute "harassment." *See Horowitz v. Mason*, 681 F. App'x 238, 240–41 (4th Cir. 2017) (per curiam) (holding that deputy sheriff was entitled to qualified immunity for alleged "threat" against plaintiff that in reality "amount[ed] to nothing more than verbal notice of the lawful options that [law-enforcement officers] were considering"); *Appel v. City of St. Louis*, No. 4:05-cv-772, 2007 WL 9808053, at *12 (E.D. Mo. Aug. 15, 2007) (granting qualified immunity to a building inspector in a Fourth Amendment case because "[p]roviding a citizen with accurate information as to his rights does not invalidate his consent, even when that information is disconcerting"). As the district court acknowledged, Sergeant Roepke and Officer Meyer engaged in respectful dialogue with Ness and attempted to suggest ways that Ness could collect the information she wanted to without harassing her neighbors. R-53 at 15.

B. The alleged right was not clearly established.

Ness's failure to state a plausible claim of a constitutional violation by the officers ends this Court's inquiry for the purposes of qualified immunity. But even if the officers had arrested Ness or otherwise stopped her from recording, the contours of Ness's alleged constitutional right were not clearly established on August 27, 2019.

A right is clearly established if its "contours were sufficiently definite that any reasonable official in [the defendant's] shoes would have understood that he was violating it, meaning that existing precedent placed the statutory or constitutional question beyond debate." *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (quotations, citations, and alterations omitted). The dispositive question is "whether it would have been clear to a reasonable officer in the [defendants'] position that their conduct was unlawful in the situation they confronted." *Wood*, 572 U.S. at 758 (quotation and brackets omitted). That is, "[t]he salient question is whether the state of the law at the time of an incident provided fair warning to the defendants that their alleged conduct was unconstitutional." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quotation and alterations omitted). This exacting standard "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quotation omitted).

What Ness must show—but cannot—is that any reasonable police officer would have understood that, based on existing precedent, it was beyond legal debate that Ness was allowed to record others' children,

without any restrictions or even discouragement, if those children are in a public place. But the Court will search in vain for a case holding that the First Amendment allows for open season on the filming or photographing of others' children if those children are in a public place. Indeed, the Supreme Court has acknowledged that the First Amendment does not include "the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965). And, as of the date that Sergeant Roepke and Officer Meyer interacted with Ness, this Court had not recognized *any* First Amendment protection for recording activity—not even the recording of police officers performing their duties in public. *See Johnson v. McCarver*, 942 F.3d 405, 414 (8th Cir. Nov. 1, 2019) (Kelly, J., dissenting in part) (acknowledging that the Eighth Circuit has not decided whether there is a First Amendment right to record and photograph police officers, but urging its recognition).

Nor does this Court's decision in *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019), issued four days before Ness's interactions with the officers, place Ness's alleged right beyond debate. *Telescope Media Group* does not mean that everyone has a First Amendment right to film non-consenting private individuals. There, the panel held that two wedding videographers could not be compelled to produce videos of same-sex

weddings. *Id.* at 747. Although the panel held that the videographers' work at issue was a form of First Amendment speech, *id.* at 750, the panel did not go so far as to hold that the mere act of recording an event (as Ness was doing) was entitled to First Amendment protection.[14] To the contrary, this Court held that the wedding videos were speech because they were the end product of a creative process of which "simple recording" was but a part:

> [T]he Larsens' videos *will not just be simple recordings, the product of planting a video camera at the end of the aisle and pressing record*. Rather, they intend to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage. . . .
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> . . . .
>
> 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 media for the communication of ideas.

Id. at 751–52 (emphasis added) (quotation and citations omitted).

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[14] The *Telescope Media Group* panel did not state that the wedding videos (or any other form of speech) are entitled to *absolute* First Amendment protection.

Nor, because the wedding videos are produced as part of a consensual commercial transaction, did this Court have anything to say about the recording of private individuals without their consent.

II. NESS LACKS STANDING TO CHALLENGE THE ORDINANCE.

"Federal jurisdiction is limited by Article III of the Constitution to cases or controversies; if a plaintiff lacks standing to sue, the district court has no subject-matter jurisdiction." *ABF Freight*, 645 F.3d at 958. The question of Article III standing cannot be waived or forfeited. *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Because Ness lacks standing to sue over the constitutionality of the Ordinance, the Court should affirm the dismissal of those claims.

"Standing has three requirements: (1) an injury in fact; (2) a causal connection between the injury and the challenged law; and (3) a likelihood that a favorable decision will redress the injury." *Jones v. Jegley*, 947 F.3d 1100, 1103 (8th Cir. 2020); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). At the very least, Ness has failed to meet the second requirement.

Even if Ness has plausibly alleged an injury in fact (i.e., ceasing her recording activity), her other allegations precluded her from plausibly alleging a causal connection between the cessation of her recording and the Ordinance. Ness alleges that she ceased her recording activity after the August 27, 2019 encounter with Sergeant Roepke and Officer Meyer because she feared that she would be "arrested and/or charged with violating the

Harassment Statute." App. 24 ¶¶ 57, 59. Without ever alleging or attesting that she *resumed* filming activity, Ness also alleges that she (1) "ceased" all recording activity because of the City's October 28, 2019 adoption of the Ordinance (App. 26 ¶ 73) *and* (2) "ceased all of [her] filming activity" because of the October 30, 2019 encounter with law enforcement, which Ness alleges "confirmed" her fears that she would be prosecuted under the harassment statute (App. 25–26 ¶ 66). That is, Ness alleges that she ceased recording in August 2019 because she feared prosecution under the harassment statute—not because of the Ordinance, which would not be enacted until months later. *See St. Louis Heart Ctr., Inc. v. Nomax, Inc.*, 899 F.3d 500, 505–06 (8th Cir. 2018) (concluding that causation requirement for standing was not met).

III. NESS'S FACIAL FIRST AMENDMENT CHALLENGE TO THE ORDINANCE FAILS.

Even if Ness had standing to sue, her facial challenge to the Ordinance under the First Amendment fails.

A. Facial challenges are disfavored.

> Under *United States v. Salerno*, 481 U.S. 739 . . . (1987), a plaintiff can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid," *i.e.*, that the law is unconstitutional in all of its applications. *Id.* at 745. . . . While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a "'plainly legitimate sweep.'" *Washington v. Glucksberg*, 521 U.S. 702, 739–740, and n. 7 . . . (1997) (STEVENS, J., concurring in judgments).

Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 (2008). The Supreme Court's reasons for disfavoring facial constitutional challenges are important for this Court to recognize at the outset of its analysis:

> Facial challenges are disfavored for several reasons.
>
> Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 609 . . . (2004) (internal quotation marks and brackets omitted).
>
> Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander v. TVA*, 297 U.S. 288, 346–347 . . . (1936) (Brandeis, J., concurring) (*quoting Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39 . . . (1885)).

> Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329 . . . (2006) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)).

Washington State Grange, 552 U.S. at 450–51 (line spacing of block quote adjusted for readability); *see also Duhe v. City of Little Rock*, 902 F.3d 858, 865 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 1178 (2019) (refusing to invalidate a state's disorderly conduct statute and explaining that "invalidating a law for overbreadth is 'strong medicine'; the doctrine should be employed 'sparingly and only as a last resort'" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973))).

B. There is no unrestricted First Amendment right to record children without consent.

The First Amendment offers some protection for filming and photography—but Ness is incorrect that her recording activity "is beyond the reach of the City Code." Br. 24. There is no absolute First Amendment right to record others' children without consent.

1. The recording of children is not entitled to the same level of protection as the recording of public officials.

The difference between recording public officials and recording private individuals is a significant one. *See, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) ("Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" (quoting *Mills v. Alabama,* 384 U.S. 214, 218 (1966))). "Moreover, as the [Supreme] Court has noted, '[f]reedom of expression has particular significance with respect to government because [i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" *Id.* (quoting *First Nat'l Bank v. Bellotti,* 435 U.S. 765, 777 n.11 (1978)). But here Ness asserts she is entitled to absolute First Amendment protection of the ability to record (without consent) school-age children in a public park. Unlike police making an arrest or county board members presiding in a public proceeding, the children have no "special incentive to repress opposition"—and do not wield "a more effective power of suppression."

That the Ordinance protects children (including while they are attending school) is significant because, as a general matter, First

Amendment protections often vary for the purpose of protecting the interests of children. As the Supreme Court has recognized when reviewing First Amendment challenges to laws intended to protect minors, "a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982)). "Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Id.* at 757. Regulating potentially frightening interactions with children who have been temporarily separated from their parents in order to attend school, in a way that does not forbid any messages that those children may see or hear, serves this "compelling" interest.

2. The captive-audience doctrine undercuts an absolute right to record children, even if those children are in a traditional public forum.

The captive-audience doctrine stands in the way of Ness's effort to equate free expression with a categorical right to record others' school-age children. For unwilling listeners or viewers, "the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by

averting his eyes." *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) (quotation and brackets omitted). But for school-age children who are unwilling subjects of recording, averting their eyes or ears makes no difference. Recorders are still going to record them.

In *Snyder*, "the Court acknowledged a legitimate government interest in preventing behavioral disturbances in shared public spaces"—an interest that is especially strong here, where a space is open to all members of the public, including vulnerable persons and persons who have limited options to avoid the recording activity. *See* Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U.L.J. 167, 213 (2017). Indeed, at least three things make the captive-audience doctrine particularly applicable here: (1) school-age children are generally required by law to attend school;[15] (2) schools are generally required to provide physical education to their pupils,[16] and are expected to also provide "daily recess of at least 20 minutes for all students,"

[15] *See* Minn. Stat. § 120A.22, subds. 5–6; *see also Cruz-Guzman v. State*, 916 N.W.2d 1, 10 (Minn. 2018) (addressing fundamental right to education under the Minnesota Constitution).

[16] *See, e.g.*, Minn. Stat. § 120B.021, subd. 1.

preferably outdoors;[17] and (3) as a practical matter, students who are the subject of unwanted recording during outdoor recess have little choice but to remain outside and endure it until the recess is over.[18]

School-age children deserve the protections from recording of the captive-audience exception to ordinary First Amendment principles. Just as "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech," *Frisby v. Schultz*, 487 U.S. 474, 487 (1988), it permits the government to prohibit offensive recording as intrusive when the "captive" subject cannot avoid the objectionable practice of recording.

Where the captive-audience doctrine applies, its protections apply even in a public forum. For example, in *Frisby*, the Supreme Court held that

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[17] 2010 Minn. Laws ch. 396, § 7, subd. 3 (mandating adoption of National Association for Sport and Physical Education standards and encouraging the Minnesota Department of Education to develop recess guidelines, which were later released by the department as *Recess Moves: A Toolkit for Quality Recess*). The first "best practice guideline" in Recess Moves is "Daily recess of at least 20 minutes for all students. Outdoors preferred." R-40 at 95 (Ex. 34); *see also id.* ("Minimally, the policy should include that recess is at least 20 minutes long and occurs outdoors as often as possible, given the added space and benefits of being outdoors.").

[18] R-40 at 98 (Ex. 34) ("Universal participation also means that **all** students receive recess.").

the captive-audience doctrine authorizes communities to flatly prohibit picketing in residential areas, including on the town's streets. *Id.* at 487–88; *see also Veneklase v. City of Fargo*, 248 F.3d 738, 743 (8th Cir. 2001) (per curiam) (upholding municipal ordinance prohibiting even peaceful picketing outside the home of the administrator of a family-planning clinic despite courts having "traditionally subjected restrictions on public issue picketing to careful scrutiny").

C. Intermediate scrutiny applies.

Courts in other jurisdictions that have acknowledged a right to record have explicitly held that the right is not absolute. For example, in *Glik*, the Eleventh Circuit stated: "To be sure, the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions." 655 F.3d at 84 (citing *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("[W]e agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.")). That is, "[e]ven in a public forum the [State] may impose reasonable restrictions on the time, place, or manner of protected speech,'" provided that the restrictions "'are justified without reference to the content of the regulated speech, that they are

narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Phelps-Roper v. Ricketts*, 867 F.3d 883, 891 (8th Cir. 2017) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis omitted); *see also Ball v. City of Lincoln, Neb.*, 870 F.3d 722, 730 (8th Cir. 2017) (stating that in a traditional or designated public forum, the government "may impose a content-neutral time, place, and manner restriction on speech as long as such restriction is narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication" (quotation omitted)). Strict scrutiny is not required.[19]

D. The Ordinance satisfies intermediate scrutiny.

The Ordinance satisfies intermediate scrutiny because the restriction it imposes on recording activity (1) is content-neutral; (2) is narrowly tailored

[19] The Court should reject Ness's suggestion that the Ordinance is subject to a higher form of scrutiny because it operates as a prior restraint. An ordinance that creates a prior restraint will be upheld "if [it] meet[s] the constitutional standards for time, place, and manner regulations." *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks* ("*Havlak Photographer*"), 864 F.3d 905, 913 (8th Cir. 2017) (citing *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992)).

to serve a significant governmental interest; and (3) leaves open ample alternative channels of communication.

1. The Ordinance is content-neutral.

Ness's argument that the Ordinance is content-based is premised on her refusal to acknowledge what this Court recognized in *Telescope Media Group*—there is a difference between Ness's act of simple recording and whatever message she might convey later using the recordings.[20] The Ordinance here is content-neutral because it does not make distinctions involving the substantive content or message that Ness (or anyone) conveys. Under the Ordinance, no person in a City park may intentionally activate a camera or other recording device directed at a minor without the consent of that minor's parent or guardian. The reach of the law does not depend on who is doing the recording, what message (if any) will be conveyed with the benefit of what was recorded, or what use (if any) will be made of the recording. To the contrary, the Ordinance prohibits *conduct* (the intentional unconsented recording of minors) that does not convey any message.

[20] The amicus brief makes the same misstep, equating simple recording activity (which can facilitate speech) with speech itself—something neither the Supreme Court nor this Court has done.

This important distinction is illustrated by one of the very cases that the amici cite as ostensible support for their argument that the Ordinance is content-based. In *United States v. Stevens*, 559 U.S. 460 (2010), the defendant was convicted of selling videos that depicted dogfights, in violation of a federal statute that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty. But—as Chief Justice Roberts noted in the second sentence of the decision—the statute "d[id] not address underlying acts harmful to animals, but only portrayals of such conduct." *Id.* at 464. That is the inverse of what the Ordinance does here. The Ordinance says nothing about what the recorder may or may not do with recordings once they are made (and indeed, does not prohibit recording of children in a City park without consent if it is done from outside the park). Instead, the Ordinance addresses the underlying act that is harmful to children: recording itself, not the content of the image or video that is created. In other words, the Ordinance targets the way in which the images or videos are captured—not the resulting images themselves or later expression that could involve the images. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 385 (1992) ("[N]onverbal 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.").

Even if the Court were to construe the Ordinance as requiring proof about the content of a recording (for example, that the offender captured the image of a minor), that requirement is plainly incidental to the Ordinance's regulation of *conduct*—that is, the action of recording itself. The Supreme Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), is particularly instructive. There, the Supreme Court considered the constitutionality of a law providing that military recruiters must be given the same access to colleges as other recruiters. The Court upheld the law because it regulated the schools' conduct, not speech—even though the recruiting assistance provided by the schools "often includes elements of speech," such as sending emails on behalf of recruiters. *Id.* at 61–62. The Court concluded that the speech affected by the law "is plainly incidental" to its regulation of conduct and noted that "'it 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.'" *Id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).[21] The Supreme Court also concluded that "[t]he expressive component" of the schools' actions was "not created by the conduct itself but by the speech that accompanies it." *Id.* at 66. Similarly, to the extent the conduct targeted by the Ordinance here (simple recording) is expressive, it is because the recordings can facilitate expression. *See infra* note 26.

Intentional unconsented recording of minors is an invasion of children's interest in their privacy, and in their educational needs (including the State of Minnesota's strong recommendation for universal outdoor recess). The City is interested in prohibiting intentional unconsented recording of minors—conduct that does not convey any message but that, to

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[21] The Supreme Court's interest in whether regulation of speech is plainly incidental to the regulation of conduct has continued notwithstanding *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). It is reflected in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (explaining that the First Amendment "does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech") (citing *Rumsfeld*, *R.A.V.*, and *Giboney*), and *National Institute of Family and Life Advocates v. Becerra,* 138 S. Ct. 2361, 2373 (2018) (distinguishing an earlier decision upholding a restriction as an example of lesser scrutiny given to "regulations of professional conduct *that incidentally burden speech*") (emphasis added). *See Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 933 (5th Cir. 2020) (explaining the increasing importance in the Supreme Court's First Amendment decisions of whether a law regulates speech incidental to the regulation of conduct).

a child, could be intimidating. *See* Kaminski, *supra*, at 206–07 (discussing nonspeech-related government interest in regulating recording, including "protecting behavior in rivalrous spaces from undue disruption, where that disruption would cause shifts in behavior that in turn have significant social costs"). Similarly, in *Frisby*, the Supreme Court held that a ban on picketing in residential areas (including traditional public fora like the town's streets) was content-neutral. 487 U.S. at 488. There, the Supreme Court recognized that the *message* of the picketers was not what was offensive—it was the "especially offensive way" that the picketers were intruding into the lives of others. *Id.* at 486.

Nor does the Ordinance turn on any listener's *reaction* to a message that is ultimately conveyed through recorded material. *E.g.*, *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cty. Sheriff Dep't*, 533 F.3d 780, 788 (9th Cir. 2008) (accepting the "heckler's veto" analogy where law-enforcement officers responded to the plaintiffs' driving their truck with graphic photographs of aborted fetuses around the perimeter of a public middle school by ordering it away as "a result of the students' reactions to Plaintiffs'

message");[22] *see also Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 252 (6th Cir. 2015) (stating that freedom of speech is too important to be abridged "simply due to the hostility of *reactionary listeners who may be offended by a speaker's message*" (emphasis added)). A child who is frightened by being filmed while at play during school recess is not a "heckler." Nor is a parent or guardian who places her child in the custody of a school for an education (including outdoor recess) and not for a traumatic experience created by a stranger. *See Ovadal v. City of Madison, Wis.*, 469 F.3d 625, 628–31 (7th Cir. 2006) (rejecting "heckler's veto" characterization of a district court's finding that police officers removed plaintiff and his sign from a freeway overpass not because of the message on the sign but because of his presence on the overpass and motorists' reaction to his presence).

Even after *Reed*, in which the Supreme Court subjected more regulations of speech itself to strict scrutiny, 135 S. Ct. at 2227 (2015), circuits recognizing First Amendment protections for recording continue to

[22] The Ninth Circuit observed that the presence of children, "among others, might conceivably support the proposition that the heckler's veto principle is less sweeping where the targeted audience is children." *Ctr. for Bio-Ethical Reform, Inc.*, 533 F.3d at 790. But the Ordinance here does not involve a *message* targeted to anyone.

permit time, place, and manner regulations on such activity. *See, e.g.*, *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) ("The right to record police is not absolute. It is subject to reasonable time, place, and manner restrictions." (quotation omitted)); *Turner v. Lieutenant Driver,* 848 F.3d 678, 688 (5th Cir. 2017) ("[A] First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions."). Notwithstanding *Reed*, governments can protect private citizens' ability to withhold consent to the capture or use of their image through otherwise-protected expressive conduct, even by enforcing criminal laws that would involve examination of the image. *See People v. Austin*, 2019 IL 123910, ¶¶ 49–50, *cert. denied*, No. 19-1029, 2020 WL 5882221 (Oct. 5, 2020). This demonstrates that recording is not entitled to the same degree of protection that speech itself receives.

The Court should reject Ness's argument that the Ordinance is content-based because whether the Ordinance is violated depends on the content of the recording that is made. Recent Eighth Circuit decisions indicate that Ness's reading of what "content based" means is unreasonably broad even after *Reed*. In *Gresham v. Swanson,* more than two years after *Reed*, the Eighth Circuit deemed Minnesota's anti-robocall statute content-

neutral despite that statute's inclusion of an exception (which the Eighth Circuit described as "content based on its face") that "exempts calls from employers advising employees of their work schedules," construing it as an exception that established a "'broad exception for subscribers with whom the caller had a current business relationship.'" 866 F.3d 853, 855 (8th Cir. 2017) (quoting *Van Bergen v. Minnesota*, 59 F.3d 1541, 1550 n.5 (8th Cir. 1995)). The Eighth Circuit explicitly held that *Reed* (and two other intervening decisions) did not "supersede *Van Bergen*." *Id.* at 856.

And, again after *Reed*, the Eighth Circuit upheld a St. Louis, Missouri suburb's park ordinance requiring a permit for "the use of any park facility, building, trail, road, bridge, bench, table or other park property for commercial purposes" (including the plaintiff's photography business), without inquiring whether the commercial/noncommercial distinction was applied by looking at her photographs. *Havlak Photographer,* 864 F.3d at 910 n.2, 911–20, *see also Ricketts,* 867 F.3d at 891–93 (8th Cir. 2017) (concluding, two years after *Reed*, that a Nebraska statute defining "picketing of a funeral" as "*protest* activities engaged in by a person or persons located" within a specific distance of certain types of buildings is "content neutral" (emphasis added)).

2. The Ordinance is narrowly tailored.

The Ordinance is narrowly tailored to serve many significant government interests, including protecting children's privacy, protecting children from intimidation or exploitation,[23] furthering children's educational needs (i.e., outdoor recess), and coordinating competing uses of the park. *See, e.g.*, *Phelps-Roker*, 867 F.3d at 893–94 (recognizing protection of people who are physically or emotionally vulnerable as a significant governmental interest); *Havlak Photographer*, 864 F.3d at 913 (holding that a municipality may "regulate competing uses" of a traditional public forum, like a park).

As this Court has explained, the *Ward* standard for time, place, and manner regulations is not a "least restrictive means" test:

[23] For example, the Ordinance would protect swimsuit-clad children at the municipal pool from being intentionally photographed or filmed by a stranger without the consent of a parent or guardian.

> "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799 . . . (quoting *United States v. Albertini*, 472 U.S. 675, 689 . . . (1985)). "[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 Cty.*, 930 F.2d 591, 595 (8th Cir. 1991). Acceptable legislative purposes for permits include "to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event." *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 . . . (2002).

Havlak Photographer, 864 F.3d at 915–16; *see also Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591, 597–98 (8th Cir. 2005) ("When 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."). Absent the restriction in the Ordinance, Bloomington's parks could be used as a place for one person to make another person feel insecure and intimidated, even though the person being recorded has as much of a right to be there as the person doing the recording. *See* S. App. 21 (§ 5.21) ("The rules and permits in this section are required to ensure the safety and general welfare of the public and the quiet and orderly use and enjoyment of the city's parks."). The Ordinance also furthers protecting the rights that

many children already have not to be photographed without the consent of their parents or guardians.[24] The Ordinance reasonably furthers the legitimate objective of coordinating multiple uses of limited space in the City's parks. *See* Kaminski, *supra*, at 201 ("The scope of First Amendment protections for speech that occur[s] in physical space is calibrated against the government's need to manage those environments so that other citizens can speak, think, live, and thrive in them. Likewise, First Amendment doctrine allows for government protection of the 'captive audience,' who can be protected from speech when that speech inescapably interferes with her ability to go about her business in a particular physical environment.").

3. Ample alternative channels are open.

By not seeking to restrict the ability of people to record children without consent if they film from *outside* a park, the City has provided alternative avenues to gather information through recording while protecting children in at least two ways. First, requiring would-be recorders

[24] *See, e.g.*, R-40 at 161 (Ex. 40) (confidentiality provisions of the Hennepin County foster care guidelines providing, regarding "photos, videos, & personal information about foster children," that "[f]oster parents must not allow photos, sketches, names or identifying information of foster children to be used in any material that will be available to the public").

to keep their distance makes it less likely that recording occurs so closely that it intimidates or frightens the children. Second, recording from a distance makes it less likely that a child's identity is ascertainable from photographs or videos taken without consent. Recording—even without consent—can still be done, but from a distance. The Ordinance reasonably steers recorders to adequate but less-threatening locations for filming (i.e., outside parks). As the Supreme Court has observed when upholding the reasonableness of airport restrictions on face-to-face solicitation (a form of protected speech): "[F]ace-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992); *see also Erznoznik v. Jacksonville*, 422 U.S. 205, 210 n.6 (1975) (noting that "[i]t may not be the content of the speech, as much as the deliberate verbal (or visual) assault, that justifies proscription") (quotation omitted).

The Court should reject Ness's argument that the Ordinance is fatally underinclusive. *See* Br. 27–29. As the Supreme Court has stated, "the First

Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015) (quoting *R.A.V.*, 505 U.S. at 387); *see also Anderson v. Treadwell*, 294 F.3d 453, 463 (2d Cir. 2002) ("[U]nderinclusiveness will not necessarily defeat a claim that a state interest has been materially advanced." (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511 (1981) (plurality opinion)). Indeed, "[i]t is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging too *little* speech." *Williams-Yulee*, 575 U.S. at 448. What the First Amendment requires in terms of narrow tailoring is not a perfect fit, but a fit where the regulation "'promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Havlak Photographer*, 864 F.3d at 915 (quoting *Ward*, 491 U.S. at 799).

Clearly the restriction against intentionally recording minors in City parks without consent makes it less likely that the parks can be used as a place to make a vulnerable category of people (children) feel unsafe and intimidated, in a setting where the children have as much of a right to be there as the person doing the recording. And although Ness contends that the City's interest in protecting children is undermined because the Ordinance allows her to film children if she is "a step or two" outside a city

park (Br. 28), keeping persons who record children without consent at a distance (1) makes it less likely that recording occurs so closely that it intimidates or frightens the children and (2) protects children from exploitation by obscuring their identity (e.g., facial features) in whatever photo or video is taken without their consent. That is, taking a step or two back does not mean a lot to Ness's interest in recording what she wants to record—but it does mean a lot to the children's interests.

4. Amici's "overbreadth" argument does not permit reversal.

"[T]he [Supreme] Court's practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law *in toto*, but rather to reverse the particular conviction." *Ferber*, 458 U.S. at 773. Amici curiae argue that the Ordinance should be struck down because of overbreadth. The Court should reject this assertion on procedural and substantive grounds.

First, because Ness did not make this argument in either her briefing to the district court or in her briefing on appeal, the Court should decline to consider it. *See, e.g.*, *Carter v. Lutheran Med. Ctr.*, 87 F.3d 1025, 1026 (8th Cir. 1996) (per curiam) ("[W]e decline to consider issues raised in the amicus brief filed by the Equal Employment Opportunity Commission, an interested

nonparty which was not involved in the proceedings below."). As the Supreme Court recognized last term when unanimously reversing the Ninth Circuit because it had overturned a conviction in response to amici's argument that the underlying statute was overbroad, "'in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quoting *Greenlaw v. United States,* 544 U.S. 237, 243 (2008)). Allowing an issue to be raised for the first time on appeal, by an amicus, as a basis for reversal—after the appellant had already waived that issue by failing to preserve it before the district court—is particularly unfair to a district court. District court judges can be fairly expected to address the issues actually briefed and presented to them before they rule, but they should not be reversed on the basis of issues that the losing party could easily have briefed and presented to the district court but did not. Doing so would also disregard the normal role of courts. To quote the words of Judge Richard Arnold as restated by the Supreme Court last May, courts "'do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide

only questions presented by the parties.'" *Sineneng-Smith,* 140 S. Ct. at 1579 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (R. Arnold, J., concurring in denial of reh'g en banc) (brackets in *Sineneng-Smith*).

Second, the Ordinance is not substantially overbroad. Under the First Amendment's overbreadth doctrine, "a statute is facially invalid if it prohibits a substantial amount of protected *speech*." *United States v. Williams*, 553 U.S. 285, 292 (2008) (emphasis added). In applying the overbreadth doctrine, the relative unimportance that the content of speech plays in the law's reach, compared to the role of conduct, is significant. As the Supreme Court explained in *Broadrick*:

> But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that *its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct* and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

413 U.S. at 615 (emphasis added). "The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it

susceptible to an overbreadth challenge." *Williams,* 553 U.S. at 303 (quotation omitted).

The amicus brief's contention to the contrary rests on an apparent misreading of what the Ordinance actually prohibits. Amici seem to treat the Ordinance as prohibiting *all* unconsented recording of minors if the minors are in a park. *See, e.g.*, Amicus Br. 4 (stating that the Ordinance "broadly prohibits *all* photography and recording of minors without parental consent"), 10 (arguing importance of "taking photographs and making recordings of what occurs on public streets or in public parks"), 11 (arguing for "the right to record activity occurring in public view in a public place, such as a street or park"). But the Ordinance does not categorically prohibit someone from recording minors who are in a public park—it merely places restrictions on where *the recorder* can be. And the Ordinance does not at all prevent someone from recording minors who are in public streets or on public sidewalks, or from recording her own children or the children of consenting parents or guardians. Amici's misreading of the law undermines their overbreadth argument. "The first step in overbreadth analysis is to construe the challenged statute[.]" *Williams,* 553 U.S. at 293. It is the "first step" because a law's inclusion of elements that operate to significantly limit

its application can prevent the law from impermissibly restricting constitutionally protected expression in a substantial number of applications. *See Austin*, 2019 IL 123910, ¶ 92 (rejecting overbreadth attack on a statute in part because the law "includes several elements that operate to significantly limit its application").

"After construing the statute, the second step is to examine whether the statute criminalizes a 'substantial amount' of expressive activity." *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1158 (8th Cir. 2014). There is nothing in the record about frequency or volume of the activities that amici hypothesize in their overbreadth argument. So Ness and amici have given the Court no choice but to guess or speculate about the answer to this essential part of the overbreadth question.

On a different record, overbreadth might be a closer question. But the record here (comprised of allegations by a plaintiff who has not argued for overbreadth and of evidence specific to her actual activities) does not permit the Court to make a solid conclusion that overbreadth renders the Ordinance invalid on its face. "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its

sanctions, assertedly, may not be applied." *Ferber,* 458 U.S. at 773–74 (quotation omitted).

IV. NESS'S AS-APPLIED FIRST AMENDMENT CHALLENGE TO THE ORDINANCE FAILS.

Nor does Ness plausibly allege that the Ordinance, as applied to her, violates the First Amendment. Ness's as-applied claim fails for all the reasons that the facial claim does. In addition, there are two points Ness has raised about the Ordinance as it relates to her activity specifically that the City Defendants now address.

First, Ness appears to allege that the City adopted the Ordinance out of hostility toward her. Br. 6. Even taking Ness's allegations as true,[25] legislative

[25] Ness's complaint contains conclusory allegations about unnamed City officials disagreeing with Ness or making unspecified "derogatory comments." App. 21–22 ¶¶ 43–45. The only concrete accusation of hostility Ness makes against the City is that the City Council "required [her] to announce her home address over the public address system" before allowing her to speak during the public-comment period of a City Council meeting. *Id.* ¶ 45. But that is not evidence of animus because the City Council Rules of Procedure state that *any speaker* is to provide his or her name and address. *See* City of Bloomington, Minn., Council Rules of Procedure § XIII(c) ("Each person addressing the Council shall step up to the microphone in front of the dais, shall state his/her name and address in an audible tone of voice for the records and sign the speaker's register."), *available online at* https://www.bloomingtonmn.gov/sites/default/files/council_rules_of_procedure_rev-2010-07-12.pdf.

motive is irrelevant because the Ordinance is neutral on its face. *See, e.g.*, *Frisby*, 487 U.S. at 482 (finding a statute enacted in response to anti-abortion protestors to be content-neutral); *Ricketts*, 867 F.3d at 892 ("Regardless of any evidence of the Nebraska legislature's motivation for passing the [statute], the plain meaning of the text controls, and the legislature's specific motivation for passing a law is not relevant, so long as the provision is neutral on its face." (quotation omitted)).

Second, with regard to open ample alternative channels, Ness's allegations show that she can film what she wants to film from public sidewalks, public streets, and private property. App. 22 ¶ 47. That is, Ness's complaint does not allege that the Ordinance prevents Ness from amassing the information she believes necessary for effective advocacy. *See Libertarian Nat'l Comm., Inc. v. Fed. Election Comm'n*, 924 F.3d 533, 548 (D.C. Cir.

2019).[26] She has acknowledged that she is still allowed to film from public sidewalks and from private property. She has not claimed that she cannot collect the information she needs, or disseminate the message she ultimately wants to convey, from these locations.

[26] The *Libertarian National Committee* case provides a helpful analogy in differentiating between Ness's speech (such as posting on social media) and her recording activity. There, the District of Columbia Circuit explained how the Supreme Court treats campaign expenditures differently than campaign contributions. Campaign expenditures (like speech) receive near-absolute protection under the First Amendment, but campaign contributions (like recording) can be more heavily burdened: "Receiving money *facilitates* speech, to be sure, but a bank account balance becomes speech only when spent for expressive purposes. This is why the Court has made clear 'that contribution limits impose serious burdens on free speech only if they are so low as to "preven[t] . . . political committees from amassing the resources necessary for effective advocacy."'" 924 F.3d at 548 (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 135 (2003), and *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)). Similarly, recording can *facilitate* speech, but the recorded material is not itself speech until someone uses it for expressive purposes.

Both Ness's facial and as-applied challenges to the Ordinance on First Amendment grounds, fail.[27] But should the Court disagree and hold that Section 5.21(23) of the City Code is unconstitutional, the City Defendants respectfully request that the Court sever the unconstitutional provision of Article III (Parks and Playgrounds). *See* App. 224 (§ 5.22.01) (severability provision for Article III); *see also, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the

[27] Ness's brief makes only a passing reference (in the statement of the issues) to the constitutionality of the Ordinance under the Fourteenth Amendment. Ness has therefore waived that issue. *See, e.g.*, *Larson v. Nutt*, 34 F.3d 647, 648 (8th Cir. 1994) (per curiam) (skeletal assertion does not raise issue on appeal). Even Ness had not waived the issue, the complaint does not contain sufficient factual matter to state a facially plausible due-process claim. Ness's complaint contains conclusory allegations that the Ordinance is "vague" (App. 28 ¶¶ 81, 85; App. 30 ¶¶ 93–96), does not provide "fair warning" (App. 30 ¶¶ 95–96), and lacks "explicit standards" (*id.* ¶¶ 97–98). But mere assertions are not sufficient to meet the federal "plausibility" standard. *See Gallagher v. City of Clayton*, 699 F.3d 1013, 1016 (8th Cir. 2012). Ness's complaint fails to identify any word or phrase in the Ordinance that is vague within the proper Fourteenth Amendment meaning of that term. This failure prevents the Court from concluding, from Ness's complaint, that the language of the Ordinance includes the type of uncertainty that will "lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quotation omitted).

solution to the problem, severing any problematic portions while leaving the remainder intact." (quotation omitted)).

V. CONSTITUTIONALITY OF THE STATE HARASSMENT STATUTE

To avoid duplicative briefing, the City Defendants refer the Court to the joint brief of the Minnesota Attorney General and the Hennepin County Attorney regarding Ness's challenge to the constitutionality of Minnesota's harassment statute. The City Defendants join the arguments therein regarding the issues of mootness, Article III standing, and the merits. In addition, with regard to standing, the City Defendants note that (like the County) the City has declined to prosecute Ness for her past conduct. App. 248 ¶¶ 2–4.

VI. NESS IS NOT ENTITLED TO SUMMARY JUDGMENT.

In a single sentence, Ness contends that she is entitled to summary judgment. Br. 50. In support, she cites only Federal Rule of Civil Procedure 56 and *Bible Believers v. Wayne County*, 805 F.3d 228, 262 (6th Cir. 2015) (en banc). The relevance of *Bible Believers*, which involved cross-motions for summary judgment, is unclear. And regardless of the adequacy of Ness's briefing to this Court on the issue of summary judgment, Ness's arguments

that she should not *lose* as a matter of law fall far short of meeting her initial burden to show that she is entitled to *win* as a matter of law.

As one of many examples, Ness's complaint seeks to hold *the City* liable under Section 1983 for its officers' alleged efforts to enforce *the state* harassment statute. App. 12–13 ¶¶ 9–11; App. 29 ¶ 87. Paragraphs 9 through 11 of the complaint suggest that Ness's attorneys appreciate much of what is required to establish municipal liability for enforcement of a state statute; those requirements are heavy and strict. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978); *see also, e.g.*, *Bd. of Cty. Comm'rs v. Brown,* 520 U.S. 397, 404–05 (1997); *City of Canton v. Harris,* 489 U.S. 378, 388 (1989). But by failing to address the subject in her opening summary-judgment memorandum, Ness did not shift the burden to the City Defendants on that point. That is because Ness failed to "'bring up the fact that the record does not contain' a genuine dispute of material fact" on each essential element of *Monell* liability and then "identify that part of the record which bears out [her] assertion." *Moore v. Martin,* 854 F.3d 1021, 1025 (8th Cir. 2017) (quotation omitted). Ness would now need the Court to hold the City vicariously liable for its officers' alleged enforcement of the state statute,

which of course is not permissible. *Monell*, 436 U.S. at 691 ("[A] municipality cannot be held liable under § 1983 on a *respondeat superior* theory.").

CONCLUSION

The City Defendants respectfully ask this Court to affirm the district court's grant of their motion to dismiss and denial of Ness's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i). The brief was prepared Microsoft Word for Office 365 (16.0), which reports that the brief contains 12,747 words excluding items listed in Fed. R. App. P. 32(f).

s/John M. Baker
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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/John M. Baker
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