No. 20-2571

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SALLY NESS,
Plaintiff-Appellant,

v.

CITY OF BLOOMINGTON; MICHAEL O. FREEMAN, in his official capacity as Hennepin County Attorney; TROY MEYER, individually and in his official capacity as a police officer, City of Bloomington; MIKE ROEPKE, individually and in his official capacity as a police officer, City of Bloomington,
Defendants-Appellees,

ATTORNEY GENERAL'S OFFICE FOR THE STATE OF MINNESOTA
Intervenor below-Appellee.

On Appeal from the
U.S. District Court for the District of Minnesota
No. 19-cv-2882 (Hon. Ann D. Montgomery)

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 16 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANT SEEKING REVERSAL

[Caption continued on next page]

Bruce D. Brown
Counsel of Record
Katie Townsend*
Sarah S. Matthews*
Caitlin Vogus*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300
bbrown@rcfp.org
**Of counsel*

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IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

Amici have obtained consent to file this brief from all parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2).

Amici are the Reporters Committee for Freedom of the Press ("Reporters Committee"), BuzzFeed, The E.W. Scripps Company, First Look Media Works, Inc., Fox Television Stations, LLC, International Documentary Assn., The McClatchy Company, LLC, MPA - The Association of Magazine Media, National Geographic Partners, National Press Photographers Association, National Public Radio, Inc., The News Leaders Association, POLITICO LLC, Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech.

Lead amicus the Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The other amici are news media outlets, publishers, and organizations dedicated to defending the First Amendment and newsgathering rights of the press and the public. As representatives of the news media, including photojournalists,

broadcast journalists, and documentary filmmakers, amici have a powerful interest in ensuring that the government does not unconstitutionally restrict the First Amendment right to record and photograph in public places. The Court's decision in this case—determining whether the government may ban photography and recording of minors in public parks absent parental consent—could have significant ramifications for all members of the public and press, who depend on the right to record on a daily basis to inform the public. Amici submit this brief to underscore that the city ordinance at issue violates fundamental First Amendment principles and, if upheld, would chill essential newsgathering activity.

RULE 29(a)(4)(E) CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than amici, its members, or counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici write to address whether, consistent with the First Amendment's protections for free speech and a free press, the government may prohibit the

photography and recording of minors in public parks, absent parental consent.[1] The Bloomington city ordinance at issue here provides: "No person shall intentionally take a photograph or otherwise record a child"—defined as anyone "under the age of 18"—"without the consent of the child's parent or guardian."[2] Violations are "petty misdemeanors." Bloomington City Ordinance § 5.22.

Contrary to the district court's decision, this ordinance presents a textbook example of a content-based restriction on speech and newsgathering activity protected by the First Amendment, and it unquestionably fails strict scrutiny. The City Ordinance targets photography and recordings only of *minors* whose parents have not consented and permits photography and recording of all other subject matter—adults, minors whose parents *have* consented, animals, nature, and anything else in the city parks.

Appellee, the City of Bloomington ("City"), has not shown how the City Ordinance, which it adopted in 2019, advances a compelling interest. In fact, it is doubtful that the City has even identified an "actual problem in need of solving." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011) (internal quotation

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[1] Amici do not address the Minnesota criminal harassment statute, Minn. Stat. § 609.749, which exempts protected First Amendment activity, *see id.* at subd. 7.

[2] *See* Bloomington City Ordinance §§ 5.21(23), 5.20, https://tinyurl.com/y2jc9zko. It appears the district court inadvertently referred to the recording provision as Bloomington City Ordinance § 5.21(24), *Ness v. City of Bloomington*, No. 19-cv-2882, 2020 WL 4227156, at *1 (D. Minn. July 23, 2020), rather than the correct provision, § 5.21(23) ("City Ordinance").

marks and citation omitted). The City purportedly seeks to protect the "privacy" of children in public parks and prevent them from being exploited or intimidated, *see Ness*, 2020 WL 4227156, at *9, but it did not proffer any evidence of the need for this ordinance or establish that minors even have a reasonable expectation of privacy in a public park. (They do not.) In any event, multiple laws—such as those prohibiting harassment, stalking, wiretapping, invasion of privacy, and intentional and negligent infliction of emotional distress—already protect a minor's legitimate privacy interests, while restricting far less speech.

Moreover, the City Ordinance is not narrowly tailored, as it broadly prohibits *all* photography and recording of minors without parental consent, regardless of whether the minor has any reasonable expectation of privacy and even if the minor *wants* to be recorded—for example, to amplify an event, such as a protest on climate change or gun violence, in which the minor is participating. The restriction applies regardless of whether the person documenting the activity poses any actual threat to the minor, whether the minor is recorded only for a fleeting moment or as part of a crowd, or whether the public interest in documenting the activity in public view overrides any minimal privacy interest the minor may have.

The potential impact of the Court's decision in this case is vast. If the Court does not reverse the district court's decision with respect to the City Ordinance,

other cities and states may adopt similar prohibitions on photography and recording in public places. This could cause a significant chilling effect on newsgathering during a time of historic protests, when the need for reporting on the public square is essential. Demonstrations in public parks and streets have swept across the nation, and the ability of the press and public to photograph and record them and disseminate this information to the public serves a vital and constitutionally protected purpose. These photographs and recordings inform the public in a richer, fuller way than words alone can convey. They enable the public to better understand current events, to engage in public debate on the issues raised by these events—such as the role of policing, the movement for racial justice, and law enforcement's response—and ultimately, to hold their elected officials accountable. The threat of fines or criminal penalties for performing an essential newsgathering function could cause members of the public and press—particularly photojournalists, broadcast journalists, and documentary filmmakers—to self-censor, depriving the public of their images, recordings, and news coverage. Thus, although the City only adopted this ordinance in 2019, the significant consequences of its poorly reasoned decision are already clear.

For the reasons set forth herein, the City Ordinance violates the First Amendment, and amici urge this Court to reverse.

ARGUMENT

I. The First Amendment protects the right to take photographs and make audio and video recordings in public parks, a quintessential public forum.

The First Amendment, applicable to the states through the Fourteenth Amendment, prohibits the enactment of laws and regulations "abridging the freedom of speech, or of the press." U.S. Const. amend. I. This constitutional protection prohibits the government from "limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). It "encompasses a range of conduct related to the gathering and dissemination of information." *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both."); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it."). And the First Amendment fully protects the gathering and dissemination of news from public sources and places. *See, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496–97 (1975) (finding that First Amendment protected publication of rape victim's name that press had lawfully

obtained from court records); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing First Amendment right to gather news on public street regarding matters of public interest). As the Supreme Court has recognized, "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

"Laws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United v. FEC*, 558 U.S. 310, 336 (2010). "Whether government regulation applies to creating, distributing, or consuming speech makes no difference," for the First Amendment protects *all* of these activities. *Brown*, 564 U.S. at 792 n.1. Accordingly, the "act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *see also Ex parte Thompson*, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014) (concluding that "a person's purposeful creation of photographs and visual recordings is entitled to the same First Amendment protection as the photographs and visual recordings themselves").

Thus, the Supreme Court has recognized that the First Amendment protects both the creation and dissemination of visual images and recordings. *See, e.g.*, *Brown*, 564 U.S. at 792 n.1, 805 (holding that law that imposed civil fines for the

sale or rental of violent video games to minors impermissibly restricted protected speech); *United States v. Stevens*, 559 U.S. 460, 468 (2010) (holding that statute criminalizing the knowing creation, sale, or possession of certain depictions of animal cruelty punished protected speech); *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 239–40 (2002) (holding that statutory prohibition on possessing or distributing "virtual child pornography," non-obscene sexually explicit images that appear to depict minors but which were produced using youthful adults or computer imaging technology, violated First Amendment).

Likewise, this Court and the district court have recognized that the First Amendment protects both the act of taking photographs and making audio and sound recordings. *Ness*, 2020 WL 4227156, at *9 (citing *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020) (finding that "[e]very circuit court to have considered the question has held that a person has the right to record police activity in public"); *Josephine Havlak Photographer, Inc. v. Village of Twin Oaks*, 864 F.3d 905, 913 (8th Cir. 2017) (applying First Amendment analysis to ordinance regulating commercial activity, including photography, in a public park)); *see also Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750 (8th Cir. 2019) (finding that wedding videos "are a form of speech" entitled to First Amendment protection).

Although the case law recognizing a First Amendment right to record has primarily focused on the right to record police officers in public places, *Chestnut*,

947 F.3d at 1090 (collecting cases), even in those cases, at least two appellate courts have outlined a broader right: "the First Amendment protects the act of making film, as 'there is no fixed First Amendment line between the act of creating speech and the speech itself.'" *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) (quoting *Alvarez*, 679 F.3d at 596).

Notably, the Ninth Circuit has recognized that the First Amendment right to record extends to matters of public interest—*including minors* at a protest on a public street who are filmed without parental consent. *See Fordyce*, 55 F.3d at 439; *see also Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (reaffirming "right to photograph and record matters of public interest" and recognizing that this applies in "public" places). In *Fordyce*, police arrested the plaintiff for videotaping a demonstration on the streets of Seattle, including a pedestrian and "her two nephews, ages twelve and thirteen" after the pedestrian asked him to stop filming. *Fordyce v. City of Seattle*, 840 F. Supp. 784, 788 (W.D. Wash. 1993), *aff'd in part, vacated in part, rev'd in part*, 55 F.3d 436 (9th Cir. 1995), *on remand*, 907 F. Supp. 1446 (W.D. Wash. 1995). Police claimed the plaintiff had violated a state law making it a criminal offense to record a private conversation without the consent of all participants. *Id.* In the plaintiff's subsequent civil rights suit challenging his arrest and alleging that a police officer had assaulted him, the Ninth Circuit recognized his "First Amendment right to film

matters of public interest" and found a genuine issue of material fact as to whether police assaulted him in an attempt to prevent or dissuade him from exercising this right. *Fordyce*, 55 F.3d at 439. On remand, in recognition of the First Amendment right to record events in public places, the district court issued a declaratory judgment that the state recording law "does not make criminal the recording of conversations held in a public street, in voices audible to passersby, by the use of a readily apparent device." 907 F. Supp. at 1448.

Thus, taking photographs and making recordings of what occurs on public streets or in public parks—such as protests, events, and law enforcement activity—is undoubtedly "speech" protected by the First Amendment, and an ordinance restricting such activity "suppresses speech just as effectively as restricting the dissemination of the resulting recording." *Alvarez*, 679 F.3d at 596.

Furthermore, a traditional public forum, like a city park, "is a quintessential forum for the exercise of First Amendment rights," *Packingham v. North Carolina*, – U.S. –, 137 S. Ct. 1730, 1735 (2017), such as photography and recording. Public parks and streets have long been "held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (internal quotation marks and citation omitted). "Even in the modern era, these places are still essential venues

for public gatherings to celebrate some views, to protest others, or simply to learn and inquire." *Packingham*, 137 S. Ct. at 1735. In these traditional public forums, "the rights of the state to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n*, 460 U.S. at 45.

Accordingly, the First Amendment unquestionably protects the right to record activity occurring in public view in a public place, such as a street or park.

II. The City Ordinance is content based and fails strict scrutiny under the First Amendment.

A. The City Ordinance targets nonconsensual photography and recording only of minors and is therefore undeniably content based.

As the Supreme Court has repeatedly explained, the "most basic" of First Amendment principles is that "government has no power to restrict expression because of its message, its ideas, its subject matter, *or its content*." *Brown*, 564 U.S. at 790–91 (emphasis added) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)); *see also Stevens*, 559 U.S. at 468. In other words, "the fundamental rule of protection under the First Amendment" is that "a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995). Accordingly, content-based laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citations omitted). Content-neutral laws, on

the other hand, must be narrowly tailored to advance a "substantial government interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

"Government regulation of speech is content based if a law applies to particular speech *because of the topic discussed* or the idea or message expressed." *Reed*, 576 U.S. at 163 (emphasis added, citations omitted) (finding city ordinance that restricted certain categories of signs based on the type of information they conveyed content based). "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* (citation omitted). "Some facial distinctions based on a message are obvious," like the City Ordinance here, which "defin[es] regulated speech by particular subject matter"—photography or recording of minors without the consent of their parents or guardians—while other regulations "are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163–64.

The Supreme Court has held that laws restricting the subject matter depicted in photographs, videos, and sound recordings—like the City Ordinance—are content based. For example, the Court held that a federal law purporting to criminalize the creation, sale, or possession of certain depictions of "animal cruelty" was an impermissible content-based restriction on speech. *Stevens*, 559

U.S. at 468. The Court found that the law "explicitly regulates expression based on content," since it prohibited "visual and auditory depictions, such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed." *Id.* (cleaned up). Similarly, the Court recognized that a California law prohibiting the sale or rental of "violent video games" to minors was also content based and did not satisfy strict scrutiny. *Brown*, 564 U.S. at 788.

The City Ordinance is a classic example of a content-based restriction. It prohibits the photography or recording, in a city park, of only *certain content*—minors without parental consent—whereas photography and recording of other subjects—such as adults, animals, nature, or minors with parental consent—are allowed. *See, e.g.*, *City of Cincinnati v. Discovery Network, Inc*., 507 U.S. 410, 429 (1993) (finding that city ordinance banning use of newsracks that distribute commercial handbills, but not newspapers was an impermissible content-based restriction); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018) (finding Idaho law to be content based where it prohibited the recording of "agricultural operations made without consent").

The district court erred by concluding that because the City Ordinance "does not draw distinctions based on a speaker's message or viewpoint, it is content neutral." *Ness*, 2020 WL 4227156, at *9 (citing *Phelps-Roper v. Ricketts*, 867 F.3d

883, 892 (8th Cir. 2017)). Although viewpoint discrimination is a "more blatant" and "egregious form of content discrimination," it is "well established that the First Amendment's hostility to content-based regulation" also extends to the "prohibition of public discussion of an entire topic"—like the photography and recording of minors, absent parental consent. *Reed*, 576 U.S. at 168–69 (internal quotation marks and citations omitted). Moreover, the City Ordinance *does* restrict activity based on the speaker's message: people must not use recordings or photography at city parks to convey information about what minors are doing in those places, absent parental consent. The City has banned only this specific, disfavored content.

And the district court's reliance on *Phelps-Roper* is misplaced. There, the Court found that Nebraska's Funeral Picketing Law was content neutral because it constituted a time, place, and manner restriction, simply limiting "when and where picketing and other protest activities may occur in relation to a funeral or burial service." *Phelps-Roper*, 867 F.3d at 892 (quoting *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 892 (8th Cir. 2012)). The law sought to protect citizens from disruption during a funeral or burial service and did not relate to the content of the regulated speech. *Id.* at 892. Unlike the City Ordinance here, which restricts the recording and photography of minors but not other subjects, Nebraska's law did not restrict the content or subject matter of picketing activities.

Accordingly, the City Ordinance is a content-based restriction and must satisfy strict scrutiny in order to pass constitutional muster.

B. The City Ordinance fails strict scrutiny because it serves no compelling interest.

Strict scrutiny requires the government to "specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution." *Brown*, 564 U.S. at 799 (quoting *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 822–23 (2000); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992)). "That is a demanding standard. 'It is rare that a regulation restricting speech because of its content will ever be permissible.'" *Id.* (quoting *Playboy*, 529 U.S. at 818). Stated another way, to survive strict scrutiny, the City must show that (a) its interest in regulating speech is compelling and (b) the City Ordinance is narrowly tailored to achieve that compelling interest. *Reed*, 576 U.S. at 171.

The City has failed to identify an actual problem in need of solving, never mind a compelling interest. The City Ordinance is apparently aimed at preserving "children's privacy" in public parks and protecting them from "intimidation or exploitation, and coordinating competing uses of the City parks." *Ness*, 2020 WL 4227156, at *9. Although the government has a compelling "interest in safeguarding the physical and psychological well-being of a minor," *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (internal quotation marks and citation

omitted), the City has not shown how that interest is implicated here. The City cited no evidence of the purported threat posed to children by photography and recording in public parks.

Minors do not have a reasonable expectation of privacy in a public park when their activity is in public view and their conversations are audible to bystanders. *See, e.g.*, *Fordyce*, 907 F. Supp. at 1448. If information is in fact public, a state cannot punish its collection and dissemination by simply categorizing it as "private." *See, e.g., Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that imposing damages on newspaper for publishing rape victim's name, which it had obtained from a publicly-released police report, violated First Amendment despite Florida law making rape victim's name "private"); *Cox Broad. Corp.*, 420 U.S. at 496–97. Likewise, the City cannot simply claim that activities occurring in public view in a city park are "private" and prohibit photography and recording of them. *See, e.g.*, *Alvarez*, 679 F.3d at 606–07 (striking down Illinois' wiretap law since it "banned nearly all audio recording without consent of the parties—including audio recording that implicates *no* privacy interests at all"); *Fordyce*, 55 F.3d at 439; *Ex parte Thompson*, 442 S.W.3d at 350 (finding that criminal law prohibiting "any non-consensual photography occurring anywhere," with sexual intent, violated First Amendment, where it applied even "to someone who takes purely public photographs").

Privacy and recording laws, as well as long-standing Fourth Amendment jurisprudence,[3] support these principles. If a minor sued a person for recording him or her in a public park claiming an invasion of privacy, this claim would almost certainly fail. *See, e.g.*, *Jackson v. Playboy Enters., Inc.*, 574 F. Supp. 10, 13 (S.D. Ohio 1983) (dismissing invasion-of-privacy claims brought by three minor boys in connection with the publication of a photograph of them, explaining that it was taken "on a city sidewalk in plain view of the public eye" and therefore plaintiffs could not allege that defendant had intruded into a private place or private seclusion).

The privacy tort most relevant here—intrusion upon seclusion—applies only if the defendant "has intruded into a private place, or has otherwise invaded a private seclusion." Restatement (Second) of Torts § 652B cmt. c (1977). As the Restatement of Torts explains, there can be no "liability for observing [the plaintiff] or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the

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[3] *See, e.g.*, *Alvarez*, 679 F.3d at 606 (finding that communications of police officers "performing their duties in public places and speaking at a volume audible to bystanders . . . lack any 'reasonable expectation of privacy' for purposes of the Fourth Amendment") (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."); *id*. at 361 (Harlan, J., concurring) ("[C]onversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.")).

public eye." *Id.* Professor William Prosser, the well-known expert on torts, observed:

> On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see.

Mark v. Seattle Times, 635 P.2d 1081, 1094 (Wash. 1981) (en banc) (quoting W. Prosser, Torts 808–09 (4th ed. 1971)).

Likewise, many state wiretap laws that restrict the surreptitious recording of certain communications explicitly exempt conversations made in public places where there is no reasonable expectation of privacy. *See* Reporter's Recording Guide, "In-person conversations," RCFP, https://www.rcfp.org/reporters-recording-sections/in-person-conversations/. And when such laws are not appropriately limited—like the City Ordinance here—they are unconstitutional. *See, e.g.*, *Alvarez*, 679 F.3d at 606; *Ex parte Thompson*, 442 S.W.3d at 350.

If people, including minors, voluntarily avail themselves of a public park, this does not render them a "captive audience" and justify stripping the public and press of their First Amendment rights in this "quintessential" public forum, as the City argued below. City's Mot. to Dismiss, *Ness v. City of Bloomington*, No. 19-cv-2882, ECF No. 68 at 16 (filed Feb. 26, 2020). The "captive audience"

doctrine—which has been applied "*only sparingly* to protect unwilling listeners from protected speech" and then, only upon "a showing that substantial privacy interests are being invaded in an essentially intolerable manner"—has no application here for the reasons set forth above. *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) (emphasis added, internal citation omitted).

C. The City has failed to show that the City Ordinance is narrowly tailored to advance its purported goal of protecting the privacy of minors in public parks.

To satisfy strict scrutiny, the City must show that the City Ordinance is "the least restrictive means for addressing a real problem." *Playboy Ent. Grp.*, 529 U.S. at 827 (invalidating federal ban that required cable programmers to either fully scramble or block channels dedicated to sexually-oriented programming or limit them to hours when children would be unlikely to view them). And if a "less restrictive alternative" would serve the City's purpose, it must use that alternative instead. *Id.* at 813. "To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit." *Id.* Moreover, "[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting our eyes'"—or, in this case, by having an appropriately limited expectation of privacy in a public park. *Id.*

(citations omitted). In addition, "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (internal quotation marks and citation omitted).

Even if the City had shown a compelling need to protect a minor's privacy in public parks, the City Ordinance sweeps in far more speech than necessary to advance that aim.[4] The City Ordinance restricts the photography and recording of minors even when they have no reasonable expectation of privacy; when the person who wants to take photographs or make recordings poses no actual threat to the minor and documenting the event may even *benefit* the minor, as discussed below; when the minor is recorded only for a fleeting moment or as part of a crowd; when another parental figure, like a relative, is present and consents; or, perhaps most significantly, when a matter of public interest occurs in the park, and the First Amendment interest in documenting it and informing the public about it overrides any minimal privacy interest the minor may have. These are not mere hypotheticals but inevitabilities in a traditional public forum, such as a park.

Courts have struck down laws that were similarly overbroad. *See, e.g.*, *Brown*, 564 U.S. at 804 (striking down California law restricting violent video

[4] Appellant aptly explains why the City Ordinance is unconstitutionally underinclusive as well, so amici do not address this point. Opening Br. 27–28.

games, finding that the law was not narrowly tailored but "vastly overinclusive" because "[n]ot all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games"). For example, in *Alvarez*, the Seventh Circuit held that Illinois' wiretap law was not narrowly tailored since it "banned nearly all audio recording without consent of the parties—including audio recording that implicates *no* privacy interests at all." 679 F.3d at 606–07.

Indeed, the City Ordinance applies even when minors *want* to draw attention to their actions and such news coverage *benefits* them. For example, millions of young people across the globe participated in climate change protests last year—many at public parks—and welcomed media attention to amplify their message. *See* Somini Sengupta, *Protesting Climate Change, Young People Take to Streets in a Global Strike*, N.Y. Times (Sept. 20, 2019), https://nyti.ms/2ABJpes. In 2018, thousands of teenagers staged a national school walkout to protest gun violence across the United States, again converging on public parks and inviting the media to publicize the event. *See, e.g.*, Vivian Yee & Alan Blinder, *National School Walkout: Thousands Protest Against Gun Violence Across the U.S.*, N.Y. Times (Mar. 14, 2018), https://nyti.ms/2FGNhvQ.

If cities and states were permitted to restrict photography at public parks like the City Ordinance does, this would significantly hamper coverage of nearly every

protest in a park, since observers would not be able to discern when they are recording minors as opposed to young adults who *look* like minors. Similarly, if a minor were attacked in a public park by another civilian or a law enforcement officer—like the fatal shooting of twelve-year-old Tamir Rice by police in 2015[5]—witnesses could be prohibited from recording that, even if the minor and his or her family *wanted* it recorded.

Moreover, laws that prohibit harassment, stalking, wiretapping, invasion of privacy, and intentional and negligent infliction of emotional distress already protect a minor's legitimate privacy interests. *See, e.g.*, Minn. Stat. § 609.749 (prohibiting harassment and stalking); Minn. Stat. § 626A.02 (barring the interception, recording, and disclosure of in-person and wire communications without the consent of at least one party to the conversation); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998) (recognizing privacy torts of intrusion upon seclusion, appropriation, and publication of private facts); *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438 (Minn. 1983) (recognizing tort of intentional infliction of emotional distress); *Stadler v. Cross*, 295 N.W.2d 552, 553 (Minn. 1980) (recognizing tort of negligent infliction of emotional distress).

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[5] *See* Shaila Dewan & Richard A. Oppel, Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. Times (Jan. 22, 2015), https://nyti.ms/1AVZBhs (reporting on Rice's death, using surveillance video of the shooting in a public park).

Accordingly, the Court must strike down the City Ordinance, for it restricts far more speech than necessary, and existing laws already achieve the City's purpose and are less restrictive.

III. Permitting the City Ordinance to stand would have significant repercussions, chilling photography and recording in public parks at a time when historic protests are taking place in these spaces.

The significance of this case extends far beyond the City of Bloomington or the individual actors involved. If the Court does not reverse the district court's decision, other cities and states may adopt similar prohibitions on photography and recording in public parks and even streets, leading to a significant chilling effect on newsgathering. Journalists—particularly photojournalists, broadcast journalists, and documentary filmmakers—may refrain from photographing or recording newsworthy activities occurring in public parks for fear that an individual captured in the image or recording *might* be a minor, thus subjecting the journalist to fines or potentially criminal liability simply for performing an essential newsgathering function. Such "compelled self-censorship, a byproduct of regulating speech based on its content, unquestionably dampens the vigor and limits the variety of public debate." *Telescope Media Grp.*, 936 F.3d at 754 (internal quotation marks and citation omitted).

The City's lack of a compelling justification for the City Ordinance at the time of enactment and the breadth of speech that it prohibits are particularly

consequential now: the resulting chilling effect would hamper the public's ability to receive timely and robust reporting at a historic moment when it is most needed. A wave of demonstrations have taken place in cities and towns across the country this year, sparked by the May 25, 2020 killing of George Floyd by a Minneapolis police officer. *See, e.g.*, Lara Putnam, et al., *The Floyd protests are the broadest in U.S. history – and are spreading to white, small-town America*, Wash. Post (June 6, 2020), https://tinyurl.com/y554kz8c. Matters of significant public interest and concern have played out in public streets and parks—not only demonstrations prompted by George Floyd's death, but also efforts to pull down or deface public monuments, protesters clashing with local, state, and federal law enforcement, and even killings of protesters by counter-protesters.[6] Minors have played a pivotal role in these events: while many peacefully participated in demonstrations, some have allegedly engaged in violence. Seventeen-year-old Kyle Rittenhouse, for example, is facing charges for killing two people and injuring a third during a protest in Kenosha, Wisconsin. Faith Karimi, *Kenosha shooting suspect called a friend to say he 'killed somebody,' police say, and then shot two others*, CNN

[6] *See, e.g.*, Olga R. Rodriguez & Jeffrey Collins, *Statues toppled throughout US in protests against racism*, AP (June 20, 2020), https://tinyurl.com/yadjsnnc; *Protesters continue to clash with federal agents in Portland*, CBS News (July 27, 2020), https://tinyurl.com/yyzjkdy8; *Portland clashes: Fatal shooting as rival groups protest*, BBC (Aug. 30, 2020), https://tinyurl.com/yydgckms; *Victims of shooting during Kenosha protests engaged gunman*, AP (Aug. 28, 2020), https://tinyurl.com/y6oudgzt.

(Aug. 28, 2020), https://tinyurl.com/y6z4cplq. It is in the public interest for the press to be able to fully report on such newsworthy events.

Photographs and recordings inform the public in a much deeper way than print alone can. "[A]udio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public. Their self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes." *Alvarez*, 679 F.3d at 607; *see also Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984) ("The adage that 'one picture is worth a thousand words' reflects the common-sense understanding that illustrations are an extremely important form of expression for which there is no genuine substitute.") (Brennan, J, concurring in part, dissenting in part).

Such photographs and recordings convey in vivid detail what it is like to be on the ground at these protests and how law enforcement officers have interacted with protesters and the press. *See, e.g.*, Ainara Tiefenthäler, et al., *Videos Show How Federal Officers Escalated Violence in Portland*, N.Y. Times (July 24, 2020), https://tinyurl.com/y39tbts3; Kate Conger & Derek Watkins, *Inside the Battle for Downtown Portland*, N.Y. Times (July 31, 2020), https://nyti.ms/3gjmw2P. This reporting has enhanced and informed a national debate on many topics, including policing tactics and funding, the role of federal law enforcement at protests, and

police violence against members of the press. If, for example, Bloomington's neighbor, Minneapolis, had adopted a similar ordinance, the press and public might not have been able to freely photograph and record the significant upheaval and protests that occurred in that city's parks at the beginning of the summer.

Now more than ever, the press must be able to fully and effectively report on demonstrations, speeches, and other matters of public interest that occur in public parks in order to enable the public to understand current events, engage in public debate about the issues raised by these events, and hold their elected officials accountable. *Bellotti*, 435 U.S. at 783. In this way, the press can fulfill its "constitutionally recognized role" of "informing and educating the public, offering criticism, and providing a forum for discussion and debate." *Id*. at 781.

In short, to restrict the photography and recording of newsworthy and historic events merely because minors may be present and may have some unreasonable expectation of privacy would not only contravene the First Amendment but also deprive the public of essential reporting on matters of significant public interest and concern.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court reverse the district court's decision and strike down the City Ordinance as unconstitutional under the First Amendment.

Respectfully submitted,

/s/ Bruce D. Brown
Bruce D. Brown
Counsel of Record for Amici Curiae
Katie Townsend*
Sarah Matthews*
Caitlin Vogus*
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300
bbrown@rcfp.org
**Of Counsel*

Dated: September 25, 2020
Washington, D.C.

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because this brief contains 6,204 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f).
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/s/ Bruce D. Brown
Bruce D. Brown, Esq.
Counsel of Record for Amici Curiae
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

Dated: September 25, 2020
Washington, D.C.

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s/ Bruce D. Brown
Bruce D. Brown, Esq.
Counsel of Record for Amici Curiae
REPORTERS COMMITTEE FOR
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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2020, I caused the foregoing brief to be filed with the Court using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Bruce D. Brown
Bruce D. Brown, Esq.
Counsel of Record for Amici Curiae
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS