STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT

State of Minnesota, Plaintiff, v. Nekima Levy-Pounds, Kandace Montgomery, Shannon Bade, Todd Dahlstrom, Amity Foster, Adja Gildersleve, Michael McDowell, Catherine Salonek, Pamela Twiss, Jie Wronski-Riley, Mica Grimm, Defendants.	Chief Judge Peter A. Cahill **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR VAGUENESS, PUBLIC FORUM, STATE ACTION, PETITION CLAUSE, AND PEACEABLE ASSEMBLY CLAUSE** Court File Nos. 27-CR-15-1307 27-CR-15-1304 27-CR-15-1350 27-CR-15-1331 27-CR-15-1346 27-CR-15-1335 27-CR-15-1320 27-CR-15-1326 27-CR-15-2766 27-CR-15-1349 27-CR-15-1829

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INTRODUCTION

"[R]estraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Defendants' rights in this case have been so infringed because 1) the statutes under which they have been charged are unconstitutionally vague; 2) in the Mall of America, Defendants are afforded the protections that the First Amendment guarantees; and 3) the Mall infringed on the Defendants' rights to petition the Government for redress of grievances and assemble. Accordingly, Defendants Nekima Levy-Pounds, Kandace Montgomery, Shannon Bade, Todd Dahlstrom, Amity Foster, Adja Gildersleve, Michael McDowell, Catherine Salonek, Pamela Twiss, Jie Wronksi-Riley, and Mica Grimm (collectively, "Defendants") submit the following Memorandum in Support of Defendants' Motion to Dismiss.

ARGUMENT

I. The Statutes that Provide the Basis for the Charges Against Defendants are Unconstitutionally Vague.

The void-for-vagueness doctrine ensures laws are applied fairly by requiring that statutes define criminal offenses sufficiently, so that "ordinary people can understand what conduct is prohibited" and that "arbitrary and discriminatory enforcement" is not encouraged. *State v. Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Unless clear guidelines for law enforcement are created by the legislature, there is a great risk that prosecutors will be able to "pursue their personal predilections," and prosecute only "particular groups deemed to merit their displeasure." *Kolender*, 461 U.S. at 358, 360 (quotations omitted).

A defendant may only bring a vagueness challenge as it relates to the defendant's own behavior, and not a hypothetical situation. *E.g. In re On-Sale Liquor License Class B*, 763

N.W.2d 359, 366 (Minn. App. 2009). As in the current case, a defendant may argue that his or her charges are related to conduct not within the "core class of conduct" contemplated by the statute he or she has allegedly violated. *State v. Broten*, 839 N.W.2d 573, 579 (Minn. App. 2013) (citing *Skilling v. United States*, 561 U.S. 358 (2010)). Moreover, a defendant may contend that the statute, although otherwise constitutional, was applied to them in such an overbroad manner as to impermissibly infringe upon their constitutional rights. *State v. Hipp*, 213 N.W.2d 610, 615 (1973). When a statute implicates First Amendment rights, however, a defendant has a broader opportunity to challenge it. In those situations, even if the statute is constitutionally applied to a defendant, he or she may challenge its vagueness as it could hypothetically be applied to others. *Id.* at 614.

A. The Statutes Underlying Counts III–VI are Invalid Under the Void-for-Vagueness Doctrine.

The disorderly conduct statute has been challenged on a void-for-vagueness and First Amendment basis before, and as a result has been significantly narrowed in its scope and application. In *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978), the Minnesota Supreme Court held that the disorderly conduct statute, Minn. Stat. § 609.72, "clearly contemplates punishment for speech that is protected under the First and Fourteenth Amendments." *S.L.J.*, 263 N.W.2d at 419. In order to save the statute, the portion of it that punishes a defendant's engagement in "offensive, obscene, or abusive language" was construed to only apply to fighting words. *Id.* at 418 (quoting Minn. Stat. § 609.72 subd. 1(3)). Defendants' speech clearly does not fall into a category of words which "have a direct tendency to cause acts of violence." *See, e.g.*, *Chaplinksy v. State of New Hampshire*, 315 U.S. 568, 573 (1942). Neither did they encourage others to speak in ways which would cause violence—quite the opposite, in fact. They were demonstrating against violence, not condoning or inviting it. Accordingly, Defendants' speech is outside the

class of offenses contemplated by the statute, and to punish it would be a violation of the First and Fourteenth Amendments.

Defendants are also charged under another clause of the disorderly conduct statute, one that punishes engagement in "offensive, obscene, abusive, boisterous, or noisy conduct." Minn. Stat. § 609.72, subd. 1(3). This charge, too, must fail under vagueness doctrine because Defendants' conduct is not within the core class which the statute contemplates, and, therefore, the statute failed to provide adequate notice to defendants that their conduct was punishable and allowed for arbitrary prosecution. Because Defendants' conduct was not offensive, obscene, or abusive, they must have been charged with boisterous or noisy conduct. This language, however, forces Defendants to guess whether an officer would find their conduct so boisterous or noisy as to put them at risk of prosecution. *Cf. City of Edina v. Dreher*, 454 N.W.2d 621, 623 (Minn. App. 1990). *Dreher* held that a city ordinance that punishes a dog owner for its dog's barking was void for vagueness, because no "observable deviant conduct occurred," and the owner was forced to guess as to who might be disturbed. *Id.* at 623. The court further suggested that disturbance in many cases is a subjective matter. *Id.* (questioning who might be disturbed by dog barking, and how their relevant tolerances might affect their perception of "disturbance").

The Mall of America is a noisy and boisterous place, especially during the holiday shopping season. Teenagers excitedly shouting, small children running, babies crying, and individuals loudly arguing are all common occurrences which reasonably could "arouse, alarm, anger, or cause resentment in others or provoke an assault or breach of the peace." Minn. Stat. § 609.72, subd. 1(3). Yet these regularly occur without incident. The "boisterous or noisy" language allows for "a standardless sweep" that allows the prosecution of individuals based solely on the biases of others. *Kolender*, 461 U.S. at 358. It is clear that the vague language of

the statute allowed for Defendants' arbitrary prosecution based on the content of their speech, and as such it is void for vagueness as applied to Defendants' situation. The charges must be dismissed.

B. The Unlawful Assembly Statute Has Been Narrowed for Vagueness to Regulate Only Criminal Conduct, Not Peaceful Demonstrations.

Much like the disorderly conduct statute discussed above, the unlawful assembly statute, Minn. Stat. § 609.705, has previously been challenged on a constitutional basis, and its scope was significantly narrowed as a result. In *State v. Hipp*, 298 Minn. 81, 213 N.W.2d 610 (1973), a group of university students were arrested and charged with unlawful assembly after a violent and dangerous protest of a restaurant. *Id.* at 82–83, 612. The *Hipp* Court recognized the potential for infringement on First Amendment rights, and construed the statute to regulate conduct, not speech or peaceful assembly. *Id.* at 88, 615 ("It is limited to regulating only criminal conduct or activities, not peaceful protest, general obnoxiousness, or deviant lifestyles."). The court went on to hold that the unlawful assembly statute was not unconstitutional as applied to the protestors' conduct in *Hipp. Id.* at 89–90, 615–16. This does not stop our inquiry, however, because, as explained below, Defendants' conduct is not comparable to the actions in *Hipp*.

The unlawful assembly statute was wrongly applied to Defendants' conduct during the Black Lives Matter demonstrations. The statute only regulates criminal conduct. *Id.* at 88, 615. Defendants did not engage in criminal conduct, but peaceful demonstration, something that is clearly outside the purview of the statute. *Id. Hipp* is illustrative here: the protestors in *Hipp* acted in an obviously criminal manner. They overcrowded the capacity of a small restaurant (150 in a space designed for 80), shouted obscenities, threw food, damaged metal door frames, stole from the assistant manager, defaced the property, and showed no regard for order or decorum, causing the situation to give rise to "imminent alarm and peril." *Id.* at 83–85, 90, 612–13, 616. In

clear contrast, Defendants and the Black Lives Matter demonstrators acted peacefully and conducted themselves in a calm, nonviolent, and non-obtrusive manner. Although the Mall was crowded, as could be expected on the Saturday before Christmas, it was nowhere near or above capacity.[1] No property damage or injuries were reported as a result of the Black Lives Matter demonstration. Defendants were peacefully assembled, and their conduct is not punishable under the unlawful assembly statute. Defendants' speech cannot be attacked solely due to its controversial nature, and their conduct was not within the criminal conduct that the unlawful assembly statute seeks to deter and punish. Because their actions were outside of the "core class" of actions that the law addresses, *see, e.g.*, *Skilling*, 561 U.S. at 358, the unlawful assembly charges against Defendants must be dropped.

II. Defendants are Afforded First Amendment Protections in the Mall of America

1. *Wicklund* Should Be Overturned.

State v. Wicklund, 589 N.W.2d 793 (Minn. 1999), held that Mall of America was not "public forum" for purposes of free-speech protections. Minnesota Supreme Court precedent is binding on this Court, thus this Court cannot overturn *Wicklund*. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. Ct. App. 2010) ("The district court, like this court, is bound by supreme court precedent and the published opinions of the court of appeals . . . ."). Defendants raise this issue to preserve the argument for potential appeal. *Cf. Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that the court of appeals generally does not address issues not raised before the district court). Regardless, however, Defendants ask this Court to find the Mall of America is a "public forum."

[1] Estimates put the Black Lives Matter demonstration at around 1,500–3,000 protestors. Just a few weeks before, an estimated 7,200 individuals had gathered in the same space to celebrate the life of a local child who had recently passed away from cancer. Leah Beno, *7,200 Singing Zach Sobiech's 'Clouds' Will Make You Cry, Again*, Fox 9 Twin Cities (Dec. 11, 2014, 3:52 PM) http://www.myfoxtwincities.com/story/27608397/zach-sobiech-clouds-mall-of-america.

2. Defendant's Case Is Distinguishable from *Wicklund* Because of Changed Circumstances.

Wicklund is distinguishable from this case. In the sixteen years since the Minnesota Supreme Court held that the Mall of America was not a public forum protected by the First Amendment, 589 N.W.2d at 803, the Mall's relationship with the City of Bloomington has changed significantly. Many of the key facts that the court relied on to make that determination have changed in the interim, rendering *Wicklund* no longer applicable to this case. *Cf. Jobe v. Comm'r of Public Safety*, 609 N.W.2d 919, 922 n.1 (Minn. Ct. App. 2000) ("That case, however, is distinguishable on its facts and does not control the decision here."). The Mall's interaction and coordination with the Bloomington Police Department ("BPD"), its financing from the City of Bloomington, its counsel and legal advice from the Bloomington City Attorney's Office, and the nature of the BLM demonstration distinguish this case from *Wicklund*. Therefore, *Wicklund* does not control the decision here.

First, the Mall of America's security policies and procedures are drastically different from those in effect during *Wicklund*. In *Wicklund*, the Court noted that the Mall was patrolled by private security guards, rather than police officers. *Wicklund*, 589 N.W.2d at 802. Today, the Mall both permanently hosts and coordinates with the Bloomington Police Department. The security guards at the Mall of America receive training in conjunction with the BPD. In addition to training, the BPD maintains a "permanent presence" at the Mall with "dedicated, full-time staff." (Flaherty Declaration, Exs. D, E). This dedicated, full-time staff was on duty at the Black Lives Matter demonstration. Furthermore, in the days leading up to the demonstration, the Mall of America frequently communicated and coordinated with the Bloomington Police. The Director of Mall Security exchanged numerous emails with the BPD to share information about the demonstration, potential demonstrators, and plans to handle the situation in coordination with

the BPD. Documents obtained through a public records request also show that MOA security obtained the protest organizers' personal information through a fake Facebook account without their knowledge, and that the MOA shared that information with Bloomington officials.[2] And not only did BPD officers personally shut down the BLM demonstration, they did so in full riot gear.[3] Thus, the Mall's security policies and procedures as well as its coordination with the Bloomington Police Department is significantly different from the procedures in place when *Wicklund* was decided.

Second, *Wicklund* held that the Mall's public financing did not convert the Mall into a "public forum" for free speech protection purposes. *Wicklund*, 589 N.W.2d at 803 ("[N]or does … public financing transform the nature of its property from private to public for purposes of free speech protection under the state constitution."). But that finding was based on the lack of a continuous stream of state funds. *Id.* at 802. Now, however, the Mall does receive a continuous stream of funds from the State and City of Bloomington. And the Mall recently secured an additional $250 million dollars in public subsidies to double its size over the next twenty-one years. The continuous stream of funds and the recent quarter of a billion dollars in subsidies distinguishes the facts of this case from those relied on in *Wicklund*.

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[2] Lee Fang, *Mall of America Security Catfished Black Lives Matter Activists, Documents Show*, The Intercept, Mar. 18, 2015, *available at* https://firstlook.org/theintercept/2015/03/18/mall-americas-intelligence-analyst-catfished-black-lives-matter-activists-collect-information/. It is well-documented that the Mall's private security guards work in close concert with local and federal law enforcement to help the government achieve its policing goals. *See, e.g.*, Daniel Zwerdling, *Under Suspicion at the Mall of America*, NPR, Sept. 7, 2011, *available at* http://www.npr.org/2011/09/07/140234451/under-suspicion-at-the-mall-of-america; Josh Rosenthal, *More Than 2 Million License Plates Scanned at the Mall of America in Past 90 Days*, KSTP, Oct. 24, 2014, *available at* http://kstp.com/article/stories/s3600435.shtml.

[3] Sarah Lazare, *Revealed: Police and FBI Spied on Black Lives Matter Organizers Ahead of Mall of America Protests*, Common Dreams, Mar. 13, 2015, *available at* http://www.commondreams.org/news/2015/03/13/revealed-police-and-fbi-spied-black-lives-matter-organizers-ahead-mall-america.

Third, unlike *Wicklund*, the Bloomington City Attorney's Office was significantly involved in the BLM demonstration. In *Wicklund*, there was no evidence that the Mall ever interacted with the Bloomington City Attorney's Office. Here, the Mall of America and Bloomington City Attorney's Office exchanged numerous emails before the BLM demonstration, detailing what the Mall should do to prepare. The City Attorney directed the Mall's personnel to investigate individuals on social media prior to the demonstration. The City Attorney instructed the Mall to provide the City Attorney's Office with information about potential demonstrators and their plans. Furthermore, the City Attorney directly advised the Mall's corporate counsel on public relations and other issues regarding the demonstration. The City Attorney's Office provided counsel and legal advice to the Mall of America, much like it provides counsel to the City of Bloomington and its elected officials. The Bloomington City Attorney drafted policies and communicated directly with the Mall's personnel and the Mall's corporate counsel to "advise and guide the [Mall of America] with respect to the state and federal statutory and constitutional provisions relating to the performance of their job duties." Civil Division Duties, City Attorney's Office, City of Bloomington, https://www.bloomingtonmn.gov/city-attorneys-office. Further evidencing the intertwinement between the City and the Mall is the fact that the City Attorney asserted that documents produced by the Mall were privileged under the work-product doctrine. (Flaherty Declaration, Ex. H.) Thus, the City Attorney's involvement in the BLM demonstration provides a stark distinction from *Wicklund*.

Finally, the Black Lives Matter demonstration was a purely political demonstration, unlike the protest at issue in *Wicklund*, which also constituted demonstrations detrimental to economic interests of private citizens. The protesters in *Wicklund* opposed animal cruelty and

urged shoppers to boycott fur products sold by Macy's. *Wicklund*, 589 N.W.2d at 795. The demonstration here was in response to the failure to indict or charge police officers for the deaths of unarmed African American men in Ferguson, Missouri and New York. The demonstrators spoke out against the racially discriminatory practices in police departments and the use of excessive force by police officers. This demonstration was purely political and was directly aimed at government practices. Its purpose was to achieve a political goal—a change in the state and local police department policies. *Cf. Wicklund*, 589 N.W.2d at 801 (describing the speech in *Wicklund* and stating that "[i]ts purpose was not to achieve some political goal"). So, the nature and goal of the BLM demonstration is distinct from the commercial speech at issue in *Wicklund*.

These factual differences render the decision in *Wicklund* inapplicable to this case. The Mall's security policies in conjunction with the Bloomington Police Department, financial support from the city of Bloomington, guidance and counsel from the Bloomington City Attorney's Office, and nature of the demonstration at issue distinguish this case from *Wicklund*. Therefore, *Wicklund* does not control this decision.

3. The Mall of America Was a Quasi-Governmental Actor for Purposes of the BLM Demonstration, So the Mall was Subject to First Amendment Constitutional Restrictions.

Even if the Mall of America is not a public forum, as *Wicklund* held, the Mall can still be subject to constitutional provisions if the Mall was a quasi-governmental actor. *See Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 567 (1972) ("[I]t must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action…."). Even though the Mall is not a traditional public forum and, thus, is not usually subject to the free speech protections guaranteed by the Constitution, the Mall's intertwinement, involvement, and coordination with the City of Bloomington leading up to the Black Lives Matter demonstration turned the Mall into a quasi-governmental actor, binding them to

constitutional limitations for purposes of the BLM demonstration. *Cf. Wickersham v. City of Columbia*, 481 F.3d 591 (8th Cir. 2007) (concluding that a private corporation, which was not typically subject to constitutional limitations, was subject to those limitations during an air show in which the corporation worked with the city to effectuate policies during the air show). Section 1983 case law[4] provides a helpful framework and a useful starting point to determine whether the Mall was a quasi-governmental actor.

Section 1983 provides individuals with a cause of action against any person, who under color of law, deprives that individual of her constitutional or statutory rights. 42 U.S.C. § 1983 (2014). Private actors cannot violate § 1983 "no matter how discriminatory or wrongful." *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). But private action can constitute state action "when it can be said that the State is responsible for the specific conduct." *Id.* at 1004. The Court considers a "host of facts" to determine whether private action is state action for a 1983 claim. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). These facts include whether the State exercised "coercive power," if the State provided "significant encouragement," if the private actor operated as a "willful participant in joint activity with the State or its agents," if the state actor is controlled by an "agency of the State," if the private actor has been delegated a public function by the State, and when the private actor is "entwined with governmental policies" or if the government is "entwined in [the private actor's] management or control." *Id.* (citations omitted).

[4] The State's filings in the *Nocella* case acknowledge this case law. *State v. Nocella*, 27-CR-15-3146, State's Memorandum in Support of Motions in Limine, at 3 n.1 ("State action may be found either where a sufficiently close nexus exists between the state and the challenged activity or where there is a symbiotic or interdependent relationship between the state and the private entity.").

Three of those facts, indicating that private action is actually state action, are present here: (1) significant encouragement, (2) willful participant in joint activity, and (3) entwinement with the State. These facts demonstrate that the Mall of America was not merely a private actor, but rather a quasi-governmental actor for the purpose of the BLM demonstration. Because the Mall was a quasi-governmental actor, the Mall was subject to constitutional limitations during the BLM demonstration.

a. The City of Bloomington Provided Significant Encouragement to the Mall of America to Investigate and Suppress the BLM Protest Such That the Mall's Action Must Be Deemed to Be That of the City.

"[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004. The Mall's actions constituted state action because the City of Bloomington, through the actions of the Bloomington Police Department and the City Attorney's Office, provided significant encouragement regarding how the Mall should handle the BLM demonstration.

The City did not merely acquiesce or approve of the Mall's policies and procedures regarding the demonstration, but instead the City directed the actions of the Mall by setting the Mall's policies and providing guidance to the Mall. *See Blum*, 457 U.S. at 1004-05; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978). The City Attorney told the Mall who to investigate and directed the Mall to provide her with information about the demonstrators and the BLM demonstration. The City Attorney also spoke directly to the Mall's corporate counsel about how to handle the demonstration. The City's actions go beyond mere approval and acquiescence such that the Mall's actions must be deemed to be that of the City.

In *United States v. Garlock*, the Eighth Circuit held that the state did not encourage the private actor because the state was not aware of the private actor's actions. *United States v.*

Garlock, 19 F.3d 441, 443 (8th Cir. 1994). Unlike Defendants' case, the court found that the government had "absolutely no control over the manner in which [the private actor] maintained its internal security." *Id.* The emails between the Mall, the Bloomington Police Department, and the City Attorney's Office show that the government not only knew about the demonstration prior to December 20, 2014, but the government also asserted control over the matter, directing the Mall as to security procedures and collecting evidence for potential criminal prosecutions. The government's direct communication and advice to the Mall constituted significant encouragement and was sufficient to turn the private actions of the Mall into the public actions of the City.

The City worked through the Mall to enforce its own policies and investigation and, therefore, the Mall's actions were that of the City and the Mall was a quasi-governmental actor. The City encouraged the Mall to investigate certain individuals and told the Mall how to do it. The City encouraged the Mall to implement certain security measures and procedures, and the Bloomington Police Department assisted them in creating those procedures and executing them. The City did not merely approve the Mall's actions. The City did not merely acquiesce to the Mall's procedures. The City, through the BPD and the City Attorney's Office, directed and encouraged these actions and procedures. The City worked through the Mall to enforce its own policies and investigation and, therefore, the Mall's actions were that of the City and the Mall was a quasi-governmental actor. As a quasi-governmental actor acting on behalf of the City, the Mall was bound to abide by the Constitution's First Amendment protections.

b. The Mall of America Was a Willful Participant in Joint Activity with the City of Bloomington.

The Mall acted under color of law as a quasi-governmental actor. "To act under 'color of law' does not require that the accused be an officer of the State. It is enough that he is a willful

participant in joint activity with the State or its agents." *United States v. Price*, 383 U.S. 787, 794 (1966). To show this, a plaintiff must plausibly allege "a mutual understanding, or a meeting of the minds, between the private party and the state actor." *Miller v. Compton*, 122 F.3d 1094, 1098 (8th Cir. 1997). Mere contacts are insufficient to show a meeting of the minds. *Mershon v. Beasley*, 994 F.2d 449, 452 (8th Cir. 1993).

Communications between the Mall, the BPD, and the City Attorney's Office show a mutual understanding, beyond mere contacts. The Mall and the City had a meeting of the minds about the BLM demonstration. (Flaherty Declaration, Ex. A.) They discussed the security and police procedures for the event and how to gather information to prepare for potential criminal charges. (Flaherty Declaration, Ex. A.) Together, the Mall and City devised a plan and were both willful participants in the planning, preparing, and executing of that plan. (Flaherty Declaration, Ex. A.)

Defendant's case is similar to *Wickersham v. City of Columbia*, in which the Eighth Circuit found that a corporation engaged in state action and was subject to First Amendment restrictions because the corporation acted jointly and intentionally with the government pursuant to a plan. *Wickersham*, 481 F.3d at 599. In *Wickersham*, the court found that the city provided "critical assistance in planning and operating the [event]" and "played an active role in enforcing the particular speech restrictions challenged in this action." *Id.* at 598. Similarly, the BPD and City Attorney's Office provided critical guidance in preparation for the BLM demonstration. The City Attorney spoke directly to Mall personnel about who to investigate, how to prepare for the demonstration, and what information the City needed to bring charges. Both the BPD and City Attorney's Office played an active role in enforcing the Mall's policies and gathering evidence in preparation for potential criminal prosecutions.

The emails exchanged between the Mall, the BPD, and the City Attorney's Office provide evidence of a mutual understanding between the parties. The Mall of America was a willing participant in this understanding and worked in conjunction with the City to plan, prepare, and execute procedures in response to the demonstration. The Mall acted with the City and received significant aid from the BPD and City Attorney's Office. These actions are sufficient to turn a private actor into a state actor. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982) (holding that a person may be a state actor if "he has acted together with or has obtained significant aid from state officials"); *Price*, 383 U.S. at 794 (concluding that a private actor's willful participation in joint activity with a state actor is enough to turn that private party into a state actor). Thus, the Mall became a quasi-governmental actor for purposes of the BLM demonstration and was subject to constitutional limitations.

c. Because the Mall of America's Management and Control Was So Entwined with the City of Bloomington, the Mall Engaged in State Action.

Finally, the Mall of America's management and control of the BLM demonstration was so entwined with the City's Attorney's Office and the BPD that the Mall constituted a state actor for purposes of the BLM demonstration. *See Brentwood Acad.*, 531 U.S. at 302. ("Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards . . . .").

The Mall's entwinement with the City is similar to the entwinement found in *ACLU of Minnesota v. Tarek Ibn Ziyad Academy*, No. 09-138, 2009 WL 2215072, at *9-10 (D. Minn. July 21, 2009). In *Tarek Ibn Ziyad Academy*, the court found that a charter school, through its monitoring and compliance policies, was so entwined with the State that its actions were fairly attributable to the State. *Id.* Similarly, the Mall and the City had entwining policies that both parties collaborated on and created in preparation for the demonstration. Furthermore, not only

did the Mall seek, and the City Attorney provide, legal counsel about the demonstration, both before and after the demonstration happened, the City claimed privilege over documents it received from the Mall. (Flaherty Declaration, Ex. H.) This legal guidance from a City Attorney is limited to the City's elected officials, various City departments and all City boards and commissions. Thus, the City Attorney provided legal counsel to the Mall the same as it would to the mayor or any other state official or entity. The City Attorney's legal advice shows that the City Attorney was entwined with the control and management of the Mall of America and treated the Mall as a government actor.

Not only was the Mall entwined with the City Attorney's Office, but the Mall was also entwined with the Bloomington Police Department. The Mall's security guards receive training in conjunction with the BPD and routinely coordinate with the BPD. Prior to the demonstration, the Mall and police department exchanged numerous emails to communicate and plan in preparation for the demonstration. The Director of Mall Security, Doug Reynolds, exchanged numerous emails with the BPD to provide details about the demonstration, potential demonstrators, and plans to handle the demonstration. Bloomington Police Department also maintains a "permanent presence" at the Mall of America with "dedicated, full-time staff." (Flaherty Declaration, Exs. D, E.) This dedicated, full-time staff was on duty during the demonstration. The training, communication, and coordination between the Mall and Bloomington Police Department shows that the two were entwined and worked together before, during, and after the demonstration.

Publicly available information has suggested a symbiotic, intertwined relationship between the BPD and MOA for years.[5] In 2011, NPR and the Center for Investigative Reporting received documentation of over 100 suspicious activity reports[6] from both mall security and local police, many of which targeted innocent individuals.[7] In one case, a man who was videotaping his experience at the Mall for his fiancé overseas was approached by a MOA security guard, who questioned him for an hour with another guard before summoning two BPD police officers. The BPD officers took him to the police substation in the basement of the Mall, where they frisked him, seized his camera, and called the Joint Terrorism Task Force. An FBI agent told the BPD officers to seize the man's memory card and delete all of his videos.[8] This incident is but one example of Mall security guards working in close concert with local and federal law enforcement.

As the digital age has enabled mass surveillance and prompted predictive methods of policing, reports indicate that cooperation between mall security and Bloomington police has expanded. In 2014, media outlets reported that 12 automatic license plate readers (ALPRs) had been installed at the MOA.[9] The reports revealed an agreement between the MOA and BPD that allows the MOA to access data each ALPR collects, which includes the plate number, date, time,

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[5] An FBI press release dated February 22, 2015 states that "Bloomington Police have a permanent presence with dedicated, full-time staffing at Mall of America." Federal Bureau of Investigation, Update on Mall of America, Feb. 22, 2105, *available at* https://www.fbi.gov/minneapolis/press-releases/2015/update-on-mall-of-america. The MOA's website boasts the same fact. Security Information, Mall of America, *available at* http://www.mallofamerica.com/guests/security.

[6] Margot Williams, *DATABASE: Mall of America Suspicious Activity Reports*, NPR, Sept. 7, 2011, *available at* http://www.npr.org/2011/08/18/139756444/database-mall-of-america-suspicious-activity-reports.

[7] Daniel Zwerdling, *Under Suspicion at the Mall of America*, NPR, Sept. 7, 2011, *available at* http://www.npr.org/2011/09/07/140234451/under-suspicion-at-the-mall-of-america.

[8] *Id.*

[9] Josh Rosenthal, *More Than 2 Million License Plates Scanned at the Mall of America in Past 90 Days*, KSTP, Oct. 24, 2014, *available at* http://kstp.com/article/stories/s3600435.shtml.

and location of vehicles that passes before it.[10] The BPD holds this data for 90 days.[11] BPD Chief Jeff Potts confirmed that Mall personnel can access the data for security purposes.[12]

Most recently, the BPD and MOA's relationship received national attention after officers jointly quashed a Black Lives Matter protest. Over 3,000 people gathered in the Mall's rotunda on December 20, 2014 to protest against police brutality.[13] BPD officers reportedly donned full riot gear and shut down several areas of the MOA for hours to enforce the Mall's rule against unpermitted demonstrations.[14] Emails between the City of Bloomington and the MOA suggest that they collaborated over their responses to the protest.[15] Furthermore, documents obtained through a public records request show that MOA security obtained the protest organizers' personal information through a fake Facebook account without their knowledge, and that the MOA shared that information with Bloomington officials.[16]

The BPD's close association with MOA security and officials raises important concerns about the privacy and speech rights of those who enter the Mall. It suggests that the BPD and

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[10] Josh Rosenthal, *Bloomington Police Using License Plate Readers at Mall of America*, KSTP, Oct. 10, 2014, *available at* http://kstp.com/article/stories/s3586870.shtml.
[11] *Id.*
[12] KSTP News, *Bloomington Police Install License Plate Readers at MOA*, KSTP, Oct. 10, 2014, *available at* https://www.youtube.com/watch?v=7EyRZmGAXFE.
[13] Sarah Lazare, *Revealed: Police and FBI Spied on Black Lives Matter Organizers Ahead of Mall of America Protests*, Common Dreams, Mar. 13, 2015, *available at* http://www.commondreams.org/news/2015/03/13/revealed-police-and-fbi-spied-black-lives-matter-organizers-ahead-mall-america.
[14] *Id.*
[15] John Reinan, *Protesters Say E-Mails Show 'Disturbing' Coordination between Bloomington and Mall of America*, Star Tribune, Mar. 10, 2015, *available at* http://www.startribune.com/protesters-say-e-mails-show-disturbing-coordination-between-bloomington-and-mall-of-america/295692141/.
[16] Lee Fang, *Mall of America Security Catfished Black Lives Matter Activists, Documents Show*, The Intercept, Mar. 18, 2015, *available at* https://firstlook.org/theintercept/2015/03/18/mall-americas-intelligence-analyst-catfished-black-lives-matter-activists-collect-information/.

MOA are collecting and sharing personal data in unlawful ways. And, that BPD's involvement and presence at the MOA to suppress free expression is in violation of the First Amendment.

To conclude, the Mall's management and control of the BLM demonstration was entwined with the City. The City Attorney's Office and the Bloomington Police Department managed and controlled the investigation leading up to the demonstration and directed the Mall's personnel and corporate counsel's actions. The City Attorney provided legal guidance to the Mall before and after the demonstration. The BPD and the Mall's security were intertwined from training to creating policies and plans in preparation for the demonstration to executing those plans as one cohesive, united police force. This unity supports the conclusion that the Mall, although a private actor by name, was acting as a quasi-governmental actor during the BLM demonstration.

The City of Bloomington through the Bloomington Police Department and City Attorney's Office significantly encouraged and even directed the Mall's actions. The Mall was a willful participant in this joint activity with the BPD and City Attorney's Office and the parties had a mutual understanding to investigate suspected demonstrators, to prepare a plan for the demonstration, and to execute that plan together. The investigation, preparation, and execution all show that the Mall's management and control was entwined with the BPD and the City Attorney's Office. From these facts, the Mall's action constituted state action because the Mall acted as a quasi-governmental actor. Thus, even if the Mall is not typically considered a public forum, the Mall became a quasi-governmental actor for the BLM demonstration and was bound by First Amendment limitations during the BLM demonstration.

III. The Mall Infringed on Defendants' Right to Petition the Government for Redress of Grievances and Assemble.

Through the Right to Assembly Clause and Petition Clause, the First Amendment protects "the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. Const. amend. 1. Marches and demonstrations, such as the one at issue here, constitute protected petitioning and peaceful assembly activity. *See, e.g.*, *Gregory v. City of Chicago*, 394 U.S. 111, 113 (1969) ("Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment."); *Henry v. City of Rock Hill*, 376 U.S. 776, 778 (1964) (finding a peaceful, orderly protest where participants carried signs and sang songs was a protected activity); *Edwards v. S. Carolina*, 372 U.S. 229, 238 (1963) (same). Protected petitioning activities are "allow[ed] the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Id.*

The Petition Clause "allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives" and "is generally concerned with expression directed to the government seeking redress of a grievance." *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011). "The plain language of the First Amendment makes clear that a 'petition' triggers the amendment's protections." *Holzemer v. Memphis*, 621 F.3d 512, 521 (6th Cir. 2010) (citation omitted). Those protections include the "petitioning of 'all departments of the Government,' and a private citizen's business interest can be the subject of a constitutionally protected petition." *Id.* (citing *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961)).

The march and demonstration at issue in this case were peaceable and, therefore, a protected activity. This is because the narrow restrictions that allow the government to restrict First Amendment rights are limited to *actual* "violence or threat of violence." *Compare Feiner v. New York*, 340 U.S. 315, 321 (1951) (finding no violation of First Amendment rights when speaker incited violence and riot), *and Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (upholding narrowly defined statutes that forbid the use of "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"), *with Edwards*, 372 U.S. at 235–36 (upholding the right to peaceably assemble and petition when there was no violence, threat of violence or fighting words), and *Cox v. Louisiana*, 379 U.S. 536, 550–51 (1965) (overturning convictions for breach of the peace even though witnesses feared "violence was about to erupt" when students' cheering, clapping and singing). The right to petition for the redress of grievances through marches and demonstrations cannot be denied based on some hostility to the march nor the threat of possible violence. *Williams v. Wallace*, 240 F. Supp. 100, 109 (M.D. Ala. 1965) (issuing an injunction to allow for the civil rights march from Selma to the state capital in Montgomery, Alabama). First Amendment rights are "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Edwards*, 372 U.S. at 237 (citation omitted).

Moreover, the Supreme Court has specifically recognized that some harm to others can be acceptable in the exercise of these important constitutional rights, making any claims of harm through inconvenience or lost sales moot. For example, the Court has found ordinances that outlaw the distribution of pamphlets are unconstitutional, even though they are on the based on harm from littering and a general threat to public safety, health and welfare. *Schneider v. Town*

of Irvington, 308 U.S. 147, 163 (1939). This idea of an acceptable level of harm to others is especially true in the exercise of rights under the Petition Clause:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

Noerr Motor Freight, Inc., 365 U.S. at 143–44.

The actions in this case produced no violence nor any "evil that rises far above public inconvenience, annoyance, or unrest." Absent those elements, the petitioning and peaceable assembly activities were protected under the First Amendment, even if there was some "incidental effect" of injury or slight harm to others. *See Cox*, 379 U.S. at 550–51 (citation omitted) ("[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise."). Such activities cannot be made criminal through the use of offenses "so generalized as to be … not susceptible of exact definition" and to be based on nothing more than "stir[ring] people to anger, invit[ing] public dispute, or br[inging] about a condition of unrest." *Edwards*, 372 U.S. at 238. *Cf.* Minn. Stat. § 609.705 (2014) (defining Unlawful Assembly to include activities "in a disorderly manner as to disturb or threaten the public peace); Minn. Stat. § 609.72.1(3) (2014) (defining disorderly conduct as including conduct "tending reasonably to arouse, alarm, anger or cause resentment of others"). The use of these types of offenses to criminalize the exercise of these basic constitutional rights, absent a valid and reasonable threat of impending violence, is facially unconstitutional. *See, e.g.*, *Cox*, 379 U.S. at 550–51; *Henry*, 376 U.S. at 777–78; *Edwards*, 372 U.S. at 235–36.

A. The Petition Clause should be interpreted more broadly than other rights.

"Among other rights essential to freedom, the First Amendment protects 'the right of the people ... to petition the Government for a redress of grievances.'" *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2491 (2011) (quoting U.S. Const. amend. 1). Although inseparable, the right to petition is not identical to other First Amendment rights. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). As the Supreme Court has made clear, interpretations that limit the right to petition to the same constraints as the right to speak are misguided. *Guarnieri*, 131 S.Ct. at 2495 ("This Court's opinion in *McDonald v. Smith*, 472 U.S. 479 (1985), has sometimes been interpreted to mean that the right to petition can extend no further than the right to speak; but *McDonald* held only that speech contained within a petition is subject to the same standards for defamation and libel as speech outside a petition.") (emphasis added). Given this unique and broad fundamental right, "the special concerns of the Petition Clause [] provide a sound basis for a distinct analysis; and … the rules and principles that define the two rights [] differ in emphasis and formulation." *Id.*

The right to petition under the Petition Clause receives the broadest interpretation and protection when the petition addresses a public concern and is exercised in conjunction with the right of assembly. "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives …." *Id.* In our democratic form of government, protected petitioning activities include bringing grievances to both government officials and the citizens that elect them. *See Edwards v. S. Carolina*, 372 U.S. 229, 236 (1963) (safeguarding the "peaceabl[e] express[ion] [of] grievances 'to the citizens of South Carolina, along with the Legislative Bodies of South Carolina'"). When the issue raised by a petition is a public concern, only the narrowest limitations and restrictions of the right are allowable. *See Guarnieri*, 131 S. Ct. at 2500; *see also Gregory v. City of Chicago*, 394 U.S. 111, 113 (1969)

(overturning the criminal convictions for disorderly conduct for protestors petitioning for the end of school segregation); *Henry v. Rock Hill*, 376 U.S. 776, 778 (1964) (overturning criminal convictions for breach of the peace for protestors petitioning for the end of segregation); *Edwards*, 372 U.S. at 238 (overturning criminal convictions for breach of the peace where protesters sought to "let [legislators] know that they were dissatisfied" with "discriminatory actions against Negroes, in general"); *NAACP v. Button*, 371 U.S. 415, 430 (1963) (finding it unnecessary to subject orderly group activity for the advancement of beliefs and ideas to "a narrow, literal conception of freedom of speech, petition or assembly").

Moreover, the breadth of activities recognized as protected petitioning activities itself implies broad boundaries to the Petition Clause. *See, e.g.*, *McDonald v. Smith*, 472 U.S. 479 (1985) (letters to the President);*United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) ("a concerted effort to influence public officials"); *Edwards*, 372 U.S. at 229 (protest against state laws promoting racial discrimination); *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (a mass media "publicity campaign, ostensibly directed toward influencing governmental action").

Exercising the right of petition to address a public concern over police brutality against minorities should be "allow[ed] the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly." *See Thomas*, 323 U.S. at 530. This is because "the extent of a group's constitutional right to protest peaceably and petition one's government for redress of grievances must be, if our American Constitution is to be a flexible and 'living' document, found and held to be commensurate with the enormity of the wrongs being protested and petitioned against." *Williams v. Wallace*, 240 F. Supp. 100, 108 (M.D. Ala. 1965) (issuing an injunction to allow the historic Selma civil rights

march). There can be no greater grievance against the government than the needless and unjust loss of life at the hands of government actors.

B. Under the broad Petition Clause rights, limitations on petitioning activity locations must be analyzed under a distinct test based on the effectiveness of the petitioning location.

The Supreme Court has long recognized limits on where protected First Amendment rights are exercised because, "while fundamental in our democratic society, [those rights] still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox v. Louisiana*, 379 U.S. 536, 550–51 (1965); *see Edwards v. S. Carolina*, 372 U.S. 229, 236 (1963) ("If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case.") However, the Court has also recognized that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. Town of Irvington*, 308 U.S. 147, 163 (1939).

The Supreme Court of the United States has historically required private shopping centers and malls to respect free speech rights. *See, e.g.*, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (finding a privately owned mall was a public forum); *Marsh v. Alabama*, 326 U.S. 501 (1946) (finding a "company town" was a public forum); *see also Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (finding that state constitutions may require private shopping centers to allow free speech and petitioning).

While current federal precedent minimally restricts the exercise of First Amendment rights on private property such as the Mall of America, *Hudgens*, 424 U.S. at 521, there is no question that the Supreme Court has recognized that the "special concerns of the Petition Clause" may require different analysis than the other four First Amendment rights. *Guarnieri*, 131 S.Ct.

at 2495. “Interpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right. A petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns.” *Id.* For the Petition Clause to be effective, it must protect the most effective methods of petitioning, especially when those petitions address a public concern and are conducted peaceably.

Nearly 50 years ago, in the midst of the civil rights movement, it was recognized that the Petition Clause must protect all peaceable petitioning activity with minimal restrictions:

> The right to petition for the redress of grievances has an ancient history and is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor. Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable, as these were.

Adderley v. Florida, 385 U.S. 39, 49–51 (1966) (Douglas, J., dissenting) (citations omitted). The petition in this case was to both government officials and to the sovereign, i.e. the general public. It is beyond dispute that December at the Mall of America is a profoundly busy time, during which attention to the Mall is most likely. By exercising their petition rights at the Mall, Defendants used the best way to reach the public. This is especially true given the content of the petition in relation to the location of the petition. The police substation is symbolic of the entire governmental construct that of which the demonstration was subject. To draw attention to this issue effecting minorities, the demonstration at the Mall of America was the only way to effectively petition.

CONCLUSION

Because the statutes under which Defendants have been charged are unconstitutionally vague, Defendants' demonstrations at the Mall of America are protected speech under the First Amendment, the Complaint infringes on the Defendants' rights to petition the Government for redress of grievances and assemble, Defendants respectfully request that the Complaint be dismissed, with prejudice, in its entirety.

Dated: July 1, 2015

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