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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota, Court File No. 27-CR-15-31387

Plaintiff,

vs.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTIONS TO DISMISS

Jordan S. Kushner,

Defendant.

INTRODUCTION

Defendant Jordan S. Kushner challenges the three misdemeanor charges against him on the grounds that his actual conduct giving rise to the charges against him, specifically verbally challenging a police action and video recording interactions between protesters and police or state officials, constitute constitutionally protected free speech or expression, and the state is unlawfully discriminating and retaliating against him for exercising these constitutional rights. This Memorandum is submitted in support of Nos. 10-12 of his pretrial motions to suppress evidence and dismiss the charges against him. The grounds for dismissal include that 1) the police and state official's actions leading to and including Kushner's arrest violated his state and federal constitutional rights to free speech, 2) the police and state have selectively and discriminatorily arrested and prosecuted Kushner in violation of his constitutional rights to free speech and equal protection, and 3) the charge of disorderly conduct based on disturbing a meeting is

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unconstitutionally vague and overbroad, both on its face and as applied to the instant case, in violation of Kushner's rights to free speech and due process.

FACTUAL BACKGROUND

On the afternoon of November 3, 2015, Defendant Jordan S. Kushner attended a lecture at the University of Minnesota Law School, Room 25, by an academic named Moshe Habertal. The lecture was open to the public and Kushner had received an invitation to the event from the Law School addressed to him, presumably because he was on the law school's mailing list as an alumnus. Room 25 is a classroom with approximately 150 seats. Kusher took a seat near the middle of the classroom near the right end (when facing the front).

An organization called the Anti-war Committee had planned a disruptive protest against the lecture to express opposition to Halbertal's support for Israeli military actions, the expectation that his lecture would relate to these positions, and the perception that the Law School institutionally supported such positions. There were other organizations that shared these positions and publicized the lecture, but did not support or participated in AWC's protest. Kushner was networked with some of these organizations and in agreement with their approach to the event.

From the beginning of the event with the Law School dean announcing the lecture, participants in the protest stood up one-by-one and interrupted the event with speeches opposing the lecture and Israeli government polices. Many of the protesters read from

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index cards. Each protester interrupting the event would be escorted out of the classroom by law school official Linda Lokensgard and/or University police officers who were present. After each protester was escorted out of the classroom, another protester would take his or her turn standing up to make a speech, and in turn would be escorted out.

Kushner was not a participant in the protest. Kushner did not support the protest, and actually felt uncomfortable with it. However, as a civil rights attorney who had also attended many protests as a Legal Observer, he responded to events occurring at the protest by using his mobile phone to video and audio record the confrontations between protesters, and the police officers or school official who escorted them out. Kushner's decision to record events was based on his numerous experiences as a Legal Observer where he observed protesters and bystanders who were improperly arrested or subject to excessive force, and his past legal representation of numerous clients who were improperly arrested, falsely accused of crimes, and victims of excessive force at protests. In more than a few of these cases (as well as in numerous non-protest cases), video, audio or photographic evidence was critical for Kushner obtaining successful results for clients. Due to the tension of the situation, Kushner thought it was appropriate to record events in case police overreacted.[1] Kushner had previously studied federal case law which held that there is a First Amendment right to video and audio record police actions.

After a couple of protesters had interrupted the event and had been removed, a

[1] Ironically but probably not coincidentally, it appears that the only victim of false arrest, false accusations and excessive force at this event was Kushner.

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police officer approached a young woman seated behind Kushner and requested that she leave the classroom.[2] Kushner was aware that this woman had not done anything to interrupt the event, had been sitting quietly, and was the only person of color in the vicinity (appearing to be of Middle Eastern descent). Kushner was concerned about this individual being arbitrarily ejected from the event and further that police may have singled her out due to racial profiling. Kushner responded by calmly and respectfully challenging the police officer in his decision to remove this individually by pointing out that Lokensgard had just read to the audience the rules of decorum for the event, what actions could lead to removal, and that this individual had not violated any of the rules. Lt. Buhta responded by threatening to arrest Kushner, thanking him for his commentary, and then backing off.[3]

A couple of minutes later, the young woman whom Kushner had advocated for stood up and started reading from an index card a speech protesting the event. Police promptly escorted her out of the classroom. Kushner recorded this event on his cell phone but did not in any way interfere or challenge her removal.

Shortly thereafter, Lokensgard approached Kushner and ordered him to stop

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[2] Although police reports claim that the officer was Ashley Lange, it was actually Lt. Troy Buhta who made the request , subsequently interacted with Kushner.

[3] Kushner audio recorded this interaction on his cell phone. The video portion depicts the young woman whom the police sought to remove but Kushner did not point the phone at the police because he was trying to defuse the situation (contrary to Officer Lange's allegation that he yelled at her and pointed his cell phone in her face).

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recording. Kushner explained that he was not recording the lecture but only police interactions with protesters. Lokensgard responded that it did not matter and demanded that he turned off his cell phone.[4] Although Kushner understood that he had a constitutional right to record events, he nevertheless turned off his cell phone video camera and placed his cell phone on the table in front of him.

Lt. Buhta then approached Kushner and demanded that he leave the classroom. Kushner questioned why he was being asked to leave because he had done nothing wrong. Buhta refused to provide an explanation but threatened to arrest Kushner if he did not leave. Kushner explained that he had not broken any law and there was no justification to require him to leave or arrest him. Lokensgard then told Kushner to give her his cell phone in order to be able to stay in the classroom. Kushner objected to giving up his cell phone. Lokensgard attempted to snatch Kushner's cell phone from the table, but Kushner quickly grabbed his cell phone and put it in his pocket before Lokensgard could get it.

Kushner then turned in his seat and began to stand up to leave. As Kushner was standing up, two to three police officer grabbed him on each arm and pulled him out of the room. After leaving the classroom, police officers threw Kushner over a brick ledge face first, handcuffed him deliberately tight to cause great pain, placed him in a squad car, and transported and booked him into the Hennepin County jail.

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[4] This interaction was also audio recorded on Kushner's cell phone.

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Several hours after the incident, Buhta prepared a report alleging that Kushner had yelled and screamed at him and other officers inside and outside the classroom, and had actively resisted officers while they escorted him out of the classroom and arrested him. More than 24 hours after Buhta prepared his report, officers Lange prepared a report mostly mimicking Buhta's allegations and Temple prepared a report alleging that Kushner had resisted arrest. Substantial parts of the officers' allegations are refuted by video, audio and photographic evidence in the prosecution's possession. Other allegations are refuted by video and audio in Kushner's possession and eyewitnesses.

When they booked Kushner into jail, police officers had him charged with Trespass and Disorderly Conduct. The prosecution subsequently added a charge of Obstruction of Legal Process at the first court appearance two weeks after the incident.

In the course of discovery, the prosecution provided three audio/video recordings of events inside the classroom during the protest which were taken by a witness identified as J.K.[5] J.K. attended the lecture as a member of an organization called Students Supporting Israel. Like Kushner, J.K. took the videos while sitting in the classroom. Ironically, J.K's videos show Kushner peacefully and non-disruptively sitting in his seat and pointing his cell phone at confrontations in the audience. Unlike Kushner, J.K. was never removed from the event, has not been criminally charged, but has been identified as a witness against Kushner.

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[5] It is unknown if J.K. took additional video. Kushner therefore seeks J.K.'s address in part so that he can serve J.K. with a subpoena duces tecum for additional video.

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ARGUMENT

I. THE EVIDENCE MUST BE SUPPRESSED AND CHARGES MUST BE DISMISSED AS A VIOLATION OF KUSHNER'S CONSTITUTIONAL RIGHTS TO FREE SPEECH.

The prosecution cannot be permitted to proceed further with its charges because they are all in direct response and in retaliation to Kushner's exercised of his constitutionally protected rights to free speech. According to police reports and any logical interpretation of events, the police ejection of Kushner from the lecture was based in part on his verbal challenge of police in their decision to remove a specific member of the audience. Kushner has a clearly established constitutional right under the First Amendment (and the corresponding Minnesota constitutional provision) to verbally challenge police actions. City of Houston v. Hill, 107 S.Ct. 2502, 2510 (1987)(ordinance prohibiting verbal challenges to police action unconstitutional); Naucke v. City of Park Hills, 284 F.3d 923, 927 (8th Cir.2002)("criticism of public officials lies at the very core of speech protected by the First Amendment.")

The next reason that police provide for removing Kushner from the lecture was his video recording of their interactions with protesters. It is also clearly established through federal appellate cases in at least three circuits that there is a First Amendment right to record the activity of police or other officials. See Gilk v. Cunniffe, 655 F.3d 78, 82 (1st Cir.2011) (holding the First Amendment protects even a non-journalist's "right to videotape police carrying out their duties in public"); Smith v. City of Cumming, 212

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F.3d 1332, 1333 (11th Cir.2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest"); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir.1995) (recognizing a "First Amendment right to film matters of public interest"); ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012) cert. denied 133 S.Ct. 651 (U.S. 2012)(striking down enforcement of eavesdropping statute against persons who openly record police officers performing their official duties as violation of the First Amendment's free speech and free-press guarantees); see also Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir.1994) (finding that plaintiffs' interest in filming public meetings is protected by the First Amendment); Williamson v. Mills, 65 F.3d 155 (11th Cir.1995) (holding that a law enforcement officer who seized the film of and arrested a participant in a demonstration for photographing undercover officers could be civilly liable).

Police officers improperly requested Mr. Kushner to leave the lecture specifically and only because of his exercise of his constitutional rights to challenge police officers and record the activity of police or public officials, and then proceeded to require him to leave the event, and forcibly arrested him in response to and in retaliation for exercise of these free speech rights. "[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions ... for speaking out." Peterson v. Kopp, 754 F.3d 594, 602 (8th Cir. 2014)(quoting Hartman v. Moore, 547 U.S. 250, 256, 126 S.Ct. 1695 (2006)).

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A pretrial evidentiary hearing in this matter to determine the presence of a First Amendment (and Minnesota) constitutional violation is as appropriate as in cases where it is established and accept practice to hold a pretrial evidentiary hearing to adjudicate violations of the Fourth, Fifth, Sixth or Fourteenth Amendments. The prosecution should not be permitted to bring a case to trial that blatantly violates an accused's constitutionally protected free speech rights by relying on a factual dispute created by inflammatory allegations that can be readily refuted. An evidentiary hearing is necessary where there is a strong showing that the case is a product and direct violation of the First Amendment, and the prosecution in and of itself is a constitutional violation. [6]

II. THE CHARGES AGAINST DEFENDANT MUST BE DISMISSED BECAUSE THEY ARE THE PRODUCT OF SELECTIVE AND DISCRIMINATORY ARREST AND PROSECUTION IN VIOLATION OF HIS RIGHTS TO FREE SPEECH AND EQUAL PROTECTION.

The police and state have improperly singled out Kushner for arrest and prosecution for video recording police actions, when they failed to take any comparable actions against others for the same activity at the same event. Furthermore, police singled out Kushner because of their perception of his view point as being opposed to the lecturer, whereas J.K. who was permitted to take videos (which are being used as part of the prosecution's case against Kushner) is a supporter of the lecturer.

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[6] If the Court does not grant an evidentiary hearing or dismiss the charges, Defendant reserves the right to present his free speech defenses and factual issues related to free speech to the jury for a determination. At a minimum, the jury must be instructed that verbally challenging police or video recording of police or government officials' actions do not constitute a crime.

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Minnesota courts have recognized a constitutional defense of selective prosecution which is appropriately raised by motion to be determined by the court before trial. "An intentional or deliberate decision by public officials, acting as agents of the state, not to enforce penal regulations against a class of violators expressly included within the terms of such penal regulation does . . . constitute a denial of the constitutional guarantee of equal protection of the laws." State v. Vadnais, 202 N.W.2d 657, 659, 295 Minn. 17 (1972). The Minnesota supreme court has held:

> To support a defense of selective discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.,* based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional right.

State v. Russell, 343 N.W.2d 36, 37 (Minn. 1984). In order to be entitled to an evidentiary hearing, a defendant must allege "sufficient facts to take the question past the frivolous state and to raise a reasonable doubt as to the prosecutor's purpose." State v. Hyland, 431 N.W.2d 868, 873 (Minn. Ct. App.1988).

Kushner has made a sufficient showing to justify an evidentiary hearing on selective prosecution. He has demonstrated that he was singled out for arrest and prosecution in at least substantial part of video recording protest activity at the event in question, whereas at least one other person engaged in the same actions was not removed, arrested or prosecuted (but he and his video are being used as a witness and evidence by

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the prosecution). There is also evidence of an invidious purpose for singling out Mr. Kushner, namely his exercise of other free speech rights. The evidence, as explained in the Facts and Argument I, supra. is that police were retaliating against Kushner because he spoke out by challenging the removal of a woman perceived by the police to be a protester. Police specifically singled out Kushner because they perceived him to be supportive of the cause of the protesters. Viewpoint discrimination is "an egregious form of content discrimination." Wishnatsky v. Rovner, 433 F.3d 608, 611 (2006) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828–29, 115 S.Ct. 2510 (1995)). Kushner is entitled to a hearing on his defense of selective prosecution.

III. THE CHARGE OF DISORDERLY CONDUCT UNDER MINN. STAT. § 609.72(2) MUST BE DIMISSED ON THE GROUNDS THAT SAID STATUTE IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD, BOTH ON ITS FACE AND AS APPLIED TO THE INSTANT CASE.

Minn. Stat. § 609.72(2) makes it a crime to engage action which intentionally (2) disturbs an assembly or meeting, not unlawful in character." This statute should be held invalid under the Fourteenth Amendment due process clause based on the "void-for-vagueness" doctrine because the language of the statute fails to set forth the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' "State v. Newstrom, 371 N.W.2d 525, 528 (Minn.1985) (quoting Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858(1983)). The terms "disturb" and "assembly or meeting" are not sufficiently definite to determine what conduct would

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violate the statute. Would carrying a sign constitute a disturbance, challenging removal of another person from the event, recording conversations on cell phones, expressing disapproval of the lecture violate the statute? The term disturb is so vague as to encourage arbitrary or discriminatory enforcement as demonstrated by this specific situation where Kushner has been singled out specifically because the police were angry at him for exercising his free speech rights. The statute is also unconstitutionally overbroad because it covers a substantial amount of conduct that is protected by the First Amendment as free speech. Rew v. Bergstrom, 845 N.W.2d 764, 778 (Minn. 2014). The statute can easily cover First Amendment activities as described above. Defendant recognizes that these facial challenges to this statute were recently rejected by the court of appeals in State v. Hensel, 2016 WL 281057, No. A15–0005 (Minn. Ct. App., January 25, 2016). However, a request for review to the Minnesota supreme court is now pending in Hensel. Kushner hereby asserts and maintains his challenge to the facial validity of this statute.

Kushner further challenges the statute "as-applied" to the facts of his case. This challenge is not in any way foreclosed by Hensel where no as-applied challenge was made. Id., n. 2. Whereas "a facial challenge seeks to invalidate the entire statute and accordingly requires a higher showing of a substantial number of unconstitutional applications," an as-applied challenge only requires a showing that the statute is unconstitutional as applied to Kushner. Id. (citing Rew at 778). Hensel acknowledged

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that there there may be at least "marginal applications in which a statute would infringe on First Amendment values" that could occur with this statute. 2016 WL 281057 at 7. In the instant case, the prosecution claims that Kushner disturbed a meeting, i.e. a lecture, by video recording police encounters with protesters and by verbally challenging police in their arbitrary and unexplained requests for another attendee and Kushner himself to leave the event. As discussed extensively in the Arguments above, these actions are clearly constitutionally protected as free speech. The application of this statute to Kushner's actions in the instant case is therefore unconstitutional.[7]

CONCLUSION

For the foregoing reasons, Defendant Jordan S. Kushner respectfully requests an evidentiary hearing to determine whether violations of his First and Fourteenth Amendment rights, and corresponding rights under the Minnesota Constitution, mandate

[7] To the extent that the prosecution asserts there are additional or countervailing facts that would constitute conduct that is not constitutionally protected, an evidentiary hearing may be warranted. If the Court does not hold the statute to be unconstitutional as applied before trial, with or without an evidentiary hearing, Defendant maintains his right to assert this defense and present facts supporting his position at trial, as well as to argue that his conduct does not violate the statute. At a minimum, the jury must be instructed that verbally challenging police or video recording of police or government officials' actions do not constitute a violation of the statue.

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suppression of evidence and dismissal of the charges.

Dated: March 25, 2016

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