**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF IOWA**
**CENTRAL DIVISION**

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| JOHN DOE and JANE DOE, individually and on behalf of their minor daughter, NANCY DOE,<br><br>Plaintiffs,<br><br>v.<br><br>ED BULL, in his official capacity as County Attorney of Marion County, Iowa,<br><br>Defendant. | Case No. 4:16-cv-00521-RP-CFB<br><br>**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**<br><br>**Oral Argument Requested** |

**MEMORANDUM IN SUPPORT OF**
**PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

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## INTRODUCTION

Plaintiffs in this civil rights action are a teenage girl, Nancy Doe, and her parents, John and Jane Doe, who seek a protection from threatened criminal prosecution by Defendant, Marion County Attorney Ed Bull, for sexual exploitation of a minor and/or child pornography for taking two non-obscene digital photographs of herself ("selfies") in May 2016. Defendant has threatened Plaintiffs with those charges unless they agree to a pre-trial diversion program wherein Nancy Doe must discuss why her conduct was wrong, sign a statement of admission as to her alleged conduct, listen to how she could potentially have to register as a sex offender for life, and give up her laptop and cell phone for an unspecified period of time. Defendant continues

to affirmatively assert that the non-obscene selfies violate Iowa Code section 728.1(7)(g) and constitute sexual exploitation of a minor, (*see* Answer to Am. Compl. 6, 7 ¶¶ 45, 51), and the threat of prosecution for her protected expression is ongoing, credible, and concrete. One photo in question shows Nancy Doe, from the waist up, hair entirely covering her breasts and dressed in boy shorts. The other photo shows Nancy Doe standing upright, clad in the same boy shorts and wearing a sports bra. The two photographs, which depict no sexual activity, nudity, or display of pubic area, are not criminal under Iowa law, and indeed are images protected by the First Amendment.

Bull nevertheless persists in threatening to prosecute Nancy because he has apparently deemed the photos "sexual" and/or "provocative." Since there is no basis to prosecute Nancy for posing in photographs that plainly are not child pornography, in terms of content or production, Bull's threat to prosecute her must be considered retaliation against Plaintiffs for asserting their constitutional rights—John and Jane's right to direct their daughter's upbringing and Nancy's rights both to free expression and against compelled speech—in refusing Bull's demands. Finally, Plaintiffs challenge as discriminatory Defendant's sex-based treatment of expressive conduct involving the breast/chest area. Specifically, Defendant has treated as criminal Nancy Doe's expressive conduct of taking, possessing, or sharing a photograph depicting some parts of her breast/chest area (although notably not any part of her nipples), which expressive conduct, if engaged in by a male, would not subject to criminal prosecution or any reeducation diversion program in lieu thereof. Accordingly, Plaintiffs seek preliminary injunctive relief to enjoin Bull from bringing the discriminatory and retaliatory criminal charges against the girl based on her refusal to accede to his demand that she submit to a pre-trial diversion program.

## STATEMENT OF FACTS[1] & BACKGROUND

The Teen Sexting and Selfie Incidents in Knoxville

In March/April of 2016, Knoxville School District officials discovered two male students using the printers in the school library to print paper copies of images that depicted both male and female individuals, many of them students enrolled in the School District and some of them semi-nude or nude and some nude but with an emoji covering their private parts. Among the photographs the boys printed were two non-nude selfies of Nancy Doe. Nancy Doe was fourteen in March of 2016 and was a freshman at Knoxville High School. Nancy was an active athlete who played volleyball, softball, basketball and soccer.

Per the School District, male students had apparently been trading the photos of the girls on their cell phones and the boys in question were collecting and printing these photographs. School officials turned the photographs and the matter over to the Knoxville Police Department, which began an investigation. On April 7, 2016, Knoxville School System Superintendent Cassi Pearson emailed all Knoxville High School parents that a potential issue had been discovered where students had shared "inappropriate content through their cell phones." The email additionally told parents that school officials were "cooperating with law enforcement." The story of "nude" photographs being shared among Knoxville High School students broke in the media, and on April 14, 2016, Knoxville Police Lt. Aaron Fuller told the media that the Department was continuing its investigation into the matter and that as of that morning, no charges had been filed against any of the students. Fuller could not say how many students were

[1] This statement of facts is taken from Plaintiffs First Amended Complaint, Jane Doe's Sworn Affidavit, and the letter from Juvenile Court Services to the Does, attached as Exhibit 1, which are fully incorporated herein by reference.

involved but he did say that once the investigation was complete, the results would be shared with Marion County Attorney Ed Bull and Juvenile Court Services.

The Hobson's Choice to Forgo Fundamental and Core Rights
or Face Baseless Criminal Prosecution

On April 27, 2016, the Does received a letter from Kristi Dotson, Marion County Juvenile Court Officer, which indicated that a complaint concerning Nancy had been made to Juvenile Court Services by the Knoxville Police Department and that the alleged violation was Sexual Exploitation of a Minor under Iowa Code section 728.1(7)(g), and requesting that Nancy and at least one of her parents "appear for an intake interview" on Tuesday, May 24, 2016. Attached to the letter, Dotson also provided the Does with a detailed questionnaire for Nancy and the family to fill out, referred to as an "Information Sheet" (hereinafter "questionnaire"). (Ex. 1 ("Prior to bringing your child to the interview, complete the enclosed Information Sheet and bring it with you. On the Family Information page, fill in ALL of the blanks . . . . This form must be completed before your interview.") The questionnaire was four pages, and delved into the intimate details of the Does and their family, how they parented their daughter, and how they disciplined her regarding the photographs.[2] On Wednesday, May 25, 2016, John Doe met with Kristi Dotson of Juvenile Court Services. At that time, Ms. Dotson indicated that she had not seen the images of Nancy that were the subject of her letter, but that she was conducting intake interviews and would check with the Defendant regarding the specifics of Nancy's two selfies

[2] For example, the questionnaire required the Does to provide information regarding all family members, including siblings, for information related to Nancy's involvement in church and religious activities, sports, and extracurricular activities. It asked for information regarding any involvement in mental health, substance abuse, and behavior issues treatment or services, health conditions or diagnoses more broadly, information about the parents' own educational backgrounds, website and internet, whether and what curfew the Does imposed on Nancy, and information regarding Nancy's associations and friendships.

and would follow up with them at their next meeting, where, she stated, Nancy would be required to be present. Again, on Friday, May 27, 2016, John and Nancy met with a staff member of Juvenile Court Services at the Marion County Courthouse, where they were informed that the family had until June 2, 2016 to decide whether to accept Bull's offer of a pre-trial diversion program, and if not, Nancy would be criminally charged with sexual exploitation of a minor.

On a June 1, 2016, telephone call between the Defendant and Attorney Lindholm for Plaintiffs, and in a series of emails thereafter, Bull continued to threaten prosecution of Nancy, despite Lindholm's communications where he pointed out the flaws in Bull's legal reasoning. Bull indicated, and media coverage confirmed, that all the other students implicated in the Knoxville sexting scandal took or were coerced into taking the diversion program. As late as Tuesday, September 20, 2016, Bull told Lindholm by email that if Nancy Doe and her parents did not agree to the diversion program and all of its requirements, Bull would file criminal charges against Nancy. Finally, in Defendant's October 21, 2016 Answer, he affirmatively re-asserted the non-obscene selfies would violate Iowa Code section 728.1(7)(g). (Answer to Am. Compl. 6, 7 ¶¶ 45, 51.) The threat of prosecution for her protected expression is credible and concrete.

The Two Selfies at Issue in this Case

The evening of April 6, 2016, John and Jane Doe went to the Knoxville Police Department to meet with investigators Sgt. Keller and Lt. Fuller. The Does' immediate concern was seeing the photographs in question that everyone was apparently talking about. Investigators showed the Does two photographs on a laptop and asked them if they could identify the young woman in question as their daughter. One of the photos showed Nancy taking her picture in her

bedroom mirror wearing grey and black "boy-shorts" style underwear and an opaque sports bra. The second photo depicted Nancy in the same boy-shorts without the sports bra but with Nancy's hair entirely covering her nipples such that no part of either nipple was visible. Neither of the selfies depicted sexual activity and neither showed Nancy's genitalia, pubic area, or any part of her nipples, or contained any nudity.

The Does were perplexed and asked investigators whether these photographs of their daughter were the photos the school was apparently concerned about. Investigators responded affirmatively, but also told the Does there were photos of other students that were graphic and explicit that they were showing to parents in an attempt to identify the subjects. Again, receiving assurances that these two photos were they only photographs of Nancy, the Does asked what the fuss was about.

Investigators indicated that they were concerned with the other images school officials had discovered and that Nancy and the Does did not have anything to worry about. Leaving the Police Department, the Does were confused why their daughter was being investigated by the police at all. The photographs of Nancy were less "racy" than photographs portrayed daily in fashion magazines and on television.

Neither of the photos of Nancy Doe depicted a prohibited sex act. Neither of the photos showed Nancy's genitalia or pubic area; and further, neither of the photos in question showed nudity, whether full or partial, because neither depicted her nipples, buttocks, or genitals. Nancy Doe did not violate Iowa Code section 728.1(7)(g) by taking the photographs of herself and sending them to her classmate. Nancy has been threatened with prosecution simply for appearing in the images. Nancy has violated no other statute of the State of Iowa by photographing herself in private in her underwear and sports bra.

The Diversion Program and Re-Education Class & Does' Parenting Philosophy

On March 24, 2016, a meeting was held in the large courtroom on the third floor of the Marion County Courthouse. Based on information and belief, Marion County Attorney Ed Bull was present and at least partially led the meeting at which at least thirty students and their parents attended. The Does were concerned about sending their daughter to the meeting because they were adamant that they did not want her labeled and/or shamed. The Does seek to raise Nancy to be an empowered person and seek to avoid sex-stereotyped, stigmatizing language and concepts in the way that they raise her. The Does understand that normal adolescent development by both boys and girls includes various non-criminal, expressive behavior as they become comfortable with their bodies.

Apparently, a roll call, tally, or other communication was made at the meeting in which it was made clear to the other parents and children swept up in the sexting incidents that Nancy Doe was accused of taking and sending nude photographs, but that she and her family were not participating.

County Attorney Bull informed all the students present that they could all be charged with child pornography charges and/or sexual exploitation of a minor charges and that such charges would require them to register to as a sex offender for life. According to reports the Does received from other parents, County Attorney Bull engaged in sex-stereotyped, stigmatizing, discriminatory framing of the taking and sending of selfies by the female students—essentially engaging in what is commonly referred to as "slut shaming." For example, in front of their peers, Attorney Bull informed the female students present that "young ladies" did not send such explicit photos to boys. The Does believe those messages would be harmful to Nancy's self-esteem, sense of dignity, and body image.

At this meeting, Bull informed the students and parents that they could avoid the charges and sexual registry by engaging in a pre-trial diversion program which included requirements that the students: (1) engage in community service; (2) complete a reeducation class on the dangers and consequences of sexting; (3) give up their laptops for an unspecified period of time; (4) give up their cellphones for an unspecified period of time; and (5) provide juvenile court services with a written confession of their conduct stating their conduct was wrong. In addition, (6) all of the children who admitted guilt as a part of the pre-trial diversion program were subject to a seven-game suspension from their sports activities at school as a result of their admitted violation of the school's honor code. In small town Knoxville, IA, where sports are very important, it is widely known why those students were not allowed to play for seven games, and contributed to the further public shaming and stigmatization of the young people involved.

In addition to their concerns with the diversion program itself, the Does wish to protect their daughter's ability to play in sports, which are especially important to her, as well as to protect her from the experience of feeling like she had suffered reputational harm and stigma in her wider community that would result from a seven-game suspension. The Does believe that Nancy's participation in the pre-trial diversion program and any seven-game suspension would be interpreted by many in Knoxville as confirmation that Nancy had engaged in unlawful conduct, which she did not.

Sexual Exploitation of Minor (Iowa Code section 728.12)

The crime of Sexual Exploitation of a Minor, the charge threatened in the letter that Juvenile Court Services sent to the Does, (*see* Ex. 1), is codified in Iowa Code section 728.12, which prohibits an individual from inducing, enticing or causing or attempting to cause a minor

to engage in a prohibited sexual act or in the simulation of a prohibited sexual act. Iowa Code § 728.12(1). Section 728.1 defines "prohibited sexual act" as any of the following:

a. A sex act as defined in section 702.17.

b. An act of bestiality involving a minor.

c. Fondling or touching the pubes or genitals of a minor.

d. Fondling or touching the pubes or genitals of a person by a minor.

e. Sadomasochistic abuse of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a depiction of the abuse.

f. Sadomasochistic abuse of a person by a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a depiction of the abuse.

g. Nudity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a depiction of the nude minor.

Iowa Code Section 702.17 defines "sex act" or "sexual activity" as any sexual contact between two or more persons by: penetration of the penis into the vagina or anus; contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person; contact between the finger or hand of one person and the genitalia or anus of another person, except in the course of examination or treatment by a person licensed pursuant to chapter 148, 148C, 151, or 152; or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

Full or partial nudity is defined elsewhere in the Iowa Code as the showing of any part of the human genitals or pubic area or buttocks, or any part of the nipple of the breast of a female, with less than fully opaque covering. Iowa Code § 709.21(2)(a).

## ARGUMENT

Plaintiffs require a preliminary injunction to stop ongoing injury and avoid further injury to their rights to free speech and expression, equal protection, and fundamental rights substantive due process. In considering whether to issue a preliminary injunction, this Court must consider (1) whether Plaintiff is likely to succeed on the merits; (2) whether Plaintiffs face a threat of irreparable harm absent the injunction; (3) the balance of harm to the Plaintiffs absent the injunction and any harm to Defendant resulting from the injunction; and (4) the public interest. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). While Plaintiffs herein address all four prongs of *Dataphase*, the likelihood of success on the merits on Plaintiffs' two First Amendment claims likely dominates the inquiry and in favor of issuing the injunction to protect Nancy Doe's rights of free expression. "When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2011) (en banc) (internal quotation marks omitted). Accordingly, when Plaintiffs are "likely to win on the merits of [their] First Amendment claim, a preliminary injunction is proper." *Id.* at 877; *see also Phelps–Roper v. Nixon* ("*Phelps-Roper v. Nixon*"), 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by Phelps–Roper v. City of Manchester, Mo.* ("*Phelps-Roper v. Manchester*"), 697 F.3d 678 (8th Cir. 2012) ("In a First Amendment case . . . the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue.")

## I. Plaintiffs Will Likely Prevail on the Merits of their Claims

### A. As a Threshold Jurisdictional Question, the Court is not barred by *Younger* Abstention Doctrine from Granting Relief to Plaintiffs in this Case.

District courts should address jurisdictional challenges before considering other issues. *See Carlson v. Arrowhead Concrete Works, Inc.*, 445 F.3d 1046, 1050 (8th Cir. 2006) ("In every federal case the court must be satisfied that it has jurisdiction before it turns to the merits of other legal arguments."). Therefore, Plaintiffs first address the jurisdictional challenge raised by Defendant in his Answer as to all claims. (Answer to Am. Compl. 2, ¶¶ 1-2 ("[T]his Court should abstain from exercising jurisdiction under the principles of federalism and comity and what has become known as the *Younger* Abstention Doctrine.").)

The *Younger* Abstention doctrine does not apply here, and this Court is not barred from exercising jurisdiction to grant relief in this case. Abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 814 (1976) (quoting *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188–89 (1959)). Abstention under *Younger* is only appropriate if three conditions are met: "(1) there is an ongoing state proceeding, (2) which implicates important state interests, and (3) there is an adequate opportunity to raise any relevant federal questions in the state proceeding." *Geier v. Mis. Ethics Com'n*, 715 F.3d 674, 678 (8th Cir. 2013) (quoting *Plouffe v. Ligon*, 606 F.3d 890, 892 (8th Cir. 2010) (internal quotation marks omitted)); *Younger v. Harris*, 401 U.S. 37 (1971).

This Court should follow the persuasive reasoning by the Third Circuit Court of Appeals in *Miller v. Mitchell* ("*Miller*"), 598 F.3d 139 (3d Cir. 2010), a nearly factually identical case out of Pennsylvania. In *Miller*, the court upheld the district court's grant of a preliminary injunction blocking the district attorney's offer to forgo criminal charges for the possession and/or

dissemination of child pornography against a minor girl in exchange for her participation in a reeducation class. *Id.* at 145–46. The court found *Younger* Abstention did not limit the district court's jurisdiction to grant the appropriate relief to the plaintiffs both because (1) the informal reeducation class which had been offered had not been agreed to, or begun; and (2) even assuming it had, no formal criminal proceeding of a judicial nature had been initiated. *Id.* at 146.

Here, Defendant's *Younger* Abstention challenge also fails all three prongs. There is no "ongoing state proceeding." Plaintiffs seek injunctive and declaratory relief to *prevent* the State from *initiating* prosecution, which it threatened to do if Nancy Doe refused to comply with the diversion program, which she did. (First Am. Compl., *passim*; Aff. of Jane Doe 1-2, ¶¶ 2–6.) Defendants have conceded this point by agreeing to forgo initiating a criminal prosecution against Nancy Doe during the pendency of this proceeding in order to avoid proceeding on Plaintiffs' Motion for a Temporary Restraining Order. Notice, at 1–2. Accordingly, because there is no ongoing state proceeding, there is no way for Nancy Doe, and consequently, her parents, to assert their constitutional rights, thus failing the first and third prongs of the analysis. Now, they wait in limbo as Defendant may or may not pursue prosecution, with the exercise of their rights chilled in the pendency. Further, assuming the State has an important interest in curtailing the spread of child pornography generally, it has no important interest in curtailing protected expression or in promoting outdated and sexist stereotypes about women, or specifically, in prohibiting the taking, possessing, or sharing by young persons' selfies containing no nudity, thus failing the second prong of the analysis. *See, e.g.*, *Phelps-Roper v. Nixon*, 545 F.3d at 690 (finding that the public interest is served by protecting constitutional rights), *overruled on other grounds by Phelps-Roper v. Manchester*, 697 F.3d 678. Therefore, *Younger* Abstention does not apply to this proceeding.

### B. Plaintiffs Have Standing to Bring this Action: Injuries are Concrete, Real, Ongoing, and Ripe

In his Answer, Defendant also argues that "Plaintiffs lack standing to contest charges that have never been brought." (Answer to Am. Compl. 2.) "Standing, whether constitutional or prudential, is a jurisdictional issue which cannot be waived or conceded." *See Animal Legal Defense Fund, Inc. v. Espy,* 29 F.3d 720, 723 n. 2 (D.C.Cir.1994); *see also Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (stating that the question of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise").

To the contrary, Plaintiffs' fears of criminal prosecution for sexual exploitation of a child for refusing to undergo a diversion and reeducation class are not speculative. They are supported by multiple written and verbal communications by Defendant Bull and by Juvenile Court Services at his direction. (*See* Ex. 1; Aff. of Jane Doe 1-2; Compl. 8-1, 11-15, 18, 21.) They are also reaffirmed by Defendant's own most recent admissions arguing that Nancy Doe's selfies meet the elements of nudity in his Answer, where he repeatedly stated they "constitute nudity for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor and are not protected by the First Amendment." (Answer to Am. Compl. 6, 7 ¶¶ 45, 51 (referring to Iowa Code section 728.1(7)(g)).)

In *International Association of Firefighters of St. Louis v. City of Ferguson* ("*International Firefighters*"), the Eighth Circuit explained that "certainty of injury is not necessary [to show an injury in fact], at least in the First Amendment context." 283 F.3d 969, 975 (8th Cir. 2002). *See also Phelps v. Powers*, 63 F. Supp. 3d 943, 949 (S.D. Iowa 2014). In *International Firefighters*, the Court explained that one is not required to "undertake a prohibited activity, and risk the subsequent [consequences], in order to test the validity of the threatened

application of [a law]." *Id.* at 975. Rather, a person can be "injured by having to give up, or hesitating to exercise, [their] First Amendment rights." *Id.* at 973. Here, Plaintiffs' fear of prosecution is objectively reasonable in light of Defendant Bull's specific statements that he would enforce Iowa Code section 728.1(7)(g) against Nancy Doe. *See Phelps v. Powers*, 63 F. Supp. at 949; *see also 281 Care Comm. v. Arneson*, 638 F.3d 621, 627–28 (8th Cir. 2011) (holding that an individual only needs to demonstrate an intent to engage in protected speech and a "credible threat of prosecution sufficient to support a claim of objectively reasonable chill" to establish an injury in fact for purposes of a First Amendment challenge to a state statute).

Finally, Plaintiffs have satisfied the remaining two elements to establish constitutional standing: that the injury is "fairly traceable" to the challenged action; and that it is likely that a favorable decision will redress the injury. *See Ben Oehrleins & Sons & Daughters, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1378 (8th Cir. 1997); *see also Phelps v. Powers*, 63 F. Supp. at 949. First, the threatened consequence of Nancy Doe's expressive communications is a very serious criminal charge, including either physical arrest, prosecution, or both, or alternative reeducation and diversion program. Second, if the Court decides favorably on Plaintiffs' claims, the State and its agents will be prevented from enforcing a criminal penalty on Nancy Doe. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992) (holding that standing is significantly tied to whether the plaintiff is the object of the government action at issue, and that if he shows that he is, it ordinarily follows that the action has caused him injury and that injunctive relief will redress the injury). Therefore, Plaintiffs respectfully ask the Court find that Plaintiffs have constitutional standing.

**C. Defendant's choice of diversion and reeducation or threatened criminal prosecution of Nancy Doe in retaliation for the two non-obscene photographs at issue in this case is an ongoing violation of her First Amendment right to free expression.**

To prevail in an action for First Amendment retaliation, Plaintiffs must show three things. First, Plaintiffs must demonstrate "a causal connection between a defendant's retaliatory animus and [plaintiff's] subsequent injury." *Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010) (citing *Osborne v. Grussing,* 477 F.3d 1002, 1005 (8th Cir. 2007) (quoting *Hartman v. Moore,* 547 U.S. 250, 259 (2006) (internal quotation marks omitted))). "Retaliation need not have been the sole motive, but it must have been a 'substantial factor' in" the government's decision to respond in the way it did. *Baribeau*, 596 F.3d at 481 (citing *Kilpatrick v. King,* 499 F.3d 759, 767 (8th Cir. 2007) (*quoting Wishnatsky v. Rovner,* 433 F.3d 608, 613 (8th Cir. 2006))). Second, Plaintiffs must prove that the retaliatory motive was a "but-for" cause of the government's action—i.e., that they were "singled out" because of their exercise of constitutional rights. *Baribeau*, 596 F.3d at 481. Finally, Plaintiffs must show that the government response "caused [them] to suffer an injury that would 'chill a person of ordinary firmness' from continuing in the protected activity.'" *Id.* (citing *Williams v. City of Carl Junction,* 480 F.3d 871, 878 (8th Cir. 2007) (quoting *Carroll v. Pfeffer,* 262 F.3d 847, 850 (8th Cir.2001))).

"[A]s a general matter, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). The burden is on Defendant to demonstrate that the practice of a teenage girl taking non-obscene and non-nude selfies and sending them to another teenager is conduct that is not protected by the First Amendment and is conduct subjecting the teenager to child pornography and/or sexual exploitation of a minor charges. The

Third Circuit persuasively upheld a preliminary injunction issued under nearly identical facts against a prosecutor for attempting to force a minor accused of "sexting" to attend a re-education class when both the minor and her parents objected to such attempts. *See Miller*, 598 F.3d at 151–55.

Plaintiffs are being compelled—through an express threat of a prosecution that clearly lacks any basis—to participate in a "re-education" program with which they disagree. Retaliation exists here because (1) their minor daughter has a constitutional right to avoid the re-education program and her parents have a constitutional right to direct her education; (2) prosecution of Nancy Doe would be retaliation (an adverse action); and (3) Nancy Doe's taking and sharing the pictures at issue was not illegal. The only reason to prosecute her would be in retaliation for exercising her and her parents' constitutional right not to participate in the program.

Defendant's retaliatory motive is a but-for cause of his actions in this case—as demonstrated by his compelling participation in a reeducation class, or threat of criminal prosecution. This retaliation was a direct result of Nancy Doe's exercise of constitutional rights of expression and John and Jane Doe's exercising of their constitutional right to raise their child as they see fit. This direct but-for causal relationship is stated clearly in the letter from Juvenile Services to John and Jane Doe, which stated a complaint was made about Nancy Doe for sexual exploitation of a minor, and summoned them for an interview where they were shown Nancy's selfies, The but-for relationship also was evident in the questionnaire mailed along with the letter itself, which inquired into the nature of their parenting response to Nancy's selfies. Finally, of course, the but-for causal relationship between the protected exercise of constitutional rights and Defendant Bull's retaliation has been clearly stated by the Defendant himself. Defendant Bull has continued to threaten to prosecute Nancy unless Jane and John Doe agree that their daughter

participate in his reeducation diversion class over their objections to its messages and methods. (*See* Ex. 1; Aff. of Jane Doe 1-2; Compl. 8-1, 11-15, 18, 21.)

In addition, the images in question here could not possibly support a charge of sexual exploitation of a minor, child pornography, or any other charge under Iowa law. As such, Defendant's threat to charge Nancy Doe with an aggravated misdemeanor is not a genuine attempt to enforce the law, but instead an attempt to force Nancy Doe to participate in the re-education program. The fact that Defendant continues to promise prosecution if Nancy Doe refuses to participate indicates that the charges are retaliation for her refusal to engage in compelled speech. She and other minors are reasonably deterred from taking any selfie photographs at all when the standard is not nudity but rather that Defendant Bull might find them 'provocative.' This chilling effect has been demonstrated already in this case by Nancy's parents placing additional restrictions on her use of electronic devices. With respect to Jane and John Doe, this threat is an attempt to compel them to abandon their Fourteenth Amendment right to control their child's upbringing. Thus, Plaintiffs' claim that the threat of a criminal prosecution would deter an ordinary person from exercising their constitutional rights meets the "reasonable likelihood of success on the merits" standard for a temporary restraining order to be issued by this Court.

**1. The two photographs at issue in this case are not obscene and are constitutionally protected expression, and Defendant's threat of criminal prosecution of Nancy Doe for the two photographs at issue in this case is content based and fails strict scrutiny.**

Defendant's threatened application of Iowa Code section 728.1(7)(g) to prosecute Nancy Doe for taking the selfies at issue is a content-based restriction of non-obscene, protected expression that cannot withstand strict scrutiny. The Supreme Court has repeatedly held that content-based restrictions must survive strict scrutiny. *See, e.g.*, *Carey v. Brown*, 447 U.S. 455

(1980). Recently, the Court clarified that a statute is content based simply if it creates a distinction "based on the message a speaker conveys." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015).[3] *Reed* makes clear that even "subtle" distinctions that proscribe regulated expression "by its function or purpose . . . are distinctions based on the message a speaker conveys, and therefore, are subject to strict scrutiny." *Id*.

First, by outlawing the non-nude, non-obscene depiction of only female torsos (where nipples are not depicted), Defendant Bull's application of the Iowa Code criminalizes expressive conduct only by certain speakers: women and girls. Even if the statute did not distinguish between protected and prohibited speech because of its function or purpose, Defendant's application of section 728.1(7)(g) would still be a content-based restriction because it privileges certain speakers (men) over others (women). *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 638 (1994); *see also Reed*, 135 S.Ct. at 2231 (noting that speaker-based laws are not necessarily content neutral.).

Second, Defendant's application of section 728.1(7)(g) is a content-based restriction on expression because it explicitly criminalizes only some instances of non-nude/non-obscene 'toplessness' but not others, based on each instance's "function or purpose." *Reed*, 135 S.Ct. at 2227. Defendant Bull does not purport to criminalize all instances of toplessness where no nipple is depicted, but only those created in his estimation for the purpose of "arousing or satisfying the sexual desires of a person who may view a visual depiction."

[3] *Reed* involved a challenge to a municipal code that regulated signs differently based on the kind of message they conveyed (such as "ideological," "directional," or "political"). *Reed*, 135 S.Ct. at 2224–25. The Court rejected the city's argument that a law had to discriminate against certain viewpoints in order to be a "content-based" restriction. *Id*. at 2229.

Here, the two selfies at issue do not depict nudity, as Nancy's nipples are not depicted. The State of Iowa cannot demonstrate that it has a compelling interest in regulating the partial exposure of a girl's torso or chest where her nipples are not depicted. Defendant's purported interest in morality in the case of non-obscene images is not compelling. Defendant Bull cannot charge Nancy Doe with sexual exploitation of a minor for behavior which is not illegal because it does not include obscenity or child pornography, simply because he assesses it as provocative. The Supreme Court has stated that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)); *see generally Loving v. Virginia*, 388 U.S. 1 (1967); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). Moral disapproval of a speaker's message is not a compelling interest under the First Amendment. *See, e.g.*, *Spence v. Washington*, 418 U.S. 405, 412 (1974) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding that, as a "bedrock principle," the First Amendment prohibits censorship of expression based on its "offensive and disagreeable" nature); *see also* Mark Cenite, *Federalizing or Eliminating Obscenity Law as an Alternative to Contemporary Community Standards*, 9 Comm. L. & Pol'y 25, 68–69 (2004). Any purported government interest in morality does not supersede Plaintiff's First Amendment rights.

**2. *State v. Hunter*, cited by Defendant in asserting that the two photographs at issue in this case are obscene, unprotected speech, is inapposite to this case.**

In his Answer, Defendant continually states that the Nancy Doe's two selfies "constitute nudity for the purpose of arousing or satisfying the sexual desires of a person who may view a

visual depiction of the nude minor and are not protected by the First Amendment." (Answer to Am. Compl. 6, 7 ¶¶ 45, 51 (referring to Iowa Code section 728.1(7)(g)).) In support of this proposition, Defendant cites *State v. Hunter*, 550 N.W.2d 460, 465–66 (Iowa 1996), *overruled on other grounds by State v. Robinson*, 618 N.W.2d 306 (Iowa 2000). However, it appears what Defendant actually means is that they constitute '*non-nudity* for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the *non-nude* minor.' *Hunter* does not govern the case at hand, and does not stand for the proposition that nudity means anything other than nudity.

In *Hunter*, a criminal defendant convicted of sexual exploitation of a minor appealed his conviction arguing that the statute was unconstitutionally vague because it failed to define either "nudity" or "for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction." *Hunter*, 550 N.W. 2d at 465 ("Hunter complains there is no statutory definition of 'nudity' or 'for the purpose of arousing or satisfying the sexual desires of a person' so as to alert him his conduct was prohibited."). After noting that "the common meaning of the word 'nudity' includes exposure of the breasts, buttocks, *or* genitalia," the court made it clear that, as applied to Hunter, the child being photographed was clearly nude:

> Whatever doubts there may be about the applicability of the statute in other contexts, Hunter's conduct falls squarely within the statute's target of "nudity of a minor." Although Hunter's daughter is not totally naked in any photograph, various photographs do show her bare breasts, pubic area and buttocks. Therefore, the statute's nudity requirement is not vague when applied to the conduct charged to Hunter.

*Id.* at 465.

Of course, that same fact pattern does not exist in this case. Plaintiffs are not asserting that Nancy Doe's two selfies lack a depiction nudity because Nancy was wearing shorts or because nudity was partial only; to the contrary, Plaintiffs assert that Nancy Doe's selfies lack a

depiction of nudity because there was *no* nudity at all. Her nipples, buttocks, and genitalia are completely covered and not depicted. Thus, the nudity element cannot be satisfied, and Nancy Doe's selfies, not meeting the criteria of any area of expression excluded from First Amendment protection, are constitutionally protected expression.

Further, the court in *Hunter* notes that to violate the statute, the images must both contain nudity *and* be created to arouse or satisfy the sexual desires of the viewer, distinguishing photos that contain nudity but have legitimate scientific, medical, or educational value from those that can be considered lascivious. *Id*. at 466 ("[T]he statute does not criminalize the mere nudity of a minor; [it] requires an element of scienter."). In contrast, because Nancy Doe's selfies do not contain nudity, the Court need not even consider the latter element.

Moreover, it is impossible for a minor acting alone to violate section 728.12. The statute by its plain language contemplates two separate people. The facts in *Hunter*, of two people, one an offender and the other a victim, align with the elements of the crime. The facts here, of only one person, acting on her own, do not. The plain language of the statute contemplates "an individual" (the offender) and "a minor" (the victim). This requires both a minor victim and a separate person who is the perpetrator. One can no more sexually assault or exploit themselves as they can commit theft or fraud on themselves. If Defendant's interpretation of section 728 were valid, it would mean that a minor could be charged of sexually exploiting himself or herself any time he or she engages in "fondling or touching" his or her own genitals. Iowa Code § 728.1(7)(d). To put it bluntly, under Defendant's theory, a minor commits a crime every time he or she masturbates—an untenable result. Rather, *Hunter*, which addressed a situation of an adult man in a motel room who, in only his underwear and with an erection, directed his teenage stepdaughter to take off her clothes and pose for pictures, does not share any common facts or

provide legal precedent to this case, which instead involves a fourteen year old's taking of two non-obscene, non-nude selfies in a mirror.

**D. Defendant's threatened criminal prosecution of Nancy Doe as related to the two non-obscene photographs at issue in this case is an ongoing violation of her First Amendment right against compelled speech and expression.**

Individuals have a right to be free from compelled speech under the First Amendment, which protects an individual's right to refrain from speaking as well as to engage in speech, neither of which may be dictated by government in content or message. *See Turner Broad Sys., Inc.*, 512 U.S. at 641 (Government may not require utterance of particular message it favors); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988) (First Amendment freedom of speech "necessarily compris[es] the decision of both what to say and what *not* to say").

"'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 573 (1995) (quoting *Pac. Gas & Electric Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986)). Thus, "[t]he Supreme Court has long recognized that, in addition to restricting suppression of speech, the First Amendment may prevent the government from . . . compelling individuals to express certain views." *United States v. United Foods, Inc.,* 533 U.S. 405, 410 (2001). This view exists because "'[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration and adherence." *Turner Broad Sys., Inc.*, 512 U.S. at 641. Among the categories of compelled speech found impermissible by the Supreme Court "is government action that forces a private speaker to propagate a particular message chosen by the government." *Id.* Because compelled speech is a form of content-based regulation, strict scrutiny

analysis applies, requiring the government to meet the burden to prove the regulation is narrowly tailored to accomplish a compelling government interest. *See Riley*, 487 U.S. at 786.

Here, in order to avoid prosecution, Nancy Doe would be compelled to write a statement, styled as a confession, that explains why her actions in taking the two selfies were wrong. (*See* Ex. 1; Aff. of Jane Doe 1-2; Compl. 14-15, 17, 18, 21.) Because she in no way violated the law, being compelled to describe her behavior as wrong on threat of an aggravated misdemeanor sexual exploitation conviction forces her to express a belief she does not hold without justification in criminal law or procedure. Defendant Bull, on behalf of the government, simply lacks any compelling governmental interest in requiring Nancy Doe to adopt a message she does not adhere to regarding her actions, women and girls generally, and their sexuality specifically. It may certainly not compel her to adopt speech confessing to one of the most serious crimes in the Iowa Code, sexual exploitation of a minor.

In *Mitchell*, the Third Circuit upheld the district court's granting of a preliminary injunction on compelled speech grounds nearly identical to those presented here. *Mitchell*, 598 F.3d at 152. The court recognized that the choice of taking part in the speech or facing criminal prosecution for child pornography was no choice at all, and consisted of compulsion to complete the reeducation program, which, as here, required a written statement explaining how the minor's actions were 'wrong.' *Id.* It found significant the juvenile status of the minor, noting that "minors are more susceptible to external influences," which in the context of protected rights of expression, "cautions against allowing actors in the juvenile and criminal justice systems to venture outside the realm of their elected authority." *Id.*

Here, too, all the elements of compelled speech are present, with no compelling governmental interest to support them. Plaintiffs thus demonstrate a significant likelihood of

success on the merits of their claim that Defendant Bull has, and continues to, violate her right to be free of compelled speech.

**E. Defendant's threatened criminal prosecution of Nancy Doe as related to the two non-obscene photographs at issue in this case is an ongoing violation of the Fourteenth Amendment right of her parents, John and Jane Doe, to raise their daughter free from undue government interference.**

John and Jane Doe are also likely to succeed on the merits of their Fourteenth Amendment due process claim. The Fourteenth Amendment precludes deprivations of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The substantive due process afforded by the Fourteenth Amendment prevents unjustified government interference in those rights which are 'implicit in the concept of ordered liberty.' *United States v. Salerno*, 481 U.S. 739, 746 (1987). Fundamental rights are afforded strict scrutiny analysis, in which a court may only uphold the governmental interference if the government can meet its burden of proving that the government action which infringes the fundamental right is narrowly tailored to serve a compelling governmental interest. *Reno v. Flores,* 507 U.S. 292, 302 (1993); *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005).

Parents have a Fourteenth Amendment substantive due process right to raise their children as they see fit without undue state interference. Indeed, this is one of the longest, consistently recognized fundamental rights in our jurisprudence. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (Washington grandparents' visitation statute violated parent's fundamental rights to determine custody, care, and control of children); *accord Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (personal choice in family matters is fundamental liberty interest); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (parent's right to the companionship, care, custody, and management of her child is an important interest); *Parham v. J.R.*, 442 U.S. 584, 602–04 (1979) (recognizing parental authority over minor children); *Quilloin v. Walcott*, 434 U.S. 246,

255 (1978) (parent-child relationship is constitutionally protected); *Wisconsin v. Yoder*, 406 U.S. 205, 232–34 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (right to raise children is "essential"); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (parent's authority to direct rearing of child is "basic in the structure of our society"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (affirming parent's liberty interest to direct upbringing and education of her child); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (Due Process Clause protects right of the individual to establish a home and bring up children).

Therefore, if Defendant's actions infringe on the John and Jane Does' fundamental right to exercise care, custody, and control over their daughter, this court must apply strict scrutiny. The Court determines whether government actions infringe on a fundamental parental right on a case-by-case basis. *Troxel*, 530 U.S. at 95–96 (Kennedy, J., dissenting).

> All of the cases in which the United States Supreme Court . . . [has] concluded that the parental right to exercise care, custody and control over children was implicated, involved situations in which the state intervened and substituted its decision making for that of the parents. The result is that a parent's decision with respect to the care, custody and control of his or her child cannot be overridden by the state in the absence of a showing that the parent is unfit or that the parent's decision will jeopardize the health or safety of the child, or will have a potential to impose significant social burdens.

*Hensler v. City of Davenport*, 790 N.W.2d 569 (Iowa 2010) (quoting *Dutkiewicz v. Dutkiewicz*, 957 A.2d 821, 832–33 (2008)) (analyzing the contours of the fundamental parental right to exercise care, custody, and control over a child); *see, e.g.*, *Troxel*, 530 U.S. at 67 (state sought to allow grandparent visitation over parent's decision not to permit); *Moore*, 431 U.S. at

496–97 (parent wanted to live with son and two grandsons in violation of housing ordinance); *Yoder*, 406 U.S. at 207–08 (state sought to force parent to send children to public school while parent sought to provide an Amish education); *Meyer*, 262 U.S. at 396–97 (state sought to override parental decision to allow foreign language study before eighth grade).

Here, John and Jane Doe object to the messages that were a part of the reeducation class that would have informed their daughter her actions were wrong, why they were wrong, and about how 'young ladies' should act. (Aff. of Jane Doe 1, 2, ¶¶ 1-2, 6; Compl. 12-15.) They oppose the sex-based stereotypes and lessons about values and what is and is not an appropriate relationship with one's own body and in relationship with others. (Id.) They oppose messages which would seek to shame their daughter, or to teach her that she is either a criminal, sexual predator, or a victim as a result of the selfies she took. (Id.) Finally, they oppose the invasive nature of the program itself, which asked the parents to account for how they had 'punished' their daughter in response to the selfies, as well as other details about their family life and parenting decisions. (Id.)

These are choices that John and Jane Doe get to make about how to raise their child, not Defendant Bull. They are core to the values and attitudes they wish to instill in their daughter as they seek to prepare her to be strong and successful in the world as an adult. Where Defendant Bull wishes to shame and stigmatize, they seek to convey self-assurance, self-respect, respect for others, and empowerment. Where Defendant Bull conveys outmoded ideas of female passivity, the Does wish to instill in their daughter confidence and agency. In the totality, Defendant Bull seeks to supplant his value system and ideas about women and girls in the upbringing of Nancy Doe instead of Jane and John's, thus infringing on their parental judgment and fundamental right to rear their child as they see fit. *Cf. Miller*, 598 F.3d at 150 (persuasive analysis upholding

district court's finding of likelihood of success on the merits on parents' Fourteenth Amendment substantive due process claim in nearly identical factual scenario occurring in Pennsylvania). In *Miller*, the Third Circuit Court of Appeals agreed "that an individual District Attorney may not coerce parents into permitting him to impose on their children his ideas of morality and gender roles." *Id.* at 151. The Court recognized "with assuredness" that while schools and teachers have a secondary responsibility after parents over certain messages about morals and values through their control of the curriculum and school environment, the prosecutor threatening the girls with prosecution unless they attended his reeducation class unequivocally lacked that same secondary responsibility. *Id.*

While the state has a compelling interest in protecting children from sexual exploitation, the state has no compelling interest in protecting children from exercising their constitutional rights of expression, or in perpetuating sexist ideas about girls and women. Here, Nancy Doe did not sexually exploit herself nor did anyone else; she took a selfie in her mirror which depicted no nudity. Similarly, there is a total lack of narrow tailoring in Defendant Bull's "choice" to Nancy of facing criminal prosecution or temporarily giving up access to phone, computer, sports participation and compelling her to attend a stigmatizing reeducation class.

Here, as in *Troxell*, and *Miller*, there has been no determination by the State that Plaintiffs John and Jane Doe are in any way unfit parents. Quite the opposite: as the very act of this suit demonstrates, they have shown themselves to be highly protective, careful, and thoughtful guardians and advocates for their daughter. And, as her parents, who love, understand, and value her, Jane and John Doe can (far better than Defendant Bull) determine with Nancy the appropriate response to the selfies in question. There has been no adjudication of criminal behavior on the part of the parents, or of the child. Indeed, she has not engaged in criminal

behavior by taking the two selfies at issue. But by using the full force of felony charges and the sex offender registry as a bully stick, Defendant Bull seeks to reeducate Nancy Doe as *he* sees fit, and in a manner found offensive and harmful by Jane and John.

Because the actions of Defendant Bull in infringing on Jane and John Doe's fundamental right to determine the care, custody, and control of their daughter cannot meet the rigors of strict scrutiny, Plaintiffs have demonstrated a likelihood of success on the merits of their Fourteenth Amendment substantive due process claim.

**F. Defendant's threatened criminal prosecution of Nancy Doe as related to the two non-obscene photographs at issue in this case is an ongoing violation of Nancy Doe's Fourteenth Amendment right to Equal Protection against Invidious Sex Discrimination**

Defendant's threatened criminal prosecution of Nancy Doe as related to the two non-obscene photographs at issue in this case is an ongoing violation of Nancy Doe's Fourteenth Amendment right to equal protection against invidious sex discrimination. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Defendant's threatened criminal prosecution of Nancy Doe in this case constitutes a gender based classification that fails intermediate scrutiny.

Under the Fourteenth Amendment, gender-based or sex-based classifications must pass intermediate scrutiny, 'with teeth.' Under this standard, the government must show that the gender-based classification serves an important government objective, and that it is substantially related to the achieving that objective. *See U.S. v. Virginia*, 518 U.S. 515, 532–33 (1996) (Virginia failed to meet the state's burden to show exceedingly persuasive justification for excluding women from Virginia military college program, such that exclusion violated equal protection); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934–35 (W.D. Mo. 2014). The state bears the

burden of establishing an "exceedingly persuasive justification" for making the sex-based classification. *Virginia*, 518 U.S. at 524 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). The justification must be genuine, not hypothesized or invented post hoc in response to litigation. *Id.* at 533. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. *Id.*

Defendant Bull has no persuasive justification for criminalizing teen girls—and only girls, not boys—for taking non-obscene selfies of themselves that display their torsos or chests but do no display their nipples. Defendant cannot show that his sex-based application (only to girls) of a law that was never meant to criminalize this type of protected activity by children of any sex in the first place, is related to the achievement of any legitimate governmental interest. Defendant Bull's sex-based application of the law perpetuates the legal and social inferiority of girls, *see Virginia*, 518 U.S. at 533-34 by stigmatizing, sexualizing, and shaming Nancy Doe and her body. It is a "classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

A law or classification violates the Fourteenth Amendment if it is passed in order to "create or perpetuate the legal, social, [or] economic inferiority of women." *U.S. v. Virginia*, 518 at 533–34. "Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Hogan*, 458 U.S. at 724–25. The Defendant's application of Iowa Code section 728.1(7)(g) only to girls, for conduct which if engaged in by similarly situated boys, would not be subject to any consequence, precisely is intended to perpetuate stereotypes that sexualize the torsos and chests of girls and women but not of boys and men. In his Answer to the Amended Complaint, Defendant Bull misstates Plaintiffs' Equal Protection claim. (Answer to Am. Compl. 1–2.) While Plaintiffs believe that Iowa's statutory definition of nudity in Iowa

Code section 709.21(2)(a) is a gender-based classification that facially violates the Fourteenth Amendment, to the extent that Defendant Bull relies on it in justifying his enforcement of 728.1(7)(g) only to girls but not boys, their claim, as stated and pled, is an as-applied challenge to Defendant Bull's disparate treatment of boys and girls by treating only girls' non-obscene selfies as sexual exploitation of a child under Iowa Code section 728.1(7)(g). That treatment, by Defendant Bull's own affirmative admissions, subjects Nancy Doe to sexual exploitation of a minor charges for being a girl while taking the selfies in question, which he finds provocative, but which subjects boys who engage in identical conduct to no consequence at all. (*See* Answer to Am. Compl. 6, 7 ¶¶ 45, 51.)

This argument is consistent with recent district court orders denying dismissal of challenges to similar sex-based regulations of the female nipple. *See, e.g., Free the Nipple-Springfield Residents Promoting Equal. v. City of Springfield*, 153 F. Supp. 3d 1037, 1040 (W.D. Mo. 2015); *Free the Nipple–Fort Collins v. City of Fort Collins*, No. 16–cv–01308–RBJ, 2016 WL 6212520 (Dist. Co. Oct. 20, 2016). In *Free the Nipple–Fort Collins*, which is of course not precedential but which is persuasive in its reasoning, the district court judge found that plaintiffs had met the burden of asserting a Fourteenth Amendment sex discrimination claim, rejecting the government's argument that the sex-based ordinance that prohibited the public exposure of only female breasts would pass intermediate scrutiny because it was based on "real" differences between the sexes. 2016 WL 6212520 at *10–11 (citing *People v. Santorelli*, 80 N.Y.2d 875, 881 (N.Y. 1992) (Titone, J., concurring) ("One of the most important purposes to be served by the Equal Protection Clause is to ensure that 'public sensibilities' grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of government. Thus, where 'public sensibilities' constitute the justification for a gender-based classification, the

fundamental question is whether the particular 'sensibility' to be protected is, in fact, a reflection of archaic prejudice or a manifestation of a legitimate government objective[.]").

The district court pointed out that the Supreme Court's equal protection jurisprudence has developed since the early part of the last century. In the early part of the last century, the Court routinely upheld laws passed by governments that discriminated against one sex based on perceived real differences between men and women. *Free the Nipple–Fort Collins*, 2016 WL 6212520, at *11 (*citing Goesart v. Clearly*, 355 U.S. 464, 466 (1948) (upholding a Michigan ban on female bartenders premised on 'real' differences between men and women); *see also Michael M. v. Superior Ct. of Sonoma Cnty.,* 450 U.S. 464, 475–76 (1981) (plurality) (upholding a California statutory rape law criminalizing only males and labelling only women as potential victims as a result of purportedly 'real' differences between the sexes)). Now, however, the "Court has since interpreted the Equal Protection Clause to permit only those laws that do the opposite." *Free the Nipple–Fort Collins*, 2016 WL 6212520, at *12 (citing *Virginia*, 518 U.S. at 531; *Hogan*, 458 U.S. at 725 n. 10; *Craig v. Boren*, 429 U.S. 190, 210 (1976); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev 83, 145 (2010)). As the more recent precedent recognizes, "while there may be some 'real' differences between men and women, these differences may only serve as the basis of discriminatory laws when such laws 'compensate' one sex for the disabilities or inequities that sex has historically suffered." *Free the Nipple–Fort Collins*, 2016 WL 6212520, at *12.

Here, Defendant has drawn a sex-based classification of behavior: he has threatened to charge Nancy Doe's taking a photograph of herself depicting some parts of her torso or chest area—although not depicting any partial nudity because no part of her nipple is displayed—as sexual exploitation of a child—here, herself—because she is a girl. Had she instead been a

teenage boy taking the same picture—even in a state of partial or full nudity, i.e., depicting some part of the nipple, from the waist up—no consequence would result. (*See* Answer to Am. Compl. 6, 7 ¶¶ 45, 51 ("Defendant denies the allegations of paragraph 51 and affirmatively states that the sexting photos depicting Nancy Doe constitute nudity for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor.").) This disparate treatment of Nancy Bull under section 728.1 and by any application of section 709.21(2)(a), treats women and girls differently and worse than men and boys, and is intended to perpetuate traditional gender roles and sex stereotypes about women's and girls' bodies, sexuality, and bodily agency, and reinforce outmoded ideas about the legal and social inferiority of women and girls.

There is no "exceedingly persuasive justification" for treating Nancy differently than a similarly situated teen boy for taking a photograph, without a shirt but not depicting any nudity, which she would not face as a result of the same behavior if she were a boy. Nancy Doe has neither invaded her own privacy pursuant to Iowa Code section 709.21 or sexually exploited herself pursuant to section 728.12. The two selfies in question reveal no nudity, but merely are, in the view of Defendant Bull, provocative. The state's interest in protecting boys from sexual exploitation by adults who might view non-nude images as provocative is surely as compelling to protect girls from the same; but the sex-based classification in this case actually accomplishes the protection of neither sex, and in that way it is both over and under inclusive.

Defendant's treatment of Nancy's behavior under Iowa Code section 728.1(7)(g) is predicated entirely on her sex, as is any application of the definition of "full and partial nudity" in Iowa Code section 709.21(2)(a) to her expressive conduct. If she were male, the same conduct would not be subject to discipline or threatened criminal charges by Defendant. Because the state

cannot meet its burden of providing any exceedingly persuasive justification that would criminalize girls for engaging in non-nude selfies but not boys, Defendant's treat of criminal prosecution of Nancy in this case cannot pass intermediate scrutiny. Therefore, Defendant Bull's threat of criminal prosecution to Nancy for photographing herself without a shirt merely because she is female also violates her right to equal protection under the Fourteenth Amendment as unenforceable sex discrimination, and Plaintiffs are likely to prevail on the merits of this claim.

## II. Plaintiffs Are Suffering Irreparable Harm

The next factor for the Court to examine is whether the Plaintiffs will suffer irreparable harm in the absence of injunctive relief. *Dataphase Systems, Inc.*, 640 F.2d at 114. Put simply, this Hobson's Choice that Defendant has imposed on Plaintiffs, either to face prosecution—based not on probable cause that a crime has been committed, but as punishment for exercising their constitutional rights—or forgo those rights and avoid prosecution, is constitutionally abhorrent and repugnant. *See Wayte v. United States*, 470 U.S. 598, 607–08 (1985) ("the decision to prosecute may not be deliberately based on . . . arbitrary classification, including the exercise of protected statutory and constitutional rights."); *United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.")

Even a temporary violation of First Amendment rights constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Here, Plaintiffs seek the remedy of injunctive relief because Defendant Bull's actions abrogate Nancy Doe's First Amendment rights and her right to equal protection under the Fourteenth Amendment, and Jane and John Doe's Fourteenth Amendment fundamental right to raise their daughter as they see fit. Indeed,

threat of prosecution has a chilling effect on the Plaintiffs expressing themselves by appearing in photographs, even such innocent photographs as those in swimsuits.

Irreparable harm also exists because Plaintiffs could not sue Defendant Bull if they were found not guilty after a prosecution, since he would be immune as prosecutor. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). The unavailability and inability of monetary damages to make Plaintiffs whole in this case requires injunctive relief to prevent further harm. *See, e.g.*, *Thrasher v. Grip-Tite Mfg. Co.,* 535 F. Supp. 2d 937, 944 (S.D. Iowa 2008) ("'Loss of intangible assets such as reputation and goodwill can constitute irreparable injury,' as those items are not readily compensable by monetary damages." (quoting *United Healthcare Ins. Co. v. AdvancePCS,* 316 F.3d 737, 741 (8th Cir. 2002)); *cf. O'Connor v. Peru State Coll.,* 728 F.2d 1001, 1003 (8th Cir. 1984) (finding potential harm from termination of employment "is not necessarily irreparable and . . . can be compensated for by money damages"). For these reasons, Plaintiffs demonstrate that they face irreparable harm from Defendant's threatened actions.

### III. The Balance of Hardships Favors Plaintiffs

The third factor courts must examine is harm to the non-moving party. *Dataphase Systems, Inc.*, 640 F.2d at 114. The balance of equities, too, generally favors the constitutionally protected freedom of expression, such that when a likelihood of success on the merits on a First Amendment claim has been shown, it will typically necessarily determine this factor under *Dataphase Systems, Inc. Nixon*, 545 F.3d at 690, *overruled on other grounds by Phelps-Roper v. Manchester*, 697 F.3d 678.

Further, no harm would come to the Defendant, the non-moving party, by delaying prosecution on this matter. Indeed, demonstrating that no sense of urgency to prosecute exists, Defendant has agreed to forgo initiating a criminal prosecution against Nancy Doe during the

pendency of this proceeding in order to avoid proceeding on Plaintiffs' Motion for a Temporary Restraining Order. Notice, at 1–2. Any harm to the non-moving party, if there is any at all, is clearly insignificant and outweighed by the harm to the Plaintiffs' First and Fourteenth Amendment rights from not granting the injunctive relief. This harm is amplified by Nancy Doe's minor status—both to her and her parents in exercising their right to raise her as they see fit. She is only a fourteen year-old once; her parents' only chance to parent her is right now, and for a short period. Because of her youth and impressionability, she is also especially susceptible to and harmed by the violations of her rights and the stigmatizing and outmoded, sex-stereotyped based messages and value system Defendant Bull seeks to impose on her and her parents.

**IV. Granting a Preliminary Injunction for Plaintiffs Will Further the Public Interest**

Issuing an injunction in this case is the public interest. The courts unsurprisingly find that the public interest is served by protecting constitutional rights. *Phelps-Roper v. Nixon*, 545 F.3d at 690, *overruled on other grounds by Phelps-Roper*, 697 F.3d 678. However, because the district courts are nonetheless directed by the Court of Appeals to should award preliminary injunctive relief only upon weighing all four factors, *Dataphase Systems, Inc.*, 640 F.2d at 114, it is important to point out the specific manner in which the public interest weighs in favor of injunctive relief. In this case, what is at stake is the carte blanche ability that Iowa prosecutors, most pointedly Defendant Bull, will have to subject countless additional families to the Hobson's Choice Defendant Bull inflicted upon the Does: to allow the invasion of their parenting judgment and values, their daughter's free expressive rights, and her right to grow up free from unjustified and harmful sex stereotyping by the government, or to subject her to a terrifying, stigmatizing, and bewildering baseless criminal prosecution. Teens use their cell phones and social networking in nearly every aspect of their lives. Without this Court's acting to protect Nancy, Jane, and John

Doe from Defendant Bull's overreach, they will continue to suffer the irreparable intrusion into their core and most fundamental constitutional rights and civil liberties, with a profound chilling effect on them and others, especially teen girls and their parents, throughout Iowa.

**CONCLUSION**

Nancy Doe is a fifteen-year-old teenager who took two selfies which she sent to another teenager via her cellphone. They may have been provocative in the eyes of Defendant Bull, but they were not obscene, and depicted neither full or partial nudity. She is not a sexual predator, or a child molester. But without this Court's protection, she stands to be subjected by the Defendant to a highly stigmatizing, harmful, humiliating ordeal in the best-case scenario. For the foregoing reasons, Plaintiffs respectfully seek a preliminary injunction prohibiting the Defendant, his employees, agents, assigns, and all those acting in concert with him, from criminally charging or threatening to criminally charge Nancy Doe for the two photographs at issue in this case, taken on or about May 19–21, 2016, in order to protect Nancy Doe's First Amendment rights of free expression, her Fourteenth Amendment rights to equal protection, and the Fourteenth Amendment right of her parents, John and Jane Doe, to raise their daughter free from undue interference by the state.

Plaintiffs respectfully request oral argument on this motion.

December 13, 2016.

Respectfully submitted,

/s/ Rita Bettis
Rita Bettis, AT0011558

/s/ Joseph Fraioli
Joseph A. Fraioli, AT0011851

ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 901

Des Moines, IA 50309–2316
Telephone: 515.243.3988
Fax: 515.243.8506
rita.bettis@aclu-ia.org
joseph.fraioli@aclu-ia.org

s/Glen S. Downey
Glen S. Downey AT0012428

The Law Offices of Glen S. Downey, LLC
301 East Walnut St., Ste. 4
Des Moines, IA 50309
Tel: (515) 259-9571
Fax: (515) 259-7599
glen@downey-law.net

s/Robert G. Rehkemper
Robert G. Rehkemper AT0006553

s/Matthew T. Lindholm
Matthew T. Lindholm AT0004746

440 Fairway Drive, Suite 210
West Des Moines, Iowa 50266
Telephone: (515) 226-0500
Facsimile: (515) 244-2914
rgrehkemper@grllaw.com
mtlindholm@grllaw.com

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I electronically filed the foregoing paper with the Clerk of Court by using the CM/ECF system.

All participants in this case are registered CM/ECF users and will served by the CM/ECF system.

Date: December 13, 2016

/s/Rita Bettis
Rita Bettis