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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1795**

Rebecca Lynn Fideldy,
Respondent,

vs.

Rose Marie Schumacher,
Appellant.

**Filed July 25, 2023
Affirmed
Reyes, Judge
Dissenting, Ross, Judge**

Itasca County District Court
File No. 31-CV-22-1862

Rebecca Lynn Fideldy, Grand Rapids, Minnesota (self-represented respondent)

John Dimich, Dimich Law Office, Grand Rapids, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Reyes,
Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this dispute over a harassment restraining order (HRO), appellant argues that the district court (1) abused its discretion by denying her request to recuse itself for bias; (2) abused its discretion by granting respondent's HRO against appellant; and (3) erred by

determining that appellant's harassing statements about respondent were not protected under the First Amendment. We affirm.

FACTS

Respondent Rebecca Lynn Fideldy has been employed as a legal secretary with the Itasca County Attorney's office for 16 years. Prior to this, she was employed with the John Dimich Law Office for ten years as a legal secretary. Appellant Rose Marie Schumacher and John Dimich have been friends for 40 years. While employed at the John Dimich Law Office, Fideldy would occasionally see Schumacher there.

In the beginning of 2022, two employees, not involved in this appeal, from the Itasca County Attorney's office were discharged from their positions with that office but remained employees of Itasca County.¹ During this time, John Dimich was running for Itasca County Attorney against incumbent, Matti Adam, Fideldy's supervisor.

On July 10 and July 12, 2022, Schumacher posted comments on social media titled "Itasca Involved. Informed. Inspired" about Fideldy.

On July 10, 2022, Schumacher posted:

Matti is desperate and her intimidation tactics are ramping up . . . it[']s coming out Matti. Whether you want it to or not. . . *Becky Fideldy isn't the only leaker in your tight circle.*

(Emphasis added.)

On July 12, 2022, Schumacher posted:

Outside agencies are watching because no one currently serving Itasca County has the balls or just love the gravy train they are on and throwing each other under the bus. *Right,*

¹ The record is unclear on the details of this matter.

Becky Fideldy? Having an alleged sex offender you asked special favors for in your parade marches is for sure an f u to Itasca County and her victims especially the rape victims she continues to victimize.

(Emphasis added.)

Schumacher also posted a photograph of Fideldy that day and stated: “The squeaky leaker. This is not her first time leaking private info,” insinuating that Fideldy had leaked information while employed at the John Dimich Law Office. She further stated in that comment: “You are pathetic [Fideldy], but I have known that for years. Karma baby.” Following the comments, Fideldy petitioned for an HRO against Schumacher. The district court held an evidentiary hearing on August 4, 2022, and issued an order granting Fideldy an HRO against Schumacher.²

Less than a month later, Schumacher filed a motion for posttrial amended findings requesting that the district court deny the HRO. In her motion, Schumacher argued that Fideldy failed to show the requisite harassment for an HRO and that the district court judge failed “to disclose a conflict of interest to the parties prior to the hearing.” The district court held another hearing and denied Schumacher’s motion, stating that “[t]here was and is no conflict of interest by this [c]ourt.” And after review of the arguments of the motion hearing as well as the record and transcript of the evidentiary hearing[,], there is no reason to change the decision of the [c]ourt.” This appeal follows.

² The HRO is in effect until August 4, 2023.

DECISION

I. The district court judge did not abuse its discretion by denying Schumacher's request to recuse himself for bias.

Schumacher argues that the district court judge should have recused himself because they knew two people that were mentioned in the social media comments and therefore expressed bias. We are not persuaded.

“We will not reverse a district court’s decision to deny a removal motion absent an abuse of discretion.” *Haefele v. Haefele*, 621 N.W.2d 758, 766 (Minn. App. 2001), *rev. denied* (Minn. Feb. 21, 2001). Under the Minnesota Code of Judicial Conduct, a judge must disqualify themselves when their impartiality may reasonably be questioned in circumstances involving personal prejudice or bias against a party. Minn. R. Jud. Conduct 2.11(A)(1); *see also* Minn. R. Civ. P. 63.02 (“No judge shall sit in any case if disqualified under the Code of Judicial Conduct.”). But “[p]rior adverse rulings by a judge, without more, do not constitute judicial bias.” *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006).

Here, the district court judge determined that “[t]here was and is no conflict of interest by this Court.” The record supports this determination and reflects that the district court did not show bias.

Schumacher points to the district court’s comment at the evidentiary hearing:

I mean, c’mon I love how . . . Ms. Schumacher says she’s so respectful and I know [D.H.]. Calling her dead weight and then in parenthesis two heavy weights, along with [A.C.]. Real respectful Ms. Schumacher.

Schumacher contends that, because the district court judge knew D.H. and A.C., who worked at the sheriff’s office, the judge had a bias and should have recused themselves.

However, the record shows the judge made the comment to put into context that Schumacher portrays herself as being respectful but that her actions indicate otherwise. Moreover, just because the judge knew those two individuals does not mean that the judge had a bias against Schumacher. District court judges engage with many individuals in a courtroom, including prosecutors, public defenders, social workers, and sheriffs, and are bound to know the people that work in those positions. At the same time, “there is the presumption that a judge has discharged [their] judicial duties properly.” *Id.* “We will not find an abuse of discretion unless the district court’s resolution of the matter is against logic and the facts on record.” *Haefele*, 621 N.W.2d at 762-63 (quotations and citation omitted). The record here supports the district court’s determination that Schumacher failed to show bias. As a result, the district court judge did not abuse their discretion by denying Schumacher’s request to recuse themselves from the case.

II. The district court did not abuse their discretion by granting Fideldy’s HRO against Schumacher.

Schumacher argues that, because there were no repeated incidents of harassment, the HRO should not have been granted. Her argument is misguided.

We review a district court’s grant of an HRO for an abuse of discretion. *Kush v. Mathison*, 683 N.W.2d 841, 843 (Minn. App. 2004), *rev. denied* (Minn. Sept. 29, 2004). “A district court’s findings of fact will not be set aside unless clearly erroneous, and due regard is given to the district court’s opportunity to judge the credibility of witnesses.” *Id.* (citing Minn. R. Civ. P. 52.01). “But this court will reverse the issuance of a restraining order if it is not supported by sufficient evidence.” *Id.*

A district court may grant an HRO if it finds “that there are reasonable grounds to believe that the respondent has engaged in harassment.” Minn. Stat. § 609.748, subd. 5(b)(3) (2022). Harassment includes “repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another.” Minn. Stat. § 609.748, subd. 1(a)(1) (2022); *see also Roer v. Dunham*, 682 N.W.2d 179, 182 (Minn. App. 2004) (explaining that district court needs to identify more than one incident to support finding of harassment).

The district court here found “reasonable grounds to believe that [Schumacher] has engaged in harassment which ha[d] or [was] intended to have a substantial adverse effect on safety, security, or privacy of [Fideldy].” On appeal, Schumacher argues that there was only one incident, which does not meet the statutory definition of harassment. But at the hearing on Schumacher’s posttrial motion to seek vacation of the HRO, Schumacher’s counsel stated otherwise:

My argument when exposed to why this decision, I believe is contrary to the facts as submitted; [section] 609.748 requires . . . incidents of unwanted contact. There has to be . . . adverse effect on the person’s safety, security, or privacy. We allege, your Honor, that there were two separate posts that have been cited by [Fideldy] in this case.

In other words, Schumacher’s counsel functionally conceded that there were repeated incidents by stating that “there were two separate posts.” We have stated that, in the absence of evidence to the contrary, statements made by attorneys can be accepted as true. *See Rose v. Neubauer*, 407 N.W.2d 727, 728 (Minn. App. 1987) (an attorney is “an

officer of the court and, absent contrary evidence, we accept his statement that he was unaware of the filing”). Against this background, we cannot say that the question of whether the evidence established the repeated incidents necessary to support an HRO was presented to the district court. As a result, Schumacher’s argument that this case lacks the repeated incidents required for the grant of an HRO is not properly before our court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that party may not “obtain review by raising the same general issue litigated . . . under a different theory”).

Even if we were to consider Schumacher’s argument on the merits, the record supports that there were at least two incidents. In a July 10, 2022 post, Schumacher called Fideldy a “leaker.” Two days later, Schumacher accused Fideldy of arranging for an alleged sex offender to march in a parade. Schumacher also posted a picture of Fideldy and, once again, described her as a “squeaky leaker” and accused her of having a history of “leaking private info.” We note that, while Schumacher does not directly challenge the last element of repeated incidents that caused a substantial adverse effect, the district court found Fideldy’s testimony credible. Fideldy testified to “undergo[ing] financial, emotional distress, and anguish over this.” Fideldy explained that she assists victims on crimes that are prosecuted by the county attorney’s office and is “afraid that if people see [those comments] they’re going to associate that with something bad.” Finally, her last name is well known in Itasca County because she owns a small business that serves that community.

Schumacher also appears to argue that harassment did not occur against Fideldy because the comments were not sent to Fideldy directly and Fideldy had to “seek it out.”

But harassment does not require direct contact or communication between the actor and the intended target. *See* Minn. Stat. § 609.748, subd.1(a)(1). We conclude that the district court did not abuse its discretion by granting the HRO against Schumacher.

III. The district court did not err by determining that Schumacher’s comments about Fideldy were not protected under the First Amendment or the Minnesota Constitution.

Schumacher argues that (1) the district court erred by rejecting her contention that she can say anything she wants because she engaged in protected First Amendment political speech and (2) her comments about Fideldy were protected political statements about a political leader or public figure. We are not convinced.

The United States and Minnesota Constitutions guarantee the right to free speech. U.S. Const. amend. I; Minn. Const. art. I, § 3. The Minnesota Constitution offers no broader protection than the First Amendment. *See State v. Wicklund*, 589 N.W.2d 793, 801 (Minn. 1999) (declining to extend free speech protections of Article I, Section 3 of Minnesota Constitution beyond those protections offered by First Amendment). Because the district court’s determination “as to application of the Minnesota Constitution’s free speech protections [is] clearly [a] determination[] of law . . . our standard of review is de novo.” *Id.* at 797. “In general, prior restraints are viewed unfavorably under the First Amendment because they forbid certain communications before they occur, usually through the issuance of an administrative or judicial order.” *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014). But “the Supreme Court of the United States has clarified that not all injunctions that may incidentally affect expression are prior restraints subject to a presumption of unconstitutionality.” *Id.* (quotation omitted). Moreover, “the state

may regulate certain categories of words or conduct without substantially infringing on speech or expressive conduct protected by the First Amendment.” *Dunham v. Roer*, 708 N.W.2d 552, 565 (Minn. App. 2006); *rev. denied* (Minn. Mar. 28, 2006).

We review whether the district court’s granting of the HRO against Schumacher violates her free-speech rights *de novo*. *See Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 657 (Minn. 2012) (reviewing as-applied challenges to the constitutionality of statutes *de novo*). Under this standard, we do not defer to the analysis of the district court, but instead exercise our independent review. *Wheeler v. State*, 909 N.W.2d 558, 563 (Minn. 2018). This, however, does not eliminate an appellant’s burden of affirmatively showing error on appeal. *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944). In other words, an appellate court cannot make arguments on the parties’ behalf when the parties fail to do so themselves. *See State Dep’t of Lab. & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to reach issues inadequately briefed).

As an initial matter, we note that Schumacher’s brief contains approximately two pages of arguments asserting First Amendment rights broadly without a meaningful analysis of the caselaw. Even if we assume that she has not forfeited these arguments due to inadequate briefing, *see id.*, we can only interpret Schumacher’s arguments as follows.

First, Schumacher appears to argue that the district court erred when it stated that she could not say “whatever [she] want[s]” simply because of the First Amendment protection for political speech. Despite citing *Fine v. Bernstein*, 726 N.W.2d 137 (Minn. App. 2007), *rev. denied* (Minn. Apr. 17, 2007), and *Lydiard v. Wingate*, 155 N.W. 212 (Minn. 1915), Schumacher did not analyze either of the cases to support her argument.

In *Fine*, we held that the First Amendment does not protect false statements in campaign materials when a political candidate acted “with actual malice or reckless disregard by publishing and disseminating [those] false factual statements” against his opponent, an elected public official. *Id.* at 150. We recognized that, while “political speech receives greater protection under the First Amendment . . . the liberty of speech is not an absolute right,” and that “[s]imply because the [political candidate’s] assertions are political statements made during an election campaign does not shield him from a state’s ability to punish an abuse of the liberty of speech.” *Id.* at 144. In other words, *Fines* holds that the state may impose limitations on political speech, such as prohibiting a candidate from making false statements in campaign materials. *Id.* at 150.

Likewise, *Lydiard* does nothing to advance Schumacher’s argument. In *Lydiard*, the plaintiff, a member of the legislature, alleged that the defendants helped publish a defamatory letter in the newspapers. 155 N.W. at 212-13. The Minnesota Supreme Court held that the publication was not libelous per se when it did not “charge plaintiff with any moral or legal delinquency, nor d[id] it reflect upon his character, and the acts and purposes imputed to him as a member elect of the [l]egislature and as a political leader.” *Id.* at 212.

In short, neither case that Schumacher relies on stands for the proposition that the First Amendment protects political speech without exception. Because her argument that she can say “whatever you want” is inconsistent with well-established caselaw, the district court did not err in rejecting it.

Second, Schumacher argues that the district court erred because the First Amendment protects political statements involving a “government official” or “political

leader.” Again, the only two cases she relies upon do not support that proposition. *See Fine*, 726 N.W.2d 137; *Lydiard*, 155 N.W. 212.

Given the caselaw in this area, we interpret Schumacher’s reference to a “government official” and “political leader” to mean a “public official” in the context of defamation law. Schumacher is correct that the First Amendment provides higher protection for speech relating to public issues. Under *New York Times Co. v. Sullivan*, the Supreme Court held that public officials cannot recover punitive damages for publication of defamatory statements which relate to their official conduct unless they can demonstrate that the statements were made with actual malice. 376 U.S. 254, 267-83 (1964). Here, however, Schumacher was not sued for defamation, nor did Fideldy seek punitive damages. Whether Fideldy is a public official is therefore irrelevant. And we are not, in any event, persuaded that Fideldy is a public official.³

Appellant’s argument boils down to the proposition that the First Amendment allows her to say anything. Well-established caselaw says otherwise. Notably, in *Dunham*,⁴ we explained that speech falling within the definition of harassment under

³ The Minnesota Supreme Court provides a three-part test to determine whether a person is a public official. *McGuire v. Bowlin*, 932 N.W.2d 819, 824 (Minn. 2019) (holding that a high-school basketball coach is not a public official for the purposes of a defamation claim). Fideldy does not meet any of the factors under this test.

⁴ The dissent states that the supreme court in *Casillas* implicitly rejected *Dunham*’s rationale by refusing “to categorically remove constitutional protection for speech that constitutes a substantial invasion of privacy.” *State v. Casillas*, 952 N.W.2d 629, 638 (Minn. 2020). As the dissent also acknowledges, the *Dunham* case has clarified that “the harassment statute only regulates speech or conduct that constitutes ‘fighting words;’” consequently, it held that the statute was “narrowly tailored” and therefore constitutional. 708 N.W.2d at 566. We do not read *Dunham* to espouse that all speech that substantially invades the privacy of another are constitutionally unprotected.

section 609.748, subdivision 1(a)(1), is “constitutionally unprotected.” 708 N.W.2d at 566.

The record supports the district court’s determination that Schumacher harassed Fideldy.

For these reasons, we conclude that the district court did not err by determining that Schumacher’s harassing statements about Fideldy are not protected under the First Amendment or the Minnesota Constitution.

Affirmed.

ROSS, Judge (dissenting)

At the core of Rose Schumacher’s argument on appeal, she insists that “[t]he Trial Judge . . . did deny Appellant[’]s right of free speech. The Judge[’]s ruling cannot be supported by any argument as to time, place or purpose justifying this restriction.” Schumacher urged the district court not to issue the harassment restraining order (HRO) because to do so would violate her right to free speech. The district court nevertheless granted the HRO against Schumacher without even attempting to explain how her challenged comments are constitutionally unprotected. Today the majority affirms the district court’s decision by rejecting her First Amendment challenge based on this court’s now-overruled premise that speech that meets the statutory “harassment” definition is necessarily constitutionally unprotected, by overstating the relationship between political speech and First Amendment protection, and by creating (and toppling) a strawman contention. Because I am certain that Schumacher’s comments are protected under the First Amendment, I respectfully dissent.

The First Amendment and the free-speech protection afforded under the Minnesota Constitution prohibit the government from restraining all types of speech, not just so-called political speech. U.S. Const. amend. I; Minn. Const. art. I, § 3. But for context, I believe that Schumacher’s comments can rightly be called political speech. Schumacher characterizes her comments as a critical “post . . . about [Rebecca Fideldy] and others in a political matter.” She posted her comments during the lead-up to an election for Itasca County Attorney on an online forum that purports to feature local political issues. The posts included in the record primarily attack incumbent county attorney Matti Adam, accusing

her and those associated with or employed by her of various forms of “corruption,” including the improper disclosure of private information. It is in this political context that Schumacher’s comments against Adam involve Fideldy, who is an employee in Adam’s office and whom Schumacher accuses of participating in the county attorney’s alleged corruption.

The United States Supreme Court has been especially protective of speech in the political context, emphasizing that restraint of politically oriented comments ought to be addressed “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Given the particular importance of the free exchange of ideas in the political arena, I feel strongly that the district court and this court should be on especially high alert when asked to grant or affirm restraints on politically oriented communication.

Whether Fideldy is or is not a “public official” does not change the political context of Schumacher’s public criticism about Fideldy in Fideldy’s role working in the office of one of the political candidates in an upcoming election. The majority’s elaborations on the topic of who is and who is not a “public official” and its related discussion of *Fine v. Bernstein*, 726 N.W.2d 137 (Minn. App. 2007), *rev. denied* (Minn. Apr. 17, 2007), *Lydiard v. Wingate*, 155 N.W. 212 (Minn. 1915), and *McGuire v. Bowlin*, 932 N.W.2d 819 (Minn. 2019), are therefore wholly irrelevant to whether Schumacher’s comments constitute political speech and even less relevant to whether the comments are protected speech. Also

irrelevant is the majority's pummeling of Schumacher's supposed "contention that she can say anything she wants because she engaged in protected First Amendment political speech." I acknowledge that the lack of precision in Schumacher's brief requires one to discern her argument somewhat by inference. But I do not believe this argument can reasonably be inferred from it.

I turn now to the heart of my deep disagreement with the majority. No court has said, or could rightly say, that the constitutional right to speak freely is limited to political speech. Schumacher's right to speak freely simply does not depend on her speech being politically oriented. So whether Schumacher's comments are what she, or I, or the majority, or anyone else might or might not call "political speech" does not determine whether the district court's HRO infringes on her right to engage in constitutionally protected speech. Although I believe that Schumacher's comments can readily be called political speech, that has little to do with why I am sure they are protected speech.

Regardless of how Schumacher's posts are categorized, we must consider *de novo* whether applying the HRO statute to restrain her speech violates her constitutional rights. *See Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 657 (Minn. 2012). And we should begin by presuming that speech is protected because the First Amendment compels us to generally disfavor prior restraints on speech, which "forbid certain communications before they occur, usually through the issuance of an administrative or judicial order." *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014). All speech—political or not—is protected unless it falls into one of several recognized categories. Schumacher's comments are protected speech because they plainly fall into none of those categories.

A few defined categories of speech miss First Amendment protection. These include “[t]rue threats of violence,” *Counterman v. Colorado*, ___, S. Ct. ___, ___, No. 22-138, slip op. at 5 (June 27, 2023) (quotation omitted), obscenity, *Miller v. California*, 413 U.S. 15, 23 (1973), defamation, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974), fraud, *United States v. Alvarez*, 567 U.S. 709, 718–19 (2012), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969), and fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942). The district court here checked two fact-finding boxes on a form to justify the HRO, signifying that it construed Schumacher’s challenged communication as evidencing that Schumacher “[c]alled [Fideldy] abusive names in a public online forum” and that she “[u]sed social media to harass [Fideldy] on multiple occasions.” I believe that neither the supposedly “abusive” name-calling nor the other language in the posts escapes First Amendment protection.

I have no doubt that Schumacher’s name-calling is protected speech. The only language in the posts that arguably constitutes name-calling are Schumacher’s statements, “You are pathetic Becky, but I have known that for years,” and, “The squeaky leaker. This is not her first time leaking private info.” Schumacher does not ask us to consider whether the district court’s factual findings constitute clear error, but if she did, I doubt we could rightly affirm the district court’s treatment of these two snipes—“pathetic” and “squeaky leaker”—as “*abusive* names.” (Emphasis added.) They are hardly name-calling at all. And the easier question, which is the one that we face but that the majority does not address, is whether Schumacher’s calling Fideldy “pathetic” and “squeaky leaker” is protected speech. Obviously, it is. “The price of free speech is putting up with all sorts of name-calling and

hurtful rhetoric.” *McCafferty v. Newsweek Media Grp., Ltd.*, 955 F.3d 352, 355 (3d Cir. 2020). Calling a police officer an “asshole” is protected speech. *Greene v. Barber*, 310 F.3d 889, 896 (6th Cir. 2002). Calling city officials “boob” and “idiot” is protected speech. *Klen v. City of Loveland*, 661 F.3d 498, 510–11 (10th Cir. 2011). Calling deputies “motherf---rs” is protected speech. *Wood v. Eubanks*, 25 F.4th 414, 423–25 (6th Cir. 2022). Calling a supervisor “son of a bitch” and “bastard” is protected speech. *Waters v. Chaffin*, 684 F.2d 833, 837–40 (11th Cir. 1982). Schumacher’s comparatively mild name-calling is, in my opinion, undoubtedly protected speech. I would therefore hold that the district court erroneously relied on the supposedly abusive name-calling as one of its two bases to restrain Schumacher for her alleged harassment.

What remains after disposing of the name-calling basis for the order is the district court’s finding that Schumacher “[u]sed social media to harass [Fideldy] on multiple occasions.” The other references to Fideldy in Schumacher’s social-media posts are also protected under the First Amendment. One post declared that Fideldy “isn’t the only leaker in [Adam’s] tight circle.” Another post implied that Fideldy and others in Adam’s office were on the “gravy train” and “throwing each other under the bus.” In the same post in which Schumacher called Fideldy pathetic, she stated that “[t]his is not [Fideldy’s] first time leaking private info” because she had previously done so working in a private attorney’s office. She accused Fideldy of being employed by Adam “as a reward for ‘tattling’ on those doing the right thing” and suggested that the reason Adam had not investigated Fideldy for being “the one who actually breached the data in this case” is because “keeping the boss happy increases your chances of promotion in [Adam’s] office.”

Nothing in these posts even arguably constitutes true threats, obscenity, fraud, incitement, or fighting words.

All that remains is the defamatory exception, but it too does not apply. It is true that during the brief evidentiary hearing Fidely asserted that Schumacher's accusation about Fidely improperly disclosing data was untrue. This assertion perhaps suggests that the accusation might qualify as defamatory, since one of the elements of a defamation claim is "a false and defamatory statement." See *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 873 (Minn. 2019) (quotation omitted) (listing defamation elements). But Schumacher testified to the contrary, insisting that she knew her posting was true because the improperly disclosed data had been about her. In any event, the district court did not even mention defamation and made no finding that the accusation was in fact false, let alone defamatory. This court on appeal is of course in no position to make any factual determination regarding whether the statement was defamatory.

The majority lists the categories of unprotected speech but never analyzes how Schumacher's speech could possibly fit any of them, except to point out that this court once opined that the statutory definition of harassment is its own special category of unprotected speech. The majority then reasons that, because Schumacher has not challenged the district court's finding that her posts meet the statutory definition of harassment, her posts must be constitutionally unprotected. The majority so reasons by relying on this court's opinion in *Dunham v. Roer*, 708 N.W.2d 552, 566 (Minn. App. 2006), *rev. denied* (Minn. Mar. 28, 2006). *Dunham* is simply not good law. In that case, we recognized first that "the focus of the [harassment] statute is to prohibit repeated and unwanted acts, words, or gestures that

have or are intended to have a substantial adverse effect on the safety, security, or privacy of another.” *Dunham*, 708 N.W.2d at 566 (citing Minn. Stat. § 609.748, subd. 1(a)(1) (2004)). Then we focused on the privacy component rather than the safety or security components of the statute, and we rejected a facial First Amendment challenge based on what is now clearly wrong thinking. We stated, “Because the harassment statute only regulates speech or conduct that constitutes ‘fighting words,’ ‘true threats,’ or substantial invasions of one’s privacy, we conclude that the statute is narrowly tailored and is, therefore, constitutional.” *Id.* So the majority is correct that in *Dunham* we indeed treated the category of speech that constitutes a substantial invasion of privacy as a new category of unprotected speech. But recently, implicitly rejecting *Dunham*’s rationale, the supreme court expressly refused “to categorically remove constitutional protection for speech that constitutes a substantial invasion of privacy.” *State v. Casillas*, 952 N.W.2d 629, 638 (Minn. 2020). And neither the Minnesota nor United States Supreme Court has ever endorsed this new category. Because speech that constitutes a substantial invasion of privacy is certainly not categorically unprotected speech under the First Amendment, and because the posts in this case, at most, implicate the privacy component of the harassment statute rather than the safety or security components, the fact that the harassment finding is unchallenged on appeal does not undercut Schumacher’s obviously correct contention that issuing the HRO infringed on her right to free speech.

In sum, I cannot join the majority’s conclusory holding that Schumacher’s online barbs—which are not true threats, obscenity, fraud, incitement, fighting words, or, as far as the record goes, defamation—are unprotected speech. I strongly disagree with the

majority's premise that a statement is unprotected speech merely because it meets the statutory definition of harassment. And I am positive that Schumacher's posts do not qualify as unprotected speech regardless of their political context or whether anyone mentioned is a public official. Because I would reverse on First Amendment grounds, I would not address the other two issues the majority discusses.