No. 15-1548

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

ROBERT W. MCKAY,
*Plaintiff - Appellant,*

v.

WILLIAM L. FEDERSPIEL;
RANDY F. PFAU
*Defendants - Appellees*

On Appeal from the United States District Court
for the Eastern District of Michigan – Northern Division
Honorable Thomas L. Ludington, District Judge

# APPELLANT'S BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Appellant McKay is not a corporate entity and, as such, has no parent corporation and is not a publicly-held corporation owning 10% or more of stock of a party. FRAP 26.1(a).

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES

STATUTES / COURT RULES

MISCELLANEOUS

## STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant Robert McKay, by counsel, requests oral argument. This is a case of first impression in this Circuit presenting legal issues that are intricate and novel under the First, Fifth, and Fourteenth Amendments to the United States Constitution. The decision by this Circuit Court will affect not only the parties to this litigation, but will have a direct effect upon the public throughout the entire circuit. The opportunity to address these constitutional issues in greater detail to this Court, and to respond to inquiries from this Court, will aid in the decision-making process, given the existence of our modern, evolved, and technologically-driven society. As is explained in this brief herein, the day that *Estes* foresaw is now here.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction to entertain and hear this case pursuant to 28 U.S.C. § 1331 and § 1343 as this case involves federal questions under the United States Constitution and federal civil rights under 42 U.S.C. § 1983.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court's final judgment and all prior orders and decisions as a final judgment was entered on April 13, 2015. Judgment, RE 80, PageID #1533. Plaintiff-Appellant Robert McKay timely appealed to this Court on May 6, 2015, being within 30 days of entry of the judgment.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Plaintiff/Appellant Robert McKay presents the following issues—

1. Did the District Court err in concluding Plaintiff Robert McKay lacks standing to bring a First Amendment pre-enforcement challenge to the Electronics Ban Order?

2. Is there a First Amendment right to non-disruptively record public officials conducting public business inside and/or outside a publicly-open courtroom?

3. Does the Electronics Ban Order unconstitutionally employ and grant improper standardless discretion for the public's exercise of First Amendment activity as to recording inside and/or outside courtrooms in the Saginaw County Governmental Center?

4. Did the District Court err in concluding Plaintiff Robert McKay lacks standing to challenge the vagueness and unequal protection of the Electronics Ban Order and the Pfau Directive?

## INTRODUCTION

The "trial courtroom" is "a public place." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980). Appellant Robert McKay, a private citizen, seeks to exercise his believed constitutional right to record trial activities, the police and sheriff deputies inside and outside the courtroom in the performance of their official duties, the elected judge in the performance of his or her duties, and other activities of public interest occurring at the Saginaw County Governmental Center, a public place, in a way not to intimidate or harass witnesses or prevent the administration of justice or the conduct of trials. First Am. Compl., RE 75, PageID #1384, ¶¶34-35. Or in his own words, "I seek to record and/or photograph trial activities and other matters of public interest quietly, noiselessly… with a modern recording device that can be as small as a deck of playing cards…" Affidavit, RE 68-5, PageID #1285, ¶3(dd). Instead, McKay is precluded because the Chief Judges of the Saginaw County Courts enacted the Electronics Ban Order, prohibiting all possession and use of recording devices, except with their grant of permission via discretion lacking any standards. McKay below alleged this administrative order violates the First Amendment in its existence and violates other constitutional prohibitions in the way the Electronics Ban Order was drafted. At least four circuits, led by the First Circuit in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), recognize the right of citizens to record a public official conducting

public business in a public place. And again, the trial courtroom is "a public place." *Richmond, supra,* at 578. This Court is now being asking to answer the constitutional question existing at the new crossroads of the modern video-making society and the corresponding rights of citizens to obtain the same in the public setting[1] as a matter of first impression for this Circuit. See *Crawford v. Geiger*, 996 F. Supp. 2d 603, 607 (N.D. Ohio 2014) ("The Sixth Circuit has not ruled specifically on the right of the public openly to film police officers and their actions in a public setting," but still finding a right to record under the First Amendment is clearly established.).

## FACTS / STATEMENT OF THE CASE

Appellant Robert McKay is a resident of Michigan and has been politically active in the elimination of administrative orders, issued by local judges, to conduct proceedings without the benefit of public recording including Local

[1] Citizen video-recording has become a modern common-place with recordings routinely shared, discussed, and reviewed by the public in evaluating the actions of governmental officials, like police officers. For example, a video recording outside of a public police building is at the heart of a case wherein the prosecutors and various police officers are alleged to have been battered by an amateur process server; the cell phone video shows the complete opposite. See Mike Perlstein, *Charges Crumble After Cell Phone Video Uncovered*, WWL-TV CHANNEL 4, *available at* http://www.wwltv.com/story/news/local/investigations/mike-perlstein/2015/02/26/charges-crumble-after-cell-phone-video-uncovered/24039559/ [link]. Such video captures are becoming so common that websites focused on the interactions between public officials performing public duties and citizens are now prominent and well-known. The largest and perhaps most well-known version is PINAC, at www.photographyisnotacrime.com [link].

Administrative Order C10-2013-08-J (hereinafter "Electronics Ban Order"), the order being the subject of this case. Affidavit, RE 68-5, PageID #1282, ¶3(a).[2] Before the issuance and implementation of the Electronics Ban Order, the Saginaw County Board of Commissioners, the legislative county body, debated whether to ordain a county ordinance banning the use of all electronic devices within the county-owned Saginaw County Governmental Center. *Id*., ¶3(b). The Saginaw County Governmental Center houses the legislative and executive offices of publicly-elected officials of Saginaw County, including the County Board of Commissioners, County Treasurer, County Clerk, Register of Deeds, and other local elected officials' offices and their staffs.[3] *Id*., ¶3(c). Also within the Saginaw County Governmental Center are judicial offices of elected judicial officers (i.e. state court judges) and their staffs, along with the public courtrooms of Tenth Circuit Court of Saginaw County, the Seventieth (70th) District Court of Saginaw County, the Probate Court of Saginaw County, and the Saginaw County Friend of the Court. *Id*., ¶3(d). In other words, the Saginaw County Governmental Center is the central hub of local county government.

[2] The affidavit of Robert McKay mirrors the allegations made earlier in the case via his Verified Complaint. See Ver. Compl., RE 1. Because the later filed First Amended Complaint was unverified, McKay submitted a sworn affidavit re-stating his allegations as a sworn statement.

[3] The Saginaw County Sheriff's Office has a permanent physical presence in the Saginaw County Governmental Center but its command offices and jail are located in the adjacent building. Affidavit, RE 68-5, PageID #1282, ¶3(e).

On August 7, 2013, the Courts and Public Safety Committee of the Saginaw County Board of Commissioners entertained a proposed ordinance that would ban all electronic devices from being brought into and/or used in the Saginaw County Governmental Center. *Id*., ¶3(f). McKay appeared at the meeting and spoke against the proposed ordinance during the public comment period. *Id*., ¶3(g). McKay argued the unfairness for certain groups of people not to have to comply with the same rules as other citizens and asked the Committee to not approve and recommend the proposed ordinance. *Id*., ¶3(h). Also speaking at the Committee hearing was M. Randall Jurrens, then Chief Judge of the 70th District Court, and Patrick J. McGraw, Chief Judge of the Saginaw County Probate Court. See *id*., ¶3(i). Chief Judge McGraw said the chief judges intended to put an administrative order in place themselves to ban electronic devices in the courts, regardless of whether commissioners decide to pass the proposed ordinance. *Id*., PageID #1283, ¶3(j). After hearing these and other arguments regarding the proposed ordinance, the Committee postponed its decision on the issue for further review by legal counsel. *Id*., ¶3(k). The proposal was never subsequently brought back to the table for discussion or a vote. *Id*., ¶3(l). In effect, the Committee abandoned the proposal in light of legal issues surrounding such a plan. The proposed ordinance was never presented to the full County Commission for any consideration.

Undaunted, on December 16, 2013, the chief judges issued and made effective the order which is the subject of this lawsuit, the Electronics Ban Order. *Id*., ¶3(m). The Electronics Ban Order reads, in pertinent part, that—

> Except with a judge's permission, possession and/or use of the following devices is prohibited in court related facilities: audio and/or video recording and/or broadcasting devices, camera/photographic devices, [and] electronic communication devices.

First Am. Compl. – Ex A, RE 75-2, PageID #1392. The Electronics Ban Order does not provide or explain any standards, guidelines, or directions to the relevant judge on when and how permission should or could be granted to individuals like McKay. The Electronics Ban Order, unlike the Pfau Directive, does not exempt any person from its prohibitions. *Id.* Further, the Electronics Ban Order prohibits "the possession and/or use" of electronic recording, broadcasting or communication devices in court related facilities" and the Electronics Ban Order defines "court related facilities" to mean only the "Saginaw County Circuit Court, District Court and Probate Court courtrooms, court administrative offices, Friend of the Court offices, Probation offices, and related common areas." *Id*. The order does not specify what constitutes a "related common area." See *id*. The Michigan Court Rules do not permit the chief judges control over areas outside the courtroom. Mich. Ct. R. 8.101; Mich. Ct. R. 8.115(C)(1)-(2). The Electronics Ban Order also directs—

> All persons and property (including closed containers) entering court related facilities *are subject to search by Sheriff Deputies* *for the purpose of enforcing this order*. The search shall be no more intrusive than necessary to enforce this order, and shall be based on a reasonable, articulable suspicion that the person or property subject to search may reveal an offending device.

*Id*. (emphasis added).

Violations of the Electronics Ban Order is punishable by contempt of court, including automatic forfeiture of the device along with its private communications contained therein, a fine of not more than $7,500.00, and/or jail for 93 days, in the discretion of the court. *Id*.; see also M.C.L. § 600.1715(1). Expectedly, McKay does not wish to be subject to contempt, confiscation of any electronic device (with or without private communications contained therein), fined not more than $7,500.00, and/or be jailed for 93 days for exercising his constitutional rights. McKay's undisputed purpose is not to intimidate or harass witnesses or prevent the administration of justice or the conduct of trials. McKay averred—

> I seek to exercise a right to record trial activities, the police and sheriff deputies inside and outside the courtroom in the performance of their official duties, the judge in the performance of his or her duties, and other activities of public interest occurring at the Saginaw County Governmental Center.
>
> But for the Electronics Ban Order, I would take photographs and/or video recordings of public officials in the performance of their public duties within the courtrooms at the Saginaw County Governmental Center.
>
> My purpose is not to intimidate or harass witnesses or prevent the administration of justice or the conduct of trials.
>
> As outlined in my Verified Complaint, I seek to record and/or photograph trial activities and other matters of public interest quietly, noiselessly, and without any way of [interrupting] court proceedings with a modern

> recording device that can be as small as a deck of playing cards, like an iPhone or other hand-held recording device. Today's modern recording/photograph technology can operate silently without flash bulbs, lights, noise, or any other distracting features like in old technology may have required in years past.

Affidavit, RE 68-5, PageID #1284-#1285, ¶¶3(aa)-(dd).

To effectuate the Electronics Ban Order, Appellee Randy F. Pfau, the sheriff official[4] who has the duty to provide security and control over the Saginaw County Governmental Center, has directed and ordered the front-desk/security screening deputies[5] by written directive to turn away and prohibit citizens, including McKay, from bringing electronic devices into the areas designated by the Electronics Ban Order and thus preventing McKay from being able to exercise his right to record. Affidavit, RE 68-5, PageID #1284, ¶3(x). The written directive also has required all deputies under Pfau's command to enforce the Electronics Ban Order, including those stationed at the main entrance and within the various courtrooms at the Saginaw County Governmental Center. See First Am. Compl., RE 75, PageID

[4] As part of the Verified Complaint, McKay alleged and averred that "Defendant WILLIAM L. FEDERSPIEL has implicitly authorized, approved, or knowingly acquiesced in the conduct of subordinate Defendant RANDY F. PFAU's issuance of the written directive to enforce the Electronics Ban Order." Ver. Compl., RE 1, PageID #5, ¶33. In response, "Defendants admit that Defendant Federspiel knowingly acquiesced to Memo 78-2013 issued by Defendant Pfau." Answer, RE 8, Page ID #244, ¶33.

[5] To see a general layout of the entrance of the Saginaw County Governmental Center together with the placement of enforcing sheriff deputies, see Photo, RE 44-5, PageID #752. One would have to pass all the signs depicted in the record at RE 44-5, Page ID #745-#751 before reaching the entrance deputies.

#1383, ¶31; Answer to First Am. Compl., RE 78, PageID #1506, ¶31. The Pfau Directive orders that "[p]ersons not wishing to comply with this order will be barred from the courthouse and those in violation inside the building may have their electronic device confiscated." First Am. Compl. – Ex. B, RE 75-3, PageID #1395.

Yet, the Pfau Directive contains various exempted persons who are not listed or identified as exempt under the Electronics Ban Order. *Id*. McKay is afraid that he will be subject to the crime of contempt and possibly have confiscated his electronic devices (with or without private communications contained therein), fined up to $7,500.00, and/or jail for 93 days for exercising his constitutional rights, in light of the Local Administrative Order and/or the Pfau Directive. See Affidavit, RE 68-5, PageID #1284, ¶¶3(u)-(w). Both the plain language of the Electronics Ban Order and the Pfau Directive places enforcement on these sheriff defendants and those under their command, who are state actors.

On January 20, 2014, McKay brought a federal action in the appropriate local federal district court. His verified complaint made six separate claims against the Electronics Ban Order and the implementing Pfau Directive: violations of the First Amendment (Counts I and III), void for vagueness (Count II), being overbroad (Count IV), violation of a prior restraint/standardless discretion under the First Amendment (Count V) and violation of equal protection (Count VI). Ver.

Compl., RE 1. McKay also concurrently filed for a preliminary injunction on First Amendment grounds. Motion, RE 2. The district court denied the latter nearly three months later holding that McKay lacked standing under the First Amendment as to *inside* courtrooms while the district court lacked sufficient factual information about the architectural organization of the spaces inside the Saginaw County Governmental Center or the manner in which the spaces are shared by the judiciary and other county agencies as to *outside* the courtrooms. Order, RE 30, PageID #413-434. The subsequent motion for reconsideration was denied. Order, RE 32, PageID #452-459.

The parties undertook limited written discovery. McKay initially moved for summary disposition on Count V (standardless discretion) while Appellees sought dismissal of Counts I, III, and IV only, leaving Counts II and VI. See RE 35 and 44. In a decision dated December 11, 2014, the district court concluded because the Electronics Ban Order does not infringe on McKay's First Amendment rights (i.e. because none exist), his motion for summary judgment be denied and Defendants' motion for summary judgment be granted. Opinion, RE 52, PageID #855.

The district court began its analysis by noting that it had previously concluded that McKay lacked standing to make a First Amendment challenge to the Electronics Ban Order as to *inside* the courtroom but then proceeded on

assumption that even if McKay had standing, "he still would not prevail on his motion for summary judgment."[6] This district court noted the inherent problem best when it stated "there are a variety [of applicable frameworks] to choose from, and the appropriate analysis depends on the specific First Amendment right at issue." Opinion, RE 52, PageID #860. The district court then analyzed the case as an 'expression' case and as a 'right of access' of case despite McKay disavowing the same were the applicable standard. See Reply Br., RE 24, PageID #369, #371.

McKay had previously proposed the appropriate framework,[7] based on *Glik*, in his motion for preliminary injunction, and the district court flatly rejected the

[6] It is important to note that McKay had only moved for summary disposition on the standardless discretion claim, not any of the First Amendment claims. McKay was instead defending against a motion for summary judgment filed by Defendants/Appellees.

[7] To determine whether there is a right to record, the proposed test previously offered by McKay, largely from *Glik*, to determine whether a right to record exists is whether the place where a person is to record is 1.) a public place which has either 2.) activities of a public interest or public officials conducting public business. See Reply Br., RE 24, PageID #373. If so, First Amendment protection attaches. See *Glik, supra* ("the videotaping of public officials is an exercise of First Amendment liberties"). And because this case involves a courtroom, the Supreme Court has already determined the appropriate standard/procedure on when and how a judge can convert a public courtroom to a non-public courtroom: the court's proceedings cannot be closed unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 U.S. 1, 13-14 (1986). No court has set forth a standard to determine whether restrictions on the right-to-record are proper or improper, or in the court-context what are the exact contours of those 'higher values.' Nevertheless, McKay has proposed that strict scrutiny applies.

same. Instead, the district court later messily struggled to analyze the issue of private citizen recording under a 'right of access to the courtroom' analysis and 'freedom of expression' analysis, neither of which is applicable. See Footnote 7. As the district court correctly points out, none of these tests work to resolve the issue because McKay is neither trying to undertake expression in the courtroom nor is barred from the courthouse. McKay is, in contrast, prohibited in "*recording* the proceedings via personal electronic devices." Opinion, RE 52, PageID #862 (italics in original); see also *id*., PageID #867, fn.6 ("Under Plaintiff's logic, he is neither asserting a right to expression nor a right of access claim under the First Amendment, but an independent "right to receive and record." But McKay provides no analytical framework[8] for analyzing his suggested First Amendment right to receive and record or any precedent establishing such a framework.). The lower court failed to adopt the correct test by incorrectly analyzing this First

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Opp. Br., RE 48, PageID #808. In the First Amendment context, strict scrutiny requires the government to show "it has a compelling interest and has used the least restrictive means of furthering that interest." *Rothamel v. Fluvanna County*, 810 F. Supp. 2d 771, 783 (W.D. Virginia 2011)(citing *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989)); *Carey v. Wolnitzek*, 614 F.3d 189, 200 (6th Cir. 2010)(citing *Eu v. San Francisco County Democratic Cent Comm*, 489 U.S. 214 (1989)). The dual *Press-Enterprise* test is a courtroom-adapted application of strict scrutiny.

[8] This is not technically accurate. McKay's framework was previously rejected in the opinion deciding his motion for a preliminary injunction. See Footnote 7.

Amendment challenge under *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 559 (6th Cir. 2007).

As to McKay's motion (solely as to Count V), the district court correctly recites that "McKay alleges that the Electronics Ban Order gives government officials 'unbridled discretion' and therefore violates the First Amendment." *Id*., PageID #855. The district court rejected McKay's argument and instead held that "standardless discretion applies only to First Amendment claims involving *expressive* activity" citing *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (1988) and *Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6th Cir. 2010). *Id*., PageID #882 (emphasis in original). The district court further opined that "[g]iven the lack of almost any First Amendment right the public has inside the courtroom, the government has much more leeway in imposing restrictions on expressive conduct," despite this case not being about expressive conduct. *Id*., PageID #884.

After this motion practice, the parties, in lieu of a trial, requested—and obtained—leave to have McKay's remaining claims, Count VI's equal protection and Count II's void for vagueness, heard on cross-motions. In its final opinion, the district court did not reach the substantive issues but instead ruled "McKay does not have standing to pursue either Count II [void for vaguness] or VI [equal protection] of his First Amended Complaint…" Opinion, RE 79, PageID #1526.

Judgment entered on April 13, 2015 dismissing the First Amended Complaint without prejudice. This appeal now follows.

## SUMMARY OF ARGUMENT

First, the district court erred in finding that McKay failed to have standing to bring his First, Fifth, and Fourteenth Amendment claims. This is a preenforcement action and standing is fulfilled under *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289 (1979) and this Circuit's application of the same in *Glenn v. Holder*, 690 F.3d 417 (6th Cir. 2012) and *Platt v. Bd. of Comm'rs*, 769 F.3d 447 (6th Cir. 2014).

Second, this Court is requested to find that a right by a private citizen to record exists under the First Amendment just as four sister circuits have done in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), *Smith v. Cumming*, 212 F.3d 1332 (11th Cir. 2000), *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995) and *American Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012). Moreover, this Court is called upon to adopt an appropriate new test to correctly analyze First Amendment challenges regarding government action in prohibiting recording of activities of a public interest or public officials conducting public business. The proposed test is: whether the proposed place where a person is to record is 1.) a public place which has either A.) activities of a public interest or B.) public officials conducting public business. If so, First Amendment protection

attaches. Any restrictions on this right must then survive strict scrutiny review—be narrowly tailored to advance a compelling state interest.

Third, and lastly, the district court erred in allowing the continued unconstitutional use of standardless discretion within the Electronics Ban Order related to the right to record, i.e. a First Amendment activity, in light of missing standards, guideposts, or direction on how the permission-based scheme is to be applied. Such standardless discretion has been deemed unconstitutional under *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), *City of Lakewood v. Plain Dealer Pub. Co*., 486 U.S. 750 (1988), and their progeny.

## ARGUMENT

### I. McKay has standing to bring a First Amendment challenge.

In this case, the district court ruled, in two separate orders, that McKay lacked any standing to bring his First Amendment challenges—either inside or outside the courtroom. This was in error.

#### A. Standard of Review

A district court's conclusions of law are reviewed de novo. *Duncan v. Coffee County, Tenn.*, 69 F.3d 88, 92 (6th Cir. 1995). When the district court reaches conclusions of law regarding standing, the district court's decision is reviewed de novo. *Doe v. Porter*, 370 F.3d 558, 561 (6th Cir. 2004). A district court's grant of summary judgment receives de novo as well. *Kalich v. AT & T Mobility, LLC*, 679 F.3d 464, 469 (6th Cir. 2012).

### B. Standing for First Amendment issues is met under pre-enforcement challenges jurisprudence.

It is well established that "preenforcement challenges . . . are within Article III." *American Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012). Standing is an aspect of justiciability. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984) (emphasis added). However, in the First Amendment context, federal courts have long relaxed standing requirements because of the possibility the citizenry will refrain from engaging further in the protected activity rather than risk punishment for prohibited conduct and then "[s]ociety as a whole then would be the loser." *Sec'y of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984). This Court recently addressed the very issue wherein a state law was challenged under the First Amendment issued after the district court's decision:

> The standing requirement ensures that the plaintiff has a personalized injury that the court can directly redress. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). And the ripeness requirement prevents courts from hearing premature or abstract disagreements. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967); *Carey*, 614 F.3d at 196-97. These doctrines "originate from the same Article III limitation" and may be analyzed together as part of "standing." E.g., *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 n.5 (2014); *Kiser v. Reitz*, ___F.3d___, No. 13-3956, 2014 WL 4211193, at *3 (6th Cir. Aug. 27, 2014).

> To have standing, the plaintiff must have suffered "injury in fact"—a "concrete and particularized" or "actual or imminent" injury. *Lujan*, 504 U.S. at 560. But in a pre-enforcement review case under the First Amendment (like this one), courts do not closely scrutinize the plaintiff's complaint for standing when the plaintiff "claims an interest in engaging in protected speech that implicates, if not violates, each [provision of the law at issue]." *Carey*, 614 F.3d at 196; *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974). **A plaintiff meets the injury-in-fact requirement—and the case is ripe—when the threat of enforcement of that law is "sufficiently imminent."** *Susan B. Anthony List*, 134 S. Ct. at 2342. This occurs when (1) the plaintiff alleges "an intention to engage in a course of conduct" implicating the Constitution and (2) the threat of enforcement of the challenged law against the plaintiff is "credible." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979).

*Platt v. Bd. of Comm'rs*, 769 F.3d 447, 451-452 (6th Cir. 2014)(emphasis added). *Babbitt* is the controlling and followed standard in this circuit for permissible preenforcement actions. See e.g. *Kiser v. Reitz*, 765 F.3d 601, 608 (6th Cir. 2014). Contrary to the implicit standard imposed by the district court of 'actual' harm, it is not necessary that McKay first expose himself to actual arrest or prosecution to be entitled to challenge a law that he claims deters the exercise of his constitutional rights. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). As such, standing exists when a plaintiff alleges "an intention to engage in a course of conduct" implicating the Constitution and (2) the threat of enforcement of the challenged law against the plaintiff is "credible." *Babbitt, supra*, at 298 (as cited in *Platt*). McKay has fulfilled both elements.

***i. McKay has pled and averred by affidavit that he intends to and wants to engage in recording inside and outside the courtrooms.***

McKay, by both his original and amended complaint, averred that he wants and intends to record inside and outside the courtrooms:

> Plaintiff ROBERT MCKAY seeks to exercise a right to record trial activities, the police and sheriff deputies inside and outside the courtroom in the performance of their official duties, the judge in the performance of his or her duties, and other activities of public interest occurring at the Saginaw County Governmental Center.
>
> Plaintiff ROBERT MCKAY's purpose is not to intimidate or harass witnesses or prevent the administration of justice or the conduct of trials.

Ver. Compl., RE 1, PageID #5, ¶¶34-35; see also First Am. Compl., RE 75, PageID #1384. McKay also later affirms and expands the same, by an unrebutted affidavit, stating:

> I seek to exercise a right to record trial activities, the police and sheriff deputies inside and outside the courtroom in the performance of their official duties, the judge in the performance of his or her duties, and other activities of public interest occurring at the Saginaw County Governmental Center.
>
> But for the Electronics Ban Order, I would take photographs and/or video recordings of public officials in the performance of their public duties within the courtrooms at the Saginaw County Governmental Center.
>
> My purpose is not to intimidate or harass witnesses or prevent the administration of justice or the conduct of trials.
>
> As outlined in my Verified Complaint, I seek to record and/or photograph trial activities and other matters of public interest quietly, noiselessly, and without any way of [interrupting] court proceedings with a modern recording device that can be as small as a deck of playing cards, like an iPhone or other hand-held recording device. Today's modern recording/photograph technology can operate silently without flash bulbs,

> lights, noise, or any other distracting features like in old technology may have required in years past.

Affidavit, RE 68-5, PageID #1284-1285, ¶¶3(aa)-(dd). As such, the element of intention to engage is clearly met.

#### *ii. McKay has shown a creditable fear of prosecution for wanting to exercise an asserted First Amendment right.*

The second element requires a creditable fear of prosecution, not an actual prosecution. *Babbitt, supra*; *Steffel, supra*. Violation of the Electronics Ban Order is explicitly punishable by contempt of court, which under Michigan law includes automatic forfeiture of the device along with its private communications contained therein, a fine up to $7,500.00, and/or jail for 93 days, in the sole discretion of the court. See M.C.L. § 600.1715; see also First Am. Compl. – Ex. A, RE 75-2, PageID #1393. The Pfau Directive implementing the Electronics Ban Order commands "[p]ersons not wishing to comply with this [Electronics Ban Order] will be barred from the courthouse and those in violation inside the building may have their electronic device confiscated." First Am. Compl. – Ex. B, RE 75-3, PageID #1395; see also First Am. Compl. – Ex. A, RE 75-2, PageID #1393. The Electronics Ban Order is alleged to violate the First Amendment rights of McKay by denying him the claimed right to record while criminalizing and legally penalizing any attempt he may undertake to perform the banned activities. "[E]xistence of a statute implies a threat to prosecute, so pre-enforcement

challenges are proper, because a probability of future injury counts as 'injury' for the purpose of standing." *Bauer v. Shepard*, 620 F.3d 704, 708 (7th Cir. 2010). Moreover, Appellees, via this case, have never disavowed the enforcement of the Electronics Ban Order against McKay. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014). Signs around the Saginaw County Governmental Center convey the same very real credible threat of enforcement. E.g. Photos, RE 44-5, PageID #745-755. This is an example:


Photo, RE 24-2, PageID #379. McKay clearly showed that threat of enforcement of that Electronics Ban Order is sufficiently imminent and thus the district court erred in concluding that McKay failed to fulfill constitutional harm. The threat of prosecution is real and credible. Standing has been clearly established.

### C. The district court put the cart before the horse.

The district court was seemingly confused about the legal role of standing in the context of McKay's federal constitutional claims. The district court initially concluded that "McKay has not identified any legally cognizable harm with regard to his assertion that he will suffer an injury by being prohibited from recording judicial proceedings *inside* the courtroom." Harm in the preenforcement context does not require McKay to subject himself to arrest or punishment to satisfy the element of harm. *Steffel, supra.* Instead, as this Court explained in *Platt*¸ McKay need only show the threat of enforcement of that law is sufficiently imminent. *Platt, supra* (citing *SBA List*). The Pfau Directive is clear: anyone, including McKay caught with an offending device "will be barred from the courthouse and those in violation inside the building may have their electronic device confiscated." Moreover, the Electronics Ban Order has an explicit penalty to McKay for exercising his alleged right to record: being summarily barred or removed from court related facilities, and/or imposition of a fine, including confiscation of any offending device, incarceration, or both for contempt of court. Under Michigan law, such a finding of contempt of court results in a penalty up to $7,500.00 and/or jail for 93 days, in the discretion of the court.

In the alternative, the district court also concluded that McKay lacked standing to bring challenges to inside the courtroom because a First Amendment

right did not exist in toto. See Order, RE 30, PageID #422.[9] As noted above, the question of standing is "whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted," not whether those claims are or would be ultimately successful. Here, McKay, as a plaintiff, is asserting that he personally and affirmatively desires to record yet an alleged unconstitutional state-level regulation prohibits the same in violation of the First Amendment. Affidavit, RE 68-5, PageID #1284-1285, ¶¶3(aa)-(dd). McKay is precisely the correct particular plaintiff because he precisely wishes to undertake acts but for the alleged unconstitutional Electronics Ban Order. See *id*. Whether or not those claims are later supported substantively is a separate inquiry from whether McKay has standing to bring the claims before the federal judiciary for a determination. This is especially true in the First Amendment context where pre-enforcement review cases under the First Amendment do not closely scrutinize the plaintiff's complaint for standing. *Platt, supra*. As such, the district court erred in concluding that McKay lacks standing as to his First Amendment claims, irrespective of whether McKay was recording inside or outside the courtrooms—a distinction without a difference.

[9] The district court concluded that McKay had standing to challenge the Electronics Ban Order as applied to outside the courtroom. Order, RE 30, Page ID #423. McKay cannot find nor explain any meaningful difference why he would have First Amendment standing for one claim but not the other. The district court's conclusion finds a difference when, in fact, no meaningful difference exists.

## II. This Court is requested, as a matter of first impression, to recognize the existence of the right to record as similarly held by four sister circuits.

### A. Standard of Review

The Court reviews First Amendment questions de novo. *P&G v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). "The constitutionality of a state statute is a question of law which this Court reviews de novo." *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 431 (6th Cir. 2008). This Court also reviews de novo a district court's grant of summary judgment based on the constitutionality of a law. *Molina-Crespo v. United States MSPB*, 547 F.3d 651, 655 (6th Cir. 2008).

### B. State courts must respect the limitations upon them by the First Amendment.

The Supreme Court said it simply and directly: "[c]ourts, too, are bound by the First Amendment." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 891 (2010). Absent explicit language, the Constitution applies in equal force to state courts just as they would to state legislatures and state executives; a state's judiciary is not immune from the Constitution's prohibitions. See *Stop the Beach Ren. v. Fla. Dept. of Env. Prot.*, 130 S. Ct. 2592, 2061 (2010). Because the First Amendment applies to the state judiciary, we must explore how and to what extent its protections are to be applied.

### C. The First Amendment applies to state court administrative orders.

The First Amendment of the United States Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The 'tree' of the First Amendment has many branches which provide shaded protection to the citizenry from the scorching hot sun of government inference. By its branches, the First Amendment extinguishes the government's burning reach in areas involving speech, religion, the press, and grievances to government officials, except for the most critical of governmental interests. Contrary to the district court's analysis, this case resides in a single (and little discussed) branch of First Amendment protections: the "gathering information" branch of the First Amendment rather than the 'expressive activity' or 'access to courts' branch far more commonly litigated in federal courts. But this little branch of the First Amendment is clear: "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978); see also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is ... well established that the Constitution protects the right *to receive* information and ideas." emphasis added). An important corollary to this interest in protecting the stock of public information is that "[t]here is an undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978).

While the First Amendment's plain text speaks only to "Congress," the United States Supreme Court has extended its protections to state action via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925); *McCloud v. Testa*, 97 F.3d 1536, 1541 fn.7 (6th Cir. 1996)(recounting the same). Action of a state's judiciary and its judges is unquestionably state action. *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).[10]

In applying the First Amendment to the judicial context, the keystone case is *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In *Richmond*, the Supreme Court[11] recited a long history of "presumptively open" criminal trials under American jurisprudence, being "an indispensable attribute of an Anglo-American trial." *Richmond, supra* at 569. Such a right is explicitly enshrined for the protection of the accused via the Sixth Amendment. *Id.*, at 580. The right of the spectator is enshrined in the First Amendment. Observers of trials have a First Amendment right to observe the same. *Id.* The reasons for such openness included

[10] "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."

[11] Although there was no majority opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment. 448 U.S., at 558-581 (plurality opinion); *id.*, at 584-598 (BRENNAN, J., concurring in judgment); *id.*, at 598-601 (STEWART, J., concurring in judgment); *id.*, at 601-604 (BLACKMUN, J., concurring in judgment).

the "proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Id*., at 569. "What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that [the First] Amendment was adopted." *Richmond, supra* at 576. Mostly critically, "a trial courtroom also is a *public place* where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place." *Id.*, at 578 (emphasis added). "[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'"[12] *Id.*, at 580. After all, "the right to an open public trial is a shared right of the accused and the public." *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 U.S. 1, 7 (1986) (hereinafter "*Press-Enterprise II*").

[12] In *Richmond*'s footnote 14, the Supreme Court limited its holding to criminal trial. Since this decision, the constitutional right to observe a public civil trial was also found. *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3rd 1984).

With a constitutional right of access and observation existing,[13] the question turns whether the right to then *record* by a citizen via photograph, video, or other electronic means, is protected by the First Amendment?[14] At least four circuits has found that such a right exists, with the First Circuit's decision in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) and the Eleventh Circuit's *Smith v. Cumming*, 212 F.3d 1332 (11th Cir. 2000) leading the way.

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[13] Critically, it must be clear that McKay is not challenging for access to the courtrooms; he can get into the Saginaw County courtrooms. He is challenging his right *to record* once inside and just outside the publicly-open courtrooms in the Saginaw County Governmental Center.

[14] The district court in its decision on the motion for preliminary injunction cited the following passage from *Chandler v. Florida*, 449 U.S. 560 (1981) as part of its holding claiming the United States Supreme Court answered the question of recording in the courtroom in the negative:

> While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings per se, by the same token we reject the argument of the [media] that the first and sixth amendments to the United States Constitution mandate entry of electronic media into judicial proceedings.

Opinion, RE 30, PageID #421, citing *Chandler, supra*, at 569. However, a careful reading of the opinion showed this to be the recited holding of the *Florida* Supreme Court (as the lower court being reviewed in that case), not the *US* Supreme Court's holding therein. See *id*. Instead, the Supreme Court in *Chandler* was answering a narrow due process question, not a First Amendment question, of whether "all photographic or broadcast coverage of criminal trials is inherently a denial of due process?" *Chandler, supra*, at 574. The answer, of course, was no. However, *Chandler* is inapplicable to this First Amendment case and the district court erred in assuming, for whatever unusual reason, that the above passage was the holding of the United States Supreme Court in *Chandler* when it clearly was not. As explained later this brief, *Estes* has invited, not precluded, the instant appeal.

Given *Richmond*'s holding that a "trial courtroom also is a public place," the Eleventh Circuit has broadly held—

> The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.

*Smith*, *supra*, at 1333. Similarly, the *Glik* Court explained, in greater detail,

> The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these [First Amendment] principles. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting "the free discussion of governmental affairs."

*Glik*, *supra*, at 82; see also *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014) (following *Glik*). These holdings mirror similar conclusions by the Ninth Circuit in *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest") and the Seventh Circuit in *Alvarez*, *supra*, at 586-587 (striking down a statute applied to prevent recording of a public official as restricting far more speech than necessary to protect legitimate privacy interests and "likely violates" the First Amendment's free-speech and free-press guarantees). Federal trial and state courts have reached the same conclusion. E.g. *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 542 (E.D. Pa. 2005) (finding "no doubt that the free speech clause of the Constitution protected" plaintiff who videotaped officers because "[v]ideotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence");

*Ramos v. Flowers*, 56 A.3d 869 (N.J. Super. Ct. App. Div. 2012). The United States Government has formally adopted McKay's general view on the First Amendment and the right to record. *Sharp v. Baltimore City Police et al.*, Case No. 11-2888, ECF No. 24 (D. MD, Jan. 10, 2012), United States' Statement of Interest [link]. Unfortunately, this circuit has never spoken on the issue, until hopefully now. *Crawford, supra,* at 607.

The reason for this principle is clear: "extensive public scrutiny and criticism" of criminal justice system officials serves to "guard[] against the miscarriage of justice." *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 560 (1976). "The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations." *Gentile v. State Bar of Nev*., 501 U.S. 1030, 1035 (1991). The First Amendment enshrines this 'right to record' for a future medium of expression commonly used for the preservation and communication of information and ideas, where police officers are performing their duties in public places and engaging in public communications audible to persons who witness the events. *Alvarez, supra* at 586. With this precedence, there is clearly a First Amendment right to record, so much so that it is, for qualified immunity purposes, considered 'clearly established' for § 1983 actions, including in district courts within this circuit. See *Glik, supra*; see *Crawford, supra*, at 615-617.

It is clear, however, that the First Amendment right to record is not absolute. However, McKay would suggest that our Supreme Court has already provided the appropriate framework for the courtroom setting. The state courts and their enforcing police actors already have a legal procedure in place from the double decisions of *Press-Enterprise* if the public must be precluded from observing public proceedings: closing the courtroom. The court's proceedings cannot be closed unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 510 (1984) (hereinafter "*Press-Enterprise I*"); *Press-Enterprise II*, *supra*, at 13-14. Recording is, obviously, not permitted in the courtroom where the courtroom is closed to the public.[15] But strict scrutiny limits the prohibitions to only those

[15] To the extent appellees would argue that a transcript can be procured in lieu of recording, courts have routinely rejected the bare transcribed word as an adequate substitute. As explained in a right-of-access challenge, the Second Circuit found "one cannot transcribe an anguished look or a nervous tic[; t]he ability to see and to hear a proceeding as is unfolds is a vital component of the First Amendment right of access — not, as the government describes, an incremental benefit." *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2nd Cir. 2004). Citing a Third Circuit decision, *Stewart* explains "some information, concerning demeanor, non-verbal responses, and the like, is necessarily lost in the translation of a live proceeding to a cold transcript." *Id*., citing *United States v. Antar*, 38 F.3d 1348, 1360 fn.13 (3rd Cir. 1994); also citing *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1072 (3rd Cir. 1984) ("[T]he availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the cold record is a very imperfect reproduction of evidents that transpire in the courtroom."), *Soc'y of Prof'l Journalists v. United States Sec'y of Labor*, 616 F. Supp. 569, 578 (D.Utah

unique circumstances where the government has a compelling interest with the narrowest of tailoring.

### D. This Court is requested to adopt a new test to implement the right to record public officials in a public setting.

To determine whether there is a right to record, the proposed test, largely from *Glik*, is to determine: whether the proposed place where a person is to record is 1.) a public place which has either A.) activities of a public interest or B.) public officials conducting public business. If so, First Amendment protection attaches. See *Glik*, *supra* ("the videotaping of public officials is an exercise of First Amendment liberties"). Any restrictions on this right must then survive strict scrutiny review. Since this case involving McKay's demand to record in the courtrooms of the Saginaw County Governmental Center and the trial courtroom is a 'public place,' said limitations on McKay's right to record may only be limited

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1985) ("[T]he full flavor of [a] hearing cannot be sensed from the sterile sheets of a transcript. Emotions, gestures, facial expressions, and pregnant pauses do not appear on the reported transcript. Much of what makes good news is lost in the difference between a one-dimensional transcript and an opportunity to see and hear testimony as it unfolds."). Courts of law recognize this integral on-going non-verbal communication in trial courts. For example, just this year this Court deferred to the trial court's non-transcribed observations in determining the credibility of those before it as part of trial proceedings. See e.g. *Wheeler v. Simpson*, 779 F.3d 366, 383 (6th Cir. 2015)("the trial court not only has an opportunity to 'assess the demeanor of the venire and the individuals who compose it,' which is of 'critical importance in assessing the attitude and qualifications of potential jurors,' it is also uniquely situated to assess 'nonverbal communication' occurring in the courtroom."). Non-verbal communication occurs and is lost by substituting a transcript for contemporaneous recording.

with specific, on the record findings, demonstrating that closure of the public proceedings is essential to preserve higher values and is narrowly tailored to serve that interest, a form of strict scrutiny. *Press-Enterprise I, supra*; *Press-Enterprise II, supra*. McKay's proposed test is straightforward, simple to administer, and has the flexibility needed to address future factual circumstances which will arise to define and refine the elements of "public places," "activities of a public interest," and "public officials conducting public business" to parse the scope of such First Amendment protections. As the district court (and other courts around the country) experienced, the current 'free speech' and 'access' jurisprudence are ill-suited analytical frameworks to this constitutional right. McKay's proposed test fixes that very problem.

### E. McKay's desired actions are protected by the First Amendment.

As outlined by his affidavit (which went undisputed below), McKay seeks to exercise a right to record trial activities, the police officers inside and outside the courtroom in the performance of their official duties, the judge in the performance of his or her duties, and other activities of public interest occurring inside and outside the Saginaw County courtrooms at the Saginaw County Governmental Center. His purpose is not to intimidate or harass witnesses or prevent the administration of justice or the conduct of trials. As such, his action fulfills the proposed test. McKay seeks to record inside and outside a public courtroom (see

*Richmond, supra*) which has public officials (i.e. the elected[16] judges,[17] prosecutors, sheriff deputies) conducting public business of public interest (see *Gentile, supra*). McKay's actions are protected First Amendment activity.

### F. The Electronics Ban Order impinges on McKay's First Amendment protected activity and thus must survive strict scrutiny.

Looking to the Electronics Ban Order, the plain language of the order prohibits the possession and use of any tools of such First Amendment activity: recording devices. According to the memo to the members of Saginaw County Bar Association from the chief judges (see First Am. Compl. – Ex. C, RE 75-4, PageID #1399), this new local administrative order is designed to relieve three ills: photographing witnesses, jurors conducting online research, and ring tones disrupting proceedings.[18] For state action to survive constitutional muster under the First Amendment, the action is reviewed using strict scrutiny—be "narrowly tailored" to advance a "compelling state interest." *Carey v. Wolnitzek*, 614 F.3d

[16] Nearly all judges in Michigan are elected to their office. M.C.L. § 168.396 (Michigan Supreme Court justices); M.C.L. § 168.409e(1) (Michigan Court of Appeals judges); M.C.L. § 168.416(1) (Michigan Circuit Court judges); M.C.L. § 168.436(1) (Michigan Probate Court judges); M.C.L. § 168.467f(1) (Michigan District Court judges); M.C.L § 168.426i(1) (Michigan Municipal Court judges).

[17] *Jenkins v. KYW*, 1986 U.S. Dist. LEXIS 16999, *6, 1986 WL 13830 (E.D. Pa. Dec. 3, 1986)("Public officials, judges included, choose to do the business of the public. Necessarily, they must be willing to bear criticism, disparagement, and even wounding assessments." emphasis added).

[18] Appellees offered no other governmental interests from the chief judges (or any other judges) in the court record below.

189, 200 (6th Cir. 2010)(citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989)). Narrow tailoring requires "the least restrictive means of furthering that compelling interest." *Rothamel, supra*. Assuming (but not conceding[19]) for the sake of argument that eradicating each ill is a compelling governmental interest, the Electronics Ban Order is not narrowly tailored. The Electronics Ban Order curbs too much protected activity to be narrowly tailored to further the proposed governmental interests in preventing photographing witnesses (with the intent to intimidate or disrupt the proceedings), preventing jurors conducting online research, and preventing ring tones disrupting proceedings.

While photographing witnesses is not a crime or a wrong under state law (for if it was, an immeasurably large group of news photographers and videographers would have to be jailed, see First Am. Compl. – Ex. D & E, RE 75-5-6, PageID #1400-1401), doing so with the intent to intimidate is already criminalized which can already be prosecuted under state law. See M.C.L. § 750.122. Moreover, Saginaw County courts, consistent with *Press-Enterprise I* and *Press-Enterprise II*, already have the needed narrowing tool—court/proceeding

[19] Under strict scrutiny, the burden shifts to the government to support its enacted regulation, which the district court did require from appellees. *Lac Vieux Desert Band v. Mich. Gaming Control Bd.*, 172 F.3d 397, 409 (6th Cir. 1999)("Under strict scrutiny review, the government bears the burden of showing that its regulation is 'necessary to serve a compelling state interest' and that it is 'narrowly drawn to achieve that end.'" internal citations omitted). "[I]t is the rare case in which. . . a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

closure. If there is concern of a threat of actual intimidation, a Saginaw County judge can close the proceedings to the public upon specific on-the-record findings demonstrating that closure is essential to preserve higher values than the First Amendment right of openness and is narrowly tailored to serve that interest." *Press-Enterprise I, supra* at 510.

As for the ill of jurors using their electronic devices to conduct research, a more narrowly tailored rule of only prohibiting electronic device use *by jurors* is a more narrowly tailored approach to cure the ill of 'techies' using their devices while impaneled as jurors.

Finally, the ill of spectators' cell-phones ringing during proceedings may be remedied without an overly broad set of rules which fully impedes recognized First Amendment rights. A more narrowly drafted rule of requiring *silenced* ring-tones and/or 'silent mode' electronic settings serves as a more narrow way to solve the ill of cell-phones ringing,[20] while still permitting the use of First Amendment protected recording under *Smith, Alvarez, Fordyce,* and *Glik.*

[20] Most cell phones are more than just telecommunication devices—they also contain (and have contained) compact, easy to use, and inexpensive photographing and video recording features. See generally *Pervasive Image, supra* at 339-341; see also *For Everyday Photography, Cell Phones Are Growing as Camera of Choice*, REUTERS (PRESS RELEASE), July 8, 2008 *available at* http://www.reuters.com/article/2008/07/08/idUS137025+08-Jul-2008+BW20080708 (more than five years ago, "96.3% of adult cell phone owners report that they have a cell phone with a camera."). Following submission of appellees' brief, counsel will request, by motion, to bring his iPhone to oral

Moreover, banning the use of electronics in the hallways and other ill-defined "common areas" of the Saginaw County Governmental Center is also not narrowly tailored to eliminate the ills sought to be cured—all ills complained of by the chief judges are occurring *inside* the courtroom, not in the hallway or common areas of the public courthouse.[21] Lack of narrow tailoring requires the Electronics Ban Order fail to pass constitutional muster.

Lastly, it is worth noting, once again, the Electronics Ban Order is essentially a legal device to partially close the Saginaw County courtrooms to First Amendment activity, and as such *Press-Enterprise II* instructs there must be specific findings on the record so that a reviewing court can determine whether closure was proper and whether less restrictive alternatives exist. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 707 (6th Cir. 2002); see also *Press-Enterprises II*, *supra* at 10 ("[t]he interest is to be articulated along with findings specific enough

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argument to demonstrate how easily, quietly, and non-disruptively video recording can be accomplished with modern technology. As accurately noted, [t]he increasingly broad availability of costless image capture and storage enables every owner of a cell phone or PDA to practice the craft of the photographer or the filmmaker. *Pervasive Image*, *supra* at 343. Moreover, these devices can easily be put into silent-mode while still operating other functions contained on the device, like photography or video-recording.

[21] Even if this Court were to find that the First Amendment protections found in *Glik*, *Smith*, *Alvarez* and *Fordyce* do not apply *inside* the courtroom, the Electronics Ban Order affects McKay's ability to record sheriff deputies and other public officials *outside* the courtrooms within the Saginaw County Governmental Center—i.e. the common areas.

that a reviewing court can determine whether the closure order was properly entered."). The Electronics Ban Order's failure to require specific finding results fails to pass the requirement of 'narrow tailoring.' *Detroit Free Press*, *supra* at 710.

Because the Electronics Ban Order is not narrowly tailored (both substantively and procedurally under *Press-Enterprises II* or *Detroit Free Press*) to address ills that are presumed (but not conceded) as compelling governmental interests, the Electronics Ban Order is unconstitutional and must be enjoined from enforcement. An alternative local administrative order can be and should be more narrowly tailored to protect intimidated witnesses who are publicly testifying, to prohibit jurors from using their electronic devices and to prevent spectators' cell-phones from ringing without complete prohibitions on the recognized and protected First Amendment right of recording.

Given this long, studied, and established jurisprudence, a First Amendment right to record matters of public interest both inside and outside the courtrooms of the Saginaw County Governmental Center fully and comfortably exists in favor of the citizenry under federal precedence, and the Electronics Ban Order fails to survive strict scrutiny.

### G. *Estes* and its progeny have invited, not foreclosed, this challenge.

It is anticipated that Appellees will cite the district court's incorrect reasoning from Justice Harlan's concurrence in *Estes v. Texas*, 381 U.S. 532 (1965) rather than the lead plurality opinion, that the First Amendment "does not give anyone a concomitant right to photograph, record, broadcast, or otherwise transmit the trial proceedings to those members of the public not present." Order, RE 30, PageID #420-421; *Estes, supra*, at 589 (HARLAN, J., concurring). However, the lead opinion in *Estes* by Justice CLARK specifically noted that "[w]hen the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case." *Id*., at 540. This holding is buttressed by Justice WHITE's observation that the Court in 1965 had "very limited amount of experience in this country with television coverage of trials." *Id*., at 616 (WHITE, J., dissenting). In 1965, the courts had *no* experience with individualized recording by citizens to the likes of today's digital cameras, iPhones, and iPads, which today are small, silent, work "noiselessly," and require no distracting cords, equipment, or lighting. See Affidavit, RE 68-5, PageID #1285, ¶¶3(dd).

Today, that has all changed. The Court does not need a specialized evidentiary record to know that recording devices are small, portable, wide-spread, and can operate silently. Judge Carr summed it up best in *Crawford*:

> Technology has put the ability to gather and disseminate newsworthy information literally in the hands of anyone who has a cell phone. With increasingly (sic) frequency, events of local, regional, national, and even international significance first and frequently most vividly come to public attention because a bystander saw, recorded, and, often as those events were underway, transmitted what was happening [citing Geoffrey J. Derrick, *Qualified Immunity and the First Amendment Right to Record Police*, 22 B.U. Pub. Int. L.J. 243, 256-257 (Summer 2013)]. Technology has thus not just greatly expanded public ability to learn about newsworthy events, but also to do so with once unimaginable speed and certainty [citing *Id.* at 263 (noting, "Citizen recordings serve as an unfiltered record of the conduct of government officials and are an essential part of the information-gathering process that undergirds a free and open marketplace of ideas.")].

*Crawford, supra*, at 614. A recorded interaction at public gatherings for public business establishes a shared basis of knowledge for public discussion and critique. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 345 (2011). "As digital technology proliferates in camera phones, iPhones, and PDAs, almost any image we observe can be costlessly recorded, freely reproduced, and instantly transmitted…." *Id*. at 337. "We live, relate, work, and decide in a world where image capture from life is routine, and captured images are part of ongoing discourse, both public and private." *Id*. In light of this change to modern life, the sister circuits, the United States Department of Justice, and the United States Government unequivocally find and assert such a right to record for the citizenry enshrined in the First Amendment. Baltimore Letter, RE 75-7, PageID # 1402-1412; *Sharp v. Baltimore City Police et al.*, Case No. 11-2888, ECF No. 24 (D.

MD, Jan. 10, 2012), United States' Statement of Interest (the question is "whether private citizens have a First Amendment right to record police officers in the public discharge of their duties… The United States urges this Court to answer…in the affirmative."). Today, both technology and ubiquitous use of that technology has substantially changed to the point that a passive court observer can silently and non-intrusively make a recording of matters of public interest in the public courtroom. As the Supreme Court noted in 1965, nearly fifty years ago, that "[w]hen the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case." *Estes, supra*, at 540 (emphasis added). The reporter's pencil and pad of yesterday has been replaced by the iPhone and iPad of today. See *Ex parte Thompson*, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014)("Using a camera to create a photograph or video is like applying pen to paper to create a writing…"). McKay proposes that today is the day that *Estes'* 'another case' has arrived—in this Court. By the plain language of *Estes*, the Supreme Court has delayed and re-invited, not foreclosed, this case today. This Court is requested to follow its sister circuits and find that a First Amendment right to record exists, and reverse the erroneous conclusion of the district court.

## III. The use of standardless discretion within the Electronics Ban Order for permission to exercise First Amendment activity is unconstitutional.

### A. Standard of Review

This Court reviews de novo a district court's decision to grant summary judgment. *Kalich, supra.* Whether a state law is constitutional is a question of law which this Court reviews de novo. *Cherry Hill, supra.*

### B. The Electronics Ban Order uses a permission-based regulatory scheme lacking narrow, objective, and definite standards.

As noted above, the exercise of the First Amendment may be subject to reasonable restrictions. *Gericke*, *supra*, at 7-8 (2014)(citing *Glik*, *supra*, at 84 and *Alvarez*, *supra*, at 607). McKay asserts, in this instance, that the *Press-Enterprise* methodology provides the sound constitutional way to permit the proper exercise of First Amendment right to record in the public courtroom while reserving the ability for courts to close the courtroom (and thus prevent recording) upon specific findings on the record so that a reviewing court can determine whether closure was proper and whether less restrictive alternatives exist. Areas protected by the First Amendment may be regulated "only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). However, the Electronics Ban Order fails to follow this approach. Instead, the Electronics Ban Order opted to use (and these appellees implemented) a permission-based regulatory scheme. Under the Electronics Ban Order, all possession and use of a recording device is banned "[e]xcept with a judge's permission." First Am. Compl. – Ex A, RE 75-2, PageID #1392. The

Electronics Ban Order provides no standards, guideposts, or direction on how the permission-granting authority the judges provided themselves is to be applied. Such a methodology has been clearly and long established as repugnant to the Constitution. See e.g. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969).

Instead, the district court concluded, rather unusually, that because the standardless-discretion jurisprudence has 'only' been applied to *expressive* conduct, a constitutional prohibition on standardless-discretion within the 'gathering information' First Amendment branch is unavailable. Opinion, RE 52, PageID #882. Yet, such a conclusion could be equally applied to the opposite proposition—that *no court* has ever held that standardless-discretion *only* applies to expressive conduct. The reason for this jurisprudential anomaly is because courts have likely only been called upon to apply the prohibition on standardless discretion in expressive conduct cases. In short, the First Amendment protects vastly beyond expressive conduct, not narrowly to only expressive conduct. The district court's legal conclusion was in error.

Having decided to give discretion to a local judge whether to allow or disallow First Amendment activity, due process obligates the decision-maker to be controlled by a "narrow, objective, and definite" standard; a lack of a standard violates constitutional guarantees of due process in both the First Amendment arena and other areas of law. See *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-

151 (1969)(in First Amendment context); *City of Lakewood v. Plain Dealer Pub. Co*., 486 U.S. 750, 757 (1988)(same); *United States ex rel. Matthews v. Johnson*, 503 F.2d 339, 345-346 (3rd Cir. 1974)(applying the standardless discretion doctrine to state criminal laws; "[a] lack of any standard to guide a decision which has the capability of restricting the liberty or property of a defendant would seem to offend settled concepts of due process."); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Saia v. New York*, 334 U.S. 558 (1948); *Schneider v. State*, 308 U.S. 147, 163-164 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Hague v. CIO*, 307 U.S. 496 (1939); *Burk v. Augusta-Richmond County*, 365 F.3d 1247 (11th Cir. 2004)("Excessive discretion over permitting decisions is constitutionally suspect because it creates the opportunity for undetectable censorship and signals a lack of narrow tailoring.").

The common thread running through these opinions is that permission-based schemes regulating conduct are invalid unless having precise, narrow, definite, and objective standards from which the appropriate official must make his decision to grant or deny the First Amendment activity. It is black-letter law: a regulation cannot condition the free exercise of First Amendment activities on the unbridled discretion of government officials. *Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996). This is because a "standardless discretion… makes it difficult to detect, and protect the public from,

unconstitutional viewpoint discrimination by the licensing official."[22] *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012).

The Electronics Ban Order improperly allows the decision-maker, i.e. a judge, to have unbridled discretion to decide whether to allow or disallow the First Amendment activity of recording public activities of public officials without any standards in which to make the permission-based determination. "It is settled" that a regulatory scheme which "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Shuttlesworth, supra*, at 151 (citing *Staub, supra*, at 322). The lack of enunciated standards within the Electronics Ban Order is a violation of the Constitution rendering the same a violation of the First Amendment as granting improper standardless discretion. This Court is requested to reverse the erroneous conclusion of the district court and find that the

[22] In accordance with the Pfau Directive, a number of individuals are exempt from the electronics ban, at the Appellees' decision, without any objective basis for being entitled to such discretion, i.e. "courthouse employees, active members of the State Bar of Michigan, law enforcement personal (sic, personnel) acting in that capacity, probation and parole officers acting in that capacity, representatives of media agencies authorized pursuant to AO 1989-1, and individuals granted ad hoc permission by an authorized judge." First Am. Compl. – Ex. B, RE 75-3, PageID #1395.

Electronics Ban Order violates the constitutional prohibition against standardless discretion in the First Amendment activity of recording.

## IV. McKay has standing to challenge the vagueness and unequal protection of the Electronics Ban Order and the Pfau Directive.

As part of his pleadings, McKay asserted that the Electronics Ban Order prohibits all electronic devices in "court related facilities," which is defined therein as "including the various Saginaw County Courtrooms, certain judicial offices, and related common areas." McKay pled that 'related common areas' is unconstitutionally vague by failing to inform him and the public what constitutes "related common areas" within the Saginaw County Governmental Center so that they may act accordingly. First Am. Compl. – Ex A, RE 75-2, PageID #1392. Additionally, McKay claimed that appellees, by their acts and acting under the color of Michigan law, violated McKay's Fourteenth Amendment right of equal protection by self-permitting traditional media outlets the right to record and/or photograph court proceedings with electronic devices, including cameras, through an exception seemingly granted to allow entry of equipment and devices, while explicitly prohibiting McKay from being able to do the same despite being similarly situated by operation of law.

The district court failed to reach the substantive issue of these claims, instead finding that McKay, while having prudential standing, lacked constitutional

standing, i.e. injury-in-fact, to bring either of these claims. Opinion, RE 79, PageID #1526. McKay asserts this conclusion as to standing for these counts was in error.

### A. Standard of Review

See Part I(A), *supra*.

### B. McKay had pled and has standing to assert a pre-enforcement vagueness challenge to existing state law.

As explained above, standing is not a question of the substance of a claim but rather answers whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen*, *supra*, at 752. Moreover, as the district court seemingly missed, it is not necessary that a plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. *Steffel*, *supra*, at 459. Moreover, the district court also missed that this vagueness challenge implicates First Amendment rights.

Standing is a three-part test, deriving from the judiciary's powers under Article III of the United States Constitution. U.S. Const, art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing requires injury (actual or imminent), causation, and redressability. The district court concluded that McKay has only failed in the first element, lack of any injury. Opinion, RE 79, PageID #1530 (McKay's void-for-vagueness claim in Count II reads as something between a "someday" intention to record and a concession that the Ban Order

actually prohibits his proposed actions. Such is not the stuff of constitutional standing.").

However, "[a]s a general matter, a plaintiff who wishes to engage in conduct arguably protected by the Constitution, but proscribed by a statute, successfully demonstrates an immediate risk of injury." *Bell v. Keating*, 697 F.3d 445, 451 (7th Cir. 2012). "[W]hen a plaintiff expresses a credible intention to disobey a statute, a sufficient likelihood of injury exists, and a pre-enforcement challenge is appropriate." *Id*. In other words, McKay need not be subject to prosecution before he has standing. See *id*. This Circuit has agreed similarly. See *Grendell v. Ohio Supreme Court*, 252 F.3d 828, 832 (6th Cir. 2001)("Since this case deals with declaratory and injunctive relief, a pre-enforcement challenge may be made before the actual completion of an injury in fact."). To show enough injury, a plaintiff must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and that there "exists a credible threat of prosecution thereunder." *Glenn v. Holder*, 690 F.3d 417, 421 (6th Cir. 2012); see also *Platt, supra* and *Babbitt, supra*.

This Circuit's *Glen* injury standard has been met. McKay, by his affidavit and similar pleadings, has specifically alleged an intention to engage in a course of conduct arguably affected with a constitutional interest:

> I seek to exercise a right to record trial activities, the police and sheriff deputies inside and outside the courtroom in the performance of their official

> duties, the judge in the performance of his or her duties, and other activities of public interest occurring at the Saginaw County Governmental Center.
>
> But for the Electronics Ban Order, I would take photographs and/or video recordings of public officials in the performance of their public duties within the courtrooms at the Saginaw County Governmental Center.
>
> My purpose is not to intimidate or harass witnesses or prevent the administration of justice or the conduct of trials.
>
> As outlined in my Verified Complaint, I seek to record and/or photograph trial activities and other matters of public interest quietly, noiselessly, and without any way of [interrupting] court proceedings with a modern recording device that can be as small as a deck of playing cards, like an iPhone or other hand-held recording device. Today's modern recording/photograph technology can operate silently without flash bulbs, lights, noise, or any other distracting features like in old technology may have required in years past.

Affidavit, RE 68-5, PageID #1284-1285, ¶¶3(aa)-(dd). Should there be any question of credible threat, the Electronics Ban Order dictates McKay's fate if he undertakes intended course of action:

> Persons not wishing to comply with this order <u>will be</u> barred from the courthouse and those in violation inside the building may have their electronic device confiscated.

First Am. Compl. – Ex. A, RE 75-2, PageID #1393 (emphasis added). The Pfau Directive similarly threatens direct and active enforcement. First Am. Compl. – Ex. B, RE 75-3, PageID #1395. As such, injury has been clearly met for standing purposes; the district court erred in implicitly requiring McKay to test, by prosecution, what areas of the Saginaw County Governmental Center the judges would deem "related common areas." McKay, on his very own personal behalf, is

seeking to challenge as void for vagueness what constitutes "related common areas." The district court would implicitly require McKay to violate the Electronics Ban Order and the Pfau Directive to see how the government would react before he had standing to challenge the claimed unconstitutionality of the Electronics Ban Order on vagueness grounds. Instead, McKay, with explicit desires to undertake activity vaguely banned, filed a preenforcement action. Contrary to the district court's statement that McKay's has a "'someday' desire to record court activities," McKay has directly averred, and has gone unrebutted that he "seek[s] to exercise a right to record trial activities, the police and sheriff deputies inside and outside the courtroom in the performance of their official duties, the judge in the performance of his or her duties, and other activities of public interest occurring at the Saginaw County Governmental Center." Affidavit, RE 68-5, PageID #1284, ¶3(aa). He cannot do this but for the Electronics Ban Order. *Id.*, ¶3(bb). Preenforcement standing is fulfilled; reversal is required.

### C. McKay had also pled and has standing to assert a pre-enforcement equal protection challenge to existing state law.

Like above, the district court again found a lack of standing for McKay because "[h]e has not been on the receiving end of any municipal action or citation" or "has not suffered any allegedly irrational application of the exemption provision." Opinion, RE 79, PageID #1531. This conclusion is also erroneous. The Supreme Court in *Lujan* explains:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Here, McKay has asserted that:

> Defendants[/Appellees], by their acts and acting under the color of Michigan law, violated Plaintiff [McKay]'s Fourteenth Amendment right of equal protection by permitting traditional media outlets the right to record and/or photograph court proceedings with electronic devices, including cameras, through an exception seemingly granted to allow entry of equipment and devices, while explicitly prohibiting Plaintiff [McKay] from being able to do the same despite being similarly situated by operation of law.

First Am. Comp., RE 75, PageID #1388, ¶73. As such, McKay has alleged himself to be on the 'receiving end' of municipal action—the unequal protection of the Electronics Ban Order (via the Pfau Directive) by the traditional media being wholly exempted (i.e. having automatic rights to record) while McKay, as an average citizen, is banned. McKay has alleged a constitutional injury in fact.

## CONCLUSION & RELIEF REQUESTED

For the reasons cited herein, Appellant Robert McKay respectfully requests this Court to enter an order reversing the erroneous decisions of the lower District Court regarding:

1.) the improper dismissal of McKay's First, Fifth, and Fourteen Amendment claims on the basis of standing;

2.) the failure to recognize McKay's First Amendment right to record non-disruptively inside and outside a publicly-open courtroom;

3.) the failure to declare and enjoin the use of standardless discretion by judges in the exercise of First Amendment activities as outlined in the Electronics Ban Order;

4.) the failure to declare the Electronics Ban Order is unconstitutional; and

5.) the failure of not enjoining enforcement of the Electronics Ban Order by these Defendants.

Upon reversal, the Court is requested to remand this matter back to the United States District Court for the Eastern District of Michigan for further proceedings, including future proceedings to permit a proper request for an award of attorney fees and costs under 42 U.S.C. § 1988 and all other statutes, laws, and court rules.

Date: June 18, 2015

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## CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a)(7)(C) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type-volume limitations of the Sixth Circuit Rule 32(a)(7)(B).

This brief has been prepared in proportional typeface using Times New Roman 14-point font. The corrected principal brief, including headers and footnotes, contains 13,088 words according to the Word Count feature in the Microsoft Word program, being less than 14,000 words.

The undersigned understands that a material misrepresentation in completing this certificate or circumvention of the type-volume limitations may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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## CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of and a copy of such filing to counsel of record at their email address(es) of record.

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## DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

| RE. | PageID Range | Description of the Document |
|---|---|---|
| 1 | #0001-0012 | Verified Complaint |
| 2 | #0111-0112 | Motion for Preliminary Injunction |
| 8 | #0239-0254 | Answer |
| 24 | #0361-0377 | Reply Brief |
| 24-2 | #0379 | Photograph |
| 30 | #0413-0434 | Opinion and Order (denying preliminary injunction) |
| 32 | #0452-0459 | Opinion and Order (denying reconsideration) |
| 35 | #0464-0475 | Plaintiff's Motion for Partial Summary Judgment |
| 44 | #0687-0722 | Defendants' Motion for Summary Judgment |
| 44-5 | #0744-0755 | Photographs |
| 48 | #0799-0817 | Opposition Brief |
| 52 | #0854-0886 | Opinion and Order (re cross motions) |
| 68-5 | #1281-1288 | McKay Affidavit |
| 75 | #1380-1390 | First Amended Complaint |
| 75-2 | #1392-1393 | Electronics Ban Order (see also RE 1-2, same) |
| 75-3 | #1394-1398 | Pfau Directive (see also RE 1-3, same) |
| 75-4 | #1399 | Chief Judge's Memorandum (see also RE 1-4, same) |
| 75-5 | #1400 | Newspaper Screenshot (see also RE 1-5, same) |
| 75-6 | #1401 | 2nd Newspaper Screenshot (see also RE 1-6, same) |
| 75-7 | #1402-1412 | FBI Baltimore Letter (see also RE 1-7, same) |
| 78 | #1500-1519 | Answer to First Amended Complaint |
| 79 | #1520-1532 | Opinion and Order (granting summary judgment) |
| 80 | #1533 | Judgment |