NO. _____

IN THE

Supreme Court of the United States

ROBERT MCKAY, *Petitioner*,

v.

WILLIAM L. FEDERSPIEL; RANDY F. PFAU,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a law criminalizing protected speech or conduct implies a threat to prosecute such that a pre-enforcement challenge is proper without any additional showing that enforcement is imminent.

2. Whether, absent extenuating circumstances, there is a constitutional right to make a public recording of courtroom proceedings.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is Mr. Robert McKay. Respondents are Mr. William L. Federspiel and Randy F. Pfau.

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The opinion of the United States Court of Appeals for the Sixth Circuit, App. 1a–18a, is reported at 823 F.3d 862. The opinions of the United States District Court for the Eastern District of Michigan, App. 19a–34a and App. 35a–78a, are not reported but are available at 2015 WL 1636638 and 2014 WL 7013574, respectively. The order of the Sixth Circuit denying rehearing en banc over the dissents of Judges Rogers and Griffin, App. 79a, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 2016. App. 1a. The court of appeals order denying rehearing en banc was entered on August 10, 2016. App. 39a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Case or Controversy Clause of the United States Constitution, Article 3, § 2, states in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [or] Laws of the United States.

The First Amendment to the United States Constitution states in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

INTRODUCTION

Petitioner Robert McKay seeks to exercise his First Amendment right to record public proceedings in a courtroom but is prohibited from doing so by a local administrative order that prohibits the unauthorized possession or use of recording devices in all courtrooms. The order threatens to punish violators with courtroom banishment, confiscation of the device, a fine, and even incarceration.

The Sixth Circuit acknowledged that this "case seeks to present significant issues concerning the ever-advancing march of technology and its role in courts and court facilities." App. 2a. And it assumed that a "ban on recording courtroom proceedings may affect constitutional rights." App. 11a n.2. Nonetheless, the Sixth Circuit affirmed the district court's grant of summary judgment in favor of Respondents, holding that McKay failed to establish an injury-in-fact for purposes of pre-enforcement standing. That ruling presents two issues that warrant this Court's immediate review.

The first question is when a plaintiff may bring a pre-enforcement challenge to a state law that prohibits protected speech or conduct in which the plaintiff wishes to engage. The Sixth Circuit held that a plaintiff must allege a subjective chill on his protected speech *and* "point to some combination of the following factors: (1) a history of past enforcement against the plaintiffs or others; (2) enforcement warning letters sent to the plaintiffs regarding their specific conduct; and/or (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action." App. 12a (citations omitted).

The Sixth Circuit's subjective-chill-*plus* rule is in direct conflict with three circuits that require nothing more than the existence of a prohibitory statute. The Seventh Circuit has repeatedly held that the mere "existence of a statute *implies* a threat to prosecute," making a pre-enforcement challenge proper without any additional showing. *Bauer* v. *Shepard*, 620 F.3d 704, 708 (7th Cir. 2010) (emphasis added, numerous citations omitted). Likewise, in *California Pro-Life Council, Inc.* v. *Getman*, 328 F.3d 1088 (9th Cir. 2003), the Ninth Circuit held that "actual and well-founded fear" of enforcement is enough to establish standing for a pre-enforcement challenge if the plaintiff's intended speech arguably falls within the statute's reach. And the Eighth Circuit, in *Saint Paul Area Chamber of Commerce* v. *Gaertner*, 439 F.3d 481 (8th Cir. 2006), similarly held that plaintiffs had standing where their fear of prosecution was not "imaginary or speculative." *Id.* at 485. The "threat is latent in the existence of the statute." *Id.* at 487.

In fact, the Sixth Circuit's "chill-*plus*" rule is not even consistent with its own precedent. In *Planned Parenthood Ass'n of Cincinnati, Inc.* v. *City of Cincinnati*, 822 F.3d 1390 (6th Cir. 1987), the plaintiff brought an action challenging Cincinnati's fetal-disposal ordinance. The Sixth Circuit held that the statute alone presented a sufficient threat of prosecution: "Planned Parenthood has alleged its intention to engage in conduct arguably affected with a constitutional interest, and we believe *the statutory language of the Ordinance evinces a credible threat of prosecution* against Planned Parenthood." *Id.* at 1396 (emphasis added). This Court should resolve the conflict and bring the Sixth Circuit into conformity with its sister circuits.

The second question presented is whether there is a First Amendment right to publicly record courtroom proceedings. Some 35 years ago, this Court held that states may adopt rules allowing cameras and recording equipment in their courts, *Chandler* v. *Florida*, 449 U.S. 560 (1981), and all 50 states now allow some type of recording in at least some proceedings. But the rules vary widely, resulting in inconsistent application of the First Amendment depending entirely on the location where a courtroom proceeding takes place.

The constitutional question is straightforward. This Court has recognized that, absent an overriding interest in justice that requires closure, there is a First Amendment right to *access* courtroom proceedings, because they involve public process in a public place. *E.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 44 U.S. 555 (1980) (recognizing First Amendment right to access criminal trials, and possibly a right to access civil trials as well). And numerous circuits have already held that there is a First Amendment right to *record* a public official conducting public business in a public place. *E.g.*, *Glik* v. *Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (First Amendment right to film police officers conducting arrest in a public place); *Smith* v. *Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Fordyce* v. *City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) ("First Amendment right to film matters of public interest"); *American Civil Liberties Union of Ill.* v. *Alvarez*, 679 F.3d 583, 586–87 (7th Cir. 2012) (statute prohibiting filming of public officials "likely violates" First Amendment).

Accordingly, Mr. McKay respectfully requests that this Court grant the petition and hold that (1) a party seeking pre-enforcement review need only allege that he intends to engage in protected speech or conduct which a challenged law or regulation prohibits, and (2) there is a First Amendment right to publicly record courtroom proceedings.

STATEMENT

A. Mr. McKay and his desire to record courtroom proceedings

Petitioner McKay is a Michigan resident who has been politically active in eliminating judicial administrative orders that prohibit public recording of judicial proceedings. In August 2013, he appeared at a meeting and spoke against an ordinance proposed by the Courts and Public Safety Committee of the Saginaw County Board of Commissioners that would have banned all electronic devices from being brought into or used in the Saginaw County Governmental Center. Two Saginaw County judges also spoke to the Committee, one of them indicating that the chief judges of the County intended to enact an administrative order that would create such a ban for the County courts regardless of whether the County Commission decided to enact the proposed ordinance. The Committee tabled its decision pending further review by legal counsel, and the proposal was never adopted.

B. The prohibition

On December 16, 2013, as promised, the chief judges for Saginaw County issued the order that is the subject of this lawsuit, Local Administrative Order C10-2013-08-J, referred to here as the "Electronics Ban Order." The Ban 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.

The Electronics Ban Order does not provide or explain any standards, guidelines, or directions on when and how permission should or could be granted, and it does not exempt any person from its prohibitions. The Order also prohibits "the possession and/or use" of "electronic recording, broadcasting or communications devices in court related facilities," defined to include 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." Finally, the Order authorizes searches of persons and property entering court-related facilities "for the purpose of enforcing" the Order.

The Electronics Ban Order states that violations of the policy are punishable by contempt of court, including automatic forfeiture of the offending device and all communications contained therein, a fine of not more than $7500, and jail for up to 93 days, all in the court's discretion.

To effectuate the Ban, Respondent Randy F. Pfau, the sheriff official who provides security and control for the Saginaw County Governmental Center, issued Memo 78-2013. (Pfau's supervisor, Respondent William L. Federspiel, knowingly acquiesced to the Memo.) The Memo directed and ordered security-screening deputies to turn away and prohibit citizens from bringing electronic devices into the areas designated by the Electronics Ban Order, and required all deputies to enforce the Order, including those stationed at the main entrance and within the various courtrooms in the Saginaw County Governmental Center. The Memo also warned 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."

C. Proceedings below

Mr. McKay filed his verified complaint on January 20, 2014. He averred that he "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." V. Compl. ¶ 34. McKay seeks to exercise his First Amendment right "to observe and record matters of public concern by public officials in a public place," *id.* ¶ 49, without being subject to "contempt, confiscation of any electronic device . . . , fined . . . , and or jail[ed] . . . for exercising his constitutional rights," *id.* ¶ 28.

After denying McKay's motion for preliminary injunction, the district court issued an opinion and order granting Respondents' motion for summary judgment on McKay's claims that he has a First Amendment right to record courtroom proceedings. The court said that McKay had not identified any legally cognizable harm from being prohibited from recording judicial proceedings inside the courtroom, and that there is no First Amendment right to use electronic devices to record events inside a courtroom in any event. App. 35a–78a. After McKay filed a First Amended Complaint, supported by an affidavit, the district court granted Respondents summary judgment on all remaining claims. App. 19a–34a.

The Sixth Circuit "assume[d] for purposes of the standing inquiry" that a "ban on recording courtroom proceedings may affect constitutional rights." App. 11a. But under Circuit precedent, "mere allegations of a 'subjective chill' on protected speech are insufficient to establish an injury-in-fact for pre-enforcement standing purposes." App. 12a (citing *Berry* v. *Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012)). Under the Circuit's chill-*plus* rule, a plaintiff bringing a pre-enforcement challenge must "allege a subjective chill *and* point to some combination" of three factors: (1) a history of past enforcement, (2) enforcement letters warning the plaintiff, and (3) statutory attributes that make enforcement "easier or more likely." App. 12a (numerous citations omitted, emphasis added). The Circuit also takes into consideration "a defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff. App. 12a–13a (citations omitted).

Applying these factors, the Sixth Circuit held that McKay could not demonstrate an injury-in-fact. App. 13a–15a. The court so held despite record evidence of multiple signs posted in and around the Saginaw Government Center warning that violation of the Electronics Ban Order "May Result in Contempt Sanctions." App. 13a–14a. These signs "address the general public, not McKay specifically or any of his past conduct," said the court, and the signs "also reference the possibility of an exemption by judicial permission." App. 14a.

The Sixth Circuit denied McKay's petition for rehearing en banc. App. 79a. Judges Rogers and Griffin would have granted the petition. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. The petition should be granted to resolve a mature circuit conflict regarding when a defendant may bring a pre-enforcement challenge to a statute that prohibits protected speech or conduct.

In *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334 (2014), this Court reaffirmed that a plaintiff has standing to request pre-enforcement review of a statute or regulation when circumstances "render the threatened enforcement sufficiently imminent." *Id.* at 2342. In other words, a plaintiff satisfies the injury-in-fact requirement, and has standing to seek pre-enforcement review, if he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* (quoting *Babbitt* v. *Farm Workers*, 442 U.S. 289, 298 (1979)).

The Court elucidated this requirement with several illustrations, two of which are pertinent here. In *Babbitt*, the plaintiffs sought to challenge a statute that deemed it an unfair labor practice to encourage consumer boycotts of agricultural products "by the use of dishonest, untruthful and deceptive publicity." *Driehaus*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 301). This Court allowed the suit to move forward because the plaintiffs had engaged in past consumer publicity campaigns and expressed their intent to do so in the future, all in a context where there were likely to be disputes about what publicity is dishonest, untruthful, or deceptive. *Id.* at 2343. Because the plaintiffs' "fear of prosecution was not 'imaginary or wholly speculative,' " their challenge presented an Article III case or controversy. *Id.* (quoting *Babbitt*, 442 U.S. at 302).

In *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988), this Court held that plaintiff booksellers could seek pre-enforcement review of a law that criminalized the knowing commercial display of material harmful to juveniles. *Driehaus*, 134 S. Ct. at 2343. As in *Babbitt*, it was enough to establish Article III standing that the booksellers had "alleged an actual and well-founded *fear* that the law will be enforced against them." *Id.* (emphasis added, quoting *American Booksellers*, 484 U.S. at 393).

Neither *Babbitt* nor *American Booksellers* implicated any of the "plus" factors that the Sixth circuit imposed on McKay. The plaintiffs in those cases (1) did not allege a history of past enforcement; (2) had not received warning letters regarding their specific conduct; and (3) did not point to a citizen-enforcement or other provision making enforcement easier or more likely.

To the contrary, in both *Babbitt* and *American Booksellers*, the plaintiffs established a "credible threat of prosecution" merely by pointing to a statutory prohibition of speech or conduct arguably affected with a constitutional interest, and alleging that they intended to engage in that prohibited speech or conduct in a context where a fear of prosecution was not "imaginary or wholly speculative." *Driehaus*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 302). The Sixth Circuit's decision here is a significant narrowing of *Driehaus*.

Equally important, the Sixth Circuit's decision conflicts with several other circuits that have declined to require any "plus" factors to prove a credible threat of prosecution when a plaintiff seeks pre-enforcement review of an allegedly unconstitutional statute or regulation. For example, in *Bauer* v. *Shepard*, 620 F.3d 704 (7th Cir. 2010), the Seventh Circuit addressed a challenge brought by a nonprofit organization, judge, and a candidate for judicial office to certain rules of conduct for judges and judicial candidates. The court noted that the plaintiffs had "not been injured yet" but held they had established a probability of future injury sufficient to establish standing. The mere "existence of a [prohibitory] statute *implies* a threat to prosecute," making a pre-enforcement challenge proper without any additional showing. *Id.* at 708 (emphasis added). Accord, *e.g., Korte* v. *Sebelius*, 735 F.3d 654, 667 (7th Cir. 2013) (threat of financial penalty and other enforcement action for non-compliance with the HHS contraception mandate, made in connection with the Affordable Care Act, was sufficient to establish standing; the mere "existence of a statute implies a threat to prosecute").

Likewise, in *California Pro-Life Council, Inc.* v. *Getman*, 328 F.3d 1088 (9th Cir. 2003), the Ninth Circuit addressed a pre-enforcement action challenging California's campaign-finance laws. The court concluded that the plaintiff established standing where the plaintiff had a reasonable fear that "enforcement proceedings *might be* initiated" if the plaintiff acted contrary to the allegedly unconstitutional disclosure laws. *Id.* at 1095 (emphasis added). This did not mean that any plaintiff could raise a First Amendment challenge by "nakedly asserting that his or her speech was chilled." *Id.* The plaintiff must have "an actual and well-founded fear that the law will be enforced against [him or her]." *Id.* (citing *American Booksellers*, 484 U.S. at 393). And in "the free speech context, such a fear of prosecution . . . inure[s] if the plaintiff's intended speech arguably falls within the statute's reach." *Id.* (citing *American Booksellers*, 484 U.S. at 392). A threat to prosecute "is latent in the existence of the [prohibitory] statute." *Id.* (quoting *Majors* v. *Abell*, 317 F.3d 719, 721 (7th Cir. 2003)). Accord, *e.g.*, *National Inst. of Family & Life Advocates* v. *Harris*, 839 F.3d 823, 832–33 (9th Cir. 2016) (pregnancy centers could bring pre-enforcement challenge to law requiring them to disseminate notice of availability of abortion services where plaintiffs intended to violate the law and law was too new to show a history of past prosecution or enforcement).

The Eighth Circuit follows the same mere-existence-of-the-statute standard. In *Saint Paul Area Chamber of Commerce* v. *Gaertner*, 439 F.3d 481 (8th Cir. 2006), three chambers of commerce challenged state campaign-finance regulations. Although the plaintiffs had never been threatened with prosecution, their "*fear* of prosecution [wa]s not imaginary or

speculative." *Id.* at 485 (emphasis added). That was because the statutes, on their face, prohibited conduct in which the plaintiffs wished to engage, and had not fallen into desuetude. *Id.* at 485–86. Again, "the threat is latent in the existence of the statute." *Id.* at 487 (quoting *Majors*, 317 F.3d at 721).

Finally, the Sixth Circuit's chill-*plus* rule conflicts with the Circuit's own precedent. In *Planned Parenthood Ass'n of Cincinnati, Inc.* v. *City of Cincinnati*, 822 F.3d 1390 (6th Cir. 1987), the court considered an abortion clinic's pre-enforcement challenge to Cincinnati's fetal-disposal ordinance. The Sixth Circuit did not require the plaintiff to establish any of the factors the court imposed here; rather, given that the plaintiff had "alleged its intention to engage in conduct arguably affected with a constitutional interest," it was enough that the ordinance's *text* "evince[d] a credible threat of prosecution" against the plaintiff. *Id.* at 1396.

In holding that McKay lacked standing, the Sixth Circuit made two more mistakes, in addition to applying a significantly more stringent standing standard than that applied in other circuits. First, the court suggested that McKay's "mere allegations" in his complaint about his intended conduct were "insufficient to carry McKay past summary judgment." App. 10a. But the courts in the numerous cases cited above similarly relied on "mere allegations" in complaints. And McKay's complaint was verified, which made it equivalent to a signed, sworn affidavit. *E.g., Ford* v. *Wilson*, 90 F.3d 245, 246–47 (7th Cir. 1996); *Hart* v. *Hairston*, 343 F.3d 762, 765 (5th Cir. 2003); *Williams* v. *Browman*, 981 F.2d 901, 905 (6th Cir. 1992); *Roberson* v. *Hayti Police Dep't*, 241 F.3d 992, 994–95 (8th Cir. 2001).

Second, the Sixth Circuit criticized McKay for failing to identify "anyone [who] has ever been held in contempt—or even subject to contempt proceedings—for violating the challenged order." App. 15a. But the apparent absence of any contempt proceedings was the natural consequence of McKay challenging the Ban quickly, rather than waiting to see whether others would be allowed to exercise their First Amendment right and record public courtroom proceedings. The Electronics Ban Order was enacted on October 30, 2013; McKay filed suit in January 2014, less than three months later. As the Ninth Circuit held when a plaintiff similarly brought a pre-enforcement challenge immediately following a prohibitory law's enactment, McKay "could *not* have demonstrated a significant history of enforcement." *National Inst. of Family & Life Advocates*, 839 F.3d at 833 (emphasis added). Accord *Wolfson* v. *Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (giving evidence of lack of past prosecution "little weight" when the challenged law is new).

In sum, had McKay sought to assert his First Amendment right in the Seventh, Eighth, or Ninth Circuits, his claim would not have been barred for lack of standing but would have proceeded to a merits hearing. The petition should be granted so this Court can restore uniformity among the circuits and equal treatment of all plaintiffs seeking pre-enforcement review of suspect laws and regulations, regardless of the circuit in which those laws were promulgated.

II. The petition should also be granted to determine whether, absent extenuating circumstances, the First Amendment protects the right to record courtroom proceedings.

This Court has previously held that there is a First Amendment right of access to certain judicial proceedings. *E.g., Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (criminal trials and possibly also civil trials); *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*) (jury selection in criminal trials); *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*) (certain preliminary hearings, though not grand-jury hearings). The First Amendment protects access to such proceedings because they involve "place[s] and process[es] [that] have historically been open to the press and general public," and "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8.

At the same time, multiple circuits have recognized that the First Amendment protects an individual's right to record matters of public interest generally. The Eleventh Circuit has broadly held that 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* v. *Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (emphasis added).

The First Circuit, in *Glik* v. *Cunniffe*, 655 F.3d 78 (1st Cir. 2011), agrees, and has explained why this is so:

> The filming of government officials engaged in their duties in a public place . . . 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." [*Id.* at 82.]

The Seventh and Ninth Circuits have reached similar conclusions. *E.g., American Civil Liberties Union of Ill.* v. *Alvarez*, 679 F.3d 583, 586–87 (7th Cir. 2012) (statute prohibiting filming of public officials "likely violates" First Amendment); *Fordyce* v. *City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (noting that police-officer assault was intended to prevent the plaintiff from exercising his "First Amendment right to film matters of public interest").

The reasoning in these circuit cases aligns with this Court's *Richmond Newspapers* decision. Recording and disseminating court proceedings serves the cardinal First Amendment value of protecting and promoting the free discussion of government affairs. Indeed, this Court has acknowledged that "extensive public security and criticism" of criminal-justice-system officials serves to "guard[ ] against the miscarriage of justice." *Nebraska Press Ass'n* 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). What better way to protect these interests than to allow recording and widespread dissemination of public judicial proceedings?

Of course, the First Amendment right to record judicial proceedings is not without reasonable limits. In *Press-Enterprises I & II* this Court already explained that closing courtroom proceedings to the public may be appropriate to preserve higher values if that exclusion is narrowly tailored to serve a legitimate interest. *Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise II*, 478 U.S. 13–14. If a courtroom is legitimately closed to the public, then it should be closed to recording as well. But in the absence of extenuating circumstances, this Court should hold that the First Amendment protects a right to record public courtroom proceedings occurring in a public place, just as the circuits have recognized a right to record other public officials conducting their duties in public places.

Assuming the First Amendment applies, the Electronics Ban Order is unconstitutional. For state action to survive a First Amendment challenge, the regulation must be narrowly tailored to advance a compelling state interest. *Eu* v. *San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214 (1989). Narrow tailoring requires the least restrictive means of furthering the compelling interest. *Sable Commc'ns of Cal., Inc.* v. *Fed Commc'ns Comm'n*, 492 U.S. 115, 126 (1989). "[It] is the rare case in which . . . a law survives strict scrutiny." *Burson* v. *Freeman*, 504 U.S. 191, 211 (1992).

Here, no compelling interest supports a blanket ban on the recording of judicial proceedings. And the Electronics Ban Order is certainly not narrowly tailored. There are numerous intermediate steps that could be taken to prevent potential problems such as electronic noises disrupting proceedings, alleged witness intimidation, and the like.

At a bare minimum, as *Press-Enterprise II* instructs in the context of courtroom access, a judge should be required to make specific findings on the record before prohibiting the recording of proceedings; that way, a reviewing court can determine whether the prohibition was proper and whether less restrictive alternatives existed. 478 U.S. at 10 ("The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."). Here, there are no findings regarding the government interest advanced by, or the alternatives availability to, the blanket ban on recording instituted by the chief judges of Saginaw County. Accordingly, the Ban is unconstitutional.

In *Estes* v. *Texas*, 381 U.S. 532 (1965), Justice Harlan's concurrence concluded that the First Amendment "does not give anyone a . . . right to photograph, record, broadcast, or otherwise transmit . . . trial proceedings to those members of the public not present." *Id.* at 589 (Harlan, J., concurring). But the lead plurality opinion reserved the question: "When 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 (emphasis added). As Justice White observed in dissent, the courts in 1965 had a "very limited amount of experience in this country with television coverage of trials." *Id.* at 616 (White, J., dissenting). With the substantial video and audio recording (and dissemination) of courtroom proceedings that take place in state and federal courts in 2017, it is long past time for this Court to revisit the First Amendment question that *Estes* left open.

III. The questions presented are of national importance, and this case is an ideal vehicle for resolving them.

The conflicting circuit decisions noted above show that the question of when a plaintiff may bring a pre-enforcement challenge to an unconstitutional statute is recurring and creating unnecessary litigation over standing. Worse, the conflict means that a citizen's right to challenge an unconstitutional law depends entirely on the jurisdiction where the law is enacted. A plaintiff planning to engage in prohibited conduct will receive a hearing on the merits in the Seventh, Eighth, or Ninth Circuits. An identically situated plaintiff in Michigan, Kentucky, Ohio, or Tennessee must rely on a public official threatening to prosecute before a court will act. (Unless, perhaps, the challenged law involves abortion; then the Sixth Circuit will find standing and an injury-in-fact regardless of past enforcement, warning letters, or citizen-suit provisions.)

And it is unlikely the circuit conflict will be alleviated absent this Court's action. McKay petitioned for rehearing en banc in this very case, and the Sixth Circuit declined to resolve the conflict, over the dissent of Judges Rogers and Griffin. App. 79a.

Any delay in resolving the conflict harms citizens, the government, and the justice system. If the Sixth Circuit is correct, then courts in numerous other circuits have opened the courthouse doors too widely for First Amendment challenges and are needlessly holding merits hearings in cases that do not fall within Article III jurisdiction. Conversely, if the Seventh, Eighth, and Ninth Circuits are correct, then citizens in the Sixth Circuit are being unlawfully denied an opportunity to be heard.

Moreover, this case is an ideal vehicle to resolve the pre-enforcement standing conflict. There are no contested material facts, and this Court's immediate intervention will bring to a certain halt the widely divergent results for similarly-situated plaintiffs in pre-enforcement cases.

It is also appropriate for this Court to grant the petition and decide whether the First Amendment protects the right to record public courtroom proceedings. In a wide variety of contexts, citizen recordings serve as an unfiltered record of the conduct of government officials. This trend has been a boon to improving public performance and assuring accountability. Such information-gathering promotes government transparency and provides information that citizens can use in the electoral process.[1]

A recent pilot project in New York refutes "virtually all of the arguments that have been raised against permitting audio-visual coverage of court proceedings." National Press Photographers Ass'n, Comments on Proposed Amendment of 22 NYCRR parts 29 and 131 (Nov. 13, 2015), available at https://goo.gl/euMA1G (summarizing results). This Court should not only hold that McKay has standing, it should consider whether, in this age of electronic media, the First Amendment protects the right to record public courtroom proceedings as well.

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[1] For example, nearly all Michigan judges are elected to their office. Mich. Comp. Laws §§ 168.396 (Michigan Supreme Court justices); 168.409e(1) (Michigan Court of Appeals judges); 168.416(1) (Michigan Circuit Court judges); 168.436(1) (Michigan Probate Court judges); 168.467f(1) (Michigan District Court judges); 168.426i(1) (Michigan Municipal Court judges).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT MCKAY, *Plaintiff-Appellant*, *v.* WILLIAM L. FEDERSPIEL; RANDY F. PFAU, *Defendants-Appellees*.	No. 15-1548

Appeal from the United States District Court
for the Eastern District of Michigan at Bay City.
No. 1:14-cv-10252—Thomas L. Ludington,
District Judge.

Argued: December 8, 2015

Decided and Filed: May 20, 2016

Before: STRANCH, DONALD, and LIPEZ, Circuit Judges.*

COUNSEL

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* The Honorable Kermit V. Lipez, Circuit Judge for the United States Court of Appeals for the First Circuit, sitting by designation.

ON BRIEF: Philip Lee Ellison, OUTSIDE LEGAL COUNSEL PLC, Hemlock, Michigan, for Appellant. Karen M. Daley, CUMMINGS, MCCLOREY, DAVIS & ACHO, P.L.C., Livonia, Michigan, for Appellees.

OPINION

JANE B. STRANCH, Circuit Judge. This case seeks to present significant issues concerning the ever-advancing march of technology and its role in courts and court facilities. The outcome of this case, however, is governed by the more particular issue of legal standing. Here, the chief judges of Saginaw County, Michigan issued a joint administrative order limiting the use of electronic devices in courtrooms and court-related facilities in the Saginaw County Governmental Center. Robert McKay, a resident of neighboring Tuscola County who states that he wishes to record law enforcement officers' and judges' activities inside the Governmental Center, contends that the administrative order violates his federal constitutional rights. Upon consideration of two sets of cross-motions for summary judgment, the district court concluded that McKay lacks standing to challenge the order prior to its enforcement. For the reasons that follow, we **AFFIRM**.

I. BACKGROUND

The Saginaw County Governmental Center houses the Saginaw County Tenth Circuit Court, Probate Court, and Seventieth District Court, as well as various county legislative and executive offices, officials, and staff. In August 2013, a subcommittee of the Saginaw County Board of Commissioners held a public meeting to discuss a proposed ordinance

that would prohibit possession or use of electronic devices within the entire Governmental Center. McKay attended the meeting and spoke against the ordinance. The commissioners postponed making a decision, however, and the proposed ordinance never came up for further discussion or for a vote.

A few months later, on October 30th, the chief judges of the Tenth Circuit Court, Probate Court, and Seventieth District Court of Saginaw County issued a joint administrative order prohibiting unauthorized possession or use of certain electronic devices in "court related facilities" in the Governmental Center. Specifically, the order—entitled "Electronic Device Policy"—provides 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
> - electronic communication devices

(R. 35-2, PageID 477.) The order defines "[c]ourt related facilities" as "the Saginaw County Circuit Court, District Court, and Probate Court (including the entire Juvenile/Family Court facility) courtrooms, court administrative offices, Friend of the Court offices, probation offices, and related common areas." (*Id.*) And, under the order, "[e]lectronic communication devices" include "any device capable of communicating information from one person to another, including cell phones, pagers, two way radios, and laptop/notebook/tablet computers." (*Id.*) The order further states that "[a]ll persons and property . . . entering court related facilities are subject to

search by Sheriff Deputies for the purpose of enforcing this order" and that "[f]ailure to comply with this order may result in appropriate sanctions, including (A) being summarily barred or removed from court related facilities, and/or (B) imposition of a fine, including confiscation of any offending device, incarceration, or both for contempt of court." (*Id.* at PageID 477, 478.)

The Saginaw County Sheriff's Department—led by Sheriff William Federspiel—handles security at the Governmental Center. Shortly after the Saginaw County judges issued the electronic device order, Lieutenant Randy Pfau circulated an internal memorandum to all Sheriff's Department personnel. The memo explained:

> Starting 16 December 2013 there will be no electronic recording device allowed (cell phone, camera, tablets, laptop computers, e[tc].) in the Saginaw County Courthouse by any members of the public. If they are brought in they will be treated as any other restricted item and people will be able to take them back to their cars.
>
> This is a policy that was established by the courts to stop the use of audio and video recordings being taken by the public and released to identify or harass witnesses. This policy is already common in neighboring counties and has been for some time. This policy will exclude the following persons:
>
> 1) Courthouse employees
> 2) Active members of the State Bar of Michigan

> 3) Law enforcement person[nel] acting in that capacity
>
> 4) Probation and Parole officers acting in that capacity
>
> 5) Representatives of media agencies authorized pursuant to AO 1989-1
>
> 6) Individuals granted ad hoc permission by an authorized judge.
>
> Persons 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.
>
> There is a permit that will be available for people coming for weddings and other official times that an electronic device may be needed (see attached permit sample). The permits will be available with the Circuit court or at the Deputies['] discretion. . . .

(R. 35-3, PageID 479–80.)

McKay filed the instant lawsuit in January 2014, arguing that the electronic device order is unconstitutional both on its face and as applied to him, and seeking injunctive and declaratory relief to prevent Federspiel and Pfau from enforcing the order. McKay's amended complaint alleges that he "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" in the Saginaw County Governmental Center. (R. 75, PageID 1384.) He further contends that the electronic device order violates the First, Fourteenth, and Fifth Amend-

ments to the United States Constitution. McKay does not allege that he has requested or been denied judicial permission to use a prohibited electronic device in the Governmental Center, nor does he allege any attempts to enter the building with such a prohibited device. Instead, McKay maintains that he "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 jail[ed] for 93 days for exercising his constitutional rights." (*Id.* at PageID 1383.)

The district court denied McKay's request for a preliminary injunction and later entered summary judgment against McKay with respect to his First Amendment claims after the parties cross-moved for partial summary judgment. After a second round of summary judgment briefing on the remaining counts, the court also entered summary judgment against McKay with respect to his Fourteenth and Fifth Amendment claims. The district court held, among other things, that McKay failed to show any legally cognizable injury and therefore lacked constitutional standing to bring any of his asserted causes of action. McKay timely appealed from both summary judgment orders.

II. STANDARD OF REVIEW

This court reviews de novo a district court's grant of summary judgment and dismissal for lack of standing. *See Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 980 (6th Cir. 2012). Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing

law[,]" and a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At the summary judgment stage, we consider the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Chapman v. UAW Local 1005*, 670 F.3d 677, 680 (6th Cir. 2012) (en banc). And where, as here, the parties filed cross-motions for summary judgment, "the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991) (quoting *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987)).

III. DISCUSSION

We address McKay's First Amendment claims and the first order for summary judgment before turning to his Fourteenth and Fifth Amendment claims and the second order for summary judgment.

A. First Amendment Claims

McKay argues that he has a First Amendment right to record trial and other activities in the Saginaw County Governmental Center and that the electronic device order improperly infringes upon that right. Before he can invoke this court's jurisdiction, however, McKay must demonstrate that he has standing to assert his First Amendment claims.

1. Legal Standard

Article III of the United States Constitution limits federal courts' jurisdiction to certain "Cases" and "Controversies[,]" U.S. Const. art. 3, § 2, and

"[t]he doctrine of standing gives meaning to these constitutional limits by 'identif[ying] those disputes which are appropriately resolved through the judicial process[,]'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (second alteration in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In essence, the standing doctrine prompts courts to inquire "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Courts assess constitutional standing in three parts, considering whether or not the plaintiff has alleged an "injury in fact" that is "fairly traceable to the challenged action of the defendant" and is capable of being "redressed" by the court. *Lujan*, 504 U.S. at 560–61; *see also Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 608 (6th Cir. 2008). "The party invoking federal jurisdiction bears the burden of establishing these elements[,]" *Lujan*, 504 U.S. at 561, and a plaintiff invoking jurisdiction must "show[] that he has standing for each type of relief sought[,]" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Moreover, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. This means that, "in response to a summary judgment motion," a plaintiff cannot rely on "mere allegations" with respect to each standing element, "but must set forth by affidavit or other evidence specific facts, which for purposes of the summary

judgment motion will be taken to be true." *Id.* (internal citation omitted).

"In a pre-enforcement challenge, whether the plaintiff has standing to sue often turns upon whether he can demonstrate an 'injury in fact' before the state has actually commenced an enforcement proceeding against him." *Kiser v. Reitz*, 765 F.3d 601, 607 (6th Cir. 2014). The Supreme Court has recognized that "[a]n allegation of future injury may" satisfy the injury-in-fact requirement if the alleged "threatened injury is 'certainly impending,' or there is a'substantial risk that the harm will occur.'" *Susan B. Anthony List*, 134 S. Ct. at 2341 (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147, 1150 n.5 (2013)). Specifically, "a plaintiff satisfies the injury-in-fact requirement" in the pre-enforcement context "where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder.'" *Id.* at 2342 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

2. Analysis

With respect to intent in the present case, the only record evidence regarding McKay's intended course of conduct at the time the district court ruled on the parties' first cross-motions for summary judgment was the allegation in McKay's amended complaint that he

> 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.

(R. 75, PageID 1384.) These allegations, without more, cannot establish McKay's intended conduct "with the manner and degree of evidence required" for standing purposes at the summary judgment stage. *Lujan*, 504 U.S. at 561. While "mere allegations" might have been enough to survive a standing challenge at the motion to dismiss stage, they are insufficient to carry McKay past summary judgment. *Id.* McKay also points to an affidavit that he later filed regarding his intended actions. That affidavit repeats the above-quoted language from McKay's amended complaint and further states that "[b]ut 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" and would do so "quietly, noiselessly, and without [in] any way [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." (R. 68-5, PageID 128, 1285.) But McKay did not file his affidavit until *after* the court's entry of partial summary judgment on the First Amendment claims, and "[i]n general, an appellate court reviewing a grant of summary judgment cannot consider evidence that was not before the district court at the time of its ruling." *Good v. Ohio Edison Co.*, 149 F.3d 413, 421 n.16 (6th Cir. 1998); *see also* Fed. R. App. P. 10(a). We may consider McKay's late-filed affidavit "for the sake of thoroughness" because it will not change the outcome of our analysis. *Good*, 149 F.3d at 421 n.16; *see also* 16A Charles Alan Wright et al., *Federal Practice & Procedure* § 3956.1 (4th ed. 2008). Even if

McKay's affidavit constitutes sufficient summary judgment evidence of his intended conduct, McKay would still have to show that such conduct is "arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder" to establish standing to bring suit under the First Amendment. *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298).

Federspiel and Pfau do not dispute that the electronic device order proscribes McKay's intended conduct, and a plain reading of the order suggests that it would apply to McKay's proposed recording unless he sought and received an exemption.[1] Assuming without deciding that McKay's proposed recording activities amount to conduct arguably affected with a constitutional interest, McKay must still show "a credible threat of prosecution" in order to establish a requisite injury-in-fact. *Id.*[2] "[W]ithout

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[1] *See infra* Part III.B.2.

[2] We assume for purposes of the standing inquiry in this case that the ban on recording courtroom proceedings may affect constitutional rights. Federspiel and Pfau challenge that premise, noting that both the Supreme Court and our circuit have declined to recognize a constitutional right to record courtroom proceedings. *See Estes v. State of Texas*, 381 U.S. 532, 539 (1965); *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988) (per curiam). McKay nevertheless points to the First Circuit's opinion in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), and the Eleventh Circuit's opinion in *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000), in support of his asserted right to record. McKay is correct that the *Glik* and *Smith* courts recognized a First Amendment right to videotape government officials carrying out their duties in public. *See Glik*, 655 F.3d at 82; *Smith*, 212 F.3d at 1333. But, as Federspiel and Pfau point out, neither of those cases concerned videotaping

[Footnote continued on next page]

some other indication of imminent enforcement[,]" our circuit has held that mere allegations of a "subjective chill" on protected speech are insufficient to establish an injury-in-fact for pre-enforcement standing purposes. *Berry v. Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012) (citing *Morrison*, 521 F.3d at 607). We have, however, found a credible threat of prosecution where plaintiffs allege a subjective chill *and* point to some combination of the following factors: (1) a history of past enforcement against the plaintiffs or others, *see, e.g.*, *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1049 (6th Cir. 2015); (2) enforcement warning letters sent to the plaintiffs regarding their specific conduct, *see, e.g.*, *Kiser v. Reitz*, 765 F.3d 601, 608–09 (6th Cir. 2014); *Berry*, 688 F.3d at 297; and/or (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action, *see Platt v. Bd. Of Comm'rs on Grievances & Discipline of the Ohio Supreme Court*, 769 F.3d 447, 452 (6th Cir. 2014). *See also Susan B. Anthony List*, 134 S. Ct. at 2345 (finding "substantial" "threat of future enforcement" based on "history of past enforcement[,]" statutory provision "allow[ing] 'any person' with knowledge of the purported violation to file a complaint[,]" and evidence that enforcement proceedings were common). We have also taken into consideration a defendant's refusal to disavow

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[Footnote continued from previous page]

activity inside a courtroom, and courtrooms are considered "nonpublic" spaces for First Amendment purposes under our precedent. *Mezibov v. Allen*, 411 F.3d 712, 718 (6th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006). Given our resolution of this case, we do not settle the competing arguments here.

enforcement of the challenged statute against a particular plaintiff. *See Kiser*, 765 F.3d at 609; *Platt*, 769 F.3d at 452. By contrast, we have declined to find a credible threat of prosecution—and, thus, declined to find pre-enforcement standing—where plaintiffs have failed to show such a combination and where "the record is silent as to whether the [defendants] threatened to punish or would have punished" a plaintiff for proposed conduct that might violate the challenged policy or statute. *Morrison*, 521 F.3d at 611.

In the instant case, McKay argues that he faces a credible threat of prosecution because: (1) the existence of the electronic device order implies a threat of enforcement; (2) there are "[s]igns around the Saginaw County Governmental Center . . . threat-[ening] enforcement" (Appellant's Br. at 21); and (3) Federspiel and Pfau "have never disavowed the enforcement of the . . . [o]rder against McKay" (*id.*). McKay relies on a case from the Seventh Circuit, *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010), for the proposition that the "existence of a statute implies a threat to prosecute," (Appellant's Br. at 20 (alteration omitted) (quoting *Bauer*, 620 F.3d at 708)). But unlike the judicial code of conduct at issue in *Bauer*, *see* 620 F.3d at 707, the electronic device order at issue here provides for exemptions on a case-by-case basis, which makes enforcement less certain given that McKay does not allege that he has requested (much less been denied) such an exemption.

As for the signs McKay references, the record contains evidence of multiple signs posted in and around the Governmental Center; many of them state that there are to be "NO Electronic Devices on"

certain floors and in certain specified areas of the building "without Judicial Permission[,]" and that "Violation May Result in Contempt Sanctions." (R. 44-6, PageID 756.) In both *Kiser* and *Berry*, we found a credible threat of enforcement based, in part, on the fact that the plaintiffs received multiple warning letters informing them that their specific conduct violated the laws challenged in those cases. *See Kiser*, 765 F.3d at 609; *Berry*, 688 F.3d at 297. The signs in the present case are distinguishable from those warning letters because the signs do not give rise to the same level of threatened enforcement—unlike the letters in *Kiser* and *Berry*, the signs in the present case address the general public, not McKay specifically or any of his past conduct, and the signs also reference the possibility of an exemption by judicial permission.

Finally, the issue of disavowal in this case appears to be more nuanced than McKay suggests. Federspiel and Pfau filed an affidavit from Lt. Pfau stating that deputy sheriffs have no independent authority to enforce the challenged order. Pfau maintains that:

> Sheriff's Deputies have been instructed not to detain[] any individual thought to be in violation of the Local Administrative Order or to confiscate any device maintained by any individual found to be in violation of the Local Administrative Order unless directed to do so by a Judge of the Saginaw County Courts.

(R. 44-9, PageID 791.) McKay has not pointed to any record evidence to dispute this testimony and, even construed in the light most favorable to McKay, Pfau's affidavit suggests that any threat of enforce-

ment against McKay or others is less immediate than McKay contends.

More importantly, the record is silent regarding any history of past enforcement of the order against McKay or anyone else. There is simply no evidence in the current record that anyone has ever been held in contempt—or even subject to contempt proceedings—for violating the challenged order. McKay is correct that "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging" the electronic device order on constitutional grounds. *Susan B. Anthony List*, 134 S. Ct. at 2342. Nevertheless, under our precedent, McKay has not set forth the manner and degree of evidence required to demonstrate a credible threat of enforcement at the summary judgment stage, especially since he has not yet sought an administrative exemption from the challenged order. Consequently, based on the current record, we conclude that McKay lacks standing to bring his First Amendment claims. We express no opinion on the merits of McKay's First Amendment arguments.

B. Fourteenth And Fifth Amendment Claims

McKay further asserts that the electronic device order violates his right to equal protection under the Fourteenth Amendment and is void for vagueness under the Fifth Amendment. As explained, McKay bears the burden of establishing this court's jurisdiction to hear his claims. *See Lujan*, 504 U.S. at 561.

1. Legal Standard

The standard for demonstrating a pre-enforcement injury-in-fact—and, thus, establishing a necessary element of standing—with respect to

McKay's Fourteenth Amendment claim parallels the standard for his First Amendment claim: McKay must allege "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298); *see also Babbitt*, 442 U.S. at 297–99 (applying single standard to analyze plaintiffs' pre-enforcement standing with respect to First and Fourteenth Amendment claims); *Platt*, 769 F.3d at 450–52 (same). In regard to McKay's ability to maintain his Fifth Amendment vagueness claim, our circuit has held that "[e]ven if a statute might be vague as it relates to other, hypothetical [individuals], courts will not entertain vagueness challenges on behalf of [individuals] whose conduct clearly falls within the ambit of the statute." *United States v. Kernell*, 667 F.3d 746, 750 (6th Cir. 2012). In other words, and as relevant in the instant case, if the electronic device order's prohibitions are not vague with respect to McKay's proposed conduct, then he lacks standing to challenge the order on vagueness grounds. This means that in addition to meeting the constitutional standing requirements discussed above—an injury-in-fact fairly traceable to the challenged actions that is capable of being redressed by the court, *see Lujan*, 504 U.S. at 560–61—to pursue his vagueness challenge McKay must also show that his proposed conduct does not clearly fall within the scope of the electronic device order.

2. Analysis

Because McKay filed the affidavit regarding his intended conduct with his second crossmotion for summary judgment—which concerned his Four-

teenth and Fifth Amendment claims—the affidavit is properly included in the appellate record with respect to this part of McKay's appeal. *See* Fed. R. App. P. 10(a). The standing analysis for McKay's Fourteenth Amendment equal protection challenge substantially mirrors the analysis for his First Amendment claim. The outcome is the same: Even if his proposed recording arguably implicates a constitutional interest, McKay still has not shown a credible threat of prosecution, with the manner and degree of evidence required to withstand summary judgment.

As for McKay's Fifth Amendment standing and whether or not McKay's proposed conduct falls within the ambit of the electronic device order, McKay states in his affidavit that he intends to use "a modern recording device . . . like an iPhone" 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." (R. 68-5, PageID 1285, 1284.) McKay has further clarified that he intends "to record . . . inside and just outside the publicly-open courtrooms in the" building. (Appellant's Br. at 28 n.13 (emphasis omitted).) McKay does not appear to dispute that the challenged order would extend to his choice of recording device. Instead, McKay argues that the phrase "related common areas" in the order's definition of "court related facilities" is unconstitutionally vague because it "fail[s] to inform him and the public what constitutes 'related common areas' within the Saginaw County Governmental Center[.]" (*Id.* at 46.) Because the order expressly prohibits the possession or use of electronic communication devices in "court-

rooms," (R. 35-2, PageID 477), it is beyond debate that the order encompasses McKay's proposed recording of courtroom proceedings. And a plain reading of the order suggests that "related common areas" at a minimum includes the areas "just outside the publicly-open courtrooms" where McKay also allegedly intends to record. The electronic device order therefore clearly covers McKay's proposed conduct, depriving him of standing to challenge the order on vagueness grounds. *See Kernell*, 667 F.3d at 750.

IV. CONCLUSION

In light of the sparse appellate record in the instant case and the constraints of our precedent, we cannot say that McKay has carried his burden to establish standing with respect to any of his claims in the manner and degree required at summary judgment. We therefore **AFFIRM**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ROBERT W. McKAY,

Plaintiff,

v.

WILLIAM L. FEDERSPIEL, and RANDY F. PFAU,

Defendants.

Case No. 14-cv-10252

Honorable Thomas L. Ludington

OPINION AND ORDER GRANTING DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT, DISMISSING COUNTS II & IV OF FIRST AMENDED COMPLAINT WITHOUT PREJUDICE, AND DENYING MOTIONS FOR CERTIFICATE OF APPEALABILITY AS MOOT

Once more, this case is before the Court on dispositive pretrial motions. Plaintiff Robert McKay and Defendants William Federspiel and Randy Pfau have filed cross-motions for summary judgment. ECF Nos. 67 & 68. The facts of this case, again, are as follows.

Plaintiff Robert McKay challenges the constitutionality of an administrative order issued by the Saginaw County Circuit Court. The administrative order (the "Electronics Ban Order" or "Ban Order") prohibits members of the public from possessing and using cell phones, cameras, and other electronic communication devices in certain areas of the Saginaw

County Governmental Center. McKay alleges that the Electronics Ban Order violates the First, Fifth, and Fourteenth Amendments of the United States Constitution that protect his right "to attend, observe, and *record* matters of public concern" within the Saginaw County Governmental Center. Compl. ¶ 1, ECF No. 1 (emphasis original).

McKay seeks summary judgment on Count II of his complaint, his void-for-vagueness challenge to the Electronics Ban Order. Defendants request summary judgment on Counts II & VI of McKay's complaint, the void-for-vagueness challenge and McKay's claim that the Ban Order runs afoul of the Equal Protection Clause of the Fourteenth Amendment. Because McKay lacks standing to bring either of these claims, Defendants' motion will be granted and McKay's complaint will be dismissed.

I.

Robert McKay is a Tuscola County resident who is "politically active in the elimination of administrative orders, issued by local judges, to conduct proceedings without the benefit of public recording." Pl.'s Mot. Summ. J. 2. On August 7, 2013, the Saginaw County Board of Commissioners entertained a proposed ordinance that would ban devices from being brought into the Saginaw County Governmental Center. *Id*. at 3. The Saginaw County Governmental Center houses the legislative and executive offices of Saginaw County, including the Saginaw County Board of Commissioners, County Treasurer, County Clerk, Register of Deeds, as well as judicial offices and courtrooms for the Tenth Circuit Court of Saginaw County, the Seventieth District Court of Saginaw County, the Probate Court

of Saginaw County, and the Saginaw County Friend of the Court. *Id.*

A.

McKay appeared at the Saginaw County Board of Commissioners' meeting to voice his opposition to the proposed ordinance. *Id.* McKay "argued regarding the unfairness for certain groups of people to not have to comply with the same rules as other citizens and asked the Committee to not approve the proposed ordinance." *Id.* at 3-4. After listening to McKay and other citizens speak, the Board of Commissioners postponed its decision on the proposed ordinance. *Id.* at 4. The proposed ordinance restricting electronics throughout the entire Governmental Center was never brought back to the table for further consideration. *Id.*

When the Board of Commissioners did not approve the proposed ordinance, the Chief Judges of the Saginaw County Courts issued an Electronics Ban Order, which prohibits many types of electronic devices in the courtrooms and surrounding areas. Pl.'s Mot. Summ. J. Ex. A. The Electronics Ban Order provides:

> 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
> - electronic communication devices
>
> Electronic communication devices include any device capable of communicating information from one person to another, including

> cell phones, pagers, two way radios, and laptop/notebook/tablet computers.
>
> Court related facilities include the Saginaw County Circuit Court, District Court, and Probate Court (including the entire Juvenile/ Family Court facility) courtrooms, court administrative offices, Friend of the Court offices, probation offices, and related common areas.

Id. The Electronics Ban Order is intended to address at least three problems: "ring tones disrupting proceedings, spectators photographing witnesses, jurors conducting on-line research, etc." Mot. Prelim. Inj., Ex. C, ECF No. 2.

A person may be exempted from the Electronic Ban Order with a judge's permission. For example, the Chief Judges have exempted attorneys—who are licensed and regulated by the State Bar of Michigan—from the Electronic Ban Order: "This significant exception recognizes that attorneys are officers of the court, increasingly dependent on electronic devices to conduct on-line research, assist in presentations, manage schedules, gain access to office and colleagues, etc., and yet appreciate the need to maintain decorum." Mot. Prelim. Inj., Ex. C; *see also* Mich. Ct. R. 8.109(B) ("The court may regulate the manner of audio or photographic recording so that it does not disrupt the proceeding."). In addition, it appears that some media outlets have already obtained permission to take photographs during criminal trials. *See* Mot. Prelim. Inj., Ex. D, E. Violation of the Electronics Ban Order "may result in appropriate sanctions, including (A) being summarily barred or removed from court related facilities, and/or (B) imposition of a fine, including confis-

cation of any offending device, incarceration, or both for contempt of court." Pl.'s Mot. Summ. J., Ex. A.

On December 13, 2013, Lieutenant Randy Pfau sent a memo to all Sheriff's Department personnel alerting them of the recently instituted Electronics Ban Order. Pl.'s Mot. Summ. J., Ex. B. Pfau explained that if prohibited electronics "are brought in they will be treated as any other restricted item and people will be able to take them back to their cars. . . . Persons 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." *Id*.

B.

McKay filed a motion for preliminary injunction on January 20, 2014, seeking to enjoin the Electronics Ban Order from taking effect. Mot. Preliminary Injunc. 2. The injunction was denied because (1) McKay did not have standing to challenge the Electronics Ban Order as applied inside the courtrooms, and (2) the parties had provided insufficient factual information to determine whether the Electronics Ban Order was unconstitutional as applied to the common areas outside the courtrooms. Order 21, ECF No. 30.

On August 15, 2014, McKay filed a motion for summary judgment on Count V of the Complaint, which alleges that the Electronics Ban Order gives government officials "unbridled discretion" in choosing who may photograph and record events inside the Saginaw County Government Center. Pl.'s Mot. Summ. J. 1, ECF No. 35. Defendants also filed a motion for summary judgment, seeking dismissal of

all of McKay's First Amendment claims.[1] Defs.' Mot. Summ. J. 35, ECF No. 44. Because the Electronics Ban Order does not infringe on McKay's First Amendment rights, his motion for summary judgment was denied and Defendants' motion for summary judgment was granted. Op. & Order Denying Pl.'s Mot. Summ. J. & Granting In Part and Denying In Part Def.'s Mot. Summ. J., ECF No. 52. McKay sought reconsideration of that opinion. ECF No. 56. That relief was not granted. ECF No. 64.

The parties then sought to file second motions for summary judgment on the two claims, Counts II and VI, that went unaddressed in the first round of summary judgment briefing. ECF No. 65. That permission was granted. *Id*.; *see also* E.D.MICH. L.R. 7(b)(2) ("A party must obtain leave of court to file more than one motion for summary judgment."). The parties then filed additional cross-motions for summary judgment which are now before the Court. ECF Nos. 67 & 68. Defendants allege that McKay lacks standing to bring his void-for-vagueness and equal protection claims. Def.'s Second Mot. Summ. J. 11-15 & 19-21, ECF No. 67. In the alternative, he argues that both challenges are meritless, since his conduct is plainly proscribed by the Ban Order and because McKay cannot establish the necessary showing of disparate treatment as a class of one. *Id*. at 15-19 & 21-26. McKay argues that summary judgment is appropriate on Count II because the Ban Order is a criminal penalty that insufficiently describes the

[1] Defendants' first motion for summary judgment did not seek summary judgment on McKay's Fifth and Fourteenth Amendment claims.

behavior that it penalizes. Pl.'s Second Mot. Summ. J., ECF No. 68.

Since McKay does not have standing to pursue either Count II or VI of his First Amended Complaint, Defendants motion for summary judgment will be granted. As a result, McKay's second motion for summary judgment will be denied and his complaint will be dismissed. Lastly, McKay's pending request for a certificate of appealability to pursue an interlocutory review of this Court's December 11, 2014 Opinion and Order will be denied. The request is mooted by the final disposition of his claim and entry of judgment.

II.

A motion for summary judgment should be granted if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The focus must be "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251–52 (1986). The moving party has the initial burden of identifying where to look in the record for evidence "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the opposing party who must set out specific facts showing "a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (citation omitted).

The Court must view the evidence and draw all reasonable inferences in favor of the nonmovant and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52, *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "Entry of summary judgment is appropriate 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Walton v. Ford Motor Co.*, 424 F.3d 481, 485 (6th Cir. 2005) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). "The fact that the parties have filed cross-motions for summary judgment does not mean, of course, that summary judgment for one side or the other is necessarily appropriate." *Parks v. LaFace Records*, 329 F.3d 437, 444 (6th Cir. 2003). Each motion must be evaluated on its own merits and all facts viewed and inference drawn "in the light most favorable to the nonmoving party." *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003).

III.

The parties now bring cross-motions for summary judgment. Defendants move for summary judgment on Counts II & VI of McKay's First Amended Complaint. McKay moves for summary judgment on Count II of his complaint.

As an initial matter, Defendants contest McKay's standing to pursue the claims he brings in Counts II & VI. Since McKay does indeed lack standing to bring these claims it is unnecessary to examine the merits of either count. Defendants' motion for sum-

mary judgment will be granted on this ground and Counts II & VI of McKay's First Amended Complaint will be dismissed without prejudice.

A.

Defendants' first challenge McKay's standing to bring his void-for-vagueness claim. Primarily, Defendants allege that McKay cannot show that he is asserting his own rights, rather than the rights of a third party—a requisite to meet the prudential standing requirements. Defendants also challenge McKay's ability to meet the constitutional injury-in-fact standing requirement of Article III.

1.

McKay answers the first allegation by Defendants—that he is not asserting his own rights—by averring that it is indeed he who seeks to record inside the Saginaw County courts and court buildings but feels that he is unable to do so. For Defendants, this averment is insufficient. But, to the contrary, McKay need not allege more at this stage than his own desire to record.[2]

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[2] In support of their claim that McKay is not actually pursuing his own rights Defendants marshal the support of *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, which provides:

> The court should . . . examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine

[Footnote continued on next page]

McKay alleges that he desires to engage in behavior that he fears may be prohibited by the vague Ban Order. On this basis McKay claims that the act is void-for-vagueness as it is applied to his conduct. There is no indication in any of McKay's pleadings that he is not actually seeking to vindicate his own rights or that he is not sincere in his claims of a perceived personal wrong. McKay does not lack prudential standing to bring Count II of his complaint.

2.

Defendants also raise constitutional standing concerns. Specifically, they claim that McKay cannot show the requisite injury-in-fact to maintain constitutional standing under Article III. McKay responds to this claim by answering that he faces a significant

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[Footnote continued from previous page]

> the complainant's conduct before analyzing other hypothetical applications of the law.

455 U.S. 489, 494-95 (1982). But the Supreme Court's admonition in *Hoffman Estates* does not address whether a plaintiff has standing to bring an as applied void-for-vagueness claim. Rather, *Hoffman Estates* explains the manner in which a court should proceed through a void-for-vagueness claim. That is, a court should not proceed to address a facial challenge if an as-applied challenge fails.

In some respect, then, *Hoffman Estates* and similar cases speak to prudential standing concerns when a plaintiff levies a facial void-for-vagueness challenge. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 755-756 (1974) (overturning lower court decision where that court determined plaintiff "had standing to challenge the vagueness of [a statute] as they might be hypothetically applied to the conduct of others, even though he was squarely within their prohibitions"). It does not address standing to pursue claims of as-applied vagueness. As such, it is not helpful here.

probability of future harm, and so he meets the imminence requirement of constitutional standing. But McKay's future harm is merely speculative at this point. So much so that he actually does not meet the constitutional standing requirements. For that reason, McKay's claim will be dismissed for lack of standing.

Unlike First Amendment overbreadth challenges, "[t]he void for vagueness doctrine . . . requires the person raising it to show that **he himself** has been injured by the overly broad language." *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1135 n.14 (3d Cir. 1992) (emphasis added). Vagueness challenges, like all other cases brought in federal court, must meet the three constitutional standing requirements. *Harrell v. The Florida Bar*, 608 F.3d 1241, 1253-54 (11th Cir. 2010).

> First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision. The party invoking federal jurisdiction bears the burden of establishing these elements.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations and quotation marks omitted). McKay cannot satisfy this first element.

In *Lujan*, the Supreme Court notably held that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Id*. But, the Court went on, "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id*. (internal citations and quotation marks omitted). McKay's interests are not much different. He seeks to observe an animal species (those partaking in legal proceedings) and record them while doing so. But like the plaintiffs in *Lujan*, he must show more than a bare desire to view and record. Currently, he has not.

In *Lujan*, a collection of environmental defense groups brought a challenge to a rule promulgated by the Secretary of the interior. 504 U.S. at 558. The Secretary had interpreted a consultation requirement in Endangered Species Act as applying only within the territorial United States and on the high seas.[3] The environmental defense groups filed suit

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[3] That requirement reads:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.

16 U.S.C. § 1536(a)(2).

"seeking a declaratory judgment that the new regulation is in error as to [its] geographic scope . . . and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation." *Id*. at 559. These groups claimed that their "injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." *Id*. at 562 (quoting Complaint ¶ 5).

A subset of the plaintiffs' individual members submitted affidavits attesting to the harm being done to certain "animal species," which thereby reduced the likelihood the plaintiffs could later observe them. But when deposed, the plaintiffs admitted that they had no concrete plans to return to Sri Lanka to view those species. The fact that the plaintiffs only possessed an intent, but not a ticket, to return to Sri Lanka "d[id] not support a finding of the 'actual or imminent' injury that our cases require." *Id*. at 564. Similarly, here, McKay's "someday" desire to record court activities—and his reticence to because he fears what may result—are insufficient to support his claim.

In fact, McKay explains his claim's deficiency when he states that "there is clearly actual present harm or at least 'significant possibility of future harm' by Plaintiff undertaking this activity without a proper opportunity to know what is prohibited by the Electronics Ban Order itself." ECF No. 68 at 4. That is, he acknowledges that he is requesting an advisory opinion. The United States Federal Courts have never rendered such an opinion and the Article III standing requirements are directed at ensuring no such opinion is ever rendered. *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89

(1947) ("As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions."); *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (reiterating that the case or controversy requirements of Article III ensures that federal courts to [sic] not render advisory opinions). 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. Count II of McKay's complaint will be dismissed without prejudice.

B.

Next, Defendants challenge Count VI of McKay's complaint. They assert that this count, pled as a claim that the Electronic Ban Order violates the Equal Protection Clause, fails as a matter of law. As they did with respect to Count II, however, Defendants first allege that McKay does not have standing to bring his Equal Protection claim. McKay does not respond to this allegation in his response brief but instead proceeds directly to the merits of his equal protection claim.

The standing analysis for equal protection claims is indistinguishable from that set forth above. *See supra* § III.A. Likewise, the analysis of McKay's claim is indistinguishable. Even if he were to allege a "class of one" Equal Protection claim, he does not satisfy the requirements for constitutional standing. "The 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be [him]self among the injured." *Swanson v. City of Chetek*, 719 F.3d 780, 783 (7th Cir. 2013), *reh'g and suggestion for reh'g en banc*

denied (July 12, 2013) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972)). In *Swanson*, the Seventh Circuit held that a resident of a property did not have standing to bring an Equal Protection class of one claim. While she often acted as the agent of the homeowner, with whom she was cohabitating on site, it was the homeowner, not her, whom the city sued and fined for ordinance violations. Although "she may have felt frustrated by the bureaucratic run-around she encountered, the legally protected interests at issue belonged to [the homeowner]." *Id*. at 783.

More importantly for McKay, the Seventh Circuit went on to hold that "[b]ecause [she] was not the subject of any municipal citation, and was not the object of any government action, [she] has not suffered an 'injury in fact,' and has not satisfied the first element of standing." *Id*. Same with McKay. He has not been on the receiving end of any municipal action or citation. He has not suffered any allegedly irrational application of the exemption provision. He has not been injured. Absent any such allegations he does not satisfy the requirements of Article III and Count VI of his complaint will be dismissed without prejudice.

IV.

Accordingly, it is **ORDERED** that Defendants' Second Motion for Summary Judgment, ECF No. 67, is **GRANTED**.

It is further **ORDERED** that Plaintiff McKay's Second Motion for Summary Judgment, ECF No. 68, is **DENIED**.

It is further **ORDERED** that Counts II & VI of Plaintiff McKay's First Amended Complaint, ECF No. 75, are **DISMISSED without prejudice**.[4]

It is further **ORDERED** that Plaintiff McKay's Motions for a Certificate of Appealability, ECF Nos. 53 & 54, are **DENIED as moot**.

Dated: April 13, 2015

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on April 13, 2015.

s/Karri Sandusky
Karri Sandusky,
Acting Case Manager

[4] Because these were the only remaining counts of McKay's First Amended Complaint that had not been dismissed, Judgment will be entered against McKay in conjunction with the issuance of this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ROBERT W. McKAY,

Plaintiff,

v.

WILLIAM L. FEDERSPIEL, and RANDY F. PFAU,

Defendants.

Case No. 14-cv-10252

Honorable Thomas L. Ludington

ORDER GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Robert McKay challenges the constitutionality of an administrative order issued by the Saginaw County Circuit Court. The administrative order (the "Electronics Ban Order") prohibits members of the public from possessing and using cell phones, cameras, and other electronic communication devices in certain areas of the Saginaw County Governmental Center. McKay alleges that the Electronics Ban Order violates the First, Fifth, and Fourteenth Amendments of the United States Constitution that protect his right "to attend, observe, and *record* matters of public concern" within the Saginaw County Governmental Center. Compl. ¶ 1, ECF No. 1 (emphasis original).

McKay filed a motion for preliminary injunction on January 20, 2014, seeking to enjoin the Electronics Ban Order from taking effect. Mot. Preliminary Injunc. 2. This Court denied the injunction because (1) McKay did not have standing to challenge the Electronics Ban Order as applied inside the courtrooms, and (2) the parties had provided insufficient factual information to determine whether the Electronics Ban Order was unconstitutional as applied to the common areas outside the courtrooms. Order 21, ECF No. 30.

On August 15, 2014, McKay filed a motion for summary judgment on Count V of the Complaint, which alleges that the Electronics Ban Order gives government officials "unbridled discretion" in choosing who may photograph and record events inside the Saginaw County Government Center. Pl.'s Mot. Summ. J. 1, ECF No. 35. Defendants also filed a motion for summary judgment, seeking dismissal of all of McKay's First Amendment claims.[1] Defs.' Mot. Summ. J. 35, ECF No. 44. Because the Electronics Ban Order does not infringe on McKay's First Amendment rights, his motion for summary judgment will be denied and Defendants' motion for summary judgment will be granted.

I

Robert McKay is a Tuscola County resident who is "politically active in the elimination of

[1] Defendants' motion for summary judgment does not, however, seek summary judgment on McKay's Fifth and Fourteenth Amendment claims.

administrative orders, issued by local judges, to conduct proceedings without the benefit of public recording." Pl.'s Mot. Summ. J. 2. On August 7, 2013, the Saginaw County Board of Commissioners entertained a proposed ordinance that would ban devices from being brought into the Saginaw County Governmental Center. *Id.* at 3. The Saginaw County Governmental Center houses the legislative and executive offices of Saginaw County, including the Saginaw County Board of Commissioners, County Treasurer, County Clerk, Register of Deeds, as well as judicial offices and courtrooms for the Tenth Circuit Court of Saginaw County, the Seventieth District Court of Saginaw County, the Probate Court of Saginaw County, and the Saginaw County Friend of the Court. *Id.*

McKay appeared at the Saginaw County Board of Commissioners' meeting to voice his opposition to the proposed ordinance. *Id.* McKay "argued regarding the unfairness for certain groups of people to not have to comply with the same rules as other citizens and asked the Committee to not approve the proposed ordinance." *Id.* at 3–4. After listening to McKay and other citizens speak, the Board of Commissioners postponed its decision on the proposed ordinance. *Id.* at 4. The proposed ordinance restricting electronics throughout the entire Governmental Center was never brought back to the table for further consideration. *Id.*

When the Board of Commissioners did not approve the proposed ordinance, the Chief Judges of the Saginaw County Courts issued an Electronics Ban Order, which prohibits many types of electronic devices in the courtrooms and surrounding areas.

Pl.'s Mot. Summ. J. Ex. A. The Electronics Ban Order provides:

> 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 device
>
> • camera/photographic devices
>
> • electronic communication devices
>
> Electronic communication devices include any device capable of communicating information from one person to another, including cell phones, pagers, two way radios, and laptop/notebook/tablet computers.
>
> Court related facilities include the Saginaw County Circuit Court, District Court, and Probate Court (including the entire Juvenile/Family Court facility) courtrooms, court administrative offices, Friend of the Court offices, probation offices, and related common areas.

Id. The Electronics Ban Order is intended to address at least three problems: "ring tones disrupting proceedings, spectators photographing witnesses, jurors conducting on-line research, etc." Mot. Prelim. Inj., Ex. C, ECF No. 2.

A person may be exempted from the Electronic Ban Order with a judge's permission. For example, the Chief Judges have exempted attorneys—who are licensed and regulated by the State Bar of Michigan—from the Electronic Ban Order: "This significant exception recognizes that attorneys are

officers of the court, increasingly dependent on electronic devices to conduct on-line research, assist in presentations, manage schedules, gain access to office and colleagues, etc., and yet appreciate the need to maintain decorum." Mot. Prelim. Inj., Ex. C; *see also* Mich. Ct. R. 8.109(B) ("The court may regulate the manner of audio or photographic recording so that it does not disrupt the proceeding."). In addition, it appears that some media outlets have already obtained permission to take photographs during criminal trials. *See* Mot. Prelim. Inj., Ex. D, E. Violation of the Electronics Ban Order "may result in appropriate sanctions, including (A) being summarily barred or removed from court related facilities, and/or (B) imposition of a fine, including confiscation of any offending device, incarceration, or both for contempt of court." Pl.'s Mot. Summ. J., Ex. A.

On December 13, 2013, Lieutenant Randy Pfau sent a memo to all Sheriff's Department personnel alerting them of the recently instituted Electronics Ban Order. Pl.'s Mot. Summ. J., Ex. B. Pfau explained that if prohibited electronics "are brought in they will be treated as any other restricted item and people will be able to take them back to their cars.... Persons 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." *Id.*

II

A motion for summary judgment should be granted if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Fed.R.Civ.P. 56(a). The moving party has the initial burden of identifying where to look in the record for evidence "which it believes demonstrate the absence of a genuine issue of material fact ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the opposing party who must set out specific facts showing "a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citation omitted). The Court must view the evidence and draw all reasonable inferences in favor of the non-movant and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52.

III

Before addressing the merits of the motions, the question of whether McKay has standing to challenge the Electronics Ban Order must first be addressed. In its April 10, 2014 Order denying a preliminary injunction, this Court concluded that McKay lacked standing to challenge the Electronics Ban as applied inside the Saginaw County courtrooms. *See* Order, ECF No. 30.

The Court first noted that McKay had 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:

> He does not explain how a prohibition on creating his own private recording of judicial proceedings harms him. McKay may attend

> court proceedings, take notes for any purpose, and then report on the proceedings to the public. Moreover, he can request permission from the presiding judge to make a recording of the proceedings. Even if the presiding judge denies McKay's request, McKay can request an official transcript from the court. *See* Mich. Ct. R. 8.108(F) ("On order of the trial court, the court reporter or recorder shall make and file in the clerk's office a transcript of his or her records ... the transcript is part of the records in the case.").

Order 7.

Moreover, the Court noted that there is no First Amendment right to use electronic devices to record events inside a courtroom:

> The Electronics Ban Order does not prevent McKay from disseminating to the public any information he learns from attending courtroom proceedings. The Saginaw County Court has not denied McKay's right to attend and observe courtroom proceedings; it has only prohibited the use of electronic equipment inside the courtroom. The Supreme Court has explicitly disavowed that observers have a First Amendment right to use electronic equipment in the courtroom. *See Estes*, 381 U.S. at 539; *Chandler*, 449 U.S. at 569.

Id. at 10.[2]

On summary judgment, McKay does not address the question of his standing to challenge the Electronics Ban Order as applied inside the courtroom. He does not assert that he has suffered an actual injury by being prohibited from recording judicial proceedings *inside* the courtroom. Instead, he proceeds directly to his arguments under the First Amendment. But McKay's First Amendment arguments cannot be considered on the merits unless he has standing to present them; constitutional standing is a jurisdictional requirement. *See Tendercare (Michigan), Inc. v. Dana Corp.*, 2002 WL 31545992, at *2 (E.D.Mich. Oct.18, 2002) ("[T]his Court must address the standing issue first because standing is necessary to confer this Court with jurisdiction.") (citing *Ward v. Alternative Health Delivery Sys., Inc.*, 61 F.3d 624 (6th Cir.2001)).

Nothing in McKay's papers or in the record indicates that McKay has standing, and therefore this Court is without subject matter jurisdiction to hear his claims. Defendants' motion for summary judgment will be granted on McKay's claim that the

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[2] Even though this Court concluded that McKay lacked standing to assert this claim in its Order Denying a Preliminary Injunction, Defendants did not move to dismiss any portion of his complaint. Instead, they waited until the summary judgment stage to argue that McKay lacked standing. Dismissal for lack of standing is most appropriately brought, however, pursuant to Federal Rule of Civil Procedure 12(b)(1). *See Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 607 (6th Cir.2007) ("If Plaintiffs cannot establish constitutional standing, their claims must be dismissed for lack of subject matter jurisdiction.").

Electronics Ban Order as applied in the courtroom violates the First Amendment, and that claim will be dismissed without prejudice. *See Hyman v. City of Louisville*, 53 F. App'x 740, 744 (6th Cir.2002) (directing district court to dismiss plaintiff's claim without prejudice because plaintiff lacked standing to assert the claim).

IV

Alternatively, even if McKay had standing to challenge the Electronics Ban Order as applied inside the Saginaw County Courtrooms, he still would not prevail on his motion for summary judgment.

A

First, the applicable framework for analyzing McKay's alleged right to record events occurring inside the Saginaw County Courthouse must be determined. There are a variety to choose from, and the appropriate analysis depends on the specific First Amendment right at issue.

It is unclear which analysis McKay is relying on. He cites a multitude of cases that all apply different standards, but he does not address the differences and distinctions between each one. For example, McKay relies in part on *Carey v. Wolnitzek*, 614 F.3d 189, 200 (6th Cir.2010), for his assertion that the Electronics Ban Order must survive strict scrutiny analysis. *Carey* involved a content-based restriction on expressive activity: the Sixth Circuit analyzed whether a Kentucky Supreme Court canon prohibiting certain statements during judicial campaigns violated the First Amendment. *Id.* at 193–94 (stating that "[c]ontent-based restrictions on

speech generally face strict scrutiny"). But McKay also cites to *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), which analyzes the public's First Amendment right to access judicial proceedings. Pl.'s Mot. Summ. J. 7.[3]

Instead of distinguishing between the two analytical frameworks, McKay blends them together into a hybrid analysis that ultimately—according to McKay—requires the Electronic Ban Order to survive strict scrutiny. It is unclear how he reaches this result in light of the precedent he relies on.

McKay's complaint leads to the conclusion that his expressed concern falls more accurately into an "access to information" case than a "freedom of expression" case. "Although access cases are rooted in First Amendment principles, they have developed along distinctly different lines than have freedom of expression cases." S.*H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 559 (6th Cir.2007) (collecting cases); *see also D'Amario*, 639 F.Supp. at 1543 n.4 (recognizing that access cases require a different analytical approach than do expression cases).

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[3] To further complicate matters, McKay also contends that neither line of analysis is applicable: McKay asserts that "Plaintiff's suit is not challenging access," Pl.'s Resp. 14, and that "Plaintiff agrees that a person does not have the First Amendment right to express themselves .... " *Id.*

But even within right of access jurisprudence, there are distinct frameworks for analyzing certain types of access claims. For instance, the Supreme Court has provided a framework for analyzing access cases addressing the issue of access to judicial proceedings. *See United States v. Miami University*, 294 F.3d 797, 820 (6th Cir.2002). Under this analysis, "a qualified right of access attaches where (1) the information sought has 'historically been open to the press and general public'; and (2) 'public access plays a significant positive role in the functioning of the particular process in question.' " *Id.* (quoting *Press–Enterprise Co. v. Superior Court* (*Press–Enterprise II*), 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). Once the qualified First Amendment right of access attaches, it can "be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press–Enterprise Co. v. Superior Court* (*Press–Enterprise I*), 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). "The right of access is not absolute, however, despite these justifications for the open courtroom." *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179.

At least facially, this line of analysis appears most applicable—it nominally applies to a right of access to courtrooms. But a more in-depth review of the facts in each of these cases reveals that they are not quite on-point. For example, in *United States v. Miami University*, 294 F.3d 797 (6th Cir.2002), the Sixth Circuit analyzed the constitutionality of a university regulation that prohibited the press or public from observing student disciplinary proceedings. Likewise, in *Detroit Free Press v.*

Ashcroft, 303 F.3d 681 (6th Cir.2002), the question facing the Sixth Circuit was whether the public could attend and observe deportation hearings. In both of these cases, the public was prohibited from attending these proceedings in full—they could not watch, they could not take notes, and they could not record the proceedings.

In contrast, McKay may attend the judicial proceedings in the Saginaw County Courthouse. He can attend, observe, and take notes on the proceedings. The only prohibited action is *recording* the proceedings via personal electronic devices. Thus, the instant facts are not in line with those of *Miami University* and *Detroit Free Press,* where public access was blocked in its entirety.

Instead, the present situation is more analogous to the right of access cases involving restrictions on recordings and photography. For example, in *S.H.A.R.K.,* the Sixth Circuit analyzed the constitutionality of park regulations that essentially limited the ability of the public to record events in a public park. 499 F.3d at 553. In *S.H.A.R.K.,* the Sixth Circuit also cited with approval *D'Amario v. Providence Civic Center Authority*, 639 F.Supp. 1538 (D.R.I.1986), a case in which a photographer's request to take photographs had been denied. Thus, as in *S.H.A.R.K.* and *D'Amario,* McKay's right of access is not limited in its entirety; instead, his alleged right to record using a personal electronic device is limited.

When a person's right of access has been limited in some way—such as by placing limits on the person's right to record judicial proceedings—the

Sixth Circuit acknowledges that there are competing interests at play:

> Although the press cannot command access wherever, whenever, and however it pleases, neither can government arbitrarily shroud genuinely newsworthy events in secrecy .... [T]he state's rulemaking power is not absolute: if the first amendment is to retain a reasonable degree of vitality, the limitations upon access must serve a legitimate governmental purpose, must be rationally related to the accomplishment of that purpose, and must outweigh the systemic benefits inherent in unrestricted (or lesser-restricted) access. The foregoing test recognizes that the government cannot use the fact that it has made a rule as an absolute shield against access.[4]

S.H.A.R.K., 499 F.3d at 561(quoting *D'Amario*, 639 F.Supp. at 1543).

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[4] Neither the plaintiff in *D'Amario* nor the plaintiffs in *S . H.A.R.K.* were members of the media. However, the courts in both cases concluded that the First Amendment analysis concerning the press was the most applicable. These courts focused on the idea that the plaintiffs—although not members of the media—were engaged in "news gathering efforts." *S.H.A.R.K.*, 499 F.3d at 560. This reasoning is also persuasive here. Although McKay is not a member of the press, he is seeking to record judicial proceedings in order to "promot[e] the free discussion of governmental affairs." Pl.'s Resp. 17 (citing *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966)). This suggests that the judicial proceedings have, at the least, some newsworthy aspect to them.

To balance these competing interests, the Sixth Circuit has established a four-part test. First, a court must "ask what rule the government is invoking that prohibits the plaintiffs from access to information ...." *Id.* at 560. Second, the court must determine "whether that rule 'selectively delimits the audience.' " *Id.* (quoting *D'Amario*, 639 F.Supp. at 1543). Third, a court must "inquire into the government's stated interest for invoking the rule." *Id.* at 561. Finally, a court must "apply the applicable test to determine whether the government's stated interest is sufficiently related to the means of accomplishing that interest ...." *Id.* In other words, "if the rule does not selectively delimit the audience, we uphold the restriction if it is reasonably related to the government's interest; if the rule does selectively delimit the audience, a stricter level of scrutiny will apply." *Id.*

B

Here, Saginaw County is invoking the Electronics Ban to prohibit McKay from recording judicial proceedings inside the courtroom. The Electronics Ban, which applies to all electronic recordings of any kind, does not selectively delimit the audience.[5]

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[5] McKay makes no assertion to the contrary. He implies that the Ban is irrational because some members of the public are granted the right to record if they ask for permission. But anyone may ask permission to record. McKay has not alleged that he asked for permission to record and was denied, nor does he produce evidence showing that any other person who asked for permission to record was denied.

Because the Electronics Ban does not selectively delimit the audience, the applicable standard of review is the rational basis standard. *S.H.A.R.K.*, 499 F.3d at 560. "The rational basis test requires the court to ensure that the government has employed rational means to further its legitimate interest." *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir.1998). Moreover, "[u]nder the rational basis review, a court usually will uphold regulations because 'the state's important regulatory interests are generally sufficient to justify them.' " *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir.1998) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)).

Defendants assert that the Electronics Ban Order serves the governmental purpose of allowing judicial officers to "better control our environment" inside the Saginaw County Courthouse. Defs.' Resp. Ex. C. Specifically, the Electronics Ban Order was enacted to limit: (1) disruptions of judicial proceedings; (2) intimidation of witnesses and jurors; and (3) jurors conducting online research. *Id.* These interests have been recognized as important to the judicial process in courtrooms, which are designated for the adjudication of civil and criminal matters. *Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir.1997); *Huminski v. Corsones*, 396 F.3d 53, 91 (2d Cir.2004). Courtrooms must be neutral, politically impartial environments dedicated to fairness and equal treatment of the litigants. *Berner*, 129 F.3d at 27. To this end, a court has an obligation to maintain courtroom decorum.

A court's duty to protect litigants' rights to a fair trial provides an additional basis for the court's restriction. Jurors are routinely instructed to avoid outside influences—such as news coverage of the case—and to avoid engaging in independent research, including online research. Moreover, preventing juror and witness intimidation further protects litigants' rights to a fair trial. Both jurors (during voir dire) and witnesses may be less forthcoming in their answers if they were being recorded. Thus, limiting outside influences on jurors and preventing juror and witness intimidation are important, legitimate interests.

Enforcing the Electronics Ban Order is reasonably related to these legitimate governmental concerns. Certainly, prohibiting cell phones and other electronic devices will reduce the instances of ringtones interrupting judicial proceedings and make it impossible for jurors to conduct online research in the courtroom. And prohibiting the recording of jurors and witnesses will alleviate any concerns about witness and juror intimidation. Accordingly, the Electronics Ban Order does not violate McKay's First Amendment rights.

C

The previous analysis is equally applicable to the claim that the Electronics Ban Order is unconstitutional as applied to the common areas outside the courtroom. The Electronics Ban does not selectively delimit the audience, and therefore—just as in the courtroom—the applicable standard of review is the rational basis standard. Defendants assert the same governmental interests—disruption of proceedings, witness intimidation, jurors

conducting online research—and banning electronic devices is a reasonable method of protecting these interests.

McKay nonetheless insists that the listed governmental interests are issues only inside the courtroom and do not provide a significant interest for prohibiting electronics outside the courtroom in common areas. The argument is not persuasive. A ringing cellphone can interrupt courtroom proceedings even outside the courtroom. Moreover, jurors and witnesses would be intimidated just as much if they are recorded entering and leaving the courtroom through the common areas. And preventing jurors from taking their electronic devices inside the Governmental Center will prevent them from doing online research in the common areas. These interests are significant, both inside the courtroom and in areas near the courtrooms. The Electronics Ban Order is rationally related to achieving these interests outside the courtroom, and therefore the Electronics Ban Order does not violate the First Amendment.

D

In summary, the appropriate analysis of McKay's claims is found in *S.H.A.R.K,* which governs First Amendment claims involving the right to access and record. Defendants have proffered important, legitimate interests in regulating the ability of the public to record events occurring inside the courthouse, and the Electronics Ban Order is reasonably related to those interests. Accordingly, Defendants did not violate McKay's First Amendment rights by enacting and enforcing the Electronics Ban Order.

V

As noted above, McKay asserts that "Plaintiff's suit is not challenging access, it is challenging denial of First Amendment right of recording." Resp. 14. Thus, McKay appears to also be suggesting that his right to record is one of freedom of expression rather than, or in addition to, access.[6] As explained above, it appears that the proper analysis of McKay's claim is under a right of access analysis. However, even assuming that McKay's claim should be analyzed as expressive conduct, his claim is still without merit.[7]

To determine whether the government has violated an individual's free speech rights, the Sixth Circuit employs a three-step analysis:

(1) we ask whether the speech is protected under the First Amendment; (2) if so, using the public-forum

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[6] However, in the same breath, McKay asserts that "Plaintiff agrees that a person does not have the First Amendment right to express themselves; Plaintiff does have the First Amendment right to receive and record information." Resp. 14–15. 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 for analyzing his suggested First Amendment right to receive and record or any precedent establishing such a framework.

[7] To be clear, this analysis is not necessary to the Court's decision. Indeed, it is an inapplicable analysis to the alleged First Amendment right at issue because *S.H.A.R.K.* is controlling. However, because most of McKay's arguments are premised in a right-of-expression analysis—the nature of the fora at issue, viewpoint discrimination, intermediate and strict scrutiny—the Court will analyze the matter to address these arguments.

doctrine, we ascertain whether the applicable forum is public or nonpublic; and (3) applying the appropriate standard for the forum, we ask whether the government's prohibition on speech passes muster under the First Amendment.

S.H.A.R.K, 499 F.3d at 559 (citing *Parks v. City of Columbus*, 395 F.3d 643, 647 (6th Cir.2005)).

Again, the distinction between recording in the courtroom and outside the courtroom is important, and the "expressive speech" analysis will be applied to both.

A

Here, McKay seeks the right to record "public trials and public court hearings" occurring inside the Saginaw County courtrooms. Thus, the first step is to determine whether there is a "right to record" events encompassed by the First Amendment. The next step is to determine whether there is a "right to record" events in a courtroom specifically.

"It is well established that in order to be protected under the First Amendment, images must communicate some idea." *Porat v. Lincoln Towers Cmty. Ass'n*, 2005 WL 646093, at *4 (S.D.N.Y. Mar.21, 2005). More specifically, to achieve protection under the First Amendment, a plaintiff must show that he possessed (1) a message to be communicated, and (2) an audience to receive this message, regardless of the medium in which the message is to expressed. *Hurley v. Irish–Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 568, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). Therefore, the taking of photographs or videography,

without more, is not protected by the First Amendment. *Porat*, 2005 WL 646093, at *5.

However, many circuit courts have determined that videotaping implicates the First Amendment when it is used "to gather information about what public officials do on public property." *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.2000); *see also ACLU v. Alvarez*, 679 F.3d 583, 599–00 (7th Cir.2012); *Glik v. Cunnliffe*, 655 F.3d 78, 79 (1st Cir.2011). Here, McKay is seeking to exercise this alleged right to record public officials (i.e., county judges).

But none of the cases McKay cites stand for the proposition that the courtroom is a "public place" in which he has the right to record the events. As explained in the April 10, 2014 Order Denying Reconsideration, the Supreme Court has stated that the public *does not* have a First Amendment right to record judicial proceedings inside a courtroom:

In *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981), the Supreme Court affirmed a state supreme court decision that "reject [ed] the argument of the Plaintiffs that *the first* and sixth amendments to the United States Constitution *mandate entry of electronic media into judicial proceedings."* (emphasis added). Moreover, in *Nixon v. Warner Communications, Inc.,* 435 U.S. 581 (1978), the Supreme Court stated: "In the first place ... there is no constitutional right to have [courtroom] testimony recorded and broadcast." (citing *Estes v. Texas*, 381 U.S. at 539–42). The Supreme Court thus concluded that there is no First Amendment right to have electronic media in the courtroom.

Order 5, ECF No. 30.[8] Thus, there is no right under the First Amendment to record judicial proceedings inside a courtroom. McKay's claim would therefore fail at the first step of the analysis.

B

However, for the sake of completeness, the rest of McKay's claim will be addressed. Assuming there is a First Amendment right to record judicial proceedings inside a courtroom, the next step is to determine the character of the courtroom—that is, whether it is a public or nonpublic forum. There are three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Jobe v. City of Cattlesburg*, 409 F.3d 261, 263–65 (6th Cir.2005) (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)). The traditional public forum includes places like parks and streets that are " 'government property that has traditionally been available for public expression.' "[9]

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[8] The Order Denying Reconsideration also distinguished *Glick, Alvarez,* and *Cumming:*

> [T]o the extent that these cited cases held that there is a First Amendment right to record, these cases dealt only with recording public officials *outside* the courtroom. Not a single cited case has held that there is a First Amendment right to record within the courtroom—nor could it, without violating Supreme Court precedent.

Order 6, n. 2.

[9] Indeed, McKay relies on cases that involved recording government officials in areas that have been consistently and repeatedly held to be public forums. *See Glik*, 655 F.3d at 79 (recording an arrest on the Boston Common); *American Civil*

[Footnote continued on next page]

Id. (quoting *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992)). In contrast, "[t]he designated public forum consists of public property 'that the State has opened for expressive activity by part or all of the public.' " *Id.* (quoting *Lee*, 505 U.S. at 678).

McKay contends that the Saginaw County Governmental Center and its courtrooms are public forums. "Traditional public forums are those places 'which by long tradition or by government fiat have been devoted to assembly and debate.' " *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 746 (6th Cir.2004) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)).

McKay's assertion—that the courtroom is a public forum—is flatly contradicted by Sixth Circuit precedent. "The courtroom is a *nonpublic forum,* where the First Amendment rights of everyone (attorneys included) are at their constitutional nadir. In fact, the courtroom is unique even among nonpublic fora because within its confines we regularly countenance the application of even viewpoint-discriminatory restrictions on speech." *Mezibov v. Allen*, 411 F.3d 712, 718 (6th Cir.2005) (emphasis added).[10] Thus, as a nonpublic forum, a

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Liberties Union of Illinois v. Alvarez, 679 F.3d at 588 (challenging statute that prohibits recordings "in public fora in and around the Chicago area").

[10] To be fair, several later circuit decisions have criticized the holding in *Mezibov;* however, they all also acknowledge that *Mezibov* is still controlling law. *See Bright v. Gallia County,*

[Footnote continued on next page]

courtroom is "less conducive to free speech rights." *Id.* at 720 (6th Cir.2005); *see also Huminski*, 396 F.3d at 90 ("We are particularly reluctant to conclude that government property is a public forum 'where the principal function of the property would be disrupted by expressive activity.' ") (quoting *Cornelius*, 473 U.S. at 804).

C

The third part of the analysis requires an assessment of whether the government's action is reasonable in light of the nature of the forum. "The government may lawfully restrict speech in a nonpublic forum so long as the restrictions are viewpoint neutral and reasonable in light of the purpose served by the forum." *Helms v. Zubaty*, 495 F.3d 252, 256 (6th Cir.2007). Given that courtrooms are nonpublic forums, the Electronics Ban Order "need only be reasonable in light of the purpose of the forum and reflect a legitimate government concern." *Gen. Media Communications, Inc. v. Cohen*, 131 F.3d 273, 282 (2d Cir.1997) (citations omitted). It "need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808.

The first step is to determine whether the Electronics Ban Order is content-neutral or content-based regulation. "As a general rule, laws that by

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Ohio, 753 F.3 d639, 654–55 (6th Cir.2014) (reluctantly following the holding in *Mezibov* because it "remains binding upon subsequent panels, under the law-of-the-circuit doctrine, until overturned by this court en banc or by the United Supreme Court.").

their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner*, 512 U.S. at 643. In contrast, a content-neutral ordinance is one that "places no restrictions on ... either a particular viewpoint or any subject matter that may be discussed." *Hill v. Colorado*, 530 U.S. 703, 723, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

Here, the Electronics Ban Order is content-neutral because it prohibits all electronic recording of all events occurring within the courtrooms: "All persons and property (including closed containers) entering court related facilities are subject to search by Sheriff Deputies for the purpose of enforcing [the Electronics Ban Order]." Pl.'s Mot. Summ. J. Ex. 2.[11] *See also Rouzan v. Dorta*, 2014 WL 1716094, at *12 (C.D.Ca. March 12, 2014) ("Further, the restriction on recording was viewpoint neutral. Neither Rule 1.150 nor the court's cellphone policy restricted

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[11] Admittedly, it is difficult to imagine a content-based regulation governing recording, given that the act of recording is not itself expressive. That is, is the way that a member of the public records judicial proceedings so different from the way a professional cameraman records judicial proceedings? Moreover, are they so different as to espouse a particular viewpoint? The inanity of this argument reinforces this Court's conclusion that the right to record under the First Amendment is better analyzed under a "right to access" rather than a "right to expression."

speech based on content; rather, the rule restricted recording of all court proceedings ....").

McKay nevertheless asserts that the Electronics Ban Order is not viewpoint-neutral[12] because "[t]he Pfau Directive allows, without question, that certain exercisers of the First Amendment, particularly the major local media outlets, need not seek any permission under the [Electronics Ban Order] or via the Pfau Directive before being allowed to bring in *and use* recording devices in the Saginaw County Governmental Center and its courtrooms ." Resp. 18 (emphasis original).

McKay's assertion contains several important factual errors. First, nothing in the Electronics Ban Order itself permits members of the media to bring in electronic devices without seeking prior approval. *See* Pl.'s Mot. Summ. J. Ex. 2 (*"All persons* ... are subject to search by Sheriff Deputies for the purpose of enforcing this [Electronics Ban Order]."). Thus, on its face, the Electronics Ban Order is content- and viewpoint-neutral.

Indeed, only the Pfau Directive,[13] which governs how the Sheriff's Department will help enforce the

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[12] "Viewpoint discrimination is a subset of content discrimination .... A viewpoint-based law goes beyond mere content-based discrimination and regulates speech based upon agreement or disagreement with the particular position the speaker wishes to express." 1 Smolla & Nimmer on Freedom of Speech § 3:9 (citing *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976)).

[13] To be clear, the Electronics Ban Order was issued by the judges of the Saginaw County Court pursuant to their authority

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Electronics Ban Order, states that there are some categories of people who may bring in their electronics without seeking permission:

> Starting 16 December 2013 there will be no electronic recording device allowed (cell phone, camera, tablets, laptop computers, ect. [*sic*]) in the Saginaw County Courthouse by any members of the public ... This policy will exclude the following persons:
>
> 1) Courthouse employees
>
> 2) Active members of the State Bar of Michigan
>
> 3) Law enforcement personal [*sic*] acting in that capacity
>
> 4) Probation and Parole officers acting in that capacity
>
> 5) *Representatives of media agencies authorized pursuant to AO 1989–1*
>
> 6) Individuals granted ad hoc permission by an authorized judge.

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under Mich. Ct. R. 8.112, while the Pfau Directive was issued to members of the Saginaw County Sheriff's Department by Lieutenant Randy Pfau. In other words, it does not appear that the Saginaw County Court judges had any role in developing the Pfau Directive, nor does it appear that the Saginaw County Sheriff's Department played any role in developing the Electronics Ban Order. At various times during this litigation, Defendants have asserted that they are not a proper party to this suit. However, no such argument was made in their instant motion for summary judgment.

Pfau Directive (emphasis added). Thus, McKay is correct that members of the media may bring in electronic devices without first seeking permission from a judge. But, importantly, nothing in the Pfau Directive permits a member of the media to use that electronic device to record events in the courtroom. Thus, the ability to use the electronic device is still governed by the Electronics Ban Order, which states that use of electronic devices is prohibited "[e]xcept with a judge's permission ...." Pl.'s Mot. Summ. J. Ex. 2. Critically, then, although members of the media (along with lawyers, courthouse employees, and law enforcement) may bring in their electronic devices without first seeking permission, they must still first ask for permission before exercising whatever First Amendment right they have to record proceedings.

To bolster his claim that the Electronics Ban Order is "viewpoint-discriminatory", McKay advances several instances in which the media have recorded various judicial proceedings. *See* Resp. Ex. D (photograph of defendant entering courtroom); Ex. E (press photograph of judge in the courtroom). From the photographs, it is clear that members of the media have been allowed to photograph and record courtroom events in at least two instances. But it is not clear whether the media asked for permission to record the events, as required by the Electronics Ban Order. Indeed, McKay makes no assertion that the media failed to seek permission but was nonetheless allowed to record events. As already noted, McKay has never identified a single person (or member of the media) who requested permission to record judicial proceedings and was denied. Likewise, he has never identified a single person (or member of the media) who was able to record courtroom events

without first seeking permission. The fact that a member of the press has been able to photograph courtroom proceedings—without any more detail regarding the factual circumstances—is not enough to show that the Electronics Ban Order is a content-based restriction on recording.[14]

And because the Electronics Ban Order is content-neutral, it need only be reasonable in light of the purpose of the courtroom. As explained above, the Electronics Ban Order protects the legitimate government interests of lessening courtroom distractions, preventing juror and witness intimidation, preventing online research. *See Mead*, 583 F.Supp.2d at 1239 ("The State 'has a legitimate need to preserve an orderly and safe place to conduct the public's business" and to maintain "proper order and decorum in the courtroom.' ") (quoting *Sammartano v. First Judicial District Court*, 303 F.3d 959, 967–68 (9th Cir.2002). Banning electronic communication devices is a reasonable method for protecting these interests. Therefore, the Electronics Ban Order reasonably fulfills a legitimate and demonstrated governmental need. *See Gen. Media Communications, Inc.,* 131 F.3d at 282. Accordingly, even analyzing the matter as a right to expression,

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[14] Moreover, even if letting the media bring in electronic devices is viewpoint-discriminatory, the Electronics Ban Order would still be constitutional under *Mezibov*. 411 F.3d at 718 ("In fact, the courtroom is unique even among nonpublic fora because within its confines we regularly countenance the application of even viewpoint-discriminatory restrictions on speech.").

the Electronics Ban Order is constitutional under the First Amendment.

D

The same analysis is applicable in determining whether the Electronics Ban violates the First Amendment as applied outside the courtroom, i.e., in the common spaces of the Saginaw County Governmental Center.

The first question is whether there is a First Amendment right to record activities occurring in the common spaces. In its April 10, 2014 Order, the Court suggested that there may be a First Amendment right to record in the common spaces, but that the parties had not provided any briefing on the issue: "Although there is no First Amendment right to tape and record courtroom proceedings, some courts have held that the media may have the right to record events taking place outside the courtroom and any restrictions on that right must be reasonable." Order 18.

Assuming there is a right to record, the next step is to determine whether the common areas surrounding the courtrooms is a public or nonpublic forum. Generally, courts have concluded that the entire interior of a courthouse is a non-public forum. *See Grace*, 461 U.S. at 178–80 (holding that the Supreme Court building and its grounds other than public sidewalks are not public forums, and noting "[courts have] not been traditionally held open for the use of the public for expressive activities."); *Sammartano*, 303 F.3d at 966 (holding that judicial and municipal complexes are nonpublic forums); *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir.1998)

("The lobby of the courthouse is not a traditional public forum or a designated public forum, not a place open to the public for the presentation of views.... It is a nonpublic forum...."); *United States v. Gilbert*, 920 F.2d 878, 884 (11th Cir.1991) (holding that although a courthouse was a nonpublic forum, the unenclosed courthouse plaza was a designated public forum); *Huminski*, 396 F.3d at 91–92 (courthouse and adjacent parking lots are nonpublic forums); *see also Cox v. Louisiana*, 379 U.S. 536, 554–55 (1965) (applying reasonable time-manner-place restrictions to expressive free speech activity outside a courthouse).

However, the Saginaw County Governmental Center contains not only courtrooms, but also legislative offices. The presence of these legislative offices does not change the characterization of the Governmental Center, though: "Municipal buildings are not traditionally regarded as forums for expressive activity .... " *Hansen v. Williamson,* 440 F.Supp. 663, 679 (E.D.Mich.2006) (citing *Sammartano*, 303 F.3d at 966 (building operated for purpose of conducting business of the county and of the municipal and state courts is a nonpublic forum)). Therefore, even the common areas outside the courtrooms are non-public fora. Accordingly, the Electronics Ban Order as applied to the common areas outside the courtrooms need only be reasonable.

As explained several times above, the Electronics Ban Order survives this reasonableness standard. The Electronics Ban Order protects the legitimate government interests of lessening courtroom distractions, preventing juror and witness

intimidation, preventing online research outside the courtroom.

In determining whether it is reasonable, the Seventh Circuit's opinion in *Dorfman v. Meiszner*, 430 F.2d 558 (7th Cir.1970), provides guidance. In *Dorfman,* the Seventh Circuit addressed a local court rule that banned the use of electronic media inside a federal building and adjacent exterior areas. Specifically, the court rule banned the "taking of photographs in the courtroom or its environs," where the environs included "the entire 25th, 24th, 23rd, 21st, 20th, 19th, 18th, 16th, 15th, 14th, 2nd and ground floors, including the plaza and sidewalks surrounding the Courthouse." *Id.* at 560. Despite the broad prohibition on recording in the federal building, the courtrooms were located only on the 19th floor and above. The remaining floors housed several federal agencies, including the Treasury Department, congressional offices, the Commission on Civil Rights, the Secretary of the Air Force, the Commerce Department, a health clinic, the Equal Employment Opportunity Commission, and the office of a United States senator. *Id.* at n. 2.

The *Dorfman* Court concluded that, although "the district court may, by rule, exclude photographing and broadcasting from those areas of the courthouse which would lead to disruption or distraction of judicial proceedings," the local court rule nevertheless "goes beyond the scope permitted by the First Amendment." *Id.* at 561. The court first clarified that the district court was acting within its discretion in prohibiting photographing and broadcasting inside as well as in the areas adjacent to courtrooms. Moreover, the extension of the

prohibition to the entire floor on which a courtroom is located, as well as the elevators on the first floor, is also permissible as a measure reasonably calculated to promote the integrity of the court's proceedings." *Id.* at 562. In addition, floors that housed the United States Marshal, the offices of the United States Attorney, and the grand jury room "may be treated in the same manner as those floors on which are located the courtrooms of the district court." *Id.* n .4. The ban was permissible for these areas because "the law not only allows but compels the courts to insure that judicial proceedings are conducted in an orderly, solemn environment free from the interferences which so often accompany modern news coverage of the events." *Id.* at 561.

In contrast, because the prohibition extended to "floors of the federal building where there are no courtrooms, to the large center lobby on the first floor, and to the plaza and outside areas surrounding the building," the ban was impermissibly broad. *Id.* at 562. Given the architecture of the federal building—and the fact that the windowless courtrooms were located 19 floors above the lobby and outside areas—no foreseeable commotion in the lobby could disturb the courtroom proceedings. Moreover, the ban also applied to floors where there were no courtrooms. Accordingly, because the ban covered areas that offered no "immediate threat to the judicial proceedings," part of the ban violated the First Amendment rights of the press.

Here, in contrast to the situation in *Dorfman,* the Electronics Ban Order does not even apply to the entirety of the Saginaw County Governmental Center—it applies only to "court related facilities."

The court-related facilities include the entirety of the third and fourth floors of the Governmental Center because these floors consist only of the 70th Judicial District Court and the 10th Judicial Circuit Court, respectively. Defs.' M. Summ. J. 12, Ex. A. On the first and second floor, the Electronics Ban Order applies only to the areas housing the Probate Court, the Family Division of the 10th Circuit Court, the Court Administrative Offices, Friend of the Court offices, Probations offices, and related common areas. *Id.* These are areas where electronic recording could lead to disruption or distraction of judicial proceedings. *Dorfman*, 430 F.2d at 562.

Unlike in *Dorfman,* however, the Electronics Ban Order does *not apply* to non-court related facilities. These areas include the Prosecutor's Office, the boardroom of the Saginaw County Commission, or the offices of the County Controller, Clerk, Treasurer, Financial Services or Equalization. Defs.' M. Summ. J. 12, Ex. A. Members of the public, including McKay, are still free to bring in and use their electronic recording devices in these areas. Because the Electronics Ban Order only applies in areas that could lead to disruption of judicial proceedings, it is a reasonable restriction.

VI

In his response, McKay also appears to use the issue of "overbreadth" as a defense to Defendants' motion for summary judgment. That is, although McKay's complaint asserts that the Electronics Ban Order violates the First Amendment because it is overbroad, McKay also appears to be using it as a defense.

A facial challenge to a law's constitutionality is an effort "to invalidate the law in each of its applications, to take the law off the books completely." *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335 (6th Cir.2009) (en banc). Sustaining a facial attack to the constitutionality of a state law is "momentous and consequential. It is an 'exceptional remedy.' " *Speet v. Schuette*, 726 F.3d 867, 872 (6th Cir.2013) (quoting *Carey*, 614 F.3d at 201).

When a plaintiff makes a facial challenge under the First Amendment to a statute's constitutionality, the "facial challenge" is an "overbreadth challenge." *Connection Distrib.*, 557 F.3d at 335. Instead of having to prove that *no* circumstances exist in which the enforcement of the statute would be constitutional, the plaintiff bears a lesser burden: "to demonstrate that a 'substantial number of instances exist in which the law cannot be applied constitutionally.' " *Glenn v. Holder*, 690 F.3d 417, 422 (6th Cir.2012) (quoting *Richland Bookmart, Inc. v. Knox Cnty.*, 555 F.3d 512, 532 (6th Cir.2009)). Not just any assertion of overbreadth will do—the law must be *substantially* overbroad—a concept that requires a comparison between the legitimate and illegitimate applications of the law. As the Supreme Court explained:

> [T]he existence of a "chilling effect," even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the

> incidental effect of inhibiting First Amendment rights, *it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control or the conduct and the lack of alternative means for doing so.*

Younger v. Harris, 401 U.S. 37 (1971) (emphasis added); *see also Speet*, 726 F.3d at 873 ("If the law does not reach a substantial amount of constitutionally protected conduct, then the overbreadth challenge must fail.") (internal citations omitted). In other words, the overbreadth must be not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). "Because of the wide-reaching effects of striking down a statute on its face ... we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.' " *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32 38, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999). The overbreadth claimant bears the burden of demonstrating from the text of the law and from *actual fact* that substantial overbreadth exists. *J.L. Spoons, Inc. v. Dragani*, 538 F.3d 379 (6th Cir.2008).

The doctrine of substantial overbreadth "involves an inquiry into the 'absolute' nature of a law's suppression of speech." *Connection Distrib.*, 557 F.3d at 340.[15] A facial challenge based on substantial

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[15] The Sixth Circuit has acknowledged that "the concept of 'substantial overbreadth' has some elusive qualities." *Connection Distrib. Co.*, 557 F.3d at 340; *see also Taxpayers for*

[Footnote continued on next page]

overbreadth "describe[s] a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 966 n. 13, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984).

McKay cannot carry his burden to show that the Electronics Ban Order is substantially overbroad. McKay asserts that the Electronics Ban Order restricts his First Amendment right to record public officials because it bans recording inside the courthouse. But as explained above, under any First Amendment analysis, the Electronics Ban Order does not impermissibly restrict McKay's First Amendment rights. Therefore, he has not shown that the Electronics Ban Order impermissibly restricts protected First Amendment activity—let alone restricts a "substantial amount" of constitutionally-protected conduct.

As part of his overbreadth challenge, McKay contends that the Saginaw County judiciary does not have the authority to regulate the common areas outside the courtroom. "If a regulation is necessary, the authority belongs to the Saginaw County Board of Commissioners as the facility owner, not the courts and the court's deputies." Resp. Br. 12 (citing Mich. Ct. Rule 8.115(C)(1)). And, McKay continues, because the Saginaw judiciary lacks the ability to

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[Footnote continued from previous page]

Vincent, 466 U.S. at 800 ("The concept of 'substantial overbreadth' is not readily reduced to an exact definition.").

promulgate rules for common areas outside the courtroom under state law, the Electronics Ban Order violates the First Amendment of the federal Constitution.

This argument is unavailing in every respect, even assuming for the moment that the Saginaw Judiciary lacks the ability under state law to promulgate rules pertaining to common areas. First, a violation of a state law is not *per se* violation of the federal Constitution, and McKay presents no precedent to the contrary. That is, accepting McKay's argument, just because the judiciary may have violated state law does not automatically mean they violated the federal Constitution. They are two separate and independent questions with two entirely different sources of law.[16]

Second, it is unclear how an alleged violation of state law factors into the overbreadth analysis. To prevail on an overbreadth challenge, McKay must show that a substantial number of applications of the Electronics Ban violate the First Amendment of the federal Constitution. Here, he appears to be arguing that a substantial number of applications of the Electronics Ban (i.e., every application outside the courtroom) violate *Michigan law* because the Saginaw Judiciary did not have the authority to regulate common areas. But, again, just because the Electronics Ban Order is argued to have violated Michigan law does not mean that it violates the federal Constitution. McKay cannot show that a

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[16] To be clear, McKay did not allege any violations of state law in his complaint.

substantial number of applications violate the First Amendment of the federal Constitution, and McKay's overbreadth challenge will therefore be denied.

VII

In his motion for summary judgment, McKay alleges that the Electronics Ban Order gives government officials "unbridled discretion" and therefore violates the First Amendment. *See* Br. 7 ("While the exercise of First Amendment rights are subject to restrictions, a law cannot condition the free exercise of First Amendment activities on the *unbridled discretion of government officials."*) (emphasis added).

A

"Any system of prior restraints of expression [bears] a heavy presumption against its constitutional validity, and a party who seeks to have such a restraint upheld thus carries a heavy burden of showing justification for the imposition of such a restraint." *Cnty. Sec. Agency v. Ohio Dep't of Commerce*, 296 F.3d at 477, 485 (6th Cir.2002) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)). Specifically, the prior restraint must not delegate overly broad licensing discretion to official decision-makers. *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

But the issue of standardless discretion applies only to First Amendment claims involving *expressive* activity. *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755–56, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) ("[W]hen a licensing statute allegedly vests

unbridled discretion in a government official over whether to *permit or deny expressive activity* ...") (emphasis added); *Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6th Cir.2010) ("Because unfettered governmental discretion over the licensing of *free expression* constitutes a prior restraint ....") (emphasis added) (internal quotation marks omitted).

As explained above, McKay's alleged right to record events is one of access, not expression. Therefore, the standardless discretion limitation is not applicable here, and McKay's motion for summary judgment will be denied on this ground.

B

But even if the Court does apply the standardless discretion analysis to the instant case, McKay would not be entitled to summary judgment. As with other First Amendment analyses, the proper starting point is to determine the nature of the forum in which McKay seeks to exercise his alleged First Amendment right to record. *M.A.L. ex rel. M.L. v. Kinsland*, 543 F.3d 841, 846 (6th Cir.2008) ("The extent to which the government may regulate speech in a particular forum depends upon the nature of the forum.").

As explained above, both the courtrooms and the Saginaw County Government Center are nonpublic forums. The Supreme Court has not yet applied the standardless discretion outside the context of a traditional public forum, but several circuits have. *See Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools*, 457 F.3d 376, 386 (4th Cir.2006). These circuits have further noted

that public officials have more discretion in limiting speech in nonpublic forums:

> This does not mean that the unbridled discretion analysis is precisely the same when a limited public or nonpublic forum, rather than a traditional public forum, is involved. The unbridled discretion inquiry is "not a static inquiry, impervious to context"; rather a court will review a grant of discretion "in light of the characteristic nature and function of that forum." *Ridley v. Mass. Bay. Transp. Auth.*, 390 F.3d 65, 94–95 (1st Cir.2004). "That discretionary access is the defining characteristic of the nonpublic forum suggests that *more official discretion is permissible in a nonpublic forum than would be acceptable in a public forum* ...."

Child Evangelism, 457 F.3d at 387 (internal edits omitted) (emphasis added). Indeed, as the Sixth Circuit concluded, First Amendment rights are "at their constitutional nadir" in the courtroom. *Mezibov*, 411 F.3d at 719. In *Mezibov,* the Sixth Circuit concluded that "in the context of the courtroom proceedings, an attorney retains *no personal First Amendment rights* when representing his client in those proceedings." *Id.* 720–21 (emphasis added). This lack of First Amendment rights is equally applicable to others in the courtroom:

> We cannot believe (and have come across no authority to suggest) that other trial participants, with the possible exception of an actual party to the case, *possess any First Amendment* right to speak up or otherwise present a point of view in the courtroom. We

> can conceive of no such right for jurors, court reporters, bailiffs, or spectators to interrupt a judicial proceeding ....

Id. at 718–19 (emphasis added).

Given 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.

Because a courthouse/municipal building is a nonpublic forum, the Saginaw County Governmental Center "is entitled to put time, place, and manner restrictions on [ ] speech so long as the restrictions are viewpoint neutral and reasonable in light of the [government's] interest in the effectiveness of the forum's intended purpose." *Kinsland*, 543 F.3d at 847 (citing *United States v. Kokinda*, 497 U.S. 720, 730, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990).

This Court has already explained numerous times that the Electronics Ban Order is a reasonable restriction on McKay's alleged First Amendment right to record—both inside and outside the courtrooms. Accordingly, summary judgment on Count V of his Complaint, alleging "unbridled discretion", will be denied.

VIII

In summary, under any analysis (right of expression, right of access, overbreadth, unbridled discretion), McKay's alleged First Amendment arguments are meritless. Therefore, his motion for summary judgment will be denied and Defendants' motion for summary judgment will be granted.

A

Defendants, however, moved for summary judgment only on McKay's First Amendment claims—not on his Fifth Amendment or Fourteenth Amendment claims.[17] Therefore, McKay's Fifth Amendment and Fourteenth Amendment claims will proceed to trial.

B

As a final matter, Defendants request costs and attorney fees "so wrongfully incurred" due to McKay's lawsuit. Defs.' Mot. Summ. J. 25. Defendants have not cited any caselaw to support their request, nor have they provided any kind of explanation for why they are entitled to costs and attorney fees. The only reference to recovery fees is the last sentence of the motion, in which "Defendant respectfully requests this Honorable Court enter an

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[17] In their reply brief, Defendants assert that those claims should be dismissed because they "are derivative of an asserted constitutional right to record trial proceedings which does not exist." Defs.' Reply 6. Defendants did not, however, raise this argument in their motion for summary judgment. "When a movant submits additional evidence or arguments in support of summary judgment after the filling of the non-movant's response, district courts have the option of either disregarding that additional evidence or providing the non-movant with the opportunity to file a surreply." *International–Matex Tank Terminals–Illinois v. Chemical Bank*, 2009 WL 1651291, at *2 (W.D.Mich. June 11, 2009) (quoting *Magoffe v. JLG Indus., Inc.*, 2008 WL 2883183, at *2 (D.N.M. May 7, 2008). McKay has not sought leave to file a sur-reply, and therefore this Court will disregard Defendants' arguments that McKay's Fifth and Fourteenth Amendment claims should be dismissed.

Order dismissing the cause of action and awarding Defendant[18] its costs and attorney fees so wrongfully incurred." Defs.' Mot. Summ. J. 25. Accordingly, Defendant's request for attorney fees will be denied without prejudice.

IX

Accordingly, it is **ORDERED** that Plaintiff McKay's Motion for Summary Judgment as to Count V (ECF No. 35) is **DENIED.**

It is further **ORDERED** that Defendants' Motion for Summary Judgment (ECF No. 44) is **GRANTED IN PART** to the extent that its seeks summary judgment on Plaintiff McKay's First Amendment claims. Defendants' Motion for Summary Judgment (ECF No. 44) is **DENIED WITHOUT PREJUDICE IN PART** to the extent it seeks recovery of costs and attorney fees.

It is further **ORDERED** that Counts I, III, IV, and V of Plaintiff's Complaint are **DISMISSED WITHOUT PREJUDICE** to the extent that Plaintiff claims that the Electronics Ban Order is unconstitutional as applied within the courtrooms of the Saginaw County Governmental Center.

It is further **ORDERED** that Counts I, III, IV, and V of Plaintiff's Complaint are **DISMISSED WITH PREJUDICE** to the extent that Plaintiff claims that the Electronics Ban Order is

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[18] Apparently, Defendants seek costs and attorney fees related to only one of the Defendants—either Sheriff Federspiel or Lieutenant Sheriff Pfau. Defendants did not, however, identify which one was seeking to recover.

unconstitutional as applied outside the courtrooms in the Saginaw County Governmental Center.

Dated: Dec. 11, 2014 s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 11, 2014.

s/Karri Sandusky
Karri Sandusky,
Acting Case Manager

No. 15-1548

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT MCKAY, Plaintiff-Appellant, v. WILLIAM L. FEDERSPIEL; RANDY F. PFAU, Defendants-Appellees.	Filed Aug 10, 2016 Deborah S. Hunt, Clerk O R D E R

BEFORE: STRANCH, DONALD, and LIPEZ, Circuit Judges.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision on the cases. The petition then was circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied. Judge Rogers and Judge Griffin would grant the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

* The Honorable Kermit V. Lipez, Circuit Judge for the United States Court of Appeals for the First Circuit, sitting by designation.