No. 22-3224

In the
United States Court of Appeals
For the Sixth Circuit

Dan Hils, et al.,
***Plaintiff-Appellants*,**
v.

Gabriel Davis, et al.,
Defendant-Appellees

On Appeal from the United States District Court
For the Southern District of Ohio, Western Division

BRIEF OF DEFENDANT-APPELLEES

Respectfully submitted,

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Statement Concerning Oral Argument

Defendant-Appellees Gabriel Davis, Ikechukwu Ekeke, and City of Cincinnati (collectively the "City") defer to the Court's judgment on the necessity of oral argument. The law is clear and Plaintiff-Appellants Dan Hils, Charles Knapp, Ken Byrne, and Adaryll Burch (collectively the "Officers") have failed to bring forward any legal precedent with analogous facts suggesting the district court erred. Regardless, in the interest of ensuring a complete understanding of the case and a just outcome, the City defers to the Court regarding the benefits of oral argument.

Statement of the Issues

The issue in this matter is whether the district court properly found that there is no First Amendment right to record Citizen Complaint Authority ("CCA") interviews. Based upon that finding, the district court granted the City's Rule 12(b)(6) motion to dismiss and supplemental motion to dismiss on the ground that the Officers failed to state a First Amendment claim upon which relief could be granted. The district court also denied the Officers' request for injunctive relief as moot based upon its finding that the City voluntarily amended its recording policies and practices, and the Officers failure to state a First Amendment claim. As such, this appeal turns entirely on the First Amendment issue.

Statement of the Case

A. The Officers' allegations.

Hils, Knapp, Byrne, and Burch, are employed as police officers by the Cincinnati Police Department. (Compl. Doc. 1, PageID #2-3, ¶¶ 2-5.) Davis and Ekeke are employees of the CCA. (Id., PageID #3, ¶ 7-8.)

The CCA is responsible for investigating citizen complaints of police misconduct. (Id., PageID #4, ¶ 11.) Knapp, Byrne, and Burch were the subjects of citizen complaints heard by the CCA. (Id., PageID #3 ¶ 3-5.) In his role as president of the Fraternal Order of Police, Lodge #69 ("FOP"), Hils represented Knapp, Byrne, and Burch during the CCA's investigation of those citizen complaints. (Id., PageID #2-3, ¶ 2.)

While the CCA has always recorded the entirety of its interviews, the Officers alleged that the CCA engaged in selective recording. (Id., PageID #5, ¶ 13.) Acting on that belief, Hils began to make his own recordings of CCA proceedings. (Id., PageID #5, ¶ 15.) But the CCA has a no-recording policy and does not allow anyone to make recordings of its interviews, so it told Hils not to do so and, when he refused, terminated interviews. (Id., PageID #5, ¶ 16.) When that happened, the CCA told officers:

> At this time, I'm advising you that CCA does not permit any persons who are being interviewed or representatives of those persons to make

> their own recordings of witness interviews or utilize personal recording devices during the interview.

(Id., PageID #5, ¶ 16 and Compl. Ex. A, PageID #9.)

B. The Officers sue the City.

Believing they had a First Amendment right to record CCA proceedings, the Officers sued the City, bringing two counts under 42 U.S.C. § 1983. In Count I, the Officers claimed that the CCA's no-recording policy violated their First Amendment right to record public officials in the performance of their duties. (Id., PageID #7, ¶¶ 23-24.) In Count II, they claimed that the City retaliated against them for asserting their First Amendment rights. (Id., PageID #7, ¶¶ 27-29.)

The Officers also filed a Motion for a Temporary Restraining Order and Preliminary Injunction, which sought to enjoin the City from "preventing the tape or video recording by Plaintiff Hils in any City of Cincinnati City Complaint Authority matter in which he is representing any City of Cincinnati Police Officer, or the tape or video recording by any other Plaintiff of an interview before the City of Cincinnati City Complaint Authority in which that Plaintiff is the subject of the investigation," and enjoining the City "from taking any adverse action against any of the Plaintiffs

solely due to their tape or video recording proceedings before the City of Cincinnati City Complaint Authority."[1] (Mot. For TRO, Doc. 2, PageID # 28.)

C. The City moved to dismiss.

The City filed a Motion to Dismiss under Rule 12(b)(1) and (6), which made four arguments: (1) the Officers lacked standing to challenge the CCA's no-recording policy because they had not suffered a cognizable injury, (2) the Officers raised claims that amounted to labor disputes that were subject to the exclusive jurisdiction of the Ohio State Employment Relations Board ("SERB"), (3) the Officers failed to state a claim upon which relief could be granted because there is no First Amendment right to record CCA interviews, and (4) defendants Davis and Ekeke were entitled to qualified immunity. (Doc. 14.)

The City also filed a Supplemental Motion to Dismiss (Doc. 19), which explained that the FOP had filed a complaint with SERB that was based upon the same events and alleged the City committed an unfair labor practice by preventing FOP members from recording interviews. (ULP Charge, Doc. 11-1.) That matter was amicably settled. As part of the settlement, the City agreed it will keep a recording device running the entire time any interview is taking place, will indicate on the

[1] References to "City Complaint Authority" are presumably meant to refer to the "Citizens Complaint Authority."

record any time the recording is stopped, will ask no questions while recordings are stopped, and, upon request, will provide FOP members with a copy of the recording following their CCA interview. (ULP Settlement, Doc 19-1, PageID # 160.) In light of this settlement, the CCA ceased using the "script" attached to the Officers' Complaint. The City argued that this settlement rendered the underlying matter moot.

D. The district court found no constitutional claim and granted the City's motions.

Before granting the City's motions to dismiss, the district court first addressed mootness. To the extent that the Officers' sought an injunction or declaratory relief based upon the allegation of selective recording, the district court found the SERB settlement rendered any claims related to selective recording moot. (Order, Doc. 22, PageID # 181.) But because the settlement did not address the no-recording policy, it found the constitutional claims related to the Officers' desire to record CCA interviews were not moot. (Id.)

The district court next considered whether the Officers had standing. Because the Officers alleged facts demonstrating that the City's no-recording policy would be enforced against them in the future, it found that the Officers had standing to assert a pre-enforcement challenge to the no-recording policy.

Ultimately, the district court found that the Officers had no likelihood of success on the merits because they had no First Amendment right to record the CCA interviews. (Id., PageID #189-190.) And since the Officers did not have a First Amendment right to record those interviews, their retaliation claim, which required engagement in protected constitutional conduct, also failed. (Id.) Finally, the district court found the Officers were not entitled to either a restraining order or an injunction since both were also founded upon that non-existent right.

Based upon those findings, the district court granted the City's Motion to Dismiss and Supplemental Motion to Dismiss, and denied the Officers' Motion for Temporary Restraining Order and Preliminary injunction. (Id.)

The Officers have now appealed those rulings to this Court.

Summary of the Argument

Access to governmental information is rooted in the First Amendment, but the First Amendment does not require states to accommodate every potential method of recording proceedings. Under this Court's precedent, a no-recording policy that does not selectively delimit the audience will be upheld if it is reasonably related to a governmental interest.

As the district court found, the CCA's no-recording policy passes that test. Having passed that test, it found that the Officers failed to state a constitutional violation. None of the Officers' counterarguments hold merit. While the general

public might have a right to record police performing their duties in public (such a right has not been clearly established by this Court), that does not translate into a right to record governmental officials performing their duties in private. Nor does Ohio's one-party-consent statute related to recordings prevent the government from prohibiting recordings.

The Officers do not have a First Amendment right to record CCA proceedings. Because all of their claims were based upon the presumption of such a right, its non-existence means the Officers have failed to state any claims upon which relief may be granted. As such, the district court's dismissal of their claims should be affirmed.

Argument

There is no First Amendment right to record proceedings that take place during CCA interviews. The trial court correctly reached that conclusion by appropriately applying relevant and settled First Amendment law.

A. Standard of Review

This Court reviews a district court's order granting a Rule 12(b)(6) motion to dismiss for failure to state a claim *de novo*. *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 793 (6th Cir. 2016). In scrutinizing a complaint under Rule 12(b)(6), courts will "accept all well-pleaded factual allegations of the complaint as true and construe the complaint in the light most favorable to the plaintiff." *Dubay v. Wells*, 506 F.3d 422, 426 (6th Cir. 2007) (quoting *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir.

2002)). A complaint survives a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To state a claim under § 1983, a plaintiff must allege that (1) a right secured by the Constitution or a federal statute has been violated and (2) the violation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

B. Issues that were argued below but that are not at issue in this appeal

While the entirety of the district court's decision turns upon its conclusion that there is no First Amendment right to record CCA proceedings, the Officers have made arguments related to standing, jurisdiction, employment limitations on the First Amendment, and qualified immunity. These arguments seemingly respond to the City's motions before the district court. There, the City made standing and jurisdictional arguments. It also made alternative arguments under *Garcetti/Pickering* related to whether terms of the Officers' employment impacted any First Amendment right that the general public might possess, as well as arguments related to qualified immunity.

While none of those issues are properly before this Court on appeal, since the Officers have raised these arguments, each will be briefly dealt with before turning to the First Amendment arguments that will decide this appeal.

1. As the district court ruled, the Officers had standing to challenge the no-recording policy and standing has not been challenged on appeal.

While the City raised standing below, the district court ruled that the Officers had standing to bring their challenge to the CCA's no-recording policy. (Order, Doc. 22, PageID #128-184.) That finding has not been challenged and is not an issue on appeal.

2. SERB only had exclusive jurisdiction over the Officer's non-constitutional claims. The district court's jurisdiction over the constitutional claims has not been challenged on appeal.

The Officers also argue that SERB could not take jurisdiction away from the district court. The City did argue below that SERB had exclusive jurisdiction over the Officers' unfair labor practice claims. As this Court has found, where a complaint is "essentially an allegation of an unfair labor practice," SERB has exclusive jurisdiction and the federal courts cannot review such claims on primary jurisdiction. *Zafiru v. Cleveland Mun. Sch. Dist.,* 448 Fed. Appx. 531, 536 (6th Cir. 2011). But as the City noted below, SERB's jurisdiction over non-constitutional claims did not deprive the district court of jurisdiction to hear viable constitutional claims. (Def. MTD, Doc. 14, PageID #96-97). The district court absolutely had jurisdiction to consider and did consider the Officers' constitutional claims.

Of course, even if the district court had jurisdiction to consider the non-constitutional claims that fell under SERB's jurisdiction, the settlement agreement

between the City and the FOP rendered those claims moot because it amounted to voluntary cessation of the allegedly illegal conduct. Amongst other things, that settlement agreement requires the CCA to use at least one recording device that will be activated when the FOP enters the room for their CCA interview; to keep the recording device on at all times during the interview, unless a break is announced on the record along with the times the recording was stopped and restarted; and to provide a copy of the recording to the officer upon request. (ULP Settlement, Doc. 19-1, PageID #160.) This amounts to the City's voluntary cessation of the alleged selective recording.

> Where the government voluntarily ceases its actions by enacting new legislation or repealing the challenged legislation, that change will presumptively moot the case unless there are clear contradictions that the change is not genuine.
>
> On the other hand, where a change is merely regulatory, the degree of solicitude the voluntary cessation enjoys is based on whether the regulator process leading to the change involved legislative-like procedures or were ad hoc, discretionary, and easily reversible actions.
>
> If the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim.
>
> Where regulatory changes are effected through formal, legislative-like procedures, we have found that to moot the case the government would need not do much more than simply represent that it would not return to the challenged policies.

Thomas v. City of Memphis, Tenn., 996 F.3d 318, 325 (6th Cir. 2021) (citing *Speech*

First, Inc. v. Schlissel, 939 F.3d 756, 768-69 (6th Cir. 2019)).

As the district court found, "[w]hile the [CCA's] policy change is pursuant to a 'discretionary' procedure, the challenged policy is subject of a settlement agreement between the City and FOP" and this "increases the 'formality' of a government's regulatory change." (Order, Doc. 22, PageID #181, citing *Thomas, supra,* 996 F.3d at 325.)

While the settlement may have mooted the Officers' concerns about the CCA's selective recording, the district court found it neither addressed nor mooted the First Amendment issues related to the no-recording policy that formed the foundation of the Officer's constitutional claims. In turn, the district court gave the Officers' constitutional claims full consideration.

3. The district court did not address qualified immunity below and the Officers abandoned their claims against Davis and Ekeke.

Finding that there was no constitutional claim, the district court did not reach the issue of qualified immunity. Because that issue was not addressed below, it is not an issue that is before this Court. Yet even if it were an issue on appeal, Davis and Ekeke are entitled to qualified immunity for two reasons.

First, while this issue was raised in the City's motion to dismiss, the Officers failed to address qualified immunity in their response. Having failed to do so, the Officers abandoned their claims against Davis and Ekeke. *West Boca Med. Ctr., Inc.*

v. Amerisource Bergen Drug Corp (In re Nat'l Prescription Opiate Litig.), 452 F.Supp.3d 745, 785 (N.D. Ohio 2020) *citing Doe v. Bredesen,* 507 F.3d 998, 1007 (6th Cir. 2007) ("a plaintiff abandons its claims by failing to raise them in its brief opposing a defendant's motion to dismiss").

Second, even if the Officers had not abandoned their claims, both Davis and Ekeke are entitled to qualified immunity. Qualified immunity shields government officials from civil liability when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Qualified immunity provides "ample protection to all but the plainly incompetent and those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); see also *Miller v. Administrative Office of the Courts*, 448 F.3d 887, 896-97 (6th Cir. 2006). As qualified immunity is an immunity from suit, not just an immunity from liability, an official's entitlement to qualified immunity should be determined at the earliest stage of the proceedings. The plaintiff has the burden to establish that a defendant is not entitled to qualified immunity. *Miller*, 448 F.3d at 894.

Because there is no constitutional right to record CCA interviews, the Officers cannot show that Davis and Ekeke violated a clearly established statutory or

constitutional right of which a reasonable person would have known. And even if this Court were to create such a right, it was not clearly established at the time Davis and Ekeke enforced the no-recording policy. As such, they are entitled to qualified immunity.

4. The district court did not cite, let alone address, *Pickering*.

Below, the City relied on *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to argue that even if the general public enjoyed a First Amendment right to record CCA interviews (which they do not), the Officers had not shown it was improper to limit their First Amendment rights as a term of their employment. And *Garcetti* relies on *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty.,* 391 U.S. 563 (1968). *Garcetti, supra,* 547 U.S. at 417.

While the City cited and relied on those cases, the district court did not. Instead, the district court found that there is no First Amendment right to record CCA proceedings whatsoever. As such, it never addressed this argument and it is not at issue in this appeal.

C. First Amendment

This appeal turns on whether there is a First Amendment right to record CCA interviews. As the district court found, there is not. And despite the different approaches the Officers take in the hopes of creating error, each fails.

1. The CCA's no-recording policy is constitutional

The Officers' claim that the CCA's no-recording policy violates the First Amendment is founded upon access to information. "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 Cty.,* 499 F.3d 554, 559 (6th Cir. 2007). Under those cases, courts have concluded that "the First Amendment does not require unfettered access to government information." *Whiteland Woods, L.P. v. Township of West Whiteland,* 193 F.3d 177, 182 (3rd Cir. 1999). "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Houchins v. KQED, Inc.,* 438 U.S. 1, 14-15 (1978).

Based upon those principles, courts have found that "'[t]he First Amendment does not require states to accommodate every potential method of recording its proceedings, particularly where the public is granted alternative means of compiling a comprehensive record.'" *Maple Heights News v. Lansky,* No. 1:15CV53, 2017 U.S. Dist. LEXIS 34639, *7 (N.D. Ohio Mar. 10, 2017) (quoting *Whiteland, supra*, 193 F.3d at 183); see, also, *Combined Communications Corp. v. Finesilver,* 672 F.2d 818, 821 (10th Cir. 1982) (upholding a ban on the use of television cameras during court-ordered redistricting negotiations where the press was free to attend, take notes, and

disseminate any information obtained). Even when there is a right of access, there is not a "'nexus between the right of access and a right to videotape.'" *Maple Heights, supra,* at * 8 (quoting *Whiteland, supra,* 193 F.3d at 183).

A crucial question in right-of-access cases is whether a rule selectively delimits the audience. This Court uses the following test to determine if a no-recording rule is constitutional:

> First, we ask what rule the government is invoking that prohibits the plaintiffs from access to information, and whether that rule "selectively [] delimit[s] the audience." . . . Second, we inquire into the government's stated interest for invoking the rule. Third, we apply the applicable test to determine whether the government's stated interest is sufficiently related to the means of accomplishing that interest: 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.

S.H.A.R.K., supra, 499 F.3d at 560-61 (quoting *D'Amario v. Providence Civic Ctr. Auth.,* 639 F.Supp. 1538, 1543 (D.R.I. 1986), *aff'd,* 815 F.2d 692 (1st Cir.), *cert. denied*, 484 U.S. 859 (1987).

The first prong asks if the CCA's rule prohibits the Officers from obtaining information or selectively delimits the audience. The CCA's no-recording policy does not prevent the Officers from obtaining information. They are obviously in attendance during their interviews and can observe everything taking place in the room. While they are not permitted to record the proceedings, they are free to take notes and will be provided a copy of the CCA's recording upon request. Nor does

the no-recording policy selectively delimit the audience. CCA interviews of police officers are not open to the public and the audience is limited to the CCA interviewer, the officer being interviewed, and the officer's representative. Nothing about the no-recording rule selectively delimits that audience.

The second prong considers the government's purpose behind the rule. Inexplicably, the Officers insist that the City has never explained the no-recording rule's purpose and that its "silence is deafening." (Officer's Brief, Doc. 20 at p. 41.) As the City explained in the motion to dismiss, the no-recording rule "serves a governmental interest in maintaining order during its proceedings. It ensures that what is discussed during the interview is not improperly broadcast and, in turn, improperly used to influence the testimony of others appearing before the CCA." (Def. MTD, Doc. 14, PageID #104-05; see, also, Reply in Support of MTD, Doc. 16, PageID #140-41) These reasons were even cited by the district court when it found the no-recording policy to be constitutional. (Order, Doc. 22, PageID #187.)

The final prong determines what level of scrutiny applies. Since the CCA's no-recording policy does not delimit the audience, it will be upheld if it is reasonably related to the government's interest. As the district court found, "[t]he CCA cannot carry out its mission in a fair and efficient manner if parts of the investigation are recorded and then released before the investigation is completed" and "the investigation conducted by the CCA would be totally frustrated if recordings were

to be made public before the investigation was complete." (Id.) Based upon those findings, it "conclude[d] that the no-recording policy is reasonably related to the legitimate concern that the CCA's investigations are fair and efficient." (Id.)

The district court properly applied the *S.H.A.R.K.* analysis and properly concluded that the CCA's no-recording rule is constitutional. The Officers, however, argue that since they are allowed to be there they are also allowed to record, and that Ohio's one-party-consent statute allows them to record whatever they want. Both arguments fail.

2. Just because you have a right to be someplace does not mean you have a right to record.

The Officers argue that they have a right to record whatever they want so long as they are some place they are allowed to be. That simply is not the law. There is no "'nexus between the right of access and a right to videotape.'" *Maple Heights, supra,* 2017 U.S. Dist. LEXIS 34639, *8 (quoting *Whiteland, supra,* 193 F.3d at 183). Courtrooms, which are open to the public, provide an excellent example of the fallacy of the Officers' argument.

In *Somberg v. Cooper,* a criminal defense attorney took a screenshot of a Zoom hearing that was being live streamed on YouTube and posted it on social media. No. 20-cv-11917, 2021 U.S. Dist. LEXIS 149752 (E.D. Mich. Aug. 10, 2021). The prosecution became aware of this and brought it to the court's attention as possibly

violating Michigan Court Rules, local court policy, and the Rules of Professional Responsibility. *Id.* at *2-3. Arguing "that the First Amendment includes an individual's 'right to record'" and relying on some of the same cases that the Officers are relying upon, the attorney brought a § 1983 action based on having a "protected right to photograph, screenshot, audio/video record, broadcast, report, distribute, share, and publish photographic, audio, and video recordings of public live-streamed Michigan court proceedings without threat of or an actual prosecution by Defendant." *Id.* at *5-6. The court rejected those arguments:

> "[C]ourtrooms are 'nonpublic' fora, where First Amendment rights 'are at their constitutional nadir.' They are different from street corners and city parks. As the Sixth Circuit explained, 'the courtroom is unique even among nonpublic fora because within its confines we regularly countenance the application of even viewpoint-discriminatory restrictions on speech.' Courtrooms' participants, including observing members of the public, are subject to unique constraints that do not apply in other public spaces."

Id. at *11 *quoting Mezibov v. Allen*, 411 F.3d 712, 718 (6th Cir. 2005) (internal citations omitted).

Even though it was a virtual hearing that was being broadcast to the world and the fact that the attorney was not even physically in the courtroom did not sway the *Somberg* court: "This Court declines to find a distinction between an in-person and a virtual proceeding for purposes of establishing the asserted right to record * * * In both scenarios, any individual may attend, observe, and subsequently comment on

the activities of public officials within the courtroom[.]" The court went on to "emphasize[] that Plaintiff can obtain transcripts to these proceedings at anytime," which demonstrated that the no-recording policy "did not interfere with the First Amendment's assurance of a free and open society." *Somberg, supra,* at *16-17.

Just like the attorney in *Somberg*, the Officers here are relying on cases that involve a right to record in *public* spaces. *Glik v. Cunniffe,* 655 F.3d 78 (1st Cir. 2011) (a public park); *Craft v. Billingslea,* 459 F.Supp.3d 890 (E.D.Mich. 2020) (a gas station parking lot); *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (recording officers in public places and speaking at a volume audible to bystanders). At least in *Somberg* the forum in question was a courtroom that was open to the public and being openly broadcast live on the Internet. Here, as the Officers acknowledge, the public is not permitted in the CCA's interview rooms. (Pl. Memo in Opp. to MTD, Doc. 15, PageID #121.) Indeed, the Officers are only permitted to be present because they are either being interviewed or representing the officer being interviewed. Regardless, just because the Officers are allowed in CCA's interview rooms, just as the general public is allowed in courtrooms, does not endow them with First Amendment rights to record.

Additionally, the Officers' ability to receive recordings of their interviews, just like the general public's ability to obtain court transcripts, offers First Amendment protections. *Somberg, supra,* at *16-17 *citing Gilk, supra,* 655 F.3d at 82-83

(transcripts protect and promote the free discussion of government affairs) and *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976) (transcripts allow extensive public scrutiny and criticism that serves to guard against the miscarriage of justice).

Ohio courts have agreed with the federal courts. The Ohio First District Court of Appeals recently affirmed a ten-day jail sentence following a finding of contempt for recording court proceedings on a cell phone. *State v. Hammock*, 1st Dist. Hamilton No. C-200368, 2021-Ohio-3574.

Nor does the Officers' newsgathering arguments do them any good. As this Court held in *Boddie v. American Broadcasting Cos.* after recognizing that newsgathering enjoys First Amendment protection, "[t]he first amendment of course does not immunize wrongful behavior simply because it is undertaken in the name of newsgathering." 881 F.2d 267, 271 (6th Cir. 1989) (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). The Officers have no more right to violate the CCA's no-recording policy in the name of newsgathering than anyone else.

Curiously, the Officers continue to rely upon *Crawford v. Geiger*, 131 F.Supp.3d 703 (N.D. Ohio 2015), for the proposition that there is a clearly established right to record police, which they try to turn into an established right to record CCA interviews. In *Crawford*, police officers prevented the plaintiffs from recording them on the plaintiff's own land and the district court initially denied the

officers qualified immunity. But as the City noted below, the district judge granted the officers qualified immunity after it *vacated* its earlier decision that there was a clearly established right to film the police:

> Earlier in this case, I ruled that the right [to record] was clearly established. On further consideration with the instant motions, however, I believe the right openly to film police carrying out their duties is not so clear cut that it is proper in *this* case to withhold qualified immunity as to the First Amendment Claim. As the Fourth Circuit has emphasized, "the contours of the constitutional right must be sufficiently clear that a reasonable officer would understand what he is doing violates that right." That is not the case here – the exact nature of the right, and the circumstances in which it applies, have been, and continue to be, subject to debate.
>
> In light of the as yet unsettled constitutional status of the ability, without fear of arrest, to record what one can otherwise lawfully see and hear, I uphold the claim of qualified immunity *vis-à-vis* the First Amendment claim in this case. Doing so, I vacate that portion of my opinion in *Crawford*.

Id. at 715, quoting *Szymecki v. Houck*, 353 Fed. Appx. 852, 852-853 (4th Cir. 2009) *vacating in part* 996 F.Supp.2d 603 (N.D. Ohio 2014) (emphasis sic; other citations omitted). In other words, the *Crawford* decision determined that the right the Officers are attempting to rely upon was not clearly established. And, as the district court here noted, this Court has still not definitively answered the question of whether there is a clearly established right to record police officers carrying out their duties. (Order, Doc. 22, PageID #188.) Regardless, even if it is presumed that there was a clearly established right to record police on your own land or in an area open

to the public, that would not translate into a right to record CCA interviews that are closed to the public.

Plaintiffs' reliance on *Nixon v. Warner Communications, Inc.,* is equally perplexing as it held that "there is no constitutional right to have such testimony recorded and broadcast." 435 U.S. 589, 610 (1978) citing *Estes v. Texas*, 381 U.S. 532, 539-42 (1965). That holding all but decides this case.

The Officers also cite to a legion of cases in support of their belief that they can simply record anything they want. Some of them at least involve recording police officers. *Crawford v. Geiger*, 131 F.Supp.3d 703, 715 (S.D. Ohio 2015) (recording police outside of the plaintiff's warehouse); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (recording police on the Boston Common); *Craft v. Billingslea,* 459 F.Supp.3d 890 (E.D.Mich. 2020) (recording police officers in a gas station's parking lot); *ACLU v. Alvarez,* 679 F.3d 583, 595 (7th Cir. 2012) (recording officers in a public place and speaking at a volume audible to bystanders); *Fields v. City of Philadelphia,* 862 F.3d 353 (3rd Cir. 2017) (recording police activity from a public street); and *Garcia v. Montgomery Cty.* 145 F.Supp.3d 492, 2015 U.S. Dist. LEXIS 151059 (retaliation for arresting a person for filming officers in public). All of those, however, involved recording the police as they performed their duties in a public setting.

Other cases, however, had nothing to do with filming the police. *Fordyce v.*

City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (police stopped a man who was filming children on a public sidewalk after the man ignored parents' requests that he stop); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (journalists sneaking into dairy farms); and *Animal Legal Def. Fund v. Herbert*, 263 F.Supp.3d 1193 (D. Utah 2017) (journalists sneaking into dairy farms).

Some cases involved someone recording something but were decided on other grounds. *Boddie v. Am. Broad. Cos.,* 881 F.2d 267 (6th Cir. 1989) (television station secretly recorded someone who did not agree to be recorded; striking down a federal law that prohibited surreptitiously recording with "injurious" intent as void for vagueness); *Blackston v. Alabama,* 30 F.3d 117, 120 (11th Cir. 1994) (finding a complaint made sufficient allegations to raise the possibility of a no-recording law being improperly content and viewpoint based); *Lambert v. Polk County,* 723 F.Supp. 128, 133 (S.D. Iowa 1989) (improper seizure of a video recording); *Williamson v. Mills,* 65 F.3d 155 (11th Cir. 1995) (reversing the granting of qualified immunity on Fourth Amendment grounds); *Melton v. City of Okla. City,* 879 F.2d 706 (10th Cir. 1989) (applying *Pickering* to officer who was fired for violating an internal ethics rule after he provided a recording to a criminal defendant); *Smith v. City of Cumming,* 212 F.3d 1332 (11th Cir. 2000) (recognizing right to record police in public exists in the 11th Circuit, but plaintiffs failed to show police violated that right); and *Chestnut v. Wallace*, 947 F.3d 1085 (8th Cir. 2020) (plaintiff was not

recording police, but was watching them from a park).

One case the Officers cite to, however, stands out because it demonstrates a no-recording policy that did violate someone's rights. In *Thompson v. City of Clio*, 765 F.Supp. 1066 (M.D. Ala. 1991), the city's mayor got upset that Thompson, a council member, was recording meetings. *Id.* at 1068. The mayor believed that Thompson "'had used his tape recording to give various people around town false impressions' and in order to prevent future 'disturbances' [the mayor] decided Thompson would no longer be permitted to tape record council sessions." *Id.* Unsurprisingly, a policy that selectively delimited the audience by prohibiting only one person from recording council meetings was deemed to be neither content nor viewpoint neutral. *Id.* at 1072.

If the CCA's no-recording rule applied only to some of the people who appeared before it, then it would not have taken a 1991 district court case from Alabama to tell us that was unconstitutional. But the CCA's no-recording policy applies to everyone. It does not matter if the person involved is a police officer, a citizen who filed the complaint, some other witness, or their representative—the no-recording policy applies to everyone, and no one is allowed to make their own recording.

Because the CCA's no-recording rule applies to everyone and does not selectively delimit the audience, under *S.H.A.R.K.*, the question becomes whether

the rule is rationally related to a governmental interest. And, as discussed above, "the no-recording policy is reasonably related to the legitimate concern that the CCA's investigations are fair and efficient." (Order, Doc. 22, PageID #187.)

There is no First Amendment right to record CCA interviews. Having a right of access does not create a right to record. Just as this and other courts enjoy the right to prevent people from making recordings of its proceedings, so does the CCA.

3. Ohio Revised Code 2933.52 does not create a right to record CCA proceedings.

The Officers' reliance on Ohio Rev. Code 2933.52 also takes them nowhere. Generally, that statute says that one-party-consent recordings are not unlawful. But as this Court held in *Horen v. Board of Education,* a case the Officers have neither cited nor addressed, that statute does not create a right to record. No. 09-4254, 2011 U.S. App. LEXIS 26643 (6th Cir. Mar. 11, 2011).

In *Horen,* parents claimed that Ohio Rev. Code 2933.52 allowed them to circumvent a Department of Education policy that prohibited recording individual educational plan ("IEP") meetings by arguing the statute allowed one-party consent to recordings in Ohio. This Court rejected that argument and found that, instead of creating a right, Ohio Rev. Code 2933.52 "states only that such recordings are not criminal acts" and ruled Department of Education policies "can limit or prohibit the recording of IEP meetings." *Id.* at *9-11.

The *Horen* decision is not surprising given that Ohio Rev. Code. 2933.52 has long been interpreted as being harmonious with policies that prohibit recordings. See Ohio AG Opinion No. 94-097, 1994 Ohio AG LEXIS 129 (surreptitious tape recording of a meeting or conversation is not unlawful, but employee has neither a constitutional nor statutory right to have a record or tape recording made of a disciplinary meeting).

Just as the Department of Education can limit or prohibit recording of IEP meetings, so too can the CCA limit or prohibit recording of its interviews. The Officers reliance on Ohio Rev. Code 2933.52, therefore, is misplaced as it does not prevent governmental agencies from prohibiting recordings.

D. Because the Officers were not engaged in constitutionally protected conduct, their retaliation claim and requests for injunctive relief fail.

The Officers also argue that the district court improperly dismissed their retaliation claim and requests for injunctive relief. But since the Officers do not have a First Amendment right to record CCA proceedings, their claims founded upon that non-existent right necessarily fail.

1. Retaliation

This Court has held that a First Amendment retaliation claim has three elements: "(1) the plaintiff engaged in constitutionally protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary

firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by the plaintiff's protected conduct." *Paterek v. Vill. of Armada, Mich.,* 801 F.3d 630, 645 (6th Cir. 2015). Because there is no First Amendment right to record CCA proceedings, the Officers cannot demonstrate they engaged in constitutionally protected conduct and cannot meet the first prong of that test. In turn, their retaliation claim necessarily fails.

2. Injunctive relief

This Court reviews a district court's decision to grant or deny a preliminary injunction for an abuse of discretion. *McGirr v. Rehme,* 891 F.3d 603, 610 (6th Cir. 2018). "That decision is only to be disturbed if it relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id.* (internal quotations and citations omitted).

Courts consider four factors when ruling on requests for preliminary injunctions: "(1) the movant's chances of succeeding on the merits; (2) if the movant would likely be permanently harmed absent the injunction; (3) whether the injunction would cause substantial harm to third parties; and (4) whether the injunction would serve the public interest. *Id.* (citing *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017)).

Here, the Officers' request for injunctive relief was founded upon their belief that the CCA's no-recording policy violated their First Amendment rights. "When a

party seeks preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits will often be the determinative factor." *City of Pontiac Retired Emps. Ass'n v. Schimmel,* 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (quoting *Obama for Am. v. Husted,* 697 F.3d 423, 436 (6th Cir. 2012).

The district court found that the Officers do not have a First Amendment right to record CCA proceedings. This Court reviews legal questions that underlie a district court's decision to deny injunctive relief *de novo*. *Fowler v. Benson,* 924 F.3d 247, 256 (6th Cir. 2019). As demonstrated above, the district court correctly found there is no First Amendment right to record CCA proceedings.

Since the Officers' request for injunctive relief was founded upon a non-existent right, they had no likelihood of success on the merits. Because the Officers cannot establish a substantial likelihood of success on the merits, they are equally unable to establish the possibility of irreparable harm. *Cf. Dayton Area Visually Impaired Persons, Inc., v. Fisher,* 70 F.3d 1474, 1490 (6th Cir. 1995) (equating likelihood of success on the merits of a constitutional claim with the likelihood of establishing harm). And even if the Officers could have once demonstrated any harm based on their allegations of selective recording, the City has since agreed to record CCA interviews in their entirety and to provide copies of those recordings to the Officers upon request, so that harm no longer exists. Finally, the lack of a First Amendment violation here undermines any finding that a public interest is at stake.

Connection Distrib. Co. v. Reno, 154 F.3d 281 (6th Cir. 1998) (determination of public interest is dependent on the likelihood of success on the merits). As such, the district court properly denied their requests for injunctive relief.

Conclusion

The district court properly found that there is no First Amendment right to record CCA proceedings. In turn, it properly granted the City's motion to dismiss and denied the Officers' request for injunctive relief as moot. The district court's decisions should be affirmed.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the foregoing brief contains 8124 words and is in compliance with Fed. R. App. P. 32(a)(7).

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Certificate of Service

I hereby certify that a copy of the foregoing has been filed electronically via CM/ECF, thereby delivering it to counsel of record on this 23rd day of June, 2022.

/s/ Scott Heenan
Scott Heenan
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Addendum

Appellee's designation of the District Court Record from 1:21-cv-475

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