United States Court of Appeals
for the Sixth Circuit

CASE NO. 22-3224

DAN HILS, CHARLES KNAPP, KEN BYRNE, AND ADARYLL BURCH	:	On Appeal from the U.S. District Court for the Southern District of Ohio
Plaintiffs/Appellants	:	1:21-cv-00475
v.	:	
GABRIEL DAVIS, IKECHUKWU EKEKE, AND CITY OF CINCINNATI	:	
Defendants/Appellees	:	

PLAINTIFFS/APPELLANTS' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Plaintiffs/Appellants (the "Plaintiffs") are not subsidiaries or affiliates of a publicly owned corporation. There is no publicly owned corporation, not a party to the appeal, which has a financial interest in the outcome.

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STATEMENT CONCERNING ORAL ARGUMENT

This appeal raises important issues under the First Amendment concerning public accountability and honesty, particularly in today's setting where the actions of law enforcement and those who provide oversight of them are under unprecedented public scrutiny; oral argument is thus warranted.

JURISDICTIONAL STATEMENT

The District Court had federal question jurisdiction over Plaintiffs' claims under 28 U.S.C. §1331. On March 14, 2022 the District Court denied Plaintiffs' Motion for a Preliminary Injunction, and granted Defendants' Motion to Dismiss. [Opinion and Order, DE#22, PageID#175-191; Judgment, DE#23, PageID#192]. A timely notice of appeal was filed on March 15, 2022. [Notice of Appeal, DE#24, PageID#193]. Accordingly, this Court has jurisdiction over Plaintiffs' appeal under both 28 U.S.C. §1291 and 28 U.S.C. §1292(a)(1).

STATEMENT OF THE ISSUES

The appeal presents the following questions:

(1) Did the District Court err in granting Defendants' Motion to Dismiss?

(2) Did the District Court err in denying Plaintiffs' Motion for Preliminary Injunction?

INTRODUCTION

As Justice Brandeis once prophetically remarked, sunlight is the best disinfectant. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (*quoting* L. Brandeis, Other People's Money 62 (Nat'l Home Library Found. ed. 1933) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.")). This case involves the still critical need for sunlight – specifically, Plaintiffs' pursuit of

complete and open transparency concerning policing in the City of Cincinnati – a desire to record, for posterity, possibly defensively, and possibly for release to conventional and non-conventional media, the full and complete record of police interviews with the Cincinnati Citizen Complaint Authority ("CCA") – and efforts by Defendants to censor that very transparency by prohibiting recordings. Significantly, the material facts are undisputed on each score.

STATEMENT OF THE CASE AND FACTS

Plaintiff, Dan Hils, is the elected President of FOP Lodge 69 and, in that capacity, routinely represents officers in interactions with the City, including without limitation, all of the matters contained herein. (Pl.'s Ver. Compl., DE#1, ¶ 2, PageID#2-3). Plaintiffs Knapp, Burch, and Byrne are Cincinnati Police Officers who recently have been the subject of complaints submitted to the CCA. (*Id.* ¶¶ 3-5, PageID#3).

Under Article XXVII of the City of Cincinnati Municipal Code, Section 1, the CCA's mission "will be to investigate serious interventions by police officers, including but not limited to shots fired, deaths in custody and major uses of force, and to review and resolve all citizen complaints in a fair and efficient manner." (*Id.* ¶ 11, PageID#4). Under Section 2 of that Article, "[a]s a condition of employment, all police officers and city employees are required to provide truthful and accurate information to the CCA." *Id.* Under Section 3-B of that Article, "[p]olice officers

and other city employees will be required to submit to administrative questions consistent with existing constitutional and statutory law." *Id.* Section 3-F of the Article provides that files for retention "**shall include tape recorded interviews of officers, complainants and witnesses**." *Id.* (emphasis added).

Prior to the filing of this case (in the summer of 2021), Plaintiff Hils had occasion to be interviewed by Defendant Ekeke where, even though the policy implicitly mandates recording the entirety of an officers' interview with the CCA, Ekeke utilized a deceptive recording technique. Specifically, he turned off the CCA recording device at various times to create a deceptive and inaccurate record of the matter including, without limitation, omitting material exculpatory statements made by the officer in the interview. (*Id.* at ¶ 13, PageID#5). Defendant Ekeke also intimidated and threatened another officer prior to the interview in an effort to obtain misleading statements by the other officer, all creating a deceptive and inaccurate record of the matter. (*Id.* at ¶ 14).

As a consequence, Plaintiff Hils began to take precautionary measures in interviews with the CCA, namely to record the entirety of the interview from the time the officer appeared. (*Id.* at ¶ 15). Plaintiff Hils has recorded, and intends to record in the future, interviews with the CCA based on a desire for complete and open transparency concerning policing in the City of Cincinnati – a desire to record, for posterity, possibly defensively, and possibly for release to conventional

and non-conventional media. *Id.* But when Plaintiff Hils attempted to record the interviews, Defendants Ekeke and Davis, or investigators acting on the directives of Defendant Davis, have terminated the interviews and threatened the officers involved with disciplinary and other measures for recording the interviews. (*Id.* at ¶ 16, PageID#5-6).

On July 14, 2021, the CCA conducted an interview with Plaintiff Charles Knapp, with Plaintiff Hils present representing Plaintiff Knapp. (*Id.* at ¶ 17, PageID#6). When Hils began recording the interview, the investigator informed Plaintiff Knapp that they would not conduct the interview with Hils recording it, informed Knapp he should find another representative who would not record the interview, and stated that negative consequences would flow to Plaintiff Knapp if the interview was recorded. When Plaintiff Knapp refused, the investigator terminated the interview. *Id.* Plaintiff Knapp refused to be interviewed unless the interview was recorded by him or Hils. *Id.*

On July 15, 2021, Defendants Davis and Ekeke retaliated by creating a policy barring recording of CCA matters by officers or their representatives. This was done to threaten officers represented by Plaintiff Hils in CCA matters because of Plaintiff Hils' insistence on recording interviews with the CCA to prevent deceptive and/or threatening tactics towards officers or at least to preserve

evidence of the same. (*Id.* at ¶ 18). A true and accurate copy of the policy is attached as Exhibit A to Plaintiffs' Complaint. *Id.*

In relevant part, the policy states:

> 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.
>
> I'm also advising you that use of such devices during a CCA interview may constitute interference with a CCA investigation or obstruction of that investigation.
>
> At this time, I'm asking you to cease your recording.
> • Are you willing to cease your recording?
> • *If No*
> o Officer John Doe, if you wish to proceed with your CCA interview at this time, you must do so without Mr. Hils.
> o If you chose to proceed with Mr. Hils today, then we will end the interview at this time pending further consultation with the Law Department for the City of Cincinnati. You are advised that CCA reserves the right to complete its investigation into this matter relying solely on information obtained from other sources.
> o Do you wish to proceed without Mr. Hils?
> • *If Officer wants to proceed with Mr. Hils*
> • Given Mr. Hil's insistence on using his recording device during this interview, we will end the interview at this time pending further consultation with the Law Department for the City of Cincinnati.

(*Id.* at Exhibit A, PageID#9).

Also on July 15, 2021, the CCA conducted two interviews, one with Plaintiff Ken Byrne and the second with Adarryl Burch, with Plaintiff Hils present representing each. (*Id.* at ¶ 19, PageID#6). When Hils began recording each of the interviews, the investigator followed the script contained in the policy, including

making the threats contained in the policy, and enforced the policy against Plaintiffs Hils, Burch and Byrne. *Id.*

Defendants Davis and Ekeke have been enforcing, and will continue to enforce in the future, their retaliatory, vindictive, and unconstitutional no-recording policy against these complaining Plaintiffs. (*Id.* at ¶ 20). The foregoing no-recording policy constitutes an official municipal policy of the Defendant City of Cincinnati, or an unofficial custom of the Defendant City of Cincinnati because the municipality was deliberately indifferent in a failure to train or supervise the other Defendants. (*Id.* at ¶ 21).

SUMMARY OF THE ARGUMENT

The District Court erred in dismissing the Complaint, because Ohio is a one-party consent recording state, the Plaintiffs had a right to be in the location where they conducted the recording, recording interviews is actually required by the Municipal Code of the City of Cincinnati and the First Amendment undeniably protects these Plaintiffs' right to record. The District Court also erred in denying the Plaintiffs' Motion for Preliminary Injunction. The District Court should be reversed.

ARGUMENT

I. The District Court erred in granting the Defendants' Motion to Dismiss

A. Standard of Review

"To survive a motion to dismiss, a complaint must contain 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)). This standard is met when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiffs, draw all reasonable inferences in their favor, and accept all well-pleaded allegations in the complaint as true. *Cahoo v. SAS Analytics, Inc.*, 912 F.3d 887, 897 (6th Cir. 2019). And, in motions to dismiss that raise standing arguments, a court must "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (*citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

B. Plaintiffs had standing to challenge the no-recording policy below

Because Defendants raised standing below, we address it here. Defendants argued that Plaintiffs lack standing to challenge the no-recording policy. Defendants audaciously claimed, with not a single case in support, that there is no "legally cognizable harm," and likened this case to *McKay v. Federspiel*, 823 F.3d

862 (6th Cir. 2016). Defendants are wrong as *McKay* actually supports reversal here.

Article III constitutional standing requires a showing that Plaintiffs have suffered: (1) "an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *McGlone v. Bell*, 681 F.3d 718, 729 (6th Cir. 2012). A "credible threat of prosecution" is an "actual or imminent" injury, and that inquiry turns on "how likely it is that the government will attempt to use these provisions against" these Plaintiffs. *Morrison v. Board of Education of Boyd County*, 521 F.3d 602, 610 (6th Cir.2008).

In *McKay*, 823 F.3d 862, the Plaintiff desired to record court proceedings, which was prohibited by rule, but subject to six exceptions, including obtaining ad hoc permission to record by the presiding judge. *Id.* at 865. *McKay* involved mere allegations of the intention to record and, most importantly, was decided on summary judgment, causing this Court to observe that: "[w]hile "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.* at 868.

And, there was no dispute in *McKay* that the policy in question was "arguably affected with a constitutional interest." *Id.* Thus, that case also turned

on whether there was a "a credible threat of prosecution." *Id.* Thus, the *McKay* Court considered this issue and determined there are three separate types of conduct by Defendants that would provide standing, "(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." *Id.* at 868. Further, "[w]e have also taken into consideration a defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff." *Id.*

In *McKay*, all of these actions were lacking. In contrast, Plaintiffs here meet all three. Here, Defendants *actually enforced* the policy against these Plaintiffs, *threatened Plaintiffs* as part of that enforcement, and Defendants confirmed *they will enforce* the policy in question in the future. Thus, there is a history of past enforcement against these Plaintiffs, which meets the first *McKay* test for standing. *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1049 (6th Cir. 2015). There also were specific verbal threats directed towards these specific Plaintiffs, and there is *an entire script* that was developed regarding Plaintiff Hils demonstrating an intention to enforce the policy in the future regarding him, thus meeting the second *McKay* factor. *Kiser v. Reitz*, 765 F.3d 601, 608-09 (6th Cir. 2014). Finally, the allegations are unequivocal that Defendants intend to enforce the policy in the

future. (Pl.'s Ver. Compl., DE#1, ¶ 20, PageID#6). And, Plaintiffs alleged an intention to attempt to record the interviews in the future. (*Id.* at ¶ 15, PageID#5). Thus, Plaintiffs have standing under the third *McKay* factor even if they didn't meet the first two.

All of the requirements to meet standing are met, including an injury in fact that is concrete and particularized (the no-recording policy) that is actual or imminent, not conjectural or hypothetical (it has been enforced previously and continues to be enforced, notwithstanding an ongoing intention by the Plaintiffs to record the interviews), that is also fairly traceable to the challenged action of the defendants (all of whom enforce and developed the policy in question), and it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision (Plaintiffs sought a straightforward injunction against the policy). Simply put, and on these undisputed facts, *McKay* compels the conclusion that standing exists.

C. State employment collective bargaining laws do not, and cannot, bar the claims

Defendants also argued below that state collective bargaining laws barred the claims here. They contended that this matter is really a collective bargaining issue, and that the State Employee Relations Board ("SERB"), by operation of Ohio Rev. Code Chapter 4117, had exclusive jurisdiction over this matter. Once again, Defendants are wrong. The federal rights at issue are independent of any

contractual or bargaining rights, and thus are outside SERB's jurisdiction as a matter of state law. *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge 9*, 59 Ohio St.3d 167 (1991) at syllabus, ¶2. But, even if SERB had exclusive jurisdiction as a matter of state law (which it does not), state law cannot preempt federal law. U.S. Const. Art. VI.; *Haywood v. Drown*, 556 U.S. 729 (2009).

In *Haywood*, there was an argument that a separate forum was created for the action. *Id.* at 734. In upholding federal preemption, the Supreme Court determined that "although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Id.* at 736. "The State's policy, whatever its merits, is contrary to Congress' judgment that all persons who violate federal rights while acting under color of state law shall be held liable [under 42 USC 1983]." *Id.* at 736-737. Indeed, "[a] jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear." *Id.* at 739.

It is clear that a valid federal law is substantively superior to a state law; "if a state measure conflicts with a federal requirement, the state provision must give way." *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965). The text of 42 U.S.C. §

1983 is clear, and it is applicable to “every person” who violates the Constitution. Defendants cannot avoid its effect by invoking a state employment law.

D. Plaintiffs stated a claim upon which relief can be granted

1. Embedded in the Constitution is a right to record in any place someone has a right to otherwise be

Freedom of the press, as protected under the First Amendment, "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). The Amendment extends to "news gathering." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). This, in turn, ensures and enhances, to the maximum extent possible, "free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The First Amendment protects not just the right of the press to gather news — it affords that right to the general public as well. *Branzburg, supra*, 408 U.S. at 684. "As the Supreme Court has observed, 'the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.'" *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). "An important corollary to this interest in protecting the stock of public information is that [t]here is an undoubted right to gather news" from any source by means within the law."' *Id.* (alteration in original) (*quoting Houchins v. KQED, Inc.*, 438 U.S. 1,

11 (1978)). *See, also, S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 560 (6th Cir. 2007) (same).

Turning to the present case, and even if this matter turned on state law, Ohio law provides that *anyone* can record a conversation to which they are a party. Ohio Rev. Code § 2933.52. City ordinances authorizing these investigations provide that the investigatory materials are open to the public.[1] Those same ordinances provide for the City to tape record interviews. *Id.* at Section 3-F. Thus, even under state law, there is a right to record a conversation in any place where someone has a right to be in the first instance.

And, turning to federal law, a Michigan federal court recently noted, "[c]ell phone use, especially to document everyday encounters, has become ubiquitous in the twenty-first century." *Craft v. Billingslea*, 459 F. Supp. 3d 890, 910 (EDMI 2020). "The video recording capacity of a cell phone has also improved dramatically over the past decade, and citizens increasingly choose to record interactions they witness or experience with the police." *Id.* "Given these

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1 https://library.municode.com/oh/cincinnati/codes/code_of_ordinances?nodeId=THADCO_ARTXXVIIICICOAU (last visited 7/29/2021) Section 3-E: "Reports prepared by the CCA, the CPD or the city manager pursuant to this process shall be publicly available to the extent provided by Ohio law." Section 3-F: "In addition to the foregoing, the CCA shall maintain its files for each investigation for a period of five years or such shorter period as may be provided in any applicable collective bargaining agreement. Where feasible, those files shall include tape-recorded interviews of officers, complainants and witnesses. These data will be made available for the accountability system."

circumstances, as well as the holdings in other Circuits, there now exists a clearly established First Amendment right to openly film police officers carrying out their duties, subject to reasonable restrictions." *Id.*

Further, the Southern District of Ohio, in *Crawford v. Geiger*, 131 F. Supp. 3d 703, 715 (SDOH 2015), was clear that there exists the open right "to film police officers carrying out their duties in public." And, "in public" coincided with the ability, without fear of arrest, "to record what one can otherwise lawfully see and hear." *Id.*

Several courts have recognized recording as either expressive conduct warranting First Amendment protection, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203-04 (9th Cir. 2018) (finding the creation of an audiovisual recording to be speech because "[t]he act of recording is itself an inherently expressive activity"), or conduct essentially preparatory to speech, *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (emphasis in original) ("The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech . . . as a corollary of the right to disseminate the resulting recording."); *see also Animal Legal Def. Fund v. Herbert*, 263 F.Supp.3d 1193, 1198 (D. Utah 2017) (examining cases and noting that "it appears the consensus among courts is that the act of recording is protectable First Amendment speech.").

Newsgathering, including the right to record the investigative proceedings here, "qualif[ies] for First Amendment protection." *Boddie v. Am. Broad. Cos.*, 881 F.2d 267, 271 (6th Cir. 1989) (*quoting Branzburg*, 408 U.S. 665, 681). "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg*, 408 U.S. at 681.

Audio and audiovisual recordings are media of expression commonly used for the preservation and dissemination of information and ideas and thus are "included within the free speech and free press guaranty of the First and Fourteenth Amendments." *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952). Moreover, "the First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Bellotti*, 435 U.S. 765, 783.

Although the rights at issue are not absolute, as explained below, the courthouse and execution recording cases cited by Defendants are inapposite. First, the Seventh Circuit in *Alvarez*, 679 F.3d 583, observed that the "public" right to record refers to whether the person doing the recording has a right to be there, and is engaged in speech "audible to persons who witness the events." *Id.* at 586. Critical to the discussion in *Alvarez* was whether or not an expectation of privacy was implicated by the conversation at issue. *Id.* at 606. Here, there is no such expectation: officers subject to the CCA assume everything they say can and will

be used against them by the CCA, if not in a court of law or City disciplinary proceedings, then in the court of public opinion. In fact, that the CCA itself is required to tape record interviews belies any sort of argument that there is an expectation of privacy here.

In *Alvarez*, the recording was "in public," in the sense that there was access to the information by the bystanders doing the recording. *Id.* So too here. Here, the CCA itself is supposed to fully record the interviews, and these recordings are available for release to the public.

Given that First Amendment interests are unquestionably implicated with recording, *Alvarez* explains that there is a balancing that occurs. As in *Alvarez*, observers and participants in the CCA process "may lawfully watch and listen to the … communications …or take shorthand notes and transcribe the conversations or otherwise reconstruct the dialogue later." *Id.* at 606. And there, as here, these observers and officer participants "may post all of this information on the internet or forward it to news outlets". *Id.* And as was the case in *Alvarez*, the Defendants here have "not identified a substantial governmental interest that is served by banning … recording of these same conversations [that Defendants themselves record]." *Id.* And there, as here, Plaintiffs "plan [] to record openly, thus giving the police and others notice that they are being recorded." *Id.*

The First Amendment protects the right to gather information about what public officials do on public property. Defendants do not dispute that these interviews occur on public property, but hypocritically claim that these interviews are somehow "not public" even though they are designed to be released to the public. *See Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir.1994) (finding that plaintiffs' interest in filming public meetings is protected by the First Amendment); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir.1995) (recognizing a "First Amendment right to film matters of public interest"); *Lambert v. Polk County*, 723 F. Supp. 128, 133 (S.D.Iowa 1989) ("It is not just news organizations … who have First Amendment rights to make and display videotapes of events…."); *Thompson v. City of Clio*, 765 F. Supp. 1066, 1070-71 (M.D.Ala.1991) (finding that city council's ban on member's attempt to record proceedings regulated conduct protected by the First Amendment); *cf. Williamson v. Mills*, 65 F.3d 155 (11th Cir.1995) (reversing district court's grant of qualified immunity to a law enforcement officer who seized the film of and arrested a participant in a demonstration for photographing undercover officers); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (finding "a right to record matters of public interest"); *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020) (implying a recognized right to record governmental activity).

Defendants also make the irrelevant argument that the public cannot attend CCA interviews with police (though presumably a member of the public could attend an interview between CCA and that member of the public). Two points in response: first, the public has a right to review the recordings of the interviews themselves, which are public records (assuming that Defendants do not alter them, as they did here). Second, the public also does not have the right to enter into homes where police activity occurs. Yet, if officers enter a home, there is no doubt but that the homeowners themselves, who have a right to be there (like Plaintiffs do here), can record the officers. *Garcia v. Montgomery Cty.*, 145 F. Supp. 3d 492 (D. Md. 2015) (right to record officers in the home).

Another case worth discussing is *Melton v. City of Okla. City*, 879 F.2d 706 (10th Cir. 1989). There, a police officer was interviewed by the F.B.I. in connection with a criminal case against a state court judge. *Id.* The police officer surreptitiously recorded the interview which contained exculpatory statements. *Id.* The police officer then turned the recording over to the defense, and the City fired him for doing so. *Id.* The Tenth Circuit found a First Amendment violation for this retaliatory firing, expressing the view that the officer had the right to make the recording.

Next, this Court's decision in *S.H.A.R.K.*, 499 F.3d 553, 560, which actually supports the right to record here. "The overarching question is whether the

plaintiffs' news-gathering efforts were 'within the law.'" *Id.* "Stated differently, the question is whether the plaintiffs had a lawful right of access to the information." *Id.* "If the plaintiffs did have a lawful right of access, then the government violates the First Amendment when it blockades access." *Id.*

"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.'" *Id.* "Second, we inquire into the government's stated interest for invoking the rule." *Id.* "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." *Id.*

Applying these factors here, the Plaintiffs had access to the location in question – there was no prohibition to the Plaintiffs accessing the CCA interview, and so we deal here not with access, but with a one-sided restraint on recording that permits the City and CCA officials to record (albeit sometimes selectively), but prohibits the Plaintiffs from recording at all. Tellingly, the Defendants have *never* adequately explained *why* the Plaintiffs cannot record. The Defendants are *supposed to* record the entirety of the interviews (though, as Plaintiffs set forth in

their verified complaint, Defendants have not done so, and even engaged in selective editing, hence the need for Plaintiffs themselves to record). Instead, apparently, the Defendants are free to selectively determine and delimit the audience for the recording they make, even claiming the right to shut off the recording at convenient times. Given this, stricter scrutiny applies, and the no-recording rule here should be enjoined.

Again, nationwide, there is a growing trend of courts adopting the view that video recording is indeed speech for First Amendment purposes. Several courts have recognized recording as either expressive conduct warranting First Amendment protection, *Wasden*, 878 F.3d 1184, 1203-04; *Alvarez*, 679 F.3d 583, 595; *Herbert*, 263 F.Supp.3d 1193, 1198; *Smith*, 212 F.3d 1332, 1333; *Blackston v. Alabama*, 30 F.3d 117, 120; *Garcia*, 145 F. Supp. 3d 492; *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017).

As the Seventh Circuit articulated in *Alvarez*, 679 F.3d at 596 (*citing Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010)), [t]he act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." "The right to publish or broadcast

an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected . . . ." *Id.*

As the First Circuit Court observed:

> 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." Moreover, as the [Supreme] Court has noted, "[f]reedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties. Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.

Glik, 655 F.3d at 84.

Further, while incidental or "time, place, or manner" restrictions on expressive conduct are permissible where supported by a sufficiently important governmental interest, so long as the regulation is justified without reference to the content of the regulated speech, the Defendants here fail to offer *any governmental interest* fostered by their no-recording policy, much less a sufficiently important one. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). *See also United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 114 (2nd Cir. 1984) (analyzing rule barring newspaper reporter from tape recording civil trial as time, place, and manner restriction). The requirement of content-neutrality is particularly important

where, as in this case, government operates "at the core of the First Amendment" by regulating speech that is "political" or that touches on "public issues." *See Boos v. Barry*, 485 U.S. 312, 317 (1988).

In yet another case, the Third Circuit explained in *Fields*, 862 F.3d 353, 359 that recordings of police activity (which this case unquestionably involves) is "ubiquitous," and that such interactions "have both exposed police misconduct and exonerated officers from errant charges." *Id.* at 355. As the Court noted, "[t]here is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them." *Id.* at 358. *See, also, Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (recognizing the "paramount public interest in a free flow of information to the people concerning public officials, their servants"). Indeed, "[t]o record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts." *Fields*, 862 F.3d 353, 359. "Hence to record is to see and hear more accurately." *Id.* "Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media." *Id.* And *Fields*, too, examined the interests proffered by the government entity and determined they were insufficient. The Fifth Circuit drew the same conclusions in *Turner*, 848 F.3d 678. Further, there is a well-established right to criticize government officials, and expose their wrongdoing. *Kennedy v. City of Villa Hills*,

635 F.3d 210, 216 (6th Cir. 2011) ("It is well-settled that the freedom to criticize public officials and expose their wrongdoing is a fundamental First Amendment value . . . .") (*quoting Arnett v. Myers*, 281 F.3d 552, 560 (6th Cir. 2002)).

What, pray tell, is the governmental interest here in preventing entirely any recording by officers or their representatives? Is it to hide from the public the truth about what occurs in selectively recorded interviews? Is it to hide material evidence from an investigative process the public is supposed to trust? Is it to ensure that only the CCA can control the recorded story about what exactly happened in the interview – in a public process – for later manipulation?

This is not a courthouse recording case, where witnesses and jurors must be protected and concerns about the impartial administration of justice are paramount. Here, *everyone* knows who the involved officers are and, unless the CCA is manipulating the interview recordings like they have done that led to the desire to record here, those interviews will eventually reach the public. The proffered governmental interests at stake in a court proceeding are simply not applicable here. Nor is this matter equivalent to a claimed right to video an execution where, again, courts have discussed various substantial governmental interests involving the safety and security of the prison that would make the challenged policy reasonable.

Here, the Defendants record (or, as it turns out, sometimes fail to record when it supports their agenda), and the Plaintiffs merely desire to also record the interviews to expose this wrongdoing to the public. Under these facts, there is constitutional right to record, as well as a state law right to record.

2. Whether or not an officer is required to report to the CCA has no bearing on their right to record

Defendants next raise the strawman argument that Plaintiffs are somehow claiming a right of *access* to CCA proceedings, and Defendants then cite cases about access. Defendants are wrong again. The issue is not whether the Plaintiffs have access to CCA interviews. They clearly do. Plaintiffs just want to record their own interviews so there is an accurate record that relays the truth of what was said in those interviews.

As the U.S. Supreme Court has observed, "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg*, 408 U.S. 665, 681. And the Supreme Court has inferred that such a right does exist where there is "a question of a truncated flow of information to the public." *Nixon v. Warner Communications*, 435 U.S. 589, 609 (1978). In other words, where, as here, there is a question of a cover-up, or doctoring of interviews, the right to record something a party otherwise sees and hears is implicated and there is a right to do so. *Id.* Once again, Ohio statutory law permits one party to a conversation to record it. Ohio Rev. Code Ann. 2933.52. The question here is a restriction

imposed by Defendants on the Plaintiffs (but not on themselves) prohibiting the recording of these interviews, where: (i) allegedly the interview is a public record available for public consumption and review; and (ii) occurring where Plaintiffs have a right to be in the first instance.

A dispositive case is *Butterworth v. Smith*, 494 U.S. 624 (1990), where the United States Supreme Court struck down what effectively was a gag order on a grand jury witness as to that witnesses' own testimony. There, as here, we deal with something the Plaintiff/parties wish to record and eventually disclose. And there, as here, we deal with the Government attempting to suppress it. And there, as here, there is a First Amendment right that protects the recordings at issue. And, although not directly on point factually, *Butterworth* still presents a compelling precedent: a grand jury proceeding where everything is secret and generally kept that way (and the public excluded), versus a CCA interview where everything is (eventually) supposed to be made public.

Finally, the Defendants cite no explicit case, in the context of First Amendment rights, about the officers being required to be at the proceeding being a outcome-determinative fact (though Hils is not required to be there at all). That is because there is no case that suggests as much. As shown above, many cases reject prior restraint on speech (and recordings in advance of a public release are speech) regardless of employment status or duties.

3. The restriction on recording at issue is neither viewpoint neutral, nor reasonable

The Defendants incredibly argued that the policy is viewpoint neutral and reasonable. It certainly is neither. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163-164.

"Because strict scrutiny applies either when a law is content based on its face, or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Id.* at 166. "Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. *Id.* For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Id.* at 169.

Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United v. Federal Election Comm'n*, 558 U. S. 310, 340 (2010), the Supreme Court has insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 658 (1994). "Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based." *Reed*, 576 U.S. 155, 170. Moreover, "characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." *Id.*

Here, only the Plaintiffs (subjects of the CCA investigation and their union representatives) are prohibited from recording (and, as a corollary, distributing that recording). The CCA representatives themselves are permitted (indeed required) to record the interview. And the CCA is permitted (and indeed ultimately required) to release the recording to the public. This is quintessential speaker-based discrimination. And it is clearly neither content, nor viewpoint, neutral.

The Supreme Court observed in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-829 (1995), that "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys," and "government regulation may not favor one speaker over

another." *Id.* So, "[v]iewpoint discrimination is thus an egregious form of content discrimination." *Id.* at 829. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*; *McCullen v. Coakley*, 573 U.S. 464, 484-485 (2014) (noting that permitting one class of speakers to speak and not another raises questions of viewpoint discrimination). It goes without saying that "[g]ranting waivers to favored speakers (or . . . denying them to disfavored speakers) would of course be unconstitutional." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002).

Some people, the CCA interviewers, are permitted to record interviews, even selectively – while the officers subject to the interviews are not. This is neither viewpoint neutral, nor reasonable.

4. The restriction on recording at issue is not implicated by *Pickering* or the doctrines involving public employees

Lastly, the Defendants argue that *Pickering v. Bd. Of Educ. Of Twp. High Sch. Dist., 205, Will. Cty.*, 391 U.S. 563, 568 (1968) applies. To begin, *Pickering* deals with limits on freedom of speech in an employment context, not freedom of the press. Not surprisingly, most right to record cases are rooted in the latter right, rather than the former and for good reason. When one considers the purpose and intent of making a recording, including for release to the public and media, it becomes clear that the reasoning behind certain speech restrictions that may be

appropriate in the employment setting are wholly inapplicable when it comes to freedom of the press.

But even taking *Pickering* as applicable, and looking to *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the appearance of the officers (but not Plaintiff Hils) at the CCA was unquestionably part of the employees' official duties. Plaintiff Hils did not appear pursuant to his duties with the City. What was not part of the employees' duties, and where the Defendants' analysis falls far short, is that the claims at issue have nothing to do with being forced to give statements to the CCA. Clearly, Defendants can compel officers to do so.

But under what ordinance or official duty are Plaintiffs required to record those interviews? To ask the question is to answer it, because clearly, CCA policy prevents that very recording. In other words, there was no employee job duty to engage in the speech (or preparation for speech) in question, i.e.: audio and video recording of these interviews. And what speech were Plaintiffs preparing to engage in? The verified complaint tells us: "a desire to record, for posterity, possibly defensively, and possibly for release to conventional and non-conventional media." (Pl.'s Verified Compl., DE#1 at ¶15). What job duties were involved in release of such interview tapes to conventional and non-conventional media to expose the fact that the CCA was engaged in serious misconduct? None. The speech (specifically the recording and later release), and preparations for

speech (the recordings to prepare for a public release), are clearly speech by employees as citizens, particularly in the case of Plaintiff Hils.

Next, does the speech touch upon areas of public concern? For Plaintiff Hils, clearly! *See Cook v. Gwinnett County Sch. Dist.*, 414 F.3d 1313, 1319 (11th Cir. 2005) (holding that a union president's similar activities raised issues of public concern); *Clue v. Johnson*, 179 F.3d 57, 61 (2d Cir. 1999) (holding that "activities on behalf of a union faction that necessarily entail a substantial criticism of management raise matters of public concern under Connick"); *Gregorich v. Lund*, 54 F.3d 410, 416 (7th Cir. 1995) (holding that a research attorney's "attempt to obtain representation for all research attorneys in the Fourth District went beyond his self-interest" and made his activity a matter of public concern).

The answer is also yes for the individual officers as well. Releasing their statements, particularly in the event of any release of a partially recorded, doctored record by the CCA also touches on core issues of public concern. The City's own ordinances demonstrate the critical importance that the CCA "be perceived as fair and impartial," and that it releases reports to the public. City Ordinances Article XXVII. CCA manipulation of officer interviews, and proof of the CCA doing so, goes to the heart of matters that are of great public concern. The allegations here are that the CCA had manipulated at least one recording that gave rise to serious

concerns by Plaintiffs here about creating a false narrative and report to the public. (Pl.'s Verified Compl. at ¶¶ 13-14).

What could be of greater public concern than a watchdog agency for Cincinnati police releasing a false narrative about citizen and police encounters in the City of Cincinnati, at a time when police officers are under increasing scrutiny and where any mis or disinformation can yield explosive consequences? The speech at issue: truthfully recording the CCA interaction with police, is at the core of public concern.

Where, as is the case here, there is an implemented policy that involves not merely an individual employee, but instead a pattern and practice, the third prong balancing test in *Pickering* is significantly lessened and traditional First Amendment analysis applies. The U.S. Supreme Court told us as much just a few years ago. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2472 (2018). There, the Court began by explaining that "[f]irst, the *Pickering* framework was developed for use in a very different context—in cases that involve 'one employee's speech and its impact on that employee's public responsibilities.'" *Id., citing United States v. Treasury Employees*, 513 U. S. 454, 467 (1995).

"This case, by contrast, involves a blanket requirement …" *Janus*, 138 S. Ct. 2448 at 2472. "While we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, we have acknowledged

that the standard *Pickering* analysis requires modification in that situation." *Id.* "A speech-restrictive law with 'widespread impact,' we have said, 'gives rise to far more serious concerns than could any single supervisory decision.'" *Id.* "Therefore, when such a law is at issue, the government must shoulder a correspondingly 'heav[ier]' burden … and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights, …. The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis." So too here. *See, also, Int'l Ass'n of Firefighters Local 3233 v. Frenchtown Charter Twp.*, 246 F. Supp. 2d 734 (EDMI 2003).

Again, there is a well-established right to criticize government officials, and expose their wrongdoing. *Kennedy*, 635 F.3d 210, 216 ("It is well-settled that the freedom to criticize public officials and expose their wrongdoing is a fundamental First Amendment value . . . .") (*quoting Arnett*, 281 F.3d 552, 560).

And, again, what governmental interest, exactly, is served by the Defendants no-recording policy? Their silence is deafening. And so even if traditional balancing applied, the fact the Defendants have articulated no governmental interest that might possibly support their blanket ban on recordings compels a finding that engaging in a *Pickering* balancing does not foreclose Plaintiffs' claims here. The District Court erred in dismissing the case below.

5. Plaintiffs adequately plead a First Amendment retaliation claim

Plaintiffs also plead First Amendment retaliation. (Pl.'s Compl., DE#1, PageID#7). They plead that they engaged in First Amendment protected activity, namely recording. (Pl.'s Compl., DE#1, at ¶¶ 15-21, 26, PageID#5-7). They likewise plead retaliatory measures, including "threaten[ing of] the officers involved with disciplinary and other measures for recording the interviews," that they would not conduct interviews with Hils present as a result, and that they would complete their investigation, and render findings adverse to the officers if they declined to cease recording. (Pl.'s Compl., DE#1, at ¶¶ 15-21, 26, Exhibit A, PageID#5-7, 9).

This Court, in *Thaddeus-X v. Blatter*, 175 F.3d 378, 386-387 (6th Cir. 1999), set forth the elements for a First Amendment retaliation claim as being: (1) the plaintiff engaged in conduct protected by the Constitution or by statute; (2) the defendant took an adverse action against the plaintiff, and (3) this adverse action was taken (at least in part) because of the protected conduct. *Id.*

As set forth above, the recording and threats of release to the media of the dishonest selective recording was protected First Amendment activity. *Blatter*, 175 F.3d 378, 388 ("Core political speech is most jealously guarded."); *Kennedy*, 635 F.3d 210, 216.

Further, adverse action includes the mere threat of discipline, as the Defendants engaged in here. *Scott v. Churchill*, 377 F.3d 565, 572 (6th Cir. 2004). And the connection between the two is clearly established here. "A defendant's motivation for taking action against the plaintiff is usually a matter best suited for the jury." *Paige v. Coyner*, 614 F.3d 273, 282-283 (6th Cir. 2010), *citing Harris v. Bornhorst*, 513 F.3d 503, 519-520 (6th Cir. 2008).

The District Court erred in dismissing the retaliation claim.

6. The conduct engaged of violated clearly established constitutional rights and Defendants are not entitled to qualified immunity

The District Court did not reach the qualified immunity issue on the damages claims, determining that Plaintiffs failed to state a claim. Of course, qualified immunity does not apply to the claims for declaratory and injunctive relief. *Smith v. Leis*, 407 F. App'x 918, 930 (6th Cir. 2011); *Collyer v. Darling*, 98 F.3d 211, 222 (6th Cir. 1996). However, on the question of damages and qualified immunity, it may, therefore, be best to remand to the District Court to determine this issue in the first instance.

There is a two-step sequence for resolving a government official's claim to qualified immunity announced in *Saucier v. Katz*, 533 U.S. 194 (2001) and *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). First, a court must decide whether the facts that a plaintiff has alleged in his/her complaint, or shown to date, make out a violation of a constitutional right. *Id.* Second, if the plaintiff has satisfied

this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's misconduct. *Id.* To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In the Sixth Circuit, once the Defendant raises the issue of qualified immunity, Plaintiffs bear the burden of proof to show that Defendants are not entitled to qualified immunity by demonstrating both that, viewing the evidence in the light most favorable to the Plaintiffs, constitutional rights were violated by Defendants and that the rights violated were clearly established at the time of the violation. *Tindle v. Enochs*, 420 Fed. Appx. 561, 563 (6th Cir. 2011). Plaintiffs can prove that point by citing to "cases of controlling authority in their jurisdiction at the time of the incident" or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617 (1999); *Kent v. Oakland County*, 810 F.3d 384, 395 (6th Cir. 2016).

As with our response to Defendants' arguments on the failure to state a claim, each of the cases we have cited and the argument we have raised was decided prior to the actions complained of. But going further, this Court has made clear that protection against First Amendment retaliation is a clearly established

right. "It is well-settled that the freedom to criticize public officials and expose their wrongdoing is a fundamental First Amendment value, indeed, "'[c]riticism of the government is at the very center of the constitutionally protected area of free discussion.'" *Arnett*, 281 F.3d 552, 560. Other cases make clear that qualified immunity does not apply to the First Amendment retaliation claims. *Holzemer v. City of Memphis*, 621 F.3d 512 (6th Cir. 2010); *Wenk v. O'Reilly*, 783 F.3d 585, 599 (6th Cir. 2015); *Anders v. Cuevas*, 984 F.3d 1166 (6th Cir. 2021).

Either remand, or reversal, is appropriate on the dismissal of the damages claims.

II. The District Court erred in denying the Plaintiffs' Motion for a Preliminary Injunction

A. Standard for Preliminary Injunctions, and Standard of Review

When deciding whether to issue a preliminary injunction, a court must consider the following four factors: (1) Whether the movant has demonstrated a strong likelihood of success on the merits; (2) Whether the movant would suffer irreparable harm; (3) Whether issuance would cause substantial harm to others; and (4) Whether the public interest would be served by issuance. *Suster v. Marshall*, 149 F.3d 523, 528 (6th Cir. 1998). These "are factors to be balanced, not prerequisites that must be met." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

However, when analyzing a motion for preliminary injunction, "the 'likelihood of success' prong is the most important [factor] and often determinative in First Amendment cases." *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009). With respect to the 'likelihood of success' prong, and because First Amendment rights are at issue, it is the Defendants, not Plaintiffs, who bear the burden of establishing the constitutionality of the challenged legislation. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000).

"Whether the movant is likely to succeed on the merits is a question of law we review de novo[,] [but] [w]e review for abuse of discretion . . . the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc).

B. Likelihood of Success -- The First Amendment violations

Above, in response to the Motion to Dismiss, Appellants demonstrated that they stated a claim (and proved the factual allegations with a verified complaint). That same analysis and discussion likewise demonstrated a likelihood of success on the merits. We incorporate that discussion herein, by reference. Appellants have demonstrated likelihood of success on the merits.

C. Plaintiffs also established irreparable harm, the harm to others factor, and that issuance of an injunction was in the public interest

Clear Sixth Circuit law establishes that the remaining factors are met where constitutional rights are infringed upon and so, in these cases, the likelihood of success factor is dispositive. *H.D.V. - Greektown, LLC v. City of Detroit*, 568 F.3d 609 (6th Cir. 2009) (abuse of discretion not to grant preliminary injunction where constitutional violation found); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (irreparable harm from violation of rights).

Irreparable harm is shown if likelihood of success is shown and, conversely, it would not be shown if there was no showing of likelihood of success. *McNeilly v. Land*, 684 F.3d 611, 620-621 (6th Cir. 2012).

As for harm to others, again, case law is clear that there is no substantial harm to others where, as is the case here, the Government is forced to comply with the Constitution. *Foster v. Dilger*, 2010 U.S. Dist. LEXIS 95195 (EDKY 2010); *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021).

Finally, as to public interest, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1999); *Guzman*, 999 F.3d 353, 360.

The District Court erred in denying the preliminary injunction.

Conclusion

The District Court erred in dismissing this case, and in denying the requested injunctive relief to Plaintiffs. Its decision should be reversed with instructions to enter the preliminary injunction, enjoining the no-recording policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I have served the foregoing upon the Defendants/Appellees, by electronic mail to their counsel, and through service of this motion via CM/ECF, this 25th day of May, 2022, as well as by filing same with the Court's CM/ECF system this same date.

*/s/Christopher Wiest*_____
Christopher Wiest (0077931)

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g) and 6th Cir. R. 32(a), I certify that this Brief contains 9,093 words. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman font using Microsoft Word.

/s/ Christopher Wiest

APPENDIX -- DESIGNATION OF THE DISTRICT COURT RECORD

Plaintiffs/Appellants, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the district court's electronic record:

Document Description	**Docket Entry No.**	**PAGEID**
Verified Complaint	DE#1	1-10
Motion for PI/TRO	DE#2	18-27
Memo Opposition to PI/TRO	DE#11	48-70
Reply in Support of PI/TRO	DE#12	71-86
Motion to Dismiss by City	DE#14	89-110
Memo Opp MTD by City	DE#15	111-130
Reply to MTD by City	DE#16	131-142
Supp to MTD Opp	DE#17	143-146
Supplemental Motion to Dismiss by City	DE#19	151-160
Memo Opp Supp MTD by City	DE#20	161-166
Order Denying Preliminary Injunction/TRO and Granting MTD	DE#22	175-191
Clerks Judgment	DE#23	192
Notice of Appeal	DE#24	193