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Brown County, WI
2023CV000250
Honorable Marc A.
Hammer
Branch 5

STATE OF WISCONSIN CIRCUIT COURT BRANCH __ BROWN COUNTY

WISCONSIN STATE SENATE,
State Capitol
PO Box 7882
Madison, WI 53707,

Case No. 23-cv-
Code No. 30701
Case Type: Declaratory Judgment

SENATOR ANDRÉ JACQUE,
Room 7 South
State Capitol
PO Box 7882
Madison, WI 53707,

ANTHONY THEISEN, on behalf of
himself and others similarly situated,
931 S Baird,
Green Bay, WI 54301,

and

JANE DOE, on behalf of herself and
others similarly situated,

Plaintiffs,

v.

CITY OF GREEN BAY
100 N. Jefferson St.,
Green Bay, WI 54301,

and

ERIC GENRICH, in his official
capacity as Mayor of the City of
Green Bay,
100 N. Jefferson St.,
Green Bay, WI 54301,

Defendants.

COMPLAINT

Plaintiffs Wisconsin State Senate, André Jacque, Anthony Theisen, and Jane

Doe (collectively, “Plaintiffs”) hereby allege as follows:

INTRODUCTION

1. The use of electronic surveillance devices to intercept and record oral communications is a felony under the Wisconsin Electronic Surveillance Control Law (“WESCL”) and a stark invasion of privacy, in violation of Wis. Stat. § 995.50. When such actions are taken by the government (or, in this case, a rogue government actor), they also violate the constitutional prohibition against unreasonable searches and seizures. And when this type of electronic surveillance occurs in government buildings where individuals come to discuss sensitive political matters with their elected representatives, it unconstitutionally infringes upon protected speech.

2. Heedless of these well-established legal principles, the Mayor of Green Bay, Eric Genrich, or a group of Green Bay City officials, secretly installed highly sensitive audio listening devices in the hallways of City Hall that have intercepted and recorded countless private communications for years (“Hallway Bugs”), including conversations between common council members, conversations between members of the public and common council members, privileged attorney-client communications, and other personal conversations. None of these communications would have been overheard by third parties but for the mayor’s unlawful surveillance program. Recent news reports have disclosed that recordings of these communications are reviewable by the mayor, the Green Bay Police Department, the City’s legal department, and potentially others. And, remarkably, the City is disclosing recordings of these private conversations to the public in response to public records requests. The American Civil

Liberties Union (ACLU) has described the surveillance devices in Green Bay as causing “very serious privacy invasion,” the likes of which they have not before seen anywhere in the country.¹

3. Plaintiffs are among those who have had private conversations in the hallways of City Hall since the mayor secretly installed the Hallway Bugs (the “Individual Plaintiffs”), as well as the Wisconsin State Senate, on behalf of itself and its members. The Individual Plaintiffs have suffered an invasion of privacy, in violation of both WESCL and Wis. Stat. § 995.50, and a violation of their constitutional right to be free from unreasonable searches and seizures. And the presence of these audio recording devices at the City’s seat of government unconstitutionally restricts the Individual Plaintiffs’ ability to exercise their First Amendment rights to speech and to petition their government.

4. Mayor Genrich did not seek the Common Council’s consent before installing these audio recording devices. Nor did he even *inform* most members of the council that he had installed these devices. Instead, either (1) he unilaterally ordered the installation of these hallway surveillance devices on his own authority, or (2) the decision was made by a group of City officials (the City has released statements asserting both). Consequently, Plaintiffs assert this action against the mayor, in his official capacity. Plaintiffs also assert this action against the City, which maintains the illegal recordings and unlawfully distributes them in response to public records requests.

¹ Ben Krumholz, ‘*Very serious privacy invasion*’: ACLU analyst on Green Bay’s audio surveillance, Fox 11 News (Feb. 9, 2023), <https://tinyurl.com/34xpx49d>.

5. Plaintiffs ask the Court to issue a declaratory judgment that the mayor and the City have violated WESCL, unlawfully invaded Plaintiffs' privacy, and violated Article I, Sections 3, 4 & 11 of the Wisconsin Constitution. Plaintiffs further ask the Court immediately to issue an injunction requiring the mayor and the City to remove the audio surveillance devices from City Hall, to refrain from using or disseminating the illegal recordings, and to destroy all audio recordings captured by those devices since their installation. Plaintiffs Theisen and Doe also seek liquidated damages, punitive damages, and attorney's fees.

PARTIES

6. Plaintiff the Wisconsin State Senate, located at the Wisconsin State Capitol, Madison, Wisconsin, 53703, is the upper house of the Wisconsin State Legislature. The Senate represents citizens across Wisconsin, including those who live in Green Bay. The Wisconsin State Senate has an institutional interest in ensuring that municipalities do not act beyond the scope of the authority given to them by the State Legislature. When a municipality takes an action directly prohibited by the Wisconsin Statutes, it acts beyond the scope of its authority and usurps the role of the Legislature, undermining its exclusive province in the constitutional separate of powers. *See Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 21, 373 Wis. 2d 543, 892 N.W.2d 233 (“A municipality is merely a department of the state, and the state may withhold, grant, or withdraw power and privileges as it sees fit.”) (citation omitted).

7. Plaintiff André Jacque is the state senator from the 1st Senate District of Wisconsin, which is located in northeast Wisconsin, encompassing the City of Green Bay. Plaintiff Jacque has served as state senator since 2019. Jacque has been to City Hall on official and personal business to discuss sensitive civic matters. He has had private and sensitive conversations throughout City Hall. Since learning about the unlawful audio surveillance, however, he is reluctant to return to City Hall and speak freely within its walls so long as his words are possibly being recorded. He also believes that one of his private conversations at City Hall over the past few years may have been recorded.

8. Plaintiff Anthony Theisen served on the Green Bay Common Council as an elected alderman for twenty-eight years until 2012. While serving on the Common Council, former Alderman Theisen regularly had private conversations with his constituents, elected officials, and others in the hallways or rooms of City Hall. He knows from his personal experience that these hallways and rooms are routinely used for sensitive conversations and discussions on matters of public importance. His private discussions often involved sensitive conversations and negotiations on civic issues. Plaintiff Theisen has been to City Hall since returning to private life to engage in matters of public concern and has had at least one sensitive, private conversation regarding the city budget in the hallway, the recording of which was, unbeknownst to him, being secretly recorded by the City and/or the Mayor. Since learning about the unlawful audio surveillance, he is reluctant to return to City Hall and speak freely within its walls.

9. Plaintiff Jane Doe, a licensed attorney, is a resident of Green Bay. In her capacity as a citizen of Green Bay and as a volunteer election observer, she has visited City Hall on several occasions over the past three years. She has also visited City Hall on official business in her work as an attorney. She has had several highly sensitive, confidential conversations in City Hall that, unbeknownst to her, were quite possibly intercepted and recorded by the audio surveillance devices installed by Mayor Genrich. Some of those conversations involved the exchange of privileged and confidential attorney-client information. Because of the illegal surveillance program, she is reluctant to return to City Hall and speak freely.

10. Defendant Eric Genrich is the Mayor of the City of Green Bay. Defendant Genrich maintains his offices at 100 N. Jefferson St., Green Bay, WI 54301. Upon information and belief, Defendant Genrich (possibly acting in concert with others) ordered and directed the installation of the audio recording devices at Green Bay City Hall sometime between Winter 2021 and Summer 2022. He oversees and controls the operation of these surveillance devices.

11. Defendant City of Green Bay is a municipality organized under the laws of Wisconsin and located in Brown County, Wisconsin. Its seat of government is City Hall, located at 100 N. Jefferson St., Green Bay, WI 54301. Upon information and belief, the City caused the unlawful surveillance system to be installed and maintained. The City of Green Bay maintains the unlawfully obtained recordings and distributes them in response to public records requests.

JURISDICTION AND VENUE

12. This is an action for declaratory and injunctive relief under Wis. Stat. §§ 806.04 and 813.01, for injunctive relief under Wis. Stat. § 995.50, and for damages under Wis. Stat. § 968.31.

13. Venue in this Court is proper pursuant to Wis. Stat § 801.50(2).

STATEMENT OF FACTS

14. Green Bay City Hall (“City Hall”) has six floors and is open to the public.

15. The first floor of City Hall contains the following three departments/offices: Clerk, Assessor, and Finance.²

16. The second floor of City Hall contains the following two departments/offices: Mayor and Law.³

17. According to one version of the facts as stated by Green Bay City Attorney Joanne Bungert, sometime between the winter of 2021 and the summer of 2022 (the “relevant time period”), Mayor Genrich unilaterally caused audio recording devices to be installed in City Hall.⁴

18. According to another version of the facts as stated by Green Bay City Attorney Joanne Bungert, sometime during the relevant time period, the audio recording devices were installed “as part of [a] collaborative operational response

² See CITY OF GREEN BAY, “Departments,” <https://greenbaywi.gov/> (Feb. 21, 2023) (providing room numbers for each department).

³ *Id.*

⁴ WBAY news staff, *Green Bay City Hall rejects attorney’s demand to remove audio surveillance*, WBAY (Feb. 14, 2023), <https://tinyurl.com/22fupfxn> (“The city attorney tells Action 2 News the building has 14 recording devices for surveillance, but beginning in the winter of 2021 three were installed, at the order of the mayor, that have the ability to record conversations. Those are located in the first- and second-floor hallways.”).

between multiple departments including PD (police department), IT (information technology) and Parks Department,” and that “[t]here were no unilateral directives given by any one individual”⁵

19. Mayor Genrich, or other City officials who were involved, did not notify Green Bay’s Common Council of his/their decision to install audio recording devices in City Hall. Nor did he/they notify the Common Council after the audio recording devices were installed.⁶ The Common Council did not pass any formal ordinance or resolution authorizing the installation of these audio recording devices.

20. Mayor Genrich, or other City officials who were involved, did, however, notify certain unidentified “staff” that the audio recording devices had been installed.⁷

21. One audio recording device is located on the ceiling in the hallway outside of the Clerk’s office on the first floor of City Hall.

22. One audio recording device is located on the ceiling in the hallway outside of Common Council’s chambers on the second floor of City Hall.

23. One audio recording device is located on the ceiling in the hallway outside of the mayor’s office on the second floor of City Hall.

⁵ Ben Krumholz, *Green Bay alder asks for surveillance policy after microphones installed at city hall*, Fox 11 News (Feb. 7, 2023), <https://tinyurl.com/yjps7b7m> [hereinafter “*Green Bay alder*”]; see also Ben Krumholz, *Very serious privacy invasion’: ACLU analyst on Green Bay’s audio surveillance*, Fox 11 News (Feb. 9, 2023), <https://tinyurl.com/34xpx49d> (description of audio surveillance program at City Hall).

⁶ See *Green Bay alder*, *supra* note 5.

⁷ Joe Schulz, *Green Bay’s use of audio recording devices in city hall sparks debate*, Wisconsin Public Radio (Feb. 14, 2023), <https://tinyurl.com/5cwy4cyz>.

24. The public was not informed that the Hallway Bugs had been installed at City Hall.⁸

25. The mayor finally ordered signage to be posted warning the public about the presence of the recording devices on or about February 17, 2023.⁹

26. There are numerous other devices installed in City Hall, in addition to the Hallway Bugs, capable of recording video images but not audio.¹⁰

27. Of the numerous recording devices installed in City Hall, only the Hallway Bugs are capable of recording audio.¹¹

28. According to one version of the facts as stated by the City, audio from the Hallway Bugs is not monitored in real time.¹²

29. According to another version of the facts as stated by Green Bay City Attorney Joanne Bungert, “[l]ive feeds are monitored by the Green Bay Police Department Shift Command office.”¹³

30. Audio recordings from the Hallway Bugs are available for review by the Green Bay Police Department, Information Technology personnel employed by the City, and the City’s legal department.

31. Audio recordings from the Hallway Bugs are also available for review by Mayor Genrich.

⁸ *Green Bay alder*, *supra* note 5.

⁹ Ben Krumholz & Scott Hurley, *State Senate lawyer warns Green Bay of impending suit over audio surveillance*, Fox 11 News (Feb 17, 2023), <https://tinyurl.com/2p9rfttt>.

¹⁰ City of Green Bay, *Fact Sheet - City Hall Security* (Feb. 10, 2023), <https://tinyurl.com/zkvs596u>.

¹¹ *Id.*

¹² *Id.* (“Footage is not continuously monitored by City staff.”)

¹³ *Green Bay alder*, *supra* note 5.

32. The City of Green Bay treats the audio recordings as public records. It has received at least three separate public records requests for the recordings, and it shared at least one audio/video recording with a citizen in response to a public records request. That citizen then shared the recording with news media. Media reports that the recording is 90 minutes long and occurred during an election. Private conversations can be heard in the recording, including conversations about personal medical issues.¹⁴

33. The media reported on those sensitive conversations but, on advice of counsel, concealed personal identifying information of the surveilled in their reporting so as to protect privacy—an approach that the City, when it handed over the audio, obviously did not take.

34. The Hallway Bugs record audio continuously while City Hall is open to the public.

35. The hallways on the first and second floors of City Hall are large enough to enable two or more people to conduct a conversation without third parties being able to overhear the conversation. The hallways on the first and second floors of City Hall are also well-suited to having sensitive phone calls. Plaintiffs and others have had both in-person conversations and/or sensitive phone calls in the hallways of the first and second floors of City Hall (hereinafter collectively referred to as “Private Conversations”).

¹⁴ Ben Krumholz, *FOX 11 obtains Green Bay City Hall surveillance recording*, Fox 11 News (Feb. 19, 2023), <https://tinyurl.com/34tmbtc6>.

36. The layout of the hallways on the first and second floors of City Hall enables persons to see approaching third parties and thus cease Private Conversations if there is a risk of being overheard.

37. In the hallways of the first and second floors of City Hall, members of the public often hold Private Conversations in low voices among themselves. These conversations are typically held discreetly to ensure they are not overheard by third parties. These conversations often involve the business of the City of Green Bay and frequently include citizens who have come to petition their government and engage in civic discourse.

38. Even if there were a risk that a Private Conversation could be overheard, virtually no one had suspected that a Private Conversation in the hallways would also be recorded and archived by the City and Mayor.

39. In the hallways of the first and second floors of City Hall (and particularly on the second floor where the Common Council's chambers are located), council members often hold Private Conversations in low voices among themselves and with their constituents. These Private Conversations are typically held discreetly to ensure that they are not overheard by third parties. These Private Conversations often involve the business of the City of Green Bay and frequently include citizens who have come to petition their government and engage in civic discourse.

40. In the hallways of the first and second floors of City Hall, attorneys and their clients hold Private Conversations in low voices sufficiently distant from third parties to ensure that there is no waiver of the attorney-client privilege.

41. In the hallways of the first and second floors of City Hall, reporters conduct off-the-record Private Conversations with other persons in low voices sufficiently distant from third parties to ensure that they are not overheard.

42. Many of these Private Conversations would not take place if citizens and council members knew that they were being recorded. There are no other readily accessible locations within City Hall where such Private Conversations can occur without being overheard by third parties, and it is impracticable to go outside (especially in the winter) to have such conversations.

43. The Hallway Bugs are capable of intercepting and recording Private Conversations.

44. The Hallway Bugs have intercepted and recorded Private Conversations and continue to intercept and record Private Conversations.¹⁵

45. Plaintiffs and other similarly situated members of the public have engaged in Private Conversations in the hallways of the first and second floors of City Hall since the Hallway Bugs were installed.

46. Plaintiffs and other similarly situated members of the public have not consented to any interception of their Private Conversations.

47. Plaintiffs and other similarly situated members of the public had a subjective expectation of privacy when they held Private Conversations in the hallways on the first and second floors of City Hall.

¹⁵ *Fact Sheet - City Hall Security*, *supra* note 10; Krumholz, *supra* note 14.

48. Plaintiffs and other similarly situated members of the public intend to engage in Private Conversations in the hallways of the first and second floors of City Hall in the future.

49. The Hallway Bugs are operating as of the filing of this Complaint and will continue to operate indefinitely into the future absent a court order.

50. Mayor Genrich's, or a group of City officials', deployment of the Hallway Bugs has made it impossible to engage in Private Conversations in City Hall in the only locations suitable to prudently and efficiently conduct such conversations. Plaintiffs' access to government buildings and services, as well as their ability to efficiently and effectively participate in government, and assist others in their civic engagements, is therefore severely limited and chilled.

CLASS ALLEGATIONS

51. Pursuant to Wisconsin Statutes Section 803.08, Plaintiffs Theisen and Doe seek to pursue their claims for declaratory and injunctive relief on behalf of a class of similarly situated persons. The parameters of the class may be refined through discovery and will be subject to Court approval and modification, but for the purposes of this Complaint, the Plaintiffs Theisen and Doe propose the following class definitions:

- a. All persons in the United States who entered Green Bay City Hall during the time that Mayor Genrich and/or the City had installed and maintained Hallway Bugs as defined by this Complaint (around winter 2021 through present), and, in the vicinity of a Hallway Bug, attempted

to have a private conversation, and all persons in the United States who plan to enter Green Bay City Hall in the future and have private conversations.

52. Plaintiffs Theisen and Doe further propose that the following persons be excluded from any certified class: (1) Mayor Genrich and his immediate family and (2) all judicial officers and associated court staff assigned to this case and their immediate family members.

53. Plaintiffs Theisen and Doe reserve the right to amend the class definition if further investigation, discovery, or both indicate that such definition should be narrowed, expanded, or otherwise modified.

54. The proposed class meets the requirements for class certification pursuant to Wisconsin Statutes Sections 803.08(1) and (2).

55. *Numerosity* (Wis. Stat. § 803.08(1)(a)). The members of the class are so numerous that joinder of all members is impracticable. The precise number of persons subject to the unauthorized surveillance and recording is unknown at this time, but it is believed to be in the thousands. Upon information and belief, Defendants have subjected most (and perhaps all) persons that have entered City Hall between the relevant time period to unlawful surveillance and recording.

56. *Commonality* (Wis. Stat. § 803.08(1)(b)). Common questions of law and fact exist as to all members of the class and predominate over any questions solely affecting individual members. Such common issues include:

b. The relevant time period under which Mayor Genrich and/or the City

- violated constitutional and statutory law;
- c. Whether Mayor Genrich and/or the City violated Wisconsin's Electronic Surveillance Control Law;
 - d. Whether Mayor Genrich and/or the City violated Article I, Section 11 of the Wisconsin Constitution, which protects against unreasonable searches and seizures;
 - e. Whether Mayor Genrich and/or the City violated Article I, Section 3 of the Wisconsin Constitution, which protects the rights of every "person [to] freely speak, write and publish his sentiments on all subjects," and forbids any laws that "restrain or abridge the liberty of speech or of the press";
 - f. Whether Mayor Genrich and/or the City violated Article I, Section 4 of the Wisconsin Constitution, which protects the "right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof";
 - g. Whether Mayor Genrich and/or the City violated Wisconsin Statutes Section 995.50, which protects citizens' privacy rights;
 - h. The appropriate injunctive relief to be awarded.

57. *Typicality* (Wis. Stat. § 803.08(1)(c)). Plaintiffs Theisen and Doe's claims are typical of the claims of other members of the class in that they have all been subjected to the same unlawful surveillance by the City and/or the Mayor.

58. *Adequacy* (Wis. Stat. § 803.08(1)(d)). Plaintiffs Theisen and Doe will

fairly and adequately represent and protect the interests of the class, and they have retained counsel competent and experienced in complex litigation and class actions. Plaintiffs Theisen and Doe have no interest antagonistic to those of the class, and Defendants have no defenses unique to Plaintiffs Theisen and Doe.

59. *Final Injunctive or Declaratory Relief* (Wis. Stat. § 803.08(2)(b)). This action is properly maintained as a class action for injunctive and declaratory relief because Defendants have acted, or refused to act, on grounds that are applicable to the class. Namely, Mayor Genrich and/or the City has surveilled and recorded all members of the class, have refused to delete these unlawful recordings, and disseminate these unlawful recordings in response to public records requests. Due to such conduct, final injunctive relief and corresponding declaratory relief are appropriate with respect to the entire class as sought in this action.

CAUSES OF ACTION

COUNT I – DECLARATORY JUDGMENT AND INJUNCTION

VIOLATION OF WISCONSIN’S ELECTRONIC SURVEILLANCE CONTROL LAW

(ON BEHALF OF ALL PLAINTIFFS AND THE PROPOSED CLASS)

60. Plaintiffs incorporate and reallege the allegations in paragraphs 1–59.

61. Wisconsin’s Electronic Surveillance Control Law (“WESCL”) prohibits any person from, among other things, “intentionally intercept[ing], attempt[ing] to intercept, or procur[ing] any other person to intercept or attempt to intercept . . . any . . . oral communication.” Wis. Stat. § 968.31(1)(a). WESCL also prohibits any person from “intentionally us[ing], attempt[ing] to use, or “procur[ing] any other person to

use or attempt to use any electronic, mechanical, or other device to intercept any oral communication.” *Id.* at (1)(b). Finally, WESCL prohibits intentionally disclosing, using, attempting to disclose, or attempting to use, the contents of any oral communication “knowing or having reason to know that the information was obtained through the interception of . . . an oral communication” in violation of WESCL. *Id.* at (1)(c) and (d).

62. In addition, WESCL contains detailed procedures for lawfully intercepting oral communications. Wis. Stat. § 968.30. However, these procedures do not permit the interception of oral and other communications “between an attorney and a client.” *Id.* at (10).

63. WESCL defines “intercept” to mean “the aural or other acquisition of the contents of any . . . oral communication through the use of any electronic, mechanical or other device” Wis. Stat. § 968.27(9). Under WESCL, “oral communication” “means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation.” *Id.* at (12).

64. The Wisconsin Supreme Court construes “oral communication” for purposes of WESCL to mean a communication where the speaker has “(1) an actual subjective expectation of privacy in the speech, and (2) a subjective expectation that is one that society is willing to recognize as reasonable.” *State v. Duchow*, 2008 WI 57, ¶ 20.

65. Plaintiffs' Private Conversations were, and will continue to be, conducted at low volume, away from third parties, with individuals who are unlikely to report the contents thereof. Plaintiffs had a subjective expectation that these Private Conversations would be kept private. These Private Conversations would not be overheard but for Defendant's use of highly sensitive Hallway Bugs. A reasonable person would consider the hallways on the first and second floors of City Hall to be locations where Private Conversations could be held without interception.

66. This case presents a bona fide controversy between adverse parties over whether Defendant's interception of Plaintiffs' Private Conversations violates WESCL.¹⁶ See *Putnam v. Time Warner Cable of Se. Wisconsin, Ltd. P'ship*, 2002 WI 108, ¶¶ 41–44.

67. Plaintiffs are therefore entitled to a declaration that Mayor Genrich's installation and maintenance of Hallway Bugs violates the WESCL and an injunction requiring Defendants to immediately disable and remove the devices. Plaintiffs are also entitled to an injunction prohibiting Defendants from disclosing the contents of any recordings captured by any audio surveillance devices at City Hall and requiring him to destroy all audio recordings unlawfully obtained by those devices.

¹⁶ WESCL provides for a civil cause of action, to be brought by "[a]ny person whose . . . oral communication is intercepted, disclosed or used," in violation of WESCL, "against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose, or use, the communication," and provides for "[a]ctual damages, but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher," punitive damages, and reasonable attorney's fees and other litigation costs. Wis. Stat. § 968.31(2m).

COUNT II – DAMAGES**VIOLATION OF WIS. STAT. § 968.31
WISCONSIN’S ELECTRONIC SURVEILLANCE CONTROL LAW****(ON BEHALF OF PLAINTIFFS THEISEN AND DOE)**

68. Plaintiffs incorporate and reallege the allegations in paragraphs 1–50.

69. Wisconsin’s Electronic Surveillance Control Law (“WESCL”) prohibits any person from, among other things, “intentionally intercept[ing], attempt[ing] to intercept, or procur[ing] any other person to intercept or attempt to intercept . . . any . . . oral communication.” Wis. Stat. § 968.31(1)(a). WESCL also prohibits any person from “intentionally us[ing], attempt[ing] to use, or “procur[ing] any other person to use or attempt to use any electronic, mechanical, or other device to intercept any oral communication.” *Id.* at (1)(b). Finally, WESCL prohibits intentionally disclosing, using, attempting to disclose, or attempting to use, the contents of any oral communication “knowing or having reason to know that the information was obtained through the interception of . . . an oral communication” in violation of WESCL. *Id.* at (1)(c) and (d).

70. Plaintiffs Theisen and Doe had private conversations at City Hall near the Hallway Bugs in which they had a reasonable expectation of privacy. Unbeknownst to them, these conversations were recorded by Defendants using the Hallway Bugs. The Individual Plaintiffs did not consent to these recordings.

71. These recordings therefore violated the WESCL.

72. “Any person whose . . . oral communication is intercepted, disclosed or used in violation” of WESCL “shall have a civil cause of action against any person

who intercepts, discloses or uses, or procures any other person to intercept, disclose, or use, the communication, and shall be entitled to recover from any such person: (a) Actual damages, but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher; (b) Punitive damages; and (c) A reasonable attorney's fee and other litigation costs reasonably incurred."

Wis. Stat. § 968.31(2m).

73. Plaintiffs Theisen and Doe are therefore entitled to compensatory and punitive damages as a result of these violations, as well as attorney's fees and costs.

COUNT III – DECLARATORY JUDGMENT AND INJUNCTION

VIOLATION OF ARTICLE 1, SECTION 11 OF THE WISCONSIN CONSTITUTION

(ON BEHALF OF ALL PLAINTIFFS AND THE PROPOSED CLASS)

74. Plaintiffs incorporate and reallege the allegations in paragraphs 1–59.

75. In language substantively identical to the federal Fourth Amendment, Wisconsin's Constitution protects against unreasonable searches and seizures. Wis. Const. Art. I, § 11.

76. Therefore, the Wisconsin Supreme Court "normally interpret[s Article I, section 11 of the Wisconsin Constitution] coextensively with the United States Supreme Court's interpretation of the Fourth Amendment." *State v. Floyd*, 2017 WI 78, ¶ 19.

77. The Fourth Amendment extends to the recording of oral statements where the person recorded has a legitimate expectation of privacy. *Katz v. United States*, 389 U.S. 347, 353 (1967). "A person does not surrender all Fourth

Amendment protection by venturing into the public sphere. To the contrary, ‘what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.’” *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (quoting *Katz*, 389 U.S. at 351–52).

78. The Private Conversations of the Individual Plaintiffs and others were, and will continue to be, conducted at low volume, away from third parties, with those unlikely to report the contents thereof. These Private Conversations would not be overheard but for Defendant’s use of highly sensitive Hallway Bugs. In other words, the Individual Plaintiffs’ and others’ subjective expectation of privacy is entirely reasonable.

79. The Individual Plaintiffs and others similarly situated have been and continue to be harmed by the unlawful recording of their Private Conversations.

80. Plaintiffs are therefore entitled to a declaration that the mayor and/or the City has violated Article I, Section 11 of the Wisconsin Constitution by installing and monitoring the Hallway Bugs. Plaintiffs also request an injunction ordering Defendants to immediately disable and remove the devices, to refrain from accessing or disseminating the unlawfully obtained recordings, and to destroy all audio recordings unlawfully obtained by those devices.

COUNT IV – DECLARATORY JUDGMENT AND INJUNCTION

VIOLATION OF ARTICLE I, SECTIONS 3 & 4 OF THE WISCONSIN CONSTITUTION

(ON BEHALF OF ALL PLAINTIFFS AND THE PROPOSED CLASS)

81. Plaintiffs incorporate and reallege the allegations in paragraphs 1–59.

82. Article I, Section 3 of the Wisconsin Constitution states, in relevant part, “Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press.” Wis. Const. art. I, § 3. Article I, Section 4 of the Wisconsin Constitution states, “The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged.” Wis. Const. art. I, § 4.

83. Article I, Sections 3 and 4 of the Wisconsin Constitution “guarantee the same freedom of speech and right of assembly and petition as do the First and Fourteenth amendments of the United States constitution.” *Bd. of Regents-UW Sys. v. Decker*, 2014 WI 68, ¶ 43, n.19 (quoting *Lawson v. Hous. Auth. of City of Milwaukee*, 270 Wis. 269, 274 (1955)).

84. The U.S. Supreme Court has recognized that government surveillance can have a profound chilling effect on First Amendment rights. See *United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. 297, 313–14 (1972). Plaintiffs’ Private Conversations, given that they occur within City Hall, often regard political issues. First Amendment protections are therefore at their zenith. See *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶¶ 46–47.

85. City Hall is a public forum in which any restriction on speech must be narrowly tailored to achieve a substantial government interest and must leave open ample alternatives for communication.

86. The requirement that any individual speaking in City Hall must submit to unfettered audio recording of their speech is not narrowly tailored to achieve a substantial government interest because a substantial portion (indeed, nearly all) of the burden on speech does not serve to advance the goals of safety, which is the purported impetus for the Hallway Bugs.

87. Nor do the Hallway Bugs leave open ample alternatives for communication. City Hall is the seat of government, where citizens come to participate in civic discourse, to vote, and to petition their government for redress. These activities cannot be effectively achieved elsewhere.

88. The Individual Plaintiffs and the public at large will continue to be harmed by the presence of the Hallway Bugs and the requirement that any speech in City Hall be subject to audio recording, including because they cannot freely engage in protected activities in City Hall.

89. The Plaintiffs are therefore entitled to a declaration that the Hallway Bugs violate Article I, Sections 3 and 4 of the Wisconsin Constitution. Plaintiffs are also entitled to an injunction requiring Defendants to immediately disable and remove the devices, to refrain from using or disseminating any unlawfully obtained audio recording, and to destroy all audio recordings unlawfully obtained by those devices.

COUNT V – INJUNCTION**VIOLATION OF WIS. STAT. § 995.50
STATUTORY RIGHT TO PRIVACY****(ON BEHALF OF THE INDIVIDUAL PLAINTIFFS AND THE PROPOSED
CLASS)**

90. Plaintiffs incorporate and reallege the allegations in paragraphs 1–59.

91. Wisconsin has codified a statutory right to privacy. Wis. Stat. § 995.50. “One whose privacy is unreasonably invaded is entitled to” relief under the statute. *Id.* § 995.50(1). The Wisconsin statutory right to privacy “shall be interpreted in accordance with the developing common law of privacy *Id.* § 995.50(3). The codification recognizes four actionable versions of “invasion of privacy” including “[i]ntrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a *place* that a reasonable person would consider private, or in a manner that is actionable for trespass.” *Id.* § 995.50(2)(am)1 (emphasis added). “Place” as used in the statute is of “geographical” significance. *Hillman v. Columbia Cnty.*, 164 Wis. 2d 376, 392 (Ct. App. 1991) (looking to the dictionary and identifying the following: “an indefinite region or expanse ... 3 a: a particular region or center of population ... 4 a: a particular portion of a surface: specific locality.”) (internal quotations omitted). Unlike WESCL, which requires that interceptions be intentional “[t]he test [here] is an objective one: whether a reasonable person would find the intrusion highly offensive. There is no requirement that the actor have a particular mental state or intent.” *Gillund v. Meridian Mut. Ins. Co.*, 2010 WI App 4, ¶ 29.

92. The Individual Plaintiffs’ and others’ Private Conversations were, and will continue to be, conducted at low volume, in a *place* away from others, regarding

private, sensitive, or even privileged matters. Defendant's intrusion into such communications is highly offensive to Plaintiffs. A reasonable person would find Defendant's intrusion highly offensive.

93. Wisconsin's statutory right to privacy provides that equitable relief is available "to prevent and restrain" invasions of privacy, as well as damages and attorney's fees. Wis. Stat. § 995.50(1)(a) –(c).

94. Defendants had no authority to intercept the Private Conversations. Wis. Stat. § 968.31.

95. Defendants thus violated the Individual Plaintiffs' statutory right to privacy. Plaintiffs are entitled to an injunction ordering Defendants to immediately disable the audio recording devices installed at City Hall and to destroy all recordings from those devices immediately.

Prayer for Relief

WHEREFORE, Plaintiffs request the following relief:

- A. A determination that the claims for declaratory and injunctive relief in this action may be maintained as a class action pursuant to Wisconsin Statutes Section 803.08.
- B. A declaration that Defendants violated the WESCL by installing and maintaining the Hallway Bugs, and by using and disseminating unlawfully obtained recordings.

- C. A declaration that Defendants violated Article I, Section 11 of the Wisconsin Constitution by installing and maintaining the Hallway Bugs.
- D. A declaration that Defendants violated Article I, Sections 3 and 4 of the Wisconsin Constitution by installing and maintaining the Hallway Bugs.
- E. An injunction ordering Defendants to disable all audio recording devices at City Hall and prohibiting them from reinstalling any such devices in the future.
- F. An injunction ordering Defendants to destroy all audio recordings made from the audio recording devices at City Hall.
- G. Damages pursuant to Wis. Stat. § 968.31(2m)(a), (b), which includes “liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher” and “[p]unitive damages.”
- H. Pre- and post-judgment interest as provided by law.
- I. Reasonable attorney’s fees and litigation costs, as provided by law.
- J. Any other relief that this Court deems just and proper.

Dated: February 21, 2023

Respectfully submitted,

Electronically signed by Ryan J. Walsh

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