STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY
BRANCH 5

WISCONSIN STATE SENATE, SENATOR ANDRÉ JACQUE, ANTHONY THEISEN, and JANE DOE,

Plaintiffs,

v.

THE CITY OF GREEN BAY, and ERIC GENRICH, in his official capacity as Mayor of the City of Green Bay,

Defendants.

Case No. 23-cv-250
Hon. Marc A. Hammer

PLAINTIFFS' BRIEF IN SUPPORT OF EMERGENCY MOTION FOR EX PARTE TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

INTRODUCTION

Sometime within the past 18 months, the Mayor of Green Bay, Eric Genrich, ordered the installation of sensitive audio surveillance devices in Green Bay City Hall ("City Hall"). Whether he took this action unilaterally or with the support of selected staff members (the City's story has changed multiple times since news of the surveillance first broke), he never informed the Common Council of his decision or sought its approval for this shocking invasion of privacy. Nor did he alert the public to the fact that private conversations in the hallways of City Hall would now be intercepted, recorded, and potentially reviewed by the Mayor, the Green Bay Police Department, and the City's legal department. And he certainly did not disclose that

these surreptitious recordings would be made publicly available—*without redaction*—in response to open records requests, as has already happened.[1]

As a result of the Mayor's outrageous decision to eavesdrop on council members and his constituents, countless private conversations that have occurred in the hallways of City Hall have been intercepted and recorded. Many of these conversations involved sensitive personal information (such as "medical issues"),[2] attorney-client privileged communications, and confidential political discussions. The individuals having these conversations, including the individual Plaintiffs here, had a reasonable expectation that these conversations not only were private—because they were conducted at low volume with no third parties within earshot—but also were not being recorded and archived by rogue government actors. More, because the hallways of City Hall are a place where such conversations between and among council members, attorneys, and members of the public have traditionally taken place, that expectation of privacy is objectively reasonable.

The Mayor's decision to bug City Hall thus violates numerous laws and constitutional provisions that protect the public against such intrusive government surveillance. Most significantly, the Wisconsin Electronic Surveillance Control Law ("WESCL") prohibits the intentional interception of any oral communication where the speaker has a subjective expectation of privacy in the speech and that expectation

[1] *See, e.g.*, Ben Krumholz, *FOX 11 obtains Green Bay City Hall surveillance records*, FOX 11 News (Feb. 19, 2023), https://tinyurl.com/yc5k7ffv.
[2] *See id.* (reporting that the recording produced to FOX 11 included audible "personal conversations between individuals discussing medical issues").

is objectively reasonable. Through WESCL, the Legislature stripped the Mayor of any authority he may historically have had (he had none) to install listening devices in City Hall. But, even beyond WESCL, the Mayor's conduct violates Plaintiffs' statutory right to privacy, which codified a long-standing right to privacy. The City's warrantless audio surveillance also violates Wisconsin's constitutional prohibition against unreasonable searches and seizures. And to the extent that the City's recent policy of snooping on its citizens has now been publicly disclosed, it unconstitutionally chills core protected speech. As a national expert on privacy issues from the American Civil Liberties Union explained to Green Bay media, "[t]o have a recording device that people might not be aware of, at such a location, is a serious threat to privacy and completely unjustified."[3] It is also largely unprecedented.[4]

Yet, despite being notified by the Senate that their audio surveillance program is unlawful, the Mayor and the City have refused to remove the audio surveillance devices or destroy the audio recordings in their possession. Instead, they proposed to remedy any ongoing violation by posting signs at City Hall alerting the public to the presence of these devices. But the government cannot destroy the reasonable expectation of privacy simply by publicizing the creation of an always-listening police state. Residents of Oceania may *know* that the Party listens to their every word, but

[3] Ben Krumholz, *"Very serious privacy invasion": ACLU analyst on Green Bay's audio surveillance*, FOX 11 News (Feb. 9, 2023) (quoting ACLU's Jay Stanley), https://tinyurl.com/4en7b2uj.

[4] *Id.* (Stanley: This is the first sort of city hall or political location that I've heard doing something like this," and, despite "millions of video surveillance cameras all around this country," "almost none of them have microphones on them").

the Ministry of Truth's surveillance is still an unmistakable invasion of privacy. Thankfully, Wisconsin law does not permit such indiscriminate government intrusions, and those (like the Mayor) who would "glibly assert that 'you have no privacy in public' are writing off an entire realm of freedom that Americans have always enjoyed," including the "right to a private conversation in a public area."[5]

Absent immediate injunctive relief, the Mayor and City plan to continue unlawfully recording private conversations in the hallways of City Hall. They will also continue to produce these unredacted recordings in response to records requests, which is itself unlawful and which will expose countless private and privileged conversations to the public. Given the clear unlawfulness of Defendants' conduct and the imminent risk of irreparable harm, Plaintiff the Wisconsin State Senate and Individual Plaintiffs André Jacque, Anthony Theisen, and Jane Doe respectfully urge this Court to ***issue an ex parte temporary restraining order and/or preliminary injunction by noon on February 22, directing Defendants to immediately cease all use of audio surveillance in Green Bay City Hall and, at the very least, to refrain from accessing or producing any recordings captured by the audio recording devices pending further proceedings.***

STATEMENT OF FACTS

On Tuesday, February 7, 2023, at a full Green Bay Common Council ("City Council") meeting, news broke that there were audio recording devices present at

[5] Jay Stanley, *Adding Audio Recording to Surveillance Cameras Threatens A Whole New Level of Monitoring in American Life*, ACLU (Dec. 12, 2012), https://www.aclu.org/news/national-security/adding-audio-recording-surveillance-cameras.

City Hall. This came as a surprise, since the public and City Council were not advised of the presence of these audio recording devices, and no signs warned of their existence. Shortly after the City Council meeting, Green Bay City Attorney Joanne Bungert, in responding to media requests regarding the devices, stated that live feeds from the audio recording devices are monitored by the Green Bay Police Department Shift Command Office. Bungert confirmed the existence of the microphones in the first and second floor hallways of City Hall, outside of the Clerk's Office, Council Chambers, and the Mayor's Office, which she stated were installed between spring 2021 and summer 2022. At the time, Bungert asserted that the microphones were installed "as part of collaborative operational response 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 . . . ." However, the Green Bay Police Chief Chris Davis stated that the Green Bay Police Department was "kind of peripheral to the discussion," and opined that "the decision was made at the senior staff level at the city, so among department directors."[6]

The revelation of the presence of microphones in the first and second floor hallways of City Hall (hereinafter "Hallway Bugs" or "Audio Surveillance Program") sparked understandable outrage, including from the American Civil Liberties Union ("ACLU") and State Senator André Jacque. The ACLU, speaking through Jay

[6] All factual allegations of this paragraph are drawn from 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.

Stanley, a senior policy analyst in Washington D.C. with over 20 years of relevant experience, stated "[t]his is the first sort of city hall or political location that I've heard doing something like this . . . ."[7] Senator Jacque was "stunned," pointing out that he, "[h]aving worked in Green Bay City Hall as a City employee and traversing its halls for years before and since in numerous capacities both in a public and as a private citizen, . . . can speak firsthand to the sort of sensitive information that routinely gets shared in those spaces with an unsuspecting expectation of privacy . . . ."[8]

In response, three days later, on Friday, February 10, the City of Green Bay issued a "fact sheet" regarding the Hallway Bugs, confirming that "Green Bay City Administration felt it necessary to enhance the security system on the first and second floors of City Hall between Winter 2021 and Summer 2022." The fact sheet stated that "[t]here are 14 cameras located in multiple public areas of City Hall, including entrances, exits, and hallways," and that "[t]hree of those cameras, located only in the hallways of the first and second floors, have audio capability." The fact sheet asserted that use of such audio surveillance devices is "lawful and commonplace." In an apparent contradiction to Bungert's statement from earlier in the week, the "fact sheet" stated that although the Green Bay Police Department "has access to this feed and several others in the community for the purposes of responding to an emergency[,] . . . [f]ootage is not continuously monitored by City staff." The fact

[7] Ben Krumholz, *'Very serious privacy invasion': ACLU analyst on Green Bay's audio surveillance*, Fox 11 News (Feb. 9, 2023), https://tinyurl.com/34xpx49d.

[8] WisPolitics, *Press Release: Sen. Jacque: Statement on Green Bay Mayor Genrich's snooping scandal* (Feb. 9, 2023), https://tinyurl.com/4kntf9pp.

sheet further asserted that "video and audio [have] been reviewed and proved valuable in gathering information about accidents, altercations, and damage to property at City Hall." The fact sheet opined that "[s]ignage is not required in these circumstances," but indicated that the City would nevertheless install signs "in the near future."[9]

On February 13, 2023, council of record for Plaintiffs in this case, Ryan J. Walsh, sent a letter on behalf of the Wisconsin State Senate to the Green Bay Mayor pointing out that the Hallway Bugs are illegal and unconstitutional, and demanding that they be disabled by February 14 and all recordings captured by the Hallway Bugs destroyed by February 17. Attorney Bungert responded the next day with a four-sentence letter, reiterating the City's position that the Hallway Bugs are "lawful and commonplace," and confirming that the City would not disable the Hallway Bugs or destroy the recordings.

In response to the media questions precipitated by the City's February 13 letter, Joseph Faulds, Green Bay Chief of Operations, stated, contrary to Bungert's previous assertion, that the audio recordings are *not* continually monitored by City staff. On or about February 14, Bungert contradicted her own prior statement, telling the media that the Hallway Bugs were installed at the order of the Mayor, while also admitting that the Hallway Bugs have the ability to record conversations.[10]

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

[10] All factual allegations of this paragraph are drawn from WBAY news staff, *Green Bay City Hall rejects attorney's demand to remove audio surveillance*, WBAY (Feb. 14, 2023), https://tinyurl.com/22fupfxn.

Finally, on Friday, February 17, reports indicated that signs had been installed at City Hall notifying the public of the ongoing audio surveillance.[11] That same day, counsel for Plaintiffs sent a response to the City's February 14 letter, notifying the City of obligations to take reasonable steps to preserve and retain all documents relevant to this suit.

In the last few days, a news agency reported that it had obtained a 90-minute audio and video recording from an anonymous source that had requested the recording in a public records request. The news agency decided not to share audio from the recording "due to legal and privacy concerns." The recording is from the first-floor hallway of City Hall, just outside the City Clerk's office, captured from November 8th, the day of the midterm election, between 11:30 a.m. and 1:00 p.m. The article notes that "[a]t the end of the hallway, we could clearly hear more personal conversations between individuals discussing medical issues."[12]

Plaintiffs have filed a complaint and motion for temporary restraining order and temporary injunction to stop the use of the surveillance devices and prevent the disclosure of any intercepted communications.

LEGAL STANDARD

Ex parte restraining orders are governed by Wis. Stat. § 813.025. This Court may grant an ex parte restraining order "if [it] is of the opinion that irreparable loss

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

[12] All factual allegations of this paragraph are drawn from Ben Krumholz, *FOX 11 obtains Green Bay City Hall surveillance recording*, Fox 11 News (Feb. 19, 2023), https://tinyurl.com/34tmbtc6.

or damage will result to the applicant unless a temporary restraining order is granted . . . ." *Id.* § 813.025(2). Such an order "shall be effective only for 5 days unless extended after notice and hearing thereon, or upon written consent of the parties or their attorneys." *Id.*

Temporary injunctions are governed by Wis. Stat. § 813.02(1). To secure a temporary injunction, the movant must establish: (1) "a reasonable probability of ultimate success on the merits," (2) that an injunction is "necessary to preserve the status quo," (3) "a lack of adequate remedy at law;" and (4) "irreparable harm." *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520–21, 259 N.W.2d 310 (1977). The Wisconsin Supreme Court has also held that a movant must "satisfy the [ ] court that on balance equity favors issuing the injunction." *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

Before granting a temporary injunction or temporary restraining order, "the court may attempt to contact the party sought to be restrained, or his or her counsel if known, by telephone," but is not required to do so. Wis. Stat. § 813.02(1)(b).

ARGUMENT

I. Plaintiffs Are Extremely Likely to Succeed on the Merits

A. The Audio Surveillance Program Violates Wisconsin's Electronic Surveillance Control Law

WESCL prohibits anyone in Wisconsin from: (1) intentionally intercepting,[13]

[13] 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).

or procuring another to intercept, any "oral communication"; (2) using, or procuring another to use, any electronic device with the intention of intercepting any "oral communication"; and (3) disclosing and using 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. Wis. Stat. § 968.31(1)(a)–(d).

WESCL does allow law enforcement to intercept oral communications in order to obtain evidence regarding specifically enumerated crimes, but only if the statute's detailed procedures are followed and the resulting warrant is narrowly tailored and time limited. S*ee* Wis. Stat. § 968.30 (stringent application procedures and restrictive warrant requirements); Wis. Stat. § 968.28 (exclusive list of crimes).[14]

Defendants did not obtain, or cause law enforcement to obtain, a warrant for the audio surveillance of City Hall. In any event, no warrant would have issued for the continuous, blanket monitoring of all conversations on the first and second floors of City Hall where no specific crime is suspected. Wis. Stat. § 968.30; Wis. Stat. § 968.28.

1. Defendant Mayor Genrich clearly had the requisite intent: indeed, he has

[14] These detailed requirements, patterned on Title III of the federal Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), must "be construed strictly" because the statutes "creat[e] an investigative mechanism which potentially threaten[s] the constitutional right to privacy" as recognized by the U.S Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967). *See State v. House*, 2007 WI 79, ¶ 15, 302 Wis.2d 1, 734 N.W.2d 140; *see also id.* at ¶¶ 23, 33 (interpreting WESCL "restrictive[ly]" and explaining that the state statute must be at least as restrictive as Title III); *State v. Duchow*, 2008 WI 57, ¶¶ 14–16, 19, 310 Wis. 2d 1, 749 N.W.2d 913 (consulting Title III legislative history, federal cases construing Title III, and constitutional search and seizure protections to interpret WESCL).

admitted to it. Through the Green Bay City Attorney, Mayor Genrich recently admitted to unilaterally ordering the installation of devices in the hallways of a public building which are capable of recording audio. Compl. ¶ 17 & n.4. It is therefore beyond dispute that Mayor Genrich has "intentionally use[d], attempt[ed] to use or procure[d] any other person to use or attempt to use any electronic, mechanical or other device to intercept" conversations occurring on the first and second floors of City Hall. *See* Wis. Stat. § 968.31(1)(b). And as the Mayor has further admitted, these bugs are *recording* these communications. *See* Compl. ¶ 44 n.15 (City, in a "fact sheet," admitting that "audio has been reviewed and has proved valuable in gathering information"; media report of private conversations being audible in recordings obtained by a public records request). As explained below, the communications that these surveillance devices capture are private "oral communications:" exactly the type of communications that WESCL was designed to protect. *House*, 2007 WI 79, ¶¶ 14–15.

2. WESCL prohibits the interception of communications where the speaker has "an actual subjective expectation of privacy in the speech," and that expectation "is one that society is willing to recognize as reasonable." *State v. Duchow*, 2008 WI 57, ¶ 20, 310 Wis. 2d 1, 749 N.W.2d 913.

At various times over the past year, Plaintiffs engaged in private conversations in the first and second-floor hallways that concerned sensitive matters. Plaintiffs had a subjective expectation that these conversations were private. Compl. ¶ 47; Affidavit of J. Doe, ¶ 5; Affidavit of A. Jacque, ¶ 4.; Affidavit of A. Theisen, ¶ 14. The

conversations took place when no one else was around, at low enough volumes that their voices would not be heard by those in adjacent offices or stairways. Compl. ¶¶ 35–36, 39–41; Doe Aff., ¶ 5; Jacque Aff. ¶ 5. Plaintiffs broke off their conversations when third parties approached, thus ensuring that the conversations would remain private. Compl. ¶ 36. Taking such active steps plainly evinces a subjective expectation of privacy. *Bond v. United States*, 529 U.S. 334, 338 (2000) (subjective expectation found where defendant, on a public bus, placed object in opaque bag above his seat since he "[sought] to preserve [something] as private.").

Moreover, as Plaintiffs have testified, they would not have engaged in these private conversations if they believed others would overhear. Theisen Aff., ¶ 16; Doe Aff., ¶¶ 8–9; Jacque Aff., ¶¶ 5–8. Plaintiffs have thus demonstrated that they had a subjective expectation of privacy. *See United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978) (finding that there was "no question" that defendant had a subjective expectation of privacy based *solely* on the defendant's testimony "that he believed that normal conversations in his office could not be overheard, even when the doors to his office were open"); *Duchow*, 2008 WI 57, ¶ 20 (State stipulated that defendant, who threatened another person's child on an empty bus, had the subjective belief that the communication was private).

3. Plaintiffs' expectation of privacy was objectively reasonable because it falls within the "scope of privacy that a free people legitimately may expect." *See Duchow*, 2008 WI 57, ¶ 21 (citation omitted). It is by "now [an] unremarkable proposition that, because society recognizes as reasonable an expectation of privacy for confidential

conversations between individuals, the government needs a warrant to intercept or record such conversations." *Gennusa v. Canova*, 748 F.3d 1103, 1110, 1112–13 (11th Cir. 2014) (finding interception of attorney-client communications in a government building violates defendant's reasonable expectations of privacy). And "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger v. State of N.Y.*, 388 U.S. 41, 63 (1967).

In determining whether a subjective expectation of privacy is one that society is willing to recognize as reasonable, courts consider the totality of the circumstances, including, but not limited to: "(1) the volume of the statements; (2) the proximity of other individuals to the speaker, or the potential for others to overhear the speaker; (3) the potential for the communications to be reported; (4) the actions taken by the speaker to ensure his or her privacy; (5) the need to employ technological enhancements for one to hear the speaker's statements; and (6) the place or location where the statements are made." *Duchow*, 2008 WI 57, ¶ 22 (citing *Kee v. City of Rowlett, Tex.*, 247 F.3d 206, 212–15 (5th Cir. 2001)).

Each one of these factors militates in favor of finding that Plaintiffs' expectation of privacy was reasonable. Plaintiffs spoke in hushed voices in empty hallways regarding sensitive subjects. *See McIntyre*, 582 F.2d 1221, 1223–24 (9th Cir. 1978) (reasonable to expect privacy in normal conversation in open-door office with co-worker fifteen feet away). They ceased those conversations when others approached. And they discussed confidential information that they did not expect the other party to disclose—including sensitive political issues and attorney-client

privileged matters. *See Duchow*, 2008 WI 57, ¶ 22 (unreasonable to expect that physical threats to someone else's child would not be reported). Accordingly, but for the presence of the bugs at City Hall, these conversations would have been kept private. *See United States v. Mankani*, 738 F.2d 538, 543 (2d Cir.1984) ("[T]he Fourth Amendment protects conversations that cannot be heard except by means of artificial enhancement.").

The Mayor appears to believe that no one can have a reasonable expectation of privacy within the walls of City Hall. But the U.S. Supreme Court recently reaffirmed that "[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). WESCL, drafted with the Fourth Amendment in mind, "protects people, not places." *See Katz*, 389 U.S. at 351. Plaintiffs thus have a legitimate expectation that their conversations will not be overhead by the "uninvited ear[s]" of the Mayor, his administration, or other members of the public with access to the recordings. *See Katz*, 389 U.S. at 352. Indeed, if an arrestee who suspected he was being videotaped while alone in an FBI interview room has a reasonable expectation of privacy in his *spoken* words, *see United States v. Llufrio*, 237 F. Supp. 3d 735, 742, 745–46 (N.D. Ill. 2017), Plaintiffs clearly have a reasonable expectation that conversations in an empty hallway at City Hall will remain private.

Finally, some courts have held that whether an expectation of privacy is

legitimate or reasonable "necessarily entails a balancing of interests." *Gennusa*, 748 F.3d at 1111 (quotation marks and citation omitted). Here, the Mayor has asserted that he installed the bugs to ensure "safety and security." Compl. ¶ 26 n.10. But there are many video cameras in City Hall that can serve this interest, and the Mayor has not explained why audio surveillance is also necessary. Indeed, the surveillance devices are not monitored in real time (according to the latest statements from City officials), so the audio recordings are unlikely to prevent unlawful conduct from occurring. At most, they would assist in investigating suspected unlawful or disruptive conduct after the fact. But the Mayor has not pointed to any epidemic of such activity in the first and second floor hallways at City Hall. And whatever nominal interest the Mayor may have in expediting such investigations does not outweigh Plaintiff's interest in keeping sensitive and privileged conversations private. *See Gennusa*, 748 F.3d at 1111 (noting no weighty law enforcement or security interest in warrantless recordings in non-custodial setting at a sheriff's office). And when the video recordings are used in conjunction with audio recording, the identities of the speakers are very easily determined, further decimating Plaintiffs' protected privacy interests.

Mayor Genrich may believe that every person who has entered City Hall should be "deemed" to have consented to the recording of their conversations, no matter how private or sensitive. But merely walking into a building—even one that provides notice—falls far short of the "unequivocal and specific" consent required for such a privacy invasion. *State v. Prado*, 2021 WI 64, ¶¶ 3, 46, 397 Wis.2d 719, 960

N.W.2d 869 (notice in implied consent law does not amount to consent). Many citizens have no choice but to visit City Hall, whether for City Council meetings, court hearings, to meet with councilmembers, or for other civic purposes. Defendants cannot force citizens to abandon their right to privacy as a condition of entering City Hall. Consent to audio surveillance under WESCL "must be an essentially free and unconstrained choice, not the product of duress or coercion, express or implied." *State v. Turner*, 2014 WI App 93, ¶ 29, 356 Wis. 2d 759, 854 N.W.2d 865 (internal citations and quotations omitted). Consent is "not voluntary if the state proves no more than acquiescence to a claim of lawful authority." *Id.*

Since Plaintiffs' subjective expectation of privacy is objectively reasonable, the warrantless bugging of their conversations at City Hall violates WESCL.

B. The Audio Surveillance Program Violates Article I, Section 11 of the Wisconsin Constitution

The Wisconsin Constitution protects against unreasonable searches, including recording private conversations. Article I, Section 11 of the Wisconsin constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Wis. Const., art. I, § 11. Courts typically interpret the Wisconsin Constitution consistent with the Fourth Amendment. *State v. Dearborn*, 2010 WI 84, ¶ 14, 327 Wis. 2d 252, 786 N.W.2d 97. So long as a person has a reasonable expectation of

privacy, the recording of oral conversations constitutes a "'search and seizure' within the meaning of the Fourth Amendment," and must therefore meet constitutional requirements. *Katz v. United States*, 389 U.S. 347, 353–54 (1967). A person has a reasonable expectation of privacy when "the individual's conduct exhibited an actual (i.e., subjective) expectation of privacy in the area searched and the item seized" and the expectation "was legitimate or justifiable (i.e., one that society is willing to recognize as reasonable)." *State v. Bruski*, 2007 WI 25, ¶ 23, 299 Wis. 2d 177, 727 N.W.2d 503. Thus, where there is a reasonable expectation of privacy, a warrantless audio recording is "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (citation omitted).

In determining whether a person has a legitimate or justifiable expectation of privacy, the courts "consider the totality of the circumstances." *Bruski*, 2007 WI 25, ¶ 24. A person may have a reasonable expectation of privacy even in a public space. This is because "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," "[b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* Thus, the Court in *Katz* held that a person had a reasonable expectation of privacy in a public phone booth. *Id.* at 352. Even though he could be seen, Mr. Katz still had a reasonable expectation that his conversation would be private. *Id.* "He did not shed his right to" "exclude . . . the uninvited ear" "simply

because he made his calls from a place where he might be seen." *Id.* The Court noted that it had found reasonable expectations of privacy in other semi-public locations, such as "a business office, [ ] a friend's apartment, or [ ] a taxicab." *Id.*

Thus, to determine whether a person has a reasonable expectation of privacy in their oral statements, courts focus on the steps taken to protect those statements. As discussed above, factors that courts look to include "(1) the volume of the statements; (2) the proximity of other individuals to the speaker, or the potential for others to overhear the speaker; (3) the potential for the communications to be reported; (4) the actions taken by the speaker to ensure his or her privacy; (5) the need to employ technological enhancements for one to hear the speaker's statements; and (6) the place or location where the statements are made." *Duchow*, 2008 WI 57, ¶ 22 (citing *Kee v. City of Rowlett, Tex.*, 247 F.3d 206, 213–15 (5th Cir. 2001)). Where individuals take reasonable steps to keep their oral communications from being heard by unwanted ears, courts have held that the individual has a reasonable expectation of privacy in those communications, even if made in a public place. *See, e.g.*, *United States v. Llufrio*, 237 F. Supp. 3d 735, 742–43 (N.D. Ill. 2017).

Here, the Plaintiffs had a reasonable expectation of privacy in their oral conversations held privately in the hallways of City Hall. Jane Doe had private, sensitive, and confidential conversations with clients. Doe Aff. ¶ 5. These conversations "did not occur within the hearing distance of any person who was also in the hallway," Doe Aff. ¶ 9, and she subjectively believed that these conversations were private. Doe Aff. ¶ 8. Similarly, Senator Jacque had "at least one private

conversation in City Hall" that "did not occur within the hearing distance of any other person" in the hallway. Jacque Aff. ¶¶ 4–5. And Mr. Theisen had "private" conversations in these hallways as well. Theisen Aff. ¶ 14. The Plaintiffs were not aware that there were audio-recording devices in these hallways, as there was no signage notifying the public of the devices. *See* Theisen Aff. ¶¶ 10, 15; Doe Aff. ¶ 5. Plaintiffs would not have had these sensitive conversations had they known that the mayor installed sensitive Hallway Bugs capable of intercepting and recording them.

Defendants may argue that any violation of Article I, Section 11 has been cured by the newly installed signage alerting the public that their conversations may be recorded by the Hallway Bugs. But even if an individual knows that others may be listening, they still may have a reasonable expectation of privacy if they take steps to shield their conversations from those listeners. *Cf. Llufrio*, 237 F. Supp. 3d at 742–43. And, certainly, neither Plaintiffs nor anyone else have freely consented to having their private conversations recorded. *See supra* pp. 15–16. The government should not be allowed to immunize itself from suits under Article I, Section 11 merely by announcing its intention to conduct otherwise-unlawful surveillance. If the government is caught using internet-enabled devices within the home (such as Amazon's Alexa or Google's Home or Nest) to eavesdrop on private conversations, it is no answer for the government to simply announce publicly that it is engaging in such surveillance. Put differently, the government cannot unilaterally destroy a reasonable expectation of privacy merely by declaring that it plans to invade that privacy. If the expectation of privacy was reasonable *before* the government began its

surveillance activities, the public disclosure of those activities does not change the analysis. Because Plaintiffs (and other members of the public) had a reasonable expectation of privacy in the first and second floor hallways of City Hall, the posted signage does eliminate the unconstitutional nature of Defendants' conduct.

C. The Audio Surveillance Program Violates Article I, Sections 3 & 4 of the Wisconsin Constitution

Like its federal counterpart, the Wisconsin Constitution protects the rights to free speech, assembly, and to petition the government for redress. Article I Section 3 of the Wisconsin Constitution provides, "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. And Article I Section 4 provides, "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. These provisions "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, 355 Wis. 2d 800, 850 N.W.2d 112 (citation omitted), and so Wisconsin courts will look to federal law when applying these provisions, *see, e.g., id.* ¶ 43 & n.20. "Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis." *Wayte v. United States*, 470 U.S. 598, 610, n.11 (1985).

Civic engagement, including through political speech and the petitioning of one's government, is one of the most closely guarded rights. "Both speech and petition are integral to the democratic process." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011). "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs." *Id.* These rights "reflect[ ] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346–47 (1995) (citation omitted). Thus, these rights "are among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

Government eavesdropping devices and wiretapping in public fora are antithetical to the free flow of ideas protected by the First Amendment. Indeed, the Supreme Court has long recognized that government surveillance presents a "great[ ] jeopardy to constitutionally protected speech." *United States v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313–14 (1972). Indeed, "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger v. State of N.Y.*, 388 U.S. 41, 63 (1967). This is because, among other things, "awareness that one's conversations may be being overheard and recorded is likely to have a chilling effect on one's willingness to speak freely." *Ellsberg v. Mitchell*, 709 F.2d 51, 68, n.71 (D.C. Cir. 1983).

The Audio Surveillance Program in Green Bay City Hall regulates speech by subjecting anyone who speaks in the hallways subject to audio recording. As such, it is akin to a time, place, and manner restriction on speech. "The United States Supreme Court applies a forum-based approach to government restrictions on speech." *Decker*, 2014 WI 68, ¶ 43. "The applicable level of judicial scrutiny is determined based on whether the forum involved is a traditional public forum, a designated public forum, or a non-public forum." *Id.* "Traditional public forums are places such as parks, streets, and sidewalks, 'which by long tradition or by government fiat have been devoted to assembly and debate.'" *Id.* ¶ 43 n.20 (citation omitted). "A designated public forum is 'created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.'" *Id.* (citation omitted). Finally, "[n]on-public forums are places 'which, by tradition or design, are not appropriate platforms for unrestrained communication' such as 'military installations and federal workplaces.'" *Id.* (citation omitted).

To determine whether a location has, by designation, been transformed into a public forum, courts look "to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). For example, Wisconsin's state statute "providing for open school board meetings" created a public "forum for citizen involvement" at such meetings. *See id.* at 803 (citing *Madison Joint School District v. Wisconsin*

Employment Relations Comm'n, 429 U.S. 167, 174, n.6 (1976)). The Court has also found that universities are public fora to their students, and that government property became public fora when the government opened that property to student groups or expressive activities. *See id.* at 802–03.

Courts apply heightened scrutiny to speech regulations involving a traditional public forum or a designated public forum. *See Decker*, 2014 WI 68, ¶ 43 (traditional public fora and designated public fora "are afforded the same constitutional protections"). Under this standard, the regulation (1) "must be content-neutral," (2) "must be 'narrowly tailored to serve a significant government interest,'" and (3) "must 'leave open ample alternatives for communication.'" *State v. Crute*, 2015 WI App 15, ¶ 26, 360 Wis. 2d 429, 860 N.W.2d 284 (citation omitted). "A time, place, and manner regulation of expressive activity is considered narrowly tailored so long as it 'promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* ¶ 30 (citation omitted). Nevertheless, "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* (citation omitted). And an "alternative channel of communication" must be "more than 'merely theoretically available,'" but "must be realistic as well." *Horina v. City of Granite City, Ill.*, 538 F.3d 624, 635–36 (7th Cir. 2008) (citation omitted). Courts have thus "shown special solicitude for forms of expression that involve less cost and more autonomy for the speaker than the potentially feasible alternatives." *Id.* (citation omitted). It is the government's burden to prove, with evidence, that a restriction is narrowly tailored. *Id.* at 633–34.

For a non-public forum (or a limited public forum), the government may not restrict speech on the basis of viewpoint, and "the restriction must be 'reasonable in light of the purpose served by the forum.'" *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108 (2001) (citation omitted). The restriction "need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. And "[t]he reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Id.* at 809.

Here, City Hall, including its publicly accessible hallways, is at least a designated public forum. The building is open to the public and the public may express its views there. Theisen Aff. ¶¶ 4, 6, 9. City Hall is thus much like the state capitol building, which has been described as a "public forum." *Crute*, 2015 WI App 15, ¶ 26. City Hall can and has been used for political assemblies and discourse. *See* Theisen Aff. ¶ 9. And the building is open to the public so that citizens can have access to government services and officials to petition their government. *See* Theisen Aff. ¶ 4. Voting activities also take place at City Hall. *See* Doe Aff. ¶¶ 3, 6. These political activities are especially likely to take place at or near the locations where the recording devices have been installed—outside the City Council chambers, the Mayor's office, and the City Clerk's office. *See* Compl. ¶¶ 19–21. The government has therefore opened City Hall as a "forum for citizen involvement," and City Hall is a designated public forum. *Cornelius*, 473 U.S. at 803.

The Audio Surveillance Program fails strict scrutiny because it is not narrowly tailored to serve a significant government interest and it does not leave open ample alternatives for communication.[15] First, the ostensible purpose of the Program is security. Even assuming that this is a significant government interest, the Program is not narrowly tailored because it records any and all speech within its range, regardless of whether the recording in any way advances security. Therefore, "a substantial portion of the burden on speech does not serve to advance [the Program's] goals." *Crute*, 2015 WI App 15, ¶ 30. More, the Program does not leave open ample alternatives for communication. City Hall is the place where the public goes to access government officials in person, and to petition their government for redress. There is no alternative location to petition the City. And it is simply not feasible to take these conversations away from the prying ears of the surveillance devices, as these conversations often happen between meetings. *See* Theisen Aff. ¶ 6.

Even if the hallways of City Hall were a nonpublic forum, the Program would still fail constitutional scrutiny because it is not reasonable in light of the purpose of the forum. The purpose of City Hall is to serve as the seat of government and to allow the public to access government officials. The Program deters the very activity that City Hall is meant to facilitate—namely, speaking with public officials—and is therefore unreasonable. *See Ellsberg*, 709 F.3d at 68 n.71.

[15] The Audio Surveillance Program may be content-neutral, in that it records all audio within its range.

D. The Audio Surveillance Program Violates Wisconsin Statute Section 995.50

The Wisconsin Legislature has codified a statutory right to privacy and provides a right of action against anyone who "[i]ntru[des] upon the privacy of [a plaintiff] of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or, or in a manner that is actionable for trespass." Wis. Stat. § 995.50(2)(am)1. "Place" as used in the statute is of "geographical" significance. *Hillman v. Columbia Cnty.*, 164 Wis. 2d 376, 392, 474 N.W.2d 913 (Ct. App. 1991) ("place" in § 995.50 means "an indefinite region or expanse," "a particular region," or a "specific locality."). Unlike WESCL, Plaintiffs do not have to prove Defendant had "a particular mental state or intent"; all that is required is a showing that "a reasonable person would find the intrusion highly offensive." *Gillund v. Meridian Mut. Ins. Co.*, 2010 WI App 4, ¶ 29, 323 Wis. 2d 1, 778 N.W.2d 662.

This privacy right "shall be interpreted in accordance with the developing common law of privacy." Wis. Stat. § 995.50(3). For quite some time, the common law has recognized that people have a privacy interest in what they *say* outside of their own private abodes. *See, e.g., Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir. 1969) (citing *Katz*, 389 U.S. at 351, in noting that privacy rights "protect people, not places" and extending "tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in a plaintiff's position could reasonably expect that the particular defendant should be excluded.")

see also Nader v. Gen. Motors Corp., 255 N.E.2d 765, 771 (N.Y. 1970) ("[a] person does not automatically make public everything he does merely by being in a public place").

For example, in *Fischer v. Mt. Olive Lutheran Church*, the court rejected defendants' argument that plaintiff's calls, made from his employer's office, was not a "place" as protected by Wis. Stat. § 995.50(2)(am)1. 207 F. Supp. 2d 914, 927 (W.D. Wis. 2002) (denying defendants' motion for summary judgment and recognizing validity of plaintiff's argument that "place" is the location where the allegedly snooped on telephone call was made, not the telephone call itself).

Here, Plaintiffs were in a place where it would be reasonable to expect privacy from "uninvited ears": away from others in a hallway, speaking in low voices. And Defendants' snooping is highly offensive since this "intrusion upon the [P]laintiff[s'] . . . seclusion . . . relate[s] to 'something secret, secluded or private pertaining to the plaintiff.'" *Fischer v. Hooper*, 732 A.2d 396, 400–01 (N.H. 1999) (citation omitted) (affirming denial of motion for directed verdict where defendant recorded plaintiff's sensitive conversations and noting that "the jury could reasonably have concluded that the plaintiff did not expect her actual words and voice to be captured on tape" while being unconcerned about *where* the intercepted plaintiff was speaking from).

An uninvited ear being privy to sensitive conversations that are conducted in a manner commensurate with the conversations' private content undoubtedly is "highly offensive to a reasonable person, in a place that a reasonable person would

consider private." Wis. Stat. § 995.50(2)(am)1. Defendants have thus violated Plaintiffs' statutory right to privacy.[16]

II. The Audio Surveillance Program Causes Plaintiffs Irreparable Harm

Mayor Genrich is recording private conversations in violation of federal and state law. The City is then making those private conversations, some of which involve sensitive or even privileged matters, a matter of public record and distributing audio and video feeds of the private conversations to any member of the public who asks for them. Compl. ¶¶ 25–26. It is imperative that this Court issue a temporary injunction immediately ordering that the surveillance cease and the recordings be destroyed, since every day that goes by during the pendency of this case is another day that Plaintiffs risk having their attorney/client communications recorded and disclosed, sensitive medical matters captured and revealed, and otherwise private conversations about sensitive political matters unlawfully transformed into a matter of public record.

An injury is irreparable when "it cannot be compensated for in damages." *Uren v. Walsh*, 57 Wis. 98, 14 N.W. 902, 903 (1883); *see also Pure Milk Prod. Co-op. v. Nat'l Farmers Org.,* 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). It is well-established that the victim of a constitutional violation, such as a deprivation of privacy under the Fourth Amendment, suffers "irreparable injury." *Leaders of Beautiful Struggle v.*

[16] Neither Mayor Genrich nor the City is afforded tort immunity under Wis. Stat. § 893.80(1d), since the decision to intentionally intercept oral communications is prohibited by WESCL and thus beyond the scope of their official duties and power. *See Hillman*, 164 Wis. 2d at 398.

Baltimore Police Dep't, 2 F.4th 330, 346 (4th Cir. 2021) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); 11 A C. Wright & A. Miller, Fed. Prac. & Proc. § 2948.1 (3d ed. 2021) ("When an alleged deprivation of a constitutional right is involved . . . , most courts hold that no further showing of irreparable injury is necessary."). Thus, "given the fundamental right involved, namely, the right to be free from unreasonable searches," Plaintiffs have "sufficiently demonstrated for preliminary injunction purposes that [they] may suffer irreparable harm arising from a possible deprivation of [their] constitutional rights." *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992).

Broadcasting privileged communications, including those between Jane Doe and her clients, also clearly inflicts irreparable harm. *See Squealer Feeds v. Pickering*, 530 N.W.2d 678, 682 (Iowa 1995) (collecting cases in which "courts have concluded that the production of privileged" materials "result[s] in irreparable injury"), *abrogated on other grounds in Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38 (Iowa 2004). As one court succinctly summarized, "the general [irreparable] injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged" information "is clear enough." *United States v. Philip Morris, Inc.*, 314 F.3d 612, 622 (D.C. Cir. 2003) (concluding further that no "specific irreparable injury" need be identified), *abrogated on other grounds in Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).

Moreover, if this Court does not immediately intervene to destroy these unlawful recordings, the potential disclosure of confidential and privileged information would inevitably inflict irreparable harm on other members of the public

similarly situated to Plaintiffs—and thus members of the proposed class. Indeed, if such material is disclosed, "the very right sought to be protected [here] has been destroyed." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1065 (D.C. Cir. 1998) (*per curiam*) (recognizing that disclosure of confidential and privileged material inflicts irreparable injury). Put differently, once "the cat is out of the bag," any further remedy "is obviously not adequate." *Id.* (collecting cases in which courts "have concluded that such harm renders appeal after final judgment [] inadequate"); *see also Providence J. Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) ("Once the [information] is surrendered . . . confidentiality will be lost for all time" and "[t]he status quo could never be restored"); *Metro. Life Ins. Co. v. Usery*, 426 F. Supp. 150, 172 (D.D.C. 1976) ("Once disclosed, such information would lose its confidentiality forever," and the "injuries would indeed be irreparable.").

For similar reasons, Plaintiffs' damages, though substantial, are also difficult to quantify in monetary terms. Courts ordinarily find irreparable harm when there is "difficult[y] ascertain[ing] the specific amount" of harm. *Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills*, 589 F.3d 865, 872–73 (7th Cir. 2009). And although WESCL provides a cause of action for damage, "[i]nvasion of privacy, like injury to reputation, inflicts damage which is both difficult to quantify and impossible to compensate fully with money damages." *Williams v. Poulos*, 801 F. Supp. 867, 874 (D. Maine 1992). By way of example, disclosure of either a confidential discussion between management and labor concerning unions operations, or private health

information shared between a child and parent in the hallways of City Hall, could not be quantified and compensated in monetary terms.

A temporary, and ultimately, a permanent injunction is thus necessary to prevent Plaintiffs from suffering irreparable injury. For the same reasons, Plaintiffs have no adequate remedy at law (i.e. damages). Although some Plaintiffs may be entitled to some damages for certain violations, *see* Wis. Stat. § 968.30, those damages are inadequate to remedy the serious and ongoing violations of Plaintiffs' statutory and constitutional rights. A temporary injunction is therefore entirely appropriate.

III. The Other Factors Favor an Injunction

Courts issue temporary injunctions where necessary to restore the *lawful* status quo. "An unconstitutional act . . . is not a law. It confers no rights, imposes no penalty, affords no protection, is not operative, and, in legal contemplation, has no existence." *John F. Jelke Co. v. Hill*, 208 Wis. 650, 242 N.W. 576, 581 (1932). "[T]he granting of the temporary injunction [thus] preserve[s], rather than upset[s], the status quo" when a party lacks legal authority to perform the act enjoined. *Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964). An injunctive "order does no more than preserve the status quo" when it "does not hinder any *legitimate* activities of the defendants" and "[t]he only conduct which is enjoined is conduct forbidden by statute or the common law." *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 263, 219 N.W.2d 564 (1974) (emphasis added). Likewise, a court "act[s] well within its jurisdiction" to enjoin official acts "in

contravention of the Constitution." *John F. Jelke Co.*, 242 N.W. at 581 ("This is the power to preserve the status quo.").

Here, the Plaintiffs' "right to be secure against rude invasions of privacy by state officers is . . . constitutional in origin," and to permit the warrantless bugging of City Hall to continue, since it is the unlawful "status quo," would be to render the protections afforded Plaintiffs and everyone else at City Hall "an empty promise." *See Mapp v. Ohio*, 367 U.S. 643, 660 (1961). To restore the *lawful* status quo that existed before the Mayor's brazenly unconstitutional and unlawful acts, the court should order Defendants to cease their audio surveillance at City Hall immediately and to refrain from producing any audio recordings to the public.

The equities favor an immediate injunction. As established above, every second that the surveillance continues at City Hall, irreparable injury is visited on Plaintiffs and all citizens who wish to speak privately in City Hall. On the other hand, Defendants merely need to disable the hallway bugs and refrain from producing the illicit recordings to anyone. Such an order would in no way jeopardize the safety of City Hall. There are numerous video cameras throughout that are available for the Mayor and law enforcement to review when there is a disturbance.

CONCLUSION

Before noon on February 22, this Court should grant Plaintiffs' motion. This Court should order Defendants to immediately disable the audio recording devices, to refrain from accessing any recording gathered through the devices, and to refrain from disseminating any recording gathered through the devices.

Dated: February 21, 2023

Respectfully submitted,

Electronically Signed by Ryan J. Walsh
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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2023, I electronically filed the foregoing with Wisconsin circuit court eFiling system, which will send notification of such filing to any counsel of record.

I further certify that on the same date, I also served the foregoing by email on counsel for Defendants, City Attorney Joanne Bungert, at Joannebu@greenbaywi.gov, and by certified U.S. Mail, at 100 N. Jefferson Street, Room 200, Green Bay, WI 54301.

Dated: February 21, 2023

Electronically Signed by Ryan J. Walsh

Ryan J. Walsh