UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ROBERT W. MCKAY,
Plaintiff,

v.

WILLIAM L. FEDERSPIEL, in his official capacity as Sheriff of Saginaw County,

and

RANDY F. PFAU, in his individual capacity and official capacity as Lieutenant-Sheriff of Saginaw County,
Defendants
_____/

Case No.: 14-10252
Honorable Thomas L. Ludington

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION PURSUANT TO FED. R. CIV. P. 65

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"When government begins closing doors, it selectively controls information rightfully belonging to the people…

[T]he public's interests are best served by open proceedings."[1]

[1] *Detroit Free Press v Ashcroft*, 303 F3d 681, 683, 711 (6th Cir. 2002).

INTRODUCTION

This is a case involving the First, Fifth, and Fourteenth Amendments to the United States Constitution to be allowed, in a free and open society, to attend, observe, and *record* matters of public concern—i.e. the conduct of public proceedings at the Saginaw County Governmental Center as undertaken by governmental officials. Local Administrative Order C10-2013-08-J[2] impinges on these constitutional rights in a non-narrowly designed way. As this brief lays out, the right to observe and record public officials conduct public business is well-established under law. For these reasons, as more fully discussed herein, Plaintiff needs and seeks to preliminarily enjoin the legal effect of Local Administrative Order C10-2013-08-J pending resolution of this matter before this Court.

FACTS

Plaintiff Robert McKay is a resident of a Tuscola County and has been politically active in the elimination of administrative orders, issued by local judges, to conduct proceedings without the benefit of public recording. Verified Compl., ¶7. Before the issuance and implementation of Local Administrative Order C10-2013-08-J (hereinafter "Electronics Ban Order"), the Saginaw County Board of Commissioners debated whether to ordain a county ordinance banning the use of all electronic devices within the Saginaw County Governmental Center. Verified Compl., ¶8. The Saginaw County Governmental Center houses the legislative and executive offices of publicly-elected officials of Saginaw County, including the

[2] The Electronics Ban Order also has also been designated as Saginaw County Probate Court Order 2013-02-J and Saginaw County 70th District Court Order 2013-04-J. See Exhibit A.

County Board of Commissioners, County Treasurer, County Clerk, Register of Deeds, and other local elected officials' offices and their staffs.[3] Verified Compl., ¶9. Also within the Saginaw County Governmental Center are judicial offices of elected judicial officers (i.e. state court judges) and their staffs, along with the public courtrooms of Tenth Circuit Court of Saginaw County, the Seventieth (70th) District Court of Saginaw County, the Probate Court of Saginaw County, and the Saginaw County Friend of the Court. Verified Compl., ¶10. In other words, the Saginaw County Governmental Center is the central hub of local county government.

On August 7, 2013, the Courts and Public Safety Committee of the Saginaw County Board of Commissioners entertained a proposed ordinance that would ban all electronic devices from being brought into and/or used in the Saginaw County Governmental Center. Verified Compl., ¶12. Plaintiff appeared at the meeting and spoke against the proposed ordinance during the public comment period. Verified Compl., ¶13. He argued the unfairness for certain groups of people not to have to comply with the same rules as other citizens and asked the Committee to not approve and recommend the proposed ordinance. Verified Compl., ¶14. Also speaking at the Committee hearing was M. Randall Jurrens, Chief Judge of the 70th District Court and Patrick J. McGraw, Chief Judge of the Saginaw County Probate Court. Verified Compl., ¶15. Chief Judge McGraw said the chief judges

[3] The Saginaw County Sheriff's Office has a permanent physical presence in the Saginaw County Governmental Center but its command offices and jail are located in the building next store. Verified Compl., ¶11.

intended to put an administrative order in place themselves to ban electronic devices in the courts, regardless of whether commissioners decide to pass the proposed ordinance. Verified Compl., ¶16. After hearing these and other arguments regarding the proposed ordinance, the Committee postponed its decision on the issue for further review by legal counsel. Verified Compl., ¶17. The proposal was never subsequently brought back to the table for discussion or a vote. Verified Compl., ¶18.

On December 16, 2013, the chief judges issued and made effective the order being the subject of this lawsuit, the Electronics Ban Order. Verified Compl., ¶¶19-20. According a memo issued by the Chief Judges, this new Electronics Ban Order is designed to relieve three disclosed ills: photographing of witnesses/jurors, jurors conducting online research, and ring tones disrupting proceedings. Verified Compl., ¶4. All electronic devices, regardless of purpose, are banned, absent a "judge's permission." See Verified Compl., Exhibit A. Violations of the Electronics Ban Order is seemingly punishable by contempt of court, including automatic forfeiture of the device along with its private communications contained therein, a fine of not more than $7,500.00, and/or jail for 93 days, in the discretion of the court. MCL 600.1715(1). Plaintiff does not wish to be subject to contempt, confiscation of any electronic device (with or without private communications contained therein), fined not more than $7,500.00, and/or jail for 93 days for exercising his constitutional rights as more fully explained below. Plaintiff ROBERT MCKAY's purpose is not to

intimidate or harass witnesses or prevent the administration of justice or the conduct of trials. Verified Compl., ¶33.

To effectuate this order, Defendant RANDY F. PFAU, the sheriff official who has voluntarily assumed or been assigned the duty to provide security and control over the Saginaw County Governmental Center, has directed the front-desk/security screening deputies to turn away and prohibit citizens, including Plaintiff, from bringing electronic devices into the areas designated by the Electronics Ban Order and thus preventing Plaintiff being able to exercise his First Amendment rights. Verified Compl., Exhibit B. The written directive also has required all deputies under Defendant RANDY F. PFAU's command to enforce the Electronics Ban Order, including those stationed at the main entrance and within the various courtrooms at the Saginaw County Governmental Center. *Id.* Yet, Defendant RANDY F. PFAU's written command contains various exempted persons who are not otherwise listed or identified as exempt under the Electronics Ban Order. Compare Verified Compl., Exhibit A with Verified Compl., Exhibit B. On belief only, Defendant RANDY F. PFAU is also acting at the direction and will of Defendant WILLIAM L. FEDERSPIEL. Plaintiff is afraid that he will be subject to the crime of contempt and possibly have confiscated his electronic devices (with or without private communications contained therein), fined up to $7,500.00, and/or jail for 93 days for exercising his constitutional rights, absent intervention of this Court. Verified Compl., ¶28. However, since the Electronics Ban Order came into effect,

attorneys have been exempted from the ban (see Exhibit C) as has newspaper photographers and videographers without arrest or penalty.[4]

ARGUMENT

I. Standards of a Preliminary Injunction in a First Amendment Case

The standards for a preliminary injunction are well-established: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction. *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007). In First Amendment cases, however, "'the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because . . . the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the [state action].'" *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007). "[W]hen First Amendment rights are implicated, the factors for granting a preliminary injunction essentially collapse into a

[4] See e.g. Andy Hoag, *Jury seated in Michael Lawrence trial in 6-year-old Lay'la Jones death; openings set for Tuesday*, SAGINAW NEWS, Jan 10, 2013 *available at* http://www.mlive.com/news/saginaw/index.ssf/2014/01/jury_seated_in_michael_lawrenc.html (photo taken by Mlive.com photographer Jeff Schrier of accused and two deputies), screenshot attached as Exhibit D; see also Jessica Fleischman, *Saginaw man accused of shooting Michigan State Police trooper to face trial*, SAGINAW NEWS, Dec 21, 2013 *available at* http://www.mlive.com/news/saginaw/index.ssf/2013/12/trooper_shot_saginaw.html (photo taken by Mlive.com photographer Jeff Schrier of witness and Chief Judge Jurrens, one of the signers of the Electronics Ban Order), screenshot attached as Exhibit E. Saginaw County Circuit Court Judge Robert Kaczmarek seemingly allowed local news station ABC12 to video-record in his courtroom in relation of the sentencing of a confessed killer in a heavily followed court case. See Terry Camp, *Victim's son to killer: "You are sick."*, ABC12 *available at* http://www.abc12.com/story/24436546/victims-son-to-killer-you-are-sick (video being taken in Saginaw County courtroom with deputy in background).

determination of whether restrictions on First Amendment rights are justified to protect competing constitutional rights." *Cnty. Sec. Agency v. Ohio Dep't of Commerce*, 296 F.3d 477, 485 (6th Cir. 2002). This is because the irreparable injury prong is automatically fulfilled upon likelihood of success because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976)(plurality).

A. The First Amendment protects Plaintiff's right to observe and record matters of public interest and thus the Electronics Ban Order is not narrowly tailored to protect competing constitutional rights.

The First Amendment of the United States Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

"These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). As the Supreme Court has stated, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978); see also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is ... well established that the Constitution protects the right to receive information and ideas."). An important corollary to this interest in protecting the stock of public information is that "[t]here is an undoubted right to gather news

'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978).

While the First Amendment's plain text speaks only to "Congress," the US Supreme Court has extended its protections against state action via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925); *McCloud v. Testa*, 97 F.3d 1536, 1541 fn.7 (6th Cir 1996)(recounting the same). Action of the state judiciary and its judges is unquestionably state action. *Shelley v Kraemer*, 334 U.S. 1, 14 (1948)("That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."). Governmental action infringing a fundamental right receives strict scrutiny. *Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381, 393 (6th Cir. 2005). In the First Amendment context, strict scrutiny requires the government to show "it has a compelling interest and has used the least restrictive means of furthering that interest." *Rothamel v. Fluvanna County*, 810 F. Supp.2d 771, 783 (WD Virginia 2011)(citing *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989)).

In applying the First Amendment to the judicial context, the keystone case is *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In *Richmond*, the US Supreme Court plurality[5] recited a long history of "presumptively open" criminal

[5] Although there was no majority opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment. 448 U. S., at 558-581 (plurality opinion); id., at 584-598 (BRENNAN, J.,

trials under American jurisprudence, being "an indispensable attribute of an Anglo-American trial." *Richmond*, *supra* at 569. Such a right is explicitly enshrined for the protection of the accused via the Sixth Amendment. See U.S. Const. Am. XI. The right of the spectator is enshrined in the First Amendment. Observers of trials have a First Amendment right to observe the same. The reasons for such openness included the "proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Id.*, at 569 (citing M. Hale, The History of the Common Law of England 343-345 (6th ed. 1820); 3 W. Blackstone, Commentaries *372-*373.). "What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Richmond*, *supra* at 576. Mostly critically, "a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place." *Richmond*, *supra* at 578 (emphasis added). "[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important

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concurring in judgment); *id.,* at 598-601 (Stewart, J., concurring in judgment); *id.,* at 601-604 (BLACKMUN, J., concurring in judgment).

aspects of freedom of speech and 'of the press could be eviscerated.'"[6] After all, "the right to an open public trial is a shared right of the accused and the public." *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 US 1, 7 (1986) (hereinafter "*Press-Enterprise II*").

Having determined that a constitutional right of access and observation exists, the question turn whether the right to record public court proceedings, by a citizen via photograph, video, or other electronic means, is protected by the First Amendment. A recorded interaction at public gatherings for public business establishes a shared basis of knowledge for public discussion and critique. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 345 (2011)(attached to Complaint as Exhibit F). "As digital technology proliferates in camera phones, iPhones, and PDAs, almost any image we observe can be costlessly recorded, freely reproduced, and instantly transmitted…." *Id.* at 337. "We live, relate, work, and decide in a world where image capture from life is routine, and captured images are part of ongoing discourse, both public and private." *Id.* In light of this change to modern life, a line of cases and the US Department of Justice unequivocally finds such a right to record for the citizenry enshrined in the First Amendment. With *Richmond*'s tradition that a "trial courtroom also is a public place," the Eleventh Circuit has broadly held—

[6] In Footnote 14, the Supreme Court limited its *Richmond* holding to criminal trial trials. Since this decision, the constitutional right to observe a public civil trial was also found. *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (1984).

> The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.

Smith v. Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000). This holding mirrors the similar holdings by the Ninth Circuit in *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest"), the First Circuit's *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)("recognition that the First Amendment protects the filming of government officials in public spaces…"), and the Seventh Circuit's *American Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 586-587 (7th Cir 2012)(striking down a statute applied to prevent recording of a public official as restricting far more speech than necessary to protect legitimate privacy interests and "likely violates" the First Amendment's free-speech and free-press guarantees).[7] The reason for this is clear: "extensive public scrutiny and criticism" of criminal justice system officials serves to "guard[] against the miscarriage of justice." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560 (1976). Importantly, this First Amendment right to record is premised on the ideal that to "[g]ather[] information about government officials in a form *that can readily be disseminated to others* serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik*, 655 F.3d at 82 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The First Amendment enshrines this right to record as a medium of expression commonly used for the preservation and communication of information

[7] The Sixth Circuit has seemingly never spoken on the issue.

and ideas, where police officers are performing their duties in public places and engaging in public communications audible to persons who witness the events. *Alvarez, supra* at 586. "The explicit, guaranteed rights to speak and *to publish* concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Richmond, supra*. "History had proven that secret tribunals were effective instruments of oppression." *Estes v. Texas*, 381 U.S. 532, 539 (1965). "Our national experience instructs us that except in rare circumstances openness preserves, indeed, is essential to, the realization of that right and to public confidence in the administration of justice." *ABC, Inc. v. Stewart*, 360 F.3d 90, 104-105 (2nd Cir 2004). The right to reasonably record in a non-disruptive manner is firmly established.

Plaintiff seeks to exercise a right to record trial activities, the police officers inside and outside the courtroom in the performance of their official duties, the judge in the performance of his or her duties, and other activities of public interest occurring inside and outside the Saginaw County courtrooms at the Saginaw County Governmental Center. His purpose is not to intimidate or harass witnesses or prevent the administration of justice or the conduct of trials. As such, the Electronics Ban Order over-broadly prohibits this protected activity by banning all electronic devices and must be reviewed under First Amendment strict scrutiny because the opportunity to record is fully banned, and is not merely limited to time, place, and manner restrictions. According to the memo to the members of Saginaw County Bar Association from the signing chief judges (see Verified Compl., Exhibit

C), this new local administrative order is designed to relieve three ills: photographing witnesses, jurors conducting online research, and ring tones disrupting proceedings. See Verified Compl., Exhibit C. For state action to survive constitutional muster under the First Amendment, the action is reviewed using strict scrutiny—be "narrowly tailored" to advance a "compelling state interest." *Carey v Wolnitzek*, 614 F.3d 189, 200 (6th Cir 2010)(citing *Eu v San Francisco County Democratic Cent Comm*, 489 US 214 (1989)). Narrow tailoring requires "the least restrictive means of further that compelling interest." *Rothamel, supra*. Assuming (but not conceding) for the sake of argument for this motion that eradicating each ill is a compelling governmental interest, the Electronics Ban Order is not narrowly tailored. The Electronics Ban Order curbs too much protected activity to be narrowly tailored to further the proposed governmental interests in preventing photographing witnesses (with the intent to intimidate or disrupt the proceedings), preventing jurors conducting online research, and preventing ring tones disrupting proceedings.

While photographing witnesses is not a crime or a wrong under state law (for if it was, an immeasurably large group of news photographers and videographers would have to be jailed, see Verified Compl., Exhibits D and E), doing so with the intent to intimidate is already criminalized which can already be prosecuted under state law. See MCL 750.122. Moreover, Saginaw County courts, consistent with *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 US 501, 510 (1984)(hereinafter "*Press-Enterprise I*"), already have the tool needed—

court/proceeding closure. If there is concern of a threat of actual intimidation, a Saginaw County judge can close the proceedings to the public upon specific on-the-record findings demonstrating that closure is essential to preserve higher values than the First Amendment right of openness and is narrowly tailored to serve that interest." *Press-Enterprise I, supra* at 510.

As for jurors from using their electronic devices to conduct research, a more narrowly tailored rule of only prohibiting electronic device use *by jurors* is a more narrowly tailored approach to cure the ill of 'techies' using their devices while impaneled as jurors.

Finally, the ill of spectators' cell-phones ringing during proceedings may be remedied without an overly broad set of rules which fully impedes recognized First Amendment rights. A more narrowly drafted rule of requiring *silenced* ring-tones and/or electronic sound settings serves as a more narrow way to solve the ill of cell-phones ringing,[8] while still permitting the use of First Amendment protected recording under *Smith*, *Alvarez, Fordyce,* and *Glik.*

Moreover, banning the use of electronics in the hallways and other ill-defined "common areas" of the Saginaw County Governmental Center is also not narrowly

[8] Most cell phones are more than just telecommunication devices—they also contain (and have contained) compact, easy to use, and inexpensive photographing and video recording features. See generally *Pervasive Image, supra* at 339-341; see also *For Everyday Photography, Cell Phones Are Growing as Camera of Choice*, REUTERS (PRESS RELEASE), July 8, 2008 *available at* http://www.reuters.com/article/2008/07/08/idUS137025+08-Jul-2008+BW20080708 (more than five ago, "96.3% of adult cell phone owners report that they have a cell phone with a camera."). Plaintiff's counsel would be willing, if requested, to bring his iPhone to court to show how easy (and quietly) a photograph and/or a video recording can be made using a cell phone. As accurately noted, [t]he increasingly broad availability of costless image capture and storage enables every owner of a cell phone or PDA to practice the craft of the photographer or the filmmaker. *Pervasive Image*, *supra* at 343. Moreover, these devices can easily be put into silent-mode while still operating other functions contained on the device, like photography or video-recording.

tailored to effectuate the ills sought to be cured—all ills complained of are occurring *inside* the courtroom, not in the hallway or common areas of the public courthouse.[9] Lack of narrow tailoring requires the Electronics Ban Order to fall.

Lastly, it is worth noting the Electronics Ban Order is essentially a legal device to partially close the Saginaw County courtrooms to First Amendment activity, and as such *Press-Enterprise II* instructs there must be specific findings on the record so that a reviewing court can determine whether closure was proper and whether less restrictive alternatives exist. *Detroit Free Press v. Ashcroft*, 303 F. 3d 681, 707 (6th Cir. 2002); see also *Press-Enterprises II*, *supra* at 10 ("[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."). Failure to include specific finding results in failure to establish 'narrow tailoring.' *Detroit Free Press, supra* at 710.

Because the Electronics Ban Order is not narrowly tailored (both substantively and procedurally under *Press-Enterprises II*) to address ills that are presumed (but not conceded) as compelling governmental interests, the Electronics Ban Order is likely unconstitutional and must be enjoined from enforcement pending the outcome of this case. An alternative local administrative order can be and should be more narrowly tailored to protect intimated witnesses who are publicly testifying, to prohibit jurors from using their electronic devices and to

[9] Even if this Court were to find that the First Amendment protections found in *Glik*, *Smith*, *Alvarez* and *Fordyce* do not apply *inside* the courtroom, the Electronics Ban Order affects Plaintiff's ability to record sheriff deputies and other public officials *outside* the courtrooms within the Saginaw County Governmental Center—i.e. the common areas.

prevent spectators' cell-phones from ringing without complete prohibitions on recognized and protected First Amendment rights of recording.[10]

Given this long, studied, and established jurisprudence, a First Amendment right of access to observe and to record matters of public interest both inside and outside the courtrooms of the Saginaw County Governmental Center fully and comfortably exists in favor of the citizenry under federal precedence, and the Electronics Ban Order fails survive strict scrutiny. Likelihood of success on the merits is established.

B. Plaintiff is suffering irreparable injury absent the injunction.

Because this is a First Amendment case, irreparable injury is presumed when a "likely" First Amendment violation is found, being "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality); see also

[10] It also bears noting that several non-Supreme Court and non-Sixth Circuit cases from several decades ago exist finding a First Amendment right did not protect a *reporter's* machinery presence in the courtroom. These cases are now implicitly overruled or are distinguishable. Cases like *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111 (2nd Cir. 1984), *Combined Communications Corp. v. Finesilver*, 672 F.2d 818 (10th Cir.1982), *Mazzetti v. United States*, 518 F.2d 781 (10th Cir. 1975) and *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967); *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958) all involve the right of a *reporter* to record and broadcast. An argument could be made that the federal circuit courts' 'discovery' of a right to record public officials performing public duties in *Glik*, *Smith*, *Alvarez* and *Fordyce* should be made equally applicable to the press due to the long-standing rule of whatever constitutional access rights the public has, the press has the same—no more, no less. See *Branzburg v. Hayes*, 408 US 665 (1972)("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."); see also *Radio & Television News Ass'n v. United States Dist. Court of the Cent. Dist.*, 781 F.2d 1443, 1447 (9th Cir. 1986)("As with the public, the press has no greater privilege than the right to attend the trial."). However, the Plaintiff before the Court today is not a reporter—he is a general citizen. Perhaps an enterprising media attorney could make that argument to another court on another day. The Second Circuit in *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111 (2nd Cir. 1984) held that "*[i]f* the right to attend carries with it the right to record, this right should not be denied any courtroom spectator." *Yonkers*, *supra* at 113. And at that time, the right to record public officials in the discharge of their public duties was not then established. Today, it is. See *Glik*, *Smith*, *Alvarez*, and *Fordyce.*

Newsom v. Norris, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief…." "Violations of first amendment rights constitute per se irreparable injury…").

C. The injunction will not cause substantial harm to others.

No harm will be suffered by others by issuance of a preliminary injunction. If, however, the Saginaw County courts have a particular case in which a real threat to the fair administration of justice requires the suspension of recording, the Saginaw County courts have the legal tool—i.e. the authority—to close the proceedings to the public upon specific on-the-record findings demonstrating that closure is essential to preserve higher values that the First Amendment right of openness which is concurrently narrowly tailored to serve that interest under *Press-Enterprise I*.

D. The public interest would be served by the issuance of an injunction.

The citizenry is always served when unconstitutional state actions are minimized or neutralized. *Planned Parenthood Association v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987). Moreover, the Sixth Circuit has eloquently explained that "the public's interests are best served by open proceedings" as "[a] true democracy is one that operates on faith — faith that government officials are forthcoming and honest, and faith that informed citizens will arrive at logical conclusions." *Detroit Free Press, supra* at 711. Openness serves everyone better, it assures a proper functioning of a trial; assures the proceedings were conducted fairly to all concerned; discourages perjury, the misconduct of participants, and

decisions based on secret bias or partiality. *Richmond, supra* at 569. As Justice Black specifically noted just after the Second World War—

> distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. . . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.

E. Security is not required.

Federal Rule of Civil Procedure 65(c) states that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party found to have been wrongfully enjoined or restrained." FED. R. CIV. P. 65(c). Although the plain language of the rule suggests that a bond is mandatory, the Sixth Circuit has observed that security is not mandatory under Rule 65(c), and can be dispensed with in the discretion of the court. See *Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995). Because Defendants will suffer no harm, economic or otherwise, no security should be required. If security is required, however, the Court is requested to require a mere nominal amount—$1.00—as guarding constitutional rights should not be contingent upon an applicant's ability to pay the bond. See *Sak v. City of Aurelia, Iowa*, 832 F.Supp.2d 1026, 1048 (ND Iowa 2011).

RELIEF REQUESTED

Based on the above discussion, Plaintiff ROBERT McKAY, through counsel, moves for entry of a preliminary injunction without posting security pursuant to

FED. R. CIV. P. 65 to halt any enforcement by Defendants, along with all those active concert and all those under their command (including but not limited to those deputies stationed as bailiffs inside each courtroom and those deputies at the front-desk of the Saginaw County Governmental Center), regarding the likely unconstitutional Electronics Ban Order imposed on Plaintiff and those who enter the Saginaw County Governmental Center pending the outcome of this matter.

Date: January 20, 2014

RESPECTFULLY SUBMITTED:

/s/ Philip L. Ellison

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