

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

ROBERT W. MCKAY,
Plaintiff,

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

v.

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

**VERIFIED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

and

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

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VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NOW COMES Plaintiff ROBERT McKAY, by and through counsel, and as his verified complaint for declaratory and injunctive relief, complains as follows:

INTRODUCTION

1. 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 legal proceedings at the Saginaw County Governmental Center as undertaken by governmental officials.

PARTIES

2. Plaintiff ROBERT MCKAY is a resident of the State of Michigan.

3. Defendant WILLIAM L. FEDERSPIEL is a resident of the State of Michigan and is sued in his individual capacity and official capacity as Sheriff of Saginaw County.

4. Defendant RANDY F. PFAU is, on information and belief, a resident of the State of Michigan and is sued in his individual capacity and official capacity as Lieutenant-Sheriff of Saginaw County.

JURISDICTION

5. This Honorable Court has original jurisdiction pursuant to 28 U.S.C. § 1331 and § 1343 as this case involves federal questions and federal civil rights under 42 U.S.C. § 1983.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

GENERAL ALLEGATIONS

7. Plaintiff ROBERT MCKAY is a resident of a Tuscola County and has been actively involved in the elimination of administrative orders, issued by local judges, to conduct proceedings without the benefit of public recording in both Saginaw and Tuscola Counties.

8. In August 2013, the Saginaw County Board of Commissioners undertook debate from a request from the chief judges of the various Saginaw County courts on whether to ordain a county ordinance banning the use of all electronic devices within the Saginaw County Governmental Center.

9. The Saginaw County Governmental Center houses the legislative and executive offices of Saginaw County, including the Saginaw County Board of Commissioners, County Treasurer, County Clerk, Register of Deeds, and other local elected officials' offices and their staffs.

10. Also within the Saginaw County Governmental Center are judicial offices and staff, along with the public courtrooms of Tenth (10th) 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.

11. On information and belief, the Saginaw County Sheriff's Office has a permanent physical presence in the Saginaw County Governmental Center but has its command offices and jail located at a county building adjacent.

12. On August 7, 2013, the Courts and Public Safety Committee of the Saginaw County Board of Commissioners entertained a proposed ordinance banning all electronic devices from being brought into the Saginaw County Governmental Center, with certain exceptions to certain individuals.

13. Plaintiff ROBERT MCKAY appeared at the meeting and spoke against the proposed ordinance during the public comment period.

14. Plaintiff ROBERT MCKAY argued regarding the unfairness for certain groups of people to not have to comply with the same rules as other citizens and asked the Committee to not approve the proposed ordinance.

15. Also testifying at the Committee hearing was the Chief Judge of the 70th District Court and the Chief Judge of the Saginaw County Probate Court.

16. Chief Probate Judge Patrick J. McGraw said at the Committee hearing that the judges intend to put an administrative order in place banning electronic devices in the courts themselves, regardless of whether the commissioners decide to pass the proposed ordinance.

17. After hearing these and other arguments regarding the proposed ordinance and to seek legal guidance, the Committee postponed its decision on the issue.

18. The proposed ordinance was never brought back to the table further consideration.

19. On December 16, 2013, the Chief Judges of the Saginaw County Courts issued and made effective the order being the subject of this lawsuit, Local Administrative Order C10-2013-08-J¹ (hereinafter “the Electronics Ban Order”).

20. A fair and accurate copy of the Electronics Ban Order is attached as Exhibit A.

21. The Electronics Ban Order was signed and approved by the chief judges of the various Saginaw County courts.

22. The Electronics Ban Order was, and is, an order issued not connected to any particular litigation and/or any particular case before any judge or chief judge.

23. There is no appeal by right or by leave to a higher appellate court for Plaintiff regarding the Electronics Ban Order.

¹ 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.

24. According to a statement issued by the Chief Judges, this new Electronic Ban Order is designed to relieve three disclosed ills: photographing of witnesses/jurors, jurors conducting online research, and ring tones disrupting proceedings. See Exhibit C.

25. Unless a person obtains an exception based upon “a judge’s permission” (though not clear whether it means any judge or one of the chief judges), mere possession of any/all electronic devices is contempt of court and thus is banned.

26. The plain language and/or effect of Electronics Ban Order prohibits Plaintiff and all others from taking photographs and/or video recordings of public officials in the performance of their public duties at the Saginaw County Governmental Center.

27. Violations of the Electronics Ban Order is 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 sole discretion of the court.

28. Plaintiff, by this lawsuit, 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.

29. Defendant WILLIAM L. FEDERSPIEL has authority to issue orders and directives and/or caused orders and directives by his command staff to be issued to the deputies stationed at the main-entrance of the Saginaw County Governmental Center and to the deputies assigned in each judicial courtroom.

30. To effectuate and enforce the Electronics Ban Order, Defendant RANDY F. PFAU has voluntarily agreed to enforce said order and commanded by written directive that the front-desk/security screening sheriff deputies under his control are to turn away and prohibit citizens, including Plaintiff, from bringing, having, and/or possessing electronic devices into the areas designated as prohibited by the Electronics Ban Order.

31. To effectuate and enforce the Electronics Ban Order, Defendant RANDY F. PFAU has voluntarily agreed to enforce said order and commanded by written directive that other subordinate deputies within the Saginaw County Governmental Center, including those stationed in courtrooms, to enforce the Electronics Ban Order.

32. A fair and accurate copy of the written command/directive is attached as Exhibit B.

33. Defendant WILLIAM L. FEDERSPIEL has implicitly authorized, approved, or knowingly acquiesced in the conduct of subordinate Defendant RANDY F. PFAU's issuance of the written directive to enforce the Electronics Ban Order.

34. Plaintiff ROBERT MCKAY seeks to exercise a right to record trial activities, the police and sheriff deputies 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 at the Saginaw County Governmental Center.

35. Plaintiff ROBERT MCKAY's purpose is not to intimidate or harass witnesses or prevent the administration of justice or the conduct of trials.

COUNT I
42 U.S.C. § 1983
FIRST AMENDMENT VIOLATION
RIGHT TO RECORD PUBLIC OFFICIALS/ITEMS OF PUBLIC INTEREST
IN NON-COURTROOM AREAS

36. Plaintiff incorporates by reference all prior allegations of this Complaint into this Count.

37. Defendants, by their acts and acting under the color of Michigan law, violated and/or will violate Plaintiff's First and Fourteenth Amendments rights by taking action to impinge upon Plaintiff's right to observe and record matters of public concern by public officials in a public place outside the courtrooms within the Saginaw County Governmental Center by the Electronics Ban Order without a compelling government interest that is narrowly tailored.

38. As applied to areas outside the courtrooms in the Saginaw County Governmental Center, the Electronics Ban Order is not a narrowly tailored means, the least restrictive alternative, a necessary means, or a directly and palpably connected means to further any sufficient, substantial or compelling governmental interest.

39. Said acts and actions under the color of Michigan law includes the written command/directive by Defendant RANDY F. PFAU to all deputies to enforce the unconstitutional Electronics Ban Order in effect at the Saginaw County Governmental Center.

40. As a result of the written command/directive issued by Defendant RANDY F. PFAU, Defendant RANDY F. PFAU is enforcing and/or threatening to enforce an unconstitutional state law, in the form of an administrative order, upon Plaintiff in violation of his First Amendment rights.

COUNT II
42 U.S.C. § 1983
FIFTH AMENDMENT VIOLATION
CONSTITUTIONAL VAGUENESS

41. Plaintiff incorporates by reference all prior allegations of this Complaint into this Count.

42. Under the Due Process Clause of the Fifth Amendment, state law is unconstitutionally vague if it fails to give fair notice of the conduct that is forbidden or required by either (a) failing to inform the regulated parties what is required of them so that they may act accordingly; or (b) failing to provide enough precision and guidance to limit the discretion of those enforcing the law in order to avoid arbitrary or discriminatory law enforcement.

43. The Electronics Ban Order prohibits all electronic devices in “court related facilities.”

44. “Court related facilities” is defined within the Electronics Ban Order as including the various Saginaw County Courtrooms, certain judicial offices, and “related common areas.”

45. Related common areas is unconstitutionally vague by failing to inform Plaintiff and the public what constitutes “related common areas” within the Saginaw County Governmental Center so that they may act accordingly.

46. Related common areas is unconstitutionally vague by failing to provide enough precision and guidance as to what constitutes “related common areas” to limit the discretion of those enforcing the law, including Defendants, in order to avoid arbitrary or discriminatory enforcement other areas of the Saginaw County Governmental Center is presumably not controlled by the Electronics Ban Order (i.e. county legislative and executive branch offices)

47. The ability for the chief judges to regulate non-court related areas like the front entry, hallways, meeting rooms, non-court related departments and facilities is questionable given the court’s authority under separation of powers to control non-court related areas.

COUNT III
42 U.S.C. § 1983
FIRST AMENDMENT VIOLATION
RIGHT TO RECORD PUBLIC OFFICIALS/ITEMS OF PUBLIC INTEREST
IN COURTROOM AREAS

48. Plaintiff incorporates by reference all prior allegations of this Complaint into this Count.

49. Defendants, by their acts and acting under the color of Michigan law, violated and/or will violate Plaintiff's First and Fourteenth Amendments rights by taking action to impinge upon Plaintiff's right to observe and record matters of public concern by public officials in a public place inside the Saginaw County Governmental Center courtrooms via the Electronics Ban Order without a compelling government interest that is narrowly tailored.

50. As applied to areas inside the courtrooms in the Saginaw County Governmental Center, the Electronics Ban Order is not a narrowly tailored means, the least restrictive alternative, a necessary means, or a directly and palpably connected means to further any sufficient, substantial or compelling governmental interest.

51. Said acts and actions under the color of Michigan law includes the written command/directive by Defendant RANDY F. PFAU to enforce the unconstitutional Electronics Ban Order in effect at the Saginaw County Governmental Center.

52. As a result of the written command/directive issued by Defendant RANDY F. PFAU, Defendant RANDY F. PFAU is enforcing and/or threatening to enforce an unconstitutional state law upon Plaintiff in violation of his First Amendment rights.

COUNT IV
42 U.S.C. § 1983
FIRST AMENDMENT VIOLATION – OVERBROAD

53. Plaintiff incorporates by reference all prior allegations of this Complaint into this Count.

54. Defendants, by their acts and acting under the color of Michigan law, violated Plaintiff's First and Fourteenth Amendments rights by creating and imposing a direct restriction via the Electronics Ban Order on protected First Amendment activity, namely, the recording of public officials in the performance of their public duties in public areas outside the physical courtroom.

55. The prohibitions created and imposed by the Electronics Ban Order involve ills occurring *inside* the courtroom only, namely photographing witnesses with the intent to intimidate, jurors conducting online research, and ring tones disrupting on-going proceedings, and thus are too imprecise as creating an unnecessary risk of impingement on protected activity *outside* the courtroom.

56. The Electronics Ban Order is constitutionally overbroad.

COUNT V
42 U.S.C. § 1983
FIRST AMENDMENT VIOLATION
PRIOR RESTRAINT/STANDARDLESS DISCRETION

57. Plaintiff incorporates by reference all prior allegations of this Complaint into this Count.

58. The Constitution abhors the misuse of discretion as a license for arbitrary procedure.

59. Under the Electronics Ban Order, all electronic devices are banned unless and until a judge grants permission.

60. The Electronics Ban Order fails to provide any standards, guidelines, or directions on when and how permission should or could be granted.

61. As a result of the Electronics Ban Order not containing standards of when and how judges in Saginaw County are to grant permission, the Electronics Ban Order's standardless discretion constitutes an unconstitutional prior restraint on First Amendment protections.

62. Already the chief judges have exempted attorneys from the ban without explaining why or on what basis, creating various classes of persons who may or may not exercise constitutionally protected activity. See Exhibit C.

63. Judges are also routinely granting members of the news media, including newspaper photographers, implicit permission to use electronic devices in the courtrooms covering public trials and hearings. See Exhibits D and E.

64. The Electronics Ban Order fails to put Plaintiff and the public on notice of what is required to be entitled to obtain permission and fails to provide any process or procedure for protection of the public's constitutional right to record under the First Amendment.

65. Where an official enjoys unduly broad discretion in determining whether to grant permission, there is a risk that he will favor or disfavor speech based on its content or its speaker identity.

66. The Electronics Ban Order fails to have adequate standards to guide a judge's decision and to render it subject to effective further judicial review.

67. The underlying concern is that placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

68. The Electronic Ban Order's standardless discretion chills protected First Amendment protected activities.

69. The Electronics Ban Order is thus unconstitutional.

COUNT VI
42 U.S.C. § 1983
FOURTEENTH AMENDMENT VIOLATION - EQUAL PROTECTION

70. Plaintiff incorporates by reference all prior allegations of this Complaint into this Count.

71. Under federal jurisprudence, the press and Plaintiff are similarly situated as it applies to protections under the First Amendment.

72. The Electronic Ban Order impinges on a fundamental First Amendment right to record and thus is accord review under strict scrutiny.

73. Defendants, by their acts and acting under the color of Michigan law, violated Plaintiff's Fourteenth Amendment right of equal protection by permitting traditional media outlets the right to record and/or photograph court proceedings with electronic devices, including cameras, through an exception seemingly granted to allow entry of equipment and devices, while explicitly prohibiting Plaintiff from being able to do the same despite being similarly situated by operation of law.

RELIEF REQUESTED

74. Plaintiff requests that this Court grant the following:

- a. Enter a declaration that the Electronics Ban Order, with respect to the prohibition of a private citizen to record public officials in the performance of their public duties *outside* a public courthouse violates the First and Fourteenth Amendments to the United States Constitution and cannot be enforced by any governmental entity or agency;
- b. Enter a declaration that the Electronics Ban Order, with respect to the prohibition of a private citizen to record public officials in the performance of their public duties *inside* a public courthouse violates the First and Fourteenth Amendments to the United States Constitution and cannot be enforced by any governmental entity or agency;
- c. Enter a declaration that the Electronics Ban Order is constitutionally vague in violation of the Fifth and Fourteenth

Amendments to the United States Constitution cannot be enforced by any governmental entity or agency;

- d. Enter a declaration that the Electronics Ban Order, with respect to the unequal protection of laws violates the Fourteenth Amendment to the United States Constitution and cannot be enforced by any governmental entity or agency;
- e. Enter preliminary and permanent injunctive order(s) prohibiting and enjoining all Defendants, to the extent possible under the Eleventh Amendment, from enforcing the Electronics Ban Order;
- f. Enter a declaration that Plaintiff's First, Fifth, and Fourteenth Amendments rights were violated;
- g. Award Plaintiff's costs and attorney fees pursuant to 42 U.S.C. § 1988; and
- h. Award all other relief that is just and proper.