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February 28, 2023

VIA EMAIL (David.Lasee@da.wi.gov)

David L. Lasee
Brown County District Attorney
300 East Walnut Street
Green Bay, WI 54301

Re: Audio Recording in Green Bay City Hall

Dear Attorney Lasee:

I represent the Wisconsin Senate, Senator André Jacque, Anthony Theisen, and Jane Doe in a civil suit pending against the City of Green Bay and Mayor Eric Genrich. *See* No. 23-cv-250 (Brown Cnty. Cir. Ct.). The case centers on the Defendants' illegal use of audio-recording devices in City Hall, a practice that has been widely covered in the media and that, as the American Civil Liberties Union declared yesterday, "needs to stop."[1]

On behalf of Plaintiffs, I respectfully request that your office open a criminal investigation into the City's and Mayor's audio-surveillance practices. To our knowledge, those practices are unprecedented. We know of no other municipality in Wisconsin that has installed bugs in the hallways of the seat of government.

As our enclosed complaint and principal brief explain, Wisconsin's Electronic Surveillance Control Law (WESCL) makes it a Class H felony intentionally to intercept oral conversations. Wis. Stat. § 968.31. The law also makes it a felony to use or disseminate the contents of any intercepted communication when one knows or has reason to know that it was intercepted in violation of the WESCL. An "oral communication" is one in which the person has a "reasonable expectation of privacy" in the communication, meaning "both (1) an actual subjective expectation of privacy in the speech, and (2) a subjective expectation that is one that society is willing to recognize as reasonable." *State v. Duchow*, 2008 WI 57, ¶¶ 19–20, 310 Wis. 2d 1, 749 N.W.2d 913.

[1] https://www.aclu.org/news/privacy-technology/firestorm-over-green-bay-city-hall-surveillance-microphones-is-a-reminder-of-country-we-dont-want-to-live-in.

As our filings explain, and as Defendants admit, the City and the Mayor have been covertly recording private conversations held in the hallways of City Hall for over a year. Many (if not all) of those who held such conversations reasonably expected that they were and would remain private. Those individuals also reasonably expected that the government was not listening in and recording them. Defendants' conduct, therefore, clearly violates the WESCL. Making matters worse, the City and Mayor have treated their illegal surveillance tapes as public records and have disseminated unredacted, raw video and audio recordings to third parties, in further violation of the WESCL. *See* Ben Krumholz, *Fox 11 obtains Green Bay City Hall surveillance recording*, Fox 11 News (Feb. 19, 2023) (explaining that recordings obtained by Fox 11 News capture "personal conversations between individuals discussing medical issues").[2]

We respectfully request that you, as the chief law-enforcement official in Brown County with investigative and prosecutorial authority, immediately open an investigation into the City's and Mayor's practices. The Tennessee Attorney General has recently initiated a similar probe into audio-recording practices surreptitiously undertaken at a district attorney's office. *See* Julia Wilburn, *AG Launches Investigation of Wiretapping Allegations Against DA Funk*, Tennessee Bar Association (Feb. 21, 2023).[3]

Audio-recording persons within the walls of City Hall is not only an egregious violation of constitutional rights; it is also a criminal act. Our principal concern is that the practice be stopped and that any illegally obtained recordings be destroyed and, until then, be made inaccessible.

Sincerely,

RYAN J. WALSH

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[2] https://fox11online.com/news/local/green-bay/fox-11-obtains-green-bay-city-hall-surveillance-recording.
[3] https://www.tba.org/?pg=LawBlog&blAction=showEntry&blogEntry=87959.

Enclosures

CC:

Tina Virgil, Administrator of the Department of Criminal Investigation,
Wisconsin Department of Justice
Joanne Bungert, Green Bay City Attorney
Ted Waskowski and Kyle Engelke, Stafford Rosenbaum LLP

FILED
02-21-2023
Clerk of Circuit Court
Brown County, WI
2023CV000250
Honorable Marc A. Hammer
Branch 5

STATE OF WISCONSIN CIRCUIT COURT BRANCH __ BROWN COUNTY

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

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

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

and

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

Plaintiffs,

v.

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

and

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

Defendants.

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

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as the term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is **Brown County Clerk of Circuit Court, 100 South Jefferson Street, Green Bay, WI 54301**, and to Ryan J. Walsh, Plaintiffs' attorney, whose address is **10 East Doty Street, Suite 621, Madison, Wisconsin 53703**. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Date: February 21, 2023

Respectfully submitted,

Electronically Signed by Ryan J. Walsh
Ryan J. Walsh (WBN 1091821)
Amy C. Miller (WBN 1101533)
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Attorneys for Plaintiffs

FILED
02-21-2023
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Brown County, WI
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Honorable Marc A.
Hammer
Branch 5

STATE OF WISCONSIN CIRCUIT COURT BRANCH __ BROWN COUNTY

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

SENATOR ANDRÉ JACQUE,
Room 7 South
State Capitol
PO Box 7882
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ANTHONY THEISEN, on behalf of
himself and others similarly situated,
931 S Baird,
Green Bay, WI 54301,

and

JANE DOE, on behalf of herself and
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Plaintiffs,

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

and

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

Defendants.

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

COMPLAINT

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

Doe (collectively, "Plaintiffs") hereby allege as follows:

INTRODUCTION

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

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

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

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

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

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

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

PARTIES

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

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

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

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

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

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

JURISDICTION AND VENUE

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

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

STATEMENT OF FACTS

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

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

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

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

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

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[2] *See* CITY OF GREEN BAY, "Departments," https://greenbaywi.gov/ (Feb. 21, 2023) (providing room numbers for each department).

[3] *Id.*

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

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

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

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

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

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

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

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

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

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

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

25. The mayor finally ordered signage to be posted warning the public about the presence of the recording devices on or about February 17, 2023.[9]

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

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

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

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

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

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

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[8] *Green Bay alder*, *supra* note 5.
[9] Ben Krumholz & Scott Hurley, *State Senate lawyer warns Green Bay of impending suit over audio surveillance*, Fox 11 News (Feb 17, 2023), https://tinyurl.com/2p9rfttt.
[10] City of Green Bay, *Fact Sheet - City Hall Security* (Feb. 10, 2023), https://tinyurl.com/zkvs596u.
[11] *Id.*
[12] *Id.* ("Footage is not continuously monitored by City staff.")
[13] *Green Bay alder*, *supra* note 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLASS ALLEGATIONS

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

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

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

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

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

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

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

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

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

violated constitutional and statutory law;

c. Whether Mayor Genrich and/or the City violated Wisconsin's Electronic Surveillance Control Law;

d. Whether Mayor Genrich and/or the City violated Article I, Section 11 of the Wisconsin Constitution, which protects against unreasonable searches and seizures;

e. Whether Mayor Genrich and/or the City violated Article I, Section 3 of the Wisconsin Constitution, which protects the rights of every "person [to] freely speak, write and publish his sentiments on all subjects," and forbids any laws that "restrain or abridge the liberty of speech or of the press";

f. Whether Mayor Genrich and/or the City violated Article I, Section 4 of the Wisconsin Constitution, which protects the "right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof";

g. Whether Mayor Genrich and/or the City violated Wisconsin Statutes Section 995.50, which protects citizens' privacy rights;

h. The appropriate injunctive relief to be awarded.

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

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

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

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

<u>CAUSES OF ACTION</u>

COUNT I – DECLARATORY JUDGMENT AND INJUNCTION

VIOLATION OF WISCONSIN'S ELECTRONIC SURVEILLANCE CONTROL LAW

(ON BEHALF OF ALL PLAINITFFS AND THE PROPOSED CLASS)

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

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

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

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

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

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

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

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

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

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

COUNT II – DAMAGES

VIOLATION OF WIS. STAT. § 968.31 WISCONSIN'S ELECTRONIC SURVEILLANCE CONTROL LAW

(ON BEHALF OF PLAINTIFFS THEISEN AND DOE)

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

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

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

71. These recordings therefore violated the WESCL.

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

who intercepts, discloses or uses, or procures any other person to intercept, disclose, or use, the communication, and shall be entitled to recover from any such person: (a) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher; (b) Punitive damages; and (c) A reasonable attorney's fee and other litigation costs reasonably incurred." Wis. Stat. § 968.31(2m).

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

COUNT III – DECLARATORY JUDGMENT AND INJUNCTION

VIOLATION OF ARTICLE 1, SECTION 11 OF THE WISCONSIN CONSTITUTION

(ON BEHALF OF ALL PLAINTIFFS AND THE PROPOSED CLASS)

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

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

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

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

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

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

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

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

COUNT IV – DECLARATORY JUDGMENT AND INJUNCTION

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

(ON BEHALF OF ALL PLAINTIFFS AND THE PROPOSED CLASS)

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

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

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

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

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

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

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

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

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

COUNT V – INJUNCTION

VIOLATION OF WIS. STAT. § 995.50
STATUTORY RIGHT TO PRIVACY

(ON BEHALF OF THE INDIVIDUAL PLAINTIFFS AND THE PROPOSED CLASS)

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

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

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

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

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

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

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

Prayer for Relief

WHEREFORE, Plaintiffs request the following relief:

A. A determination that the claims for declaratory and injunctive relief in this action may be maintained as a class action pursuant to Wisconsin Statutes Section 803.08.

B. A declaration that Defendants violated the WESCL by installing and maintaining the Hallway Bugs, and by using and disseminating unlawfully obtained recordings.

C. A declaration that Defendants violated Article I, Section 11 of the Wisconsin Constitution by installing and maintaining the Hallway Bugs.

D. A declaration that Defendants violated Article I, Sections 3 and 4 of the Wisconsin Constitution by installing and maintaining the Hallway Bugs.

E. An injunction ordering Defendants to disable all audio recording devices at City Hall and prohibiting them from reinstalling any such devices in the future.

F. An injunction ordering Defendants to destroy all audio recordings made from the audio recording devices at City Hall.

G. Damages pursuant to Wis. Stat. § 968.31(2m)(a), (b), which includes "liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher" and "[p]unitive damages."

H. Pre- and post-judgment interest as provided by law.

I. Reasonable attorney's fees and litigation costs, as provided by law.

J. Any other relief that this Court deems just and proper.

Dated: February 21, 2023

Respectfully submitted,

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STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY
BRANCH 5

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

Plaintiffs,

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

v.

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

Defendants.

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

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[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 <u>by noon on February 22</u>, 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.*

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[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
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