

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
AT NASHVILLE**

**JASON D. KNIGHT, DAVID WEBB,** )  
**and JOSHUA WIKHOLM,** )  
 )  
**Plaintiffs,** )  
 )  
**Vs.** )  
 )  
**MONTGOMERY COUNTY,** )  
**TENNESSEE,** )  
 )  
**Defendant.** )

**Docket No.: 3:19-cv-0710**  
**Judge Richardson**  
**Magistrate Judge Frensley**

**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT**

Comes now the Defendant, MONTGOMERY COUNTY, TENNESSEE, by and through counsel, and files this Memorandum of Law in support of its Motion for Summary Judgment, and states as follows:

This case involves a claim that Section 7 of Montgomery County Resolution 19-8-3 violates the freedom of speech and expression found in the First Amendment to the United States Constitution and Article I, section 19 of the Tennessee Constitution. (Second Amended Complaint, ¶ 1, Doc. 32). Resolution 19-8-3 states in relevant part as follows: “No live broadcast from within the Commission Chambers of its proceedings in whole or in part is allowed. A simultaneous broadcast of the proceedings is available on the internet at ‘YouTube’ and the same is preserved for an extended period of time.” (Resolution 19-8-3, Section 7, Doc. 1-2). Prior to enactment of this Resolution, some of the Plaintiffs would live stream the Montgomery County

Commission meetings to the social media account of Plaintiff JASON KNIGHT via Facebook live. (Second Amended Complaint, ¶ 4, 6, 8, Doc. 32). The Plaintiffs allege Resolution 19-8-3 violates their freedom of speech or expression under the First Amendment to the United States Constitution and also the Tennessee Constitution because they are not permitted to live stream the Montgomery County Commission meeting. (Second Amended Complaint, ¶ 1, Doc. 32). The Plaintiffs allege because they are not able to live stream the Montgomery County Commission meetings, they are not able to comment or communicate with individuals during the Montgomery County Commission meeting through the live stream's comment section and contend such restriction violates their right of speech and expression. (Second Amended Complaint, ¶¶ 8, 31-32, 38, Doc. 32).

However, governments restrict individuals' speech all the time. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner than may be desired." Heffron v. Int'l Soc. For Krishna Consciousness, 452 U.S. 640, 684 (1981)(internal citations omitted). The fact that speech or expression is restricted or regulated in and of itself is not a violation of the First Amendment. Id. In designated or limited public forums, such as the Montgomery County Commission meeting, "the government may regulate speech so long as the regulation is (1) 'content-neutral,' (2) 'narrowly tailored to serve a significant governmental interest' and (3) 'leave[s] open ample alternative channels for communication of the information.'" Lowry v. Jefferson Co. Bd. Of Educ., 586 F.3d 427, 432 (6th Cir. 2009)(internal citation omitted). Resolution 19-8-3 meets all three of these criteria and is therefore constitutionally valid.

## FACTS

Plaintiffs aver they are all citizens and residents of Defendant MONTGOMERY COUNTY, TENNESSEE. (Second Amended Complaint, ¶¶ 4-6, Doc. 32). Plaintiff JASON D. KNIGHT also serves as a Commissioner on the MONTGOMERY COUNTY Commission, the Defendant's elected governing body. (Second Amended Complaint, ¶ 4, Doc. 32). MONTGOMERY COUNTY, TENNESSEE, through its County Commission operates regular meetings to conduct governmental business. During these Commission meetings, MONTGOMERY COUNTY simultaneously broadcasts these meetings on a YouTube page it operates. (Second Amended Complaint, ¶ 17, Doc. 32; see also Resolution 19-8-3, Section 7, Doc. 1-2). MONTGOMERY COUNTY's YouTube page is located at [www.youtube.com/channel/UCo1CY-INQM4uZSqrJCeHTGg](https://www.youtube.com/channel/UCo1CY-INQM4uZSqrJCeHTGg).

MONTGOMERY COUNTY, TENNESSEE, holds its County Commission meetings in the historic Courthouse. (Fuson Dep., p. 10, 60, Doc. 41-1). Structurally, the historic Courthouse is a building from the early 1800s with lots of little crevices and alleyways. (Fuson Dep., p. 68, Doc. 41-1). There is one main public entrance available, which involves passing through a metal detector and placing items on a belt for inspection, but there are several ways to enter the building without going through the public entrance if someone was actively trying to avoid entering through the security entrance. (Fuson Dep., p. 10, 15-16, 67-72, Doc. 41-1). For example, there are outside stairs on the east and west side of the historic Courthouse which lead to doors on each side. (Fuson Dep., p. 15, 69-70, Doc. 41-1). While those doors are typically locked from the outside, they could be breached depending upon the security in the area and the individual's knowledge of the security in the area. (Fuson Dep., p. 69-71, Doc. 41-1). Someone on the inside of the building could open

either of the doors on the east and west side of the building to allow someone to enter the building. (Fuson Dep., p. 70-72, Doc. 41-1). If either of the doors on the east or west side of the historic Courthouse are breached, the individual could take the inside stairwell next to those exterior doors one flight up and reach the meeting room for the County Commission. (Fuson Dep., p. 70, Doc. 41-1; see also Smith Dep., p. 32-33, 36-40, Doc. 41-5). There are also other doors and multiple windows on the ground floor which could potentially provide access to the building. (Fuson Dep., p. 68-70, Doc. 41-1). The Sheriff of Montgomery County is responsible for the security of the Courthouse including while the County Commission is in session and must consider all of these access points when creating his security plan for the building and more specifically the County Commission meetings. (Fuson Dep., p. 7-10, 18-20, Doc. 41-1; Smith Dep., p. 7, Doc. 41-5).

On August 12, 2019, MONTGOMERY COUNTY, TENNESSEE, through its County Commission considered a Resolution to amend the procedural operating rules of the Montgomery County Commission. (Resolution 19-8-3, Doc. 1-2; Second Amended Complaint, ¶ 24, Doc. 32). The relevant portion of Resolution 19-8-3 applicable to this litigation is Section 7 which reads as follows: “No live broadcast from within the Commission Chambers of its proceedings in whole or in part is allowed. A simultaneous broadcast of the proceedings is available on the internet at ‘YouTube’ and the same is preserved for an extended period of time.” (Resolution 19-8-3, Section 7, Doc. 1-2). The Resolution with Section 7 as stated above was passed by a vote of twenty to one. (Resolution 19-8-3, Doc. 1-2). Plaintiff KNIGHT voted in favor of the Resolution. Id.

While live broadcasting is prohibited under Section 7 of the Resolution, Sections 6 and 8 confirm recordings of the meetings are permitted from a designated area. (Resolution 19-8-3, Sections 6 and 8, Doc. 1-2). Those sections state as follows:

**6.** An area will be designated within the Montgomery County Commission Chambers for the use of audio and video recording devices by the press and others which will provide ample position and opportunity to record by audio and video means the official business of the Commission while in session.

**8.** The area designated for the press and others who wish to make audio or video recordings will be designated by the Chair and the Sergeant at Arms will direct persons so identified to this area. Only in this area will the presence of audio and video recordings be allowed.

(Resolution 19-8-3, Sections 6 and 8, Doc. 1-2).

Prior to the passing of Resolution 19-8-3, Plaintiffs aver some of them had participated in some form or fashion in broadcasting the Commission meetings live through social media platforms. (Second Amended Complaint, ¶ 23, Doc. 32). It is undisputed that Resolution 19-8-3 would prevent anyone at the meeting from lawfully live broadcasting the Commission meetings from the Chambers, but recording the proceedings was not otherwise affected. (Second Amended Complaint, ¶ 28, Doc. 32; see also Resolution 19-8-3, Sections 6-8, Doc. 1-2; Knight Dep., p. 60, Doc. 41-2). Resolution 19-8-3 does not discuss or otherwise restrict or prevent speech or other expressive activity during the meeting, including posting on various social media websites. (Resolution 19-8-3, Doc. 1-2; Order on Motion for Temporary Restraining Order, p. 4, Doc. 8).

The Plaintiffs contend Resolution 19-8-3 violates their constitutional rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. (Second Amended

Complaint, ¶ 1, Doc. 32). Specifically, the Plaintiffs assert Resolution 19-8-3 violates their First Amendment right to freedom of expression because they are no longer able to live stream the Commission meetings and engage in real time conversation by posting comments to the live stream. (Second Amended Complaint, ¶¶ 38, Doc. 32).<sup>1</sup> The Plaintiffs also allege a cause of action pursuant to Article I, Section 19 of the Tennessee Constitution which mirrors their claims under the First Amendment to the U.S. Constitution as it relates to free speech and expression. (Second Amended Complaint, ¶¶ 1, 46-51, Doc. 32). Analysis under both the First Amendment to the U.S. Constitution and Article I, Section 9 of the Tennessee Constitution as it relates to speech and expression is the same. See generally Lamar Tenn., LLC, v. City of Knoxville, 2016 Tenn. App. LEXIS 142, \* 39-40 (Tenn. Ct. App. Feb. 25, 2016), appeal denied, 2016 Tenn. LEXIS 465 (Tenn. June 23, 2016)). Respectfully, even if livestreaming qualifies as expressive conduct generally protected by the First Amendment,<sup>2</sup> Resolution 19-8-3 is a proper time, place, and manner restriction under the First Amendment to the U.S. Constitution and Article I, Section 19

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<sup>1</sup> In their discovery responses, at least two of the Plaintiffs contend Resolution 19-8-3 violates their First Amendment right to freedom of the press. (See generally Interrogatory Responses of Plaintiffs Webb and Wikholm, Docs. 41-9 and 41-10). No claim for violation of the freedom of the press has been plead in this case. (See generally Plaintiffs' Second Amended Complaint, Doc. 32). Therefore, the Defendant does not otherwise respond to any freedom of the press arguments except to assert no such claim has been plead and therefore no such claim is before this Court.

<sup>2</sup> See generally Memorandum Opinion, p. 11, Doc. 25. "Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 n. 5 (1984). The Plaintiffs have offered little, if any, proof that live streaming in and of itself constitutes expressive conduct protected by the First Amendment. Even if live streaming does constitute expressive conduct, the Resolution is still valid as a proper time, place, and manner restriction. Id.

of the Tennessee Constitution. Therefore, the Plaintiffs' Complaint should be dismissed as a matter of law.

### LEGAL ANALYSIS

A Motion for Summary Judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a) and (c). To defeat a motion for summary judgment the non-moving party may not rest on allegations, but instead must set forth specific facts showing there is a genuine issue of fact to be decided by a trier of fact. Fed. R. Civ. Proc. 56(e); Pack v. Damon Corp., 434 F.3d 810, 813-14 (6th Cir. 2006). "The mere existence of a scintilla of evidence" supporting the nonmoving party's claims is insufficient to defeat summary judgment. Pack, 434 F.3d at 814. Rumors, conclusory allegations, and subjective beliefs cannot defeat a motion for summary judgment. Mitchell v. Toledo Hosp., 964 F.2d 577, 584-85 (6th Cir. 1992). Because Resolution 19-8-3 does not violate the First Amendment to the United States Constitution or the Tennessee Constitution, the claims of the Plaintiffs fail as a matter of law.

The Plaintiffs assert their constitutional claim pursuant to 42 U.S.C. § 1983. (Second Amended Complaint, ¶¶ 1-2, Doc. 32). To establish a claim under 42 U.S.C. § 1983, the Plaintiffs must show the Defendant deprived them of their "rights, privileges, or immunities secured by the Constitution" under color of law. Lindsey v. Detroit Ent'mt, LLC, 484 F.3d 824, 827 (6th Cir. 2007)(quoting 42 U.S.C. § 1983). Even assuming Resolution 19-8-3's prohibition on live streaming does somehow restrict speech or expressive activity protected by the First Amendment

to the U.S. Constitution and Article I, Section 19 of the Tennessee Constitution, these constitutional provisions are not violated and the Plaintiffs have no deprivation of their constitutional rights because any regulation of speech or expression found in Resolution 19-8-3 is content-neutral, is narrowly tailored to serve a significant governmental interest, specifically security, and there are other ample alternative channels for open communication. Therefore, the claims of the Plaintiffs should be dismissed as a matter of law.

**I. RESOLUTION 19-8-3 IS A CONSTITUTIONALLY VALID TIME, PLACE, AND MANNER RESTRICTION BECAUSE IT IS CONTENT NEUTRAL, NARROWLY TAILORED TO SERVE THE SIGNIFICANT GOVERNMENTAL INTEREST OF SECURITY, AND LEAVES OPEN AMPLE ALTERNATIVE CHANNELS OF COMMUNICATING THE INFORMATION THE PLAINTIFFS DESIRE TO EXPRESS.**

There are three types of forums when considering speech and expression regulations: traditional public forums, designated or limited public forums, and nonpublic forums. Traditional public forums are those places typically held in trust for the public, such as sidewalks and parks. Lowry v. Jefferson Co. Bd. Of Educ., 586 F.3d 427, 432 (6th Cir. 2009). Nonpublic forums include military bases, internal mail systems, and public transit advertising spaces. Id. Designated public forums are areas the government has intentionally opened for a public purpose but not every type of speech is permitted in those areas. Id. **The Commission meeting where Resolution 19-8-3 applies is a designated or limited public forum.** Id. In designated or limited public forums, “the government may regulate speech so long as the regulation is (1) ‘content-neutral,’ (2) ‘narrowly tailored to serve a significant governmental interest’ and (3) ‘leave[s] open ample alternative



channels for communication of the information.” Id. (internal citation omitted). Resolution 19-8-3 meets all three of these criteria.

**A. Resolution 19-8-3 Is Content Neutral.**

The Resolution is content neutral. It does not distinguish between the nature of the content and instead prohibits all live broadcasting of the Commission meeting. (Resolution 19-8-3, Section 7, Doc. 1-2). Furthermore, it does not restrict recording of the meeting for subsequent broadcast. (Resolution 19-8-3, Section 6-8, Doc. 1-2; Knight Dep., p. 60, Doc. 41-2). The Plaintiffs have previously conceded the resolution is content neutral. (Plaintiffs’ Amended Response to Defendant’s Rule 12 Motion, p. 10, Doc. 20)(“Plaintiffs concede that the resolution is content-neutral.”).<sup>3</sup>

**B. Resolution 19-8-3 Serves The Significant Governmental Interest Of Security And Is Narrowly Tailored To Serve That Interest As It Allows Recordings Which Can Be Posted Following The Conclusion Of The Meeting.**

Section 7 of Resolution 19-8-3 is narrowly tailored to serve a significant governmental interest, that of the safety of the public and more particularly those individuals attending the meeting. (Fuson Dep., p. 26-27, 34, 42-44, 71-72, 78, Doc. 41-1; Durrett Dep., p. 14-15, 25-26, 30-32, 43, Doc. 41-8; Smith Dep., p. 23, 27-34, 36-40, Doc. 41-5; see also generally Complaint, ¶

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<sup>3</sup> In their Interrogatory responses, some of the Plaintiffs attempt to argue the Resolution is not content neutral because Montgomery County’s YouTube live broadcast is delayed. (Wikhholm’s Responses to Defendant’s Interrogatories, No. 6, Doc. 41-10; Webb’s Responses to Defendant’s Interrogatories, No. 7, Doc 41-9). However, these arguments relate in no way to the content of the ban on live streaming within the County Commission chambers.

13, Doc. 1; First Amended Complaint, ¶ 26, Doc. 15). Security has been deemed a significant governmental interest. United States v. Albertini, 472 U.S. 675, 687, 689 (1985).

The presence of a live broadcast stream within the Chambers presents a security risk which can be avoided or eliminated. (Durrett Dep., p. 32, Doc. 41-8; Fuson Dep., p. 19-20, 24, 74, Doc. 41-1). **A live broadcast provides immediate information to others regarding the positions of officers, doorways, and security points; the circumstances at the time such as an event, altercation, or interruption in the meeting which draws attention; or any other aspect of the interior of the building and the security officers the Sheriff has in place.** (Fuson Dep., p. 34, 42-44, 71-72, Doc. 41-1; Durrett Dep., p. 31-32, Doc. 41-8; Smith Dep., p. 23, 27-34, 36-40, Doc. 41-5). A recording does not have the same real time component. (Fuson Dep., p. 19-20, 24-25, 35-37, Doc. 41-1; see also generally Smith Dep., p. 23-25, 27-29, Doc. 41-5). In the development of the rule, the recording device area was designated in a position where it minimized the recording of security in place. (Durrett Dep., p. 25-26, Doc. 41-8; Fuson Dep., p. 26-27, 78, Doc. 41-1). This positioning was accounted for in development of all future security plans. The positioning of security officers in the facility waxes and wanes depending upon what crowd is anticipated and the emotions of the issues to be discussed, but some security is always present and the positioning of the recording area eliminates a recording from capturing the entirety of the security at any one time. (Durrett Dep., p. 14-15, 25-26, 30, 43, Doc. 41-8; Fuson Dep., p. 26-27, Doc. 41-1).

Live broadcast presents a different security risk from an audio or video recording without a simultaneous broadcast. **A live broadcast allows someone to show, in real time, the positioning**

of all officers, when and where their attention may be drawn away from one particular general security observation point to another based upon circumstances or a diversion, and can likewise transmit the presence of persons entering or exiting the Chamber during the meeting. (Durrett Dep., p. 32, Doc. 41-8; Fuson Dep., p. 19-20, 26-27, 34-35, 78, Doc. 41-1; Smith Dep., p. 27-40, Doc. 41-5). This ability presents a security risk which can be avoided. (Durrett Dep., p. 32, Doc. 41-8; Fuson Dep., p. 19-20, 24, 74, Doc. 41-1). To simply preclude the live broadcast of these meetings eliminates that risk. (Durrett Dep., p. 32, Doc. 41-8; Fuson Dep., p. 24, Doc. 41-1). Anyone who wished to commit any sort of assault on the dignity of the meeting, the participants, or the general public would be aided by a live broadcast from the meeting, and the rule provides a basis to eliminate that risk without eliminating the right of the public to come into the facility, hear and listen to the meeting as allowed by law, and even audio or video record in the designated area. (Fuson Dep., p. 19-21, 24, 26-27, 34, 36-37, 71, 74, 79, Doc. 41-1; Smith Dep., p. 29-34, 36-40, Doc. 41-5). The Resolution only eliminates the live broadcast. (See Resolution 19-83, Doc. 1-2). Thus, the regulation is narrowly tailored. Individuals, including the Plaintiffs, are still permitted to record the meeting from a designated position and can broadcast it to their social media platforms for discussion following the conclusion of the meeting. (See generally Resolution 19-8-3, Doc. 1-2; see also Fuson Dep., p. 37, Doc. 41-1; Knight Dep., p. 35-40, Doc. 41-2).

"[T]he requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Jobe v. City of Catlettsburg, 409 F.3d 261, 268 (6th Cir. 2005)(citing Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) and Prime Media Inc. v. City of Brentwood, 398 F.3d 814, 819 (6th Cir. 2015)). Sheriff Fuson has described his reason for the ban on live streaming during the

County Commission meeting and explained the safety and security concerns involved. (See Defendant's Responses to Plaintiffs' Interrogatories and Requests for Production of Documents, Doc. 41-11). He confirmed addressing security vulnerabilities is necessary for a good security assessment of any building. (Fuson Dep., p. 19, Doc. 41-1). Sheriff Fuson acknowledged, "anytime someone has a way to communicate information to folks outside of that inner circle [those inside the chamber] . . . that could give them an opportunity to . . . study . . . the movements of folks inside the building, could tell you who's inside the building, where exactly they're at in proximity to doors or windows or things like that that, you know, could cause folks to form some type of attack." (Fuson Dep., p. 19-20, Doc. 41-1). Chief Deputy John Smith more specifically outlined how a livestreaming video could allow a bad actor to have real time knowledge of the location of the security personnel present at any given time to assist in attempting some type of bad act. (Smith Dep., p. 27-40 Doc. 41-5).<sup>4</sup> Such real time information is a security vulnerability that must be addressed. (Fuson Dep., p. 19-20, Doc. 41-1). Security is less effective without the ban on livestreaming. (Fuson Dep., p. 36-37, Doc. 41-1).

"[P]roof that the problem has occurred in the past [ . . . ] or an elaborate study of their present-day necessity . . ." is not required. Jobe v. City of Catlettsburg, 409 F.3d 261, 269 (6th Cir. 2005). One needs only to recall recent events in our nation, including those at our nation's Capitol building where protestors were able to gain access to Congressional Chambers, to

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<sup>4</sup> Chief Deputy Smith actually discussed possible scenarios where a live stream video could be used to commit a bad act. His discussion covers several pages of his deposition and therefore will not be reproduced verbatim here but provides a good description of how live streaming videos could affect the safety and security of individuals inside the County Commission meeting. (See Smith Dep., p. 29-40, Doc. 41-5).

recognize security in designated or limited public places is a serious issue and a significant governmental interest. Furthermore, the fact that the Tennessee General Assembly saw fit to make security plans, assessments of security vulnerabilities, and information related to security of government buildings confidential and an exception to the Public Records Act seemingly confirms the significant government interest in security. Tenn. Code Ann. § 10-7-504(m).

The Resolution is narrowly tailored to the interest of security. It does not outright ban recording of the County Commission meeting. (Resolution 19-8-3, Doc. 1-2). It simply prevents live streaming the meeting, when the security threat is at its highest. **Real time information can allow individuals to identify targets or check for the location of law enforcement or security.** (Smith Dep., p. 27, Doc. 41-5). The Defendant is targeting real time video information of its County Commission meetings to prevent threats to security. (Fuson Dep., p. 20, 24, 36-37, Doc. 41-1; Smith Dep., p. 27-34, Doc. 41-5).

**The Plaintiffs appear to want to argue that if security is such a problem, banning live streaming is not enough because individuals inside the building can still text information.** (See generally Fuson Dep., p. 24-25, 48-49; Durrett Dep., p. 43, Doc. 41-8; Smith Dep., p. 34, Doc. 41-5). **But this argument supports the Defendant's position that banning live streaming is minimal and indicates the Defendant may need to consider a greater restriction when dealing with security for a foreseeable threat.** (Fuson Dep., p. 24-25, 48-49, Doc. 41-1). Nonetheless, the Supreme Court has confirmed in the context of protecting parks, “[i]f the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if

the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment. . .” Clark v. Community for Creative Non-Violence, 468 U.S. 288, 297 (1984). Similarly, as outlined by the individuals specifically tasked with providing security for the Commission meetings, the Montgomery County Commission meetings would be more exposed to harm without the live streaming prohibition than with it and the government has a legitimate interest in ensuring the safety and security of the meetings and those in attendance. (Fuson Dep., p. 7, 19-20, 24, 34, 42-44, 71-72, 74, Doc. 41-1; Smith Dep., p. 23, 27-34, 36-40, Doc. 41-5; Durrett Dep., p. 31-32, Doc. 41-8). Therefore, the live streaming ban should similarly be safe from invalidation under the First Amendment. Clark, 468 U.S. at 297.

Finally, a district court in Texas determined a ban on videotaping a County Commission meeting did not violate the First Amendment. Johnson v. Adams, 629 F.Supp. 1563, 1564-1565 (E.D. Tex. 1986). The Texas District Court held

The Titus County Commissioners Court<sup>5</sup> has the privilege to restrict the use of cameras in presence during its sessions if it so wishes. The House of Representatives and the Senate of the United States do so. The Titus County Commissioners are no less the master of their own house than are the members of those great deliberative bodies. Nothing in the actions of the [County Commissioners] Court restricts the press from reporting on the activities of the Commissioners Court, or from commenting on those activities. If members of the Titus County Commissioners Court wish to follow the lead of the United States Courts in forbidding the use of videotape cameras in their presence, they may do so. There is no First Amendment violation extant in their actions.

Id. at 1565. The same should be true here. **Security concerns for a government’s meetings are no less important at the local level than those at the federal level.** See generally id. Security during

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<sup>5</sup> “[T]he ‘Commissioners Court’ is not an adjudicative or judicial body . . . [but] rather a name given by Texas law to the managing or governing body of a county.” Johnson v. Adams, 629 F.Supp. 1563, n. 1 (E.D. Tex. 1986).

a governmental legislative session such as Montgomery County's Commission meetings is a significant governmental interest and live streaming is a security vulnerability as acknowledged by the individuals responsible for ensuring security to that building and during that meeting. (Fuson Dep., p. 7, 19-20, 24, 34, 42-43, 74-75, Doc. 41-1; Smith Dep., p. 27-40, Doc. 41-5). Because Section 7 of Resolution 19-8-3 only bans live streaming, not recording, it is narrowly tailored to the significant governmental interest of security.

**C. There Are Ample Alternative Channels For Communicating The Information Which Could Be Expressed Through A Live Stream Broadcast, Including Subsequent Broadcast Of The Meeting, Commenting On The County's YouTube Page, Or Commenting On Social Media During Or Following The Meeting.**

In this case there are ample alternative channels for communicating the information which are open to the Plaintiffs including, but not limited to, through the Defendant's YouTube page which simultaneously broadcasts the Commission meetings and preserves the video for an extended period of time for public access, through their own social media sites with or without a video of the meeting proceedings, and by simply discussing the matters with people outside of the internet through other normal channels of communication. (Resolution 19-8-3, Section 7, Doc. 1-2; Order, Doc. 8, p. 5; Second Amended Complaint, ¶ 17, Doc. 32).<sup>6</sup> Comments can be made on

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<sup>6</sup> The Plaintiffs' Second Amended Complaint appears to allege the Defendant's YouTube page is not an ample alternative channel because both MONTGOMERY COUNTY and YouTube have the ability to hide or delete content. (Second Amended Complaint, ¶¶ 18-22, Doc. 32). However, the Plaintiffs fail to present any facts that such action has been or was taken in the past or would be taken in the future. (Wikholm Dep., p. 22, 25, 28, Doc. 41-7; Webb Dep., p. 21-22, Doc. 41-6; Knight Dep., p. 52-53, Doc. 41-2). Furthermore, the Plaintiffs have developed a way to continue to live stream the meeting on Facebook by showing the YouTube video stream while the meeting was taking place. Plaintiff WIKHOLM live streamed the YouTube broadcast of the September 3, 2019, meeting through Plaintiff KNIGHT's Facebook page,

the YouTube site. (See generally screenshot shown on page 4 of Plaintiff’s Memorandum in support of Rule 65 Motion for Temporary Restraining Order and Preliminary Injunction, p. 4, Doc. 5; see also Burchett Dep., p. 23-24, Doc. 41-4; Knight Dep., p. 23-24, 44-45, Doc. 41-2). Nonetheless, communication need not be by live stream to be an ample channel of communication. Whiteland Woods, L.P., 193 F.3d at 184 (indicating the complaining party “was allowed to attend all meetings . . . and [ ] compile a full record of the proceedings, whether by written and stenographic notes or audiotaping.”); Phelps-Roper v. Strickland, 529 F.3d 356, 372 (6th Cir. 2008). Plaintiffs are free to post content during the meeting on social media platforms and can record the meeting for subsequent broadcast, both of which provide the interactive nature desired by the Plaintiffs. (Knight Dep., p. 35, 46-47, 60, Doc. 41-2; Wikholm Dep., p. 23, Doc. 41-7; see generally Webb Dep., p. 29-30, Doc. 41-6, discussing Plaintiff Knight’s use of Facebook).

There is no dispute MONTGOMERY COUNTY operates a slightly delayed live broadcast of its County Commission meetings on its YouTube page which includes a chat component allowing individuals to respond and interact with one another through that simultaneous chat. (Burchett Dep., p. 23-24, 26-27, Doc. 41-4; Knight Dep., p. 44-45, 47, Doc. 41-2; Webb Dep., p. 12, 19-20, Doc. 41-6; see also screenshot shown on page 4 of Plaintiff’s Memorandum in support of Rule 65 Motion for Temporary Restraining Order and Preliminary Injunction, p. 4, Doc. 5). Plaintiff KNIGHT often uses snippets from the Montgomery County YouTube broadcast to post

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[www.facebook.com/JasonKnightCountyCommissioner/](http://www.facebook.com/JasonKnightCountyCommissioner/). (See generally Wikholm Dep., p. 23, Doc. 41-7). Thus, the ban of live stream is not “diverting viewers away from those [social media] pages” as alleged by the Plaintiffs because the Plaintiffs have found a way to continue to live stream the broadcast on their Facebook page without violating Resolution 19-8-3. (See generally Second Amended Complaint, ¶ 31, Doc. 32).



onto his own Facebook page because it showed his name and had a better viewing angle.<sup>7</sup> (Knight Dep., p. 39-40, Doc. 41-2). Knight even indicated “[i]f someone wanted to know specifically what I stated about a particular thing . . . that’s when we would pull that particular snippet from the County’s YouTube video.” (Knight Dep., p. 41-42, Doc. 41-2). The Plaintiffs have acknowledged Montgomery County’s YouTube allows for comments, will zoom in on the person talking, and can also show the vote board when a vote is occurring and offers a similar function to their Facebook livestream. (Knight Dep., p. 39-40, 43, 47, Doc. 41-2). Such broadcast with commenting or chat functions available would be a sufficient alternative channel of communication.

Plaintiff WEBB claims MONTGOMERY COUNTY’s YouTube page is “unreliable” as it freezes or cuts out on occasion offering no proof outside of hearsay evidence; however, he seems to focus his dispute on a transparency argument,<sup>8</sup> asserting the government should not be the sole

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<sup>7</sup> Montgomery County’s broadcast via YouTube includes the use of multiple cameras which can direct the video feed onto whomever is speaking at any given time or the voting board to show results of the Commissioners’ votes. (Knight Dep., p. 43, Doc. 41-2; Burchett Dep., p. 45, Doc. 41-4). It does not show other areas of the Commission chambers, only the voting board or the front of the speaker. (See generally Burchett Dep., p. 45, Doc. 41-4; see also Defendant’s Responses to Plaintiffs’ Interrogatories, No. 7, p. 6, Doc. 41-11). Furthermore, unlike a cell phone microphone which picks up limited audio in the area, Montgomery County’s broadcast directly ties into the microphones used by each speaker which are only turned on when that individual is speaking. (See generally Knight Dep., p. 43, Doc. 41-2).

<sup>8</sup> Although not pled and therefore not before this Court, the government transparency complaints asserted by at least some of the Plaintiffs in their written discovery responses and/or deposition testimony **appear to contain a right of access theory** or a freedom of the press claim rather than or possibly in addition to a speech or expression claim. (Webb Dep., p. 12, 17, 20, 33-34, a copy of which is attached to Defendant’s Notice of Filing, Doc. 41-6; Webb’s Responses to Defendant’s Interrogatories, Nos. 1 & 4, a copy of which is attached to Defendant’s Notice of Filing, Doc. 41-9; Wikholm’s Responses to Defendant’s Interrogatories, No. 5, a copy of which is attached to Defendant’s Notice of Filing, Doc. 41-10; Knight Dep., p. 46-47, 49, Doc. 41-2). However, “[t]he

provider of this outlet. (Webb Dep., p. 15, 33-34, Doc. 41-6). The Plaintiffs contend they should therefore be permitted to live stream the meetings to advise their social media followers of the activities which have occurred during the meeting to provide real time transparency. (Webb Dep., p. 17, 20, 33-34, Doc. 41-6; see generally Knight Dep., p. 46-47, 49, Doc. 41-2).

These sentiments, however, are misplaced in this First Amendment analysis. “An alternative can be adequate even when the speaker is denied its best or favored means of communication.” Harrington v. City of Brentwood, 726 F.3d 861, 865 (6th Cir. 2013). The Sixth Circuit has confirmed the key for determining whether an alternative is adequate is whether it allows the speaker to meet its intended audience. Id. The Harrington case involved an ordinance prohibiting someone from using or occupying a city street, alley, sidewalk, or public right of way to sell goods or materials and was directed at sales of *The Contributor*, a newspaper typically sold by homeless or formerly homeless individuals. 726 F.3d at 863. While the paper was typically sold by street vendors to motor vehicle occupants, the Sixth Circuit found the intended audience for the newspaper sales was not so limited and was instead the general citizenry of Brentwood. Id.

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First Amendment does not require states [or local governments] to accommodate every potential method of recording its proceedings, particularly where the public is granted alternative means of compiling a comprehensive record.” Whiteland Woods, L.P. v. Twp. Of West Whiteland, 193 F.3d 177, 180-1814, 183 (3rd Cir. 1999). In the case at bar, as the Plaintiffs acknowledge, they are permitted to record the meeting including for later broadcast as long as they do not live stream it. (Second Amended Complaint, ¶ 28, Doc. 32). There are also other means of compiling a comprehensive record of the proceeding as outlined in the Whiteland Woods case, which include written and stenographic notes or audiotaping, all of which would be permitted under MONTGOMERY COUNTY’s Resolution 19-8-3. Whiteland Woods, L.P., 193 F.3d at 184. Thus, there is no violation of a right of access to the Commission meeting created by Resolution 19-8-3’s ban on livestreaming.

at 865-66. As in Harrington, the Plaintiffs' intended audience is the general citizenry of their area, here Montgomery County citizens.

There are multiple ways to reach this audience other than through live streaming the County Commission meeting. The Plaintiffs can comment on MONTGOMERY COUNTY'S YouTube page,<sup>9</sup> can record the Commission meeting for subsequent broadcast and comments, or can discuss the issues online through comments or posts or in person without a recording or broadcast. When considering this issue, courts have held there are adequate alternative channels of communication where a person is "free to express [his/her] message outside of the times and places set forth in the statute, and the statute does not create a barrier to . . . [the] use of other means to deliver [the] message to the public." Phelps-Roper v. Strickland, 529 F.3d 356, 372 (6th Cir. 2008). **The Plaintiffs are not barred from posting on social media during the meeting and can freely engage and express themselves during the meeting without live broadcasting.**<sup>10</sup> Id. (citing Frisby v. Schultz, 487 U.S. 474, 483-84 (1988)(holding "an ordinance prohibiting picketing in front of someone's home afforded ample alternative channels of communication because '[p]rotestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching. They may go door-to-door to proselytize their

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<sup>9</sup> Many of the Plaintiffs assert a general lack of trust in MONTGOMERY COUNTY'S YouTube broadcast which has a slight delay. (Webb Dep., p. 11-12, Doc. 41-6). None of the Plaintiffs have offered any evidence of editing or removing portions of the meeting from the video. (Webb Dep., p. 21-22, 30, Doc. 41-6; Wikholm Dep., p. 25, 28, Doc. 41-7; Knight Dep., p. 26, 52-53, Doc. 41-2). Such distrust does not prevent or restrict other means of communication and expression.

<sup>10</sup> Plaintiff KNIGHT can actually communicate his opinions orally during the meeting as he is a Commissioner and can speak and address the Commission chambers during the meeting while also posting his thoughts or comments on social media to his intended audience.

views. They may distribute literature in this manner or through the mails. They may contact residents by telephone, short of harassment.””).

Additionally, the Plaintiffs can communicate their message to their intended audience by recording the meeting and subsequently posting the video for comments, can post and comment on social media or other websites before, during, and after a County Commission meeting, can go door-to-door to discuss their message, and can participate in radio shows or other media events to express their views. All of these means of communication allow the Plaintiffs to reach their intended audience and are therefore open ample adequate alternative means of communication. In fact, Plaintiff KNIGHT advises he responds to Facebook comments during the County Commission meetings and even more significant conducts a “live break down of each commission meeting after the commission meeting as well,” actions which would seemingly allow him to actively participate, comment, engage, and respond to his intended audience. (Plaintiff Knight’s Responses to Defendant’s First Set of Interrogatories, No. 11, Doc. 41-3; see also Knight Dep., p. 35-39, Doc. 41-2).

Plaintiff WIKHOLM alleges Montgomery County’s YouTube live broadcast is not an open ample alternative channel for communication of the information because “[m]any seniors or others do not know how to use Youtube, and can only use Facebook.” (Wikholm’s Responses to Defendant’s Interrogatories, No. 8, Doc. 41-10). Plaintiff Wikholm clarified this statement in his deposition, stating he is not certain whether seniors do not know how to use YouTube but only that they do not prefer it. (Wikholm Dep., p. 11, Doc. 41-7). No such documentation or proof has

been produced to support such a claim. Such allegation, even if there was evidence to support it, is immaterial because the Plaintiffs are not entitled to their preferred or best means of communication. Phelps-Roper v. Strickland, 529 F.3d at 372 (citing Heffron v. Int’l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981)(“It is [] common ground . . . that the First Amendment does not guarantee the right to communicate one’s views at all times and places and in any manner that may be desired.”)). The Plaintiffs claim Montgomery County’s live broadcast of the County Commission on YouTube is not an adequate alternative and appear to assert the only adequate means of communication is their preferred method of live streaming the meeting to their social media followers via Facebook. However, such is not supported by law or the facts in this case.

An alternative is not inadequate simply because the speaker must change its tactics. If it were so, then a speaker could limit the adequacy of alternatives by choosing its method of communication and limiting its tactics to a specific form of communication. Such a rule would largely deprive the government of the ability to enact reasonable time, place, and manner restrictions.

Roland Digital Media Inc. v. City of Livingston, 2018 U.S. Dist. LEXIS 216200, \* 25 (M.D. Tenn. Dec. 26, 2018)(citing Harrington v. City of Brentwood, 726 F.3d 861, 866 (6th Cir. 2013). Here, the Plaintiffs desire to live stream the County Commission meetings presumably so they can comment on items in the meeting as they are occurring. (Second Amended Complaint, ¶ 8, Doc. 32). Of course, the Plaintiffs can still do so on their own social media pages without the video and can also comment on Montgomery County’s YouTube broadcast. Furthermore, the Plaintiffs are permitted to record the meetings from the designated area and subsequently post them to social media sites for live or future comment. (Knight Dep., p. 35-39, 60, Doc. 41-2). Plaintiff KNIGHT acknowledges he hosts a post-meeting “live breakdown of each commission meeting after the commission meeting as well.” (Knight’s Responses to Interrogatories, No. 11, Doc. 41-3; see also

Knight Dep., p. 35-40, Doc. 41-2). Such activity alone would satisfy the Court's definition of an open ample alternative method of communication. Phelps-Roper v. Strickland, 529 F.3d 356, 372-73 (6th Cir. 2008)(indicating the plaintiff has a website where her message is seen).

The multiple ways the Plaintiffs can express themselves or communicate their message to their intended audience constitute ample alternatives to live streaming. See Jobe v. City of Catlettsburg, 409 F.3d 261, 270 (6th Cir. 2005)(finding an ordinance banning the placement of leaflets on vehicles was constitutional in part because ample alternative means of communication included face-to-face conversation, door-to-door communication, or leaving leaflets or pamphlets at private residences); see also Frisby v. Schultz, 487 U.S. 474, 483-84 (1988)(holding the ordinance prohibiting picketing in front of someone's home afforded ample alternative channels of communication because "[p]rotestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching. They may go door-to-door to proselytize their views. They may distribute literature in this manner or through the mails. They may contact residents by telephone, short of harassment."); see also Harrington v. City of Brentwood, 726 F.3d 861, 865-866 (6th Cir. 2013)(upholding an ordinance prohibiting the sale or distribution of newspapers on streets or to occupants of a motor vehicle on the street as there were other ways to reach their audience, such as "by going door-to-door, by seeking out people on sidewalks, or by distributing *The Contributor* via the mail, email, and news boxes"). Similarly, the Plaintiffs have multiple adequate alternative channels of communication – they can comment on Montgomery County's YouTube (slightly delayed) live broadcast, they can comment on their own social media platforms or the platforms of others during the County Commission meeting, and they can record the meeting for subsequent broadcast and comment such as what Plaintiff

KNIGHT does following the Commission meetings. (Knight's Responses to Defendant's Interrogatories, No. 11, Doc. 41-3; Knight Dep., p. 35-40, Doc. 41-2). The Plaintiffs can also go door to door, speak to people they meet through the community, and otherwise post on social media to express their viewpoints. All of these alternative channels of communication are adequate and openly available to the Plaintiffs. Therefore, Resolution 19-8-3 does not violate their right of speech or expression under either the First Amendment to the United States Constitution or the Tennessee Constitution, Article I, Section 19.

**II. PLAINTIFF KNIGHT VOTED IN FAVOR OF RESOLUTION 19-8-3 AND THEREFORE LACKS STANDING TO ASSERT IT IS CONSTITUTIONALLY INVALID.**

In a unique twist, Plaintiff JASON KNIGHT, a Montgomery County Commissioner, voted in favor of Resolution 19-8-3 but now is a party to a suit seeking to declare the Resolution unconstitutional. (Resolution 19-8-3, Doc. 1-2, p. 3 of 9). Constitutional standing requires three elements: (1) the plaintiff must have an injury in fact defined as a legally protected interest which is concrete and particularized and is actual or imminent rather than conjectural or hypothetical, (2) there must be a causal connection between the injury and the conduct complained of, and (3) the injury will be redressed by a favorable decision. Brian A. v. Bredesen, 2009 U.S. Dist. LEXIS 96685, \* 5-6 (M.D. Tenn. Oct. 15, 2009)(citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)). The causal connection element requires the injury to be fairly traceable to challenged conduct of the defendant and not the result of the independent action of a third party not before the court. Id. In this case, while admittedly the passing of Resolution 19-8-3 is an action of the Defendant, it is also an action of Plaintiff KNIGHT who voted in favor of the Resolution. Here,

the conduct of passing Resolution 19-8-3 in part is fairly traceable to Plaintiff KNIGHT himself. Plaintiff KNIGHT should not be permitted to vote in favor of a Resolution and then have standing to argue the Resolution he voted in favor of is unconstitutional.

### **CONCLUSION**

Restrictions on speech in designated or limited public forums are permitted as long as they are content neutral, narrowly tailored to serve a significant governmental interest, and there are ample alternative channels of communication open to the Plaintiffs. Resolution 19-8-3's ban on live streaming a Montgomery County Commission meeting satisfies all three of those requirements. There is no question the Resolution is content neutral. Security in those governmental meetings is significant and important, and the ban on live streaming is narrowly tailored to restrict real time information regarding the security in the area. Finally, there are multiple appropriate alternative channels of communication available without live streaming the Commission meeting. Montgomery County has a slightly delayed YouTube broadcast available which includes a chat feature. Comments can be made through any social media site during the meeting so long as no live stream occurs. The meetings can be recorded and posted following the meeting. A post-meeting breakdown such as the one Plaintiff KNIGHT has following the meetings is also a sufficient alternative channel of communication. Outside of the social media realm, the Plaintiffs could also discuss their positions through other more traditional media outlets or merely by speaking to people in the community. All of these alternatives satisfy the Court's requirements for adequate alternative channels of communication. Therefore, Resolution 19-8-3 meets all of the standards for a valid time, place, and manner restriction, and should be upheld as a matter of law.



Respectfully submitted,

BY: /s/ W. Timothy Harvey  
W. Timothy Harvey (#10469)  
Rebecca J. Garman (#026317)  
LAW OFFICE OF W. TIMOTHY HARVEY  
*Attorneys for the Defendant*  
*Montgomery County, Tennessee*  
310 Franklin Street  
Clarksville, TN 37040  
(931) 552-0549  
Fax (931) 552-0559  
timharvey@wtharveylaw.com

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing has been served on counsel of record by:

<input type="checkbox"/> Hand	Wesley Clark, BPR #32611
<input type="checkbox"/> Mail	Frank R. Brazil, BPR #34586
<input type="checkbox"/> Facsimile	BRAZIL CLARK, PLLC
<input type="checkbox"/> Federal Express	<i>Attorneys for Plaintiffs</i>
<input type="checkbox"/> E-Mail	2901 Dobbs Avenue
<input checked="" type="checkbox"/> E.C.	Nashville, TN 37204
	615-730-8619
	615-514-9674 (fax)
	<u>wesley@brazilclark.com</u>
	<u>frank@brazilclark.com</u>

This the 12th day of March, 2021.

/s/ W. Timothy Harvey  
W. Timothy Harvey