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

JASON D. KNIGHST, DAVID WEBSB, AND JOSHUA WIKHOSLM *Plaintiffs* V. MONTGOMERY COUNTY, TENNESSEE *Defendant*	**Case No. 3:19-CV-00710** **Judge Eli Richardson** **Magistrate Judge Frensley**

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Come now the Plaintiffs JASON D. KNIGHT, DAVID WEBB, AND JOSHUA WIKHOLM, represented by attorneys BRAZIL CLARK, PLLC, in support of its motion for summary judgment, and states unto the Court as follows:

INTRODUCTION

In seeking summary judgment, the Plaintiffs are asking this Court to hold that there is no genuine issue as to any material fact regarding the enforcement of a recently enacted local ordinance of Montgomery County, Tennessee, § 7 of Resolution 19-8-3, and its unreasonable restriction of the Plaintiffs' rights to free speech and free press protected by the First Amendment as guaranteed by the Fourteenth Amendment to the United States Constitution, as well as Article 1 § 19 of the Tennessee State Constitution and the Plaintiffs are entitled to judgment as a matter of law.

Compare what is permitted by the resolution: photography, recording, texting, instant messaging, electronic communications on a cellular device, and viewing a livestream with a slight delay; to what is prohibited – operating an independent livestream from within the commission

chambers of precisely the same content and a slightly reduced delay, but with the ability for viewers to comment outside the moderation of the Defendant. Within this slight gap falls an entire medium of communication. The Resolution restricts core First Amendment speech. Not only are the First Amendment rights of public officials now infringed, but so are the rights of citizens, who depend on elected and appointed public officials to inform them about matters of public concern so they can participate in the political process.

STATEMENT OF ISSUES PRESENTED

I. Is livestreaming a local county commission meeting considered protected speech under the First Amendment?

II. Is Resolution 19-8-3, § 7, narrowly tailored to serve a significant interest of Montgomery County, as required for any reasonable time, place, and manner restriction on expression?

III. Is Montgomery County's YouTube channel a sufficient alternative channel of communication, as required for any reasonable time, place, and manner restriction on expression?

FACTUAL ALLEGATIONS

The Plaintiffs rely on all allegations contained within their contemporaneously-filed Statement of Undisputed Material Facts.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(C). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there by no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-

48 (1986). A fact is "material" within the meanings of Rule 56(c) "if its proof or disproof might affect the outcome of the suit under the governing substantive law." Id. at 248. A dispute about a material fact is "genuine" if the evidence is such that a reasonable fact finder could render a verdict for the non-moving party. Id.

The party bringing the summary judgment motion has the initial burden of identifying portions of the record that demonstrate the absence of a genuine dispute over material facts. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets that burden, then in response the non-moving party must set forth specific facts showing that there is a genuine issue for trial. *See* Pittman v. Experian Information Solutions, Inc., 901 F.3d 619, 627-28 (6th Cir. 2018).

The Court should view the facts and draw all reasonable inferences in favor of the non-moving party. *See* Id. Credibility judgments and weighing of evidence are improper. Hostettler v. College of Wooster, 895 F.3d 844, 852 (6th Cir. 2018). The Court determines whether sufficient evidence has been presented to make the issue of fact a proper jury question. Id. The mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient to survive summary judgment. Rodgers v. Banks, 344 F.3d 587, 595 (6th Cir. 2003).

LAW AND ARGUMENT

I. LIVESTREAMING IS SPEECH PROTECTED BY THE FREE THE FIRST AMENDMENT

The Supreme Court has held that the purpose of the First Amendment is to prohibit governments from "abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble." Richmond Newspapers v. Commonwealth of Virginia et al, 448 U.S. 555, 575 (1980). The Court in Richmond continued, indicating that the First Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-

loving society, will allow." 448 U.S. at 576. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its messages, its ideas, its subject matter, or its content." Ashcroft v. ACLU, 535 U.S. 564, 573 (2002).

Further, the First Amendment has a core purpose of "assuring freedom of communication on matters relating to the functioning of government." Richmond 448 at 575. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966). Regarding communications relating to governmental affairs, the Court in Richmond claims: "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." 448 U.S. at 575-76 (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)) *See* Russell v. Lundergan-Grimes, 784 F.3d 1037, 1051 (6th Cir. 2015) (stating that "political speech concerning public affairs is more than self-expression; it is the essence of self-government").

The Supreme Court in Citizens United evaluated the relationship between the First Amendment and communications about governmental affairs. *See* Citizens United v. Fed. Election Commn., 558 U.S. 310, 339 (2010). The Court in Citizens United held that "more speech, not less, is the governing rule" and "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." Id.

Similarly, the Supreme Court in Globe Newspaper indicated that a major purpose of that Amendment was "to protect the free discussion of governmental affairs." Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 605-06 (1982) (quoting Mills, 384 U.S. at 218). The Court in Globe Newspaper also held that "the First Amendment serves to ensure that

the individual citizen can effectively participate in and contribute to our republican system of self-government." Id.

In the case at bar, this court is called upon to determine, as a matter of first impression, whether livestreaming constitutes protected speech. The resolution at issue uniquely discriminates against livestreaming, as it allows for photography, video recording, and the Defendant itself operates a government-run livestream. The Supreme Court has said that "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011). *See* Reno v. ACLU, 521 U.S. 844, 869-70 (1997) (recognizing that the internet is a "dynamic, multifaceted category of communication"). Once such basic principle is "to protect the free discussion of governmental affairs… reflect[ing] our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2828 (2011) (quoting New York Times v. Sullivan, 376 U.S. 254, 270). The Court has further voiced "particular concern with laws that foreclose an entire medium of expression." City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994).

The Supreme Court extended its First Amendment jurisprudence to social media in general in Packingham v. North Carolina. 137 S. Ct. 1730 (2017). In Packingham, the Court held: "various social networking websites [are] principal sources for knowing current events" and that "such websites [are] the modern public square." Id. Continuing, the Court in Packingham held that "the 'vast democratic forums of the Internet' in general, and social media in particular," have become "the most important places… for the exchange of views." 1737 S. Ct. at 1735 (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997). Social media "can provide perhaps the most powerful

mechanisms available to a private citizen to make his or her voice heard. They allow a[ny] person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" Id. at 1737 (quoting Reno, 521 U.S. at 870). Several circuit and district courts have built upon the foundation laid by Packingham, recognizing that the right to access and interact with social media is a First Amendment protected activity and subject to forum analysis.[1]

Not only do citizens have the right to distribute speech on current political issues, but citizens have a parallel and equally important right to receive said speech. The Supreme Court of the United States has held that "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them." Bd. Of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982). "More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press and political freedom." Id. *See* Citizens United, 558 U.S. at 341 ("it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes").

While the Sixth Circuit has not directly addressed attempts by the government to prevent its citizens from broadcasting or live-streaming council meetings to other, fellow citizens, a parallel issue has been dealt with by the Seventh Circuit in ACLU of Illinois v. Alvarez. The ACLU in Alvarez filed an action against the State's Attorney asking for injunctive relief barring her from enforcing Illinois eavesdropping statute against organization's "police accountability program," which included a plan to openly make audiovisual recordings of police officers performing their duties in public places. *See* 679 F.3d at 583 (2012). The Court in ACLU focused on the act of creating a recording as a form of protected speech, holding: "[a]udio and audiovisual recording are

[1] *See e.g.,* Garnier v. Poway Unified School District, 2109 WL 4736298 (S.D. Ca 2019) and Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016).

media of expression commonly used for the preservation and dissemination of information and ideas and thus are "included within the free speech and free press guaranty of the First and Fourteenth Amendments." Id. at 595 (quoting Burstyn v. Wilson, 343 U.S. 495, 502 (1952). "Audio and audiovisual recording are communication technologies, and as such, they enable speech. Criminalizing all nonconsensual audio recording necessarily limits the information that might later be published or broadcast… and thus burdens First Amendment rights." Id. at 596.

Digital life, and electronic speech, are a ubiquitous part of modern life. Rose, Kevin, New York Times, *The Coronavirus is Showing Us How to Live Online* (March 17, 2020) https://www.nytimes.com/2020/03/17/technology/coronavirus-how-to-live-online.html. Since the pandemic, using the internet to connect with others, share information and resources, and solve problems has shifted from an option to a mandatory part of daily living. *Id.* Facebook's app usage soared by over 50 percent since March of 2020 at the beginning of COVID-19 lockdowns. Isaac, Mike and Frenkel, Sheera, New York Times, *Facebook Is 'Just Trying to Keep the Lights On' as Traffic Soars in Pandemic* (March 24, 2020) https://www.nytimes.com/2020/03/24/technology/virus-facebook-usage-traffic.html. Facebook has become an essential communications and information tool during the pandemic, and livestreaming has provided the medium by which Americans exercise some of their most sacred First Amendment rights, including spreading political messages and participating in church services. *Id.*

The United States Army operates an official livestream at https://www.twitch.tv/usarmyesports. "More than 700 million people a month play, watch or hang out in gaming groups on Facebook, said Vivek Sharma, the company's head of gaming." Khan, Imad, New York Times, *Why Twitch is Still the King of Live Game Streaming* (Dec. 15, 2019)

https://www.nytimes.com/2019/12/15/business/tech-video-game-streaming-twitch.html The government's comment moderation on its channel has come under fire, with Senior Staff Attorney Katie Fallow opining that "The government can't try to engineer the conversation of the public by saying only people who agree with us can respond." Horton, Alex, Washington Post, *Army ban on war crime comments during Twitch stream may have violated First Amendment, lawyers say* https://www.washingtonpost.com/video-games/esports/2020/07/20/army-esports-twitch-speech/. Precisely the same conduct is at issue in this case.

In this case, Plaintiff Knight used his Facebook page to host a livestream of Montgomery County Commission meetings prior to the enactment of Resolution 19-8-3. (Knight Declaration). Prior to the enactment of Resolution 19-8-3, Plaintiff Knight would sometimes livestream Montgomery County Commission meetings from his commissioner's chair when Plaintiff Wikholm was not able to attend the meetings. (Knight Depo. 11:13-19). Seeing public comments during livestreams allowed Plaintiff Knight to gauge public reaction in real-time to the events transpiring on the commission floor. (Knight Depo. 44:14-22). Hosting livestreams and engaging with viewers through a Facebook livestream is an effective manner to increase voters' awareness of issues additional "likes" on Plaintiff Knight's Facebook page. (Knight Declaration) Beginning in 2018, Plaintiff Joshua Wikholm was employed by Plaintiff Knight to stand in the commission chambers and hold an electronic device from which the video feed was captured and broadcast to Jason Knight's Facebook page. (Wikholm Depo. 7:8-13; Knight Depo. 12:9-16). When livestreaming, Plaintiff Wikholm would use one electronic device to capture video feed and broadcast the feed to Facebook simultaneously. (Wikholm Depo., 23:1-24:25). Plaintiff Webb preferred to view commissioner Jason Knight's livestream due in part to the community of other viewers and their comments. (Webb Declaration).

Based on these facts, livestreaming has more in common with broadcasting and publishing than recording. There exists an added communicative layer of engagement with audience engagement with the streamer's content on social media networks, and the viewership on such networks presents a new and crucial medium for the dissemination of information and the spread of political ideas.

These facts directly implicate 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011). See Reno v. ACLU, 521 U.S. 844, 869-70 (1997). Livestreaming on one's own social media page is a unique form of modern communication. The effect of Resolution 19-8-3 § 7 is the silencing of disagreement. Pro-government comments are allowed, and certain anti-government comments are auto-filtered by the moderation setting maintained by the County. (Exhibit 1; Burchett Depo. Exhibit 1). Whether or not this is the default setting, it is a choice among options and the choice remains in the control of the government. Exhibit 2.

II. RESOLUTION 19-8-3, § 7, IS AN IMPROPER TIME, PLACE, AND MANNER RESTRICTION ON PROTECTED SPEECH

The next step is to perform a forum analysis and determine the appropriate level of scrutiny to be applied by the court to the purported restriction. *See* Tucker v. City of Fairfield, 398 F.3d 457, 463 (6th Cir. 2005). The courts have determined that a local government meeting, such as a county commission meeting, is a limited public forum and, therefore, the government may "apply restrictions to the time, place, and manner of speech so long as those restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" Youkhanna v. City of Sterling Heights, 332 F.Supp.3d 1058, 1069 (E.D. Mich. 2018) (quoting Jobe v. City of Catlettsburg, 409 F.3d 261, 266 (6th Cir.

2005). *See e.g.*, City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n, 429 U.S. 167, 174-176 (1976); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

Resolution 19-8-3 was adopted by the Montgomery County Commission on August 12, 2019 (ECF 1-2) Resolution 19-8-3, § 7, states:

> "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 there for an extended period." (ECF 1-2)

The Plaintiffs concede that Resolution 19-8-3, § 7, is content neutral.

In determining whether a limitation on speech is permissible under the First Amendment, courts apply a "forum analysis." Tucker v. City of Fairfield, 398 F.3d 457, 463 (6th Cir. 2005). "When the government designates a limited public forum for speech, as [in] the case of a city council meeting, it may apply restrictions to the time, place, and manner of speech so long as those restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' " Youkhanna v. City of Sterling Heights, 332 F. Supp. 3d 1058, 1069 (E.D. Mich. 2018), *aff'd*, 934 F.3d 508 (6th Cir. 2019) (quoting Jobe v. City of Catlettsburg, 409 F.3d 261, 266 (6th Cir. 2005)).

" '[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,' and does not 'burden substantially more speech than is necessary to further the government's legitimate interests.' " *Tucker*, 398 F.3d at 463 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). "[T]he regulation's defender, not the challenger, bears the burden on the issue of narrow tailoring." *Timmon v. Wood*, 316 F. App'x 364, 365 (6th Cir. 2007) (citing *Horton v. City of Houston*, 179 F.3d 188, 194 (5th Cir. 1999)).

A. Resolution 19-8-3, § 7, is Not Narrowly Tailored to Serve a Significant Government Interest.

Initiating a facial challenge against a statute's constitutionality under the First Amendment is an overbreadth challenge. *See* Speet v. Schuette, 726 F.3d 867, 872 (6th Cir. 2013). Under these circumstances, "the plaintiff bears a lesser burden: to demonstrate that a substantial number of instances exist in which the law cannot be applied constitutionally." Id. In the First Amendment overbreadth challenges, "showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate all enforcement of that law." Viginia v. Hicks, 539 U.S. 113, 119 (2003).

First, § 7 of Resolution 19-8-3 is over-inclusive because it prohibits all livestream communications, including those containing objectively neutral, factual information. These onerous and broad restrictions are not narrowly tailored. *See* McCutcheon v. Fed. Election Commn., 134 S. Ct. 1434, 1446 (2014) ("if a law that restricts political speech does not 'avoid unnecessary abridgment' of First Amendment rights, it cannot survive 'rigorous' review") (quoting Buckley, 424 U.S. at 25). "Security" is the justification upon which Montgomery County hopes to pin its success, but it cannot justify this broad ban in light of the less restrictive alternatives.

Montgomery County Commission meetings are held on the third floor of the historic courthouse at 1 Millennium Plaza in Clarksville, Tennessee. (Fuson Depo. 14:11-18). The historic courthouse is a building with three floors. (Smith Depo. 8:11-9:25) There are no operational security cameras in the building. (Burchett Depo. 16:15-17:11). The public may only access the building through one entrance on the first floor, which is manned by armed guards at a security checkpoint with a metal detector and an x-ray machine. (Durrett Depo. 12:17-6). There are four operational cameras in the commission chambers with audio that are used to generate the video

feed broadcast through the livestream. (Burchett Depo. 45:1-25) The mere act of livestreaming alone does not cause harm or pose a security threat. Fuson Depo., 26:13 to 26:19. Neither photography nor video recording is prohibited, but these activities are required to take place in a designated area of the chambers, and this area was designated in order to prevent certain viewing angles that could pose a security threat. (Fuson Depo., 22:20-22; ECF 1-2)

Further, § 7 of Resolution 19-8-3 is also unconstitutional because it pick-and-chooses who may engage in political speech. The Court in Citizens United held that the First Amendment prohibits any restriction that "distinguish[es] among different speakers, allowing speech by some but not others." 558 U.S. at 340. Here, this Provision allows the government to broadcast its own recording of council meetings, while preventing others from distributing the same recording. "When Government seeks to use its full power, including criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves." Citizens United, 558 U.S. at 356. *See* First Nat. Bank of Boston, 435 U.S. at 784-85 ("[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subject about which persons may speak and the speakers who may address a public issue"). *See also* City of Renton, 475 U.S. at 48-49 ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

Montgomery County, as operator of the livestream, maintains the ability to remove comments from the livestream if he decided to do so, but Skip Burchett (the official who actually oversees the moderation) has never affirmatively removed a comment from the livestream. (Burchett Depo. 28:19-24) Montgomery County's comment moderation features on its YouTube

channel are the "default" selection among options ranging from "Turn off comments" to "allow all comments." That setting is called "Hold potentially inappropriate comments for review." YouTube automatically prevents "potentially inappropriate" comments from appearing in the livestream publicly, and such comments must then be reviewed and approved by the livestream operator before they may viewed publicly. (Burchett Depo. 39:1-40:25; Burchett Depo. Exhibit 1).

By operating the government YouTube livestream with control over moderation, and especially by using the "flag inappropriate comments for review" function, the Defendant is essentially "licensing" critical speech. In fact, the Supreme Court recognizes "two evils that will not be tolerated," once of which is "a scheme that places 'unbridled discretion in the hands of a governmental official or agency." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225 (1990) (quoting City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 757 (1988). Laws that subject the exercise of First Amendment freedoms to the prior restraint of a license "must contain 'narrow, objective, and definite standards to guide the licensing authority.'" Forsyth Cty., Ga. V. Nationalist Movement, 505 U.S. 123, 131 (1992) (quoting Shuttlesworth v. City of Birmingham Ala., 394 U.S. 147, 150-51 (1969). "The reasoning is simple: if the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted." Id. Second, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible." FW/PBS, Inc., at 226.

"Unbridled discretion runs afoul of the First Amendment because it risks self-censorship and creates proof problems in as-applied challenges. City of Lakewood, 486 U.S. at 757-759. "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior

restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." Id. at 757. Moreover, even where self-censorship is avoided, "the absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power." Id. at 758. Any "eventual relief may be 'too little and too late.'" Id. Because unfetter governmental discretion over the licensing of free expression "constitutes a prior restraint and may result in censorship," a plaintiff may bring facial challenges to statutes granting such discretion "even if the discretion and power are never actually abused." Id. at 757. Miller v. City of Cincinnati, 622 F.3d 524, 532 (6th Cir. 2010).

Under the unbridled discretion doctrine, the Supreme Court has struck down restraints such as: (1) a licensing scheme limiting public demonstrations on city streets to only those that benefit "public welfare, peace, safety, health, decency, good order, morals or convenience," Shuttlesworth, 394 U.S. at 149-50, (2) an ordinance authorizing the mayor to evaluate applications for the installation of news racks on public property without any stated criteria, Lakewood, 486 U.S. at 753, and (3) a permitting scheme for parades, assemblies, and demonstrations that required payment of a fee based on the expenses incident to the maintenance of "public order," Forsyth Cty. 505 U.S. at 126-27.

The Supreme Court has not explicitly elaborated on the unbridled discretion doctrine in a limited public forum or a nonpublic forum case. Nor do the parties identify that we. Among our sister circuits, however, "there is broad agreement that, even in limited and nonpublic forums, investing governmental officials with boundless discretion over access to the forum violates the First Amendment." Child Evangelism Fellowship of MD, Inc. v. Montgomery Cty. Pub. Sch., 457 F.3d 376, 386 (4th Cir. 2006); *See also* Amidon v. Student Assoc. of the State Univ. of NY at Albany, 508 F.3d 94, 102-05 (2nd Cir. 2007); Child Evangelism Fellowship of SC v. Anderson

Sch. Dist. Five, 470 F.3d 1062, 1069-70 (4th Cir. 2006) (striking down fee waiver policy based on the "the district's best interest"); Am. Crivil Lierties Union v. Mote, 423 F.3d 438, 445-46 (4th Cir. 2005); Southworth v. Bd of Regents, 307 F.3d 566, 575-80 (7th Cir. 2002); DeBoer v. Vill. Of Oak Park, 267 F.3d 558, 572-74 (7th Cir. 2001) (striking down policy requiring events to "benefit[ ] the public as a whole"); Roach v. Stouffer, 560 F.3d 860, 869-70 (8th Cir. 2009); Lewis v. Wilson, 253 F.3d 1077, 1078-81 (8th Cir. 2001) (striking down policy allowing denial of custom license plates contrary to "public policy")' Kaahumanu v. Hawaii, 682 F.3d 789, 805-07 (9th Cir. 2012); Atlanta Journal & Constitution v. City of Atlanta Dept. of Aviation, 322 F.3d 1298, 1310-11 (11th Cir. 1991); Sentinel Commc'ns Co. v. Watts, 936 F.2d 1189, 1196-1200 (11th Cir. 1991); Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1321-25 (Fed. Cir. 2002); Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299, 1308-10 (Fed. Cir. 2008). "Indeed, the dangers associated with unbridled discretion are no less present in limited public forums, and Governor Abbott and Mr. Welsh do not argue to the contrary." Freedom From Religion Found v. Abbott, 955 F3d 417, 427-28 (5th Cir. 2020).

Further, to satisfy the requirement of narrow tailoring, the restriction must promote a significant government interest that "would be achieved less effectively absent the regulation,' and does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" Tucker, 398 F.3d at 463 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) ("the law must not 'burden substantially more speech than is necessary to further the government's legitimate interests.") (quoting McCullen v. Coakley, 573 U.S. 464, 486 (2014). While a regulation is not invalid simply because the government's interest could be adequately served by some less-speech restrictive alternative, the availability of less restrictive alternatives demonstrates why the

Resolution is "substantially broader than necessary." Ward, 491 U.S. at 800. Further, "the regulation's defender, not the challenger, bears the burden on the issue of narrow tailoring." Timmon v. Wood, 316 F. App'x 364, 365 (6th Cir. 2007) (citing Horton v. City of Houston, 179 F.3d 188, 194 (5th Cir. 1999).

Montgomery County could not identify a specific, articulable security threat posed by non-government livestreaming that did not depend on another, far more significant variable such as an unlocked and unattended door. (See generally Fuson Depo., Smith Depo., Burchett Depo., Durrett Depo.) Because this ban does not actually serve the purpose of protecting security in any meaningful fashion, it cannot be narrowly tailored to achieve this interest.

Moreover, § 7 of Resolution 19-8-3 also constitutes an impermissible prior restraint on First Amendment rights. The Supreme Court in Nebraska Press Ass'n v. Stuart held that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." 427 U.S. 539, 559 (1976). "A prior restraint… by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for a time." Id. In fact, the Court in Nebraska Press found that prior restraints on speech are particularly heinous when they restrict communications relating to news and commentary on current events, such as council meetings. Id. *See* New York Times Co. v. U.S. 403 U.S. 713, 714 (1971) ("[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity") *See also* First Nat. Bank of Boston, 435 U.S. at 784-85 (held that attempts to channel the expression of views through prior restraints are "unacceptable under the First Amendment").

B. Resolution 19-8-3, §7, is Not Supported by a Significant Governmental Interest

The governmental interests being used to support this Provision are substantially outweighed by the rights of access provided by the First Amendment and our Nation's interest in maintaining an open government.

The Court in Richmond indicated that "[t]he right of access to places traditionally open to the public… may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the rights of assembly is not without relevance." Richmond 448 at 577. "People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may 'assembl[e] for any lawful purpose.'" Id. at 578 (quoting Hague v. CIO, 307 U.S. 496, 519 (1939). Here, livestreaming serves all these purposes of assembly. Plaintiff Knight hosted and operated his livestream and actively participated in commentary with viewers; Plaintiff Wikholm operated livestreams and actively participated in commentary with viewers; and Plaintiff Webb chose to listen, observe, and learn about Montgomery County legislative activity through these livestreams.

The Court in Globe Newspaper Co. indicated that "the circumstances of the particular case may affect the significance of the interest." 457 U.S. at 608. The Tennessee Attorney General elaborated on the government's interest in these matters and indicated that "a city council may make reasonable rules to ensure that its meetings are conducted in an orderly and efficient manner… a city council may impose reasonable restrictions on persons in attendance at public meetings… [a city council] may exercise the State's police power… to protect the public health, safety and welfare… The question is whether these interests would be held sufficient to justify a blanket (or some lesser) restriction on the presence of photographic equipment… at the city council meeting." TN Att'y Gen. Op. No. 95-126 (1995). (pg 5). The Tennessee Attorney General

continued, holding: "it is the opinion of this Office that these interests would not be deemed sufficient to justify a total ban on video and photographic equipment at city council meetings. The breadth of the proposed total ban goes well beyond that which is reasonably related to the city's legitimate interests" Id. (pg 6).

Montgomery County has failed to articulate a sufficient significant governmental interest to support Resolution 19-8-3, § 7. During deposition, Sheriff Fuson specifically stated that the act of livestreaming alone does not cause harm. Fuson Depo., 26:13 to 26:19. The Defendant relies upon the claim that livestreaming presents a security risk because it may facilitate the ability or one or more persons outside the chamber or outside the building to do harm by disclosing the location of security personnel or other targets in real-time. Id., 26:13 to 26:19. Sheriff Fuson developed this opinion despite the fact that a security assessment performed by Brian Grisham failed to implicate livestreaming as a viable security threat. Id., 90:7 to 90:12.

Sheriff Fuson described the security measures in place "have to come through the metal detector, place their items on the built, the deputy checks them. Then they would go up an elevator… and come out on the third floor to go to the county commission meeting." Id. 16:15 to 16:22. Also, Sheriff Fuson indicated that the sole purpose of the security checkpoint on the first floor is to prevent anyone from entering the building with a weapon. Id. 25:14 to 25:18. Sheriff Fuson then stated that anywhere from three to five deputies would be stationed inside and out of the county commission meeting room. Id. 15:7 to 15:12.

Sheriff Fuson also stated that the specific purpose of the designated area for the non-live broadcasted audio/video recordings is to prevent those certain viewing angles of the person recording. 27:4 to 27:8. Further, Mr. Burchett stated in deposition that Montgomery County uses

"three to four" different cameras "at different angles" to capture county commission meetings for Montgomery County's YouTube channel. Id. 45:3 to 45:10.

It is for these reasons that the livestreaming ban does not serve a compelling government interest. In the alternative, Plaintiffs contend all arguments raised in this section support their argument that the Resolution is not narrowly tailored to achieve any compelling government interest.

C. Resolution 19-8-3, § 7, Does Not Leave Open Ample Alternative Channels of Communication

Montgomery County's YouTube channel is not a sufficient alternative channel of communication as compared to a real-time livestream, regarding both the manner and level of citizen engagement. Other livestreams, including those provided by Jason Knight and Joshua Wikholm allow individuals to comment and, potentially, critique or criticize the county commission meetings. A fact which Montgomery County seeks to avoid by limiting distribution of the meeting solely to its YouTube channel. The Supreme Court in Globe Newspaper Co. held: "[p]ublic scrutiny… enhances the quality and safeguards the integrity… Moreover, public access… fosters an appearance of fairness, thereby heightening public respect… [and] permits the public to participate and serve as a check… an essential component in our structure of self-government." 457 U.S. at 606.

Montgomery County's IT Director, Skip Burchett, acknowledged that Montgomery County's YouTube channel operates on a time delay from the actual County Commission meeting, stating that "yes, there's a broadcast delay… if there was… some kind of event that needed to not be broadcast out live." Burchett Depo. 26:14 to 27:8. Montgomery County's YouTube channel also includes a comment section that is subject to moderation by the account holder (in this case,

Montgomery County). Mr. Burchett stated during his deposition: "I do believe, as the operator of the stream, [Montgomery County] would have the ability to remove comments if we decided to." Burchett Depo. 28:14 to 28:22. Montgomery County can choose to remove certain comments, or they are held for review by YouTube's comment moderation system. Burchett Depo. 32:16 to 32:20. According to Mr. Burchett, the default moderation setting, and the one currently used by Montgomery County, is to "hide potentially inappropriate comments for review." Burchett Depo. 39:20 to 39:22. Under this setting: "YouTube's system works to find potentially inappropriate comments, but it's not always correct. As you review comments, the system gets better at finding comments to hold for review." Burchett Depo. 39:23 to 40:13. During one county commission meeting on January 11, 2020, a user's comment "IDIOTS" was held for review and subsequently removed by Mr. Burchett. Burchett Depo. 37:4 to 37:9.

During his deposition, Jason Knight indicated that Montgomery County's YouTube channel has about "three to five hundred individuals that participated… versus about two to five thousand on [his Facebook livestream]. 47:15 to 47:18. Josh Wikhom made similar remarks about the lower participation rates for Montgomery County's YouTube channel, stating that the discrepancy was because "somebody was responding on the Facebook channel and nobody was responding on the YouTube Channel." 13:10 to 13:16.

III. RESOLUTION 19-8-3 VIOLATES ARTICLE I, § 19 OF THE TENNESSEE STATE CONSTITUTION

The Tennessee Constitution acknowledges that "[t]he free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Tenn. Const. art. I, § 19. This language has been stated by the Tennessee Supreme Court to be "a substantially stronger provision that that contained in the First Amendment to the Federal Constitution." Press, Inc. v. Verran, 569

S.W.2d 435, 442 (Tenn. 1978). As the Tennessee Supreme Court observed in Leech v. American Booksellers Ass'n, Inc., in the context of determining whether obscenity was entitled to greater protection under the Tennessee Constitution than the Federal Constitution, "we may interpret Article I, § 19 of the State Constitution as providing greater freedom of expression than that provided in the Federal Constitution. 582 S.W.2d 738, 745 (Tenn. 1979).

The free speech and expression protections of the Tennessee Constitution are at least as broad as the First Amendment. State v. Mitchell, 343 S.W. 3d 381, 392 (Tenn. 2011). "In order to be permissible, any regulation of free speech 'must serve an important and substantial public interest, wholly divorced form the suppression of free speech,' and the restrictions 'must be no greater than is essential to the furtherance of that interest.'" Id. (quoting H&L Messengers, Inc. v. City of Brentwood, 577 S.W.2d 444, 452 (Tenn. 1979)).

In the case at bar, the Plaintiffs aver that the "free communication of thoughts and ideas" and the "right to speak, write, and print" guaranteed by Article I, § 19, requires Montgomery County to demonstrate that Resolution 19-8-3, § 7, 'serve an important and substantial public interest, wholly divorced from the suppression of free speech,' and the restrictions 'must be no greater than is essential to the furtherance of that interest.

As the Plaintiffs demonstrate *supra*, by reference to the farcical claims regarding threats to public safety posed by livestreaming, suppression of free speech is the objective of Resolution 19-8-3, § 7, and the County's cited safety concerns are spurious. Therefore, Resolution 19-8-3, §7, violates Article I, § 19, of the Constitution of the State of Tennessee.

CONCLUSION

Section 7 of Resolution 19-8-3 violates the First Amendment rights of the Plaintiffs so flagrantly that there is no genuine dispute of material fact and the Plaintiffs are entitled to judgment as a matter of law. Accordingly, this Motion should be granted.

Respectfully submitted,

/s/ Wesley Clark
Wesley Clark, #32611
Frank R. Brazil, #34586
BRAZIL CLARK, PLLC
2901 Dobbs Avenue
Nashville, TN 37204
615-730-8619
615-514-9674 (fax)
wesley@brazilclark.com
frank@brazilclark.com

CERTIFICATE OF SERVICE

I certify that on March 12, 2021, I filed a true and correct copy of the foregoing document via the Court's electronic filing system and a copy of this document is expected to be served by operation of that system to the following:

W. Timothy Harvey
Rebecca J. Garman
LAW OFFICE OF W. TIMOTHY HARVEY
Attorneys for the Defendant
310 Franklin Street
Clarksville, Tennessee 37040
(931) 552-0549
Fax: (931) 552-0559
timharvey@wtharveylaw.com
rebeccagarman@wtharveylaw.com

/s/ Wesley Clark