UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ANDREW WHITE, *et al.*,	:	**Case No. 1:18-CV-533**
	:	
Plaintiffs,	:	**Judge Michael R. Barrett**
	:	
-vs-	:	
	:	
CITY OF CINCINNATI, OHIO, *et al.*,	:	
	:	
Defendants.	:	

PLAINTIFF ANDREW WHITE'S MOTION TO REMAND OR IN THE ALTERNATIVE MOTION FOR PRELIMINARY INJUNCTION

The City of Cincinnati impermissibly restrains city residents for exercising their constitutional right to, though a home security alarm, communicate in defense of themselves, their families, their homes, and their businesses, irrespective of whether their communications actually *request* police assistance and irrespective of whether they have already paid general and line-itemed local taxes dedicated to funding police protection.

If Defendants' enforcement of the Prohibition is not immediately enjoined, Plaintiffs will suffer irreparable harm for which there is no adequate remedy at law, including but not limited to subjection to fines of $800 per-communication if they exercise their right to secure and defend themselves and their private property (and communicate pursuant thereto) without first paying an uncorrelated assessment to the City.

Accordingly, Plaintiffs hereby move, pursuant to Civ. R. 65, for issuance of a preliminary injunction preliminarily enjoining the City from (1) enforcing City of Cincinnati Codified Ordinance Section 807-1-A4(2) so as to forbid communications (reporting crime and alerting potential criminals on-site) without prior payment of an arbitrary assessment; and (2) enforcing City of Cincinnati Codified Ordinance Section 807-1-

A4(2) so as to impose fines upon those who communicate important security-alarm-related information without making prior payment of the City's arbitrary alarm assessment.

However, Plaintiffs concomitantly recognize the impermissible risk that the foregoing assessment they seek to enjoin could be deemed a tax for the purposes of the Tax Injunction Act.[1] As such, moving forward in this Court could cause inefficiencies and misallocation of resources, including a potential *sua sponte* finding by the Court of Appeals that this Court never properly maintained jurisdiction in the first instance.

Consequently, Plaintiffs respectfully request that this Court avoid the inefficiencies associated with an ostensible lack of jurisdiction by remanding this matter to the Hamilton County Court of Common Pleas. In sum, this Court should remand this case to the Court of Common Pleas if unless it concludes that one or more of the challenged assessments is a "tax," but enjoin the challenged assessments if it concludes - - absolutely and beyond any doubt - - otherwise.

I. BACKGROUND[2]

Plaintiffs initiated this civil rights action on July 31, 2018 by filing a Verified Complaint challenging, facially and as applied to them, the City of Cincinnati's restraint on security-alarm-related communications.

A. The City's Prohibition on Communicating Evidence of a Crime through an Alarm Agent or Sounding an Alarm absent prior payment to the City.

With respect to *content* and most *speakers,* the City of Cincinnati and its Police Department invites homeowners to report information reflecting potential criminal conduct. See Verified Complaint, Paragraphs 30-33. However, when those same homeowners opt to share that information through associating with a security alarm business, the invitation is invoked and significant restraints are imposed. Meanwhile, homeowners are forbidden from independently - - without police assistance - - communicating through alarms that protect their home unless they first pay the City a royalty of between $50 and $100.

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[1] To be clear, Plaintiffs' believe that the challenged "alarm registration fees" only, and not the City's fines, are subject to the TIA.

[2] Facts recounted herein are derived from Plaintiffs' Verified Complaint and attached Exhibits.

More specifically, a Cincinnati homeowner may not (1) "alert[] an entity which notifies a government organization of [an unlawful act's commission or occurrence];" (2) "give a signal, either visual, audible or both, or cause[] to be transmitted a signal;" or (3) "give[] a signal [of an unlawful act, or of an emergency], either visual, audible, or both only at the alarm site and which does not alert a governmental organization." See Sections 807-1-A2; 807-1-A4(2)(a); 807-1-L. Communicating through signaling the occurrence of an unlawful act or emergency does not result in any penalty unless it is done through an alarm or alarm agent. If done through an alarm or alarm agent, the homeowner who so signals is fined $100. Section 807-1-A4(2)(d).

Further, the City charges twice as much to local businesses who inform the City of criminal activity through alarm-related information: "*residential* alarm users shall pay a non-refundable, non-transferable, user and location-specific biennial fee of $50 . . . *Non-residential* Alarm Users shall pay a non-refundable, non-transferable, user and location-specific biennial fee of $100." Section Section 807-1-A4(2)(b) and (c).

The City's own public records display that all revenue from these assessments are placed into the City's "General Funds Account," rather than in an account established for alarm-related expenses. See Exhibit 3 to Verified Complaint. And the assessment are well beyond what is necessary to accomplish the City's administrative ends: the City summarizes the "total cost to administer" the alarm system program as $192,403.31 per year. *Id.* However, the City has collected $488,665 in alarm registration fees in 2015, $242,901 in alarm registration fees in 2016, and $476,098 in alarm registration fees in 2017. *Id.* Thus, the City typically collect more than double the costs of administering the program in alarm registration fee revenue alone (this number does not include other assessments for false alarms, for alarm business registration, or for fines imposed on those who communicate without a license).

B. The City's Enforcement against Plaintiffs

The City has enforced its restraints on alarm communication against each Plaintiff here. Plaintiff Vena Jones-Cox was forced to pay the alarm license fee of $50 to communicate in defense of herself and her

home and a separate alarm license fee of $100 to communicate in defense of herself and her office. Plaintiff Andrew White reported evidence of crime at one of his Cincinnati homes and swiftly drew a fine of $100 from the City for doing so without first paying the City. Verified Complaint, Paragraphs 8-14, 43-45, Exhibit 2. The City informed him that the next communication and each communication thereafter, irrespective of the seriousness or validity of the crime reported, would cost him $800. *Id.* The City further informed him that these fines would persist even if Mr. White simply utilized a "local" alarm signal that alerts a criminal that he has been detected on the property (akin to a car alarm). *Id.* As a result, Mr. White has been forced to chill his own expression and limit his defenses by removing his security alarms, despite risking greater exposure to further criminal conduct. With each day that passes, Mr. White places his safety and property at risk or faces an $800 fine each time he communicates evidence of criminal activity, whether to the city or simply directly to the criminal intruder on the premises at the time.

I. LAW AND ANALYSIS

This Court should remand this case. If however, it determines that the Tax Injunction Act does not forbid its jurisdiction, it should preliminarily enjoin the City's restraint on and suppression of protected communications.

In determining whether to grant the present motion for issuance of a preliminary injunction, the Court is to consider four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether the issuance of a temporary restraining order or preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of a temporary restraining order or preliminary injunction. *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (*en banc*). These factors are to be *balanced* against one another and should not be considered prerequisites to the granting of a temporary restraining order or preliminary injunction. *See United Food & Commercial Workers Union,*

Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341, 347 (6th Cir. 1998). This balance of interests weighs strongly in favor of the Plaintiffs and the granting of the present motion.

A. Because the challenged assessment is likely a "tax," this Court should remand to state court.

The removing party maintains the burden of proving the existence of federal jurisdiction. *See Strawn v. AT & T Mobility LLC*, 530 F.3d 293, 296 (4th Cir.2008). And when the plaintiff challenges the propriety of removal, the defendant bears the burden of proving that removal was proper. *See Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir.1994). On a motion to remand, the court must "strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court." *Richardson v. Phillip Morris, Inc.*, 950 F.Supp. 700, 702 (D.Md.1997) (citing *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir.1993)). This standard reflects the reluctance of federal courts "to interfere with matters properly before a state court." *Id.* at 701. *Brittingham 62, LLC v. Somerset Cty. Sanitary Dist., Inc.*, No. CIV.A. GLR 12-3104, 2013 WL 398098, at 2 (D. Md. Jan. 31, 2013). Here, there is sufficient cause for doubt as to whether this Court maintains jurisdiction to enjoin the challenged monetary assessments.

The Tax Injunction Act provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. This statute creates a "broad jurisdictional barrier" that "limit[s] drastically federal district court jurisdiction to interfere with ... the collection of [state and local] taxes." *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 825–26 (1997). "Thus, the Supreme Court has gone so far as to hold that the TIA deprived it of jurisdiction even in cases where the defendant State argued in *favor* of federal court review." See *California v. Grace Brethren Church*, 457 U.S. 393, 408–09 (1982).

Although not a *quintessential* example of a tax, the City's "alarm registration fee" likely qualifies as a "tax" for TIA purposes. As an initial matter, the fact that the assessment challenged here is characterized as a "fee" rather than a "tax" is not dispositive:

> For purposes of the Tax Injunction Act, it is this court that decides whether the state or local law is a tax, guided by "federal law ... rather than ... state tax labels." *Robinson Protective Alarm Co. v. City of Philadelphia,* 581 F.2d 371, 374 (3d Cir.1978); *see Collins Holding Corp.,* 123 F.3d at 800 n. 3 (noting that "[w]hether the body imposing the assessment labels it as a tax or a fee is not dispositive because the label is not always consistent with the true character of the assessment"). Thus, we look to federal law which "make[s] a general distinction between broader-based taxes that sustain the essential flow of revenue to state (or local) government and fees that are connected to some regulatory scheme." *Collins Holding Corp.,* 123 F.3d at 800. A tax is generally a revenue-raising measure, imposed by a legislative body, that allocates revenue "to a general fund, and[is] spent for the benefit of the entire community." *Id.* (quoting *San Juan Cellular Tel. Co. v. Public Serv. Comm'n,* 967 F.2d 683, 685 (1st Cir.1992)). A user fee, by contrast, is a "payment[ ] given in return for a government provided benefit" and is tied in some fashion to the payor's use of the service. *United States v. City of Huntington,* 999 F.2d 71, 74 (4th Cir.1993). Generally speaking, a special assessment imposed by a municipality qualifies as a tax within the meaning of the Tax Injunction Act. *See, e.g., Burris,* 941 F.2d at 720; *Indiana Waste Sys., Inc. v. County of Porter,* 787 F.Supp. 859, 865 (N.D.Ind.1992) (collecting cases).

Folio v. City of Clarksburg, W.Va., 134 F.3d 1211, 1212–18 (4th Cir. 1998); see also *Hedgepeth v. Tennessee*, 215 F.3d 608, 612 (6th Cir. 2000)("the definition of the term 'tax'" in the Tax Injunction Act 'is a question of federal law").

The Sixth Circuit Court of Appeals' 2016 decision in *Page v. City of Wyandotte, MI* is illuminates the character of the City's alarm assessment due to its broad recitation of the law on this front as well as its adjudication of a materially similar assessment. There, the Court confronted a materially similar disposition, which ostensibly resulted in the conclusion that the District Court should have remanded that matter:

> Page sued the City, the City's mayor, and the City Council in state court, challenging the City's collection of water and cable franchise fees from its water and cable customers. The City removed the case to federal court, citing Page's federal constitutional claims. But Page moved to remand, arguing that, because the franchise fees are taxes, the Tax Injunction Act deprived the federal court of subject matter jurisdiction. The district court denied the motion to remand with respect to Page's federal claims, proceeding to dismiss the complaint under Federal Rule of Civil Procedure 12(c). We agree with Page that the Tax Injunction Act deprived the district court of jurisdiction to hear Page's case. Accordingly, we must VACATE the district court's opinion and REMAND so that the district court may remand the case to state court.

Page v. City of Wyandotte, MI, 666 F. App'x 390, 391–96 (6th Cir. 2016)("Page seeks to enjoin the City's collection of franchise fees . . . if the franchise fees are 'tax[es]' within the meaning of the Act, the Act bars federal jurisdiction. This is true regardless of whether another basis for federal jurisdiction would otherwise apply"). The Court then articulated the test District Courts within this Circuit are to apply as follows:

> We consider three factors when determining whether a state regulatory assessment is a tax for purposes of the Tax Injunction Act: (1) what entity imposes the assessment; (2) who pays it; and (3) the revenue's ultimate use. *Id.* The goal of this analysis is to determine "whether the assessment in question is for revenue[-]raising purposes"—a tax—"or merely a regulatory or punitive ... fee." *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist.*, 166 F.3d 835, 837 (6th Cir. 1999) (quoting *Wright v. McClain*, 835 F.2d 143, 145 (6th Cir. 1987)). When the factors point in different directions, the third factor is determinative. *Id.* at 838.

Id., at 392, 393. Pursuant to these factors and the Sixth Circuit's application thereof, alongside additional relevant factors, the City of Cincinnati's Alarm Registration Fee would appear to be a tax for TIA purposes.

First, the charge is imposed by Cincinnati City Council rather than a regulatory agency. In *Page*, the Court explained that such an arrangement suggested that the "franchise fee" was indeed a "tax": "The Wyandotte City Council itself authorized both franchise fees. 'An assessment imposed directly by the legislature is more likely to be a tax than an assessment imposed by an administrative agency.'" *Page*, supra.

Second, the alarm assessment is imposed upon a broad range of citizens: any homeowner who either maintains or uses a security alarm at his or her home or business. "An assessment imposed upon a broad class of parties is more likely to be a tax than an assessment imposed upon a narrow class." *Id*. Here, thousands of residents, homeowners, and business owners pay the assessment. See Defendants' Respond to Plaintiffs' Interrogatory No. 3.

Third, and perhaps most importantly, the assessments are transferred directly into the general fund and therefore - - just like general tax dollars - - spent on general public projects, services, and purposes rather than solely on expenses accrued to serve Plaintiffs. In "the absence of a [textual] restriction on the uses of the fee for covering the costs of regulation," a prior assessment licensing expression devolves into an "ill-fated licensing tax." *Fernandes v. Limmer*, 663 F.2d 619, 632–33 (5th Cir. 1981), citing *Murdock v. Pennsylvania*, 319 U.S. 105, at 111 (1943). Simply put, a monetary charge is a tax when "the assessment is expended for general public purposes" and not "only for the benefit of those who pay the fee." *Page*, supra., citing *Hedgepeth*, 215 F.3d at 612 (quoting *Am. Landfill*, 166 F.3d at 837). Accordingly, "[w]hen the ultimate use is to provide a general public benefit, the assessment is likely a tax, while an assessment that

provides a more narrow benefit to the [payees] is likely a fee." *Am. Landfill*, 166 F.3d at 838, 839 ("holding that certain assessments on solid waste disposal were taxes because the money was 'placed in a fund that, while separate from the general fund, serve[d] public purposes benefitting the entire community'"). On this front, the *Page* Court explained as follows: "Our decision in *Hedgepeth* is instructive. There we considered whether assessments for new and renewed disabled parking placards were taxes or regulatory fees. Because the assessments were imposed by the state but collected only from individuals needing a disabled parking permit, the analysis ultimately came down to the revenue's use. We held that, because the revenue went into various funds, including the state highway fund and the general fund, the assessments were taxes." *Id.*, citing *Hedgepeth*, at 612–13.

Here, the ordinance imposing the assessment includes no provision earmarking collected revenue for uses specific to costs imposed upon the City by security alarm users. See, generally, Section 807. Further, when asked for "a complete breakdown of where the money paid for the license fee goes," the City conceded that "the money goes into the City's general funds account." See Doc. 2-1, Exhibit 3 to Plaintiffs' Verified Complaint; see also Defendants' Response to Plaintiffs' Interrogatory No. 4. Thus, the revenue collected through the challenged assessments is not earmarked for City expenses incurred on behalf of or due to the homeowners who pay the fee or for expenditure on these homeowners. Even if funds were spent towards addressing crime reported by way of security alarms, the reduction and remediation of crime is a general public governmental purpose.

Fourth, the revenue exceeds the costs of administering the alarm registration program. In *Page*, the Sixth Circuit found this significant:

> The renewal fee raised revenue approximately one-and-a-half times the cost of the program, and the record revealed a "substantial difference between the actual cost of the permanent placard or license plate and the amount that must be paid to obtain one." *Id.* at 613–14. We distinguished cases from other circuits in which the disability permit fee was only high enough to cover the costs of the program. *See Hexom v. Ore. Dep't of Transp.*, 177 F.3d 1134, 1139 (9th Cir. 1999); *Marcus v. Kan. Dep't of Revenue*, 170 F.3d 1305, 1312 (10th Cir. 1999); *see also Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000) (holding that a disabled parking permit fee, whose only purpose was to pay for the cost of the program, was not a tax).

Id., at 393, 394. Here, the City itself concedes that it has collected over $488,665 in "alarm user registration fees" in 2015, over $424,901 in 2016, and $476,000 in 2017 even though its "total costs to administer" the alarm program hovered around $192,000. See Doc. 2-1, Exhibit 3 to Plaintiffs' Verified Complaint; see also Defendants' Response to Plaintiffs' Interrogatories No. 1 and 2. *Id*. Meanwhile, the City's code expressly renders these funds "non-refundable." See Section 807-1-A4(2)(b). Finally, the City appears to not even track what it spends on alarm-related expenses, as demonstrated by its attorneys' disagreement with the program's experts on the amount of such expenditures. See Defendants' Response to Plaintiffs' Interrogatories No. 20, 21, and 22. Thus, the City does not reimburse homeowners when it over-collects, and there is no evidence of an attempt to calibrate the City's collections to the program's actual administrative costs.

Fifth, as supposed "services" for payment of the alarm assessment, citizens who pay it receive nothing beyond that generally available to and received by all City residents, irrespective of whether they pay the alarm assessment: police attention and (arguably) protection, which is kind of service that one would typically expect as a matter of right as a taxpayer, rather than as an "add on" funded by user fees. The Sixth Circuit explained this in *Page*:

> Even if the City could somehow demonstrate that the revenue from the franchise fees covered the portion of the cost of providing City services that is attributable to the utilities, we are still convinced that the franchise fees would be taxes within the meaning of the Act. The City maintains its roads and provides police and fire protection regardless of how many customers subscribe to the City's cable or hook up to its water line. And municipalities do not charge a fee-for-service to fund the police and fire departments; they impose levies, i.e., *taxes*. The franchise fees may be a clever way to surreptitiously increase the City's coffers, but we are convinced that this alternate stream of revenue is nonetheless *tax* revenue. The Tax Injunction Act therefore bars federal court jurisdiction over Page's attempt to "enjoin, suspend or restrain" that revenue stream.

Id. Here, Plaintiffs already pay taxes to fund police protection and other general governmental operations, and are already entitled to receive services related to each. Further, the City concedes that those without security alarms receive the same level of police protection without having to pay any assessment. See Defendants' Response to Plaintiffs' Interrogatory No. 18 ("it is possible to request a police response without

having an alarm system…" Indeed, municipal ordinances imposing such alarm assessments are exceedingly rare, meaning that the vast majority of Ohio cities provide police protection to alarm-using residents through general tax revenue.

Finally, this is not a "fee for service," akin to a water bill. It is of course true that "a fee for service is not a tax." *Page,* supra., citing *Folio v. City of Clarksburg*, 134 F.3d 1211, 1217 (4th Cir. 1998) (holding that a municipal fire service protection fee was a tax since it "was based upon a resident's property owner status instead of his use of the city service"). However, the alarm assessment here is imposed in response to residents' status, i.e. maintaining or using a security alarm affixed to one's home or business, *rather than one's actual use or consumption of city services*. The text of the City's municipal code ensures that, irrespective of whether a homeowner uses any City services associated with his alarm, he or she must pay the alarm fee that is "non-refundable," "non-transferable," and "user and location specific." See Section 807-1-A4(2)(b). By contrast, when the alarm user is responsible for a "false alarm," "false alarm fees" are imposed commensurate with the use of city services.

In conclusion, the alarm registration assessments are quite likely taxes for TIA purposes - - or, at minimum, it appears difficult to meet the high standards of resolving all doubts otherwise.[3] Accordingly, this Court should remand to the County Court of Common Pleas.

B. Plaintiffs are likely to succeed on the merits.

Should this Court reach the merits, Plaintiffs are likely to succeed on the merits of their claim because the City's restraints on alarm-related communications is a content-based and speaker-based prior restraint on important protected expression that is not narrowly tailored to achieve any compelling

[3] Plaintiffs reach this conclusion mindful of this Court's holding *Etzler v. City of Cincinnati*, and respectfully submit the presents of meaningful distinctions exists in this case: (1) the funding of general governmental operations and police services is much broader than the use made of revenue from the assessments challenged in *Etzler*; (2) the Sixth Circuit's subsequent holding in *Page v. City of Wyandotte,* identified additional factors that weight in Plaintiffs' favor here; and (3) the Plaintiffs in Etzler do not have to adequately and timely briefed the issue.

governmental interest (even if suppressing evidence of criminal conduct *were* a compelling governmental interest).

i. The alarm communication restraints suppress protected expression.

A telephone call reporting potential criminal conduct is protected communication, as is signaling detection of a criminal at one's home or business. This is not altered by the fact that the information is factual in nature rather than opinion, whether it arises in response to technology, whether it is made through a professional business or agent on behalf of another, or even whether the speech is occasionally determined to be false.

First, the Supreme Court has emphasized that "the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell v. IMS Health Inc.,* 131 S.Ct. 2653, 2667, (2011); see also *Jian Zhang v. Baidu.com Inc.,* 10 F. Supp. 3d 433, 438–39 (S.D.N.Y. 2014)(noting that the First Amendment "protects the collection and communication of facts as much as it protects opinions, including facts that are not ideologically laden—such as names of crime victims in three-sentence crime reports, names of accused juvenile offenders, lists of bestselling books, lists of tenants who had been evicted by local landlords, information in a mushroom encyclopedia, recipes in a cookbook, and computer program source code" (citing cases)). Thus, "[t]he First Amendment protects even dry information, devoid of advocacy, political relevance, or artistic expression," and " the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell*, supra, citing, *Bartnicki, supra,* at 527, 121 S.Ct. 1753 ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct" (some internal quotation marks omitted)); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 481 (1995) ("information on beer labels" is speech); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (plurality opinion) (credit report is "speech").

Essentially anything "designed to convey a message" is protected expression. *Century Fed., Inc. v. City of Palo Alto,* 710 F. Supp. 1559, 1561–62 (N.D. Cal. 1988); see also *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150–51 (2017)("The law tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer . . . What the law does regulate is how sellers may communicate their prices. A merchant who wants to charge $10 for cash and $10.30 for credit may not convey that price any way he pleases . . . Instead, if the merchant wishes to post a single sticker price, he must display $10.30 as his sticker price. * * * In regulating the communication of prices rather than prices themselves, § 518 regulates speech."); *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 741 (D.C. Cir. 2016)("The Supreme Court has explained that the First Amendment comes "into play" only where "particular conduct possesses sufficient communicative elements," that is, when an "intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it").

Second, telephone calls are protected by the First Amendment. See *Woods v. Santander Consumer USA Inc*., No. 2:14-CV-02104-MHH, 2017 WL 1178003, at 1–5 (N.D. Ala. Mar. 30, 2017), citing *Wreyford v. Citizens for Transp. Mobility, Inc.*, 957 F. Supp. 2d 1378, 1379–82 (N.D. Ga. 2013)("'automated calls to cell phones' is a type of expression, if not pure speech, protected by the First Amendment"). See also *Greenley v. Laborers' Int'l Union of N. Am.*, 271 F. Supp. 3d 1128, 1145–51 (D. Minn. 2017); *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015)(striking down a state anti-robocall statute on First Amendment grounds).

Third, communications directed towards the police are protected by the First Amendment, even when those communications consist of raising middle fingers or uttering obscene words at officers. *See, e.g., Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir.1997)("First Amendment protection is very expansive. The only type of language that is denied First Amendment protection is 'fighting words' . . . Sandul's words and actions do not rise to the level of fighting words. The actions were not likely to inflict injury or to incite

an immediate breach of the peace."); *Duran v. City of Douglas*, 904 F.2d 1378 (9th Cir.1990); *Nichols v. Chacon*, 110 F.Supp.2d 1099, 1102 (W.D.Ark.2000); *Brockway v. Shepherd*, 942 F.Supp. 1012, 1015 (M.D. Pa. 1996); see also *Commonwealth v. Kelly*, 758 A.2d 1284, 1288 (Pa. Super. Ct., 2000).

Fourth, the instrumentalities, technologies, and infrastructures that facilitate the communication of information are protected by the First Amendment. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011)("use of pharmacy records that reveal the prescribing practices of individual doctors" is speech); *Century Fed., Inc. v. City of Palo Alto*, 710 F. Supp. 1559, 1561–62 (N.D. Cal. 1988)(franchise fee on cable operators running cable for communications implicates First Amendment); *Phillips v. Darby Twp., Pa.*, 305 F. Supp. 763, 765 (E.D. Pa. 1969)("In light of the paramount importance of free speech and of possible uses of sound trucks that are relatively innocuous, it seems to us that certain uses of sound trucks cannot be justifiably prohibited by the municipality, and thus Darby's absolute prohibition on the use of sound trucks is unconstitutionally overbroad."); *Kovacs v. Cooper*, 336 U.S. 77, 101 (1949)("[an] ordinance, aimed at the use of an amplifying device, invaded the area of free speech guaranteed the people by the First and Fourteenth Amendments."); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 438–39 (S.D.N.Y. 2014)("After all, the algorithms themselves were written by human beings, and they inherently incorporate the search engine company engineers' judgments about what material users are most likely to find responsive to their queries. In short, one could forcefully argue that what is true for parades and newspaper op-ed pages is at least as true for search engine output.").

Fifth, the freedom of expression is no less viable when one opts to communicate his or her message through a more adept, engaged, or attentive professional agent. In *Brinkman v. Budish*, the Court adeptly explained this:

> "[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Lobbying the government falls within the gambit of protected First Amendment activity. *See F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990) ("It is, of course, clear that the association's efforts ... to lobby District officials to enact favorable legislation

> ... were activities that were fully protected by the First Amendment."); *Roberts,* 468 U.S. at 627 (characterizing lobbying as being "worthy of constitutional protection under the First Amendment").

692 F. Supp. 2d 855, 858–66 (S.D. Ohio 2010). Nor is the protection of Plaintiffs' expression diminished merely because a business professional such as an Alarm Businesses agent, speaks on their behalf. See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018)("Speech is not unprotected merely because it is uttered by "professionals." This Court has "been reluctant to mark off new categories of speech for diminished constitutional protection").

Sixth, punishing or otherwise guarding against allegedly "false" alarms fails to alter the reality that Plaintiffs' communications and proposed communications are speech. See *Turner Broadcasting System v. FCC,* 512 U.S. at 640, 114 S.Ct. 2445 ("[T]he mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards ...."); see also *Jian Zhang v. Baidu.com Inc*., 10 F. Supp. 3d 433, 437–38 (S.D.N.Y. 2014).

Here, the text of the ordinance plainly demonstrates that it regulates, burdens, suppresses, and punishes *communication* such as "alerts," "notifications," and "signals," whether directed to police, criminals, or private security. See Sections 807-1-A2; 807-1-A4(2)(a); 807-1-L; Section 807-1-A4(2)(d). Indeed, the City concedes that alarms are used when "Alarm Businesses and/or Alarm Users contact the Cincinnati Police Department in a variety of ways including but not limited to calling 911, calling other numbers . . . making face-to-face request, texting, emailing, faxing, and using other means…." Defendants' Response to Plaintiffs' Interrogatory No. 16. In essence, the Alarm Business, only if unable to reach homeowners first, calls the City Police Department to inform it that an Alarm User's alarm has alerted, alongside any surrounding circumstances. This is the speech that restrained and punished in the absence of prior payment of an alarm registration assessment.

Meanwhile, the fees and fines abridge, suppress, restrain, and punish protected communication in defense of one's fundamental rights: expression in defense of oneself and one's property from criminal

threats is as important as political speech, insofar as the absence of such expression increases one's exposure to the risk of bodily injury, loss of valuable property, and possibly even the loss of life itself. Indeed, for almost a century, Ohio courts have affirmed that Ohioans maintain a constitutional right to hire others to defend their private property: In 1919, in *In Re W.C. Reilly*, the Court relied upon the language of Article I, Section I to invalidate a municipal ordinance that attempted to criminalize the conduct of "employing any person as a special guard during any industrial disturbance or strike, unless such person shall first have been empowered to act as such special guard by the director of public safety."[4] The Court reasoned that "the assumption heretofore has been that any one was acting entirely within his fundamental rights when he sought, without let or hindrance, from any one, to protect his property."[5]

Thus, there can be no doubt that agents' telephone calls to police to report facts surrounding potential criminal activity adduced through a security alarm is designed to convey a message and then ensuing communication of information to authorities or intruders on-site is protected: when an alarm is triggered it suggests that an unwarranted individual has entered the home or business. The message conveyed to the police (or private security) by the monitoring alarm company, via phone call, is equally expressive: it expresses that there is evidence that an unwelcome intruder has entered the home at a particular address, just as is the message conveyed to the criminal intruder by a local alarm that does not request police help ("we know you're in here").

ii. The assessment on alarm-related communications suppresses, burdens, and restrains protected expression.

A regulation need not be a total prohibition of speech to impermissibly infringe upon protected expression. *First*, **"**it is of course true that government may not tax or otherwise charge a speaker simply for exercising its constitutional right to speak. . . . A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution . . . The power to impose a license tax on the exercise of [first

[4] *In Re W.C. Reilly* (1919), 31 Ohio Dec. 364, 23 Ohio N.P. (N.S.) 65.
[5] Id.

amendment] freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down." *Century Fed., Inc. v. City of Palo Alto,* 710 F. Supp. 1559, 1561–62 (N.D. Cal. 1988), citing, *inter alia, Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943) (citations omitted); *Cox v. New Hampshire*, 312 U.S. 569, 576–78 (1941).

Second, pursuant to clear United States Supreme Court and Sixth Circuit precedent, "regulations that are triggered solely by speech are in fact regulations of speech,"[6] "[g]enerally speaking, government action which chills constitutionally protected speech or expression contravenes the First Amendment,"[7] and "[t]he threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions."[8] The Sixth Circuit's understanding of this matter is that "the harassment necessary to rise to a level sufficient to deter an individual is 'not extreme.'"[9]

Here, the City had conditioned citizens' rights to communicate evidence of criminal conduct at their home or business, uncovered through home security alarms, on citizens' *prior* payment of a non-nominal assessment. Failure to pay this assessment as a prerequisite to communicating results in fines of up to $800 per "unlicensed" communication.

iii. The prior restraint on alarm communications is subject to strict scrutiny.

The alarm licensing fee is a content-based speaker-based prior restraint on communication and is therefore subject to strict scrutiny.

First, "a regulation or licensing requirement that imposes a prior restraint on expression protected by the First Amendment bears "a heavy presumption against its constitutional validity." *BJS No. 2, Inc. v. City of Troy, Ohio,* 87 F. Supp. 2d 800, 805–15 (S.D. Ohio 1999), citing *Bantam Books, Inc. v. Sullivan*, 372

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6 *Commonwealth Brands, Inc. v. U.S.* Not Reported in F.Supp.2d, 2009 WL 3754273 (W.D.Ky. 2009).

7 *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 794 (1988); *Gehl Group v. Koby*, 63 F.3d 1528, 1534 (10th Cir. 1995); *See also Gehl*, 63 F.3d at 1534-35 ("[i]n the context of a government prosecution, a decision to prosecute which is motivated by a desire to discourage protected speech or expression violates the First Amendment and is actionable under § 1983.")

8 *NAACP v. Button,* 371 U.S. 415, 433 (1963).

9 *See Siggers-El v. Barlow*, 412 F.3d 693, 701 (6th Cir. 2005) (remarking that because "there is no justification for harassing people for exercising their constitutional rights, [the deterrent effect] need not be great in order to be actionable").

U.S. 58, 70 (1963); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224 (6th Cir. 1996). "Furthermore, an ordinance that imposes upon a proprietor the burden of obtaining a permit in order to engage in constitutionally protected activity is properly analyzed as a prior restraint." *Id.*

Second, strict scrutiny is warranted when "the statute disfavors speech with a particular content as well as particular speakers." *Sorrell*, supra., at Syllabus.

Third, content-based regulations are subject to strict scrutiny. In *Reed v. Town of Gilbert*, an Arizona pastor challenged a local sign regulation that effectively prevented his church from posting temporary signs directing people to church services. *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015). The Supreme Court agreed with the pastor, explaining that "[a] law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech," *Reed*, at 2229.

Reed explains that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." 135 S. Ct. at 2227 (citation omitted). Thus, whether the regulation involves "defining regulated speech by particular subject matter ... [or] by its function or purpose" is ultimately irrelevant. *Id.* "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* The Supreme Court then chronicled factors governing the identification of a content-based restrictions on speech:

> * * * [A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. The Town's Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate . . .. That is a paradigmatic example of content-based discrimination. Nor do the Sign Code's distinctions hinge on "whether and when an event is occurring." * * * it requires Town officials to determine whether a sign is "designed to influence the outcome of an election" (and thus "political") or merely "communicating a message or ideas for noncommercial purposes" (and thus "ideological"). * * * And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. * * * As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed.

Id. (Emphasis added, citations omitted). Here, the text of the City's ordinance is inherently content and speaker-based: a Cincinnati homeowner may not (1) "alert[] an entity which notifies a government organization of [an unlawful act's commission or occurrence];" (2) "give a signal, either visual, audible or both, or cause[] to be transmitted a signal;" or (3) "give[] a signal [of an unlawful act, or of an emergency], either visual, audible, or both only at the alarm site and which does not alert a governmental organization" of a potential crime. See Sections 807-1-A2; 807-1-A4(2)(a); 807-1-L. Thus communicating information relating to the crime of home break-ins is singled out for special treatment, while no assessments apply to the reporting of other crimes. More globally, only speech *reporting potential criminal conduct*, as reflected by a triggered alarm, is singled-out, restrained, punished, and suppressed.

Further, the restrictions are speaker-based: communicating through signaling the occurrence of an unlawful act or emergency does not result in any penalty unless it is done through an alarm or alarm agent. If done through an alarm or alarm agent, the homeowner who so signals is fined $100. Section 807-1-A4(2)(d). Meanwhile, identical speech reporting criminal conduct is *invited* when from speakers other than homeowners' security alarm businesses or from those reporting the content reflecting potential criminal conduct *not* uncovered by a security alarm. See Verified Complaint, Paragraphs 30-33 ("we want to hear from you!"). Neighbors and family members are not restrained from or punished after calling the police to communicate that "something doesn't look right" at a home or business. And homeowners are free to suspend their lives and stand guard themselves all day, calling to report criminal conduct when they observe it. Even security guards are free to call the police to report criminal conduct without prior restraint or fear of punishment.

Accordingly, the prior restraints here trigger strict scrutiny: (1) the restraints apply only to alarm-based communications, i.e. speech reporting criminal conduct uncovered by a security alarm is subject to prior restraints and subsequent fines and penalties; (2) identical communications reporting criminal conduct

are exempt from prior restraint and subsequent fines when emanating from those other than homeowners' security alarm businesses.

iv. The City's burdens and restraints on alarm-related communications do not withstand strict scrutiny.

To withstand strict scrutiny, a law that serves a compelling government interest must be narrowly tailored to achieve that interest. *Reed*, 135 S.Ct. at 2231. "If a less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 813 (2000). Further, the restriction cannot be overinclusive by "unnecessarily circumscrib[ing] protected expression." *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002) (citation omitted). Nor can the restriction be underinclusive by "leav[ing] appreciable damage to [the government's] interest unprohibited." *Reed*, supra., at 2232, quoting *White*, at 780).

Monetary assessments that restrain protected expression and the amounts thereof, are subject to this same strict scrutiny analysis, i.e. an assessment is not narrowly tailored where it is unnecessarily imposed beforehand, greater than necessary, or otherwise uncorrelated to administrative costs associated with permitting:

> It is well-settled that the government may not levy a tax on the exercise of first amendment rights. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). If the government seeks to impose a fee for the operation of a first amendment business, it must demonstrate that "the fees are necessary to cover the costs of the licensing system." *Bayside Enterprises, Inc. v. Carson*, 450 F.Supp. 696, 705 (M.D.Fla.1978).

Cascade News, Inc. v. City of Cleveland, No. 1:92CV0758, 1992 WL 808790, at 3–9 (N.D. Ohio June 15, 1992); see also *Am. Civil Liberties Union of Ill. v. White*, No. 09 C 7706, 2009 WL 5166231, at 1–5 (N.D. Ill. Dec. 23, 2009)(it is the government's "burden affirmatively to establish the fit between the Levy and cost of administering the activities covered by the act. . . the ACLU has sufficiently shown that it has a reasonable likelihood of success on the merits of its challenge to the size of the Levy"); *Century Fed., Inc. v. City of Palo Alto,* 710 F. Supp. 1559, 1561–62 (N.D. Cal. 1988)(only "fees to help defray the administrative cost of necessary licensing may be permissible."); *Fernandes v. Limmer*, 663 F.2d 619, 632–33 (5th Cir.

1981)("A licensing fee to be used in defraying administrative costs is permissible but only to the extent that the fees are necessary."); *Moffett v. Killian*, 360 F.Supp. 228, 231-32 (D.Conn.1973) (invalidating fee imposed for legislative lobbying when in excess of costs of administration); *NAACP v. City of Chester*, 253 F.Supp. 707 (E.D.Pa.1966) (invalidating $25.00 fee for use of a sound truck when defendant did not submit evidence justifying permit fee on the basis of administrative cost); *Sullivan v. City of Augusta*, 511 F.3d 16 (1st Cir.2007)("[i]t [was] a violation of the First Amendment to have charged [the plaintiff] more than the actual administrative expenses of the license, as set forth in the ordinance."); *iMatter Utah v. Njord*, 774 F.3d 1258, 1261–72 (10th Cir. 2014)("In this case, Utah has failed to show how the costs it imposes on applicants align with the actual expenses Utah incurs in hosting a parade," even though government "must offer *some* evidence that this amount, and not some lesser amount, is necessary.") *Jacobsen v. Crivaro*, 851 F.2d 1067, 1071 (8th Cir. 1988)(" a governmental entity cannot profit by imposing a licensing fee on a First Amendment right"); *E. Connecticut Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1055–57 (2d Cir. 1983)("no evidence that the administrative fee charged and to be charged to plaintiffs is equal to the cost incurred or to be incurred by defendants for processing plaintiffs' request to use the property under DOT's control. Absent such a showing, DOT's administrative fee cannot be sustained.")

In the seminal case of *Murdock v. Pennsylvania*, the Supreme Court declared that "[f]reedom of speech ... [must be] available to all, not merely to those who can pay their own way," and that "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution." 319 U.S. 105, at 111 (1943). In *Murdock*, the Court invalidated a license tax—imposed on Jehovah's Witnesses distributing literature and soliciting donations from door to door—under circumstances where the failure to obtain the license would completely foreclose the plaintiffs' protected First Amendment activity. *Id.* at 106, 117, 63 S.Ct. 870 ("The ordinance ... sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless the tax is paid.").

The Court concluded that the licensing fee was essentially a licensing tax because the fee was "fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues." *Id.* Nor was it a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. Nor was it in any way apportioned. *Id.* at 113-14, 63 S.Ct. at 875. "*Murdock* therefore turned not on the existence of the fee or on the financial ability of the plaintiffs to pay that fee, but rather on the fact that the fee stood between the plaintiffs and any exercise of their protected First Amendment activity." *iMatter Utah v. Njord*, 774 F.3d 1258, 1261–72 (10th Cir. 2014). ("The cost of obtaining a permit must align with the cost borne by the government in hosting the permittee's expressive activity.").

Since *Murdock*, courts have occasionally approved financial assessments, but only in narrow circumstances inapplicable here: where the assessment is issued in response to speakers attempts to essentially "rent" public space for their expression, to the exclusion of others, and where the amount of that assessment was no greater than necessary to cover the administrative costs of such a rental. In the seminal permit case of *Cox v. New Hampshire*, for example, the Supreme Court upheld a permit requirement that accounted for disruption to the public's use of the streets and to ensure that only one parade marched at a time because the flexible structure of the fee "t[ook] into account" the "varying conditions" that could lead to greater or lesser public expense. 312 U.S. at 576–78, 61 S.Ct. 762. Thus, the fee was constitutional because it was specifically targeted "to meet the expense incident to the administration of the [event]." *Id.* (internal quotation marks omitted). Here, as in *Murdock*, the Court is not "confronted with a state regulation of the streets to protect and insure the safety, comfort, or convenience of the public."

Here, the City's cannot establish that its restraints and assessments are narrowly tailored to achieve any governmental interest. The City professes a governmental interest in "recouping costs expended by the City of Cincinnati associated with false alarms." See Def. Response to Plaintiffs' Interrogatory No. 10 ("the purpose of enforcing Chapter 807 is to recoup cost expended by the City of Cincinnati associated with false alarms."). However, even if this interest were compelling, the City's imposition of prior assessments of $50

and $100 and fines of $100 - $800 per communication are not narrowly tailored to achieve this interest, are over-inclusive and under-inclusive, and unnecessarily circumscribe protected expression.

First, like in *Murdock*, the assessment is a flat tax of $50 and $100 on all homeowners and business owners, without regard for circumstances that may render such an amount impermissibly high, and the ordinance makes no effort to correlate this assessment to the City's actual costs.

Second, there is no statutory or other textual restriction requiring that revenue from the assessments be used only to cover the costs imposed by those with alarm systems. And the City transfers revenue collected from the assessments into its *general revenue fund, to be spent on anything*, rather into a special fund related to alarm issues. See Plaintiffs' Exhibit 3.

Third, the law is under-inclusive with the respect to the City's interest: no similar impositions are imposed upon others who increase costs to the City by calling, without a security alarm, to report potential criminal conduct: there is no equivalent prior restraint of "false phone calls" from friends, family or neighbors - - whether nosy or well-meaning - - or even security guards. Only alarm agents are singled out. In this respect, the alarm fees and fines are significantly under-inclusive in recouping costs imposed upon the City related to false crime reporting. The ordinance even makes numerous exemptions for those *most responsible* for false alarm calls. See Defendants' Response to Plaintiffs' Interrogatory No. 10; see also *http://www.fox19.com/story/29114852/fox19-investigates-cincinnati-schools-untouchable-in-violating-citys-false-alarm-law* (Cincinnati Public Schools, which is exempt, has accounted for over 3,000 of the false alarm calls to the City).

Fourth, imposition of the assessments is over-inclusive with respect to the City's interests: homeowners are taxed irrespective of whether they ever speak to the City, much less engage in speech resulting in a false-alarm. This chills and deters speech - - useful speech in defense of oneself and one's property - - that residents may otherwise engage in. Further, the assessments are, by the plain text of the ordinance, imposed even upon alarms communications irrespective of whether those alarms or

communications invoke the City's police department that the police *do not* monitor, i.e. residents who use "local alarms" and private security must still pay the assessments prior to communicating even though they impose no costs on the City. The assessments are imposed irrespective of whether those with security alarms *actually use or disrupt city services* and *irrespective of whether citizens have already paid more than enough general or line-item local taxes towards police protection* to cover whatever costs the alarm user might allegedly be imposing on the City.

Fifth, neither the $50 or $100 fee is narrowly tailored to achieve the City's interests in recouping its costs because the City itself admits that alarm assessments and fines raise twice as much revenue as the City spends on security alarm-related administrative expenses, even if homeowners with such alarms could be viewed as somehow *imposing* those costs on the City. *Id.* And this is without even taking into account the additional revenue derived from Alarm Business assessments, fines, false alarm assessments, and fines for failure to register alarms. See Exhibit 3. Thus the fees are not calibrated to the administrative costs to the City, and are impermissibly excessive. The City maintains no evidence justifying why the assessments are $50 and $100, and especially balks at explaining why the non-residential assessment is twice that of the residential assessment. See Defendants' Responses to Plaintiffs' Interrogatory No. 24 (providing no evidence as to why each assessment is "necessary"); see also No. 9 (stating only that "non-residential locations require, on the whole, more resources to investigate.").

Sixth, the City's prior assessments and other impositions are not the least restrict means of abridging Plaintiffs' protected communications. The Police Department could reduce costs through exercising discretion and discernment in determining which alarm-related communication to respond to, taking user and location history into account. See Defendants' Response to Plaintiffs' Interrogatory No. 14 (admitting there is no law *requiring* a police response to each alarm call); see also *https://www.cincinnati.com/story/news/2015/04/27/city-police-cracking-false-alarms/26481375/* (City police themselves proposing this strategy). The City could recoup *false* alarm calls through calibrating *false* alarm

fees rather than punishing the innocent. More broadly, the City could perhaps even charge assessments to those relying upon it to respond to *accurate* alarm calls. The City could simply permit alarm users to communicate with private security or another police force without paying the assessment, or to utilize a "local alarm" without paying the assessment. See Response to Interrogatory No. 15 (admitting there is no law requiring communications to be funneled solely to the City's Police Department). The City could even fund this general public purpose of crime reduction through general tax revenues. Moreover, there is no evidence that the City's assessments actually reduce the number of false alarm calls received by the City.

In sum, the alarm assessments and fines do not fund city services related to security alarms, bear no relationship to citizens' use of city services due to their alarms, operate irrespective of whether citizens have already paid for such city services through their taxes, are impermissibly excessive compared to what is necessary to fund alarm-related expenses, and single out one form of communication for oppressive and discriminatory treatment while ignoring others communications that may give rise to similar costs. Communication in support of such a vital cause and fundamental constitutional right cannot be so flippantly oppressed. Consequently, in a court that maintains jurisdiction to do so, Plaintiffs are highly likely to succeed on their claim that the City's alarm-related prior assessments and subsequent fines must be enjoined.

Plaintiffs have demonstrated a substantial likelihood of success on the merits. As such, Plaintiffs will suffer irreparable injury if Defendants are not immediately enjoined from pursuit of their unconstitutional suppression of Plaintiffs' security and communications in self-defense. Each day, Plaintiffs' safety is imperiled and speech chilled.

B. Plaintiffs are confronted with irreparable injury.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, (1976) (plurality); *accord id.* at 374–75, 96 S.Ct. at 2690 (Stewart, J., concurring); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir.1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment

values constitutes irreparable injury sufficient to justify injunctive relief."). Thus, satisfaction of the first prong of the preliminary injunction standard – demonstrating a strong likelihood of success on the merits – also satisfies the irreparable injury standard. *Id.* (holding that if a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (finding that "when a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor").

C. **No public interest is served by continued imposition of assessments and fines against Plaintiffs, nor would be private harm accrue.**

Neither Defendants nor others will suffer any harm if they are enjoined from enforcing this unconstitutional policy against Plaintiffs. There is no reason to believe that City operations would be threatened. And the unconstitutional character of this threat leaves no legitimate interest in its continued application. On the other hand, the public interest is served by protecting free expression, maximizing political activity, striking down policies that chill speech, and by vindicating Plaintiffs' constitutional rights. *See G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent the violation of a party's constitutional rights"). Meanwhile, a city government's interest in immediate revenue is undermined by its vast over-collection of alarm-related fund heretofore.

III. CONCLUSION

For the foregoing reasons, this Court must preliminarily enjoining the City from (1) enforcing Section City of Cincinnati Codified Ordinance Section 807-1-A4(2) so as to suppress communications reporting crime and alerting potential criminals on-site without prior payment of an arbitrary licensing assessments; and (2) enforcing Section City of Cincinnati Codified Ordinance Section 807-1-A4(2) so as to impose fines upon those who utilize security-alarm communications without making prior payment of the alarm licensing assessments.

Respectfully submitted,

/s/ Maurice A. Thompson

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion and memorandum in support, as well as the verified complaint filed in this action has been served upon Defendants' Counsel.

Respectfully submitted,

/s/ _Maurice A. Thompson

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