No. 20-1598

In The Supreme Court of the United States

PROJECT VERITAS ACTION FUND,
Petitioner,

v.

RACHAEL S. ROLLINS,
in her official capacity as District Attorney
for Suffolk County Massachusetts,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONER

Scott W. Gaylord
ELON UNIVERSITY SCHOOL OF LAW
201 North Greene Street
Greensboro, NC 27401
Phone: (336) 279-9331
Email: sgaylord@elon.edu

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond VA 23219 (800) 847-0477

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CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program devoted to promoting religious freedom for people of all faiths. Given its educational mission, CVEF is concerned about the ability of Massachusetts and other States to prohibit individuals from secretly recording public officials discussing matters of public concern when those officials do not have a reasonable expectation of privacy in the recorded communications. The blanket ban on undisclosed recording under Mass. Gen. Laws ch. 272, § 99 ("section 99") directly contravenes the First Amendment, which "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." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). The threat to First Amendment principles is amplified when the government curbs the collection of information about government officials and their positions on matters of public concern: "Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a

[1] As required by Rule 37.2(a), *amicus* provided counsel for each party with timely notice of its intent to file this amicus brief, and each party consented to the filing of this amicus brief. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

more effective power of suppression.'" *Id.* at 777 n.11.

Section 99 reflects this type of "special incentive." Massachusetts shields the candid statements of government officials from public review, thereby limiting the collection and "dissemination of information relating to alleged governmental misconduct," *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034-35 (1991), even though such speech "has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990). *See also Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (recognizing that "many governmental processes operate best under public scrutiny"). Moreover, Massachusetts does so even when those officials lack any reasonable expectation of privacy in their communications—which is frequently the case. As this Court explained in *Bartnicki v. Vopper*, "[o]ne of the costs associated with participation in public affairs is an attendant loss of privacy." 532 U.S. 514, 534 (2001). What a public servant says and does, whether at an official meeting or in hushed tones in a hallway, bears directly on matters of public concern: "[a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest … extends to 'anything which might touch on an official's fitness for office … [including] dishonesty, malfeasance, or improper motivation….'" *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)).

Being able to record frank comments that reveal a government official's opinions and motivation is important in numerous situations, especially in the Free Exercise context. Among other things, government officials must give religious beliefs "neutral and respectful consideration," free of "impermissible hostility." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018). But statements like "to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others" are "disparag[ing]" and "cast doubt on the fairness and impartiality of the" government, *id*. at 1729-30, whether they are said during a commission meeting, at a dinner function, in a hallway in a government building, or in any other public place. In the wake of *Masterpiece Cakeshop*, the lesson for some government officials may be to avoid criticizing religious beliefs and practices during public meetings. If a public official holds such views and divulges them in a less formal public setting, though, the public has a strong interest in knowing about the official's actual beliefs regarding religion (and a wide array of other topics).

Section 99, however, precludes anyone—whether a member of the institutional press or a concerned citizen—from secretly capturing the unvarnished, forthright statements of government officials. Litigants, the courts, and the public at large have a right to know whether religious animus is at work, and recording the actual words used in public spaces preserves an accurate record of both what was said and how it was said: "[W]here the criticism is of public officials and their conduct of public business,

the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth. *Garrison*, 379 U.S. at 72-73. CVEF comes forward, therefore, to urge this Court to resolve this critically important First Amendment question: whether the First Amendment safeguards the unannounced recording of government officials who discuss matters of public concern (such as the nature and appropriateness of certain religious beliefs) in a public place.

REASONS FOR GRANTING THE WRIT

Supreme Court review is warranted in this case for at least two reasons. First, as the First Circuit noted, "[t]he categorical and sweeping nature of section 99 gives rise to [] important questions" of First Amendment law that this Court has not resolved. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 817 (1st Cir. 2020) ("*Project Veritas*"). Can Massachusetts and other States prohibit individuals from secretly recording government officials when the officials have no reasonable expectation of privacy in the communications recorded? Section 99's broad ban does just that, preventing the recording and dissemination of comments by public officials on matters of public concern. *See Garrison*, 379 U.S. at 74-75 ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."). Section 99 merits review, therefore, because it forecloses a critical avenue of "public

scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

Second, the First Circuit's characterization of section 99 as content neutral (and, thus, subject only to intermediate scrutiny) is inconsistent with two distinct lines of First Amendment speech cases. *See Project Veritas*, 982 F.3d at 835 (agreeing with the District Court that "[s]ection 99's ban is content neutral"). This Court has recognized that a law is content-based if it is directed at the communicative impact of the prohibited expression. *See McCullen v. Coakley*, 573 U.S. 464, 481 (2014) ("[T]he Act would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.' ") (citation omitted); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("The emotive impact of speech on its audience … must be considered content-based."). As the Suffolk County District Attorney explained, Massachusetts enacted section 99 to "help[] ensure 'the vibrancy of [] public spaces and the quality of the discourse that occurs there' by allowing speakers to take comfort in the fact that they will not be unwittingly recorded." *Project Veritas*, 982 F.3d at 837-38. That is, Massachusetts banned secret recordings because of its concern that such recordings have a deleterious effect on the marketplace of ideas. Accordingly, section 99 is

content-based and subject to strict, not intermediate, scrutiny. *See United States v. Eichman*, 496 U.S. 310, 317-18 (1990) (explaining that if legislation "suppresses expression out of concern for its likely communicative impact," it "must be subjected to 'the most exacting scrutiny' ") (citation omitted).

In addition, this Court has held that the government's "mandating speech … alters the content of the speech" and constitutes "a content-based regulation of speech." *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Section 99 requires a person who wants to record a public official to tell the official (through words or expressive conduct) that the official is being recorded. If the person who wants to record does not let the official know, Massachusetts commands the would-be newsgatherer to forego recording, *i.e.*, to remain silent instead of engaging in expression. Thus, section 99 compels either speech or silence. Either way, it imposes a content-based restriction on speech and is subject to strict scrutiny once again. *See Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (confirming that "content-based restrictions on speech … can stand only if they survive strict scrutiny").

I. Given the importance of robust discussion about governmental affairs, this Court should decide whether a State can prohibit the unannounced recording of candid statements by public officials in public places.

Massachusetts's complete ban on secretly recording speakers necessarily prevents individuals

from covertly capturing the frank statements of government officials who discuss matters of public concern in the hallways of government buildings, on public sidewalks, in public parks, at restaurants, and in a host of other locations. This ban is in direct conflict with the First Amendment, which ensures the right of citizens to gather and to disseminate information about the government and those who serve in it. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment."). Under *Gertz*, audio and video recordings of the forthright opinions of government officials bear directly on "the public's interest [in] … 'anything which might touch on an official's fitness for office,' " including evidence of "personal attributes" relating to " 'dishonesty, malfeasance, or improper motivation.' " 418 U.S. at 344-45 (quoting *Garrison*, 379 U.S. at 77). Whether an official, like the Commissioner in *Masterpiece Cakeshop*, has a positive or negative view about religion (or a political rival or tax policy or many other topics) is important to a wide range of constituents and bears on the official's fitness for office.

Moreover, an official's unguarded comments on governmental policies, procedures, and actions constitute "speech on 'matters of public concern' [which] is 'at the heart of the First Amendment's protection.' " *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (opinion of Powell, J.) (quoting *Bellotti*, 435 U.S. at 776). Recordings of government officials discussing current issues capture and preserve "matter[s] of

political, social, or other concern to the community," *Connick v. Myers*, 461 U.S. 138, 146 (1983), and are "a subject of general interest and of value and concern to the public." *San Diego v. Roe*, 543 U.S. 77, 83-84 (2004) (*per curiam*). As a result, such secret recordings "occup[y] the highest rung of the hierarchy of First Amendment values, and [are] entitled to special protection." *Connick*, 461 U.S. at 145 (internal punctuation omitted). *See also Garrison*, 379 U.S. at 74-75 ("For speech concerning public affairs is more than self-expression; it is the essence of self-government.").

Rather than provide special protection for those who secretly record public officials, section 99 removes all First Amendment safeguards on such expression, preventing anyone from recording a government official unless that official knows that she is being recorded. In place of the First Amendment's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), Massachusetts imposes a ban on a particularly illuminating source of information about public officials. Section 99, therefore, is in direct tension with longstanding First Amendment principles. *See Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (confirming that the First Amendment "embraces at the least the liberty to

discuss publicly and truthfully all matters of public concern").

Whereas the First Amendment generally protects "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *id.*, and even many false statements about them, section 99 insulates *government officials* from recordings of their *actual words* while engaged in public discourse— "expression situated at the core of our First Amendment values." *Texas v. Johnson*, 491 U.S. 397, 411 (1989). In this way, Massachusetts inverts the protection that the First Amendment usually provides to those who report on government affairs. If someone inadvertently overheard a public official making candid statements and recounted them, the First Amendment would safeguard that information from governmental control. *See Bartnicki*, 532 U.S. at 525 (explaining that statements about labor negotiations would remain "newsworthy … if a third party had inadvertently overheard Bartnicki making the same statements to Kane when the two thought they were alone"). Yet section 99 denies such protection to one who secretly records and distributes the same statements.

As a result, this case "present[s] a conflict between interests of the highest order"—the public's "interest in the full and free dissemination of information concerning public issues" and the government's "interest in individual privacy." *Bartnicki*, 532 U.S. at 518. Given that the views of government officials on matters of public concern implicate "the essence of self-government," *Garrison*, 379 U.S. at 75, there are strong reasons to afford

robust First Amendment protection to the recordings of these statements. Yet the First Circuit suggests that, at most, intermediate scrutiny applies, even though Massachusetts denies all protection to such recordings. Given the importance of a free and robust marketplace of ideas to self-government, this Court should decide the appropriate level of scrutiny for bans on the undisclosed recordings of government officials in the public domain.

II. Contrary to the First Circuit's analysis, section 99 is a content-based speech restriction and, therefore, is subject to strict scrutiny.

The First Circuit acknowledges, as it must, that "the First Amendment limits the government regulation of information collection." *Project Veritas*, 982 F.3d at 831. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."). In fact, the First Circuit previously recognized that "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.' " *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). Collecting information about public officials "not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally." *Id.* at 82-83.

Despite the "cardinal" importance of acquiring information about government officials, the District Court applied only intermediate scrutiny, concluding

that "Section 99's ban is content neutral, because it prohibits secret recording without regard to the topics or ideas recorded." *Project Veritas*, 982 F.3d at 834. The First Circuit agreed, treating section 99 as a type of time, place, and manner restriction. *Id.* at 835-36. *See also Jean v. Mass. State Police*, 492 F.3d 24, 29 (1st Cir. 2007) ("[S]ection 99 is a 'content-neutral law of general applicability.' ") (citation omitted); *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 604 (7th Cir. 2012) (indicating that intermediate scrutiny should apply to an eavesdropping statute prohibiting open recording in public spaces).

The lower courts' scrutiny analysis is inconsistent with this Court's case law for at least two reasons. First, the lower courts did not consider, let alone discuss, the effect of Massachusetts's adopting section 99 to avoid the communicative impact of secret recordings on the marketplace ideas. Laws that restrict speech based on the effect of that expression on other speech activity trigger strict scrutiny, not intermediate. *See Eichman*, 496 U.S. at 317-18 (applying strict scrutiny to legislation that "suppresses expression out of concern for its likely communicative impact"). Second, a lower level of scrutiny is inapt because section 99 compels speech, requiring anyone who wants to record a public official to either tell the official about the recording or not record at all. *See Riley*, 487 U.S. at 796-97 (explaining that "in the context of protected speech, the difference [between compelled speech and compelled silence] is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising

the decision of both what to say and what *not* to say"). Speech compulsions are content-based because they alter the content of a speaker's expression, *see Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*"), and, consequently, trigger strict scrutiny. *See Reed*, 576 U.S. at 171.

A. Massachusetts's attempt to protect the vitality and quality of public discourse by banning secret recordings is a content-based distinction subject to strict scrutiny.

The District Court employed, what this Court has called, the "commonsense meaning of the phrase 'content based,' " considering whether section 99 " 'on its face' draws distinctions based on the message a speaker conveys." *Id*. at 163 (citation omitted). The District Court concluded that section 99 does not draw such distinctions "because it prohibits secret recording without regard to the topics or ideas recorded." *Project Veritas*, 982 F.3d at 834. The First Circuit agreed. *Id*. at 835-36. According to the lower courts, then, the statute is content-neutral because Massachusetts bans undisclosed recordings of public officials regardless of the topic or the viewpoint expressed.

The problem is that the lower courts' evaluation ignores "a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be 'justified without reference to the content of the regulated speech.' " *Reed*, 576 U.S. at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S.

781, 791 (1989)). Laws that restrict or ban speech based on its content contravene "the usual rule that governmental bodies may not prescribe the form or content of individual expression." *Cohen v. California*, 403 U.S. 15, 24 (1971). Such content-based laws "must also satisfy strict scrutiny." *Reed*, 576 U.S. at 164.

Section 99 fits squarely within this additional category of content-based laws. To determine whether someone violated section 99, a court must look at the content of the recording—whether it captures the statements of a public official who knew she was being recorded. *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (describing how a law prohibiting animal cruelty was content-based because it "restricts … videos or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed"). If the recording is of an official who did not know about the recording, then section 99 is contravened; if the official had notice, then there is no violation. In this way, Massachusetts favors the "filtered" speech of government officials in public spaces (*i.e.*, the statements of officials who have prior notice of the recording) over their candid statements without such notice. *See Barr v. American Assoc. of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) ("Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech.").

Furthermore, Massachusetts targets this specific type of content because of its communicative impact on the marketplace of ideas. Massachusetts is concerned that the secret, nonconsensual recording

of public officials will have an injurious effect on " 'the vibrancy of [] public spaces and the quality of the discourse that occurs there.' " *Project Veritas*, 982 F.3d at 837 (quoting the Suffolk County District Attorney). If government officials do not know whether they are being recorded, they will talk less in public and be more circumspect in their conversations when they do speak. Section 99 seeks to avoid this result by ensuring that officials have "a specific type of privacy" right, namely "notice of being recorded." *Id*.

Two members of the state Senate Commission that recommended the language in section 99 expressed the same concerns about the impact of secret recordings on public discussions. In his statement concurring in the recommendation of section 99, Senator Cole, joined by Senator Homans, favorably quoted a letter from an academic describing the alleged problem with allowing people to secretly record others:

> "From a public policy standpoint, we must consider what would be the *impact* in the coming decade, when electronic monitoring devices spread even more widely in the population…. I think *this creates a serious inhibition on freedom of communication*…. {T]he individual expresses his personality in private conversation, and has a right to do so freely, without distrust and suspicion. *This expression of personality would disappear if individuals feared that their conversations, even their tone of voice, were secretly being recorded*. Men would no longer be able to engage in natural, free discussion."

Interim Report of the Special Comm'n to Investigate Electronic Eavesdropping and Wiretapping, Senate No. 1132 (Petitioner's Appendix at 1465) (emphasis added).

As *Bartnicki* confirms, the government's interest in individual privacy is of the "highest order," 532 U.S. at 518, but as the statements of the District Attorney and Senate Commission members demonstrate, Massachusetts does not—and cannot—defend section 99 based on a general privacy interest of public officials. The Massachusetts law prohibits the secret recording of government officials at all times, even when they are carrying out their public duties and engaging in speech in public spaces. *Project Veritas*, 982 F.3d at 841. In such situations, public officials have no reasonable expectation of privacy. *See Bartnicki*, 532 U.S. at 534 ("One of the costs associated with participation in public affairs is an attendant loss of privacy."); *Gertz*, 418 U.S. at 344 ("An individual who decides to seek governmental office … runs the risk of closer public scrutiny than might otherwise by the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties.").

Accordingly, Massachusetts takes a different tack. Instead of focusing on privacy generally, the District Attorney explained that Massachusetts was "safeguarding a specific type of privacy—not freedom from being recorded, but rather notice of being recorded." *Project Veritas*, 983 F.3d at 837. Such notice is important because of its alleged salutary effect on the marketplace ideas. Speakers who have notice can "take comfort in the fact that they will not be unwittingly recorded," thereby promoting "the

vibrancy of [] public spaces and the quality of the discourse that occurs there." *Id.* at 837-38. The converse is also true. Absent notice, government officials would be uncomfortable sharing their candid views with others, thereby reducing the vivacity and quality of expression in those locales.

The First Amendment, though, is not about making the public—let alone governmental officials—comfortable. *New York Times Co.*, 376 U.S. at 270 (confirming "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); *McCullen*, 573 U.S. at 481 ("If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech."). Instead, "[r]egulations that focus on the direct impact of speech on its audience … must be considered content-based." *Boos*, 485 U.S. at 321. But this is precisely what section 99 does—it bans a specific type of speech (the recording and dissemination of a government official's unfiltered statements made without a reasonable expectation of privacy) because of its effect on the liveliness and quality of discussion in public spaces.

As a result, section 99 "suffers from the same fundamental flaw" as the Flag Protection Act in *Eichman*: "It suppresses expression out of concern for its likely communicative impact." *Eichman*, 496 U.S. at 317. In *Eichman*, Congress sought to protect

" 'the physical integrity of the flag under all circumstances' in order to safeguard the flag's identity 'as the unique and unalloyed symbol of the Nation.' " *Id.* at 315 (citation and internal punctuation omitted). This Court concluded that the Act was content-based because Congress was concerned with "the communicative impact of flag destruction," particularly the effect of "disrespectful treatment of the flag and … those acts likely to damage the flag's symbolic value." *Id.* at 317). Here, Massachusetts worries that secret recordings will jeopardize the marketplace of ideas, reducing the quantity and quality of discourse in the public sphere. *Project Veritas*, 982 F.3d at 837. Massachusetts's concern over the vitality of public discourse may be sincere, but its earnestness does not change the fact that section 99 is a content-based regulation. Massachusetts prohibits a specific type of speech—undisclosed recordings of public officials—because of the "undesirable effects that arise from" such speech. *McCullen*, 573 U.S. at 481. Contrary to the First Circuit, then, section 99 is a content-based regulation and is subject to strict scrutiny. *See Eichman*, 4496 U.S. at 318; *Boos*, 485 U.S. at 321.

B. Section 99 is also content-based because it compels a would-be newsgatherer to tell a public official about the recording or to forego recording altogether.

Section 99 is content-based for another reason—it obliges one who wants to record in secret to speak or remain silent. *See NIFLA*, 138 S. Ct. at 2371 (quoting *Riley*, 487 U.S. at 795) ("By compelling individuals to speak a particular message, such

notices 'alte[r] the content of [their] speech.' "). According to the Supreme Judicial Court of Massachusetts, section 99 requires that the person being recorded "have 'actual knowledge of the recording.' " *Project Veritas*, 982 F.3d at 819 (quoting *Commonwealth v. Jackson*, 349 N.E.2d 337, 340 (Mass. 1976)). This, of course, makes it impossible for a person who wants to record public officials without their knowledge to remain clandestine. To avoid violating section 99, the person doing the recording must inform an official about the recording—through words or expressive action—to ensure that the official knows she is being recorded. The Massachusetts high court confirmed section 99's notice requirement: "[t]he problem … could have been avoided if, at the outset of the traffic stop, the defendant had simply informed the police of his intention to tape record the encounter, or even held the tape recorder in plain sight." *Commonwealth v. Hyde*, 434 750 N.E.2d 963, 971 (Mass. 2001).

Although couched in terms of the knowledge of the person being recorded, the burden (and hence the speech compulsion) is on the individual doing the recording. As in *Hyde*, the would-be recorder must "inform" the official of the audio or visual recording through words ("I am recording you now") or expressive nonverbal conduct that conveys the same information (such as holding a tape recorder or smart phone in plain view to make a public official aware that she is being recorded). *See Id.*; *Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First

Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' ").

The upshot is that Massachusetts gives newsgatherers who want to record in secret a "contrived choice," *Sorrell*, 564 U.S. at 574—either make known their intent to record a government official (thereby losing the ability to capture the public official's unfiltered statements) or remain silent and not record (thereby foregoing the opportunity to obtain and disseminate information about the government official's candid views on matters of public concern). Stated differently, Massachusetts allows one to record the statements of a government official "but only on terms favorable to the speech the State prefers." *Id.* The newsgatherer is stuck with either recording the government's favored message (the filtered statements of government officials) or not recording at all. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) ("Believing in the power of reason as applied through public discussion, [those who won our independence] eschewed silence coerced by law—the argument of force in its worst form.").

The problem is that both disjuncts are unconstitutional. Requiring a person to speak a government-mandated message—"I am recording you"—through words or expressive conduct is a speech compulsion. Section 99 forces would-be recorders to speak when they would prefer to remain silent, to tell a public official about the recording

instead of recording surreptitiously. This violates the "fundamental rule" under the First Amendment that "a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). This rule protects a speaker's right to decide "both what to say and what *not* to say." *Riley*, 487 U.S. at 796-97; *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action, includes both the right to speak freely and the right to refrain from speaking at all."). By definition, a person who wants to record a public official in secret does not want to tell the official about the recording, but section 99 requires the person to do just that. That Massachusetts forces the person doing the recording to disclose a fact ("I am recording you") instead of an opinion is irrelevant. *See Riley*, 487 U.S. at 797-98 (describing how "either form of compulsion," whether a compelled statement of opinion or of fact, "burdens protected speech"). The "choice" to speak or to remain silent "is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575.

Section 99's effect on the person who wants to record in secret does not stop there. Massachusetts's mandated notice also alters the content of the recording itself, precluding the person recording from capturing the official's unvarnished statements. Instead of chronicling the official's candid views, the official who now knows about the recording can be guarded in her statements or decide to avoid speaking at all. Consequently, "[b]y requiring [a

newsgatherer] to inform [government officials that they are about to be recorded]—at the same time [the newsgatherer] tr[ies to capture the official's candid speech—section 99] plainly 'alters the content' of [the newsgatherer's] speech." *NIFLA*, 138 S. Ct. at 2371 (quoting *Riley*, 487 U.S. at 795).

The second disjunct—compelled silence—fares no better. If a person who wants to record a government official in secret does not tell the official about the recording, then Massachusetts prohibits the person from recording at all. That is, if one refuses to give an official notice, section 99 insists that that person remains silent. The problem is that such compelled silence also infringes First Amendment principles: "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley*, 487 U.S. at 796-97. Speech prohibitions are unconstitutional for the same reason as speech compulsions—they prevent a speaker from determining the content of her message. *See Wooley*, 430 U.S. at 714. Section 99 denies "the right to speak freely" to those who want to record and disseminate the candid statements of public officials in public spaces. *See Sorrell*, 564 U.S. at 570 ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment.").

As discussed above, Massachusetts claims a weighty reason for requiring a newsgatherer to

choose between forced speech ("I am going to record you") and compelled silence (not recording at all)—to promote the "vibrancy" and "quality" of discourse in public spaces. *Project Veritas*, 982 F.3d at 838. Whatever Massachusetts's reasons, however, such speech compulsions and restrictions are content-based regulations subject to strict scrutiny. *See Riley*, 487 U.S. at 798 (holding that North Carolina's speech compulsion was a "content-based regulation … subject to exacting First Amendment scrutiny"). Exacting scrutiny is warranted because "[a]s with other kinds of speech, regulating the content of [a newsgatherer's] speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.' " *NIFLA*, 138 S. Ct. at 2374 (quoting *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994)). That recordings of public officials speaking candidly on matters of public concern may affect the marketplace of ideas reinforces the need for *greater* protection for such speech, not lesser: "[T]he law … is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579. Review is needed, therefore, because the First Circuit's application of intermediate scrutiny is inconsistent with the Court's compelled speech cases and ignores the right of speakers to "choose the content of [their] own message." *Id.* at 573.

CONCLUSION

This case implicates an important First Amendment question—whether newsgatherers have a right to collect and disseminate truthful information about what government officials say on matters of public concern when the bright lights are not shining directly on them. By denying this right to would-be newsgatherers to protect the marketplace of ideas, Massachusetts challenges core First Amendment principles. As James Madison emphasized, "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed. 1910). The First Amendment "protects the paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison*, 379 U.S. at 77. Newsgathering falls comfortably within this broad protection: "[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills*, 384 U.S. at 219. Accordingly, review is warranted to resolve the competing constitutional issues at stake—personal privacy and freedom of expression—and to determine when, if ever, States can preclude individuals from secretly recording public officials in public spaces.

Respectfully submitted,

Scott W. Gaylord
ELON UNIVERSITY SCHOOL OF LAW
201 North Greene Street
Greensboro, NC 27401
Phone: (336) 279-9331
Email: sgaylord@elon.edu

Counsel for Amicus Curiae

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