APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 19-1586, 19-1640

PROJECT VERITAS ACTION FUND,

Plaintiff, Appellee / Cross-Appellant,

v.

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

Defendant, Appellant / Cross-Appellee.

No. 19-1629

K. ERIC MARTIN & RENÉ PÉREZ,

Plaintiffs, Appellees,

v.

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

Defendant, Appellant,

WILLIAM G. GROSS, in his official capacity as Police Commissioner for the City of Boston,

Defendant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Patti B. Saris, U.S. District Judge]

Before

Barron, Circuit Judge,
Souter,* Associate Justice,
and Selya, Circuit Judge.

Eric A. Haskell, Assistant Attorney General of Massachusetts, with whom Maura Healey, Attorney General of Massachusetts, was on brief, for Appellant/Cross-Appellee Rachael S. Rollins.

Benjamin T. Barr, with whom Steve Klein and Statecraft PLLC were on brief, for Appellee/Cross-Appellant Project Veritas.

Jessie J. Rossman, with whom Matthew R. Segal, American Civil Liberties Union Foundation of Massachusetts, Inc., William D. Dalsen, and Proskauer Rose LLP were on brief, for Appellees K. Eric Martin and René Pérez.

Adam Schwartz and Sophia Cope on brief for Electronic Frontier Foundation, amicus curiae.

Bruce D. Brown, Katie Townsend, Josh R. Moore, Shannon A. Jankowski, Dan Krockmalnic, David Bralow, Kurt Wimmer, Covington & Burling LLP, Joshua N. Pila, James Cregan, Tonda F. Rush, Mickey H. Osterreicher, Robert A. Bertsche, Prince Lobel Tye LLP, David McCraw, Elizabeth C. Koch, Ballard Spahr LLP, D. Victoria Baranetsky, Bruce W. Sanford, Mark I.

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* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

Bailen, and Baker & Hostetler LLP on brief for The Reporters Committee for Freedom of the Press; The American Society of Magazine Editors; Boston Globe Media Partners, LLC; First Look Media Works, Inc.; The Media Institute; Meredith Corporation; MPA – The Association of Magazine Media; National Freedom of Information Coalition; National Newspaper Association; National Press Photographers Association; New England First Amendment Coalition; The New York Times Company; Politico, LLC; Reveal from the Center for Investigative Reporting; Society of Environmental Journalists; Society of Professional Journalists; and Tully Center for Free Speech, amici curiae.

Oren N. Nimni and Lauren A. Sampson on brief for Lawyers for Civil Rights, Center for Constitutional Rights, and LatinoJustice PRLDEF, amici curiae.

Nicolas Y. Riley and Robert D. Friedman on brief for Institute for Constitutional Advocacy and Protection, amicus curiae.

December 15, 2020

BARRON, Circuit Judge. Massachusetts, like other states concerned about the threat to privacy that commercially available electronic eavesdropping devices pose, makes it a crime to record another person's words secretly and without consent. But, unlike other concerned states, Massachusetts does not recognize any exceptions based on whether that person has an

expectation of privacy in what is recorded. See Mass. Gen. Laws ch. 272, § 99 ("Section 99"). As a result, Massachusetts makes it as much a crime for a civic-minded observer to use a smartphone to record from a safe distance what is said during a police officer's mistreatment of a civilian in a city park as it is for a revenge-seeker to hide a tape recorder under the table at a private home to capture a conversation with an ex-spouse. The categorical and sweeping nature of Section 99 gives rise to the important questions under the First Amendment to the United States Constitution that the challenges that underlie the consolidated appeals before us present.

The first appeal that we address stems from a 2016 suit filed in the District of Massachusetts by two civil rights activists in Boston – K. Eric Martin and René Pérez ("the Martin Plaintiffs"). They allege that Section 99 violates the First Amendment insofar as it criminalizes the secret, nonconsensual audio recording of police officers discharging their official duties in public spaces. The other appeal that we address stems from a suit filed in that same year in that same district – and eventually resolved by the same district court judge – by Project Veritas Action Fund ("Project Veritas"), which is a national media organization dedicated to "undercover investigative journalism."

Project Veritas's suit targets Section 99 insofar as it bans the secret, nonconsensual audio recording of any government official discharging official duties in public spaces, as well as insofar as it bans such recording of any person who does not have a reasonable

expectation of privacy in what is recorded. Project Veritas also alleges that Section 99 must be struck down in its entirety pursuant to the First Amendment doctrine of overbreadth.

We affirm the District Court's grant of summary judgment to the Martin Plaintiffs, based on its ruling that Section 99 violates the First Amendment by prohibiting the secret, nonconsensual audio recording of police officers discharging their official duties in public spaces. We also affirm the District Court's order dismissing Project Veritas's First Amendment overbreadth challenge for failing to state a claim on which relief may be granted. However, we vacate on ripeness grounds the District Court's order dismissing with prejudice Project Veritas's First Amendment challenge to Section 99 insofar as that statute prohibits the secret, nonconsensual audio recording of individuals who lack an expectation of privacy in what is recorded. For the same reason, we vacate the District Court's grant of summary judgment to Project Veritas on its claim that Section 99 violates the First Amendment insofar as that statute bars the secret, nonconsensual audio recording of government officials discharging their duties in public. We remand the claims asserting these two latter challenges to the District Court with instructions to dismiss them without prejudice for lack of subject matter jurisdiction.

I.

We begin by reviewing the background that led to the enactment of Section 99, its key terms, and the way that the Supreme Judicial Court of Massachusetts ("the SJC") construes them. We then describe the travel of the two cases.

A.

In 1964, Massachusetts created a commission to study whether to strengthen the Commonwealth's prohibitions on electronic eavesdropping. The commission issued its final report in June of 1968, which found "that eavesdropping devices are readily available to members of the public from commercially available stores" and that these devices make it quite easy for even laypeople to use them "for purposes of illegally intercepting wire or oral communications." Report of the Special Commission on Electronic Eavesdropping, 1968 Mass. Sen. Doc. No. 1132, at 6 ("1968 Commission Report"). The report recommended "that wiretapping and eavesdropping other than by law enforcement officers should be strictly prohibited," and it proposed the adoption of an " 'all-party consent' provision," "which would require the consent of all parties to a conversation before that conversation could be recorded or otherwise electronically 'intercepted.' " Id. at 9, 11.

A month later, the Massachusetts legislature enacted Section 99, which states in its preamble "that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave

dangers to the privacy of all citizens of the commonwealth." Mass. Gen. Laws ch. 272, § 99(A). The measure goes on to make it a crime for "any person" to "willfully commit[] an interception, attempt[] to commit an interception, or procure[] any other person to commit an interception or to attempt to commit an interception of any wire or oral communication." Id. § 99(C)(1).

Section 99 defines a "wire communication" as "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception." Id. § 99(B)(1). An "oral communication" is defined as "speech, except such speech as is transmitted over the public air waves by radio or other similar device." Id. § 99(B)(2). The term "interception" is defined as follows: "to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication." Id. § 99(B)(4).

B.

Roughly a decade after Section 99's enactment, the SJC construed the measure in Commonwealth v. Jackson, 370 Mass. 502, 349 N.E.2d 337 (1976), which concerned, among other things, whether audio recordings of a kidnapper's ransom calls had been made in

violation of Section 99. Id. at 339. In holding that they had been, the SJC agreed that even a recording of the audio of a person who had no "reasonable expectation of privacy" in what was recorded could fall under Section 99's prohibition. Id. at 340.

The SJC explained that if it "were to interpret 'secretly' as encompassing only those situations where an individual has a reasonable expectation of privacy," it "would render meaningless the Legislature's careful choice of words" in Section 99. Id. The SJC concluded that a nonconsensual audio recording is made "secretly" – and thus in violation of Section 99 – if the person recorded does not have "actual knowledge of the recording." Id. The SJC added that actual knowledge of the recording could be "proved where there are clear and unequivocal objective manifestations of knowledge." Id.

Some years later, in Commonwealth v. Hyde, 434 Mass. 594, 750 N.E.2d 963 (2001), the SJC again held that Section 99 did not impliedly exempt recordings of audio of persons who lacked an expectation of privacy in what was recorded. Id. at 965-66. This time, unlike in Jackson, the issue arose in connection with a prosecution for a violation of Section 99 itself. In the case, the criminal defendant had been charged with violating that statute for having recorded the audio of his encounter with police – without the officers' knowledge – during a traffic stop. Id. at 964-65. The defendant moved to dismiss the criminal complaint against him on the ground that Section 99 did not apply to recordings of "police officers . . . performing official police

duties." Id. at 965. In such a situation, the defendant contended, the officers "had no privacy expectations in their words, and, as a result, their conversation should not be considered 'oral communication' within the statute." Id.

The SJC affirmed the denial of the defendant's motion by explaining that "[t]he statute is carefully worded and unambiguous, and lists no exception for a private individual who secretly records the oral communications of public officials." Id. at 966. For that reason, the SJC held, "the plain language of the statute accurately states the Legislature's intent" and nothing in that language "would protect, on the basis of privacy rights, the recording that occurred here," regardless of "[t]he value of obtaining probative evidence of occasional official misconduct." Id. at 966-69.

The SJC emphasized that "[t]he commission clearly designed the 1968 amendments to create a more restrictive electronic surveillance statute than comparable statutes in other States." Id. at 967. In fact, the SJC explained, to permit the recording "on the ground that public officials are involved" would necessarily permit the secret, nonconsensual recording "of virtually every encounter or meeting between a person and a public official, whether the meeting . . . is stressful . . . or nonstressful (like a routine meeting between a parent and a teacher in a public school to discuss a good student's progress)." Id. at 970. "The door once opened would be hard to close, and the result would contravene the statute's broad purpose and the

Legislature's clear prohibition of all secret interceptions and recordings by private citizens." Id.

Hyde did note, however, that "[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." Id. at 971 (emphasis added). In this way, Hyde clarified Jackson's prior holding about what constituted "secretly" recording under Section 99.

The dissenting opinion in Hyde asserted that neither Section 99's text nor its legislative history indicated "that the Legislature had in mind outlawing the secret tape recording of a public exchange between a police officer and a citizen." Id. at 974 (Marshall, C.J., dissenting). To support this narrower understanding of the measure, the dissent offered an example that remains all too relevant today. It claimed that, under the majority's ruling, George Holliday "would have been exposed to criminal indictment rather than lauded for exposing an injustice," if his then-recent recording of Rodney King's beating at the hands of police officers in Los Angeles, California had taken place in Massachusetts. Id. at 972.

The majority responded that "[t]here is no basis to ignore the plain language and legislative history" of Section 99, "or our case law interpreting it, in favor of speculation as to how an imaginary scenario might have played out, had the Rodney King episode occurred in Massachusetts and not in California." Id. at 971. The

majority did assert, though, that "[a]lthough the Rodney King videotape visually captured the conduct of the police officers' [beating of] King, the recording was virtually inaudible, until electronic enhancements filtered the audio portion to allow the actual commands of the police officers to be heard." Id. at 971 n.11.

C.

The appeals before us arise from two different suits that challenge Section 99. But, while these suits ultimately intersected below, it is useful to describe their travel separately.

1.

On June 30, 2016, Martin and Pérez filed suit in the United States District Court for the District of Massachusetts against the Commissioner of the Boston Police Department ("BPD Commissioner") and the District Attorney for Suffolk County ("District Attorney") in their official capacities. We will refer to the BPD Commissioner and the District Attorney collectively as "the Defendants."

The Martin Plaintiffs' complaint alleges that they are civil rights activists who have regularly and openly recorded the audio of police officers without their consent as they discharge their official duties in public. Their complaint alleges that the Martin Plaintiffs would like to undertake that same type of recording secretly but fear doing so due to the criminal

prohibition that Section 99 imposes. The Martin Plaintiffs' complaint alleges that others have been prosecuted by the District Attorney for such recording and that the BPD's "official training materials," including a "Training Bulletin" and "training video" distributed to police cadets in 2010, "instruct officers that they may arrest and seek charges against private individuals who secretly record police officers performing their duties in public."

Based on these allegations, the complaint claims that Section 99 "as applied to secretly recording police officers engaged in their official duties in public places, violates the First Amendment by causing Plaintiffs to refrain from constitutionally protected information gathering" and from "encouraging, or aiding other individuals to secretly record police conduct in public." The complaint requests "declaratory and injunctive relief under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution" on the ground that Section 99 is unconstitutional when "applied to prohibit the secret audio recording of police officers performing their duties in public."

On September 30, 2016, the Defendants filed motions to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). In March of 2017, the District Court denied both motions. Martin v. Evans, 241 F. Supp. 3d 276, 288 (D. Mass. 2017). Discovery proceeded for roughly a year before the parties filed dueling motions for summary judgment. The District Court granted summary

judgment to the Martin Plaintiffs on December 10, 2018. Martin v. Gross, 340 F. Supp. 3d 87, 109 (D. Mass. 2018).

The District Court first rejected the Defendants' contention that the Martin Plaintiffs' First Amendment claim was not ripe for essentially the reasons set forth in its earlier ruling rejecting the Defendants' 12(b)(1) motion. Id. at 103. But, the District Court added, discovery reinforced the basis for that earlier ruling, as the plaintiffs had "attested to their prior recordings of police officers" and "aver[red] that they desire to secretly record police officers but have refrained from doing so because of" Section 99, and "the defendants have sought criminal complaints or charged persons for violating [the statute] numerous times since 2011." Id. The District Court also noted that "the government has not disavowed enforcement of" the statute. Id. Accordingly, the District Court determined that the "facts give rise to a live controversy over genuine First Amendment injuries." Id.

As to the merits, the District Court first addressed whether the Martin Plaintiffs were bringing a "facial" or "as applied" attack on Section 99. The District Court explained that the Martin Plaintiffs' challenge targets only a slice of what Section 99 bans, and so in that sense was "as applied." Id. at 105. But, the District Court noted, the Martin Plaintiffs sought relief that would "block the application of Section 99 to any situation involving the secret recording of police officers . . . performing their duties in public, not just in a specific instance of the plaintiffs engaging in such

conduct." Id. In that respect, the District Court concluded, the Martin Plaintiffs' challenge was facial in nature, notwithstanding that their challenge did not seek to invalidate Section 99 in its entirety. Id.

The District Court also explained that the Martin Plaintiffs' planned recording warranted at least some First Amendment protection, just as it had held in denying the Defendants' motion to dismiss. Id. at 96-98; see Martin, 241 F. Supp. 3d at 287-88. There, the District Court explained that it disagreed with the Defendants' contention that "the First Amendment does not provide any right to secretly record police officers," as it ruled that "[e]xisting First Circuit authority" – namely Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011), and Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014) – "holds otherwise." Martin, 241 F. Supp. 3d at 286.

The District Court then trained its attention on the level of First Amendment scrutiny that applied to Section 99's ban on the recording at issue. Martin, 340 F. Supp. 3d at 105. The District Court concluded that Section 99 was a content-neutral restriction on the time, place, or manner of the Martin Plaintiffs' planned speech-related activity and that, in consequence, the measure's prohibition was not subject to strict scrutiny. Id. The District Court went on to subject the ban at issue to "intermediate scrutiny," noting that although the Defendants had suggested that an even less demanding level of scrutiny "might" apply, they had not developed an argument as to why that would be the case. Id. at 105-06. In addition, the District Court explained that our prior precedent did not support the

application of less than intermediate scrutiny. Id. at 106 (first citing Glik, 655 F.3d at 82-84, then citing Jean v. Mass. State Police, 492 F.3d 24, 29 (1st Cir. 2007)).

Finally, the District Court evaluated Section 99's ban on such recording under intermediate scrutiny and determined that – on its face – it could not survive review due to its sweep. Id. at 106-08. Despite recognizing that, "[i]n this context, narrow tailoring does not require that the law be the least restrictive or least intrusive means of serving the government's interests," the District Court explained that the ban "is not narrowly tailored to protect a significant government interest when applied to law enforcement officials discharging their duties in a public place." Id. at 106-07. The District Court noted that Section 99 prohibits such recording even in circumstances in which police officers would have no expectation of privacy in what is recorded. Id. at 108. The District Court added that, given its analysis to that point, it "need[] not decide whether [the statute] leaves open adequate alternative channels for" the speech-related activity at issue. Id. (quoting Am. C.L. Union of Ill. v. Alvarez, 679 F.3d 583, 607 (7th Cir. 2012)).

2.

Project Veritas brought a similar though more expansive First Amendment challenge to Section 99 on March 4, 2016 in the same federal district as the Martin Plaintiffs. The two suits ultimately ended up before

the same judge. Martin, 340 F. Supp. 3d at 92-93. Like the Martin Plaintiffs, Project Veritas brought suit under 42 U.S.C. § 1983. Project Veritas Action Fund v. Conley, 244 F. Supp. 3d 256, 259 (D. Mass. 2017).

The Defendants moved to dismiss Project Veritas's complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The District Court determined that it had jurisdiction under Article III of the United States Constitution over Project Veritas's challenge to the statute's prohibition on the secret recording of individuals who lack a reasonable expectation of privacy and as to its challenge to the statute in its entirety. Id. at 262. However, the District Court concluded that Project Veritas's allegations that it wanted to use secret recording to investigate government officials were "too vague" to render ripe its pre-enforcement challenge to Section 99 insofar as it banned the secret, nonconsensual audio recording of any such officials in public spaces, though it left Project Veritas the opportunity "to replead[] more specific allegations." Id.

With that latter challenge to Section 99 out of the way for the time being, the District Court took up the merits of Project Veritas's claim that Section 99 violated the First Amendment both "as-applied," insofar as the measure prohibited the secret recording of private individuals who lacked an expectation of privacy (though, apparently, even as to circumstances not involving Project Veritas's own recording), and facially under the First Amendment overbreadth doctrine as to

the statute as a whole. Id. at 262-66. The District Court rejected both contentions. Id. at 265-66.

With respect to what the District Court characterized as Project Veritas's "as-applied" challenge – which concerned Section 99's ban on the secret, nonconsensual audio recording of any person lacking a reasonable expectation of privacy in what was recorded but not Section 99 as a whole – it applied intermediate scrutiny. Id. at 262-63. It then rejected this challenge on the merits, because it concluded that Section 99's ban on such recording "is narrowly tailored to serve the purpose of protecting privacy by permitting only nonsecret recordings of private conversations," even though the statute banned secret recordings in circumstances where the private speaker might not have a reasonable expectation of privacy. Id. at 265; see also id. ("While the reasonable expectation of privacy standard for defining oral communications might be the least restrictive alternative, that approach is not required under intermediate scrutiny when the privacy of individual conversations is at stake.").

There remained at that point only what the District Court characterized as Project Veritas's facial challenge to Section 99, which sought to invalidate the statute in its entirety under the First Amendment overbreadth doctrine. In addressing this challenge, the District Court observed that, under that doctrine, a plaintiff may bring a facial challenge to a statute – under the First Amendment – even "though its application in the case under consideration may be constitutionally unobjectionable." Id. (quoting Forsyth

County v. Nationalist Movement, 505 U.S. 123, 129 (1992)). The District Court went on to hold, however, that Project Veritas's First Amendment overbreadth challenge failed because "[m]ost applications of Section 99 are constitutional," as "Section 99 constitutionally protects private conversations in all settings and conversations with government officials in nonpublic settings or about non-official matters." Id. at 266.

In the wake of the District Court's rulings, Project Veritas then filed an amended complaint on April 7, 2017. Following some further back and forth, it next filed a second amended complaint on September 29, 2017. In that complaint, Project Veritas asserted that, but for Section 99, it would use or would have used secret recordings to:

- "investigate instances of landlords taking advantage of housing shortages in Boston where students may live in unsafe and dilapidated conditions, as well as the ties between these landlords and public officials";
- "investigate and report on the public controversy over 'sanctuary cities' in Massachusetts . . . by secretly investigating and recording interactions with government officials in Boston in the discharge of their duties in public places, including police officers, to learn more about their concerns about immigration policy and deportation"; and
- "investigate and record government officials who are discharging their duties at or around the State House in Boston and other public

> spaces to learn about their motives and concerns about immigration policy and deportation."

Project Veritas further alleged that, but for Section 99, its "journalists would have attended" "a large public event . . . in downtown Boston" on August 19, 2017, that involved "[i]ndividuals and organizations from other states tied to the ongoing PVA 'antifa' investigation," where they would have "secretly recorded public officials executing their duties as they related to attendees." At similar events in the future, the complaint added, Project Veritas planned to "employ cellular phone cameras and 'button cameras'" in order to "capture whether antifa public events and protests are peaceful, whether police or other public officials' interactions with antifa members are non-violent, and otherwise capture the events to report to the public."[1]

By the summer of 2018, discovery had been conducted and Project Veritas, like the Martin Plaintiffs in their case, had filed a motion for summary judgment. On December 10, 2018, in the same opinion in which the District Court granted summary judgment to the Martin Plaintiffs, the District Court granted

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[1] Project Veritas's second amended complaint also requested that the District Court hold that the statute was constitutionally infirm insofar as it prohibited the secret, nonconsensual recording of oral communications made by <u>any</u> person speaking without a reasonable expectation of privacy. It did not make this request in its motion for summary judgment, however, partially "in recognition of the fact that the [District] Court ha[d] already dismissed [its] claims insofar as they pertain[ed] to private individuals." <u>Martin</u>, 340 F. Supp. 3d at 104 & n.5.

Project Veritas's motion for summary judgment in part. See Martin, 340 F. Supp. 3d at 109.

The District Court concluded that Project Veritas had standing to challenge Section 99's bar to the secret, nonconsensual audio recording of any government official discharging official duties in public spaces. Id. at 104. The District Court also noted that "[t]he breadth of potential conduct" that Project Veritas claimed it wanted to undertake in Massachusetts, "none of which has actually occurred, creates serious ripeness concerns." Id. But, the District Court concluded that it "need[ed] no additional facts to resolve" the legal dispute over Project Veritas's challenge to the statute's application to the secret, nonconsensual audio recording of government officials performing their duties in public places and thus that the claim was ripe. Id. at 103.

Then, for largely the same reasons that led the District Court to grant summary judgment to the Martin Plaintiffs on their narrower-gauged First Amendment challenge to Section 99, it ruled that Project Veritas's challenge to the statute – insofar as it applied to ban the secret, nonconsensual audio recording of any government officials discharging their duties in public – was meritorious. Just like a ban on secretly recording the audio of police officers without their consent while they are carrying out their official duties in public places, the District Court determined, a ban on such recording of government officials more generally was subject to intermediate scrutiny and was not "narrowly tailored to serve a significant government

interest." Id. at 106-07 (quoting Rideout v. Gardner, 838 F.3d 65, 72 (1st Cir. 2016)). The District Court explained that this was so because the statute's total ban on such recording went far beyond merely protecting the "diminished privacy interests of government officials performing their duties in public." Id. at 107.

3.

Following the District Court's summary judgment rulings in favor of the Martin Plaintiffs and Project Veritas, the parties participated in briefing regarding the injunction that the District Court would order. But, on May 22, 2019, the District Court announced that it would not issue an injunction and that instead it would issue a declaratory judgment to the effect that Section 99 violated the First Amendment insofar as it barred the secret recording "of government officials, including law enforcement officers, performing their duties in public spaces." Martin v. Gross, 380 F. Supp. 3d 169, 173 (D. Mass. 2019).

The Defendants had requested that the District Court narrow or specify the meaning of "government officials" and "public space." Id. at 172. They also had asked the District Court to alter its ruling so that Section 99 could "still [be] enforceable where a surreptitious audio recording captures the oral communications of both a government official and a non-government official (i.e., a civilian)." Id. at 173 (emphasis omitted). But, the District Court declined to

"reconsider" its approach at that "late stage in the proceedings." Id.

The District Court explained, however, that it gave the terms "public space" and "government official" the same meaning that it understood them to have in Glik, which addressed whether an individual had a First Amendment right to openly record the audio of police officers – without their consent – performing their duties in public. Martin, 380 F. Supp. 3d at 172-73 (discussing Glik, 655 F.3d at 82-85). In addition, the District Court noted that in Glik, this Court found that the plaintiff had a First Amendment right to record police officers discharging their duties in public without their consent, notwithstanding the fact that the plaintiff captured a private citizen – namely, the individual the officers were arresting – in the process. Id. at 173. The District Court consequently declined to narrow its declaratory judgment on that front, too. Id.

4.

The District Attorney filed timely notices of appeal in both cases. The BPD Commissioner did not appeal. Project Veritas filed its own timely notice of appeal from the District Court's decision dismissing its claims that challenged Section 99, both in its entirety under the First Amendment overbreadth doctrine and insofar as it banned the secret, nonconsensual recording of any oral communication made by any person without a reasonable expectation of privacy.

II.

We begin with the District Attorney's appeal from the District Court's grant of summary judgment to the Martin Plaintiffs. The District Attorney contends that the District Court erred in its treatment of both jurisdiction and the merits. We review the District Court's ruling granting summary judgment to the Martin Plaintiffs de novo in determining "if the record, viewed in the light most favorable to the nonmoving party" evinces "no genuine issue of material fact," such that "the moving party is entitled to a judgment as a matter of law." Zabala-De Jesus v. Sanofi-Aventis P.R., Inc., 959 F.3d 423, 427-28 (1st Cir. 2020) (quoting Iverson v. City of Boston, 452 F.3d 94, 98 (1st Cir. 2006)).

A.

The District Attorney's jurisdictional objection concerns ripeness. The ripeness inquiry is grounded in Article III's "prohibition against advisory opinions." Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 8 (1st Cir. 2012) (quoting Mangual v. Rotger-Sabat, 317 F.3d 45, 59 (1st Cir. 2003)). The requirement's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Id. (quoting Abbott Lab'ys v. Gardner, 387 U.S. 136, 148 (1967)).

We have long used a "two-part test," derived from the Supreme Court's decision in Abbott Laboratories, to determine if a claim is ripe:

> First, the court must consider whether the issue presented is fit for review. This branch of the test typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed. The second branch of the Abbott Labs test requires the court to consider the extent to which hardship looms – an inquiry that typically "turns upon whether the challenged action creates a 'direct and immediate' dilemma for the parties."

Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir. 1995) (citation omitted) (quoting W.R. Grace & Co. v. EPA, 959 F.2d 360, 364 (1st Cir. 1992)).

"[W]hen free speech is at issue," however, "concerns over chilling effect call for a relaxation of ripeness requirements." Sullivan v. City of Augusta, 511 F.3d 16, 31 (1st Cir. 2007). For that reason, "[a] party need not marshal all its resources and march to the line of illegality to challenge a statute on First Amendment grounds." Sindicato Puertorriqueño de Trabajadores, 699 F.3d at 9. Still, "[t]o establish ripeness in a pre-enforcement context, a party must have concrete plans to engage immediately (or nearly so) in an arguably proscribed activity. This gives a precise shape to disobedience, posing a specific legal question fit for judicial review." R.I. Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999).

To frame the ripeness inquiry here, it helps to describe the Martin Plaintiffs' challenge more precisely

with respect to where it falls along the facial/as-applied spectrum. With their challenge so described, we then explain why we conclude that they have met their burden to satisfy both the fitness and hardship prongs under the ripeness inquiry.

1.

Whether a challenge is facial or as-applied can bear on whether it is ripe, see Kines v. Day, 754 F.2d 28, 30-31 (1st Cir. 1985), and so it is useful to address at the outset of our jurisdictional analysis the parties' dispute over the proper way to characterize the Martin Plaintiffs' First Amendment challenge. The dispute arises because the Martin Plaintiffs contend that they are bringing only "an as-applied claim," while the District Attorney contends that they are making a "facial" attack on Section 99.

This battle over labels is not fruitful. The Martin Plaintiffs' challenge takes aim at only a portion of Section 99, but it seeks to block it in circumstances beyond the Martin Plaintiffs' own recording. The challenge thus has both "as-applied" and "facial" characteristics. There is no obvious sense in which one predominates.

Fortunately, the Supreme Court has confronted similar half-fish, half-fowl First Amendment challenges and instructed that where the challengers "do[] not seek to strike [a statute] in all its applications" but the relief sought "reach[es] beyond the particular circumstances of [the] plaintiffs," they must "satisfy [the] standards for a facial challenge to the extent of that

reach." John Doe No. 1 v. Reed, 561 U.S. 186, 194 (2010) (emphasis added); see also Showtime Ent., LLC v. Town of Mendon, 769 F.3d 61, 70 (1st Cir. 2014). We thus proceed on the understanding that the Martin Plaintiffs seek the invalidation – facially – of Section 99 but only insofar as it applies to bar the secret, non-consensual audio recording of police officers discharging their official duties in public spaces.

We emphasize, though, that the Martin Plaintiffs contend that Section 99 is unconstitutional as applied to their own recording. In that respect, they are not bringing a First Amendment overbreadth challenge. Nor are they seeking, however, to invalidate the measure only insofar as it applies to their own conduct. They are bringing a challenge to a portion of Section 99 that they contend cannot be applied to bar such recording, whether undertaken by them or by anyone else, because it is not tailored in the way that they contend the First Amendment requires.

With the Martin Plaintiffs' challenge now better in view, we are well positioned to explain why we conclude that it is ripe. We begin with the question whether it is fit for adjudication in federal court. We then address whether the hardship prong of the ripeness inquiry has been met. In doing so, we are mindful of the Supreme Court's observation in Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014), that the notion that certain ripeness considerations are more prudential than constitutional "is in some tension" with the Court's admonition that "'a federal court's obligation to hear and decide' cases within its jurisdiction 'is

virtually unflagging.'" Id. at 167 (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125-26 (2014)). But, because, as there, "the 'fitness' and 'hardship' factors are easily satisfied here," id., we conclude the claim is ripe for our adjudication.

2.

Starting with fitness, we discern no problematic uncertainty as to the category of public officials whom the plaintiffs wish to record. Nor does the District Attorney suggest that the group of public officials encompassed by the phrase "police officers" is defined in terms that are too uncertain to permit federal court review.

The District Attorney does argue that there is a problematic degree of uncertainty as to the locations in which the recording of police officers would occur, which the Martin Plaintiffs identify as "public spaces." But, we do not agree. The Seventh Circuit in American Civil Liberties Union of Illinois v. Alvarez held that a pre-enforcement First Amendment challenge to a ban on the audio recording of police officers discharging their duties in such places was justiciable. 679 F.3d at 594. Yet, the plaintiffs' recording plan there was not materially more detailed in describing the locations in which the recording would occur. See id. at 593-94.

Indeed, the concern that "public spaces" is too amorphous a category is mitigated here by the fact that we used that same phrase in Glik and Gericke to describe the geographical bounds of the citizen's right

to record police officers that we recognized there. Glik, 655 F.3d at 84-85; Gericke, 753 F.3d at 8. Our cases have fleshed out the contours of that category by specifying that it includes traditional public fora, such as public parks like the Boston Common (which was the site of the recording in Glik, 655 F.3d at 84); the sites of traffic stops, including those that occur on the sides of roads, see Gericke, 753 F.3d at 8 (recognizing the attempted recording of a traffic stop conducted on a highway as falling within the First Amendment right to record law enforcement discharging their duties in "public spaces"); and other "inescapably" public spaces, id. at 7, such as the location of the recording that occurred in Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999), which concerned a journalist's arrest for openly recording members "of the Pembroke Historic District Commission" that were having a conversation in "the hallway" of the town hall immediately following an open public meeting, id. at 17-18.

Adding still further definition to the geographic scope of the recording plan is the fact that – despite the District Attorney's contention to the contrary, see District Att'y's Br. at 39 – we, like the District Court, see Martin, 380 F. Supp. 3d at 172-73, understand the Martin Plaintiffs to be using the phrase "public spaces" as Glik and Gericke did, and neither case, explicitly or implicitly, held that publicly accessible private property fell within the scope of "public spaces" for purposes of the right to record.

Finally, we discern no problematic uncertainty as to the nature of the police activities that the Martin

Plaintiffs' challenge targets. Because the record suffices to show that the recording for which protection is sought is of police officers only in "public spaces," the range of police conduct at issue here is no mystery, just as it was not in Alvarez, given that the conduct consists only of the discharge of official functions. See 679 F.3d at 593-94.

The Martin Plaintiffs do seek protection for "secretly" rather than openly recording, however, and that does make their challenge different from the one involved in Alvarez. See id. at 607. But, that feature of their challenge does not create uncertainty as to whether Section 99 creates a risk that the Martin Plaintiffs would be prosecuted for engaging in such recording.

As we have explained, the SJC has construed Section 99 to encompass recording not conducted in "plain sight" of the person recorded, so long as that person has no actual knowledge it is occurring. See Hyde, 750 N.E.2d at 971. So, insofar as the record suffices to show that Section 99 is enforced, there is nothing about the nature of the recording of the kind in which the Martin Plaintiffs plan to engage that, legally, insulates it from such enforcement.

Nor does the fact that the recording will be carried out secretly make the range of police activities that, in principle, is subject to the recording different from the range of such activities that was at issue in Alvarez. Those activities – as described by the Martin Plaintiffs – are only ones that officers engage in while carrying

out their official duties and then only while they are doing so in public spaces.

The District Attorney counters that precisely because the recording at issue will be conducted secretly, there is a "discrepancy . . . between the facts needed to adjudicate [the Martin Plaintiffs'] claim[ ] and the facts actually presented by [them]." As she sees it, courts have previously recognized "a right to openly record" police discharging official duties in public places but only in cases with well-developed factual records and, save for Alvarez, only ex post.

The District Attorney contends that a determination as to whether "a right to surreptitiously record" warrants the same protection as a right to record openly "is even more likely to depend on the factual circumstances surrounding the recording," in terms of where it occurs, whose audio is recorded, and how the fact of the recording is concealed. She asserts in this regard that the Martin Plaintiffs have "failed to present the kind of concrete facts about any prospective surreptitious recording [they] plan[ ] to make" that would make it possible for "a court to adjudicate their novel claims without resort to speculation, abstraction, and hypothetical facts." That the Martin Plaintiffs acknowledge that they may end up capturing the audio of private persons who interact with the police officers whom they record, the District Attorney suggests, exacerbates the concern.

It is true that, "[e]ven though a challenged statute is sure to work the injury alleged," there may be cases

in which "adjudication might be postponed until 'a better factual record might be available.'" Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 300 (1979) (quoting Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974)). But, this case is not one of them.

We do not need a more fully developed record to assess the merits of the Martin Plaintiffs' purely legal assertion that, under our decisions in Glik and Gericke, a criminal statute can constitutionally bar their planned First Amendment activity only if that activity would interfere with police officers performing their public duties or could be supported by a legitimate interest. Nor do we need additional factual development to be able to assess the purely legal question that concerns the level of scrutiny that applies to a ban on recording of this kind. See Susan B. Anthony List, 573 U.S. at 167 (finding that the challenge was ripe where it "present[ed] an issue that [was] 'purely legal, and [would] not be clarified by further factual development'" (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581 (1985))); Whitehouse, 199 F.3d at 34 (concluding that the claim was ripe because it presented a "single, purely legal question"); see also Commodity Trend Serv. v. Commodity Futures Trading Comm'n, 149 F.3d 679, 687 n.3 (7th Cir. 1998) ("[A] facial constitutional challenge presents only a legal issue – the quintessentially 'fit' issue for present judicial resolution. . . .").

There also is no need for additional factual development for us to be able to assess the merits of the

Martin Plaintiffs' assertion that the categorical prohibition that Section 99 places on the recording for which they seek protection is, on its face, too uncalibrated to survive such First Amendment review. We may assess that contention on this record, taking due account of both the fact that third parties may be recorded and that secret recording can take many forms. For while those features bear on the merits of the Martin Plaintiffs' challenge, they do not render the contention that the ban at issue is overly broad unfit for resolution in federal court.

Indeed, insofar as the District Attorney posits that the way to develop a better record would be for the Martin Plaintiffs to first violate the statute, the suggested approach is itself problematic. It runs headlong into the Supreme Court's consistent admonition that we avoid putting First Amendment plaintiffs to the stark choice of having their speech chilled or committing a crime. See, e.g., Babbitt, 442 U.S. at 298 ("When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" (quoting Doe v. Bolton, 410 U.S. 179, 188 (1973))); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) ("Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights.").

3.

If we shift our focus to the hardship prong of the ripeness inquiry, we also see no reason to conclude that there is a ripeness problem. Section 99 plainly makes it a crime to engage in the type of recording that the Martin Plaintiffs seek to undertake. In fact, the District Attorney does not dispute that point. Nor has the District Attorney "convincingly demonstrate[d] that the statute is moribund or that it simply will not be enforced." N.H. Right to Life Pol. Action Comm. v. Gardner, 99 F.3d 8, 16 (1st Cir. 1996). Indeed, Section 99 has been enforced in the not-too-distant past. Martin, 340 F. Supp. 3d at 93-94. Thus, the Martin Plaintiffs have met their burden at this stage of the proceedings to establish that it is "highly probable that [they] will at some point find [themselves] either in violation of" Section 99 "or be forced to self-censor." N.H. Right to Life Pol. Action Comm., 99 F.3d at 16; see also Alvarez, 679 F.3d at 588, 592 (finding no Article III bar where the plaintiff explained that "because of a credible fear of prosecution, it ha[d] not followed through on its [recording] program," where the "statute plainly prohibit[ed] the [plaintiffs'] proposed audio recording," and where "[t]he statute [had] not fallen into disuse").

4.

The District Attorney does point to various precedents that she contends demonstrate that the Martin Plaintiffs' challenge is too unformed to satisfy either the fitness or the hardship prongs of the ripeness

inquiry. But, those authorities, if anything, suggest the opposite.

The District Attorney first points to the portion of Babbitt in which the Supreme Court found a First Amendment challenge to a state law denying labor organizers access to farmworkers on privately owned property not ripe because the challenge "depend[ed] inextricably upon the attributes of the situs involved." 442 U.S. at 304. But, while the District Attorney contends the same is the case here, the Court was concerned there that only certain privately owned places to which the plaintiffs might be denied access would be sufficiently analogous to the company town in Marsh v. Alabama, 326 U.S. 501 (1946), to trigger First Amendment constraints at all. Babbitt, 442 U.S. at 304. Here, by contrast, the Martin Plaintiffs seek to engage in recording only in those "public spaces" that we have identified as ones in which First Amendment constraints were triggered. See Gericke, 753 F.3d at 8-9; Glik, 655 F.3d at 82.

The District Attorney's reliance on Renne v. Geary, 501 U.S. 312 (1991), is also misplaced. In that case, the ripeness problem arose from the fact that there was "no factual record of an actual or imminent application" of the challenged state law measure against the plaintiffs. Id. at 321-22. But, no similar reason for concern exists in this case, given the record of past enforcement of Section 99.

Finally, the District Attorney relies on Kines v. Day, which concerned an inmate's First Amendment

challenge to a prison regulation restricting his access to certain publications. 754 F.2d at 29. But, although we found that his challenge as to how that regulation might actually be applied to him in some unspecified future circumstance was not ripe, we addressed his facial challenge to that rule without questioning that it was properly subject to our review of the merits. See id. at 29-31. Thus, Kines offers no support to the District Attorney, as the Martin Plaintiffs' challenge more closely resembles the facial challenge in Kines that we addressed on the merits than the as-applied challenge that we held to be unripe in that case. See also Reed, 561 U.S. at 194 (explaining that a claim can have "characteristics" of both a facial and an as-applied challenge but that it is the "relief that would follow" and not the "label" that "matters"); see also supra Section II.A.1.

5.

For these reasons, the District Court correctly ruled that the Martin Plaintiffs' pre-enforcement challenge satisfies both the "fitness" and "hardship" prongs of the test for ripeness under Abbott Laboratories, 387 U.S. at 148-49, and therefore necessarily meets the demands of Article III with respect to ripeness. See Alvarez, 679 F.3d at 594 ("So long as th[e] uncertainty does not undermine the credible threat of prosecution or the ability of the court to evaluate the merits of the plaintiff's claim in a preenforcement posture, there is no reason to doubt standing.").

B.

We move on, then, to the merits. In taking them up, we first need to address whether the recording at issue – secretly conducted though it is – warrants at least some degree of First Amendment protection. Because we conclude that it does, we next need to explicate the level of First Amendment scrutiny that Section 99's ban on that recording warrants. With that analytical foundation in place, we then explain why we conclude that, given the breadth of the measure's prohibition on that kind of recording, it cannot survive the degree of scrutiny that we conclude we must apply.

1.

The Martin Plaintiffs challenge a restriction on their right to collect information rather than on their right to publish information that has been lawfully collected. But, the First Amendment limits the government regulation of information collection, as our decisions in Glik and Gericke show. See also 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, as we next explain, those decisions show that the First Amendment imposes at least some restrictions on the government's authority to bar the audio recording of police officers while they are discharging their official duties in public spaces.

As we explained in Glik, the First Amendment's protection "encompasses a range of conduct related to

the gathering and dissemination of information." 655 F.3d at 82. That is so, Glik elaborated, because "[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.'" Id. (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

In recognizing the "particular significance" of First Amendment newsgathering rights "with respect to government," moreover, Glik noted that "the state has a special incentive to repress opposition and often wields a more effective power of suppression." Id. (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.11 (1978)). Glik explained in this regard that protecting the right to collect information about government 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 (citation omitted). Glik added that the justifications for protecting newsgathering were "particularly true" when it came to collecting information about "law enforcement officials." Id. at 82.

Based on these observations, Glik held the following. It ruled that the federal constitutional guarantee of freedom of speech protects the right to record "government officials, including law enforcement officers, in the discharge of their duties in a public space," id. at 85, even when the recording, which there involved both audio and video, is undertaken without the consent of the person recorded, id. at 80.

Gericke then went on to extend Glik. See Gericke, 753 F.3d at 7-8. There, the person attempting to record both audio and video was an individual whom the police had pulled over during a traffic stop, id. at 7, and thus, unlike in Glik, she was not a mere observer to the police encounter that was recorded but a participant in it. Further distinguishing the case from Glik, the recording at issue in Gericke attempted to capture an encounter that occurred on the side of a highway rather than in a public park. Id. at 3-4. But, even though the recording was attempted by a person the police had stopped in a location that was hardly a traditional site for First Amendment expression, Gericke held based on Glik that the recording at issue warranted First Amendment protection, at least to some extent. Id. at 7. Indeed, Gericke reaffirmed Glik's broad formulation of the kind of recording that constituted newsgathering and found that it encompassed the attempted recording there. Id. at 7-9.

Notably, Glik and Gericke accord with the decisions of several of our sister circuits that similarly have held that such recording warrants some degree of First Amendment protection as a type of newsgathering. See, e.g., Alvarez, 679 F.3d at 600 (finding that the challenged eavesdropping statute "burdens speech and press rights" because it "interferes with the gathering and dissemination of information about government officials performing their duties in public"); Fields v. City of Philadelphia, 862 F.3d 353, 359 (3d Cir. 2017) ("[R]ecording police activity in public falls squarely within the First Amendment right of access to

information."); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing the First Amendment "right to gather information about what public officials do on public property" and "to record matters of public interest"); Fordyce v. City of Seattle, 55 F.3d 436, 442 (9th Cir. 1995) (finding a genuine dispute of material fact as to whether officers had interfered with the plaintiff's "First Amendment right to gather news"). And, while some courts of appeals have held that this right to record is not clearly established in some contexts for purposes of qualified immunity, see, e.g., Kelly v. Borough of Carlisle, 622 F.3d 248, 263 (3d Cir. 2010), none has held that the right does not exist.

It is true that these other cases – like Glik and Gericke themselves – concerned the open rather than the secret, nonconsensual recording of police officers. But, Glik described the scope of the recording activity that triggers First Amendment protection as a type of newsgathering capaciously as recording "government officials, including law enforcement officers, in the discharge of their duties in a public space." 655 F.3d at 85. Gericke then went on to use that same broad formulation, 753 F.3d at 9, which does not exempt secret recording.

The logic that Glik and Gericke relied on in setting forth that encompassing description of First Amendment-protected recording of police supplies strong support for understanding it to encompass recording even when it is conducted "secretly," at least as Section 99 uses that term. To understand why, one need only

consider the Hyde dissent's example of the recording of the beating of Rodney King.

Like the many recordings of police misconduct that have followed, the recording in the King case was made from a location unlikely to permit it to qualify as recording conducted in "plain sight" of those recorded, just as the dissent in Hyde emphasized. But, as recent events around the nation vividly illustrate, such undetected recording can itself serve "a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs,'" and "not only aids in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally." Glik, 655 F.3d at 82-83 (quoting Mills, 384 U.S. at 218); cf. Fields, 862 F.3d at 359 ("Civilian video . . . fills the gaps created when police choose not to record video or withhold their footage from the public.").

In fact, as the Martin Plaintiffs point out, audio recording of that sort can sometimes be a better tool for "[g]athering information about" police officers conducting their official duties in public, and thereby facilitating "the free discussion of governmental affairs" and "uncovering . . . abuses," than open recording is. See Glik, 655 F.3d at 82 (quoting Mills, 384 U.S. at 218). That is not only because recording undertaken from a distance – and thus out of plain sight of the person recorded – will often be the least likely to disrupt the police in carrying out their functions. It is also because recording that is not conducted with the actual knowledge of the police officer – even if conducted

proximate to the person recorded – may best ensure that it occurs at all, given the allegations that the Martin Plaintiffs set forth about the resistance from official quarters that open recording sometimes generates.

In sum, a citizen's audio recording of on-duty police officers' treatment of civilians in public spaces while carrying out their official duties, even when conducted without an officer's knowledge, can constitute newsgathering every bit as much as a credentialed reporter's after-the-fact efforts to ascertain what had transpired. The circumstances in which such recording could be conducted from a distance or without the officers' knowledge and serve the very same interest in promoting public awareness of the conduct of law enforcement – with all the accountability that the provision of such information promotes – are too numerous to permit the conclusion that recording can be prohibited in all of those situations without attracting any First Amendment review. We thus hold that the Martin Plaintiffs' proposed recording constitutes a type of newsgathering that falls within the scope of the First Amendment, even though it will be undertaken secretly within the meaning of Section 99.[2]

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[2] We thus need not and do not address here the possible bounds of this right, such as whether it includes recording via deceptive tactics that would affirmatively mislead officers into incorrectly thinking that they are not being recorded.

2.

That such recording qualifies as a species of protected newsgathering does not mean that Section 99's criminal bar against it necessarily violates the First Amendment. We cautioned in Glik that the right to record that was recognized there "is not without limitations." Id. at 84. We thus must determine whether the "limitations" that Section 99 imposes on this type of recording – conducted secretly as it will be – comport with the First Amendment.

Glik had "no occasion to explore those limitations" because the audio recording of the officers at issue there occurred "peaceful[ly]," from a "comfortable" distance, in a "public space," and in a manner that did "not interfere with the police officers' performance of their duties." Id. But, although Glik made clear that such peaceable open recording – which captured an "arrest on the Boston Common" – was "worlds apart" from the recording of a "traffic stop," id. at 85, Gericke explained that the distinct concerns about public safety and interference with official duties implicated by such a stop did not, without more, "extinguish" the right we recognized in Glik. Gericke, 753 F.3d at 7 (discussing Glik, 655 F.3d at 82-83). In fact, although Gericke recognized that the circumstances of a given police encounter "might justify a safety measure" that could incidentally constrain citizens' right to record, it held that "a police order that is specifically directed at the First Amendment right to [record] police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the

[recording] itself is interfering, or is about to interfere, with his duties." Id. at 8.

Gericke did recognize that the government might choose to regulate such recording in a more general, ex ante manner. But, it concluded that the government would need a "legitimate governmental purpose" to impose a limitation of that sort. Id. Thus, in light of Glik and Gericke, we must decide whether either the Commonwealth's interest in prohibiting conduct that "interfere[s]" with police officers' ability to carry out their duties or some other "legitimate governmental purpose" justifies Section 99's ban on the secret, nonconsensual audio recording of police officers discharging their official duties in public spaces. Id.; see also Glik, 655 F.3d at 84.

Before answering that question, though, we must decide how tailored Section 99's ban on the recording here needs to be to the legitimate governmental interest that the Commonwealth claims Section 99's criminal bar against the recording at issue serves, whether it is the interest in preventing interference with the discharge of police functions or some other interest altogether. We thus turn to that antecedent question, which sounds in the familiar vernacular of "level of scrutiny."

a.

The District Court agreed with the Martin Plaintiffs that Section 99's ban is content neutral, because it prohibits secret recording without regard to the

topics or ideas recorded. Martin, 340 F. Supp. 3d at 105; see also Jean, 492 F.3d at 29 ("[S]ection 99 is a 'content-neutral law of general applicability.'" (quoting Bartnicki v. Vopper, 532 U.S. 514, 526 (2001))). Accordingly, the District Court also agreed with the Martin Plaintiffs that strict scrutiny would not be appropriate. Martin, 340 F. Supp. 3d at 105.

The District Court expressly pointed out, however, that the Defendants did not develop an argument that "a standard lower than intermediate scrutiny" should be applied, as they merely suggested that such a lower standard "might" be appropriate. Id. at 106. Thus, the District Court accepted the Martin Plaintiffs' argument that Section 99's bar on the secret recording at issue should be evaluated under "intermediate scrutiny," id. at 105, which required the District Court to determine whether the bar is "narrowly tailored to serve a significant government interest," id. at 106 (quoting Rideout, 838 F.3d at 71-72). The District Court also noted that for a law to survive intermediate scrutiny, it "must 'leave open ample alternative channels for communication.'" Id. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

On appeal, the District Attorney challenges the District Court's decision to apply that level of scrutiny by referencing precedents applying forum analysis to evaluate restrictions on expression. She notes that the category "public spaces" encompasses not only traditional public fora like public parks but also limited and nonpublic fora, such as the shoulders of highways and certain areas of public buildings like the site of the

recording at issue in Iacobucci, 193 F.3d at 18. But, she points out, the intermediate level of scrutiny that applies to content-neutral restrictions on expression in traditional public fora, see Cutting v. City of Portland, 802 F.3d 79, 84 (1st Cir. 2015) (applying intermediate scrutiny), gives way to a lower level of scrutiny when we evaluate such restrictions in other fora, see Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth., 781 F.3d 571, 581 (1st Cir. 2015) (asking as to nonpublic fora whether the restrictions "are not viewpoint-based and are reasonable in light of the purposes for which the forum was established"). For that reason, the District Attorney contends, the District Court erred in applying intermediate scrutiny to Section 99's bar across the board, as by doing so the District Court failed to attend to the differing locales in which the planned recording would occur and thus required the government to satisfy a degree of fit between means and ends that was unnecessarily demanding.

Neither Glik nor Gericke, however, purported to predicate the level of scrutiny that applied to the challenged recording restrictions on forum analysis. And while the Supreme Court has not addressed a challenge to a prohibition against secretly (or, for that matter, openly) recording law enforcement, there is no indication in its precedent that the "forum based" approach that is used to evaluate a "regulation of speech on government property," Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) (emphasis added), necessarily applies to a regulation on the collection of information on public property, see United

States v. Am. Libr. Ass'n, 539 U.S. 194, 205 (2003) (plurality opinion) ("[P]ublic forum principles . . . are out of place in the context of this case."); see also id. ("We expressly declined to apply forum analysis [in National Endowment for the Arts v. Finley, 524 U.S. 569 (1998)]."); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 544 (2001) (noting that the Court's limited forum cases were related to but did not control its subsidy cases). Compare March v. Mills, 867 F.3d 46, 53-54 (1st Cir. 2017) (applying forum analysis to a statute that "restrict[ed] noisemaking even in public parks . . . [and] other traditional public fora"), with Pleasant Grove City v. Summum, 555 U.S. 460, 480 (2009) ("[A]s a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property."). Nor does the District Attorney offer anything beyond assertion as to why forum analysis – in a strict sense – applies in the context of the right to engage in the newsgathering involved here.

The application of intermediate scrutiny also accords with the approach that we took in Glik and Gericke, even though neither case explicitly named the level of scrutiny deployed. Indeed, the District Attorney – by repeatedly emphasizing that the facts underlying Glik took place in a traditional public forum and by conceding that intermediate scrutiny pertains in such a setting – implicitly recognizes that we effectively applied that level of scrutiny in Glik. See Glik, 655 F.3d at 84 (recognizing that the right to record may be subject to appropriate time, place, and manner restrictions); see also, e.g., Rideout, 838 F.3d at 71-72

(citing Ward, 491 U.S. at 791, a case about time, place, or manner restrictions, in articulating the inquiry for intermediate scrutiny); McGuire v. Reilly, 260 F.3d 36, 43 (1st Cir. 2001) (describing the "level of analysis" that applies to "time, place, and manner" restrictions as "intermediate scrutiny"). And, while Gericke was no more express than Glik in naming the level of scrutiny applied, it purported only to be following Glik, despite the fact that the recording there did not occur in a traditional public forum.

Finally, the intermediate level of scrutiny the District Court applied roughly tracks the scrutiny applied to restrictions on newsgathering in other locales to which the public generally has access to collect information. This correspondence reinforces our conclusion that we have no reason to depart from the District Court's approach here. See Press-Enter. Co. v. Superior Ct., 478 U.S. 1, 13-14 (1986) (holding that a criminal proceeding may be closed to protect the accused's right to a fair trial only if doing so is "narrowly tailored to serve that interest," meaning that "there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent" and that "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights" (quoting Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 510 (1984))); see also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580-81 (1980) (plurality opinion); United States v. Three Juveniles, 61 F.3d 86, 88 (1st Cir. 1995).

b.

We have, then, but one task left to complete: We need to review the District Court's application of intermediate scrutiny to the bar that Section 99 imposes, which in turn requires us to evaluate each of the Commonwealth's purported interests in enacting the ban on the type of recording in which the Martin Plaintiffs plan to engage and the extent to which Section 99 furthers those interests.[3] As we will explain, we conclude that the District Court rightly determined that, even though intermediate scrutiny does not require that a measure be the least restrictive means of achieving the government's interests, Section 99 is not narrowly tailored to further either of the identified governmental interests – namely, preventing interference with police activities and protecting individual privacy – notwithstanding their importance. See Martin, 340 F. Supp. 3d at 106-08.

i.

The government is under no obligation to permit a type of newsgathering that would interfere with police officers' ability to do their jobs. But, neither Glik nor Gericke accepted the notion that the mere act of open recording, without more, so severely disrupted officers in carrying out their duties that it justified the restriction of such recording in the absence of the consent

[3] We note also that at least one other circuit has suggested that restrictions on open recording in public places should be subject to intermediate scrutiny. See Alvarez, 679 F.3d at 604.

of all recorded persons. Those cases in this respect establish, at the least, that the police's own view of whether recording of their work is desirable is not the measure of whether it causes interference that would justify its total prohibition.

Because the recording here will not be done in plain sight or with the actual knowledge of the officers whose words will be recorded, they will not even be aware that such recording is occurring. For that reason, they will not be on specific notice of a need to take precautions to ensure that words that they do not wish to have recorded are not. But, insofar as the mere prospect of being recorded leads officers to feel the need to refrain from uttering words or engaging in actions that would constitute misconduct, it hardly interferes with their capacity to perform their official duties. Nor does the record show how heightened consciousness on the officers' part that recording may be occurring, even if the officers are not on specific notice that it actually is, would appreciably alter their ability to protect the public either in gross or at the retail level of more individualized interactions.

It was suggested at oral argument that officers seeking to converse with confidential informants could be constrained in their ability to do so, in light of the possibility that any such exchange would be recorded by an unknown and unseen observer. See also Alvarez, 679 F.3d at 613 (Posner, J., dissenting). But, we presume officers are already careful when engaging in such sensitive conversations within earshot of others, and the record offers no other details about how any

such heightened caution might disrupt police practice. Thus, the record provides no support for the conclusion that Section 99 reduces interference with official police responsibilities in any meaningful way with respect to at least the mine-run of circumstances – whether involving an arrest in a park, a roadside traffic stop, or a gathering in a foyer following a public meeting in a public building – in which police officers may be "secretly" recorded without their consent while discharging their official functions in public spaces. See Gericke, 753 F.3d at 8; cf. City of Houston v. Hill, 482 U.S. 451, 463 n.11 (1987) (explaining that true "physical obstruction of police action" may "constitutionally be punished under a properly tailored statute" but that such an objective cannot be accomplished by "broadly criminalizing" First Amendment activity directed toward an officer).

Accordingly, we conclude that the statute's outright ban on such secret recording is not narrowly tailored to further the government's important interest in preventing interference with police doing their jobs and thereby protecting the public. See Rideout, 838 F.3d at 72; see also Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (plurality opinion) (explaining that even where the government's asserted interests are important it still "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"); City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 496 (1986) (advising that courts should not "simply assume" that a

statute "will always advance the asserted state interests sufficiently" (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n.22 (1984))). Rather, despite a record that does little to show how secret, nonconsensual audio recording of police officers doing their jobs in public interferes with their mission, Section 99 broadly prohibits such recording, notwithstanding the myriad circumstances in which it may play a critical role in informing the public about how the police are conducting themselves, whether by documenting their heroism, dispelling claims of their misconduct, or facilitating the public's ability to hold them to account for their wrongdoing.

ii.

There remains the question whether Section 99's prohibition against the recording at issue is nevertheless properly calibrated to serve some other "legitimate governmental purpose." Gericke, 753 F.3d at 8. The District Attorney contends that it is, because although Massachusetts "values public scrutiny of government affairs, including that accomplished through recordings," it has a "significant interest" in "assur[ing] that its citizens are aware of when they are being recorded, safeguarding a specific type of privacy – not freedom from being recorded, but rather notice of being recorded." The District Attorney also presses the related contention that protecting such a privacy interest helps 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.

Protecting the privacy of the citizens of Massachusetts is a legitimate and important governmental interest. See Bartnicki, 532 U.S. at 532-33. But, as we noted in Glik, "[i]n our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." 655 F.3d at 84; see also City of Houston, 482 U.S. at 462-63 ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."). That includes the loss of some measure of their privacy when doing their work in public spaces. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) ("An individual who decides to seek governmental office . . . runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties."); Jean, 492 F.3d at 30 (finding police officers' privacy interests "virtually irrelevant" where they were recorded searching a private home). Thus, even if there might be circumstances in which officers – while in public spaces and working – have some privacy interest that the prospect of secret recording could threaten, the total ban on all such audio recording of any of their official activities in public spaces simply because it qualifies as being done "secretly" within the meaning of Hyde is too unqualified to be

justified in the name of protecting that degree of privacy.

Rather than dispute this point, the District Attorney focuses on the fact that private citizens in the vicinity of the officers are not themselves governmental employees, let alone law enforcement officers on the job. She argues that "[c]ivilians have many reasons to voluntarily interact" with government officials, including police officers, in public and that even civilians who have no intention of interacting with police "might simply be within audible recording range." Yet, the District Attorney notes, their words may be picked up by the recording that the Martin Plaintiffs contend they have a First Amendment right to undertake without those persons having any notice that recording is taking place.

In pressing this point, the District Attorney contends that special attention must be paid to the fact that "when a recording is made surreptitiously, the person being recorded unwittingly becomes a captive." She supports this argument by invoking the Supreme Court's captive-audience cases. See, e.g., Hill v. Colorado, 530 U.S. 703, 716-17 (2000); Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 738 (1970).

In that line of cases, the Court recognized that government can protect an "interest" in "avoid[ing] unwelcome speech" if "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." Hill, 530 U.S. at 717-18 & n.24 (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975)).

The District Attorney argues that the recording of an unwitting private citizen is tantamount to rendering that person a captive because "that person is unaware of the recording, and thus is deprived of any meaningful opportunity to do anything about it."

But, the captive-audience line of authority concerns restrictions on expression that the government may impose to protect persons from being subjected to speech they wish to avoid. The risk of being subjected to unwanted speech, of course, is not a concern here. Moreover, the only individuals who will be recorded by the Martin Plaintiffs are those in public spaces who are within earshot of police officers and choose to speak. Thus, we do not see how – across the board – the proposed secret recording results in "substantial privacy interests . . . being invaded in an essentially intolerable manner." Cohen v. California, 403 U.S. 15, 21 (1971). For similar reasons, we are not persuaded by the District Attorney's reliance on Bartnicki v. Vopper, 532 U.S. at 517, 533. The differences between the circumstances of the telephone conversation recorded there and those in which the recording would occur under the Martin Plaintiffs' desired rule, which pertains only to a far more public setting, are too great to make the analogy a persuasive one.

We can envision circumstances in which an individual who is interacting with (or in the vicinity of) a police officer might have a particularly heightened reason to wish to have notice that her comments are being recorded. Cf. Fla. Star v. B.J.F., 491 U.S. 524, 537 (1989) (recognizing a privacy interest in the identity of rape

victims); United States v. Cotto-Flores, 970 F.3d 17, 38 (1st Cir. 2020) (recognizing a compelling interest in "protecting 'minor victims of sex crimes from further trauma and embarrassment'" (quoting Maryland v. Craig, 497 U.S. 836, 852 (1990))); United States v. Tse, 375 F.3d 148, 164 (1st Cir. 2004) (recognizing the "important concern[ ]" of preventing unnecessary embarrassment to witnesses). But see Branzburg, 408 U.S. at 693 (minimizing the interest of newspaper informants who wish to remain anonymous where "[t]hey may fear that disclosure will threaten their job security or personal safety or that it will simply result in dishonor or embarrassment"); see Alvarez, 679 F.3d at 611 (Posner, J., dissenting) (cataloging examples of interactions that an officer may have with private citizens in public). Notice of recording may help such private individuals avoid the shame or embarrassment of the recording of their unfiltered comments or help prevent their statements from being taken out of context. See 1968 Commission Report at 12 (expressing an interest in protecting "the person who chooses to speak frankly and freely in personal conversation" from the exposure of "what he says in jest, with a wink, for its shock value on his conversational partner, or to test some belief held by the other party"). But, as a general matter, an individual's privacy interests are hardly at their zenith in speaking audibly in a public space within earshot of a police officer. Cf. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 494-95 (1975). Thus, we conclude that Massachusetts may not deploy the blunderbuss prohibitory approach embodied in Section 99 to protect civilians in the core set of situations where their privacy interests

may be heightened. See Ward, 491 U.S. at 799 ("Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."); Frisby v. Schultz, 487 U.S. 474, 485 (1988) ("A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil."); Cutting, 802 F.3d at 86 ("[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency." (quoting McCullen v. Coakley, 573 U.S. 464, 486))); cf. Fla. Star, 491 U.S. at 539 ("We have previously noted the impermissibility of categorical prohibitions upon media access where important First Amendment interests are at stake.").

In light of our analysis to this point, we need not address whether the statute leaves open viable alternative channels for First Amendment activity. See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 168-69 (2002) (striking down an ordinance on tailoring grounds without reaching whether alternative channels of communication were sufficient). We are not persuaded, however, by the District Attorney's assertion that Section 99 "preserves adequate alternative channels" because it "does not limit open recording in any way." "[A]udio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public," Alvarez, 679 F.3d at 607, and the undisputed record supports the Martin Plaintiffs' concern that open recording puts

them at risk of physical harm and retaliation and thereby undermines its capacity to serve as an adequate alternative means of newsgathering if the type of recording at issue here is barred.

c.

We thus conclude that Section 99, which does not contain the privacy-based exceptions other states recognize in their recording bans, see, e.g., Fla. Stat. § 934.02(2), is insufficiently tailored to serve the important privacy interests implicated in the context of the Martin Plaintiffs' challenge.[4] Accordingly, we affirm the District Court's grant of summary judgment to the Martin Plaintiffs.

III.

We now turn to the cross-appeals that stem from Project Veritas's suit challenging Section 99 on First Amendment grounds. We first consider Project Veritas's appeal from the District Court's grant of the Defendants' motion to dismiss its claim that Section 99 is invalid in its entirety under the First Amendment's overbreadth doctrine. We then consider its challenge to the District Court's grant of the Defendants' motion to

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[4] The District Attorney also "observes," in a footnote, that Section 99 "might alternatively be analyzed as a regulation of conduct that imposes a mere incidental burden on expression." But, the argument is waived for insufficient development. Doe v. Trs. of Bos. Coll., 892 F.3d 67, 83 n.7 (1st Cir. 2018) (quoting Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 60 n.17 (1st Cir. 1999)).

dismiss its claim that Section 99 is unconstitutional insofar as it prohibits the secret recording of private individuals whenever they have no expectation of privacy. Finally, we take up the District Attorney's appeal from the District Court's decision to grant summary judgment to Project Veritas on its claim that this measure violates the First Amendment insofar as it prohibits the secret, nonconsensual audio recording of all government officials performing their duties in public spaces. The District Attorney challenges that ruling both on jurisdictional grounds and on the merits. Our review of these challenges – whether brought by Project Veritas or the District Attorney – is de novo. Zabala-De Jesus, 959 F.3d at 427; Lyman v. Baker, 954 F.3d 351, 359 (1st Cir. 2020).

A.

The District Court implicitly ruled that Project Veritas's facial overbreadth claim was ripe, Project Veritas Action Fund, 244 F. Supp. 3d at 262, 265, and we agree. It "presents a single, purely legal question." Whitehouse, 199 F.3d at 34; see also Commodity Trend Serv., 149 F.3d at 687 n.3. Project Veritas also has adequately shown that it has refrained from some secret recording that it would undertake but for Section 99's bar, Project Veritas Action Fund, 244 F. Supp. 3d at 262, which the District Attorney has previously enforced, see Martin, 340 F. Supp. 3d at 93-94.

The District Court rejected Project Veritas's facial overbreadth claim on the merits, however, and it is

that ruling that Project Veritas challenges on appeal. We see no error.

A law may be invalidated in its entirety under the First Amendment overbreadth doctrine only "if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" United States v. Stevens, 559 U.S. 460, 473 (2010) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)). The District Court determined that Project Veritas's overbreadth challenge failed, because "[m]ost" of the statute's applications are constitutional. Project Veritas Action Fund, 244 F. Supp. 3d at 266.

Project Veritas does identify ten examples of applications of Section 99 that it argues are unconstitutional and that "[o]ne can expand these ten examples almost exponentially to grasp the amazing breadth and reach of this law." But, by looking solely at one half of the equation, Project Veritas fails to show, as it must, that the unconstitutional applications are "substantial" relative to the extensive range of applications it does not even challenge. We thus affirm the District Court's rejection of Project Veritas's First Amendment overbreadth challenge.

B.

There remain the challenges to the District Court's rulings on Project Veritas's two more narrowly targeted attempts to show that Section 99 violates the First Amendment insofar as it bars certain types of

recording. In the first of these attempts, Project Veritas contends that the statute is unconstitutional insofar as it prohibits the secret, nonconsensual audio recording of any person who does not have a reasonable expectation of privacy in what is recorded. In the second, Project Veritas contends that the statute is unconstitutional insofar as it prohibits the secret, nonconsensual audio recording of all government officials discharging their official duties in public spaces.

The District Court ruled against Project Veritas on the merits as to the former claim but for Project Veritas on the merits as to the latter. Id. at 265; Martin, 340 F. Supp. 3d at 108. Thus, we confront an appeal by Project Veritas as to that first ruling and an appeal by the District Attorney as to the second. As we will explain, we conclude that neither of the underlying challenges to Section 99 is ripe.

Our conclusion, we emphasize, does not turn on any skepticism that, but for Section 99, Project Veritas would engage in the investigations it describes itself as intending to undertake. See Torres-Negrón v. J & N Recs., LLC, 504 F.3d 151, 163 (1st Cir. 2007) (explaining that, in the event that "the plaintiff presents sufficient evidence to create a genuine dispute of material (jurisdictional) facts," the case must survive a motion to dismiss). Instead, as we will explain, it rests on the fact that Project Veritas has not sought relief in bringing these challenges that is more congruent in scope to an articulated set of planned investigations. For that reason, we conclude that the organization through these challenges impermissibly seeks to transform our

First Amendment inquiry "from a necessary means of vindicating [a party's] right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws." Renne, 501 U.S. at 324 (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 484-85 (1989)).

1.

We begin with Project Veritas's First Amendment challenge to Section 99 insofar as it bars the secret recording of "individuals who lack[ ] any reasonable expectation of privacy." In a response to interrogatories from the District Attorney, Project Veritas explained that it "defines 'reasonable expectation of privacy' as a circumstance in which the parties to the communication may reasonably expect that the communication may not be overheard or recorded."

That vague yet sweeping definition, however, is problematic from the perspective of the ripeness inquiry. It fails to ensure that the "contours" of this challenge to Section 99 are "sharply defined." Stern v. U.S. Dist. Ct., 214 F.3d 4, 10 (1st Cir. 2000); cf. Whitehouse, 199 F.3d at 32 (reviewing claim where the "parameters of the activity that [the plaintiff] proposed to undertake were discrete and well-defined").

This lack of precision also prompts the concern that it is merely "conjectural to anticipate" that Section 99 will ever be applied in many of the distinct contexts to which Project Veritas's challenge to that measure – by the organization's own terms – extends. Babbitt,

442 U.S. at 304. That Project Veritas has emphasized to us that it intends to record "newsworthy" content "in which the public has a legitimate concern" but has made no effort to cabin its request for relief accordingly only exacerbates the disconnect between the alleged intended action and the requested relief. And that concern about adjudication of hypothetical rather than real disputes looms even larger when one considers the ways in which the First Amendment analysis could be affected by the types of conversations that are targeted.

In this respect, Project Veritas's claims are distinct from those brought in Mangual v. Rotger-Sabat, on which the organization relies heavily for its jurisdictional arguments. See 317 F.3d at 59-60. There, the plaintiff sought declaratory and injunctive relief to the effect that Puerto Rico's criminal libel statute incorporated constitutionally deficient standards with regard to statements about public officials or figures. See id. at 51-52, 69. The scope of that pre-enforcement protection was coextensive with the plaintiff's alleged plans to continue working as an investigative journalist and publish statements about public figures. See id. at 58, 69.

Nor is Project Veritas's reliance on the Seventh Circuit's analysis in Alvarez helpful to its cause. As we explained in our analysis of the ripeness of the Martin Plaintiffs' challenge, see supra Section II.A.2, Alvarez concerned a very different plan of recording – that the ACLU intended to "use its employees and agents to audio record on-duty police officers in public places," 679

F.3d at 593. That plan was congruent to the ACLU's request for relief, which sought pre-enforcement protection for that very same activity. Id. at 588.

Accordingly, we conclude not merely that the challenge raises "serious ripeness concerns," as the District Court recognized, Martin, 340 F. Supp. 3d at 104, but that those concerns are so serious that Article III precludes this challenge from going forward in its present state. We thus must vacate the District Court's merits-based ruling on the ground that this aspect of Project Veritas's challenge to Section 99 must be dismissed on ripeness grounds.

2.

Project Veritas's First Amendment challenge to Section 99's bar to the secret, nonconsensual audio recording of "government officials discharging their duties in public spaces" raises similar ripeness concerns. In a response to interrogatories from the District Attorney, the organization defined the phrase "government officials" as broadly as we can imagine, explaining that it intended to refer to "officials and civil servants."[5]

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[5] Project Veritas also listed the Black's Law Dictionary definition of each term. See Official, Black's Law Dictionary (10th ed. 2014) ("Someone who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government's sovereign powers. – Also termed public official."); Civil Servant, Black's Law Dictionary (10th ed. 2014) ("Someone employed in a department responsible for conducting the affairs of a national or local government. – Also termed public employee.").

That definition is of concern with respect to ripeness because Project Veritas has described its planned investigations in terms that are not nearly so broad. Project Veritas alleged in connection with this challenge that it seeks to record "government officials who are discharging their duties at or around the State House in Boston and other public spaces" in hopes of learning those officials' unvarnished thoughts about "immigration policy and deportation"; "to capture whether antifa public events and protests are peaceful, whether police or other public officials' interactions with antifa members are non-violent," and to otherwise report on those events; and that its "journalists would have attended" "a large public event" related to "the ongoing PVA 'antifa' investigation" but for Section 99.

Thus, Project Veritas gives no indication that it intends to investigate any and every type of civil servant, no matter their function or place in the governmental hierarchy. But, if we take Project Veritas at its word and construe the term "government officials" as broadly as "officials and civil servants," that category covers everyone from an elected official to a public school teacher to a city park maintenance worker.

The contrast between the narrowness of Project Veritas's plans and the breadth of the remedy that it has requested leads to the concern that it has not adequately shown that it intends to engage in much of the conduct covered by the relief it seeks. Cf. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 735 (1998) ("The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too

abstract or unnecessary ordinarily outweigh the additional costs of – even repetitive – [more focused] litigation."). The concern that this disconnect renders this dispute hypothetical and abstract rather than real and concrete is compounded by the fact that the First Amendment analysis might be appreciably affected by the type of government official who would be recorded. It is hardly clear that a restriction on the recording of a mayor's speech in a public park gives rise to the same First Amendment concerns as a restriction on the recording of a grammar school teacher interacting with her students in that same locale while on a field trip or public works employees conversing while tending to a city park's grounds.

Thus, we conclude here, too, that the disparity between plan and challenge is too great for us to conclude that there is a live case or controversy as to Section 99's enforcement in the context of the full spectrum of "government officials discharging their duties in public spaces." For that reason, we vacate the District Court's ruling on the merits of Project Veritas's challenge to Section 99 insofar as it applies to bar the secret, nonconsensual audio recording of any "government official" discharging official duties in public spaces. Instead, we hold that this challenge must be dismissed without prejudice for lack of Article III jurisdiction on ripeness grounds.

IV.

The privacy that we enjoy, even in public, is too important to be taken for granted. Cf. Carpenter v. United States, 138 S. Ct. 2206, 2217-18 (2018) (first citing United States v. Jones, 565 U.S. 400, 430 (2012) (Alito, J., concurring in judgment), then citing id. at 415 (Sotomayor, J., concurring)). But, so, too, is the role that laypersons can play in informing the public about the way public officials, and law enforcement in particular, carry out their official duties.

We conclude that, by holding that Section 99 violates the First Amendment in criminalizing the secret, nonconsensual audio recording of police officers discharging their official duties in public spaces and by granting declaratory relief to the Martin Plaintiffs, the District Court properly accounted for the values of both privacy and accountability within our constitutional system. We further conclude that the District Court properly rejected Project Veritas's First Amendment overbreadth challenge, in which the organization sought to invalidate the measure in its entirety, given the substantial protection for privacy that it provides in contexts far removed from those that concern the need to hold public officials accountable. Finally, we vacate and remand the District Court's rulings as to the remainder of Project Veritas's challenges, because, in their present state, they ask us to engage in an inquiry into sensitive and difficult First Amendment issues – concerning both privacy in public and government accountability – that is too likely to be a hypothetical one, given the disconnect between the organization's

concrete allegations regarding its intentions and the breadth of the relief it seeks. We thus affirm the District Court's judgment in the Martin Plaintiffs' case and affirm in part and vacate and remand in part its judgment in Project Veritas's. The parties shall bear their own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

K. ERIC MARTIN and RENÉ PÉREZ, Plaintiffs, v. WILLIAM GROSS, in His Official Capacity as Police Commissioner for the City of Boston, and RACHAEL ROLLINS, in Her Official Capacity as District Attorney for Suffolk County, Defendants.	Civil Action No. 16-11362-PBS
PROJECT VERITAS ACTION FUND, Plaintiff, v. RACHAEL ROLLINS, in Her Official Capacity as Suffolk County District Attorney, Defendant.	Civil Action No. 16-10462-PBS

MEMORANDUM AND ORDER

May 22, 2019

Saris, C.J.

INTRODUCTION

In these two actions, Plaintiffs challenged the constitutionality of Mass. Gen. Laws ch. 272, § 99 ("Section 99"), which, among other things, prohibits secret audio recordings of government officials in Massachusetts.[1] On December 10, 2018, the Court allowed Plaintiffs' motions for summary judgment in both cases and declared that Section 99 violates the First Amendment insofar as it prohibits the secret audio recording of government officials, including law enforcement officers, performing their duties in public spaces, subject to reasonable time, place, and manner restrictions. Martin v. Gross, 340 F. Supp. 3d 87, 109 (D. Mass. 2018). The Court directed the parties to submit a proposed form of injunction. Id. Defendants, the Suffolk County District Attorney and the Police Commissioner for the City of Boston, now argue that a permanent injunction is not necessary, and a declaratory judgment is sufficient. Defendants also ask the Court to narrow the

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[1] The Court assumes familiarity with its earlier opinions in both cases. See Martin v. Gross, 340 F. Supp. 3d 87 (D. Mass. 2018); Project Veritas Action Fund v. Conley, 270 F. Supp. 3d 337 (D. Mass. 2017); Project Veritas Action Fund v. Conley, 244 F. Supp. 3d 256 (D. Mass. 2017); Martin v. Evans, 241 F. Supp. 3d 276 (D. Mass. 2017).

scope of its previous ruling, for example, by defining "government officials" and "public space."

For the reasons discussed below, the Court agrees that a declaratory judgment is sufficient to give effect to the Court's ruling but declines the request to narrow the holding.

DISCUSSION

Defendants argue that the Court should enter a declaratory judgment that fixes the bounds of constitutionally permissible conduct rather than issue an injunction. They contend that a declaratory judgment is a less drastic, non-coercive remedy that will have the same practical effect as an injunction and will better comport with the principles of federalism and comity. They also argue for various provisions not contained in the Court's December 10 order, including: (1) a definition of "public space" as "a traditional or designated public forum"; (2) a more robust definition of "government official"; and (3) an affirmative declaration that Section 99 is still enforceable against a person who surreptitiously records the communications of someone other than a "government official."

1. Declaratory Judgment or Injunction

The first question is whether the Court should issue a declaratory judgment rather than an injunction. The Supreme Court has explained that Congress enacted the Declaratory Judgment Act (codified at 28

U.S.C. §§ 2201-02) to create a form of relief "to act as an alternative to the strong medicine of the injunction and to be utilized to test the constitutionality of state criminal statutes in cases where injunctive relief would be unavailable." Steffel v. Thompson, 415 U.S. 452, 466 (1974). Although the practical effect of the two forms of relief is ordinarily the same, see Samuels v. Mackell, 401 U.S. 66, 73 (1971), a declaratory judgment is a "milder form of relief" because it is not coercive, i.e., noncompliance will not result in contempt proceedings, Steffel, 415 U.S. at 471; see also Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary.").

In some cases where a constitutional challenge to the validity of a state or local statute or regulation has been successful, the First Circuit has approved the entry of injunctive relief. See Cutting v. City of Portland, 802 F.3d 79, 81 (1st Cir. 2015); Mangual v. Rotger-Sabat, 317 F.3d 45, 69 (1st Cir. 2003); see also Nationalist Movement v. City of Boston, 12 F. Supp. 2d 182, 195 (D. Mass. 1998) (entering permanent injunction barring enforcement of city ordinance regulating parade permitting after the court held the regulation was facially invalid). But in other cases where the validity of a state or local statute or regulation is at issue, courts in this district have issued declaratory judgments rather than permanent injunctions. See, e.g., McLaughlin v. City of

Lowell, 140 F. Supp. 3d 177, 197 & n.16 (D. Mass. 2015) (in facial challenge to city's anti-panhandling ordinance, declaring ordinance unconstitutional but declining to enter separate injunction to similar effect); Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester, 851 F. Supp. 2d 311, 321 n.5 (D. Mass. 2012) (in facial challenge to city's prohibition on advertising of tobacco products, declaring ordinance unconstitutional but declining to enter separate injunction to similar effect); Canterbury Liquors & Pantry v. Sullivan, 16 F. Supp. 2d 41, 51 (D. Mass. 1998) (declaring state statute relating to the pricing of wholesale liquor was preempted by the Sherman Act but declining to enter separate injunction to similar effect); S. Bos. Allied War Veterans Council v. City of Boston, 875 F. Supp. 891, 920 (D. Mass. 1995) (in as-applied challenge to city's parade permitting policy, declaring that permitting requirements for St. Patrick's Day parade violated the Constitution but declining to enter separate injunction to similar effect); Mass. Gen. Hosp. v. Sargent, 397 F. Supp. 1056, 1057, 1063 (D. Mass. 1975) (declaring that state policy of failing to make prompt and full payments under the federal Social Security program violated Article VI of the U.S. Constitution but declining to enter injunction to similar effect).

The Court holds that a declaratory judgment is more appropriate than a permanent injunction in this case for two reasons. First, the Court has held that Section 99 is invalid as applied to the secret audio recording of government officials, "subject to reasonable time, place, and manner restrictions." Martin, 340

F. Supp. 3d at 109. Because there is room for disagreement about whether a restriction is reasonable, the threat of contempt for violation of the injunction is too blunt and coercive an enforcement mechanism in situations where decision-making is necessarily split second. Second, the Court has not defined the meaning of "public space" or "government official." The issuance of an injunction could effectively implicate a judicial second-guessing of the policing function to determine whether the order was violated. Cf. Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 782 (7th Cir. 2010) (holding that a declaratory judgment sufficed where an injunction may have effectively required the judge to take over management of the program for distributing funds to student groups challenged on First Amendment grounds). For these reasons, the Court concludes that a declaratory judgment strikes the correct balance between Plaintiffs' First Amendment interests and Defendants' sovereignty as state and local law enforcement officials. See Doran, 422 U.S. at 931.

Plaintiffs in Martin claim that a permanent injunction is necessary because there are reasons to doubt that Defendants will comply with just a declaratory judgment. As evidence, they point to the fact that Defendants continued to enforce Section 99 for eight years following the First Circuit's holding in Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011), "that the First Amendment protects the filming of government officials in public spaces." Further, they contend Defendants enforced Section 99 one time during the pendency

of this litigation, even after the Court denied their motions to dismiss.

The Court is not persuaded that Defendants will not comply with its decision going forward. The Court has interpreted Glik "as standing for the proposition that the First Amendment protects the right to record audio and video of government officials, including law enforcement officers, performing their duties in public, subject only to reasonable time, place, and manner restrictions." Id. at 97-98. As a factual matter, though, Glik concerned recording done openly rather than secretly. See 655 F.3d at 79, 87. That Defendants read Glik narrowly in the past is not proof that they will continue to do so now that the Court has ruled. Defendants have stated they will follow this Court's ruling, and the Court will take them at their word. See No. 16-cv-11362-PBS, Dkt. No. 166 at 2. The Court "assume[s] that municipalities and public officers will do their duty when disputed questions have been finally adjudicated and the rights and liabilities of the parties have been finally determined." Commonwealth v. Town of Hudson, 52 N.E.2d 566, 572 (Mass. 1943); see also McLaughlin, 140 F. Supp. 3d at 197 n.16.

Thus, the Court will not issue a permanent injunction and finds that a declaratory judgment is a sufficient remedy.

2. Scope of Declaratory Judgment

Defendants ask the Court to adopt a declaratory judgment that narrows the definitions of "public space"

and "government official." As Defendants acknowledge, the Court concluded that it would leave "it to subsequent cases to define these terms on a better record." Martin, 340 F. Supp. 3d at 109. With respect to "public space" and "government official," in its December 10 order the Court specifically adopted the language that the First Circuit employed in Glik. See, e.g., 655 F.3d at 82 ("The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles."); id. at 83 ("Our recognition that the First Amendment protects the filming of government officials in public spaces accords with the decisions of numerous circuit and district courts."); id. at 84("Such peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation.") id. at 85 ("In summary, though not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment."). Defendants' proposal that "public space" be defined as encompassing "traditional and designated public for[a]," then, is narrower than the plain language of Glik. And, while Defendants have proposed a list of persons that might qualify as a "government official," at this late stage in the proceedings the Court has no basis for evaluating whether it is an overinclusive or underinclusive list. The Court will not reconsider its December 10 order to give either "public space" or "government official" definitions.

Defendants also ask the Court to narrow its declaration so that Section 99 is still enforceable where a surreptitious audio recording captures the oral communications of both a government official and a non-government official (i.e., a civilian). Defendants contend that this limitation is necessary to protect the privacy interests of civilians (such as victims). However, in Glik, the plaintiff was arrested for recording several police officers arresting a man on the Boston Common. Id. at 79. The First Circuit found that the plaintiff had a First Amendment right to do so notwithstanding the fact that the recording also captured a civilian (i.e., the arrestee). See id. at 84. Moreover, the police retain discretion to impose reasonable restrictions.

In sum, Defendants have provided no basis for the Court to revise the declaration. In this respect, the Court denies Defendants' motion for reconsideration. See United States v. Allen, 573 F.3d 42, 53 (1st Cir. 2009).

DECLARATORY JUDGMENT AND ORDER

The Court declares Section 99 unconstitutional insofar as it prohibits the secret audio recording of government officials, including law enforcement officers, performing their duties in public spaces. This prohibition is subject to reasonable time, place, and manner restrictions. The Court orders that this declaration be provided to every police officer and to all assistant district attorneys within 30 days.

SO ORDERED.

/s/ PATTI B. SARIS
Patti B. Saris
Chief United States
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

K. ERIC MARTIN and RENÉ PÉREZ, Plaintiffs, v. WILLIAM GROSS, in his Official Capacity as Police Commissioner for the City of Boston, and DANIEL F. CONLEY, in his Official Capacity as District Attorney for Suffolk County, Defendants.	Civil Action No. 16-11362-PBS
PROJECT VERITAS ACTION FUND, Plaintiff, v. DANIEL F. CONLEY, in his Official Capacity as Suffolk County District Attorney, Defendant.	Civil Action No. 16-10462-PBS

MEMORANDUM AND ORDER

December 10, 2018

Saris, C.J.

INTRODUCTION

These two cases challenge the application of Mass. Gen. Laws ch. 272, § 99 ("Section 99") to secret audio recordings in Massachusetts.[1] Section 99, in relevant part, criminalizes the willful "interception" of any "communication." Mass. Gen. Laws ch. 272, § 99(C)(1). An "interception" occurs when one is able "to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device" without the consent of "all parties to such communication." Mass. Gen. Laws ch. 272, § 99(B)(4). Thus, the statute does not apply to open (or non-secret) recording or to video recording (without audio). See id.; Commonwealth v. Hyde, 750 N.E.2d 963, 964 (Mass. 2001) (holding that Section 99 "strictly prohibits the secret electronic recording . . . of any oral communication").

The plaintiffs in Martin argue that Section 99 violates the First Amendment insofar as it prohibits the secret audio recording of police officers performing their duties in public. The plaintiff in Project Veritas

[1] The Court assumes familiarity with its earlier opinions in both cases. See Project Veritas Action Fund v. Conley, 270 F. Supp. 3d 337 (D. Mass. 2017); Project Veritas Action Fund v. Conley, 244 F. Supp. 3d 256 (D. Mass. 2017); Martin v. Evans, 241 F. Supp. 3d 276 (D. Mass. 2017).

makes a similar, though broader, argument: that Section 99 violates the First Amendment insofar as it prohibits the secret audio recording of government officials performing their duties in public. The parties in each case also clash over certain ancillary issues that are discussed in more detail below.

On the core constitutional issue, the Court holds that secret audio recording of government officials, including law enforcement officials, performing their duties in public is protected by the First Amendment, subject only to reasonable time, place, and manner restrictions. Because Section 99 fails intermediate scrutiny when applied to such conduct, it is unconstitutional in those circumstances.

FACTUAL BACKGROUND

The following facts, drawn from the summary judgment record in each case, are not subject to genuine dispute.

I. *Martin v. Gross*

A. The Parties

The plaintiffs K. Eric Martin and Rene Perez are two private citizens who live in Jamaica Plain, Massachusetts. The defendants are Suffolk County District

Attorney Daniel Conley and City of Boston Police Commissioner William Gross.[2]

B. The Plaintiffs' Secret Recordings

Since 2011, Martin has openly recorded police officers performing their duties in public at least 26 times; Perez has done so 18 times, often live-streaming his recordings. The plaintiffs' recordings of police have included one-on-one interactions, traffic and pedestrian stops of others, and protests.[3] Between the two of them, the plaintiffs have wanted to secretly record police officers performing their duties in public on at least 19 occasions since 2011, but have refrained from doing so. Both have stated that their desire to record secretly stems from a fear that doing so openly will endanger their safety and provoke hostility from officers.

The plaintiffs have not advanced any specific plans or intentions to surreptitiously record police officers in the course of this litigation. But Perez stated that he would not rule out secretly recording police officers in various sensitive situations and that he

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[2] In Martin, Commissioner Gross was automatically substituted for former Commissioner William Evans pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. In both cases, because Conley is no longer the district attorney, his replacement shall also be substituted upon notice.

[3] Two specific subsets of Martin's recordings are the subject of a motion to draw adverse inferences. These recordings depict interactions between police officers and citizens (1) in the vicinity of the Boston Common and (2) inside the Arizona BBQ restaurant in Roxbury. In his deposition, Martin refused to testify about these recordings, invoking the Fifth Amendment.

intended to live-stream any secret recordings he is permitted to make. Neither Martin nor Perez has ever been arrested for violating Section 99.

C. Enforcement of Section 99

Since 2011, the Suffolk County District Attorney's Office ("SCDAO") has opened at least 11 case files that involve a felony charge under Section 99. These have included Section 99 charges where the person recorded was a police officer performing her duties in public. During the same period, the Boston Police Department ("BPD") has applied for a criminal complaint on a Section 99 violation against at least nine individuals for secretly recording police officers performing their duties in public.[4]

When asked what governmental interest Section 99 advances, the district attorney asserted that it protects individuals' privacy rights – specifically, the right of citizens and public officials alike to be on notice of when they are being recorded. Asked the same question, the police commissioner referred generally to Section 99, its legislative history, and judicial decisions interpreting the statute.

D. Police Training on Section 99

Section 99 is one of several topics on which BPD officers receive training. The methods of training

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[4] It is unclear on this record whether, or to what extent, the SCDAO and BPD Section 99 cases overlap.

include training bulletins, training videos, and in-service training. In all, BPD recruits receive 50 to 60 hours of criminal law instruction at the police academy. The instructor teaches from his own textbook, which touches on many, but not all, crimes under Massachusetts law. The text includes a segment on Section 99 -one of over 150 sections discussing various criminal law topics. BPD officers are also instructed using at least two other criminal law manuals that similarly include segments on Section 99 among 150 to 200 other criminal laws.

Furthermore, BPD has created a training video and a training bulletin related to Section 99. Since 2009, BPD has published 28 training videos; one of them related to Section 99. In recent years, BPD has disseminated 22 training bulletins. One of them is related to Section 99, and it has been circulated three times.

The video tells officers that Section 99 prohibits only secret recording. It depicts two scenarios of citizens recording police – one openly and one in secret – and instructs officers that the first is not a violation of Section 99, but the second is. The video became mandatory viewing for current officers. New recruits watch it as well.

The bulletin describes two court cases where defendants were convicted for secretly recording police officers performing their duties in public, instructing officers that they have a "right of arrest" whenever they have probable cause to believe an individual has

secretly recorded a conversation. It was first circulated in November 2010, then again in October 2011, and most recently in May 2015. The 2011 and 2015 circulations are the only bulletins since 2011 that have required police commanders to read the bulletin aloud to their officers at roll call. A memo accompanying the 2011 recirculation explicitly references the First Circuit decision in Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011), discussed in more detail below.

E. Procedural History

The Martin plaintiffs' claim, brought under 42 U.S.C. 1983, alleged that Section 99 violates the First and Fourteenth Amendments as applied to the secret recording of police officers engaged in their duties in public places. Resolving a motion to dismiss, the Court held that the plaintiffs had adequately stated a claim that Section 99 violates the First Amendment. The Court also rejected a challenge to the plaintiffs' standing, held that the complaint adequately stated a claim for municipal liability, and held that Pullman abstention was unwarranted.

The defendants now challenge the claim on the grounds of standing, ripeness, and municipal liability. The district attorney also asks the Court to draw adverse inferences against Martin. The parties have filed cross-motions for summary judgment on the constitutional claim.

II. ***Project Veritas Action Fund v. Conley***

A. The Parties

The plaintiff, Project Veritas Action Fund ("PVA"), is a nonprofit organization that engages in undercover journalism. The defendant is the Suffolk County District Attorney.

B. WA's Secret Recording Practices

PVA has a history of investigating government officials, candidates for public office, and others through the use of secret recording. The organization also investigates suspected fraud, abuse, and corruption. PVA would like to secretly record government officials in Massachusetts, including when they make statements in public places while performing their public duties. PVA has refrained from doing so due to Section 99.

In general, PVA decides to investigate a story based on considerations like cost, time, level of public interest or newsworthiness, and the likelihood that it will obtain "candid information" from sufficiently high-level individuals. Once an investigation is assigned to a PVA reporter, he or she develops a "cover story" designed to develop trust with the source. The "cover story" is "rarely" true, but PVA enhances its verisimilitude by, for instance, creating fake email or social media accounts, printing false business cards, or creating a new business entity. Often the "cover story" involves volunteering or interning at a target organization, or donating to it. In other cases, PVA reporters use

flattery, sex appeal, or romantic overtures to appeal to target sources.

PVA reporters use "sophisticated" recording equipment, including hidden necktie cameras, purse cameras, eyeglass cameras, and cameras whose lenses are small enough to fit into a button or rhinestone. They have made recordings during campaign staff meetings, within a target's offices, and while meeting with representatives of a target organization. They have also recorded pretextual "dates" with target individuals and conversations at bars.

PVA's ultimate product is an edited "video report" that is released to the public via its website and/or YouTube channel. The final report leaves out portions of the raw footage. The record includes several examples of PVA's final reports and the raw footage used to create them.

In this case, PVA identifies four specific projects that it has refrained from conducting on account of Section 99. The projects involve secretly recording: (1) landlords renting unsafe apartments to college students; (2) government officials, including police officers, legislators, or members of the Massachusetts Office for Refugees and Immigrants, to ascertain their positions on "sanctuary cities"; (3) "protest management" activities by both government officials and private individuals related to Antifa protests; and (4) interactions with Harvard University officials to research its endowment and use of federal funds. PVA would like to send its journalists into Massachusetts

to develop leads on these and other stories that may emerge.

C. Procedural History

PVA's original complaint challenged the constitutionality of Section 99 facially and as applied to it, targeting the statute's prohibition on secret recording in a public place (Count I) and secret recording of oral communications of individuals having no reasonable expectation of privacy (Count II). In March 2017, the Court dismissed PVA's claims insofar as they challenged the application of Section 99 to the secret recording of private conversations, and insofar as they presented facial and overbreadth challenges to Section 99. See Project Veritas Action Fund, 244 F. Supp. 3d at 264-66.

Having preserved its appellate rights as to those rulings, PVA has filed an amended complaint and has narrowed its claim to challenge only Section 99's application to the secret recording of government officials engaged in their duties in public spaces. The district attorney has moved to dismiss on ripeness grounds. Both parties seek summary judgment on the constitutional claim.

LEGAL BACKGROUND

I. Summary Judgment Standard

A party is entitled to summary judgment when "the movant shows that there is no genuine dispute as

to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphases in original). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. A fact is material if it "might affect the outcome of the suit under the governing law." Id.

II. Setting the Scene: *Glik* and *Gericke*

The discussion that follows requires an understanding of two First Circuit decisions: Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011), and Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014).

In Glik, the plaintiff was arrested for using his cell phone's digital video camera to openly film several police officers arresting someone on the Boston Common. 655 F.3d at 79, 87. He was recording audio as well as video on the cell phone. Id. at 80. The plaintiff was charged with violating Section 99 and two other state-law offenses. Id. at 79. These charges were later dismissed. Id. The plaintiff sued the police under 42 U.S.C. § 1983, claiming that his arrest for audio and video recording of the officers constituted a violation of his rights under the First and Fourth Amendments. Id. The police officers raised a qualified immunity defense.

Id. A central issue on appeal was whether the arrest violated the plaintiff's First Amendment rights – in other words, "is there a constitutionally protected right to videotape police carrying out their duties in public?" Id. at 82.

The First Circuit answered affirmatively. Id. It held that the First Amendment's protection "encompasses a range of conduct related to the gathering and dissemination of information." Id. The First Amendment prohibits the government "from limiting the stock of information from which members of the public may draw." Id. (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)).

> The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles. Gathering 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."

Id. (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). This freedom of expression has particular significance with respect to law enforcement officials, "who are granted substantial discretion that may be misused to deprive individuals of their liberties." Id.

Although the First Circuit did not define "filming," Glik involved a cell phone used to record both audio and video. At least two of the cases cited in Glik

involved both audio and video recording. See Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest" where plaintiff's videotaping of people on the streets of Seattle simultaneously captured audio); Demarest v. Athol/Orange Cty. Television, Inc., 188 F. Supp. 2d 82, 94-95 (D. Mass. 2002) (recognizing "constitutionally protected right to record matters of public interest" where a reporter was punished for broadcasting video and audio recordings of communication with government officials).

The First Circuit acknowledged that the right to record "may be subject to reasonable time, place, and manner restrictions." Id. at 84. But it did not explore those limitations because the plaintiff's conduct – openly recording both audio and video of police arresting someone on the Boston Common – "fell well within the bounds of the Constitution's protections." Id. It also held that the right was "clearly established," concluding that "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." Id. at 85.

More recently, in Gericke, a case involving an attempted open audiovisual recording of a late-night traffic stop, the First Circuit reiterated an individual's First Amendment right to film police officers performing their duties carried out in public, subject to reasonable restrictions. 753 F.3d at 7. Therefore, "a police order that is specifically directed at the First

Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering or about to interfere with his duties." Id. The First Circuit repeated the admonition from Glik that police officers "are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." Id. at 8 (quotation omitted).

Like Glik, Gericke did not directly address audio recording. However, it did rely on American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 607 (7th Cir. 2012), for the proposition that the First Amendment right to record may be subject to reasonable orders to maintain safety and control. Gericke, 753 F.3d at 7-8. Alvarez itself resonates with this case because it held that "[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." 679 F.3d at 595. This was due, in part, to the Seventh Circuit's observation "that audio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public. Their self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes." Id. at 607.

All of which is to say that the Court interprets Glik as standing for the proposition that the First Amendment protects the right to record audio and video of government officials, including law enforcement

officers, performing their duties in public, subject only to reasonable time, place, and manner restrictions.

DISCUSSION

I. Preliminary Issues *in Martin v. Gross*

Before the paths of these two cases converge again, the Court must first address three preliminary issues that arise only in Martin.

A. Standing

In Martin, the police commissioner first argues that the plaintiffs lack standing to bring this case because their claims are speculative, the scope of the right they assert is amorphous, and their fear of arrest and prosecution is not caused by Section 99. The commissioner's line of argument is essentially identical to the one that the Court addressed, and rejected, in its prior opinion in this case. See Martin, 241 F. Supp. 3d at 281-83. There, the Court "easily conclude[d]" that the plaintiffs intended to secretly record police if not for Section 99. Id. at 282. The Court found a credible threat of prosecution because "Section 99 is alive and well." Id. at 283. And the Court found causation and redressability satisfied because the alleged injury arose from the potential arrest and/or prosecution of the plaintiffs by BPD or the SCDAO. Id.

The current record only solidifies those conclusions because now, instead of allegations, the plaintiffs have provided facts that are not subject to genuine

dispute. The commissioner points to nothing that would change the Court's analysis. The plaintiffs still have standing to bring this case.

B. Municipal Policy

1. Parties' Arguments

The police commissioner next argues that merely training police officers on how to enforce Section 99 is not a municipal policy for purposes of a § 1983 claim. More pointedly, he argues that even under the framework of Vives v. City of New York, 524 F.3d 346 (2d Cir. 2008), the record does not demonstrate a municipal "choice" to enforce Section 99. He also argues that the plaintiffs' fear of making secret recordings is caused by Section 99 itself, not by any municipal policy to enforce Section 99, and therefore the plaintiffs have failed to show a causal connection between any municipal policy and their alleged harm.

The plaintiffs argue that nothing requires BPD to enforce Section 99 against individuals who secretly record police. Therefore, enforcement of the law must be the result of a conscious policy choice by the city, as evidenced by repeated efforts to train officers on Section 99. The plaintiffs further argue that answering the question on the existence of a municipal policy simultaneously resolves the causation question.

2. Legal Standard

Local governments (and local officials sued in their official capacities) can be sued under § 1983 "for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 690 (1978). "[T]he word 'policy' generally implies a course of action consciously chosen from among various alternatives." City of Okla. City v. Tuttle, 471 U.S. 808, 823 (1985).

3. Analysis

The parties first dispute the appropriate legal standard for evaluating the existence of a "policy" for purposes of a Monell claim – an issue on which courts have diverged. The plaintiffs argue that the Court should apply the Second Circuit's framework from Vives, as it did at the motion to dismiss. Under Vives, the existence of a municipal "policy" depends on "(1) whether the City had a meaningful choice as to whether it would enforce [the statute in question]; and (2) if so, whether the City adopted a discrete policy to enforce [the statute in question] that represented a conscious choice by a municipal policymaker." 524 F.3d at 353. The police commissioner urges the Court to adopt the Seventh Circuit's decision in Surplus Store & Exchange, Inc. v. City of Delphi, which stated:

> It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the "policy" of enforcing state law. If the language and standards from Monell are not to become a dead letter, such a "policy" simply cannot be sufficient to ground liability against a municipality.

928 F.2d 788, 791-92 (7th Cir. 1991). The First Circuit has not weighed in on this question, aside from brief dicta in a concurrence that positively cited Surplus Store. See Yeo v. Town of Lexington, 131 F.3d 241, 257 (1st Cir. 1997) (Stahl, J., concurring).

Surplus Store does not govern here because the record demonstrates that BPD has done more than merely "enforc[e] state law." Rather, BPD has highlighted what it believes Section 99 allows (open recording of police officers) and does not allow (secret recording of police officers).

To show the existence of a municipal policy, the plaintiffs rely on an array of BPD training materials that discuss Section 99, including a video and a training bulletin. The roughly seven-minute video begins with a summary of the statute. It then reenacts two scenarios. In the first, a bystander holds up a cell phone and records police officers interacting with a couple arguing in the street. The video instructs that this does not constitute an "interception" under Section 99 because the bystander is openly, not secretly, recording the interaction. The second scenario parallels the

facts of Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001), in which the SJC affirmed the Section 99 conviction of a defendant who surreptitiously recorded his conversation with police during a traffic stop. The video instructs officers that charges are appropriate in this scenario, although it emphasizes that, in order to violate Section 99, the recording "Must be SECRET!"

The bulletin, issued in November 2010, provides Section 99's definitions of "interception" and "oral communication," and breaks down the crime into elements. It also summarizes Hyde and Commonwealth v. Manzelli, 864 N.E.2d 566 (Mass. App. Ct. 2007), two Massachusetts appellate cases interpreting Section 99. The bulletin describes Section 99 as "designed to prohibit secret recordings of oral communications." It twice states, "Public and open recordings are allowed under the Wiretap statute. There is no right of arrest for public and open recordings under this statute."

The bulletin has been recirculated twice. In October 2011, the bulletin was accompanied by a memo from the Commissioner citing the Glik decision. The memo instructs officers that "public and open recording of police officers by a civilian is not a violation" of Section 99. The cover memo for the May 2015 recirculation "remind[s] all officers that civilians have a First Amendment right to publicly and openly record officers while in the course of their duties."

Section 99 is discussed in other training materials as well. For instance, the Municipal Police Training Committee, a state agency that sets minimum training

standards for police academies in Massachusetts, discusses Section 99 in at least two training manuals used by the BPD. The record includes four additional manuals or texts that appear to discuss the statute as well.

These materials – particularly the video and bulletin -demonstrate why Surplus Store is inapt here. They instruct officers that Section 99 permits open, but not secret, recording of police officers' actions. But Glik did not clearly restrict itself to open recording. Rather, it held that the First Amendment provides a "right to film government officials or matters of public interest in public space." Glik, 655 F.3d at 84-85. The right is "fundamental and virtually self-evident," subject only to reasonable time, place, and manner restrictions. Id. The BPD training materials narrowly read this holding, which amounts to more than mere enforcement of state law.

The same considerations demonstrate the existence of a policy under the two-prong Vives test. The parties do not dispute the first prong. That is, they seem to agree – correctly – that local police have discretion about whether and when to enforce Section 99. The second prong asks whether BPD has adopted a "discrete policy" to enforce Section 99 that "represent[s] a conscious choice by a municipal policymaker." Vives, 524 F.3d at 353. The police commissioner does not dispute that these training materials exist and have been disseminated to BPD personnel. Because there is no genuine dispute as to this factual basis for the alleged municipal policy, the only remaining

question is one of law, appropriate for resolution on summary judgment: Do these training materials evince a "conscious choice" by BPD to enforce Section 99?

The answer is yes. Although an individual police officer retains discretion about whether to arrest someone for violating Section 99, the training materials cited above make clear that BPD "put flesh on the bones" of Section 99 and "apparently instructed officers that they could make arrests" for what the plaintiffs now claim was constitutionally protected conduct. Vives, 524 F.3d at 356. The video, bulletin, and manuals all speak with one voice regarding when Section 99 is and is not violated. The Court concludes, as a matter of law, that this evidence demonstrates a "conscious choice" and amounts to a municipal policy for purposes of a Monell claim.

The police commissioner protests that BPD's guidance was in accordance with, and pursuant to, cases interpreting Section 99, and it is unfair to subject BPD to liability for trying to ensure that its officers comply with the law. He also argues that finding a municipal policy here will create "a perverse incentive not to train police officers." But the training materials go beyond telling officers when it is impermissible to arrest; taking a narrow construction of Glik, they also communicate that it is permissible to arrest for secretly audio-recording the police under all circumstances. In other words, it gives the green light to arrests that, as the Court holds below, are barred by Glik.

As the plaintiffs predicted, this analysis also resolves the causation question. "Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward." Bd. of Cty. Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 404 (1997). Here, the commissioner acknowledges that BPD's training materials were intended to ensure that officers complied with Glik. But Glik did not distinguish between First Amendment protection applicable to audio and video recording. BPD's policymakers interpreted (in the Court's view, misinterpreted) the case as permitting arrest for secret audio recording in all circumstances without regard for the First Amendment interest at stake of police performing their duties in public. BPD's policies narrowly interpreting Glik caused the injury complained of in this case.

Accordingly, the Court concludes that the plaintiffs have proven the existence of a municipal policy and causation for purposes of their Monell claim against the police commissioner.

C. Adverse Inferences

1. Parties' Arguments

The district attorney argues that, for purposes of summary judgment, the Court should draw adverse inferences against Martin based on his refusal to answer certain questions during his deposition by invoking his Fifth Amendment privilege. The motion concerns two sets of videos produced in discovery: one from the

Boston Common and one from the Arizona BBQ restaurant in Roxbury. The district attorney argues that he is prejudiced by Martin's assertion of the privilege because it prevents him from learning details about these videos, such as whether Martin created them, whether the recorder was holding the recording device in plain view, and whether the recorder had the subjects' permission to record. As a consequence, the district attorney asks the Court to make certain inferences about the videos – for instance, that Martin did create them, that the recording device was not held in plain view, and that Martin did not have permission to record from persons in the videos.

Martin opposes the motion only in two respects. First, he seeks to ensure that none of the adverse inferences can be used in any criminal proceeding. Second, he opposes one specific inference – that the Arizona BBQ restaurant is a "public place" for purposes of the plaintiffs' requested relief on their constitutional claim. He argues that this inference is outside the scope of his assertion of the Fifth Amendment privilege.

2. Legal Standard

In general, " 'the Fifth Amendment does not forbid adverse inferences against parties in civil actions when they refuse to testify,' . . . nor does it mandate such inferences, especially as regards topics unrelated to the issues they refused to testify about." Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 678 (1st Cir. 1996)

(quoting Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)). Moreover, the First Circuit has "expressed doubt as to whether a court can draw [such an adverse] inference at the summary judgment stage, where all reasonable inferences must be drawn for the non-movant." In re Marrama, 445 F.3d 518, 522-23 (1st Cir. 2006).

3. Analysis

Because Martin opposes the inferences only in part, the Court generally allows the district attorney's motion. This comes with two caveats. First, as both parties seem to agree, the Court draws these inferences solely for the purpose of summary judgment in this case. Second, the Court agrees with Martin that the requested inference about the Arizona BBQ restaurant is outside the scope of his invocation of the Fifth Amendment privilege. That is, whether the Arizona BBQ restaurant constitutes a "public place" is a legal determination that likely would turn on facts outside the scope of any testimony Martin would offer on the topic. The district attorney's motion, therefore, is allowed in part and denied in part.

II. Ripeness

A. Parties' Arguments

In both cases, the district attorney moves to dismiss for lack of jurisdiction on the grounds that the case is unripe for judicial review. He argues that the plaintiffs' claims turn upon a host of fact-dependent

considerations, but the plaintiffs have yet to develop a sufficient record to enable the Court to evaluate them.

The plaintiffs in Martin contend primarily that their claims do not turn on the factual considerations that the district attorney identifies. Even if they did, the plaintiffs argue that they have provided plenty of facts to decide their respective cases. The plaintiff in Project Veritas argues that its history of secret recording activity in other states amply supports its intent to engage in the same conduct in Massachusetts and that this satisfies ripeness.

B. Legal Standard

Ripeness is an aspect of justiciability rooted in both the Article III case-or-controversy requirement and in prudential considerations. Reddy v. Foster, 845 F.3d 493, 500 (1st Cir. 2017). Its purpose is "to prevent the adjudication of claims relating to 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " Id. (quoting Texas v. United States, 523 U.S. 296, 300 (1998)). As such, "plaintiffs bear the burden of alleging facts sufficient to demonstrate ripeness." Id. at 501. "Even a facial challenge to a statute is constitutionally unripe until a plaintiff can show that federal court adjudication would redress some sort of imminent injury that he or she faces." Id.

In general, the ripeness analysis has two prongs: fitness and hardship. Id. The fitness prong has both jurisdictional and prudential components. Id. The jurisdictional component of fitness asks "whether there

is a sufficiently live case or controversy, at the time of the proceedings, to create jurisdiction in the federal courts." Id. (quoting Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 89 (1st Cir. 2013)). The prudential component of fitness concerns "whether resolution of the dispute should be postponed in the name of judicial restraint from unnecessary decision of constitutional issues." Id. (quoting Roman Catholic Bishop, 724 F.3d at 89). The hardship prong is not disputed here.

In the context of a First Amendment challenge like this one, Supreme Court and First Circuit precedent describes two types of cognizable injury. The first is when the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the statute, and there exists a credible threat of prosecution. Mangual v. Rotger-Sabat, 317 F.3d 45, 56-57 (1st Cir. 2003). The second is when a plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences. Id. at 57.

C. Analysis: Martin

The plaintiffs in Martin satisfy both aspects of fitness (the only ingredients of ripeness at issue here). The First Circuit has recognized that, "though not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First

Amendment." Glik, 655 F.3d at 85. Both plaintiffs have attested to their prior recordings of police officers. The plaintiffs aver that they desire to secretly record police officers but have refrained from doing so because of Section 99. And the defendants have sought criminal complaints or charged persons for violating Section 99 numerous times since 2011. In this case and its companion, the government has not disavowed enforcement of Section 99. See Project Veritas Action Fund, 270 F. Supp. 3d at 342; Martin, 241 F. Supp. 3d at 283.

These facts give rise to a live controversy over genuine First Amendment injuries. Therefore, both the jurisdictional and prudential components of fitness are satisfied. That is, the plaintiffs have shown "a sufficiently live case or controversy . . . to create jurisdiction in the federal courts," while also satisfying the Court that resolution of the case need not (indeed, ought not) be postponed. Reddy, 845 F.3d at 501 (quoting Roman Catholic Bishop, 724 F.3d at 89). This conclusion is bolstered by the principle that "courts sometimes exhibit a greater willingness to decide cases that turn on legal issues not likely to be significantly affected by further factual development." Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 536 (1st Cir. 1995). Such is the case here.

Many of the district attorney's arguments about an underdeveloped factual record seem to relate to his concern that secret recordings could somehow endanger police officers or the public. This concern is not directly relevant to the issue of fitness. Moreover, nothing in Glik or in the relief sought by these

plaintiffs would prohibit an officer from taking reasonable steps to preserve public safety. See Glik, 655 F.3d at 84 (noting that right to record "may be subject to reasonable time, place, and manner restrictions"); cf. Gericke, 753 F.3d at 8 ("[A]n individual's exercise of her First Amendment right to film police activity carried out in public . . . necessarily remains unfettered unless and until a reasonable restriction is imposed or in place."); Alvarez, 679 F.3d at 607 (noting that First Amendment right to record does not prevent officers from "tak[ing] all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations").

D. Analysis: Project Veritas

The undisputed facts in Project Veritas show a live controversy over, at a minimum, whether the plaintiff has been "chilled from exercising [its] right to free expression or [has] forgo[ne] expression in order to avoid enforcement consequences." Mangual, 317 F.3d at 57. It is beyond dispute that PVA has used secret audiovisual recording in the past. This has included secret audiovisual recording of government officials, such as New Hampshire voting officials during the 2016 primaries, and of private citizens, such as those depicted in PVA's recordings during the August 2017 protests in Charlottesville, Virginia. Further, according to PVA, Glik extends to secret recording, and therefore Section 99 chills them from engaging in protected conduct. The district attorney disagrees that the right recognized in

Glik covers secret audio recording. The Court needs no additional facts to resolve that legal dispute. See Ernst & Young, 45 F.3d at 536 (describing how courts often "exhibit a greater willingness to decide cases that turn on legal issues not likely to be significantly affected by further factual development").

The district attorney further emphasizes deposition testimony where PVA's designated witness, when asked whether PVA had any present intentions of secretly recording in Massachusetts, stated:

> Not in Massachusetts, no, that would be against the law. We can't do that. I would love to probably secretly record a whole bunch of people because that's what I do. I think it is a very important and valuable kind of journalism. We don't have any plans to because we can't. It's against the law, and we don't break the law.

The district attorney is correct that this testimony undercuts a specific threat-of-prosecution injury, since the witness admitted not having a current "intention to engage in a course of conduct arguably affected with a constitutional interest." Mangual, 317 F.3d at 56. But by the same token, this testimony is unmistakable evidence that Section 99 has "chilled [PVA] from exercising [its] right to free expression" and that PVA is "forgo[ing] expression in order to avoid enforcement consequences." Id. at 57.

The district attorney also asserts that ripeness requires additional details about PVA's foregone

investigations. But for many of the same reasons just discussed with respect to Martin, the First Circuit has not indicated that the right to record is as fact-bound as the district attorney suggests. In addition, waiting for additional details to develop on a case-by-case basis could exacerbate the "pull toward self-censorship" that First Amendment pre-enforcement review is supposed to avoid. See N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 13-14 (1st Cir. 1996).

That said, the four investigations that PVA proposes are described with such sparse detail that they could encompass a vast array of settings and subjects for secret recording. The breadth of potential conduct involved, none of which has actually occurred, creates serious ripeness concerns. See Texas v. United States, 523 U.S. at 300; Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979). On this score, PVA has narrowed the scope of its summary judgment motion to only those applications of Section 99 that involve the recording of government officials performing their duties in public.[5] Significantly, PVA's challenge remains broader than the one in Martin, which challenges the

[5] In part, this was in recognition of the fact that the Court has already dismissed PVA's claims insofar as they pertain to private individuals. See Project Veritas Action Fund, 244 F. Supp. 3d at 265 (holding that Section 99 survives intermediate scrutiny insofar as it permits only non-secret recording of private conversations). Although PVA continues to advance some of those arguments (e.g., by now arguing that Section 99 is unconstitutionally overbroad and is unconstitutional whenever the subject of a recording lacks a reasonable expectation of privacy), the Court has already rejected them.

statute only with respect to the secret recording of police officers. But with respect to Project Veritas, the Court's ensuing analysis will focus solely on PVA's "government officials" claim. That claim is ripe to the extent just discussed, and the motion to dismiss is denied.

III. First Amendment Challenge

On the core constitutional question, the parties contest three issues: (1) whether to treat the plaintiffs' claims as "facial" or "as applied" challenges; (2) whether Section 99 is subject to strict scrutiny, intermediate scrutiny, or rational basis review; and (3) whether Section 99 survives whatever level of constitutional scrutiny governs. The Court addresses each of those issues before turning to a few loose ends.

A. "Facial" or "As Applied" Challenge

The parties dispute whether the plaintiffs' First Amendment claims are "as applied" or "facial" in nature. As sometimes occurs, the claims in these cases "obviously [have] characteristics of both." John Doe No. 1 v. Reed, 561 U.S. 186, 194 (2010). They are "as applied" in the sense that the plaintiffs only challenge Section 99 insofar as it applies to the secret recording of police officers (in Martin) or government officials (in Project Veritas) performing their duties in public. They are "facial" in the sense that the relief sought in both cases would block the application of Section 99 to any situation involving the secret recording of police

officers or government officials performing their duties in public, not just in a specific instance of the plaintiffs engaging in such conduct.

The Supreme Court faced a similar situation in Reed and instructed that "[t]he label is not what matters." 561 U.S. at 194. Rather, the point of inquiry is whether the claim and the relief that would follow "reach beyond the particular circumstances of [the] plaintiffs" in the case. Id. If so, the plaintiffs must satisfy the "standards for a facial challenge to the extent of that reach." Id.; see also Showtime Entm't, LLC v. Town of Mendon, 769 F.3d 61, 70 (1st Cir. 2014) (applying Reed to hold that a strip club's challenge to a town's zoning laws was facial because the club sought to invalidate the zoning laws, not merely to change the way those laws applied to the club).

Here, there is no genuine dispute that the relief the plaintiffs seek in both cases "reach[es] beyond [their] particular circumstances." Reed, 561 U.S. at 194. Specifically, the plaintiffs all seek to partially invalidate Section 99. Thus, under Reed, their claim is facial to a certain extent. However, there are only two "set[s] of circumstances" at issue: the secret recording of police officers performing their duties in public, and the secret recording of government officials doing the same. That is the limited "extent" of the facial challenges in these cases. See id.

B. Level of Constitutional Scrutiny

The parties also dispute the appropriate level of constitutional scrutiny. PVA argues that Section 99 is a content-based restriction on expression because it primarily injures undercover journalists, and therefore strict scrutiny should apply. This argument is easily dispatched. A content-based restriction is one that "applies to particular speech because of the topic discussed or the idea or message expressed." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (emphasis added). Section 99 does not do this. Rather, in the scenarios at issue here – the secret recording of police officers or other government officials performing their duties in public – Section 99 acts as a content-neutral restriction on conduct that, under Glik, is protected by the First Amendment (for citizens and journalists alike). See Jean v. Mass. State Police, 492 F.3d 24, 29 (1st Cir. 2007) (noting that Section 99 "is a content-neutral law of general applicability" (internal quotation marks omitted)). Thus, intermediate scrutiny applies. See Rideout v. Gardner, 838 F.3d 65, 71-72 (1st Cir. 2016) ("Content-neutral restrictions are subject to intermediate scrutiny. . . ."), cert. denied, 137 S. Ct. 1435 (2017). The plaintiffs in Martin agree that this standard governs here.

Finally, the district attorney suggests in a footnote that a standard lower than intermediate scrutiny "might" apply. He does not convincingly develop this argument, and neither Glik nor Jean supports it. See 655 F.3d at 82-84; 492 F.3d at 29.

C. Intermediate Scrutiny

Intermediate scrutiny requires that the law be "narrowly tailored to serve a significant government interest." Rideout, 838 F.3d at 72 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). In this context, narrow tailoring does not require that the law be the least restrictive or least intrusive means of serving the government's interests. Id. However, it requires a "close fit between ends and means" and dictates that the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." McCullen v. Coakley, 134 S. Ct. 2518, 2534-35 (2014). The law also must "leave open ample alternative channels for communication of the information." Ward, 491 U.S. at 791.

The defendants state that the purpose of Section 99 is to ensure that all citizens – government officials and private citizens alike – receive "guaranteed notice of being recorded, so that one can respond appropriately." The defendants describe this as a privacy interest of both the government officials and the private individuals with whom they interact.[6]

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[6] The district attorney also suggests that this interest falls within the First Amendment's protection against compelled participation in the expressive conduct of another. In other words, if notice of recording permits a person to modulate her behavior to account for the recording, a lack of notice forces the person to unknowingly participate in the expressive conduct (here, recording) of another. Conley cites no case that applies this "compelled participation" line of First Amendment jurisprudence in a

The argument that Section 99 protects privacy interests is consistent with case law from the Massachusetts Supreme Judicial Court, which has stated that Section 99 "was designed to prohibit the use of electronic surveillance devices by private individuals because of the serious threat they pose to the 'privacy of all citizens.'" Hyde, 750 N.E.2d at 967-68 (quoting Mass. Gen. Laws ch. 272, § 99). Generally speaking, protection of individual privacy is a legitimate and significant government interest. See Bartnicki v. Vopper, 532 U.S. 514, 532 (2001) ("Privacy of communication is an important interest. . . ."); cf. Frisby v. Schultz, 487 U.S. 474, 484 (1988) (recognizing protection of residential privacy as a "significant government interest" for purposes of First Amendment claim).

The Martin plaintiffs contend that allowing police officers to "respond appropriately" to notice of recording will permit them to alter any inappropriate behavior. They point to the important First Amendment interest in monitoring the conduct of law enforcement officials. In Glik, the First Circuit recognized the First Amendment's protection for information-gathering has special force with respect to law enforcement officials who are granted so much discretion in depriving individuals of their liberties. See 655 F.3d at 83. But the same basic interest applies generally to government officials: "Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary

right-to-record dispute, and the First Circuit has not done so in its recent explorations of the topic (i.e., Gericke and Glik).

effect on the functioning of government more generally." Glik, 655 F.3d at 82-83 (citations omitted).

The Court holds that Section 99 is not narrowly tailored to protect a significant government interest when applied to law enforcement officials discharging their duties in a public place. See id. at 84 ("In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights."). The same goes for other government officials performing their duties in public. Id. at 82-83, 85; see Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) ("An 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 in the officers of government is not strictly limited to the formal discharge of official duties.").

This is not to say that police and government officials have no privacy interests. However, the diminished privacy interests of government officials performing their duties in public must be balanced by the First Amendment interest in newsgathering and information-dissemination. The First Amendment prohibits the "government from limiting the stock of information from which members of the public may draw." Bellotti, 435 U.S. at 783. "An important corollary to this interest in protecting the stock of public information is that '[t]here is an undoubted right to gather news from any source by means within the law.'" Glik, 655 F.3d at

82 (quoting Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978)) (internal quotation marks omitted).

The First Circuit has recognized that "[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles." Id.; see also Alvarez, 679 F.3d at 595 (recognizing audio and audiovisual recording as among forms of information-gathering protected by First Amendment). Based on this case law, the Court holds that the First Amendment protects both audio and video recording. Because "the public's right of access to information is coextensive with that of the press," this right inures to individual citizens and journalists alike. Glik, 655 F.3d at 83. The right "may be subject to reasonable time, place, and manner restrictions," although Glik does not discuss what those restrictions might entail. Id. at 84.

Here, the defendants counter with several hypotheticals that might implicate individual privacy or public safety issues – for instance, when an officer meets with a confidential informant or encounters a crime victim on the street. But these examples miss the mark. When such situations arise, police are free to "take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations." Alvarez, 679 F.3d at 607; see also Glik, 655 F.3d at 84 ("[T]he right to film . . . may be subject to reasonable time, place, and manner restrictions."). Nothing in the relief these plaintiffs seek would require otherwise. If an officer needs to protect the safety of an informant

or her fellow officers, or seeks to preserve conversational privacy with a victim, the officer may order the recording to stop or to conduct the conversation at a safe remove from bystanders or in a private (i.e., non-public) setting. See Alvarez, 679 F.3d at 607. ("Police discussions about matters of national and local security do not take place in public where bystanders are within earshot. . . ."). A reasonable restriction would remove the conversation from the scope of the relief sought (and ordered) in this case.

In short, Section 99 prohibits all secret audio recording of any encounter with a law enforcement official or any other government official. It applies regardless of whether the official being recorded has a significant privacy interest and regardless of whether there is any First Amendment interest in gathering the information in question. "[B]y legislating this broadly – by making it a crime to audio record any conversation, even those that are not in fact private – the State has severed the link between [Section 99's] means and its end." Alvarez, 679 F.3d at 606. The lack of a "close fit" between means and end is plain. See McCullen, 134 S. Ct. at 2534-35.

Further, "[b]ecause [Section 99] is not closely tailored to the government's interest in protecting conversational privacy, [the Court] need[s] not decide whether it leaves open adequate alternative channels for this kind of speech." Alvarez, 679 F.3d at 607. Even if it reached that issue, however, the "self-authenticating character" of audio recording "makes

it highly unlikely that other methods could be considered reasonably adequate substitutes." Id.

D. Loose Ends

Some difficult questions remain about what constitutes a "public space" and who is considered a "government official" for purposes of the right to record. The facts of Glik provide some guidance on the "public space" issue. There, the recording took place on the Boston Common, "the apotheosis of a public forum" in which "the rights of the state to limit the exercise of First Amendment activity are 'sharply circumscribed.'" Glik, 655 F.3d at 84 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). Many of the police-involved scenarios that the plaintiffs desire to secretly record would occur in similar locations – traditional public forums like parks, streets, and sidewalks. See Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018) (describing framework for traditional public forums, designated public forums, and nonpublic forums); Gericke, 753 F.3d at 7 (extending the right to record to traffic stops). It seems clear enough from Glik and Gericke that the right to record a government official, including a law enforcement official, performing her duties generally applies in public forums.

But the holding of Glik uses the phrase "public space," not "public forum." 655 F.3d at 85. The plaintiffs in Martin believe the right to secretly record the police extends to private property that is open to the general

public, such as a restaurant. For example, one of Martin's recordings of police activity occurred at the Arizona BBQ restaurant from a vantage point on the sidewalk outside the restaurant. In general, though, the First Amendment does not guarantee a right to free expression on private property. See Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976) (holding that federal constitution did not protect employees' right to picket inside shopping center).

Moreover, there is a definitional issue with Glik's use of the term "government official." Glik, Gericke, and cases cited therein teach that a police officer falls within the ambit of "government official." But who are these other government officials? The First Amendment doctrine surrounding "public officials" may provide some guidance. See, e.g., Mangual, 317 F.3d at 65-66 (describing how definition of "public official" has evolved to "include[ ] many government employees, including police officers").

The parties did not focus on defining "public space" or "government official," and it is not prudential, under the ripeness doctrine, to do so now. While Glik's use of the term "public space" seems to indicate something broader than "public forum," and its use of the term "government official" includes a broader scope of public official than "law enforcement officer," the Court leaves it to subsequent cases to define these terms on a better record.

CONCLUSION

Consistent with the language of Glik, the Court holds that Section 99 may not constitutionally prohibit the secret audio recording of government officials, including law enforcement officials, performing their duties in public spaces, subject to reasonable time, manner, and place restrictions.

ORDER

In Martin, the motion for adverse inferences (Dkt. No. 115) is **ALLOWED IN PART** and **DENIED IN PART**. The plaintiffs' motion for summary judgment (Dkt. No. 121) is **ALLOWED**. The defendants' motion to dismiss for lack of jurisdiction and motions for summary judgment (Dkt. Nos. 110, 111, and 116) are **DENIED**.

In Project Veritas, the motion to dismiss on ripeness grounds (Dkt. No. 112) is **DENIED**. The motions for summary judgment (Dkt. Nos. 101, 117, and 126) are **ALLOWED IN PART** and **DENIED IN PART**.

The Court declares Section 99 unconstitutional insofar as it prohibits audio recording of government officials, including law enforcement officers, performing their duties in public spaces, subject to reasonable time, place, and manner restrictions. The Court will issue a corresponding injunction against the defendants

in these actions. The parties shall submit a proposed form of injunction by January 10, 2019.

/s/ PATTI B. SARIS
Patti B. Saris
Chief United States
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PROJECT VERITAS ACTION FUND, Plaintiff, v. DANIEL F. CONLEY, in his Official Capacity as Suffolk County District Attorney, Defendant.	)	Civil Action No. 16-10462-PBS

MEMORANDUM AND ORDER

March 23, 2017

Saris, C.J.

Plaintiff Project Veritas Action Fund ("Project Veritas"), a news gathering organization, brings facial and as-applied challenges to the Massachusetts Wiretap Statute, Mass. Gen. Laws ch. 272, § 99 ("Section 99"), on the ground that it violates the First and Fourteenth Amendments by prohibiting secret recording of the oral conversations of public and private individuals.[1] The verified complaint, brought under 28 U.S.C.

[1] Other plaintiffs raised similar claims before this Court in Martin v. Evans, No. CV 16-11362-PBS, 2017 WL 1015000, at *1 (D. Mass. Mar. 13, 2017). The Court assumes familiarity with that opinion.

§§ 2201-02 and 42 U.S.C. § 1983, seeks declaratory and injunctive relief. The Defendant, Suffolk County District Attorney, Daniel Conley, moves to dismiss on the grounds that plaintiff lacks standing and the complaint fails to state a claim.

After hearing, the Court **DENIES** the Motion to Dismiss (Docket No. 26) in part and **ALLOWS** it in part. The Court holds that Project Veritas survives the standing challenge with respect to its claim that the state prohibition of the secret recording of private individuals violates the First Amendment. However, the Court holds that Section 99's ban on the secret recording of conversations by private individuals does not violate the First Amendment because the statute is narrowly tailored to promote the significant governmental interest of protecting the conversational privacy of Massachusetts residents. The Motion for Preliminary Injunction (Docket No. 21) is **DENIED**.

FACTUAL BACKGROUND

For the purposes of the motion to dismiss, the facts are taken as true, as alleged in the verified complaint.

Project Veritas is a national media organization primarily engaged in undercover journalism. Its undercover newsgathering techniques involve recording and intercepting oral communications of persons without their knowledge or consent. This secret recording often occurs in public places such as polling places, sidewalks, and hotel lobbies.

These undercover techniques are used in news gathering in a variety of scenarios. In 2014, Project Veritas utilized "undercover newsgathering" to discover "a stark contrast between the public statements of a candidate for United States Senate in Kentucky and the statements of her campaign staff." Docket No. 1 ¶ 22. In September 2015, Project Veritas "exposed campaign finance violations in New York using undercover techniques." Id. ¶ 23. It exposed "electoral malfeasance" in Nevada using similar recording techniques. Id. ¶ 24. Most recently, it "detailed the weakness of voter registration laws in New Hampshire by focusing on the surreptitiously recorded statements of government officials." Id. ¶ 25.

Project Veritas has not previously engaged in any surreptitious recording in Massachusetts, though it wants to, because of a fear that utilizing undercover techniques in Massachusetts would expose it to criminal and civil liability under Section 99.[2] Project Veritas hopes to undertake undercover investigation of public issues in Boston and throughout Massachusetts. Id. ¶ 27. Specifically, Project Veritas alleges that it "would like to investigate the recently reported instances of landlords taking advantage of housing shortages in Boston where students may live in unsafe and dilapidated conditions. Likewise, [Project Veritas] would like

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[2] Project Veritas also alleges that another provision of the statute, § 99(Q), "would subject it to civil lawsuits under Massachusetts law from aggrieved persons, subjecting it to claims for actual damages, punitive damages, and attorney's fees." Docket No. 1 ¶ 19. However, PVA does not seek any relief regarding this section. See id. at 9.

to investigate the trustworthiness and accountability of government officials, including police officers, in a variety of public and non-public settings." Id. ¶ 21.

LEGAL FRAMEWORK

I. Motion to Dismiss Standard

Courts evaluate motions to dismiss for lack of standing under Federal Rule of Civil Procedure 12(b)(1). See United Seniors Ass'n, Inc. v. Philip Morris USA, 500 F.3d 19, 23 (1st Cir. 2007). In assessing Project Veritas' standing, the court must take the complaint's well-pleaded facts as true and indulge all reasonable inferences in its favor. Hochendoner v. Genzyme Corp., 823 F.3d 724, 730 (1st Cir. 2016). "[A]t the pleading stage, the plaintiff bears the burden of establishing sufficient factual matter to plausibly demonstrate his standing to bring the action. Neither conclusory assertions nor unfounded speculation can supply the necessary heft." Id. at 731.

The same basic principles apply to evaluating a Rule 12(b)(6) motion used to dismiss complaints that do not "state a claim upon which relief can be granted." See Fed. R. Civ. P. 12(b)(6). In evaluating a Rule 12(b)(6) motion, the Court must accept the factual allegations in the plaintiff's complaint as true, construe reasonable inferences in its favor, and "determine whether the factual allegations in the plaintiff's complaint set forth a plausible claim upon which relief may be granted." Foley v. Wells Fargo Bank, N.A., 772 F.3d 63, 71 (1st Cir. 2014).

To survive a motion to dismiss pursuant to Rule 12(b)(6), the factual allegations in a complaint must "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678 (citing Twombly, 550 U.S. at 556). To reach the threshold of plausibility, the allegations must be "more than merely possible." Schatz v. Repub. State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012). Dismissal for failure to state a claim pursuant to Rule 12(b)(6) is appropriate when the complaint fails to set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997) (quoting Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988)).

II. Massachusetts Wiretap Statute

The Massachusetts Wiretap Statute makes it a crime to "willfully commit[ ] an interception, attempt[ ] to commit an interception, or procure[ ] any other person to commit an interception or to attempt to commit an interception of any wire or oral communication." Mass. Gen. Laws ch. 272, § 99(C)(1). Interception is defined as "to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any

intercepting device by any person other than a person given prior authority by all parties to such communication." Id. § 99(B)(4). An oral communication is defined as "speech, except such speech as is transmitted over the public air waves by radio or other similar device." Id. § 99(B)(2).

DISCUSSION

I. Standing for Pre-Enforcement Review

Defendant Conley moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) arguing that Project Veritas lacks standing to bring this suit since it fails to allege facts that show, with any plausible degree of specificity, that it intends to secretly record the oral communications of individuals in Suffolk County without their consent in violation of Massachusetts law.

Project Veritas alleges that if not for Section 99, it would secretly record "landlords taking advantage of housing shortages in Boston where students may live in unsafe and dilapidated conditions" and would also record communications in order to investigate "the trustworthiness and accountability of government officials, including police officers, in a variety of public and non-public settings." Docket No. 1 ¶ 21. James O'Keefe, President of Project Veritas, "verif[ied] under penalty of perjury under the laws of the United States of America that the factual statements contained in [Project Veritas'] Verified Complaint concerning [Project Veritas'] existing and proposed activities are true and

correct." Docket No. 1 ex. 1. Project Veritas argues that it cannot provide any more specific details about whom it intends to record, where, when and how frequently because it cannot know all the developments an investigation may involve. To disclose this type of information would severely hinder the success of the investigation.

The First Circuit has stated that "when dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 15 (1st Cir. 1996). See generally Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014).

In Martin v. Evans, the Court set forth the caselaw governing pre-enforcement challenges to statutes based on the First Amendment. 2017 WL 1015000, at *2-4. There the Court concluded that the plaintiffs, two civil rights activists, would face a credible threat of prosecution should they engage in their intended actions of secretly tape recording police officers. Id. at *4. In Martin, the complaint alleged recent instances of Section 99 prosecutions in the state "against secret recording of police officers performing their duties in public." Id. at *2. The complaint also alleged that the Boston Police Department has "official training materials [that] instruct officers that they have a 'right of arrest' whenever a person secretly records oral communications." Id.

Section 99 is not a moribund law. Although there are no statistics in this record about how often persons are arrested or charged for a Section 99 violation, the Supreme Judicial Court reaffirmed the vitality of the statute in Commonwealth v. Hyde. 750 N.E.2d 963, 964 (Mass. 2001) (finding that an individual may be prosecuted under Section 99 for secretly tape recording statements made by police officers during a routine traffic stop). Moreover, when asked at the hearing in Martin, Conley's counsel did not disavow enforcement of Section 99. See Blum v. Holder, 744 F.3d 790, 799 (1st Cir. 2014) (finding no standing where "the Government . . . disavowed any intention to prosecute plaintiffs for their stated intended conduct").

Project Veritas stated in its verified complaint that it intends to investigate private landlords. Project Veritas is an aggressive news gathering organization that has engaged in significant undercover surveillance of private individuals in states that permit it. There is no reason to believe it would not be doing so in Massachusetts if it were not deterred by the law. As such, the Court finds a credible threat of enforcement against Project Veritas that has chilled its speech with respect to its specific intent to investigate "scofflaw" landlords.

With respect to Project Veritas' claim that it intends to investigate government officials, however, the allegations are too vague to pass muster. Project Veritas does not specify any particular investigation it seeks to undertake. While Project Veritas states it would be tipping its hand by being too specific about individuals it is investigating, the law requires a

plausible showing of true intent to investigate that has been chilled. In evaluating a pre-enforcement challenge, a court must distinguish between situations where the plaintiff's "interest was manifest and the parameters of the activity that it proposed to undertake were discrete and well-defined," from cases involving "plaintiffs who were unlikely to engage in the proscribed activity or plaintiffs who had formulated no firm plans for doing so." R.I. Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 32 n. 2 (1st Cir. 1999).

The Court concludes that Project Veritas has sufficiently alleged standing with respect to the First Amendment challenge to the ban on the secret audio recording of private individuals. However, the motion to dismiss is allowed with respect to government officials without prejudice to repleading more specific allegations.

II. First Amendment As-Applied Challenge

Conley argues that Project Veritas fails to state a claim under the First Amendment because the First Amendment does not provide a right to secretly record oral communications. The First Circuit has recognized that the First Amendment protects "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space. . . ." Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011). Although information gathering about matters of public interest through audio and audio-visual recording in public spaces is protected by the First

Amendment, it is subject to reasonable restrictions. Id. at 83-84. The Fifth Circuit recently cited Glik in Turner v. Lieutenant Driver, concluding that a "First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions." 848 F.3d 678, 688 (5th Cir. 2017); see also Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (finding a "First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct").

As the Court explained in Martin, the Court must apply intermediate scrutiny because Section 99 is a content-neutral law. 2017 WL 1015000, at *7. The Court found "[t]he government does not have a significant interest in protecting the privacy of law enforcement officials discharging their duties in a public space" and that the law was not narrowly tailored to serve other important government interests. Id. at *8. As such, the Court held, "Section 99, as applied to the secret recording of government officials in the performance of their duties in public, violates the First Amendment." Id. Martin did not involve a claim challenging Section 99's prohibition on secretly recording the conversations of private individuals.

The cutting-edge issue in this case is whether Section 99 violates the First Amendment by categorically prohibiting the intentional secret recording of private individuals.

The Supreme Court has held, "[p]rivacy of communication is an important interest." Bartnicki v. Vopper,

532 U.S. 514, 532 (2001) (involving the illegal tape-recording and broadcast of a private conversation about a matter of public concern published by the media in a union dispute). "Moreover, the fear of public disclosure of private conversations might well have a chilling effect on private speech." Id. at 532-33. The government has a significant interest in protecting the "conversational privacy" of its citizens. Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 608 (7th Cir. 2012) (holding that the Illinois eavesdropping statute violated the First Amendment in an action involving the open recording of police officers).

The express legislative purpose of Section 99's unequivocal ban of secret audio recording is to protect Massachusetts citizens' privacy. The statute's preamble states that secret recording "pose[s] grave dangers to the privacy of all citizens of the commonwealth." Mass. Gen. Laws ch. 272 § 99(A). The Supreme Judicial Court ("SJC") stated: "The statute's preamble expresses the Legislature's general concern that 'the uncontrolled development and unrestricted use of modern electronic surveillance devices pose[d] grave dangers to the privacy of all citizens of the commonwealth' and this concern was relied on to justify the ban on the public's clandestine use of such devices." Commonwealth v. Hyde, 750 N.E.2d 963, 967 (Mass. 2001) (quoting Mass. Gen. Laws ch. 272 § 99(A)); see Commonwealth. v. Gordon, 666 N.E.2d 122, 134 (Mass. 1996) ("It is apparent from the preamble that the legislative focus was on the protection of privacy rights. . . .").

The SJC has found that the statute is meant to protect individuals independent of their reasonable expectation of privacy: "[W]e would render meaningless the Legislature's careful choice of words if we were to interpret 'secretly' as encompassing only those situations where an individual has a reasonable expectation of privacy. If the Legislature had intended to [prohibit only secret recording where an individual has a reasonable expectation of privacy], the statute would have been written in terms similar to those used in the California eavesdropping statute. . . . Rather, it is apparent from the Report of the Special Commission on Electronic Eavesdropping, 1968 Senate Doc. No. 1132, that the legislative intent was to impose more stringent restrictions on the use of electronic devices by private individuals than is done in other States." Commonwealth v. Jackson, 349 N.E.2d 337, 340 (Mass. 1976).

Project Veritas argues that it has the First Amendment right to record private conversations of individuals speaking in public places where there is no reasonable expectation of privacy. But, "private talk in public places is common." Alvarez, 679 F.3d at 606. Individuals have conversations they intend to be private, in public spaces, where they may be overheard, all the time – they meet at restaurants and coffee shops, talk with co-workers on the walk to lunch, gossip with friends on the subway, and talk too loudly at holiday parties or in restaurant booths. These types of conversations are ones where one might expect to be overheard, but not recorded and broadcast. There is a

significant privacy difference between overhearing a conversation in an area with no reasonable expectation of privacy and recording and replaying that conversation for all to hear. See Alvarez, 679 F.3d at 605-06 (recognizing that the First Amendment permits greater protection for conversational privacy than for the public conversations of public officials); see also State v. O'Brien, 774 A.2d 89, 96 (R.I. 2001) ("Although we may expect individuals with whom we are communicating to hear and even to remember what we are saying (and perhaps how we have said it), we usually do not expect them to acquire surreptitiously an exact audio reproduction of the conversation that they can later replay at will for themselves or for others.").

Project Veritas protests that it intends to record individuals such as "scofflaw" landlords and such newsgathering serves an important public policy interest protected by the First Amendment. Of course, reporters can take notes, but Project Veritas makes a fair argument that audio-recording of an individual will carry a more powerful punch than a reporter's recounting of an encounter. Alvarez, 679 F.3d at 606 ("We acknowledge the difference in accuracy and immediacy that an audio recording provides as compared to notes or even silent videos or transcripts.").

Project Veritas claims that Section 99 fails the intermediate scrutiny standard because the statute is not narrowly tailored to protect conversational privacy only in those circumstances where there is a reasonable expectation of privacy. "Most state electronic privacy statutes apply only to private conversations; that

is, they contain (or are construed to include) an expectation-of-privacy requirement that limits their scope to conversations that carry a reasonable expectation of privacy." Alvarez, 679 F.3d at 607 (citing Jesse Harlan Alderman, Police Privacy in the iPhone Era?, 9 First Amend. L. Rev. 487, 533-45 (2011) (collecting state statutes)); see, e.g., Cal. Penal Code § 632(c) (defining "confidential communication" to exclude circumstances "in which the parties to the communication may reasonably expect that the communication may be overheard or recorded"). Project Veritas points out that without the reasonable expectation of privacy benchmark, it could be charged with a felony for intercepting oral communications made by a private person giving a speech on the Boston Public Common where the speaker had no possible legitimate expectation of privacy. The SJC has eschewed an approach that limits the reach of the statute to situations where the speaker did not have a reasonable expectation that his speech is confidential. Commonwealth v. Rivera, 833 N.E.2d 1113 (Mass. 2005). However, the First Circuit pointed out: "Although the case was resolved on other grounds, four of the seven justices of the Supreme Judicial Court concurred to note that the defendant's unawareness of the audio recording capabilities of the security cameras did not render the recordings 'secret' under the wiretap statute where the cameras were in plain sight." Glik, 655 F.3d at 87 (citing Commonwealth v. Rivera, 833 N.E.2d 1113, 1125 (Mass. 2005) (Cowin, J., concurring in part) ("That the defendant did not know the camera also included an audio component does not convert this otherwise open recording

into the type of 'secret' interception prohibited by the Massachusetts wiretap statute."); id. at 1130 (Cordy, J., concurring) ("Just because a robber with a gun may not realize that the surveillance camera pointed directly at him is recording both his image and his voice does not, in my view, make the recording a 'secret' one within the meaning and intent of the statute.")). Thus, the statute permits open recording in plain sight by cameras or cell phones with an audio component.

Project Veritas argues that incorporating a reasonable expectation of privacy limitation would adequately protect a right to privacy that was enforceable in courts under state tort or statutory law. See Mass. Gen. Laws ch. 214, § 1B (creating statutory right to privacy). The Massachusetts Legislature, though, is not limited to using these after-the-fact tort remedies which apply only after private conversations are broadcast in public. While the reasonable expectation of privacy standard for defining oral communications might be the least restrictive alternative, that approach is not required under intermediate scrutiny when the privacy of individual conversations is at stake.

In sum, under the intermediate scrutiny standard, Section 99 is narrowly tailored to serve the purpose of protecting privacy by permitting only non-secret recordings of private conversations. Project Veritas has failed to state a claim that Section 99, as applied to the secret recording of private individuals, violates the First Amendment.

III. Facial Challenge

To succeed on a facial challenge a plaintiff generally "must establish that no set of circumstances exists under which [a legislative act] would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). In the First Amendment context, however, the overbreadth doctrine applies to facial challenges. Virginia v. Hicks, 539 U.S. 113, 118 (2003) (citing Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984)). "It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable. This exception from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." Forsyth Cty., Ga. v. Nationalist Movement, 505 U.S. 123, 129 (1992) (internal citations omitted).

The overbreadth doctrine requires a substantial number of a statute's applications to be unconstitutional, "judged in relation to the statute's plainly legitimate sweep." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008). The Supreme Court has recognized the overbreadth doctrine as "strong medicine" and has limited its application to instances where a law "prohibits a substantial amount of protected speech." United States v. Williams, 553 U.S. 285, 29293 (2008). To the extent that a statute infringes on First Amendment rights, chills the exercise

of a protected activity, and is "sweeping" and without limitation, it is more likely to be found constitutionally invalid. See, e.g., New York v. Ferber, 458 U.S. 747, 771-72 (1982). However, if the reach of the statute is limited, the statute is less likely to be found constitutionally overbroad. Id. "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

Most applications of Section 99 are constitutional. Section 99 constitutionally protects private conversations in all settings and conversations with government officials in nonpublic settings or about non-official matters.

Although Martin found Section 99 unconstitutional as applied to the recording of government officials in the discharge of their duties in public, a wide range of legitimate applications remain. When the likelihood of unjustifiable applications of the statute is a small fraction of the constitutional applications, the statute is unlikely to be substantially overbroad. See, e.g., Ferber, 458 U.S. at 773 (finding statutory ban on child pornography did not constitute substantial overbreadth because medical, educational, or artistic works containing nude children doubtfully "amount[ed] to more than a tiny fraction of the materials within the statute's reach"). Since the reach of the statute is

limited and the majority of its applications are legitimate, Section 99 is not substantially overbroad and it is not, therefore, unconstitutional on its face.

ORDER

Project Veritas' Motion for a Preliminary Injunction (Docket no. 21) is **DENIED.** Conley's Motion to Dismiss (Docket No. 26) is **ALLOWED** with respect to the secret recording of private individuals. Pursuant to Fed. R. Civ. P. 12(b)(1), the Motion to Dismiss (Docket No. 26) is **ALLOWED** as to government officials but without prejudice to amending the complaint within 30 days.

/s/ PATTI B. SARIS
Patti B. Saris
Chief United States District Judge

APPENDIX E

M.G.L.A. 272 § 99

§ 99. Interception of wire and oral communications

A. Preamble.

The general court finds that organized crime exists within the commonwealth and that the increasing activities of organized crime constitute a grave danger to the public welfare and safety. Organized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living.

The general court further finds that because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective in the investigation of illegal acts committed by organized crime. Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized criminal activities.

The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy

of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime.

B. Definitions. As used in this section –

1. The term "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception.

2. The term "oral communication" means speech, except such speech as is transmitted over the public air waves by radio or other similar device.

3. The term "intercepting device" means any device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication other than a hearing aid or similar device which is being used to correct subnormal hearing to normal and other than any telephone or telegraph instrument, equipment, facility, or a component thereof, (a) furnished to a subscriber or user by a communications common carrier in the ordinary course of its business under its tariff and being used by the subscriber or user in the ordinary course of its business; or (b) being used by a communications common carrier in the ordinary course of its business.

4. The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

5. The term "contents", when used with respect to any wire or oral communication, means any information concerning the identity of the parties to such communication or the existence, contents, substance, purport, or meaning of that communication.

6. The term "aggrieved person" means any individual who was a party to an intercepted wire or oral communication or who was named in the warrant authorizing the interception, or who would otherwise have standing to complain that his personal or property interest or privacy was invaded in the course of an interception.

7. The term "designated offense" shall include the following offenses in connection with organized crime as defined in the preamble: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gaming in violation of section

seventeen of chapter two hundred and seventy-one of the general laws, intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

8. The term "investigative or law enforcement officer" means any officer of the United States, a state or a political subdivision of a state, who is empowered by law to conduct investigations of, or to make arrests for, the designated offenses, and any attorney authorized by law to participate in the prosecution of such offenses.

9. The term "judge of competent jurisdiction" means any justice of the superior court of the commonwealth.

10. The term "chief justice" means the chief justice of the superior court of the commonwealth.

11. The term "issuing judge" means any justice of the superior court who shall issue a warrant as provided herein or in the event of his disability or unavailability any other judge of competent jurisdiction designated by the chief justice.

12. The term "communication common carrier" means any person engaged as a common carrier in providing or operating wire communication facilities.

13. The term "person" means any individual, partnership, association, joint stock company, trust, or corporation, whether or not any of the foregoing is an officer, agent or employee of the United States, a state, or a political subdivision of a state.

14. The terms "sworn" or "under oath" as they appear in this section shall mean an oath or affirmation or a statement subscribed to under the pains and penalties of perjury.

15. The terms "applicant attorney general" or "applicant district attorney" shall mean the attorney general of the commonwealth or a district attorney of the commonwealth who has made application for a warrant pursuant to this section.

16. The term "exigent circumstances" shall mean the showing of special facts to the issuing judge as to the nature of the investigation for which a warrant is sought pursuant to this section which require secrecy in order to obtain the information desired from the interception sought to be authorized.

17. The term "financial institution" shall mean a bank, as defined in section 1 of chapter 167, and an investment bank, securities broker, securities dealer, investment adviser, mutual fund, investment company or securities custodian as defined in section 1.165-12(c)(1) of the United States Treasury regulations.

18. The term "corporate and institutional trading partners" shall mean financial institutions and general business entities and corporations which engage in the

business of cash and asset management, asset management directed to custody operations, securities trading, and wholesale capital markets including foreign exchange, securities lending, and the purchase, sale or exchange of securities, options, futures, swaps, derivatives, repurchase agreements and other similar financial instruments with such financial institution.

C. Offenses.

1. Interception, oral communications prohibited.

Except as otherwise specifically provided in this section any person who –

willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.

Proof of the installation of any intercepting device by any person under circumstances evincing an intent to commit an interception, which is not authorized or permitted by this section, shall be prima facie evidence of a violation of this subparagraph.

2. Editing of tape recordings in judicial proceeding prohibited.

Except as otherwise specifically provided in this section any person who willfully edits, alters or tampers with any tape, transcription or recording of oral or wire communications by any means, or attempts to edit, alter or tamper with any tape, transcription or recording of oral or wire communications by any means with the intent to present in any judicial proceeding or proceeding under oath, or who presents such recording or permits such recording to be presented in any judicial proceeding or proceeding under oath, without fully indicating the nature of the changes made in the original state of the recording, shall be fined not more than ten thousand dollars or imprisoned in the state prison for not more than five years or imprisoned in a jail or house of correction for not more than two years or both so fined and given one such imprisonment.

3. Disclosure or use of wire or oral communications prohibited.

Except as otherwise specifically provided in this section any person who –

a. willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception; or

b. willfully uses or attempts to use the contents of any wire or oral communication, knowing that the information was obtained through interception, shall be

guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

4. Disclosure of contents of applications, warrants, renewals, and returns prohibited.

Except as otherwise specifically provided in this section any person who –

willfully discloses to any person, any information concerning or contained in, the application for, the granting or denial of orders for interception, renewals, notice or return on an ex parte order granted pursuant to this section, or the contents of any document, tape, or recording kept in accordance with paragraph N, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

5. Possession of interception devices prohibited.

A person who possesses any intercepting device under circumstances evincing an intent to commit an interception not permitted or authorized by this section, or a person who permits an intercepting device to be used or employed for an interception not permitted or authorized by this section, or a person who possesses an intercepting device knowing that the same is intended to be used to commit an interception not permitted or authorized by this section, shall be guilty of a misdemeanor punishable by imprisonment in a jail or house

of correction for not more than two years or by a fine of not more than five thousand dollars or both.

The installation of any such intercepting device by such person or with his permission or at his direction shall be prima facie evidence of possession as required by this subparagraph.

6. Any person who permits or on behalf of any other person commits or attempts to commit, or any person who participates in a conspiracy to commit or to attempt to commit, or any accessory to a person who commits a violation of subparagraphs 1 through 5 of paragraph C of this section shall be punished in the same manner as is provided for the respective offenses as described in subparagraphs 1 through 5 of paragraph C.

D. Exemptions.

1. Permitted interception of wire or oral communications.

It shall not be a violation of this section –

a. for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of service or to the protection of the rights or property of the carrier of such communication, or which is necessary to prevent the use of such facilities in violation of section fourteen A of chapter

two hundred and sixty-nine of the general laws; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

b. for persons to possess an office intercommunication system which is used in the ordinary course of their business or to use such office intercommunication system in the ordinary course of their business.

c. for investigative and law enforcement officers of the United States of America to violate the provisions of this section if acting pursuant to authority of the laws of the United States and within the scope of their authority.

d. for any person duly authorized to make specified interceptions by a warrant issued pursuant to this section.

e. for investigative or law enforcement officers to violate the provisions of this section for the purposes of ensuring the safety of any law enforcement officer or agent thereof who is acting in an undercover capacity, or as a witness for the commonwealth; provided, however, that any such interception which is not otherwise permitted by this section shall be deemed unlawful for purposes of paragraph P.

f. for a financial institution to record telephone communications with its corporate or institutional trading partners in the ordinary course of its business; provided, however, that such financial institution shall establish and maintain a procedure to

provide semi-annual written notice to its corporate and institutional trading partners that telephone communications over designated lines will be recorded.

2. Permitted disclosure and use of intercepted wire or oral communications.

a. Any investigative or law enforcement officer, who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence in the proper performance of his official duties.

b. Any investigative or law enforcement officer, who, by any means authorized by this section has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents or evidence in the proper performance of his official duties.

c. Any person who has obtained, by any means authorized by this section, knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any state or in any federal or state grand jury proceeding.

d. The contents of any wire or oral communication intercepted pursuant to a warrant in accordance with the provisions of this section, or evidence derived therefrom, may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.

e. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this section shall lose its privileged character.

E. Warrants: when issuable:

A warrant may issue only:

1. Upon a sworn application in conformity with this section; and

2. Upon a showing by the applicant that there is probable cause to believe that a designated offense has been, is being, or is about to be committed and that evidence of the commission of such an offense may thus be obtained or that information which will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense may thus be obtained; and

3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

F. Warrants: application.

1. Application. The attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney may apply ex parte to a judge of competent jurisdiction for a warrant to intercept wire or oral communications. Each application ex parte for a warrant must be in

writing, subscribed and sworn to by the applicant authorized by this subparagraph.

2. The application must contain the following:

a. A statement of facts establishing probable cause to believe that a particularly described designated offense has been, is being, or is about to be committed; and

b. A statement of facts establishing probable cause to believe that oral or wire communications of a particularly described person will constitute evidence of such designated offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense; and

c. That the oral or wire communications of the particularly described person or persons will occur in a particularly described place and premises or over particularly described telephone or telegraph lines; and

d. A particular description of the nature of the oral or wire communications sought to be overheard; and

e. A statement that the oral or wire communications sought are material to a particularly described investigation or prosecution and that such conversations are not legally privileged; and

f. A statement of the period of time for which the interception is required to be maintained. If practicable, the application should designate hours of the day or night during which the oral or wire communications

may be reasonably expected to occur. If the nature of the investigation is such that the authorization for the interception should not automatically terminate when the described oral or wire communications have been first obtained, the application must specifically state facts establishing probable cause to believe that additional oral or wire communications of the same nature will occur thereafter; and

g. If it is reasonably necessary to make a secret entry upon a private place and premises in order to install an intercepting device to effectuate the interception, a statement to such effect; and

h. If a prior application has been submitted or a warrant previously obtained for interception of oral or wire communications, a statement fully disclosing the date, court, applicant, execution, results, and present status thereof; and

i. If there is good cause for requiring the postponement of service pursuant to paragraph L, subparagraph 2, a description of such circumstances, including reasons for the applicant's belief that secrecy is essential to obtaining the evidence or information sought.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts establishing such probable cause are derived in whole or part from the statements of persons other than the applicant, the sources of such information and belief must be either disclosed or described; and the

application must contain facts establishing the existence and reliability of any informant and the reliability of the information supplied by him. The application must also state, so far as possible, the basis of the informant's knowledge or belief. If the applicant's information and belief is derived from tangible evidence or recorded oral evidence, a copy or detailed description thereof should be annexed to or included in the application. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant or information and belief, with the source thereof, and reason therefor, specified.

G. Warrants: application to whom made.

Application for a warrant authorized by this section must be made to a judge of competent jurisdiction in the county where the interception is to occur, or the county where the office of the applicant is located, or in the event that there is no judge of competent jurisdiction sitting in said county at such time, to a judge of competent jurisdiction sitting in Suffolk County; except that for these purposes, the office of the attorney general shall be deemed to be located in Suffolk County.

H. Warrants: application how determined.

1. If the application conforms to paragraph F, the issuing judge may examine under oath any person for the purpose of determining whether probable cause

exists for the issuance of the warrant pursuant to paragraph E. A verbatim transcript of every such interrogation or examination must be taken, and a transcription of the same, sworn to by the stenographer, shall be attached to the application and be deemed a part thereof.

2. If satisfied that probable cause exists for the issuance of a warrant the judge may grant the application and issue a warrant in accordance with paragraph I. The application and an attested copy of the warrant shall be retained by the issuing judge and transported to the chief justice of the superior court in accordance with the provisions of paragraph N of this section.

3. If the application does not conform to paragraph F, or if the judge is not satisfied that probable cause has been shown sufficient for the issuance of a warrant, the application must be denied.

I. Warrants: form and content.

A warrant must contain the following:

1. The subscription and title of the issuing judge; and

2. The date of issuance, the date of effect, and termination date which in no event shall exceed thirty days from the date of effect. The warrant shall permit interception of oral or wire communications for a period not to exceed fifteen days. If physical installation of a device is necessary, the thirty-day period shall begin upon the date of installation. If the effective period of the warrant is to terminate upon the acquisition of

particular evidence or information or oral or wire communication, the warrant shall so provide; and

3. A particular description of the person and the place, premises or telephone or telegraph line upon which the interception may be conducted; and

4. A particular description of the nature of the oral or wire communications to be obtained by the interception including a statement of the designated offense to which they relate; and

5. An express authorization to make secret entry upon a private place or premises to install a specified intercepting device, if such entry is necessary to execute the warrant; and

6. A statement providing for service of the warrant pursuant to paragraph L except that if there has been a finding of good cause shown requiring the postponement of such service, a statement of such finding together with the basis therefor must be included and an alternative direction for deferred service pursuant to paragraph L, subparagraph 2.

J. Warrants: renewals.

1. Any time prior to the expiration of a warrant or a renewal thereof, the applicant may apply to the issuing judge for a renewal thereof with respect to the same person, place, premises or telephone or telegraph line. An application for renewal must incorporate the warrant sought to be renewed together with the application therefor and any accompanying papers upon which it was issued. The application for renewal must

set forth the results of the interceptions thus far conducted. In addition, it must set forth present grounds for extension in conformity with paragraph F, and the judge may interrogate under oath and in such an event a transcript must be provided and attached to the renewal application in the same manner as is set forth in subparagraph 1 of paragraph H.

2. Upon such application, the judge may issue an order renewing the warrant and extending the authorization for a period not exceeding fifteen (15) days from the entry thereof. Such an order shall specify the grounds for the issuance thereof. The application and an attested copy of the order shall be retained by the issuing judge to be transported to the chief justice in accordance with the provisions of subparagraph N of this section. In no event shall a renewal be granted which shall terminate later than two years following the effective date of the warrant.

K. Warrants: manner and time of execution.

1. A warrant may be executed pursuant to its terms anywhere in the commonwealth.

2. Such warrant may be executed by the authorized applicant personally or by any investigative or law enforcement officer of the commonwealth designated by him for the purpose.

3. The warrant may be executed according to its terms during the hours specified therein, and for the period therein authorized, or a part thereof. The authorization shall terminate upon the acquisition of the

oral or wire communications, evidence or information described in the warrant. Upon termination of the authorization in the warrant and any renewals thereof, the interception must cease at once, and any device installed for the purpose of the interception must be removed as soon thereafter as practicable. Entry upon private premises for the removal of such device is deemed to be authorized by the warrant.

L. Warrants: service thereof.

1. Prior to the execution of a warrant authorized by this section or any renewal thereof, an attested copy of the warrant or the renewal must, except as otherwise provided in subparagraph 2 of this paragraph, be served upon a person whose oral or wire communications are to be obtained, and if an intercepting device is to be installed, upon the owner, lessee, or occupant of the place or premises, or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.

2. If the application specially alleges exigent circumstances requiring the postponement of service and the issuing judge finds that such circumstances exist, the warrant may provide that an attested copy thereof may be served within thirty days after the expiration of the warrant or, in case of any renewals thereof, within thirty days after the expiration of the last renewal; except that upon a showing of important special facts which set forth the need for continued secrecy to the satisfaction of the issuing judge, said judge may direct that the attested copy of the warrant be served on

such parties as are required by this section at such time as may be appropriate in the circumstances but in no event may he order it to be served later than three (3) years from the time of expiration of the warrant or the last renewal thereof. In the event that the service required herein is postponed in accordance with this paragraph, in addition to the requirements of any other paragraph of this section, service of an attested copy of the warrant shall be made upon any aggrieved person who should reasonably be known to the person who executed or obtained the warrant as a result of the information obtained from the interception authorized thereby.

3. The attested copy of the warrant shall be served on persons required by this section by an investigative or law enforcement officer of the commonwealth by leaving the same at his usual place of abode, or in hand, or if this is not possible by mailing the same by certified or registered mail to his last known place of abode. A return of service shall be made to the issuing judge, except, that if such service is postponed as provided in subparagraph 2 of paragraph L, it shall be made to the chief justice. The return of service shall be deemed a part of the return of the warrant and attached thereto.

M. Warrant: return.

Within seven days after termination of the warrant or the last renewal thereof, a return must be made thereon to the judge issuing the warrant by the applicant therefor, containing the following:

a. a statement of the nature and location of the communications facilities, if any, and premise or places where the interceptions were made; and

b. the periods of time during which such interceptions were made; and

c. the names of the parties to the communications intercepted if known; and

d. the original recording of the oral or wire communications intercepted, if any; and

e. a statement attested under the pains and penalties of perjury by each person who heard oral or wire communications as a result of the interception authorized by the warrant, which were not recorded, stating everything that was overheard to the best of his recollection at the time of the execution of the statement.

N. Custody and secrecy of papers and recordings made pursuant to a warrant.

1. The contents of any wire or oral communication intercepted pursuant to a warrant issued pursuant to this section shall, if possible, be recorded on tape or wire or other similar device. Duplicate recordings may be made for use pursuant to subparagraphs 2 (a) and (b) of paragraph D for investigations. Upon examination of the return and a determination that it complies with this section, the issuing judge shall forthwith order that the application, all renewal applications, warrant, all renewal orders and the return thereto be transmitted to the chief justice by such persons as he shall designate. Their contents shall not be disclosed

except as provided in this section. The application, renewal applications, warrant, the renewal order and the return or any one of them or any part of them may be transferred to any trial court, grand jury proceeding of any jurisdiction by any law enforcement or investigative officer or court officer designated by the chief justice and a trial justice may allow them to be disclosed in accordance with paragraph D, subparagraph 2, or paragraph *O* or any other applicable provision of this section.

The application, all renewal applications, warrant, all renewal orders and the return shall be stored in a secure place which shall be designated by the chief justice, to which access shall be denied to all persons except the chief justice or such court officers or administrative personnel of the court as he shall designate.

2. Any violation of the terms and conditions of any order of the chief justice, pursuant to the authority granted in this paragraph, shall be punished as a criminal contempt of court in addition to any other punishment authorized by law.

3. The application, warrant, renewal and return shall be kept for a period of five (5) years from the date of the issuance of the warrant or the last renewal thereof at which time they shall be destroyed by a person designated by the chief justice. Notice prior to the destruction shall be given to the applicant attorney general or his successor or the applicant district attorney or his successor and upon a showing of good cause to the chief justice, the application, warrant, renewal, and return

may be kept for such additional period as the chief justice shall determine but in no event longer than the longest period of limitation for any designated offense specified in the warrant, after which time they must be destroyed by a person designated by the chief justice.

O. Introduction of evidence.

1. Notwithstanding any other provisions of this section or any order issued pursuant thereto, in any criminal trial where the commonwealth intends to offer in evidence any portions of the contents of any interception or any evidence derived therefrom the defendant shall be served with a complete copy of each document and item which make up each application, renewal application, warrant, renewal order, and return pursuant to which the information was obtained, except that he shall be furnished a copy of any recording instead of the original. The service must be made at the arraignment of the defendant or, if a period in excess of thirty (30) days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty (30) days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed, at least thirty days before the commencement of the

criminal trial, shall render such evidence illegally obtained for purposes of the trial against the defendant; and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

2. In any criminal trial where the commonwealth intends to offer in evidence any portions of a recording or transmission or any evidence derived therefrom, made pursuant to the exceptions set forth in paragraph B, subparagraph 4, of this section, the defendant shall be served with a complete copy of each recording or a statement under oath of the evidence overheard as a result of the transmission. The service must be made at the arraignment of the defendant or if a period in excess of thirty days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed at least thirty days before the commencement of the criminal trial, shall render such service illegally obtained for purposes of the trial against the defendant and such evidence shall not be

offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

P. Suppression of evidence.

Any person who is a defendant in a criminal trial in a court of the commonwealth may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom, for the following reasons:

1. That the communication was unlawfully intercepted.

2. That the communication was not intercepted in accordance with the terms of this section.

3. That the application or renewal application fails to set forth facts sufficient to establish probable cause for the issuance of a warrant.

4. That the interception was not made in conformity with the warrant.

5. That the evidence sought to be introduced was illegally obtained.

6. That the warrant does not conform to the provisions of this section.

Q. Civil remedy.

Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by

means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person –

1. actual damages but not less than liquidated damages computed at the rate of $100 per day for each day of violation or $1000, whichever is higher;

2. punitive damages; and

3. a reasonable attorney's fee and other litigation disbursements reasonably incurred. Good faith reliance on a warrant issued under this section shall constitute a complete defense to an action brought under this paragraph.

R. Annual report of interceptions of the general court.

On the second Friday of January, each year, the attorney general and each district attorney shall submit a report to the general court stating (1) the number of applications made for warrants during the previous year, (2) the name of the applicant, (3) the number of warrants issued, (4) the effective period for the warrants, (5) the number and designation of the offenses for which those applications were sought, and for each of the designated offenses the following: (a) the number of renewals, (b) the number of interceptions made during the previous year, (c) the number of indictments believed to be obtained as a result of those

interceptions, (d) the number of criminal convictions obtained in trials where interception evidence or evidence derived therefrom was introduced. This report shall be a public document and be made available to the public at the offices of the attorney general and district attorneys. In the event of failure to comply with the provisions of this paragraph any person may compel compliance by means of an action of mandamus.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

PROJECT VERITAS ACTION FUND, Plaintiff, v. DANIEL F. CONLEY, IN HIS OFFICIAL CAPACITY AS SUFFOLK COUNTY DISTRICT ATTORNEY, Defendant.	C.A. No. 1:16-cv-10462-PBS

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed Sep. 29, 2017)

Plaintiff Project Veritas Action Fund respectfully brings this action for declaratory and injunctive relief and complains as follows:

INTRODUCTION

1. Project Veritas Action Fund ("PVA") is a national media organization on the forefront of undercover investigative journalism.

2. Because Massachusetts maintains an unconstitutional recording law, PVA is prohibited from exercising its First Amendment right to engage in undercover newsgathering and journalism. *See* G.L. c. 272, §99.

3. PVA's undercover investigative journalism reports have averaged over 100,000 views online and PVA's stories are often reported by other news outlets. Through its undercover investigative journalism, PVA is able to educate and inform the public about newsworthy topics of public concern and government accountability.

4. However, PVA's undercover newsgathering and reporting could result in criminal charges and civil lawsuits if undertaken in Massachusetts. PVA would focus its efforts on various issues within the Commonwealth, but is unconstitutionally restrained by an overbroad statute prohibiting the interception and disclosure of oral communications. *See* G.L. c. 272, §99.

5. Based on past experience, PVA has not uncovered newsworthy matters to report by publicly announcing its recording efforts and seeking the consent of all parties to be recorded. Rather, PVA has uncovered newsworthy matters to report through secretive recording of discussions, often in areas held open to the

public such as voting places, sidewalks, and hotel lobbies. Without utilizing such techniques, PVA is unable to exercise its First Amendment rights to engage in undercover newsgathering and journalism in Massachusetts.

6. Across the United States, the First Amendment interests in free speech and a free press have provided ample protection to investigate and report issues of public concern. This protection includes preventing interception laws from going beyond the legitimate protection of individual privacy. Court decisions in the United States Court of Appeals for the First Circuit have curtailed such abuses on a case-by-case basis. *See*, *e.g.*, *Jean v. Mass. State Police*, 492 F.3d 24, 29–30 (1st Cir. 2007) (recognizing First Amendment right to publish recording of illegally intercepted communications over the prohibition in G.L. c. 272, §99); *Glik v. Cuniffe*, 655 F.3d 78, 82–84 (1st Cir. 2011) (recognizing "a constitutionally protected right to videotape police carrying out their official duties in public" under the First Amendment); *see also Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014). Although this precedent is welcome, it does not guarantee the protection of additional instances where surreptitious recording would be protected under the First Amendment. Massachusetts maintains a facially overbroad eavesdropping law that must be declared unconstitutional to prevent a prior restraint on PVA's future efforts within Massachusetts. *See*, *e.g.*, *Commonwealth v. Manzelli*, 68 Mass. App. Ct. 691, 694 (2007).

JURISDICTION AND VENUE

7. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiffs claims arise under the First and Fourteenth Amendments to the Constitution of the United States. This Court also has jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, and the Civil Rights Act, 42 U.S.C. § 1983.

8. This Court has jurisdiction to award attorneys' fees, in its discretion, in this action. 42 U.S.C. § 1988(b).

9. Venue is proper in this Court under 28 U.S.C. §§ 1391(b)(1)–(2) because Defendant resides in the District of Massachusetts and all of the events or omissions giving rise to the claims occurred in this division.

PARTIES

10. Plaintiff PVA is a nonprofit corporation organized under section 501(c)(4) of the Internal Revenue Code. It is headquartered in Mamaroneck, New York.

11. Defendant Daniel F. Conley is the Suffolk County District Attorney, whose office is located in Boston, Massachusetts. District Attorney Conley has the power to prosecute for illegal interception of oral communications under G.L. c. 272, §99 that occurs within the office's jurisdiction. *See* G.L. c. 12, §13.

STATEMENT OF FACTS

12. Massachusetts law requires consent of all persons who are party to a conversation for PVA to legally record, rather than illegally intercept, conversations. *See* G.L., c. 272, §99(B)(4) ("The term 'interception' means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person *other than a person given prior authority by all parties to such communication* . . . " (emphasis added)).

13. PVA's undercover newsgathering techniques involve intercepting oral communications of persons using intercepting devices as defined in statute. *See* G.L. c. 272, §§99(B)(2) (defining "oral communication"); (B)(3) (defining "intercepting device"); (B)(4) (defining "interception"); (B)(13) (defining "person").

14. PVA does not engage and has no intention of engaging in the interception of wire communications as defined in the statute. *See* G.L. c. 272, §99(B)(1).

15. PVA's undercover newsgathering techniques would subject it to felony prosecution under Massachusetts law for prohibited interception of oral communications. G.L. c. 272, §99(C)(1).

16. PVA's newsgathering techniques would subject it to misdemeanor prosecution under Massachusetts law for prohibited possession of interception devices. G.L. c. 272, §99(C)(5).

17. PVA's news reporting would subject it to misdemeanor prosecution under Massachusetts law for prohibited disclosure of oral communications. G.L. c. 272, §99(C)(3).

18. A single PVA reporter's newsgathering and news reporting activities would subject most of PVA's staff to conspiracy or accessory charges that carry the same penalties for prohibited interception, prohibited possession of interception devices and prohibited disclosure of oral communications. G.L. c. 272, §99(C)(6).

19. PVA's newsgathering and news reporting activities would subject it to civil lawsuits under Massachusetts law from aggrieved persons, subjecting it to claims for actual damages, punitive damages, and attorney's fees. G.L. c. 272, §99(B)(6); (Q); *see, e.g.*, *Johnson v. Frei*, 2016 Mass. App. Div. 122 (Mass. Dist. App. Div. 2016).

20. PVA and its respective journalists do not qualify for any exemptions under the statute. *See* G.L. c. 272, §99(B)(4), (D).

21. But for the prohibitions throughout "Section 99," PVA would engage in undercover investigative journalism projects in Massachusetts. In particular, PVA would investigate instances of landlords taking advantage of housing shortages in Boston where students may live in unsafe and dilapidated conditions, as well as the ties between these landlords and public officials.

22. But for Section 99, PVA would investigate and report on the public controversy over "sanctuary cities" in Massachusetts. It would accomplish this by secretly investigating and recording interactions with government officials in Boston in the discharge of their duties in public places, including police officers, to learn more about their concerns about immigration policy and deportation. Further, PVA would secretly investigate and record government officials who are discharging their duties at or around the State House in Boston and other public spaces to learn about their motives and concerns about immigration policy and deportation. PVA's intention is that through secretly recorded, informal discussions with police officers and legislative representatives that it will obtain more information about the impact of immigration policies in Massachusetts and share that with the public to better educate it.

23. In 2014, through undercover newsgathering, PVA uncovered a stark contrast between the public statements of a candidate for United States Senate in Kentucky and the statements of her campaign staff. *See Grimes' campaign workers caught on hidden camera: "It's a lying game"*, YOUTUBE, Oct. 6, 2014, https://www.youtube.com/watch?v=A1N3rbwRA_k. This exposé provided the citizens of Kentucky with relevant information about a candidate seeking election to federal office. If undertaken in Massachusetts, the methods utilized by PVA in this investigation would subject it to criminal and civil penalties under Section 99.

24. In September 2015, PVA exposed campaign finance violations in New York using undercover techniques. *See HIDDEN CAM: Hillary's National Marketing Director Illegal Accepting Foreign Contribution,* YOUTUBE, Sept. 1, 2015, https://www.youtube.com/watch?v=-qxF7Z2N7Y4. If undertaken in Massachusetts, the methods utilized by PVA in this investigation would subject it to criminal and civil penalties under Section 99.

25. Just one week later, PVA brought national attention to electoral malfeasance in Nevada using similar techniques. *See Hidden Cameras Capture Clinton Campaign Staff in Nevada not Only Skirting the Law but Mocking it*, PROJECT VERITAS ACTION FUND, http://www.projectveritasaction.com/video/hidden-cameras-capture-clinton-campaign-staff-nevada-not-only-skirting-law-mocking-it. If undertaken in Massachusetts, the methods utilized by PVA in this investigation would subject it to criminal and civil penalties under Section 99.

26. In February, 2016, a PVA report detailed the weaknesses of voter registration laws in New Hampshire by focusing on the surreptitiously recorded statements of government officials. Chuck Ross, *EXCLUSIVE: New O'Keefe Video Shows How Easy It Is to Commit Voter Fraud in New Hampshire*, DAILY CALLER, Feb. 2, 2016, http://dailycaller.com/2016/02/10/exclusive-new-okeefe-video-shows-how-easy-it-is-to-commit-voter-fraud-in-new-hampshire-video/. If undertaken in Massachusetts, the methods utilized by

PVA in this investigation would subject it to criminal and civil penalties under Section 99.

27. PVA conducted a secret investigation into the wrongdoings of political operatives connected to various campaigns during the 2016 presidential election, including operations seeking to provoke violence at political rallies. *Rigging the Election, Video 1: Clinton Campaign and DNC Incite Violence at Trump Rallies*, YOUTUBE, Oct. 17, 2016, https://www.youtube.com/watch?v=5IuJGHuIkzY. In the course of this investigation, PVA uncovered evidence of serious violations of federal election law. It detailed those violations to the public in its investigations and filed an appropriate complaint with the Federal Election Commission for redress. Notably, these secret recordings were of private political actors whose actions would have an effect on the outcome of the 2016 presidential election. If undertaken in Massachusetts, the methods utilized by PVA in this investigation would subject it to criminal and civil penalties under Section 99.

28. PVA has continued to investigate the ties between sophisticated political operations and public protests outside of Massachusetts. PVA's journalists have embedded in certain groups that identify as "antifa," or "anti-fascist," and have documented support within some of these groups for instigating violence at public events relating to free speech or contrarian political beliefs. In this capacity, PVA's journalists have attended numerous public rallies since April, 2017 while secretly recording in a manner that would violate Section 99. Secret recording in this capacity has

included recording interactions between police and attendees at such events, including in Charlottesville, Virginia on August 12, 2017 and in Atlanta, Georgia on August 13, 2017. These recordings raised numerous concerns over how police interact with people expressing different viewpoints at public events, and PVA is including the issue of protest management as part of its investigation.

29. On August 19, 2017, a large public event occurred in downtown Boston. Individuals and organizations from other states tied to the ongoing PVA "antifa" investigation attended this event. But for the unequivocal ban on secret recording in Section 99, PVA journalists would have attended the event and secretly recorded public officials executing their duties as they related to attendees.

30. On information and belief, public events will continue to occur in Suffolk County that relate to PVA's investigation into "antifa" groups, immediately and indefinitely. But for the unequivocal ban on secret recording in Section 99, PVA journalists would attend these events and secretly record public officials executing their duties as they relate to attendees. PVA would employ cellular phone cameras and "button cameras" to achieve these recordings. It would seek to capture whether antifa public events and protests are peaceful, whether police or other public officials' interactions with antifa members are non-violent, and otherwise capture the events to report to the public.

31. In its newsgathering activities, PVA journalists would not impede police or other public officials executing their duties, would remain at least five feet away from such officials while recording, would comply with requests from these officials, and would not engage in otherwise harassing or interfering behavior. Rather, PVA journalists would quietly and secretly record such interactions while ensuring that public officials are able to carry out their duties.

32. Undercover investigative journalism employing surreptitious recording is the sole method through which PVA is able to uncover newsworthy matters concerning government fraud, abuses in the political process and other areas of public concern. In a substantial amount of instances, the public's interest in being informed about such matters outweighs the government's interest in prohibiting all surreptitious newsgathering. Indeed, on a national basis, undercover journalism is responsible for uncovering police corruption, environmental pollution, poor airport security, and white collar crime.

33. But for the unequivocal ban in Section 99, PVA would undertake undercover investigation of public issues in Boston and throughout Massachusetts, including: (1) public officials discharging their duties in public spaces; (2) public officials in places with no expectation of privacy; and (3) private individuals in places with no expectation of privacy. PVA cannot attest to where its investigations would lead because most are spontaneous in nature—journalists are deployed to an area, begin researching and discussing

on-the-ground controversies, and follow where the facts lead them. As to PVA's usual operations, one cannot predict (or plead) where these sorts of spontaneous investigations will lead and how they will develop. Rather, PVA can only attest that the investigations would be extensive, immediate, and that its lost opportunities under Section 99's alarming ban are immeasurable.

COUNT I

The Prohibition in Section 99 Against Intercepting the Oral Communications of Government Officials in the Discharge of Their Duties in a Public Place is Unconstitutional Facially and as Applied to PVA.

34. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]" U.S. CONST. amend. I. "[T]he First Amendment is applicable to the States through the Fourteenth [Amendment.]" *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978). "The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within [the] principles [of the First Amendment]." *Glik*, 655 F.3d at 82.

35. "In the First Amendment context," the Supreme Court "recognizes 'a . . . type of facial challenge,' whereby a law may be invalidated as overbroad if 'a *substantial number* of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *U.S. v. Stevens*, 559 U.S. 460, 473 (2010),

citing Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008) (emphasis added).

36. Section 99 prohibits PVA from recording and disclosing any conversation in Massachusetts without the consent of all parties, including government officials engaged in official duties in a public place. The Commonwealth's courts have affirmed this interpretation on numerous occasions. *Manzelli*, 68 Mass. App. Ct. at 694 (allowing conviction for public recording of police officers); *Commonwealth. v. Hyde*, 434 Mass. 594, 605 (2001) ("Secret tape recording by private individuals has been unequivocally banned . . . unless and until the Legislature changes the statute[.]" (emphasis added)).

37. As applied, Section 99 fails First Amendment scrutiny by prohibiting the secret recording of government officials, including law enforcement officers, in the discharge of their duties in a public space.

38. While prior First Circuit precedent has afforded limited protection on a case-by-case basis, particularly for the recording of police officers in public spaces, these cases do not protect PVA's First Amendment rights to engage in future exposés that would surreptitiously record other government officials in public areas.

39. The law "create[s] a criminal prohibition of alarming breadth." *Stevens*, 559 U.S. at 474. It is unconstitutional, facially and as applied to PVA.

COUNT II

Section 99's Prohibition Against Intercepting Oral Communications of Individuals Having No Reasonable Expectation of Privacy is Unconstitutionally Overbroad on Its Face and as Applied to PVA.

40. Even relying on the First Circuit's previous recognition of First Amendment protection for recording police officers engaged in their official duties in public places, PVA remains unconstitutionally burdened by Section 99.

41. PVA is prohibited from secretly recording oral communications made in any conversation—even when the communications occur in circumstances with no reasonable expectation of privacy—without prior authority of all parties. G.L. c. 272, §§99(B)(2), (B)(4), (C)(1).

42. PVA is prohibited from secretly recording speeches made in public places by non-government officials without prior authority by the speaker. G.L. c. 272, §§99(B)(2), (B)(3), (B)(4), (C)(1).

43. PVA is prohibited from simply possessing intercepting devices and "evincing an intent to commit an interception not permitted or authorized by this section[.]" As discussed, despite First Circuit precedent, PVA remains "unequivocally banned" from engaging in all of its undercover newsgathering activities under the statute. *Hyde*, 434 Mass. at 605.

44. The unequivocal ban in Section 99 cannot be overcome by prosecutorial discretion. *Stevens*, 559 U.S. at 480 ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige.* We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.")

45. PVA retains the First Amendment right to publish information of public concern about political processes through its undercover journalism about governmental and nongovernmental individuals involved in investigations. PVA should likewise be afforded prepublication protection as it gathers such information.

46. Section 99 fails to survive constitutional scrutiny, prohibiting interception far beyond conversations undertaken with a reasonable expectation of privacy, and is invalid under the First Amendment, facially and as applied to PVA.

PRAYER FOR RELIEF

Wherefore, PVA prays for the following relief:

1. A declaratory judgment that G.L. c. 272, §99(B)(4), (C)(1), (C)(3), (C)(5) and (C)(6) are unconstitutional facially and as applied to PVA.

2. Preliminary and permanent injunctive relief pursuant to 42 U.S.C. § 1983 against enforcement of G.L. c. 272, §99(B)(4), (C)(1), (C)(3), (C)(5) and (C)(6) against activity that constitutes the interception of

oral communications of public officials engaged in their duties in public places.

3. Preliminary and permanent injunctive relief pursuant to 42 U.S.C. § 1983 against enforcement of G.L. c. 272, §99(B)(4), (C)(1), (C)(3), (C)(5) and (C)(6) against activity that constitutes the interception of oral communications of persons when such communications occur in circumstances with no reasonable expectation of privacy.

4. Plaintiffs' reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988 or any applicable statute or authority, and further relief this Court may grant in its discretion.

5. Any other relief that the Court deems just and appropriate.

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Respectfully submitted,

PROJECT VERITAS ACTION FUND,

By its attorneys,

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September 29, 2017.

[Certificate Of Service Omitted]