

No. 20-1598

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**In the Supreme Court of the United States**

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PROJECT VERITAS ACTION FUND, *Petitioner*

v.

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

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

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**BRIEF OF PROTECT THE 1<sup>ST</sup>, INC.  
AS *AMICUS CURIAE*  
SUPPORTING PETITIONER**

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## **QUESTIONS PRESENTED**

The questions presented are:

1. Whether the First Circuit erred in holding—in direct conflict with the Illinois Supreme Court and in conflict with four other circuit courts of appeals—that a recording law which makes it a felony for individuals to secretly record under any circumstances is not facially overbroad under the First Amendment.
2. Whether the First Circuit erred in holding—in direct conflict with five other circuit courts of appeals—that a party challenging a speech-suppressive law has the burden to precisely articulate every type of contemplated speech activity to satisfy ripeness for as-applied challenges.

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## INTRODUCTION AND INTEREST OF *AMICUS*<sup>1</sup>

*Amicus* Protect the 1st, Inc. (PT1) is a nonprofit, nonpartisan organization that advocates for protecting First Amendment rights in all relevant settings. PT1 thus defends the speech and association rights of people from across the ideological spectrum, including people who may not even agree with the organization's views.

This case is of particular concern to PT1 because it involves a constitutional challenge to a Massachusetts law that hinders core First Amendment rights. Specifically, the law guts the ability of journalists and citizens alike to engage in a form of newsgathering by recording individuals unawares, even in public. The law does so by making it illegal for anyone but law enforcement officers to record others without their permission.

The petition (at 11-39) clearly explains how the decision below is incorrect in its resolution of ripeness, overbreadth and as-applied First Amendment issues presented here. And Petitioner's proposal—which would allow the undisclosed recording of government officials publicly performing their official functions, as

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<sup>1</sup> Petitioner was given notice more than 10 days before—and consented to—the filing of this brief. Respondent was given notice less than 10 days before filing but consented to the filing and has since waived its right to file a brief in opposition. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than PT1 and its counsel, make a monetary contribution to fund its preparation or submission. PT1 is not publicly traded and has no parent corporations, and no publicly traded corporation owns 10% or more of *Amicus*.



well as private individuals when they have no reasonable expectation of privacy—properly balances First Amendment and privacy concerns. See App. 4-5.

*Amicus* writes separately to provide additional, practical reasons why review should be granted. Specifically, *Amicus* provides additional examples of important recordings of public events that would have been illegal under the Massachusetts law here and similar laws around the country. If individuals are denied the ability to record such public events—and not even allowed to challenge such decisions before the individual has been prosecuted—many newsworthy actions will either remain unknown to or not fully understood by the public. And citizens will lose an important protection against and deterrent to criminal activity.

Additionally, *Amicus* writes to highlight that the Massachusetts law and others like it criminalize behavior that is commonplace in our increasingly technology-saturated society. That is another important reason that governments and citizens nationwide badly need this Court's guidance as to when recordings made by private individuals or entities are and are not protected by the First Amendment, and greater clarity as to when restrictions on such recordings can be challenged in federal court.

For the reasons stated in the petition, and for these additional reasons, the petition should be granted.



## STATEMENT

This is the latest in a long line of cases addressing the intersection of First Amendment rights with privacy interests in light of advancing technology. A Massachusetts regulation known as Section 99 makes it illegal for anyone but law enforcement officers to record others without their permission. Mass. Gen. Laws ch. 272, § 99. Petitioner is a media organization dedicated to “undercover investigative journalism.” App. at 4. It intends to engage in such secret audio recording in Massachusetts but fears doing so would expose it to criminal and civil liability under Section 99. App. at 105-106. Accordingly, in 2017, Petitioner filed suit in the local U.S. district court, arguing that the restrictions violated the First Amendment.

That court granted summary judgment to Petitioner on its claim that, as applied to secret audio recording of government officials discharging their duties in public, Section 99 violates the First Amendment. App. 5. But it dismissed Petitioner’s claims challenging the statute as applied to the secret audio recording of private individuals and challenging the statute as a whole for being overbroad. *Ibid.* The First Circuit affirmed the district court’s dismissal of the overbreadth challenge but held that the other two claims—regarding the recording of government officials or other individuals—were not ripe for review. The court thus vacated the rulings on those issues and remanded with instructions to dismiss those claims without prejudice. *Ibid.*

## ADDITIONAL REASONS TO GRANT THE PETITION

### **I. If Individuals Are Barred from Recording Public Events, Many Newsworthy Events Will Remain Unknown or Inadequately Understood.**

This Court has recognized that “the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from *limiting the stock of information* from which members of the public may draw.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (emphasis added). The ability of the citizenry to gather, share, and receive information about events of public interest is often essential for the proper functioning of individuals and groups in civil society, and in their ability to make informed decisions in both their public and private capacities. By severely restricting the ability of citizens to challenge laws that restrict their ability to gather and share important information, the decision below tramples First Amendment rights and eviscerates the sanitizing and protective effects of “sunlight” for some of society’s most vulnerable. Indeed, the examples are legion of journalists or citizens recording newsworthy events, often involving abusive behavior by government or private actors, without seeking the permission of those they were recording. But under Massachusetts law, all of those recordings would have been illegal, and the valuable information they contain would be lost to human knowledge.

1. American journalism has a long and honored history of using undercover means to expose the illegal

or the dangerous. Perhaps the pioneer of undercover investigative journalism was Nellie Bly, a New York World reporter in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, who a rival newspaper called “the best reporter in America.” See C. Thomas Dienes, *Protecting Investigative Journalism*, 67 Geo. Wash. L. Rev. 1139, 1141-1142 (1999). She famously pretended to be mentally ill to be admitted to a women’s “Lunatic Asylum,” and her published portrayal of the abuse the patients suffered there resulted in a grand jury investigation and, ultimately, reform. *Ibid.* In later journalistic endeavors she would also pose “as a maid to expose abuses by employment agencies, as an unwed mother to investigate trafficking in newborns, and as a patient to investigate the quality of medical care at city health centers.” *Id.* at 1142 (cleaned up).

Similarly, Upton Sinclair wrote *The Jungle* after going undercover as a worker in a Chicago slaughterhouse. *Ibid.* That book prompted the adoption of federal food and drug legislation. *Ibid.*<sup>2</sup>

These journalistic practices, designed to shed light where light otherwise would not shine, not only continued into the middle of the 20th century, but garnered journalism’s most prestigious recognition. For example, the Buffalo News won a Pulitzer Prize

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<sup>2</sup> See also Upton Sinclair, *Whose Muckraking Changed the Meat Industry*, The New York Times (June 30, 2016), <https://www.nytimes.com/interactive/projects/cp/obituaries/archives/upton-sinclair-meat-industry> (“Sinclair’s novel ‘The Jungle’ \*\*\* helped spur the public outrage that led to” “President Theodore Roosevelt sign[ing] two historic bills aimed at regulating the food and drug industries into law on June 30, 1906.”).

for its undercover news stories on a county welfare department; and the Chicago Tribune likewise won a Pulitzer for a series of articles on voting irregularities when one of its reporters concealed his identity to obtain a position on the Chicago elections board. See Dienes, *Protecting Investigative Journalism*, at 1142.

This rich and respected journalistic tradition adapted to new technology. Thus, in 1968, *60 Minutes* started on television, using investigative journalism and undercover cameras aggressively. See *ibid.* This spawned similar television news programs, such as *20/20* and *Inside Edition*, leading to increased public awareness of important issues and prompting reform where it otherwise would not be possible. See *ibid.* For instance, *20/20* and a Houston-area newspaper did undercover investigations, including secret filming, on Texas nursing home conditions that led to statewide reform of regulations governing nursing homes.<sup>3</sup> The importance of recording technology in these and numerous other examples cannot be overstated—it is far easier to deny or obfuscate wrongdoing based only on the account of a reporter than it is to deny what all can hear or see from one’s own recorded words and deeds.

2. As technology evolved, journalists and citizens discovered more tools to expose wrongdoing. And such technology has provided insight into that which otherwise would have been unknown, both in the United States and abroad. For example, activist journalists often operate within social or political

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<sup>3</sup> See, e.g., Lyrrisa C. Barnett, Note, *Intrusion and the Investigative Reporter*, 71 Tex. L. Rev. 433, 433-434 (1992).

movements, embedding themselves to provide otherwise unavailable information.<sup>4</sup>

With just cell phones, citizens can now provide or drive coverage of events the organized media might have missed on their own. For example, “citizen journalists often drove media coverage of the so-called Arab Spring.”<sup>5</sup> Likewise, Occupy New York City bloggers “broadcast hours and hours of live reports from Zucotti park in the city.” Kate Bulkley, *The Rise of Citizen Journalism*, *The Guardian* (June 10, 2012).<sup>6</sup> Similarly, “citizens under fire from government forces in Syria” uploaded videos to YouTube that the media could not because it lacked access. *Ibid.* And in Israel, traditional media has begun broadcasting citizen footage to expose incidents that were previously concealed.<sup>7</sup>

Such citizen-driven exposure provides an alternative channel of information in situations where

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<sup>4</sup> See Adrienne Russell, *Journalism as Activism: Recoding Media Power 2* (2016) (Tim Pool and the “Occupy” movement); Jason Rantz, *Here’s How Antifa Uses Twitter to Threaten Me and the Media*, Fox News (Feb. 2, 2021) (Antifa movement). While one could imagine freedom of association concerns if journalists are infiltrating non-public venues, the two examples here involved public acts by the movements—occupying public property and demonstrating and looting in public, respectively.

<sup>5</sup> Rob Lever, *Social Media Changing Perception of Policing*, Arab News (July 10, 2016), <https://www.arabnews.com/node/951366/columns>.

<sup>6</sup> <https://www.theguardian.com/media/2012/jun/11/rise-of-citizen-journalism>.

<sup>7</sup> B’Tselem’s Camera Project, B’Tselem, [http://www.btselem.org/video/cdp\\_background](http://www.btselem.org/video/cdp_background).



the state controls or influences the media, such as Cuba and China.<sup>8</sup> And in the United States, although the government does not control the press to the same degree, the government frequently tries to suppress information about its conduct and misbehavior.

And even beyond the government's recurring attempts to cover up or conceal its behavior, the organized media can, via their coverage choices and editorial selections, tilt the information flow towards a particular perspective or viewpoint. Indeed, scholars have noted that the press is increasingly homogeneous in its worldview. See, e.g., Suzanne Garment, *Scandal: The Culture of Mistrust in American Politics* 74-75, 81-82 (1992). While much criticism of the media lately has involved individuals and outlets on both the partisan right and left being accused of slanting the information flow to their respective audiences, compare *Tah v. Global Witness Publ'g, Inc.*, 991 F.3d 231, 254-256 (D.C. Cir. 2021) (Silberman, J., dissenting in part) (arguing that there is left-leaning bias in American mainstream media), with Sharon Kann, Stefanie L, Sergio Munoz & Lis Power, *Right-wing Media Ecosystem has Dominated the National Immigration Narrative*, Media Matters for America (April 29, 2021) (highlighting "the spread of a Daily Wire article" "[a]s one example of how right-leaning posts dominate the conversation and

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<sup>8</sup> See Katharine M. Villalobos, *Digital Oppression in Cuba and China: A Comparative Study of ICCPR Violations*, 24 J. Transnat'l L. & Pol'y 161, 170-172 (2015).

contribute to an echo chamber of misinformation”),<sup>9</sup> the media slant often transcends partisan views and may be a function of class, race, geography, or any other editorial perspective that can skew news coverage. This of course is nothing new, and the usual answer is to have competing voices to balance out any skewed perspective. But adding more and more diverse citizen voices and perspectives, and more diversely gathered information of public interest generally, helps offset any institutional biases that may exist across the major media outlets.

3. Recent examples of unauthorized recordings of newsworthy events in this country abound. For example, the 2016 presidential campaign was thrown into turmoil by the release of a 2005 secret recording of Donald Trump, talking “in vulgar terms about kissing, groping and trying to have sex with women.”<sup>10</sup> And we learned much about the January 6 Capitol Riot from cell phone videos that would have been illegal and thus unknown under Massachusetts law.<sup>11</sup>

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<sup>9</sup> <https://www.mediamatters.org/immigration/right-wing-media-ecosystem-has-dominated-national-immigration-narrative>.

<sup>10</sup> David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women In 2005*, The Washington Post (Oct. 8, 2016), [https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4\\_story.html](https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html).

<sup>11</sup> See, e.g., Ian Bell, *We Recreated the Capitol Riot Through Cellphone Videos and It's Terrifying*, VICE (April 14, 2021, 9:04 AM), <https://www.vice.com/en/article/pkbe4b/the-capitol-riot-through-cell-phone-videos-terrifying>; *Phone footage reveals*



In short, “the modes of journalism and our definition of who is a modern journalist are \*\*\* changing.”<sup>12</sup> And, as this Court has recognized, “beyond question, the role of the media is important; acting as the eyes and ears of the public, they can be a powerful and constructive force, contributing to the remedial action in the conduct of public business.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (plurality opinion) (cleaned up).<sup>13</sup> But laws like Massachusetts’s, whether applied to traditional media, alternative media, or citizens, cripple “[t]he primary purpose of the constitutional guarantee of a free press”—“to create a fourth institution outside the Government as an additional check on the three official branches.” Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 634 (1975).

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*chaotic scenes inside US Capitol*, BBC News (Jan. 7, 2021), <https://www.bbc.com/news/av/world-us-canada-55582886>.

<sup>12</sup> John J. Dougherty, *Obsidian Financial Group, LLC v. Cox and Reformulating Shield Laws to Protect Digital Journalism in an Evolving Media World*, 13 N.C.J.L. & Tech. On. 287, 290 (2012).

<sup>13</sup> See also Dienes, *Protecting Investigative Journalism*, at 1143 (“Undercover journalism \*\*\* allows the media to perform its role as the eyes and ears of the people, to perform a checking function on government.”).

## II. If Barred from Making Undisclosed Recordings, the Public Will Lose an Important Protection Against Crime and Other Wrongdoing.

Besides providing a check on government, undisclosed recordings can help protect victims of crime or prevent future crime. See Sarah Morgado, *From “He Said, She Said” to “He Said, She-and-Her-Iphone-Said”: Florida’s All-Party Consent Requirement Needs an Update*, 14 FIU L. Rev. 677, 694, 698 (2021).<sup>14</sup> Such recordings can also “reveal employee misconduct, political malfeasance, bullying, racism, or unethical business dealings.” *Id.* at 698. For example, undisclosed recordings have had the following positive effects:

- ◆ a Georgia woman obtained evidence of her neurologist’s inappropriate touching;<sup>15</sup>
- ◆ an undisclosed recording of a Maine business meeting uncovered improper influence in an energy deal;<sup>16</sup>

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<sup>14</sup> Such recordings also facilitate “the introduction of reliable evidence, aiding the court in the truth-finding process.” Morgado, *supra*, at 688 (citing *Lopez v. United States*, 373 U.S. 427, 439 (1963)). That’s because “a conversation, where a person can hear the exact words a person uttered, with inflection, tone, and volume, is much more reliable and compelling evidence \*\*\* than the testimony and/or notes of a conversation participant.” *Ibid.*

<sup>15</sup> Danny Robbins, *He Was Caught on Video, but Georgia Doctor Kept His Medical License*, Atlanta J. Const. (Apr. 27, 2018), [https://www.ajc.com/caught\\_on\\_video\\_but\\_kept\\_georgia\\_medical\\_license/](https://www.ajc.com/caught_on_video_but_kept_georgia_medical_license/).

<sup>16</sup> Tux Turkel, *Secret Recordings Point to Improper Influence by Top UMaine Official in Lucrative Power Contract*, Portland

- ♦ a Minnesota woman’s secret recording of conversations with a medical examiner revealed a flawed death investigation and oversight problems within the office.<sup>17</sup>

Another, more famous, example is the Halliburton whistleblower, Tony Menendez. See Jesse Eisinger, *The Man Who Blew the Whistle on Halliburton*, *The Atlantic* (Apr. 23, 2015).<sup>18</sup> He secretly taped company meetings to gather evidence revealing the company’s numerous violations of SEC rules. *Ibid.*<sup>19</sup> And the examples of crimes recorded by individuals, private or business surveillance cameras catching muggings, or elevator cameras catching sexual assault, are too numerous to cite.

But in Massachusetts, all of these recordings would have been illegal and thus could not have protected the affected individuals—or the public at large—from the malfeasance those secret recordings revealed.

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Press Herald, <https://www.pressherald.com/2018/02/04/recordings-point-to-improper-influence-by-top-umaine-exec-in-lucrative-power-contract/> (last updated Feb. 5, 2018).

<sup>17</sup> *Secret Recordings Reveal Flawed Death Investigation*, FOX 9 KMSP (Nov. 16, 2016, 3:53 PM), <http://www.fox9.com/news/investigators/secret-recordings-reveal-flawed-death-investigation>.

<sup>18</sup> <https://www.theatlantic.com/business/archive/2015/04/the-man-who-blew-the-whistle-on-halliburton/391215/>.

<sup>19</sup> Of course, public versus private recordings raise different concerns under a reasonable-expectation-of-privacy standard. And concerns about privacy in some non-public situations certainly do not apply to behavior in public or in other circumstances where one has no *reasonable* expectation of privacy, such as where a doctor is molesting a patient.

### III. Like Laws in Many Other Jurisdictions, Massachusetts's Law Criminalizes Behavior that is Commonplace in Our Technology-Saturated Society.

As illustrated by the examples cited above, the ability to record our surroundings is increasingly common. And laws like the one in Massachusetts make ordinary behavior criminal.

For example, given the spate of child abuse instances by caregivers, many parents have so-called “nanny cameras”—devices that can record children and caregivers while parents are away. See Rauvin Johl, *Reassessing Wiretap and Eavesdropping Statutes: Making One-Party Consent the Default*, 12 Harv. L. & Pol’y Rev. 177, 188 (2018). Some people have dashboard cameras on their cars. *Ibid.* And new homes often have various technologies, such as video doorbells which record both video and audio whenever someone approaches the door. *Ibid.* All of these could potentially make one unwittingly a criminal in Massachusetts and similar jurisdictions.

If that were not enough, statutes forbidding undisclosed recordings often harm the very people the law should protect, as shown by the following examples:

- ♦ A special needs student secretly recorded on his school iPad someone bullying him, resulting in the special needs student—not the bully—being

interrogated by police and charged with a felony.<sup>20</sup>

- ◆ A college student in Maryland was charged with two felonies for livestreaming a meeting with his congressman.<sup>21</sup>
- ◆ A mother was charged with a felony after recording a conversation with her daughter's school principal.<sup>22</sup> The same happened to a father who recorded a conversation with a school principal to find out about whether his daughter was being bullied.<sup>23</sup>
- ◆ An Illinois thirteen-year-old was charged with a felony after recording a conversation with his school principal.<sup>24</sup>

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<sup>20</sup> Patrick Frye, *Disabled Boy Records Bullies Tormenting Him, Police Charge Him with Illegal Wiretapping*, Inquisitr (Nov. 17, 2016), <https://www.inquisitr.com/1209361/disabled-boy-records-bullies-tormenting-him-police-charge-him-with-illegal-wiretapping/>.

<sup>21</sup> See Sarah Ash, *SU Student Facing Felony Charges for Wire Tapping*, WMDT (Feb. 14, 2019), <https://www.wmdt.com/2019/02/su-student-facing-felony-charges-for-wire-tapping/>.

<sup>22</sup> See Barry Simms, *Mom Faces Felony Wiretapping Charges After Recording Conversation with Principal*, WBALTV (Dec. 7, 2017, 10:42 AM), <https://www.wbaltv.com/article/mom-faces-felony-wire-tapping-charges-after-recording-conversation-with-principal/14378453>.

<sup>23</sup> See *Pa's Wiretapping Law is Too Restrictive*, York Daily Rec. (Aug. 22, 2016, 9:27 AM), <https://www.ydr.com/story/opinion/editorials/2016/08/22/pas-wiretapping-law-too-restrictive-editorial/88997020/>.

<sup>24</sup> Austin Berg, *Illinois 13-Year-Old Charged with Eavesdropping Felony for Recording Meeting with Principal*, Ill.

- ♦ A whistleblower who recorded his phone conversation with his superior to provide evidence of the superior admitting to various ethics violations was himself charged with a felony.<sup>25</sup>

As these examples show, public officials around the Nation believe they can routinely criminalize undisclosed recording of events by private citizens that clearly implicate the public's interest in transparency, good government, and individual liberty. Accordingly, citizens and governments throughout the Nation badly need the Court's guidance on when the First Amendment does (or does not) protect such recordings.

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Pol'y (June 21, 2018), <https://www.illinoispolicy.org/illinois-13-year-old-charged-with-eavesdropping-felony-for-recording-meeting-with-principal>.

<sup>25</sup> Rick Lee, *Judge Orders Wiretapping Charge Dismissed Against Unilife Whistle-Blower*, York Daily Rec. (July 8, 2015), <https://www.ydr.com/story/news/local/2015/07/08/judge-orders-wiretapping-charge-dismissed-against-unilife-whistle/72247922/?from=global&sessionKey=&autologin=> (while the judge ordered dismissal, the district attorney's office appealed).



## CONCLUSION

As Justice Brandeis wisely and wryly observed over a century ago, “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Louis D. Brandeis, *Other People’s Money and How Bankers Use It* 92 (1914). Were he alive today, he might well have extended his examples to include miniaturized tape recorders and mobile-phone cameras. The petition should be granted so that more First Amendment sunlight may be shed on a society desperately in need of it.

Respectfully submitted.

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