UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

K. ERIC MARTIN and RENÉ PÉREZ, *Plaintiffs*, v. WILLIAM EVANS, 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. 1:16-cv-11362-PBS

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT EVANS'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Mr. Martin and Mr. Pérez have substantial histories of recording police officers performing their duties in public. The undisputed facts also establish that, but for the Massachusetts Wiretap Statute, M.G.L. ch. 272 § 99 (Section 99), they would undertake these recordings in secret when doing so would, in their view, protect their safety or more accurately document police behavior. But the law does not require Mr. Martin and Mr. Pérez to violate Section 99, and thus risk arrest, pretrial detention, conviction, and imprisonment, just to secure a ruling that Section 99 is unconstitutional as applied to their intended conduct. Instead, the law permits this preemptive, as-applied challenge. And, as this Court has already explained, and as set forth in plaintiffs' summary judgment memo, the First Amendment protects the secret recording plaintiffs seek to undertake.

Commissioner Evans' summary judgment motion re-litigates issues raised in his motion to dismiss: *Monell* liability, standing, and the merits of plaintiffs' First Amendment claim. But this Court previously held that if discovery bore out the allegations of the complaint, (1) Evans would be liable, (2) plaintiffs would have standing, and (3) their as-applied First Amendment claim would win. *Martin v. Evans*, 241 F. Supp. 3d 276, 281-85, 286-88 (D. Mass. 2017). Because the undisputed record now supports each allegation, Evans is not entitled to summary judgment.

This Court already held that where a municipality is not mandated to enforce a particular statute, its decision to educate its officers about the statute, and to authorize those officers to enforce it under specific circumstances, constitutes a "conscious choice" that triggers *Monell* liability. *Id.* at 284-85 (citing *Vives v. City of New York*, 524 F.3d 346, 353 (2d Cir. 2008)). Discovery confirms the Boston Police Academy specifically trains officers on Section 99's

prohibition against secretly recording police officers performing their duties in public, and discovery also confirms that BPD officers have applied for criminal complaints against individuals for this conduct. SUMF ¶¶ 49, 95-96, 102, 112. Far from demonstrating a "general policy of enforcing the state criminal laws," Evans Mem.10, these conscious choices trigger *Monell* liability.

With respect to standing, plaintiffs have shown that they wish to record police officers in secret—describing more than a dozen specific scenarios in which they wanted to do so in the past—and they have explained that they do not presently intend to act on that wish only because it is illegal. SUMF ¶¶ 9-18, 26-36; Pltfs. Resp. Evans SUMF ¶¶ 5, 9; Pltfs. Resp. Conley SUMF ¶¶ 36, 37, 40; ECF No. 111-14 at 9. Contrary to Evans' suggestion that plaintiffs' claims are "conjectural," Evans Mem. 16-17, this Court previously held that our case law does not require more specificity to bring a pre-emptive claim. *Martin,* 241 F.Supp.3d at 282-83. And with good reason: since we cannot predict the future, requiring plaintiffs to predict exactly how they will violate an unconstitutional statute would essentially eliminate pre-enforcement challenges.

Finally, Evans cannot defeat plaintiffs' First Amendment claim because he cannot show that applying Section 99 to the secret recording of police officers is narrowly tailored to a government interest in civilian privacy. Evans Mem. 21-22. Evans' contrary argument ignores this Court's conclusion that "Section 99 is not narrowly tailored to serve those government interests," *Martin*, 241 F. Supp. 3d at 288, and overlooks the central issue here: the recording of *police officers*. To the extent there is a government interest in ensuring that *civilians* are not unknowingly recorded when they speak in public with or near a police officer—which the government may not have, *see* ECF No. 122, at 12-13—that interest is addressed by Section 99's application to recording civilians, not police officers. If anything, the government has a particular

interest in holding police accountable, because police officers are empowered to use force against civilians. "In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). One burden is the possibility of being recorded, without notice, when performing their duties in public. As the City of Boston has acknowledged, its "police officers have no expectation of privacy when performing their job in public." City of Boston's Opp. to Plaintiff's Mtn. for a Prelim. Injunc., at 17 n.8, *Boston Police Patrolman's Association v. City of Boston,* No. 16-cv-02670, (Super. Ct. Suffolk County Sept. 6, 2016) (hereinafter, BWC Brief) attached as Exhibit 5 to Rossman Supp. Decl. The Commonwealth cannot claim otherwise, at the expense of plaintiffs' First Amendment rights.

ARGUMENT[1]

Summary judgment is appropriate when 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). On a motion for summary judgment, the Court "must view the evidence in the light most favorable to the opposing party." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam) (cleaned up). Where, as here, the parties cross-move for summary judgment, the Court rules on "each motion independently" and "decid[es] in each instance whether the moving party has met its burden under Rule 56." *F.D.I.C. v. Hopping Brook Tr.*, 941 F. Supp. 256, 259 (D. Mass. 1996). Under this standard, Defendant Evans' motion for summary judgment must be denied.

[1] Pursuant to Local Rule 56.1, plaintiffs separately filed a concise statement of the material facts as to which there is a material dispute of fact and previously filed a statement of undisputed facts in support of their own motion for summary judgment. Plaintiffs also incorporate by reference arguments in their memo in support of their motion for summary judgment. ECF No. 122.

I. Monell liability is warranted because the BPD has consciously chosen to enforce Section 99 against people who secretly record police officers performing their duties in public.

Plaintiffs' claim against Evans in his official capacity amounts to a municipal liability claim. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.55 (1978). Municipalities are proper defendants under 42 U.S.C. § 1983 when the execution of a municipal policy— which generally implies a "deliberate" or "conscious" choice among alternatives— violates the U.S. Constitution. *See id.* at 690-91; *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986). The record confirms this Court's previous determination that the Boston Police Department (BPD) has made such a choice to enforce Section 99 against the secret recording of police officers. *Martin*, 241 F. Supp. 3d at 285.

A. Where a municipality is not mandated to enforce a particular statute, its decision to educate and authorize its officer to do so under specific circumstances constitutes a "conscious choice" that triggers *Monell* liability.

This Court already agreed with the Second Circuit, as well as three other circuits, that a municipality creates a *Monell*-triggering policy if it "decides to enforce a statute that it is authorized, but not required, to enforce" and has "focused on the particular statute in question." *Vives*, 524 F.3d at 353; *id.* at 351 (citing cases from other circuits); *Martin*, 241 F. Supp. 3d at 284-85. Practical considerations support this precedent: because a municipality cannot, and does not, prioritize the enforcement of every state statute, its decision to enforce a particular one constitutes a conscious choice among alternatives.

Evans' arguments against this approach simply reprise his motion to dismiss. He again cites *Surplus Store & Exch. Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991), which held that a municipality was not liable for enforcing a state statute, adding an unpublished district court

decision in the Seventh Circuit that followed its holding. Evans Mem. 7-8. But this opinion cuts against both the majority of appellate decisions and logic, and the Seventh Circuit has since limited its reach. *See Bethesda Lutheran Homes and Servs. Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998) (*Surplus* is "entirely consistent" with the holding that a municipality can be held liable where it is not mandated to enforce the state statute). Nor does Evans find refuge in this Circuit. He again quotes the concurring opinion in *Yeo v. Town of Lexington*, 131 F.3d 241, 257 (1st Cir. 1997), Evans Mem. 6-7, but even the concurrence did not rely on the quoted statement in its reasoning. Finally, both of the cited District of Massachusetts cases turn on the inapposite holding that municipalities cannot be liable for failure to regulate where the field had been preempted by state law. Evans Mem.7; *see Boston Taxi Owners Ass'n v. City of Boston*, 223 F. Supp. 3d 119, 123 (D. Mass. 2016); *Drivers v. City of Cambridge*, No. 16-11357, 2017 WL 373491, at *5 (D. Mass. Jan. 25, 2017). As was true when this Court denied Evans' motion to dismiss, these cases do not supply a reason to reject this Court's conclusion that municipalities can be held liable where there is a conscious choice to enforce a specific application of a particular state statute.

B. The BPD has a policy to educate and authorize officers to enforce Section 99 against the secret recording of police officers performing their duties in public.

The BPD has made such a conscious choice here. This Court already held that, if true, the allegations in the complaint "suggest that the BPD has affirmatively and consciously chosen to educate officers about Section 99 and its particular application to the recording of officers' activities" and therefore establish "a *Monell* claim against BPD Commissioner Evans." *Martin,* 241 F. Supp. 3d at 285. Evans does not identify a single unproven allegation regarding the BPD's actions. Instead, he asserts that the BPD's Section 99 training is simply a part of a "general policy of enforcing the state's criminal laws," and that its content aims "to protect the

rights of persons openly recording the police." Evans Mem. 10-13. This might be a different case if either of those statements were true. But they are not. If anything, discovery reveals even further support for the conclusion that the BPD has consistently chosen to focus on Section 99 as compared to other criminal laws, and to do so in a way that focuses on its particular application to the secret recording of police officers to the exclusion of other applications. Under this Court's earlier holding, this is more than sufficient to establish *Monell* liability.

1. The BPD's Section 99 training is not a part of a general policy to enforce criminal laws.

The BPD routinely devotes a portion of its limited resources specifically towards Section 99 training. SUMF ¶¶ 89, 91, 101, 103-04, 106, 108, 110. Evans allegation that this is part of its "broader training efforts" to "generally enforce" criminal laws relies on the fact that the BPD's Section 99 training represents just one of approximately 150 sections in the recruits' primary criminal law text and just one of approximately 25 e-learning videos. Evans Mem. 13-14. But these numbers indicate a prioritization of Section 99. There are approximately 2,160 entries in the 2015 Massachusetts Master Crime List.[2] That the BPD includes Section 99 as one of a limited number of crimes in its criminal law text—to the exclusion of crimes including hazing, unauthorized performance of music, or throwing objects at a sporting event—represents a choice. SUMF ¶ 88.

The BPD's creation of the Section 99 video and training bulletin reflect a similar focus. The BPD has put out just 28 e-learning videos since 2009, each of which requires "tons" of resources. SUMF ¶ 77-78. Over the past three years, it has put out just 22 training bulletins. SUMF ¶ 71. It created both for Section 99, even though it only does so if the Commissioner and

[2] https://www.mass.gov/files/documents/2016/08/my/mastercrimelist.pdf, attached as Ex. 6 to Rossman Supp. Decl.

the legal advisor decide a topic "deserves" it. SUMF ¶79-80.[3] Because the Academy cannot do all of these things for every statute, that it does so for Section 99 represents a "conscious choice".

2. Section 99 training does not protect civilian First Amendment rights.

Evans alternatively suggests that the purpose behind the BPD's Section 99 training is to teach officers to permit civilians to openly record police officers. Evans Mem. 11-12. Focusing on the Section 99 training bulletin and its circulating commissioner's memorandum, he alleges they (1) "were all issued in response" to *Glik*, which recognized the First Amendment right to record police officers, and (2) instructed officers that they have no right of arrest for open recordings. Evans Mem. 11. Because Evans did not produce a single witness with knowledge of the motivation to issue the commissioner's memos, Pltfs. Resp. Evans SUMF ¶¶ 22, 25, a reasonable juror could find that those materials were not produced in response to *Glik*. More important, the content of the BPD's Section 99 training does not reflect any concern with civilians. Instead, the training focuses on the statute's application to secretly recording police officers.

Plaintiffs agree that the Section 99 bulletin states that open recordings are allowed, and that CM 11-061 mentions *Glik*. Evans Mem. 11-12. Omitted from Evans' discussion, however, is the fact that the Section 99 bulletin *also* describes two cases where defendants were convicted for secretly recording police officers performing their duties in public—these are the only two examples of Section 99's application it provides— and instructs officers they have a "right of arrest" when they have probable cause to believe that an individual has secretly recorded a

[3] In addition, the two commissioner's memos circulating the Section 99 training bulletin—CM 11-061 and CM 15-023—are the only two memos in at least the last seven years to have required commanders to read a training bulletin aloud at roll call. SUMF ¶ 109. CM 11-061 is also the only commissioner's memo in at least the last seven years that has required officers to review a training bulletin or take an e-learning course within ten days. SUMF ¶ 105.

conversation. SUMF ¶ 102. As important, the bulletin *does not* include any discussion of arresting an individual for secretly recording another civilian, either on their own, or while talking with or near a police officer in public. SUMF ¶ 102. Nor does it describe *Glik*. SUMF ¶ 103. When the bulletin was recirculated in 2015, it again described only the two cases where an individual was convicted for secretly recording a police officer performing their duties in public, without any reference to *Glik* or *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014), another decision that recognized the First Amendment right to record police officers. SUMF ¶ 106.

The Section 99 recruit training and video reflect a similar focus on the secret recording of police officers. Neither the criminal law text nor the Section 99 video reference *Glik* or *Gericke*, or include any discussion of arresting an individual for secretly recording another civilian, either on their own, or while talking with or near a police officer in public. SUMF ¶¶ 100, 111. Instead, the Section 99 text used to train recruits describes the same two cases where defendants were convicted for secretly recording police officers performing their duties in public without providing any other examples of the statute's application. SUMF ¶ 111. Similarly, the Section 99 video tells officers that the statute prohibits secret recording before enacting two scenarios involving police. SUMF ¶ 93. In the first, an individual openly records officers talking to civilians on the street; in the second, an individual describes his secret recording of an officer during a traffic stop. SUMF ¶¶ 94-95. The video states that an officer could take out charges against the second individual, explaining he had a cellphone "in his pocket, out of view of the police officer and he wanted to capture the officer's voice without the officer knowing it. And that is exactly what the wiretap statue attempts to prevent." SUMF ¶ 95.

Every recruit class watches this video to learn what actions violate Section 99. SUMF

¶ 112.[4] And the clear focus of this video is the secret recording of police officers, not the enforcement of Section 99 against civilians talking with or near police officers.

3. Policy arguments support *Monell* liability here.

Finally, Evans suggests that it would create "perverse incentive[s]" to find liability here because it would encourage police departments "to provide only the minimum training that is absolutely required by the state." Evans Mem. 15. It would not. What triggers liability is the BPD's decision to train its officers specifically to enforce an unconstitutional prohibition against secretly recording police officers performing their duties in public. Holding Evans liable for this conscious choice reflects the same policy arguments underlying the Supreme Court's refusal to apply qualified immunity to municipalities. *Owen v. City of Independence*, 445 U.S. 622, 650-58 (1980). *Owen* concluded it was "fairer" to allocate the burden of unforeseen constitutional developments to the municipalities "than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." *Id.* at 655. This is particularly true when, as here, the municipality declined to halt enforcement when confronted with a lawsuit for declaratory and injunctive relief.

C. The BPD's policy has caused plaintiffs' injury.

The "[r]esolution of the policy issue should also resolve the issue of causation." *Vives*, 524 F.3d at 357. The BPD's policy of enforcing Section 99 against individuals who secretly

[4] Plaintiffs agree the MPTC training is not evidence of the BPD's policy because, as Evans notes, they are distributed by a state agency and not the BPD. Evans Mem. 13. However, they illustrate how a document can *actually* highlight the protection of open recording. The state-issued manuals include a lengthy discussion of both *Glik* and *Gericke* that emphasizes the First Amendment right to record and warns that "with the increased use of cellphones and other digital devices, law enforcement should assume that they are always being recorded." *See* ECF No. 118-12 at 883-886; ECF No. 118-13 at 900-01. That the BPD's materials continue to focus exclusively on secretly recording police officers is, in this context, evidence of a conscious policy choice.

record police officers performing their duties in public has chilled plaintiffs' First Amendment rights because they face a credible threat of arrest if they do so. Thus, the conclusion that the BPD's policy "violates federal law [] also determine[s] that the municipal action was the moving force behind the injury of which the plaintiff complains." *Bd. of County Comm'rs of Bryan Cty. v Brown*, 520 U.S. 397, 405 (1997). Evans' argument that the injury "is caused by the state statute and not by any conduct of the Boston Police Department," because "any citizen might equally effect the arrest of Plaintiffs should they violate the Wiretap Statute," Evans Mem. 9, is simply a reiteration of his suggestion that a municipality can never be held liable for enforcing state law and should be rejected for the same reasons. *See supra* at Section I(A).

II. Plaintiffs have standing because their fear of arrest and prosecution under Section 99 for secretly recording police officers performing their duties in public is a concrete and particularized injury caused by the BPD.

Because the undisputed record demonstrates (a) an injury in fact, (b) that is caused by the defendants' behavior, and (c) that will be redressed by a favorable decision, it confirms this Court's holding that plaintiffs have established standing. *Martin*, 241 F. Supp. 3d at 281-83.

A. The undisputed record shows an actual, concrete, and particularized injury.

An injury must be both "actual or imminent" and "concrete and particularized." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). In the pre-enforcement context, plaintiffs suffer a cognizable injury when their First Amendment rights are chilled. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir 2003). As Defendant Evans observes, a particularized plan of action can establish a concrete and particularized injury sufficient to establish standing. Evans Mem. 16 (citing *Susan B. Anthony List*, 134 S. Ct. at 2343 (plaintiffs describe billboard language they wanted to use)). But that degree of detail is not essential. *Martin,* 241 F. Supp. 3d at 283. Plaintiffs "need not either describe a plan to break the law or wait for a prosecution under

it" because the purpose of this basis for standing "is so that plaintiffs need not break the law in order to challenge it." *Mangual*, 317 F.3d at 60.[5] This is logical. "It makes no sense to require plaintiffs simultaneously to say 'this statute presently chills me from engaging in XYZ speech,' and 'I have specific plans to engage in XYZ speech next Tuesday.'" *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc).

For example, a union established pre-enforcement standing to challenge Arizona's prohibition of untruthful publicity in *Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 301-302 (1979), even though they neither identified a specific campaign that was chilled by this statute nor intended to lie. It was sufficient that the union had engaged in campaigns in the past and had a general intent to continue such activities in the future where, as the Supreme Court observed, "erroneous statement is inevitable in free debate." *Id.* at 301-02 (cleaned up). Similarly, the plaintiff-organization in *American Civil Liberties Union v. Alvarez*, 679 F.3d 583, 593-94 (7th Cir. 2012), established pre-enforcement standing to challenge the application of the Illinois Wiretap Statute to the recording of police officers without knowing when or whom it would record. It was sufficient that the organization (1) "intend[ed] to use its employees and agents to audio record on-duty police officers in public places," (2) claimed a First Amendment right record that was prohibited by the statute, and (3) would face prosecution for violating the statute. *Id.* at 593.[6]

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[5] *See also Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 915 (S.D. Iowa 2018) ("[I]t is not necessary for Plaintiffs to provide concrete operational blueprints—who, what, when, and where— for activities they do not intend to conduct when the entire basis for their claim is that the challenged law makes such activities *illegal*.").

[6] *See also Rhode Island Ass'n of Realtors, Inc. v. Whitehouse,* 199 F.3d 26, 28, 30-33 (1st Cir. 1999) (standing when plaintiff said it wanted to use public records to solicit new members without any further detail regarding its plan to do so); *Animal Legal Def. Fund,* 297 F. Supp. 3d at 915 (standing when plaintiffs previously conducted investigations and alleged they wanted to in the future without detailing "who, what, when, and where" that would happen).

Under this case law, plaintiffs have squarely established standing. Plaintiffs have (1) testified that they want to secretly record police officers performing their duties in public without fear of arrest or prosecution; (2) demonstrated that Section 99 prohibits their exercise of this First Amendment right; and (3) established that they face arrest and prosecution if they engage in this behavior. SUMF ¶¶ 9-11, 26-28, 42, 46-49; Pltfs. Resp. Evans SUMF ¶¶5, 8, 9; Pltfs. Resp. Conley SUMF ¶¶ 36, 37, 38, 40, 45; ECF NO. 111-14 at 9; *cf. Alvarez*, 679 F.3d at 592-93. "Nothing more is needed for pre-enforcement standing." *Alvarez*, 679 F.3d at 593. While this already defines "the boundaries" of the right plaintiffs' seek to vindicate, Evans Mem. 16, they also point to more than a dozen specific instances when they wanted to secretly record police officers performing their duties in public in the past but did not do so. SUMF ¶¶ 10, 27. That is enough for this Court to once again "easily conclude[]" that plaintiffs have demonstrated "an intention to engage in a particular course of conduct if not for Section 99." *Martin,* 241 F. Supp. 3d at 282.

Evans does not dispute that plaintiffs' credible fear of enforcement renders the harm imminent, nor could he: the BPD has applied for a criminal complaint against at least nine individuals for secretly recording police officers performing their duties in public over the last seven years, and Evans has refused to disavow such enforcement against plaintiffs. SUMF ¶¶ 42, 49. Evans also agrees that "an actual arrest, prosecution or other enforcement action is not a prerequisite to challenging the law." Evans Mem. 16. Nevertheless, he contends that plaintiffs lack standing because they cannot predict the exact circumstances in which they will secretly record a police officer performing his duties in public. *Id.* This argument "is a nonstarter." *Alvarez*, 679 F.3d at 593. "Pre-enforcement suits always involve a degree of uncertainty about

future events." *Id.* at 594. And here, the specificity of plaintiffs' claims neither hinders Evan's ability to defend the case nor hampers this Court's ability to analyze it. Evans Mem. 16-17. Section 99 entirely prohibits secret recording of police officers performing their duties in public, defendants have enforced Section 99 against individuals who secretly record police officers performing their duties in public, and plaintiffs want to secretly record police officers performing their duties in public. This Court has everything it needs "to evaluate the merits of the plaintiffs[']claim in a pre-enforcement posture." *Alvarez*, 679 F.3d at 594.[7]

Although Evans suggests that plaintiffs' claim forces this Court "to craft prospective rules rather than to determine a case or controversy," Evans Mem. 17, the opposite is true. The legislature has enacted, and defendants are enforcing, an unconstitutional blanket prohibition on secretly recording police officers performing their jobs in public. Plaintiffs' demonstrated desire to secretly record police officers performing their duties in public creates a current controversy that requires judicial intervention. Rather than ask this Court to create a newly tailored application of Section 99 out of whole cloth, plaintiffs' requested relief simply asks this Court to determine that the blanket prohibition is unconstitutional, leaving it to the legislature in the first instance to attempt to craft a law that is narrowly tailored to a significant government interest if it so chooses. Plaintiffs' pre-emptive, as-applied claim therefore protects, rather than usurps, the power of the political branches. Evans Mem. 17.

B. The undisputed record demonstrates causation and redressability.

Causation and redressability "are not legitimately [at] issue here." *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996). Causation exists

[7] As Plaintiff Pérez explained "I want to secretly record police officers performing their duties in public, but I have not done so because I am afraid of getting arrested or prosecuted under the Wiretap Statute and I will not do so until the Court affirms that it is legal and stops the District Attorney and the Police Commissioner from enforcing the Wiretap Statute against this behavior." ECF No. 111-14, at 9.

because the BPD's threat of enforcement directly chills plaintiffs' First Amendment rights. *Martin*, 241 F. Supp. 3d at 283. This injury is redressable: "when a plaintiff seeks a declaration that a particular statute is unconstitutional, the proper defendants are the government officials charged with administering and enforcing it." *New Hampshire Right to Life*, 99 F.3d at 13.

Evans argues that plaintiffs fail to demonstrate causation and redressability both because their "real target is the state law" and because "anybody at all can arrest Plaintiffs" under that law. Evans Mem. 17-18. The first is a reiteration of his misplaced *Monell* argument. *See supra* at Section I. As to the second, that civilians can theoretically arrest someone for violating Section 99 does not defeat redressability. This Court rejected the previous iteration of this argument and should do so again. *Martin,* 241 F.Supp.3d at 283 (noting "redressability requirement is not so burdensome"). "[A] plaintiff need show only that a favorable decision would redress "*an* injury," not "*every* injury."" *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902 (10th Cir. 2010) (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)) (emphasis in original). Plaintiffs live, work and wish to secretly record police officers performing their duties in public in Boston without fear of arrest or prosecution. A favorable decision here would relieve plaintiffs' problem "to some extent, which is all the law requires." *King,* 678 F.3d at 903 (cleaned up) (rejecting redressability argument where the challenged law had both public and private rights of action).

III. As applied to the secret recording of police officers performing their duties in public, Section 99 violates the First Amendment because it is not narrowly tailored to a significant government interest, and it does not preserve adequate alternatives.

Regardless of whether this lawsuit is deemed an as-applied or facial challenge, Evans must demonstrate that applying Section 99 to the secret recording of police officers performing their duties in public is narrowly tailored to a significant government interest and preserves adequate alternative channels of communication. *See Showtime Entm't, LLC v. Town of Mendon,* 769 F.3d 61, 70-78 (1st Cir. 2014). Evans has not satisfied this burden.

A. Evans must satisfy intermediate scrutiny.

Mr. Martin and Mr. Pérez do not challenge the application of Section 99 to any other government official or civilian, nor do they seek to invalidate the entire statute. Instead, they challenge only Section 99's application to the secret recording of police officers performing their duties in public. As this Court already articulated, plaintiffs' exclusive focus on this particular application of Section 99 is properly understood as an as-applied challenge that triggers intermediate scrutiny. *Martin,* 241 F. Supp. 3d at 279, 287-88; *see also Project Veritas Action Fund. v. Conley,* 244 F. Supp. 3d 256, 266 (D. Mass. 2017) ("*Martin* found Section 99 unconstitutional as applied to the recording of government officials in the discharge of their duties in public"); *United States v. Grace*, 461 U.S. 171 (1983) (analyzing and declaring statutory prohibition of displaying banners on Supreme Court grounds unconstitutional as applied to public sidewalks).

But even if this case "does not fit neatly within [the] traditional concept" of either facial or as-applied challenges, intermediate scrutiny should be used to analyze the constitutionality of Section 99 as applied to the secret recording of police officers. *Showtime,* 769 F.3d at 70; *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). Evans assumes that if the Court re-envisions plaintiffs' challenge as something other than a traditional as-applied claim, then the overbreadth test governs. Evans Mem. 19-20. That is not so. While plaintiffs bringing claims with both facial and as-applied characteristics must satisfy standards "for a facial challenge to the extent of [the] reach" of their claim, this simply means courts must apply the constitutional test that is relevant to the substance of the case to the category of applications contemplated by plaintiffs' claims. *Reed*, 561 U.S. at 194; *Showtime*, 769 F.3d at 70. For example, after determining plaintiffs' claim exhibited both facial and as-applied characteristics, *Reed* applied

the usual "exacting scrutiny" test used for electoral disclosure requirements to analyze plaintiffs' claims that the application of Washington's public records law to referendum petitions violated the First Amendment. 561 U.S. at 194-202. And in another mixed as-applied/facial case, the First Circuit in *Showtime* used intermediate scrutiny to analyze plaintiff's claim that applying the zoning bylaws to adult entertainment businesses violated the First Amendment. 769 F.3d at 70-78.

In both instances, the mixed nature of the claim did not transform the plaintiffs' case into an overbreadth challenge, but instead led the Court to apply the constitutional test relevant to the plaintiffs' claims to the category of applications they had raised.[8] An overbreadth analysis was appropriate in *Project Veritas* because the plaintiffs explicitly brought an overbreadth claim. *Project Veritas Action Fund v. Conley*, 1:16-cv-10462, (D. Mass), ECF No. 48, at 10-11. Mr. Martin and Mr. Pérez have not. ECF No. 1, at 17-18. As a result, irrespective of the label used to describe plaintiffs' claims, intermediate scrutiny applies. *Showtime,* 769 F.3d at 70-78.

B. Evans has not satisfied his burdens under intermediate scrutiny.

The record confirms this Court's determination that the challenged application of Section 99 does not survive intermediate scrutiny. *Martin*, 241 F. Supp. 3d at 287-88.

1. Evans has not demonstrated a significant government interest.

Intermediate scrutiny "requires a very fact specific inquiry concerning the government's interest and how it will be served." *South Boston Allied War Veterans Council v. City of Boston*, 875 F. Supp. 891, 918 (D. Mass. 1995). To satisfy this standard, the government must "do more than simply posit the existence of the disease sought to be cured" and provide actual evidence of

[8] Indicating that these cases do not automatically transform into overbreadth challenges, *Showtime* noted that the plaintiffs had *separately* brought an overbreadth claim, which it deemed waived, *after* it applied intermediate scrutiny. 769 F.3d at 82 n.15

its alleged interest. *Asociacion de Educacion Privada de Puerto Rico, Inc. v. Garcia*-Padilla, 490 F.3d 1, 18 (1st Cir. 2007) (cleaned up). That is precisely what Evans fails to do.

First, Evans asserts the challenged application of Section 99 serves the government's interest in protecting the privacy of "citizens in distress" who interact with police. Evans Mem. 22. But the record does not contain any evidence that "crime victims, informants, and suspected criminals," Evans Mem. 22, customarily interact with police in public, perhaps because "[p]olice discussions about matters of national and local security do not take place in public where bystanders are within earshot." *Alvarez*, 679 F.3d at 607. "The government's burden is not met when a State offers no evidence or anecdotes in support of its restriction." *Rideout v. Gardner,* 838 F.3d 65, 73 Cir. 2016) (cleaned up).

What is more, Evans has not shown how the government has an interest in protecting civilian privacy when they are speaking with or near police officers performing their duties in public. None of the Section 99 training materials created by the BPD focuses on, or even mentions, this interest. SUMF ¶¶ 100, 102, 103, 106, 111.[9] Evans' only citation is *Project Veritas,* which centers on a purported right to record the *private* conversations of *private* individuals. *Project Veritas*, 244 F. Supp. 3d at 263-64. But a conversation with a friend in a park is categorically different from a conversation with an officer on the street. *Cf. Jean v. Massachusetts State Police*, 492 F.3d 24, 30 (1st Cir. 2007) (noting the "interest in protecting private communication" "is virtually irrelevant[] where the intercepted communications involve a search by police officers of a private citizen's home in front of" family members "and at least eight law enforcement officers"). *Project Veritas* itself did not suggest that the permissible

[9] For example, the Section 99 video does not discuss arresting someone for secretly recording conversations between officers and crime victims or informants, showing only that an officer can take out charges against an individual who secretly recorded him during a traffic stop. SUMF ¶¶ 93-95, 100.

scope of Section 99 includes the latter, holding only that the statute lawfully protects "conversations with governmental officials in *nonpublic settings or about non-official matters*." *Project Veritas*, 244 F. Supp. 3d at 266 (emphasis added).

Second, Evans contends that "even when others are not present" Section 99 "advances the people's moral disapproval of 'clandestine' recording." Evans Mem. 22. Yet Evans does not provide evidence that this rationale has any weight as applied to police officers. Neither the statute nor its legislative history make any mention of police officer privacy, focusing exclusively on the privacy interests of private individuals. MGL ch. 272 § 99; 1968 Senate Report of the Special Commission on Electronic Eavesdropping, No. 1132, attached as Exhibit 7 to Rossman Suppl. Decl.

That is because the government interest cuts in the opposite direction, that is, in favor of civilians creating accurate records of what police officers say in public when they think no one is recording them. "There is a difference in kind, well recognized in our jurisprudence, between police officers, who have the authority to command civilians, take them into custody, and to use physical force against them, and other public officials who do not possess such awesome powers." *Commonwealth v. Hyde*, 434 Mass. 594, 613 (2001) (Marshall, C.J., dissenting). Police officers are "granted substantial discretion that may be misused to deprive individuals of their liberties," *Glik,* 655 F.3d at 82, or to use violence against civilians, *see, e.g.,* Washington Post National Police Shootings Database (519 people fatally shot by police in 2018 as of June 20; 987 people fatally shot by police in 2017).[10] It is in everyone's interest—the Commonwealth and civilians alike—to capture accurate recordings of these actions. Secretly recording police officers performing their duties in public is often the only mechanism to hold police accountable, both

[10] *Available at* https://www.washingtonpost.com/graphics/national/police-shootings/ (last visited July 8, 2018).

because it "aids in the uncovering of abuses" that would otherwise never be documented, and because knowledge that recording is always possible may have a general "salutary effect." *Glik*, 655 F.3d at 82-83.

Evans himself emphasizes, "[w]e have nothing to hide."[11] There is therefore no legitimate reason to prevent civilians from secretly recording police officers while performing arrests, traffic stops, stop-and-frisks, and other public actions, as the only motivation would be to allow officers to alter their behavior when they know it will be documented. "The purpose of G.L. c. 272 § 99 is not to shield public officials from exposure of their wrongdoings." *Hyde*, 434 Mass. at 975 (Marshall, C.J, dissenting).

2. Evans has not demonstrated that Section 99's prohibition against secretly recording police officers performing their duties in public is narrowly tailored to any significant government interest.

While plaintiffs agree that the right to record police officers performing their duties in public may be subject to reasonable restrictions, intermediate scrutiny makes clear that Section 99 is *not* "just such a reasonable restriction." Evans Mem. 23. This test "demand[s] a close fit between ends and means." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534, 2540 (2014). Here, even if there is a significant interest in protecting *civilian* privacy while they are interacting with police officers performing their duties in public, a prohibition on secretly recording *police officers* is not tailored to that interest. Civilians can secretly record a police officer performing their duties in public in numerous instances where no civilians would be recorded unknowingly. *See* ECF No. 122 at 15. And if an officer (unwisely) speaks with a confidential informant in public, and if someone secretly records that conversation, nothing in this lawsuit would prevent

[11] Jan Ransom, *Police Head Says He Can Assign Body Cameras to Officers*, BOS. GLOBE, (Sept. 6, 2016).

the government from defending its interest in the informant. That interest could be vindicated by applying Section 99 to the recording of the civilian who spoke with or near a police officer.

Evans' suggestion that this Court already held "the Wiretap Statute may in many circumstances be constitutionally applied to the secret recording of police officers," is incorrect. Evans Mem. 23. This Court held that "significant interests may justify certain restrictions on audio and audiovisual recording of government officials' activities," but the challenged application of Section 99 was *not* a reasonable restriction because it was "not narrowly tailored to serve those government interests." *Martin*, 241 F. Supp. 3d at 287-88. It should do so again.

3. Evans has not identified adequate alternatives to the secret recording of police officers performing their duties in public.

While "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places," "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984). Such is the case here.

Evans suggests that the challenged application of Section 99 preserves adequate alternatives because plaintiffs "are entirely free under the Wiretap Statute to record police officers in public if only they do so openly." Evans Mem. 24. But the record demonstrates that open recording often is not a viable option for individuals who fear police retaliation. Plaintiffs testified that in many situations, they do not feel safe openly recording police officer performing their duties in public based on their prior experiences. SUMF ¶¶ 19, 37. For example, a Boston police officer grabbed Mr. Martin's hand, ultimately spraining his wrist and fingers, when he saw Mr. Martin openly recording him. SUMF ¶ 21. When the officer let go of Mr. Martin's hand, Mr. Martin didn't know if he was going to reach for his baton or mace or gun, and it was

"one of the scariest moments of [his] life." SUMF ¶ 21. Mr. Pérez has also had experiences where police aggressively responded to his open recordings. SUMF ¶ 38. For example, an officer struck Mr. Pérez twice with his baton when he was openly recording police officers during a protest in Chicago, which caused his phone to stop recording and left Mr. Pérez with bruises. SUMF ¶ 40. In Boston, an officer yelled at Mr. Pérez and grabbed the recording device when he saw that Mr. Pérez was openly recording him. SUMF ¶ 39. Mr. Pérez was "terrified," and "left very shaken." SUMF ¶ 39. These experiences mean open recording cannot be an adequate alternative.

CONCLUSION

For the foregoing reasons and the reasons set out in plaintiffs' memorandum in support of their own motion for summary judgment, this Court should deny Defendant Evans' motion for summary judgment and grant summary judgment in favor of plaintiffs.

Dated: July 11, 2018

Respectfully submitted,

/s/ Jessie J. Rossman

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was filed via the Court's CM/ECF system and that and a copy will be sent automatically to all counsel of record on July 11, 2018.

/s/ Jessie J. Rossman
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