IN THE 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' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT
AGAINST DEFENDANTS WILLIAM EVANS AND DANIEL CONLEY

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The undisputed record confirms that District Attorney Conley and Commissioner Evans are the right defendants, Mr. Martin and Mr. Pérez are the right plaintiffs, and Section 99 is unconstitutional as applied to the secret recording of police officers performing their duties in public. Plaintiffs submit this reply to clarify three points.

First, regardless of the label used to describe plaintiffs' claim, this Court should apply intermediate scrutiny to Section 99's blanket prohibition of the secret recording of police officers performing their duties in public. Even in cases that exhibit both as-applied and facial features, both the Supreme Court and the First Circuit have made clear that courts must apply the relevant constitutional test "to the extent of [the] reach" of the plaintiff's claims. *John Doe No. 1 v. Reed*, 561 U.S. 186, 194-96 (2010); *Showtime Entm't, LLC v. Town of Mendon,* 769 F.3d 61, 70-72 (1st Cir. 2014). As a result, where a claim "reflects characteristics of both facial and as-applied challenges," the required analysis is "more limited in scope than that employed for paradigmatic facial claims," and instead "focuses on only the constitutional validity of the subset of applications targeted by the plaintiffs' substantive claim." *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 915 (10th Cir. 2016).[1]

Here, the scope of plaintiffs' claim is the application of Section 99 to the secret recording of police officers performing their duties in public, *see* ECF No. 1, and the relevant constitutional test is intermediate scrutiny, *see Rideout v. Gardner*, 838 F.3d 65, 71-72 (1st Cir. 2016); *Glik v. Cunniffe*, 655 F.3d 78, 84 (2011); *Jean v. Mass. State Police,* 492 F.3d 24, 29 (1st Cir. 2007). Under *Showtime,* this Court must therefore determine whether the government has demonstrated

[1] *See id.* at 916-928 (applying preemption test to determine whether rule of professional conduct was unlawful as applied to federal prosecutors only, not all attorneys); *Reed,* at 196-201 (applying test for disclosure requirements in electoral context to determine whether public records law was unlawful as applied to referendum petitions only, not all public records).

that Section 99's blanket prohibition of secretly recording police officers performing their duties in public is narrowly tailored to a significant government interest. 769 F.3d at 70-78 (applying intermediate scrutiny to plaintiff's mixed as-applied/facial claim to determine the City's application of by-laws to adult-entertainment businesses was unconstitutional). It has not.

Second, because the challenged application of Section 99 fails constitutional review, it is important to be clear about the nature and scope of relief that is warranted. As to the nature of relief, issuing both a declaratory judgment and an injunction is appropriate under First Circuit precedent and necessary to prevent the chilling of constitutional rights. *See Mangual v. Roger-Sabat*, 317 F.3d 45, 69 (1st Cir. 2003); *Mangual v. Roger Sabat,* No. 99-2049, ECF No. 59 (D. Puerto Rico, March 3, 2013) (attached as Exhibit A) (declaring criminal libel statute unconstitutional as applied to statements regarding public officials or public figures *and* enjoining Attorney General from enforcing the statute against such statements). Since declaratory relief "is not ultimately coercive," and noncompliance with declaratory relief "is not contempt," *Steffel v. Thompson*, 415 U.S. 452, 471 (1974), enforcing violations of declaratory relief alone can require re-opening the case to seek an injunction or bringing a separate damages claim. And even injunctive relief will be inadequate unless it includes Defendant Evans. If this Court enjoins only the *prosecution* of individuals who secretly record police officers performing their duties in public under Section 99, that injunction would not negate the risk of *arrest*.[2] That risk seems particularly acute here, given that the Boston Police Department (BPD) has trained its officers to arrest individuals for secretly recording police officers, BPD officers have enforced

[2] Fear of arrest is a significant harm and underscores why *Monell* appropriately imposes liability against police departments who have a policy of enforcing a particular application of a statute; indeed, such liability may provide the only relief when officers routinely arrest individuals under a challenged application of a statute but—unlike here—the district attorney does not pursue prosecution.

this application of the statute, Defendant Evans has refused to disavow such enforcement throughout this litigation, and no state court has barred the BPD from continuing these practices. Accordingly, an injunction restraining the BPD as well as Defendant Conley is necessary here.

As to the scope of relief, plaintiffs request a declaration that Section 99 is unconstitutional as applied to the secret recording of police officers performing their duties in public, and an injunction prohibiting Defendants Conley and Evans from arresting and prosecuting individuals under this application of the statute. At the least, this relief would enjoin arrests and prosecutions premised on Section 99's application to the secret recording of police officers' voices when they are performing their duties in public.[3] Under this remedy, an individual could not be arrested or prosecuted under Section 99 where the predicate action is secretly recording a police officer, such as during one-on-one interactions between the recorder and an officer, and interactions in which other recorded civilians know about or consent to the recording.[4] But if this Court orders only this minimum version of relief, the presence of an officer's voice would not necessarily preclude an arrest and prosecution under Section 99 premised on the secret recording of a civilian whose voice appears on the same recording.

In light of First Circuit precedent, however, this Court should order broader relief. Specifically, this Court should also enjoin arrest and prosecution under Section 99 whenever someone secretly records a police officer detaining or otherwise having physical contact with a civilian in public *even if that recording also includes civilian voices*. This kind of relief is required by *Glik* itself. *Glik* held that the government cannot "reasonably subject to limitation"

[3] While plaintiffs' requested remedy encompasses public spaces that are generally accessible to the public without permission, in the alternative they at least seek relief for recordings on the streets, sidewalks, public parks and other public grounds.

[4] For example, if a driver informed the passengers in their car that they were going to secretly record a police officer during a traffic stop before the officer approached the window.

the "peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties." 655 F.3d at 84. Charging someone who is secretly recording a police officer making a public arrest for secretly recording a civilian's voice at the same time would plainly, and unlawfully, "limit" this kind of recording. Consequently, *Glik* makes clear that an individual cannot be charged under Section 99 when they secretly record a police officer arresting someone in public even if that recording includes the voices of other people. The rationale for this outcome is obvious. Police accountability and public safety are advanced when individuals can secretly record public arrests, even and sometimes especially if those recordings also document civilian voices.[5] And the same principles support the conclusion that the peaceful recording of a police officer's physical altercation with a civilian in a public space that does not interfere with the officer's performance of their duties *also* cannot reasonably be subject to limitation. Otherwise, recordings of these vitally important encounters will be needlessly chilled; a civilian who begins to secretly record an officer during a violent encounter will have suddenly committed a felony if, during that encounter, a civilian says, "I can't breathe."[6]

Thus, the remedy in this case should also enjoin arrest and prosecution under Section 99 when someone secretly records a police officer detaining or otherwise having physical contact with a civilian in public even if that recording also includes civilian voices. But if this Court has any concerns about where to draw the line between secret recordings of police officers that cannot support any wiretap prosecution even though they also contain civilian voices, and secret

[5] The government also has not demonstrated a significant interest in preventing the secret recording of bystanders in such circumstances, particularly as they *already* can unknowingly be recorded by someone who is openly recording an arrest with their back turned toward them.
[6] *I Can't Breathe*: *Eric Garner Put in a Chokehold by NYPD Officer – Video*, THE GUARDIAN (Dec. 4, 2014), *available at* https://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video

recordings of police officers that could in theory support a wiretap prosecution because they also contain civilian voices, it should resolve those concerns by enjoining the application of Section 99 whenever it is as applied to someone secretly recording a police officer performing their duties in public, even if that recording also includes civilian voices. That relief would err on the side of shielding conduct unquestionably protected by the First Amendment, while still allowing for the possibility that the Commonwealth could replace the existing Section 99 with a narrower law. Indeed, to the extent significant government interests in protecting the privacy of civilians interacting with police officers performing their duties in public actually exist in specific situations,[7] this relief would give the legislature the opportunity to draft a provision in the first instance that is narrowly tailored to such interests if it so chooses.[8]

Third, notwithstanding arguments suggested by Project Veritas in its facial challenge to Section 99, this Court can enjoin Section 99's application to the conduct at issue here—the secret recording of interactions with police officers performing their duties in public—without striking the statute in its entirety. Although a court's authority to narrowly interpret a state law to *avoid* constitutional violations is limited to "reasonable and readily apparent" meanings, *Boos v. Barry*, 485 U.S. 312, 330 (1988), this statutory construction doctrine has no bearing on the court's ability to *strike down* an unconstitutional application of a statute. To the contrary, courts can and have determined that particular applications of a statute which are unquestionably included in its language are nevertheless unconstitutional. *See United States v. Grace*, 461 U.S. 171, 175, 179

[7] *But see* ECF No. 122 at 12-13; No. 140 at 14; No. 142 at 17-18 (arguing defendants have not demonstrated a significant government interest in preventing the secret recording of civilians while they are speaking with or near police officers performing their duties in public).
[8] *See* ECF No. 122 at 13-16; No. 140 at 17-19; No. 142 at 19-20 (arguing in the alternative defendants have not demonstrated that Section 99's blanket prohibition of all secret recordings of police officers performing their duties in public is narrowly tailored to any significant government interest in preventing the secret recordings of civilians while they are speaking with or near police officer performing their duties in public).

nn.8 & 9 (1983) (noting statutory language prohibiting the display of banners on Supreme Court grounds "cannot be construed to exclude the sidewalks" before holding that statute was unconstitutional as applied to sidewalks); *Mangual*¸ 317 F.3d at 52 (holding criminal libel statute, whose language explicitly covered statements about public officials, was unconstitutional as applied to such statements). Accordingly, if this Court concludes that Section 99 is unconstitutional as applied to interactions with police officers, but not as applied to other government officials, it can issue relief targeted to that holding.

CONCLUSION

For at least the foregoing reasons and the reasons stated in Plaintiffs' opening brief (ECF No. 122), the Court should grant Plaintiffs' Motion for Summary Judgment.

Dated: July 23, 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 23, 2018.

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