IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Case Nos. 19-1586, 19-1640

PROJECT VERITAS ACTION FUND,
Plaintiff-Appellee-Cross-Appellant,

v.

RACHEL S. ROLLINS, in her official capacity as District Attorney for Suffolk County,
Defendant-Appellant-Cross-Appellant.

Case No. 19-1629

K. ERIC MARTIN & RENE PEREZ,
Plaintiffs-Appellees,

v.

RACHEL 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.

On Appeal from the United States District Court for the District of Massachusetts
Case Nos. 16-11362-PBS and 16-10462-PBS

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 16 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES K. ERIC MARTIN & RENE PEREZ URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT
AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

Amici curiae have not appeared earlier in this case. Counsel of record for *amici curiae* is Bruce D. Brown of the Reporters Committee for Freedom of the Press. Additional counsel for *amici curiae* are listed in Appendix B.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are 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 d/b/a Western Mass News; 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. A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

Amici file this brief in support of Plaintiffs-Appellees K. Eric Martin and Rene Perez. As members and representatives of the news media, *amici* have a strong interest in ensuring that the right to record government officials—including law enforcement officers—in the public performance of their duties is fully protected. The free exercise of newsgatherers to collect and distribute information of public concern is essential to the news media's ability to inform the public, foster discourse, and provide a necessary check on government power.

SOURCE OF AUTHORITY TO FILE

Counsel for all parties have consented to the filing of this *amicus* brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(A)(4)(E) STATEMENT

Amici declare that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court is asked to review whether, as held by the district court below, the Massachusetts Wiretap Statute, Mass. Gen. Laws ch. 272 § 99 (the "Statute"), is unconstitutional to the extent it prohibits the secret recording of government officials, including law enforcement officers, performing their duties in public, subject to reasonable time, place, and manner restrictions. *See Martin v. Gross*, 340 F. Supp. 3d 87, 109 (D. Mass. 2018).

The Statute criminalizes the "interception of any wire or oral communication," Mass. Gen. Laws ch. 272, § 99(C)(1), with "interception" defined as "to secretly hear, secretly record, or aid another to secretly hear or secretly record 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). In granting summary judgment for Plaintiffs-Appellees Martin and Perez, the district court correctly recognized that the First Amendment prohibits application of the Statute to the conduct at issue here—specifically, recording government officials, including law enforcement officers, in the public performance of their duties, with or without consent or objective awareness. If the decision of the district court is reversed, the Statute would therefore apply to any recording made absent the express consent or objective awareness of all individuals captured in the recording. This would include, for example, recordings

made by the news media concerning law enforcement activity conducted in public spaces in which there is no reasonable expectation of privacy "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." *Martin*, 340 F. Supp. at 108.

The First Amendment protects freedom of the press and, as a corollary, safeguards the rights of journalists and citizens alike to gather news and information. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). In fact, this Court, when previously considering the constitutionality of the Statute, found that "[the] 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 v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011).

Both the U.S. Supreme Court and this Court have recognized that purported privacy interests under wiretapping statutes such as the Statute at issue here must give way to the First Amendment issues at stake. *See Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (finding that the First Amendment shielded publisher from liability under the federal wiretapping statute for publication of an intercepted phone call regarding a matter of public interest)*; Jean v. Mass. State Police*, 492 F.3d 24, 30 (1st Cir. 2007) (upholding the First Amendment right to publish

surreptitiously recorded video of police misconduct). Moreover, in situations where parties to a secretly recorded interaction have no reasonable expectation of privacy, it cannot be said that any state interest is advanced by criminalizing recording of that interaction. To the contrary, the news media's ability to freely and effectively report on matters of public interest provides a vital public policy benefit and serves as an essential check on government power, creating "a salutary effect on the functioning of the government more generally." *Glik*, 655 F.3d at 83.

For these reasons, *amici* urge this Court to affirm the order of the U.S. District Court for the District of Massachusetts granting summary judgment for Martin and Perez and holding that the Statute is unconstitutional to the extent it prohibits the secret recording of government officials, including law enforcement officers, performing their duties in public, subject to reasonable time, place, and manner restrictions.

ARGUMENT

I. The First Amendment protects the news media's ability to gather and report information regarding matters of public interest, including the public activities of law enforcement officers.

The Supreme Court has repeatedly "emphasize[d] the special and constitutionally recognized role of . . . [the press] in informing and educating the public . . . ." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 781 (1978); *see also Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J.,

dissenting) ("[The press] is the means by which the people receive that free flow of information and ideas essential to intelligent self-government."); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs.") (discussing *Lovell v. Griffin*, 303 U.S. 444 (1938)).

In recognition of this role, the Supreme Court has long held that the rights of the press to receive and disseminate information are protected by the First Amendment. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both."); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Martin v. Struthers*, 319 U.S. 141, 143 (1943) ("This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it."). This First Amendment protection has been held to extend to the receipt and publication of illegally recorded statements by those not involved in the recording. *See Bartnicki*, 532 U.S. at 527 (likening the delivery of a tape recording to the delivery of a pamphlet or handbill and thus finding that the former is the kind of "speech" the First Amendment protects).

The constitutional guarantee of a free and unfettered press begins with the right to gather information. Indeed, as the Supreme Court has recognized,

"without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg*, 408 U.S. at 681. Simply put, the right to gather news is thus among those freedoms that, "while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

A. This Court has recognized that the right to record government officials, including law enforcement officers, in the public performance of their duties is safeguarded by the First Amendment.

This Court acknowledged the importance of the right to gather news in *Glik v. Cunniffe*, a case in which the Court upheld a First Amendment challenge to the Statute and recognized the right of the news media and citizens alike to film police officers in public spaces: "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.'" 655 F.3d at 82 (quoting *Mills*, 384 U.S. at 218).

In *Glik,* this Court was asked to consider whether the First Amendment protects the right to videotape police officers carrying out their duties in public—a question it answered unequivocally in the affirmative: "[the] 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. As this Court recognized, this right 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.* at 82.

Although this Court in *Glik* noted that the right to record government officials may be subject to reasonable time, place, and manner restrictions, it found it had no occasion to explore such limitations given the facts of that case. In *Glik*, the appellee's activities occurred in a public forum—Boston Common—and "[i]in such traditional public spaces, the rights of the state to limit the exercise of First Amendment activity are 'sharply circumscribed.'" *Id.* at 84 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983)).

In the instant case, any potential time, place, and manner limitations are similarly inapplicable, as Martin and Perez seek to record police officers in public spaces while in the performance of the officers' public duties. As this Court explained in *Glik*, "peaceful recording of [police activity] in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation." *Id.* And though this Court in *Glik* was not asked to consider whether any time, place, and manner limitations would apply to the "secret" recording of police officers in public places—that is, without the explicit awareness of the officer that he or she is being filmed—it follows that such a

recording would not threaten to "interfere with the police officers' performance of their duties." To the contrary, it presents no possibility of interference with, or distraction from, an officer's performance of his or her duties.

On its face, the Statute prohibits all "secret" recording of law enforcement officials "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." *Martin*, 340 F. Supp. at 108. As the district court below correctly held, however, such an overbroad interpretation of the legislation severs the link between the statute's means and its end, making it "not narrowly tailored to protect a significant government interest when applied to law enforcement officials discharging their duties in a public place." *Id.* at 107–08.

Because the aegis of the First Amendment "encompasses a range of conduct related to the gathering and dissemination of information" and prohibits the government from "limiting the stock of information from which members of the public may draw," *Glik*, 655 F.3d at 82 (quoting *First Nat'l Bank*, 435 U.S. at 783), to the extent that any privacy interests are implicated by the conduct at issue here—specifically, the recording of government officials, including police officers, in the public performance of their duties—such interests are overcome by the First Amendment interests at stake.

B. Any purported interest in protecting privacy rights under the Statute must give way to the First Amendment interest in gathering and reporting information of public importance.

Both this Court and the U.S. Supreme Court have recognized that First Amendment interests must be accounted for when considering the enforcement of wiretapping laws such as the Statute at issue here.

In *Bartnicki v. Vopper*, the Supreme Court held that the First Amendment shielded defendants from liability under the federal wiretapping statute for disclosing an intercepted communication regarding a matter of public interest. *See* 532 U.S. at 532–35. The communication at issue—an intercepted private phone call between the president of a local labor union and the union's chief negotiator—was received by Yokum, a representative of a local taxpayers' organization. *Id.* at 519. The recording captured the union president stating: "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . . To blow off their front porches, we'll have to do some work on some of those guys." *Id.* at 518–19. Yokum provided a copy of the recording to Vopper, a radio commentator who subsequently played the recording on air during his public affairs talk show. *Id.* at 519. In finding that the First Amendment protected Vopper's receipt and dissemination of the recording, the Court acknowledged that although the nature of the particular communication implicated privacy interests, the "privacy concerns

give way when balanced against the interest in publishing matters of public importance." *Id.* at 534.

Similarly, in *Jean v. Massachusetts State Police*, this Court upheld a preliminary injunction enjoining police officers from using the Statute to interfere with a political activist's dissemination of a third party's secret recording of an arrest and warrantless search by the police of a private residence. 492 F.3d at 25. The Court held that, "where the intercepted communications involve[d] a search by police officers of a private citizen's home in front of that individual, his wife, other members of the family, and at least eight law enforcement officers," the privacy interest was "virtually irrelevant," and gave way to the "broad [public] interest in permitting 'the publication of truthful information of public concern,' described in *Bartnicki*" applied to the recording in *Jean* as well. *Id*. at 30.

Amici recognize that *Bartnicki* and *Jean* addressed the First Amendment's protections for the disclosure of recorded communications, and not the act of recording itself. However, both cases make clear that application of a statute that, by its plain language, would restrict gathering and disseminating information about matters of public interest must comport with the First Amendment: "[W]hether [the] conduct [falls] within the statute is not determinative. . . . Rather, the determinative question is whether the First Amendment . . . permits Massachusetts to criminalize [the] conduct." *Jean*, 492 F.3d at 31. And, even assuming,

arguendo, that the First Amendment's protection for recording are more attenuated than its protections for dissemination, no compelling or substantial governmental interest is served by applying the Statute at issue here to criminalize the former where there is no reasonable expectation of privacy on the part of the recorded subject.

A reasonable expectation of privacy cannot be said to exist when a citizen interacts with a government official, including a law enforcement officer, in a public space. Nor can government officials, including law enforcement officers, possess a reasonable expectation of privacy in the performance of their duties in public places. Indeed, the press has traditionally enjoyed a right of access to public fora, including streets, sidewalks, parks, and other large gathering places. *See, e.g.*, 1 Lee Levine et al., *Newsgathering and the Law* 11-22 (5th ed. 2018); Ashley Messenger, *Media Law: A Practical Guide* 192 (Rev. ed. 2019). Where no reasonable expectation of privacy exists, the Constitution prohibits enforcement of the Statute as generally applied to specific conduct protected by the First Amendment—namely, the right to gather and publish information of public importance.

II. The ability of the news media to record and report on the activity of law enforcement officers and other government officials, where no reasonable expectation of privacy exists, serves the public interest.

The press serves as an important and necessary check on governmental power. *See New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The press was protected so that it could bare the secrets of government and inform the people."); *Herbert v. Lando*, 441 U.S. 153, 185 (1979) (writing that "the [First] Amendment shields those who would censure the state or expose its abuses"). This Court has recognized that permitting journalists—and citizens—to record activity by law enforcement officers and other government officials, where there is no reasonable expectation of privacy, enhances the functioning of government: "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 effect on the functioning of the government generally . . . ." *Glik*, 655 F.3d at 82–83. This is true whether or not such newsgathering is conducted with or without an officer's knowledge. Indeed, under certain circumstances, recording police activity in public places without the recorded officers' knowledge may *better* serve the public interest.

For example, in the investigative documentary film Crime + Punishment, filmmaker Stephen Maing utilized recordings of New York Police Department ("NYPD") officers to shine a light on the department's covert quota system, which mandated a predetermined number of arrests and summons each month and disproportionately targeted communities of color. Though the NYPD denied the

existence of a quota system, recordings of officers performing their duties in public places, including recordings captured without those officers' apparent knowledge, offered evidence to the contrary. *See* Tricia Olszewski, *"Crime + Punishment" Film Review: Powerful Doc Shows Cops Suing NYPD for Targeting Minorities*, The Wrap (Aug. 22, 2018), https://perma.cc/GQ86-AE2S. The documentary spurred increased public interest in transparency around the NYPD's practices and earned a special jury award for social impact filmmaking at the 2018 Sundance Film Festival. *See, e.g.,* David Alm, *Documentary "Crime + Punishment" Exposes Abuse of Power in the NYPD*, Forbes (Oct. 31, 2018), https://perma.cc/Y9NS-3VHG; Alissa Wilkinson, *Crime + Punishment*, Vox (Sep. 28, 2018), https://perma.cc/7AD3-V46Y; Julia Felsenthal, *Stephen Maing's Crime + Punishment is a Blood-Boiling Look at Systemically Racist Policing*, Vogue (Aug. 22, 2018), https://perma.cc/HF33-MATX.

Similarly, audio secretly recorded by Alvin Cruz while stopped on the street by NYPD officers, and which was later obtained and published by *The Nation*, contributed to enhanced scrutiny of the department's controversial "stop and frisk" policy. *See* Ross Tuttle & Quinn Rose Schneider, *Stopped and Frisked for Being a F**king Mutt*, The Nation (Oct. 8, 2012), https://perma.cc/QQ8C-4LL2. The audio and story, as reported by *The Nation*, were subsequently referenced by the Southern District of New York in *Floyd v. City of New York,* 959 F. Supp. 2d 540

(S.D.N.Y. 2013), in connection with the court's finding, *inter alia*, that the NYPD's stop and frisk policy was unconstitutional under the Fourth and Fourteenth Amendments. *Id.* at 665, n. 774.

As *The Nation* example illustrates, the ability of private citizens to freely gather and share information with news organizations can greatly enhance the news media's ability to report on matters of significant public interest. George Holliday's video of the 1991 police beating of Rodney King in Los Angeles is one of the most well-known examples of a citizen-created recording that reflects how the news media can work with bystanders to inform the general public. *See* Paul Pringle & Andrew Blankstein, *King Case Led to Major LAPD Reforms*, L.A. Times (June 17, 2012), https://perma.cc/TVJ3-L5CB. After Los Angeles Police Department ("LAPD") officials rejected Holliday's attempts to provide them with the recording, Holliday delivered the footage to KTLA, a local TV news station. KTLA broadcast the footage the following night, setting in motion a sequence of events that resulted in the video being seen by millions and spurring reforms within the LAPD. *Id.*

Press coverage of police shootings have also benefitted from bystander recordings. In 2015, Feidin Santana, a 23-year-old barber, recorded South Carolina police officer Michael Slager shooting Walter Scott, a motorist whom Slager had stopped because of a broken taillight. The video, which aired on

newscasts nationwide, showed Slager shooting Scott in the back multiple times after Scott had attempted to flee. Santana's video contradicted initial accounts from the police and Slager's attorney, who contended that Slager had feared for his life. *See* Mark Berman, *S.C. Investigators Say They Thought Fatal Police Shooting Was Suspicious Before Video Emerged*, Wash. Post (Apr. 10, 2015), https://perma.cc/5Q5H-H6TJ. In addition to leading to the officer's indictment for murder, the video caused many to question whether, if not for its existence, "the officer's narrative of . . . [the] struggle would have ever been truly challenged." *Id.*

The 2016 shooting of Alton Sterling in Baton Rouge, Louisiana, raised similar issues. Bystanders' video recordings showed two Baton Rouge police officers first pinning Sterling down and then shooting him twice in the chest, and again four more times. The recordings showed no indication that Sterling reached for a gun. *See* Zack Kopplin & Justin Miller, *New Video Emerges of Alton Sterling Being Killed by Baton Rouge Police*, The Daily Beast (July 7, 2016), https://perma.cc/G6AC-XSNF; *see also* Maya Lau & Bryn Stole, *'He's got a gun! Gun': Video shows fatal confrontation between Alton Sterling, Baton Rouge police officer*, The Advocate (July 5, 2016, 7:00 AM), https://perma.cc/SA7Q-W6E4. In response to public concern following news reports of the incident (which included footage from the video), the Baton Rouge Police Department put both officers on paid administrative leave and later fired one of the officers for violating

department use of force policies. *See* Eric Levenson, *Baton Rouge Police Chief Apologizes for Hiring the Officer Who Killed Alton Sterling,* CNN (Aug. 1, 2019, 4:20 PM ET), https://perma.cc/4L3X-CXR8.

Even when the details of an incident are not necessarily disputed, bystander recordings can help the news media report the story in a more complete way. The death of Eric Garner, a Staten Island man who was killed as a result of being placed in a chokehold by police, brought the question of how police handle arrests to the forefront of a national conversation on the state of policing in America. *See, e.g.*, J. David Goodman, *Man Who Filmed Fatal Police Chokehold Is Arrested on Weapons Charges*, N.Y. Times (Aug. 3, 2014), https://perma.cc/LX4S-2US7. Although federal prosecutors ultimately declined to bring charges against the officer involved, the NYPD terminated him following a department disciplinary investigation. *See, e.g.*, Melissa Chan, *Officer in Eric Garner Death Fired After NYPD Investigation*, TIME (Aug. 19, 2019), https://perma.cc/WD7E-HELZ. It is doubtful whether the case would have captured the same level of public attention if bystanders had not recorded Mr. Garner's fatal encounter with police on cellphones and shared their recordings with the news media.

Similarly, when a Minnesota police officer fatally shot Philando Castile during a traffic stop in 2016, Castile's girlfriend, Diamond Reynolds, used Facebook to livestream the harrowing aftermath, bringing the final moments of

Castile's life to the public as they occurred. *See* Catherine E. Shoichet, *Facebook Live video offers new perspective on police shootings*, CNN (July 7, 2016, 3:37 PM), https://perma.cc/6DUD-9PV2. This recording was used by the news media in reporting the story. When a sniper shot and killed five police officers the next day in Dallas, Texas, bystanders likewise recorded footage of the tragedy. *See* Manny Fernandez, Richard Pérez-Peña & Jonah Engel Bromwich, *Five Dallas Officers Were Killed as Payback*, N.Y. Times (July 8, 2016), https://perma.cc/M7QK- QA4H; *see also* Hasani Gittens and Alex Johnson, *'All of a Sudden, You've Seen Them Just Fall': Witnesses Recount Dallas Horror*, NBC News (July 8, 2016, 3:25 AM), https://perma.cc/J6J8-MAHG. The news media quickly identified, worked to verify, and distributed this important footage to the public when reporting on these events, improving the accuracy and depth of the reporting. *See, e.g.*, *id.; see also* Eliott C. McLaughlin, *Woman streams aftermath of fatal officer-involved shooting*, CNN (July 8, 2016, 4:57 AM), https://perma.cc/3MLV-P56U.

Each of these events occurred in public places in connection with law enforcement officers' public performance of their official duties. And each involved matters of significant public interest. But if any of these events had occurred in Massachusetts, the recording of such activities without the consent or objective awareness of the police officers involved could have resulted in criminal

liability under the Statute—creating an untenable chilling effect on the gathering and dissemination of news and information to the public.

III. Prohibiting the secret recording of law enforcement officers and other government officials in the public performance of their duties will create a chilling effect on newsgathering and reporting by the media.

The significance of this case extends far beyond the individual actors involved. If the district court's decision is reversed, it will hinder the ability of the news media to gather news and provide the public with information of vital public interest. Journalists may refrain from recording newsworthy police or governmental activities occurring in public places for fear that an individual captured in the recording may later contend that he or she was unaware of the recording, thus subjecting the reporter to criminal liability for performing an essential newsgathering function. This is especially relevant in the context of breaking news events where a high degree of confusion or danger can exist, or where it would threaten public or officer safety for the journalist to interrupt the officer in the course of his or her duties to ensure that everyone at the scene consents to, or is objectively aware of, being recorded. The resulting chilling effect would have significant ramifications on the public's ability to receive timely and robust reporting on matters of public safety and concern.

Not only would a reversal of the district court's decision stymie the news media's ability to gather news but, to the extent that bystanders are deterred from

recording publicly occurring police or governmental activity, one of the news media's most important sources of information will be eliminated, further frustrating the ability to report on matters of public interest. As this Court recognized in *Glik*, the ubiquity of mobile phones with sophisticated recording capabilities has resulted in user-generated content becoming a common component of news programming. *See* 55 F.3d at 84. A 2014 study of eight international 24-hour news channels found that "an average of 11 pieces of [user-generated content] were used every day on television by [the] news organizations [studied]." *See* Claire Wardle et al., *Amateur Footage: A Global Study of User-Generated Content in TV and Online-News Output*, A Tow/Knight Report, at 13 (2014), https://perma.cc/9T68-STT3. Another study of eight popular news websites found that the sites collectively used 237 items of citizen-created content per day, with *The New York Times* using on average 20 pieces per day. Pete Brown, *A Global Study of Eyewitness Media in Online Newspaper Sites*, Eyewitness Media Hub, at 9 (2015), https://perma.cc/8MC5-SC69. If bystanders refrain from recording publicly occurring police activity out of fear of potential criminal liability, the news media's ability to widely share and disseminate information on matters of public concern will be severely limited. And—as the Cruz, King, Sterling, Garner, and Castile stories illustrate—an important check on government power will be lost.

Because, in part, the ability to record governmental activity, including that of law enforcement officers, in public places is essential to the effective functioning of the free press, the majority of state wiretapping statutes criminalize only the interception of communications in which there is a reasonable expectation of privacy. *See* Andrew Martinez Whitson, *The Need for Additional Safeguards Against Racist Police Practices: A Call for Change to Massachusetts & Illinois Wiretapping Laws*, 34 B.C.J.L. & Soc. Just. 195, 201 (2014).[1] Massachusetts is

[1] Indeed, at least three dozen states, the District of Columbia, and the federal government recognize that the subject of a recording must have a reasonable expectation of privacy in their criminal wiretapping statutes. *See* 18 U.S.C. § 2510(2) (2019); Ala. Code § 13A-11-30(1) (2019); Ariz. Rev.Stat. Ann. § 13-3001(8) (2019); Colo. Rev. Stat. § 18-9-301(8) (2019); Del. Code Ann. tit. 11, § 2401(13) (2019); D.C. Code § 23-541(2) (2019); Fla. Stat. § 934.02(2) (2019); Ga. Code Ann. § 16-11-62(1) (2019); Haw. Rev. Stat. Ann. § 803-41 (2019); Idaho Code Ann. § 18-6701(2) (2019); Iowa Code § 808B.1(8) (2019); Kan. Stat. Ann. § 22-2514(2) (2019); La. Rev. Stat. Ann. § 15:1302(15) (2019); Me. Rev. Stat. tit. 15, § 709(4)(B) & 709(5) (2019); Md. Code Ann., Cts. & Jud. Proc. § 10-401(13)(i) (2019); Mich. Comp. Laws § 750.539a (2019); Minn. Stat. § 626A.01(4) (2019); Miss. Code Ann. § 41-29-501(j) (2019); Mo. Rev. Stat. § 542.400(8) (2019); Neb. Rev. Stat. § 86-283 (2019); Nev. Rev. Stat. § 179.440 (2019); N.H. Rev. Stat. Ann. 570-A:1(II) (2019); N.J. Stat. Ann. § 2A:156A-2(b) (2019); N.C. Gen. Stat. § 15A-286(17) (2019); N.D. Cent. Code § 12.1-15-04(5) (2019); Ohio Rev. Code Ann. § 2933.51(B) (2019); Okla. Stat. tit. 13, § 176.2(12) (2019); R.I. Gen. Laws § 12-5.1- 1(10) (2019); S.C. Code Ann. § 17-30-15(2) (2019); S.D. Codified Laws § 23A- 35A-1(10) (2019); Tenn. Code Ann. § 40-6-303(14) (2019); Tex. Crim. Proc. Code Ann. § 18A.001(19) (2019); Utah Code Ann. 77-23a-3(13) (2019); Va. Code Ann. § 19.2-61 (2019); Wash. Rev. Code § 9.73.030(1)(b) (2019); W. Va. Code § 62-1D-2(i) (2019); Wis. Stat. § 968.27(12) (2019); Wyo. Stat. Ann. § 7-3-701(a)(xi) (2019).

one of only a handful of states whose wiretapping laws do not explicitly require that parties to the intercepted communication have a justified expectation of privacy in order for the interception to be criminal. *See id.*; Lisa A. Skehill, Note, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for Surreptitious Recording of Police Officers*, 42 Suffolk U. L. Rev. 981, 991 (2009). If the district court's decision is reversed, and this Court does not recognize a First Amendment right to record government officials in public places where there is no reasonable expectation of privacy (with or without the recorded individuals' objective awareness or consent), the ability of the news media to gather and report on information of public interest and concern will be significantly impaired, and Massachusetts citizens will be deprived of essential information about the functioning of their government.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the decision below and find that the Statute may not constitutionally prohibit the secret recording of government officials, including law enforcement officers, performing their duties in public spaces where no reasonable expectation of privacy exists.

Dated: October 4, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Bruce Brown, do hereby certify that the foregoing brief of *amici curiae*: (1) complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by the Fed. R. App. P. 32(f), it contains 6,026 words; and (2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman font.

Dated: October 4, 2019

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APPENDIX A

SUPPREMENTAL STATEMENT OF IDENTITY OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The American Society of Magazine Editors ("ASME") is the principal organization in the United States for the editorial leaders of magazines and websites. Founded in 1963, ASME strives to defend the First Amendment, support the development of journalism, and promote the editorial integrity of print and digital publications. ASME sponsors the National Magazine Awards for Print and Digital Media in association with the Columbia Journalism School, conducts training programs for writers and editors and publishes the ASME Guidelines for Editors and Publishers.

Boston Globe Media Partners, LLC publishes The Boston Globe, the largest daily newspaper in New England.

First Look Media Works, Inc. is a non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting. First Look Media Works operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

Meredith Corporation owns and operates Western Mass News in the Western Massachusetts market area, which airs dozens of hours of local news each week.

MPA – The Association of Magazine Media ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover news, culture, sports,

lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

National Newspaper Association is a 2,400 member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Missouri.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

New England First Amendment Coalition is a non-profit organization working in the six New England states to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know in our region. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to more than 350 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day, publishes POLITICO Magazine, with a circulation of 33,000 six times a year, and maintains a U.S. website with an average of 26 million unique visitors per month.

Reveal from The Center for Investigative Reporting, founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website https://www.revealnews.org/, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

APPENDIX B

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I, Bruce D. Brown, do hereby certify that I have filed the foregoing Brief of *Amici Curiae* electronically with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system on October 4, 2019. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system, via electronic notice to:

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