**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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| K. ERIC MARTIN, and RENE PEREZ<br><br>Plaintiffs,<br><br>v.<br><br>WILLIAM EVANS, in his official capacity as Police Commissioner for the City of Boston, and DANIEL F. CONLEY, in his official capacity as the District Attorney for Suffolk County<br><br>Defendants. | Civil Action No. 16-11362-LTS<br><br>Leave to File Excess Pages Granted On October 4, 2016 |

**MEMORANDUM OF LAW**
**IN SUPPORT OF MOTION TO DISMISS**

## Introduction

No one can dispute that the relationship between law enforcement officers and the civilians they are charged with protecting has been transformed by the proliferation of electronic recording devices and media platforms for making those recordings public. Seemingly every day, a new police recording is in the news. The issues that these recordings raise are profound. Many vividly show the omnipresent risk of violence that police officers face. Others provide a perspective on the effectiveness of police training and community policing strategies, society's failure to treat the mentally ill, or racial and ethnic disparities. Many police organizations and prosecutors, including those in Boston, and citizens' groups see recordings of police-citizen interactions as promoting transparency and the accountability of public officials and citizens.

Nor is there any question that people in Massachusetts have a constitutional right to record law enforcement officers performing their duties in public. The First Circuit has held that the right

is "clearly established" under the First Amendment. *Glik v. Cunniffe*, 655 F.3d 78, 84-85 (1st Cir. 2011). And, police and prosecutors in Boston and elsewhere understand that they cannot arrest, charge, or otherwise penalize civilians who record (but do not interfere with) police work in public spaces.

In the *Glik* case, the Boston Municipal Court ruled that the plaintiff could not be charged under the Massachusetts wiretapping statute, Mass. G.L. c. 272, § 99, because he made the recording with his cell phone in plain view. 655 F.3d at 80. Now, plaintiffs Eric Martin and René Pérez, through the ACLU, ask this Court to enter an injunction and judgment declaring that the Massachusetts wiretapping law is unconstitutional as applied to any recording of police officers acting in public, even where the recording is not made in plain view. To reach that constitutional question, however, this Court would have to first decide what conduct the wiretapping statute does, and does not, reach in the public sphere, and under what circumstances, if any, a citizen with a smartphone or wearable device is acting "secretly" while observing and recording police officers performing their duties in public.

Rather than issue such a sweeping verdict about the meaning and constitutionality of the state wiretapping law, this Court should abstain and allow the Massachusetts courts to address these issues. The statute last received major revisions in 1968, and astounding advancements in technology have raised interpretative questions that, if resolved, may obviate the need for this lawsuit. For example, the statute does not prohibit a recording if the person recorded has knowledge of it, including presumptive knowledge. How knowledge may be presumed given the state of current technology, including the ubiquitous nature of smartphones and wearable devices, will be important in assessing what actions are within, or without, the reach of the statute. Likewise, in certain circumstances the statute excepts a "telephone" from the definition of "intercepting device[s]," but does not address whether this refers to a cellular "telephone" or other wireless communication technology. That definition is critical here because it may make certain

recordings permissible under the statute. And all of these issues must be assessed in light of the "changes in technology and society" that animated the First Circuit's ruling in *Glik*. 655 F.3d at 84. Allowing the Massachusetts courts to address these unresolved issues of state law could easily obviate any need to address the constitutional questions raised in this matter. Furthermore, abstention would avoid unnecessary friction in federal-state relations, interference with important state functions, and federal decisions on important questions of constitutional law in the absence of guidance from the state's highest court on the scope of the wiretapping statute.

In the alternative, this Court should dismiss this action for lack of a case or controversy. To bring a pre-enforcement claim, the plaintiffs must demonstrate a certainly impending threat that they would be prosecuted under the wiretapping statute. But their pleadings show neither a credible threat of prosecution for their proposed actions nor a chilling of those actions to avoid prosecution. This is particularly so where the plaintiffs' alleged fears of future arrest or prosecution entail unsupported assumptions about how Boston police and the Suffolk County District Attorney will apply the wiretapping law in the face of technological developments and the First Circuit's ruling in *Glik*.

For these reasons, this action should be dismissed.

## THE CHALLENGED STATUTE AND RELEVANT ALLEGED FACTS

### I. Chapter 272, Section 99 of the Massachusetts General Laws.

The Massachusetts wiretapping law, Mass. G.L. c. 272, § 99, was first enacted in 1920. *See Commonwealth v. Hyde*, 434 Mass. 594, 607 n.4 (2001) (Marshall, C.J., dissenting) (citing St. 1920, c. 558, § 1 and St. 1959, c. 449, § 1). It received two major modifications, first in 1959 and then again in 1968. It has only received minor changes since. *Id.* at 599-600 (opinion of Supreme Judicial Court discussing 1968 modifications, St. 1968, c. 738, §1); *see also* St. 1986, c. 557, §

199; St. 1993, c. 432, § 13; St. 1998, c. 163, §§ 7, 8. Apparently, since 1968 there has been no state appellate decision involving an assertion that the statute violates the First Amendment.

Although Section 99 covers an array of wiretapping, including restrictions on that done by law enforcement, the Plaintiffs focus on only one section, subsection (C)(1). That section provides, in pertinent part, that anyone who "willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined . . . or imprisoned . . . or both." Mass. G.L. c. 272, § 99(C)(1).

The statutory definitions of "interception" and "intercepting device" are key to understanding this prohibition. An "intercepting device" is defined as a "device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication," with a general exception for telephones and hearing aids used for their normal purposes. Mass. G.L. c. 272, § 99(B)(3). And, subsection (B)(4) provides that, "'interception' means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication." Mass. G.L. c. 272, § 99(B)(4). Both of these sections are described in more detail below.

Accordingly, the provisions of Section 99 at issue here state that it is a crime to use an intercepting device to intentionally, secretly record (or attempt to record) an audio communication without permission of all participants. Culpability thus turns on the device used, the user's intentionality, and whether or not the recording is secret.[1]

The wiretapping statute's prohibition on this conduct flows from the interests articulated in Section 99's Preamble—*i.e.*, that the "uncontrolled development and unrestricted use of modern

[1] There is no express statutory provision prohibiting only visual, as opposed to audio, recordings. *See, e.g., Commonwealth v. Wright*, 61 Mass. App. Ct. 790, 791 n.1 (2004).

electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth." Mass. G.L. c. 272, § 99(A); *see also Hyde*, 434 Mass. at 598.

## II. The Facts Alleged in the Complaint.[2]

Messrs. Martin and Perez are civil rights activists. Compl. ¶¶ 41, 66. Both already record the police on a regular basis. *Id.* ¶¶ 43, 67. Both allege they have wanted to secretly record the police in the past, and hope to do so in the future. *Id.* ¶¶ 46, 70. The manner in which they presently record and how that manner would change to become "secret" is not clear. But, both allege a fear of openly recording the police at times. *Id.* ¶¶ 44, 48, 49, 56, 76, 79, 84. And, both alleged a fear of prosecution if they secretly record the police. *Id.* ¶¶ 47, 56, 60, 71, 79, 84.

Martin alleged a number of bases for his fear of openly recording, including a video of a Boston police officer waving what turned out to be a fake gun in front of a citizen who was openly recording the officer's activities. Compl. ¶ 50. He also cites his own history of traffic stops and an incident in which he allegedly had an altercation with a Boston police officer and was threatened with arrest while he was taking photographs at the Occupy Boston event. *Id.* ¶¶ 51, 55. The complaint also states that Martin's fear comes from a personal interaction, which he refers to as life-changing, with the police in Colorado eleven years ago. *Id.* ¶¶ 52, 53. Martin alleges that he wants to secretly record the Boston Police to capture police interactions with Black and Hispanic citizens, and the homeless. Compl. ¶¶ 58, 59.

Like Martin, Perez avers that he is fearful of openly recording police officers. Compl. ¶¶ 76, 79, 84. Also like Martin, Perez's fear of the police stems, at least in part, from his own experiences, including experiences with police outside of Massachusetts (in his case, Texas). *Id.* ¶¶ 73, 74. He alleges he has been pulled over several times in Boston and that those interactions have been different than his experience in Texas. *Id.* ¶ 75. He also alleges a fear of openly recording due to an interaction he had with a police officer following a demonstration outside of Secretary

[2] For the purposes of this motion, the allegations contained in the complaint are treated as true.

of State John Kerry's private home. *Id.* ¶¶ 77, 78. He further describes an incident in Chicago in which he was openly recording a demonstration when a police officer allegedly struck his hand with a baton. *Id.* ¶ 83. Perez alleges that he wants to secretly record the police during traffic stops. Compl. ¶¶ 72, 79. He also asserts he would like to secretly record "these encounters"—which presumably refers to police officers performing their duties in public—in the future. *See Id.* ¶ 84.

Both also teach "know your rights" classes that address, at least in part, filming police officers. Compl. ¶¶ 61-65, 85-88.

## ARGUMENT

### I. This Court Should Abstain From Deciding The First Amendment Issues Raised By This Case Until A Massachusetts Court Interprets Key Uncertainties In The Wiretapping Statute Implicated By The Plaintiffs' Claims.

A federal court is not required to address a complaint just because it raises a federal question. When an interpretation of state law is also required, and that law is uncertain, the federal court may abstain under federalism principles to allow the state court to resolve the ambiguity. Indeed, "[a]mong the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute the meaning of which is unclear under state law." *Barr v. Galvin*, 626 F.3d 99, 107 (1st Cir. 2010) (quoting *Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 84 (1975)).[3]

Under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), abstention is appropriate "where (1) substantial uncertainty exists over the meaning of the state law in question, and (2) settling the question of state law will or may well obviate the need to resolve a significant federal constitutional question." *Barr*, 626 F.3d at 107-08 (concluding *Pullman* abstention was required to resolve unclear issue of Massachusetts election law) (quoting *Batterman v. Leahy*, 544

[3] Asserting that the statute needs interpretation by the state courts does not, in any way, concede problems with the statute other than that interpretation is needed. Indeed, "[t]he mere fact that a statute requires interpretation does not necessarily render it void for vagueness." *Barr*, 626 F.3d at 108.

F.3d 370, 373 (1st Cir. 2008)). In our federalist system, abstention serves several critical functions, among them "avoid[ing] unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Babitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 306 (1979) (quoting *Harman v. Forssenius*, 380 U.S. 528, 534 (1965)). Both requirements for abstention are met here.

### A. It Is Uncertain Whether the Wiretap Statute Prohibits Certain Conduct in Which the Plaintiffs Desire to Engage.

Dramatic and unanticipated advances in technology now raise questions about a statute that was passed in 1968 and has remained largely unchanged since that time. For perspective, when Section 99 was passed, the United States telephone system was based on land lines and entirely controlled by one company. Now, smartphone technology is ubiquitous, its use is quickly evolving, and no one company controls the system. Indeed, according to the Pew Research Center, by 2015 nearly two-thirds of Americans owned a smartphone, which is up from thirty-five percent ownership in 2011. *See* Pew Research Center: U.S. Smartphone Use in 2015, *available at* www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/. And, by the end of 2013, over forty percent of households in the United States had only wireless phones. *See* CDC: Two of Every Five U.S. Households Have Only Wireless Phones, *available at* http://www.pewresearch.org/fact-tank/2014/07/08/two-of-every-five-u-s-households-have-only-wireless-phones/. These changes in technology and its use now raise at least two questions about whether Section 99 would apply to citizens recording officers in public: (1) the degree of knowledge required to render a recording not secret and, thus, outside the statute; and (2) whether certain devices like smartphones are within the "telephone exception" to the definition of "intercepting device." In these, and possibly other, respects, the statute is ambiguous and should be construed by the Massachusetts courts before the federal constitutional issue is reached.

**1. If a person being recorded has knowledge of the recording, then it is not secret and, thus, the recording is not proscribed by the statute. But, with advances in technology, and the ubiquity of multi-use devices like smartphones, what qualifies as presumptive knowledge under Massachusetts law is unclear.**

To be illegal, an interception must be secret. Mass. G.L. c. 272, § 99(B)(4) ("'interception' means to *secretly* hear, *secretly* record, or aid another to *secretly* hear or *secretly* record the contents of any wire or oral communication . . ." (emphasis added)). A recording is not secret, and thus not within the statute, if it is made with actual knowledge of the one being recorded. *See Commonwealth v. Boyarsky*, 452 Mass. 700, 705 (2008); *Commonwealth v. Rivera*, 445 Mass. 119, 134 (2005) (Cowin, J., concurring in part); *id.* at 142 (Cordy, J., concurring); *Hyde*, 434 Mass. at 605; *Commonwealth v. Jackson*, 370 Mass. 502, 505-07 (1976). According to the SJC, "actual knowledge is proved where there are clear and unequivocal objective manifestations of knowledge." *Jackson*, 370 Mass. at 507. This is straightforward in some cases. In *Jackson*, the person recorded made clear statements that he knew of the recording ("I know the phone is tapped"), so the recording was not within the statute. *Jackson*, 370 Mass. at 504, 507; *see also Glik*, 655 F.3d at 80, 87 (no dispute that recording was done openly and officers being recorded knew of it). A person may also be presumed to know he is being recorded based on the type of recording device used. For example, four justices in *Rivera* agreed that an individual had knowledge that he was being recorded by observable convenience store video cameras, even if he did not subjectively know those cameras also recorded audio. *Rivera*, 445 Mass. at 134 (Cowin, J., concurring in part); *id.* at 142 (Cordy, J., concurring); *see also Hyde*, 434 Mass. at 595, 605 (stating that holding tape recorder in plain sight would not be illegal).

Massachusetts courts have not yet decided, under Section 99, how or whether knowledge may be presumed in the current era of nearly ubiquitous cell phone use. For example, as applied here, may it be concluded that a police officer knows he is being recorded if a person is holding a

cell phone, or a cell phone is partially visible?[4] Or, is something more required because, unlike a tape recorder or a video camera, a cell phone has many other functions that one may reasonably assume are being used (*e.g.*, texting, internet browsing, use of an application or game) such that it is not objectively reasonable to assume the officer knows he is being recorded? Indeed, as the First Circuit recognized in *Glik*, "changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw," in large part because "[t]he proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera." 655 F.3d at 84. The First Circuit did not have to wrestle with the knowledge issue in *Glik* because the plaintiff's open recording, and the police officers' knowledge of that recording, clearly fell outside of the wiretapping statute. *Id.* at 87. But, in many cases actual knowledge likely will not be as clear, and the Massachusetts courts should have the opportunity to examine the statute in light of the intersection of evolving technology and knowledge.

Likewise, assuming that the Plaintiffs plan to act as uninvolved third parties to record interactions between police officers and other citizens, as they allege, how is it shown that every person being recorded knows about the recording? Indeed, the Plaintiffs are likely to record people who need police assistance. That is, "[i]f a person has been shot or raped or mugged or badly injured in a car accident or has witnessed any of these things happening to someone else, and seeks out a police officer for aid, what sense would it make to tell him he's welcome to trot off to the nearest police station for a cozy private conversation . . . ?" *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 614 (7th Cir. 2012) (Posner, J., dissenting). Are these victims or witnesses presumed to know that their conversation is being recorded based on the device used by the Plaintiffs or how it is displayed? Or, to use the Plaintiffs' own example, if Martin chooses to record a police officer

[4] Understanding the knowledge element as applied here is difficult due to the Plaintiffs' failure to describe what devices they have used in the past, or plan to use in the future, to openly record or attempt to secretly record.

interacting with a homeless person (Compl. ¶¶ 59, 60), depending on how he chooses to hold a recording device, may that action be outside the statute based on presumptive knowledge, and, if so, how is knowledge presumed for each person being recorded—that is, are the citizen and the officer presumed to have the same knowledge?

These examples, and many others based on the capabilities of smartphones and other modern technology, raise numerous questions about knowledge that will place activities in or out of the statute and should be answered first by the Massachusetts courts.

**2. Massachusetts courts have not considered how the telephone exception applies to new technologies like smartphones.**

Another critical requirement for conviction under the statute is the use of an "intercepting device." Section 99(B)(3) defines that term to mean "any device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication." The definition contains two exceptions—one for hearing aids, and the other colloquially referred to as the "telephone exception." The telephone exception provides that the following is not an intercepting device: "any telephone or telegraph instrument, equipment, facility, or a component thereof, . . . furnished to a subscriber or user by a communications common carrier in the ordinary course of its business under its tariff and being used by the subscriber or user in the ordinary course of its business." Mass. G.L. c. 272, § 99(B)(3). Originally, this exception was identical to its federal counterpart. *Dillon v. Mass. Bay Transp. Auth.*, 49 Mass. App. Ct. 309, 314 (2000). After the breakup of AT&T in the early 1980s, however, much of the equipment and services previously provided by the phone company could be obtained from other non-telephone company sources. *Id.* As a result of this, among other changes in technology, the federal statute was called "hopelessly out of date" and was changed in 1986. *Id.* at 314-15. Section 99 did not change. *Id.* at 315. Thus, what was once a common-sense definition has fallen behind the times.

Now, several phrases from the telephone exception may be ambiguous as applied to modern technology. That is, phones attached to landlines obviously are no longer the only "telephones" in use. Cell phones now incorporate phone capabilities with functions to record video and audio, take pictures, use the internet, and use various other applications. Likewise, computers now have "telephone" capabilities, including voice over internet protocols (VOIP) and video conferencing. And, many electronic tablets now have similar capabilities too. That is to say, unlike in 1968, what is a "telephone" is no longer so clear. Parts of the definition are taken in turn.

Under subsection (B)(3), a "telephone . . . instrument, equipment, facility or a component thereof" does not qualify as a listening device if "furnished to a subscriber or user by a communications common carrier." The Massachusetts Appeals Court has recognized that deviation from this literal definition is warranted now that phones are available from more than one source, some of which are not communications companies. *Dillion*, 49 Mass. App. Ct. at 315-16 (rejecting argument that phones did not fit within the exception because they were not provided by a phone company). But, what now qualifies as "telephone . . . equipment"? The SJC held in 1973 that the word "telephone" in (B)(3) "clearly has reference to a whole instrument as furnished to the subscriber or user." *Commonwealth v. Todisco*, 363 Mass. 445, 452 (1973). There, telephones were disabled and receivers had to be added to make them operational. *Id.* at 451. The SJC rejected the argument that adding these receivers constituted the use of an intercepting device. *Id.* at 452. According to the court, the "clear and obvious legislative intent was to prevent the illegal use of devices external and extraneous to the regular telephone equipment." *Id.* More recently, the court has said that "[i]f the device is connected directly to the phone line it is more likely to be 'telephone equipment' within the meaning of the wiretap statute." *O'Sullivan v. NYNEX Corp.*, 426 Mass. 261, 265 (1997) (concluding that call recording equipment that was separate from phone system, but attached thereto, was "telephone equipment" within meaning of wiretap statute); *see also Dillon*, 49 Mass. App. Ct. at 316-19 (concluding that recording

equipment "directly integrated into phone lines" was telephone equipment for wiretap statute). But, what now counts as regular telephone equipment? Is it the entire cell phone, including any built-in video camera and any audio-recording application? Or just some of the phone's functions, such as those integral to making voice calls? If the phone's recording functions do not normally utilize any communication networks, but they do allow for recordings to be sent over such networks, are those functions directly integrated into phone lines? What about computers and tablets with phone-like capabilities?

Subsection (B)(3) also provides that the telephone exception only applies when the subscriber is using the equipment in the "ordinary course of its business." When claims are made against companies for recording calls, this phraseology makes sense. *See O'Sullivan*, 426 Mass. at 266-67 (noting that most cases involving this phrase have concerned an employer monitoring employees' phone calls, and concluding that company had legitimate reason for recording calls to monitor quality of communications with customers); *Crosland v. Horgan*, 401 Mass. 271, 274-77 (1987) (concluding it was appropriate to ask whether hospital had legitimate business reason to use phone extension to locate person making bomb threats); *Dillon*, 49 Mass. App. Ct. at 319 (calling this the "crux" of telephone exception and concluding MBTA's recording of all calls was within its legitimate business purposes). This phrase, however, also applies to *individuals* using phones and has been "interpreted expansively in the context of a subscriber's residence." *Commonwealth v. Vieux*, 41 Mass. App. Ct. 526, 528 (1996). At least one court in Massachusetts has held that eavesdropping on a phone line within a home did not violate Section 99. *Id.* at 532. With current technology, how does the "ordinary course of business" apply when using a cell phone or computer?

Struggles with this section are not new. The SJC has recognized at least once that the legislative history of subsection (B)(3) provides "little clear guidance." *Crosland*, 401 Mass. at 274. As demonstrated above, since 1968 the Massachusetts courts have had to adjust the

understanding of this section to changes in technology. The state courts should be allowed to do so in light of current phone technology.

### B. A Massachusetts Court Ruling that Clarifies the Massachusetts Wiretapping Statute Could Eliminate Any Need for this Court to Address the First Amendment Issue.

Next, a dispositive ruling on the state-law issues by a state court could eliminate the need for this Court to reach the First Amendment question. If the Massachusetts courts were to construe the statute in a manner that would allow the Plaintiffs to record police-citizen interactions in the desired way without threat of prosecution, then there would be no need for First Amendment review. This case, therefore, fits within "the paradigm of the 'special circumstances' that make abstention appropriate." *Babbitt*, 442 U.S. at 306; *see id.* ("paradigm" is case where state law "is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question"); *cf. Commonwealth v. Bigelow*, No. SJC-11974, 2016 WL 5375401, *3-4 & n.12, 9 (Mass. Sept. 27, 2016) (interpreting state criminal statute in conjunction with First Amendment considerations).

On this point, the *Pullman* case itself is illustrative. *Pullman* involved an equal protection challenge to a Texas Railroad Commission regulation that required every sleeping car operated in Texas to have conductors (who, at the time, were all white) in addition to porters (who were all black). 312 U.S. at 497. The Pullman Company challenged the regulation on grounds that it exceeded the Commission's authority under state statutory law; the Pullman porters intervened, challenging the regulation on grounds that it discriminated against them in violation of the Fourteenth Amendment. *Id.* at 498. The Supreme Court held that, in these circumstances, the proper course was for the district court to abstain from reaching the equal protection issue pending a decision by the Texas courts interpreting the state statute. *Id.* at 501. The Court reasoned that, if the Texas courts determined that the statute did not authorize the Commission's regulation, then there would be "an end of the litigation," and "the constitutional issue does not arise." *Id.* That

result would in turn promote the rule that "federal courts ought not to enter" into a sensitive area of constitutional law "unless no alternative to its adjudication is open." *Id.* at 498.[5]

Here, if the Massachusetts courts conclude that certain devices are not "intercepting device[s]" or that knowledge of the persons recorded may be presumed in certain circumstances in favor of the Plaintiffs, then the Plaintiffs could not be prosecuted under Section 99 and this litigation would conclude. The Court, then, would not need to address the constitutional issue. *Pullman* abstention is therefore appropriate. *See Barr*, 626 F.3d at 108 (abstention warranted where state courts' interpretation of statute governing ballot access could "end the 'void for vagueness' argument"); *Pustell v. Lynn Pub. Sch.*, 18 F.3d 50, 54 (1st Cir. 1994) (abstention warranted where plaintiffs' interpretation of state law, if accepted, "would spare [federal court] from rendering an advisory opinion on the constitutional issues").

### C. The Assertion of a First Amendment Claim Does Not Render the *Pullman* Abstention Doctrine Inapplicable. This Court May Still Abstain, Especially Given the Procedural Mechanisms Available to Quickly Resolve the State-Court Issues.

Finally, the mere fact that the Plaintiffs claim a First Amendment violation does not render abstention inappropriate. The Supreme Court "has never endorsed such a proposition." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring) (citing *Babbitt*, 442 U.S. at 306-12). Indeed, although the Supreme Court has been "particularly reluctant to abstain in cases involving *facial* challenges based on the First Amendment," *City of Houston v. Hill*, 482 U.S. 451, 468 (1987) (emphasis added), an as-applied challenge presents different considerations. When a facial challenge is involved, abstention is generally not appropriate because "extensive adjudications, under a variety of factual situations, [would be required to bring the statute] within the bounds of permissible constitutional certainty," a result which would be "quite costly where

[5] As demonstrated by *Pullman*, abstention can be appropriate even if no state-court action is pending. 312 U.S. at 501; *see also Barr*, 626 F.3d at 108 n.3 ("Though the existence of a pending state court action is sometimes considered as a factor in favor of abstention, the lack of such pending proceedings does not necessarily prevent abstention by a federal court.").

the vagueness of a state statute may inhibit the exercise of First Amendment freedoms." *Baggett v. Bullitt*, 377 U.S. 360, 378, 379 (1964); *see also Zwickler v. Koota*, 389 U.S. 241, 252 (1967) (addressing facial challenge to state criminal statute for anonymous distribution of handbills, and stating that "to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect"). Those concerns, however, do not arise in an as-applied challenge under the First Amendment.

Where the state courts can, in a single proceeding, determine the bounds of the state statute by choosing between alternative meanings of the statute, abstention is proper even where a First Amendment challenge is involved. *See, e.g.*, *Babbitt*, 442 U.S. at 308. Here, the Plaintiffs will not suffer irreparable harm if they are required to litigate their state-law claims in state court. According to the Plaintiffs, they know they are free to record police interactions in a variety of ways, and, apparently, have done so. *See* Compl. ¶¶ 43, 67. Neither of the Plaintiffs has been prosecuted, or even threatened with prosecution, for any of their actions. Litigating this as-applied challenge in the state courts, thus, would not pose an "onerous burden" on the Plaintiffs. *See Barr*, 626 F.3d at 103, 108 n.3 (*Pullman* abstention proper, even though plaintiffs claimed that state law violated their rights to free speech and freedom of association, because "any delay in obtaining relief pending state court adjudication would impose no onerous burden upon the parties").

Furthermore, the weighing of abstention versus expediency is also affected by the availability of a certification procedure to the state court. The Supreme Court has stated that "the availability of certification greatly simplifies" this analysis. *Bellotti v. Baird*, 428 U.S. 132, 151 (1976) (recognizing availability of certification to Massachusetts Supreme Judicial Court and concluding District Court should have certified question of state law to that court). Indeed, the Court has remarked that certification now covers much of the same territory as traditional *Pullman* abstention. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-76 (1997) (recognizing

advantages of certification and concluding that federal courts should have certified question of state law to state courts). Indeed, "[s]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Id.* (quoting *Brockett*, 472 U.S. at 510 (O'Connor, J, concurring)). The SJC is authorized to address questions of state law certified from this Court, and it is the appropriate forum in which to clarify the scope and application of Section 99. Mass. Sup. Jud. Ct. R. 1:03.[6]

**D. Beyond *Pullman* Abstention, and in Addition to the Massachusetts Courts, the State Legislature, Law Enforcement Organizations, and Citizens Should Be Allowed to Continue the Multiple Levels of Engagement on the Issue of Police and Citizen Interactions before this Court Intervenes.**

The laboratory of democracy in Massachusetts is very engaged in addressing the crux of the Plaintiffs' lawsuit—interactions between police and citizens, and the extent to which they can and should be recorded. Although this statute is rarely, if ever, used to prosecute citizens for the actions the Plaintiffs discuss, the Massachusetts legislature has been actively debating updates or changes to the statute. In the last two-year session alone (the 189th General Court), numerous bills were introduced in the House and the Senate proposing various changes to the wiretap statute. *See* An Act to Assist the Investigation of Serious Crimes, S. 941; An Act to Assist the Investigation of Serious Crimes H. 1222; An Act Updating the Wire Interception Law, H. 1554; An Act Relative to the Interception of Wire and Oral Communications, H. 1487; An Act to Allow the Recording of Conversations to Reflect Federal Law Whereby a Party to a Conversation May Record It Without Prior Consent as long as the Recording Is Not Done with Criminal or Tortious Intent, S.

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[6] In pertinent part, Supreme Judicial Court Rule 1:03 states:

> This court may answer questions of law certified to it by . . . a United States District Court . . . when requested by the certifying court if there are involved in any proceeding before it questions of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

861; An Act Clarifying a Designated Offense Under the State's Wiretap Statute, H. 1638; An Act Relative to the Interception of Wire and Oral Communications, S. 883; An Act Relative to the Interception of Wire and Oral Communications, H. 4313. The democratic process is currently working on these issues and should be allowed to continue.

As further evidence of the current debate at the local level, the Boston Police Department and other departments are currently weighing the use of officers wearing body cameras. The result of these experiments could conceivably allay the concerns of these Plaintiffs in seeking to record the police. Allowing citizens and their government to work through these issues is the best solution.

Plainly, parts of the current wiretap statute may be ambiguous when applied to evolving technology, and experiments for monitoring police-citizen interactions are already underway. These issues of local concern and governance should be left to the Massachusetts courts, officials, and citizens to decide.

* * *

In sum, interpreting the wiretapping statute as applied here implicates substantial state concerns. And, as discussed next, the ambiguities in the statute raise questions of how or whether the Plaintiffs are even injured and, hence, whether this Court even has jurisdiction to determine this matter. Thus, the interests of comity and wise judicial administration would be advanced if the Massachusetts courts are given the opportunity to address those questions before this Court reaches the First Amendment claim. *See Babbitt*, 442 U.S. at 307-312 (state courts should have first opportunity to construe state statute, and so federal court should have abstained despite presence of multiple First Amendment claims); *Pustell*, 18 F.3d at 54 (district court should have abstained from deciding constitutional issues, including free-exercise claim under First Amendment, in order to avoid "'needless friction' with state and local policies") (quoting *Pullman*, 312 U.S. at 500). This Court, therefore, should abstain and dismiss the complaint to allow the Massachusetts courts to address any ambiguities contained in the wiretap statute.

## II. The Plaintiffs Lack Standing.

### A. Standard of Review for a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1).

Under Federal Rule of Civil Procedure 12(b)(1), a court must dismiss a case for which it lacks subject matter jurisdiction, as when the plaintiffs lack standing. In deciding a motion to dismiss for lack of standing, the court must "accept as true all well-pleaded factual averments in the plaintiff's complaint and indulge all reasonable inferences therefrom in his favor."[7] *Katz v. Pershing, LLC*, 672 F.3d 64, 70 (1st Cir. 2012) (internal alterations omitted). Nonetheless, allegations of standing must be reasonably definite, be factual, and relate either directly or inferentially to each material element necessary to establish standing. *See United States v. AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992) (rejecting "conclusory allegations" and "generalized averments" of standing and requiring "reasonably definite factual allegations, either direct or inferential, regarding each material element needed to sustain standing"); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As with any complaint, bare assertions or legal conclusions are not sufficient. *Ashcroft*, 556 U.S. at 678 (stating that Rule 8 pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation" (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

### B. The Complaint Fails to Demonstrate that the Plaintiffs Have Standing.

A plaintiff has the burden of establishing standing to bring a claim before a federal court, which may only decide cases and controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992); *Blum v. Holder*, 744 F.3d 790, 795 (1st Cir. 2014) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013), which in turn quoted *Lujan*, 504 U.S. at 561) ("The party

[7] A review under Rule 12(b)(1), unlike a motion under Rule 12(b)(6), allows the court to consider materials outside of the complaint. *See Carroll v. United States*, 661 F.3d 87, 94 (1st Cir. 2011). No such materials were submitted with the complaint here. But should any of the defendants' arguments be viewed as referencing outside sources, it would not change the character of their motion.

invoking federal jurisdiction bears the burden of establishing standing")); *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 30 (1st Cir. 1999) ("The burden of establishing standing rests with the party who invokes federal jurisdiction") (citing *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997)). The standing inquiry is "especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by [another] branch [of government] was unconstitutional." *Clapper*, 133 S. Ct. at 1147 (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). That principle should be even stronger where, as here, the case challenges actions taken by the legislative body of a dual sovereign. *See Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (recognizing that federalist system and separation of powers both prevent excesses of power).

Standing involves both constitutional and prudential considerations. The constitutional elements of standing must be proven in every case. *See Osediacz v. City of Cranston*, 414 F.3d 136, 139 (1st Cir. 2005) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). To do so, a plaintiff must show (1) that he personally has suffered an actual or threatened injury; (2) that the injury can be fairly traced to the challenged conduct; and (3) that a favorable decision likely will redress it. *Rhode Island Ass'n of Realtors*, 199 F.3d at 30 (citations omitted); *see also Lujan*, 504 U.S. at 560-61. In general, prudential considerations require a plaintiff to show that he is seeking to protect his own legal rights, that his complaint is not merely a generalized grievance, and that the complaint is within the zone of interests protected by the law invoked. *See, e.g.*, *Ramirez v. Sanchez Ramos*, 438 F.3d 92, 98 (1st Cir. 2006) (concluding plaintiff had standing for as-applied challenge because criminal charges were pending at the time she sued).

In a pre-enforcement challenge to a criminal statute, as here, "[b]y definition, . . . the government has not yet applied the allegedly unconstitutional law to the plaintiff, and thus there is no tangible injury." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 47 (1st Cir. 2011). Thus, the injury-in-fact prong can be difficult to meet. It requires one of two showings. Either, a plaintiff must allege "an intention to engage in a course of conduct arguably affected with a constitutional

interest, but proscribed by [the] statute, and there exists a credible threat of prosecution." *Blum*, 744 F.3d at 796 (citations omitted). Or, he must allege that he is "chilled from exercising [his] right to free expression or forgoes expression in order to avoid enforcement consequences." *Id.* (citations omitted). The Plaintiffs have not satisfied either option.

Both paths require a plaintiff to make a clear showing of a credible threat that the statute will be enforced against him to his detriment. *See Blum*, 744 F.3d at 796 ("The Supreme Court has long held that as to both sorts of claims of harm, '[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'") (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). The threatened injury must be "certainly impending." *Id.* at 797-98 (quoting *Clapper*, 133 S. Ct. at 1147 (other citations omitted)).[8] A subjective fear of enforcement is not enough. *Id.* at 796 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)); *see also id.* at 797 (recognizing Supreme Court's holding that it is not enough to "allege a subjective fear of injurious government actions, even if that subjective fear is not fanciful, irrational, or clearly unreasonable" (citations and quotations omitted)). Nor are allegations of merely possible future injury adequate. *Clapper*, 133 S. Ct. at 1147 (citing cases). Although the threshold showing for a plaintiff was previously called "modest," it is nonetheless real. *See Ramirez*, 438 F.3d at 98-99 (concluding that plaintiff's pleading failed to properly allege standing for facial First Amendment challenge); *see also Blum v. Holder*, 930 F. Supp. 2d 326, 335-37 (D. Mass. 2013) (concluding plaintiffs failed to allege standing because none of their proposed activities violated challenged statute), *aff'd*, 744 F.3d 790 (1st Cir. 2014). The Plaintiffs do not pass the threshold.

[8] Indeed, the First Circuit in *Blum* recognized that the Supreme Court's rejection of an "objectively reasonable likelihood" standard in *Clapper* may have announced a more stringent injury standard for standing in pre-enforcement challenges on First Amendment grounds to state statutes than previously used in this Circuit. *Blum*, 744 F.3d at 798 (citing previous First Circuit cases).

The Plaintiffs present no facts that a prosecution against them is certainly impending for violating Section 99.[9] Although the Plaintiffs allege that they intend to engage in conduct proscribed by the statute, the allegation lacks specificity and fails to articulate a credible threat of prosecution. Both Plaintiffs repeatedly state that they want to secretly record the police, but they fail to provide any allegations of how the recordings would be secret. *See* Compl. ¶¶ 46, 47, 48, 57, 60, 70, 72, 79, 80, 84, 106, 107. For example, Martin states that he "wants to secretly record BPD police officers performing their public duties when he is alone." Compl. ¶ 48. Yet, he does not explain how that conduct might be an illegal "interception" as defined in Section 99, or what type of "intercepting device" he might use.[10] Mass. G.L. c. 272, § 99 (B)(3), (4). His vague pleading is further compounded by the potential interpretive issues with Section 99 discussed above. That is, whether a prosecution is likely turns on both facts he has not clearly articulated and interpretive questions with the state law.

Perez's allegations suffer from the same problem. He only presents conclusory statements—such as that he "wanted to secretly record BPD police officers performing their duties in public on numerous occasions, and he wants to do so in the future"—without providing enough detail to determine whether the recording would be illegal, or likely subject him to prosecution. Compl. ¶ 70. His only clearly-stated desire is to secretly record police during a traffic stop. Compl. ¶ 72. There is no allegation that such a stop is "certainly impending" and the possibility of such a

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[9] Although the Supreme Court re-articulated the "certainly impending" standard for standing in *Clapper*, and the First Circuit recognized in *Blum* that this standard calls into question its previous reasonableness standard, the Plaintiffs appear to rely on the reasonableness standard. Compl. p. 15, heading V; *see Clapper*, 133 S. Ct. at 1147 ("the . . . 'objectively reasonable likelihood' standard is inconsistent with our requirement that 'threatened injury must be certainly impending to constitute injury in fact.'").

Also, for this argument it will be assumed, but not conceded, that the First Amendment "arguably affect[s]" the Plaintiffs' actions.

[10] He repeats a similar allegation in relation to desiring to film police officers interacting with homeless individuals in Downtown Crossing. Compl. ¶¶ 59, 60. In addition to the issues above, he fails to articulate basic information about this desire such as what time of day these interactions might occur; or why, in such a populated area of downtown Boston, he either (a) fears open recording, or (b) fears that arrest and prosecution for secret recording is certainly impending.

stop in the future is too speculative to support jurisdiction. *See Clapper*, 133 S. Ct. at 1148 (theory of standing that relies on "highly attenuated chain of possibilities" is not sufficient to satisfy injury requirement).

Moreover, although the Plaintiffs allege that their desire to secretly record is mostly due to their fear of the police, many of their allegations relate to police conduct in other states from years ago. This Defendant does not question the genuineness of their fears.[11] But, the question of jurisdiction must focus on the current likelihood of harm in Massachusetts. In the complaint, Martin claims that the turning point for him was an interaction with police that occurred in Colorado eleven years ago. Compl. ¶¶ 52, 53. Perez alleges fears based on traffic stops in Texas and an interaction with a police officer in Chicago. Compl. ¶¶ 73, 74, 83. Indeed, Perez admits that his interactions with Boston police officers "have been different from those in Texas." Compl. ¶ 75. Moreover, only one of these three allegations (Perez in Chicago) has any relation to recording police; the others relate to police stopping Martin on the street and an unidentified number of traffic stops of Perez. Compl. ¶¶ 52, 73, 74, 83. Not to minimize these individuals' alleged interactions in those locations, but allegations about police in other states bears little relevance to establishing standing based on the likelihood of prosecution in Massachusetts.[12]

Likewise, the Plaintiffs' conclusory assertions that the Suffolk District Attorney has a policy of using Section 99 to prosecute falls well short of meeting the "clearly impending" requirement. The entire section of the Complaint dedicated to enforcement of Section 99 (¶¶ 90-

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[11] Indeed, in discussing the consideration of an individual's flight as one factor in assessing whether police have reasonable suspicion for an investigatory stop, the Supreme Judicial Court recently recognized that black males on the streets of Boston might be equally motivated by a desire to avoid being racially profiled as by the desire to hide criminal activity. *Commonwealth v. Warren*, No. SJC-11956, 2016 WL 5084242, *6 (Mass. Sept. 20, 2016) (concluding that flight is not eliminated "as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop" but instructing that judges "should, in appropriate cases, consider the report's findings [that black men in Boston are more likely to be subjected to police-civilian interactions] in weighing flight as a factor").

[12] Although Martin elsewhere alleges he has been stopped "nearly a dozen times by police officers," Compl. ¶ 51, he does not allege where those stops occurred (*i.e.*, whether they were in Boston, or even Massachusetts), or why. Perez also alleges that "on multiple occasions" police have interrupted his open recording, Compl. ¶ 81, but mentions only one example in any detail (from a protest, Compl. ¶ 77, 78).

107) makes only one allegation about the Suffolk District Attorney: that the office prosecuted one person ten years ago using Section 99.[13] Compl. ¶ 91. Otherwise, the Plaintiffs provide nothing but boilerplate statements, such as that "the Suffolk District Attorney enforces Section 99."[14] Compl. ¶¶ 90, 91, 106, 107. Nor is this pleading failure saved by the Plaintiffs' reference to other cases earlier in the complaint. That is, the Plaintiffs allege only six uses of Section 99 state-wide in the past fifteen years. Compl. ¶¶ 33-39. Two of these are the prosecutions in *Hyde* and *Manzelli*; the other four involve charges brought by police departments in Hadley, Chicopee, Shrewsbury and Hardwick, none of which, obviously are the named defendants here. *Id.* And, as relevant to the Suffolk District Attorney, for at least three of those allegations the complaint provides no details about whether an actual prosecution resulted. Compl. ¶¶ 36, 38, 39.

This lack of a history is critical because, to assess "the risk of prosecution as to particular facts, weight must be given to the lack of a history of enforcement of the challenged statute to like facts." *Blum*, 744 F.3d at 798.[15] Plainly, the lack of charges or prosecutions in Suffolk County under this statute undermines any argument by the Plaintiffs that a prosecution of them is certainly impending.

In sum, the Plaintiffs fail to allege, with any plausible degree of specificity and concreteness, that a prosecution against them under Section 99 is fairly certain. As such, their complaint stands in stark contrast to those cases in which standing is found. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342-46 (2014) (detailing other cases in which standing was

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[13] The Plaintiffs are referring to *Commonwealth v. Manzelli*, 68 Mass. App. Ct. 691 (2007). There, the defendant was prosecuted for both disorderly conduct and violation of the wiretap statute. *Id.* at 691. On appeal he challenged his conviction because a copy of the recordings was not produced at trial. *Id.* at 693. The Plaintiffs nowhere suggest that they would act in a similarly disruptive manner and otherwise fail to articulate any link, or provide any details, about how their actions might be similar to those of the defendant in *Manzelli*.

[14] The remainder of the allegations in this section focus on co-defendant the Boston Police Department and discuss its documents and videos. Compl. ¶¶ 92-105.

[15] Under pre-*Blum* and *Clapper* law, the lack of criminal prosecutions, standing alone, would not be dispositive in the defendants' favor. *See Rhode Island Ass'n of Realtors*, 199 F.3d at 32 (pointing out issues in relying heavily on lack of prosecution in this analysis). The First Circuit's directive in *Blum* certainly calls this position into question.

established; and concluding standing existed, in part, because plaintiff pleaded "specific statements they intend to make" (in addition to past statements made), there was history of past enforcement in like circumstances, plaintiff had taken some actions to make statement, and state commission had found probable cause to believe statement violated state statute). The first option for standing—an intention to engage in conduct that is "proscribed by [the] statute, [where] there exists a credible threat of prosecution"—is, therefore, not met. *Blum*, 744 F.3d at 796.

The Plaintiffs also cannot find standing under the second option for a pre-enforcement complaint—showing that their actions have been chilled by the statute. *Blum*, 744 F.3d at 796. The Plaintiffs may, of course, record police-citizen interactions openly. But, their allegations of chilling of secret recording, due to their beliefs about prosecution, are bare statements that they will not secretly record in the future. For example, Martin states that he "will continue to refrain from [secretly recording], because he is afraid that he will get arrested or prosecuted for violating Section 99." Compl. ¶ 47; *see also id.* ¶¶ 56, 60. Perez makes the same statement. *Id.* ¶¶ 71, 79, 84. These "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Blum*, 744 F.3d at 796 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)); *see also Clapper*, 133 S. Ct. at 1152. This is plain when the Plaintiffs' averments are compared to cases in which plaintiffs have detailed how their speech was chilled. *See, e.g.*, *Meese v. Keene*, 481 U.S. 465, 467, 472-75 (1987) (concluding plaintiff had standing when his allegations showed he was unquestionably regulated by relevant statute, films he wished to show were already labelled "political propaganda," and, among other things, he demonstrated through "detailed affidavits" that showing films would risk his personal, political, and professional reputation and career); *see also Clapper*, 133 S. Ct. at 1152-54. The Plaintiffs' conclusory statements of subjective fear of prosecution are not enough to meet their burden of proving standing.

"[T]he mere existence of a state penal statute [] constitute[s] insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." *Poe v. Ullman*, 367 U.S. 497, 507 (1961) (opinion of Frankfurter, J., for a plurality of the Court). Accordingly, the complaint should be dismissed.

## CONCLUSION

For the above reasons, the Court should dismiss the complaint.

Respectfully submitted,

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Dated: September 30, 2016

## LOCAL RULES 7.1(A)(2) CERTIFICATION

I hereby certify that I have conferred with counsel for the Plaintiff in this matter and attempted in good faith to resolve or narrow these issues.

/s/ *Ryan E. Ferch*
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Assistant Attorney General

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ *Ryan E. Ferch*
Ryan E. Ferch
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