UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

K. ERIC MARTIN, and RENÉ PÉREZ Plaintiffs, v. WILLIAM EVANS, in his Official Capacity as Police Commissioner for the City of Boston, and DANIEL F. CONLEY, in his Official Capacity as District Attorney for Suffolk County, Defendants.	Civ. No 1:16-cv-11362-PBS **Oral Argument Requested**

PLAINTIFFS' OPPOSITION TO DEFENDANT CONLEY'S MOTION TO DISMISS

Plaintiffs Eric Martin and René Pérez bring this challenge to vindicate their First Amendment right to record police officers in the public performance of their duties. Because plaintiffs wish to secretly exercise this right, and because doing so would expose them to a Massachusetts wiretap law prosecution by defendant Daniel Conley, the District Attorney for Suffolk County, this case should proceed to the merits of plaintiffs' pre-enforcement challenge.

Plaintiffs believe that secretly exercising their First Amendment right to record police officers publicly performing their duties is sometimes the only means to safely gather and disseminate accurate information about police actions in the community. However, the Massachusetts wiretap law, M.G.L. ch. 272 § 99 (Section 99), broadly prohibits secret recordings. The Supreme Judicial Court (SJC) has held that this prohibition applies to the secret recording of police officers, *Commonwealth v. Hyde,* 434 Mass. 594, 599-600 (2001), and the Boston Police Department (BPD) has adopted a policy of enforcing this same interpretation of Section 99, Complaint (Compl.) ¶¶ 92-105, ECF No. 1. As a result, although plaintiffs want to

secretly exercise their constitutional right to record police officers performing their public duties, they are refraining from doing so due to a credible fear of arrest and prosecution. They therefore assert a viable First Amendment claim that the existence and enforcement of Section 99 unlawfully chills their constitutional rights.

District Attorney Conley does not deny that if plaintiffs secretly record police officers performing their duties in public, they will be in outright violation of Section 99. Nor does he disavow an intention to prosecute plaintiffs for this violation. But Conley nevertheless asks this Court to refrain from reaching the merits of this case. First, he argues that this Court should abstain so that the Massachusetts SJC has an opportunity to address statutory arguments that cannot succeed and which no one in this case has advanced. Second, Conley argues that plaintiffs lack standing, notwithstanding the clear peril they will face if they secretly record a police officer performing duties in public. Both arguments are incorrect.

First, the "extraordinary and narrow exception" of *Pullman* abstention is not warranted here. *Cuesnongle v. Ramos*, 835 F.2d 1486, 1499 (1st Cir. 1987) (internal quotation marks omitted). Courts abstain under *Pullman* only if there is both "substantial uncertainty" regarding the meaning of a state law, and a "reasonable possibility" that a state court decision resolving that uncertainty would dispose of the federal claim. *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 322 (1st Cir. 1992). But there is no "substantial uncertainty" regarding Section 99. *Hyde* unequivocally held that this statute criminalizes the secret recording of police officers performing their duties in public, 434 Mass. at 599-600, and the Boston Police Department's policy—expressed in official training materials and Commissioner Evans' motion to dismiss in this case—is to enforce Section 99 against civilians who secretly record officers. Although

Conley speculates that the SJC might limit what constitutes secret recording, or hold that Section 99 does not apply to smartphones, these are not plausible readings of Section 99.

Even if Section 99 were substantially uncertain, there would be no "reasonable possibility" that abstention by this Court would yield an SJC opinion that disposes of this case. As a threshold matter, neither defendant Conley nor defendant William Evans appears willing to argue that the SJC *should* adopt any limiting construction of Section 99. But even if they were, and even if the SJC were to expand the conduct that is deemed *not secret* under Section 99, this Court would still need to address plaintiffs' constitutional challenge for the simple reason that plaintiffs wish to engage in conduct that *is secret* under Section 99. Because this Court will need to address plaintiffs First Amendment claim no matter what the SJC might do, the *Pullman* doctrine mandates that this Court is the proper forum now.

Second, plaintiffs have standing because they have established a "credible threat of enforcement" of Section 99 against them. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2343 (2014). The law's plain language, the SJC's decision in *Hyde*, and the BPD's continued and explicit assertion that they will enforce this prohibition against those who secretly record police officers performing their duties in public, all belie Conley's suggestion that plaintiffs' fears "entail unsupported assumptions." Conley Mem. 3, ECF No. 17-1. Conley cannot overcome the presumption that the Commonwealth will enforce this non-moribund statute against plaintiffs because he fails to disavow enforcement of Section 99 and does not give any other indication that there is no intent to enforce. *Blum v. Holder*, 744 F.3d 790, 798-99 & n.11 (1st Cir. 2014); *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996).

STATEMENT OF FACTS

As elaborated more fully in the argument below, the Complaint alleges the following facts:

I. Law enforcement officials enforce Section 99's ban of secretly recording police officers performing their duties in public.

Section 99 imposes up to five years' incarceration on "any person who willfully commits an interception, [or] attempts to commit an interception" of any "communication," where "interception" means "to secretly hear, secretly record, or aid another to secretly hear or secretly record." M.G.L. ch. 272 § 99(B)(4) & (C)(1). It imposes the same felony liability on any person who "permits," "participates in a conspiracy to commit," or serves as "an accessory to a person who commits" a prohibited interception. *Id.* § 99(C)(6). Section 99 contains no exemption for secretly recording police officers performing their duties in public, and indeed, law enforcement officials have arrested and prosecuted several individuals for this behavior.

For example, Michael Hyde was convicted under this statute for secretly recording a traffic stop, *Hyde*, 434 Mass. at 594-97, and District Attorney Conley prosecuted Jeffrey Manzelli under Section 99 for recording police officers during a demonstration with an allegedly secret tape recorder, *Commonwealth v. Manzelli*, 68 Mass. App. Ct. 691 (2007). In the past six years, both the Hadley and Chicopee Police Departments have charged individuals with violating Section 99 for secretly recording police officers performing their duties in public, while the Hardwick Police Department charged a woman as an accessory because she knew about, and was present during, the secret recording of a traffic stop. Compl. ¶¶ 35-36, 39. During this same period, the Shrewsbury Police Department charged an individual under Section 99 for instructing a passenger how to use a recording device so that she could secretly record his interaction with a police officer. *Id.* ¶ 38.

BPD's training materials instruct officers that they may arrest and charge someone who secretly records police officers performing their duties in public. *Id.* ¶ 93. BPD's Training Bulletin 15-10 describes two cases where defendants were convicted for secretly recording police officers performing their duties in public, and instructs officers that they have a "right of arrest" if they have probable cause to believe that someone violates Section 99. *Id.* ¶¶ 94-97. A BPD training video similarly tells officers that Section 99 "specifically prohibit[s] all secret recordings by members of [the] public, including recordings of police officers." *Id.* ¶ 102. It goes on to depict a scene where a driver secretly records a police officer during a traffic stop, instructing officers that they could "take charges out against" the driver for secretly recording the police. *Id.* ¶¶ 102, 104-105.

II. Mr. Martin and Mr. Pérez want to secretly record police performing their duties in public, but are afraid to do so for fear of arrest or prosecution under Section 99.

Mr. Martin and Mr. Pérez each want to secretly record police officers performing their duties in public. *Id.* ¶¶ 6, 46, 56-57, 70, 80. Mr. Martin would like to do so when he is alone because he does not feel safe openly recording police officers in such instances. *Id.* ¶¶ 6, 44, 48-49, 56, 72, 76, 79. This fear stems from his personal experiences—including an instance in Colorado where police officers pulled their guns and slammed Mr. Martin on the hood of a car before realizing that he was not their suspect, and another when a BPD officer shoved him to the ground and yelled at him to stop taking pictures during a political demonstration—as well as the April 2015 video of a BPD officer waving what appeared at the time to be a real gun in the face of a civilian who was openly recording the officer's activities. *Id.* ¶¶ 50, 52-55. He also wants to secretly record police officers performing their duties in public to create an accurate narrative of their behavior during street stops or their interactions with homeless individuals. *Id.* ¶¶ 57-60.

Mr. Pérez similarly wants to secretly record police officers during traffic stops when he is alone because he does not feel safe doing so openly. *Id.* ¶¶ 72-79. This fear partially stems from his experiences in Texas, where police officers always yelled at him to get out of the car as soon as he was pulled over. *Id.* ¶ 74. He is also afraid to record such interactions because—based on an instance when a BPD police officer screamed at him and grabbed his recording device while he was openly recording the officer's interactions with protesters—he learned that openly recording a BPD police officer can trigger a hostile response that threatens his physical safety. *Id.* ¶¶ 76-78. Mr. Pérez also wants to secretly record police officers to accurately capture their behavior and to ensure he can record without disruption. *Id.* ¶¶ 80-83.

Despite their desire to secretly record police officers performing their duties in public, plaintiffs will not do so because they are afraid of being arrested and prosecuted under Section 99. ¶¶ 1, 8, 47, 71.

ARGUMENT

I. The narrow *Pullman* abstention doctrine does not apply here.

Pullman abstention is "an extraordinary and narrow exception" applicable only in "exceptional circumstances." *Cuesnongle*, 835 F.2d at 1499 (internal quotation marks omitted); *see also Zwickler v. Koota*, 389 U.S. 241, 248 (1967) (*Pullman* abstention applies "only in narrowly limited, special circumstances"). Specifically, there must be (1) "substantial uncertainty over the meaning of state law at issue," and (2) "a reasonable possibility that the state court clarification of the law will obviate the need for a federal constitutional ruling." *Rivera-Puig*, 983 F.2d at 322. Neither prerequisite is met here.

A. The meaning of Section 99 is not substantially uncertain.

Although "any statutory provision can be made ambiguous through a sufficiently assiduous application of legal discrimination," that is not the relevant test for the purposes of *Pullman* abstention. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 315-16 (1979) (Brennan, J. concurring in part and dissenting in part). Instead, there must be substantial uncertainty that is evident on the face of the statute. *See, e.g., Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496, 499 (1941) (meaning of statutory terms "discrimination" and "abuses" is "far from clear").

Section 99 poses no such uncertainty. Its plain language prohibits using any "intercepting device" "to secretly hear, secretly record or aid another secretly hear or secretly record the contents of any wire or oral communication." M.G.L. Ch. 272 § 99(B)(3) & (4). The SJC has held that this "carefully worded and unambiguous" statute "strictly [] prohibit[s] all secret recordings by members of the public, including recordings of police officers." *Hyde*, 434 Mass at 598-99; *see id.* at 605 (secret recording is "unequivocally banned").[1] And Commissioner Evans agrees that the SJC "has applied this rule in precisely the situation that Plaintiffs claim to fear." Evans Mem. 9, ECF No. 19.

Faced with unanimous agreement that Section 99 criminalizes the secret recording of police officers conducting their duties in public, District Attorney Conley nevertheless argues that statutory ambiguity exists because: (1) Section 99 might be interpreted to impute "presumptive knowledge" to almost anyone subject to recording, based on the "nearly

[1] Decided in 2001, *Hyde* remains relevant and persuasive for this Court's *Pullman* analysis. *Cf. Kusper v. Pontikes*, 414 U.S. 51, 55 (1973) (abstention inappropriate where state supreme court interpreted statute 18 years earlier); *Kimball v. Florida Bar*, 537 F.2d 1305, 1306 (5th Cir. 1976) (abstention inappropriate where state supreme court interpreted statute 19 years earlier).

ubiquitous" use of cellphones; or (2) Section 99's "telephone exception" might be interpreted to include cellphones, which would exempt all cellphone recordings from the ban on secret recordings. Conley Mem. 7-13. Either interpretation would authorize essentially all cellphone recordings of *any person*, not just police officers.[2] But neither interpretation is plausible.

With respect to the ubiquity of cellphones, since "the uncontrolled development and unrestricted use of modern electronic surveillance devices," was the impetus for Section 99's enactment, M.G.L. ch. 272 § 99(A), the popularity of consumer recording devices is an unlikely rationale for imputing "presumptive knowledge" to people who are the subject of recordings. True, the ubiquity of cellphones might make it more difficult to prove that a recording in a particular case was in fact "secret" under Section 99. But proving a violation of a criminal law often hinges on case-specific facts; this reality has not prevented federal courts from addressing constitutional challenges in the past, and should not do so here. *See, e.g., Thayer v. Worcester*, 144 F. Supp. 3d 218, 235-38 (D. Mass. 2015) (analyzing First Amendment challenge to ordinance criminalizing panhandling in "an aggressive manner"); *McLaughlin v. Lowell*, 140 F. Supp. 3d 177, 194-95 (D. Mass. 2015) (analyzing First Amendment challenge to ordinance criminalizing panhandling in an "intimidating" manner).

Notably, other law enforcement agencies have no uncertainty about the application of Section 99 to cellphones. Individuals have been charged with violating Section 99 for recording police officers with cellphones. *See, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 79-80 (1st Cir. 2011).[3] In

[2] It is therefore unclear why the District Attorney has floated these questions as grounds for abstention in this case but not in *Project Veritas Action Fund v. Conley*, where the plaintiff alleges that Section 99 is unconstitutional on its face. *See* No. 16-cv-10462, ECF No. 27-1.

[3] *See also* "Woman accused of wiretapping for allegedly recording own arrest," Julianne Pepitone, NBC News, (May 12, 2014) (secret recording via cellphone), *available at* http://www.nbcnews.com/tech/tech-news/woman-accused-wiretapping-allegedly-recording-own-

addition, we anticipate the evidence to show that the BPD's official training materials instructs officers that they can take charges out against an individual for secretly recording a police officer with a cellphone. There is therefore no uncertainty, let alone a substantial one, about the meaning of Section 99.

B. There is no reasonable possibility that a state court interpretation of Section 99 would dispose of this case.

Even if the meaning of Section 99 were uncertain, abstention would still be inappropriate because it is not "fairly subject to an interpretation" that would obviate the need to address the constitutional question. *Harman v. Forssenius,* 380 U.S. 528, 534-35. "In the abstract, of course, such possibilities always exist." *Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229, 237 (1984). But abstention requires much more than a "bare, though unlikely, possibility" of such a construction. *Id.*; *see also Druker v. Sullivan*, 458 F.2d 1272, 1274 (1st Cir. 1972) ("[T]he mere mechanical possibility" of a particular interpretation "does not itself make abstention appropriate."). Instead, the statute must be "obviously susceptible" to an interpretation that would render a constitutional ruling unnecessary. *Zwicker* 389 U.S. at 251 n.14. Conley cannot satisfy this standard.

First, Conley does not argue that the SJC *should* hold (1) that any cellphone recording is presumptively not secret, or (2) that cellphones are not intercepting devices. Indeed, if this case were to arrive in state court, District Attorney Conley might be expected to oppose these limiting constructions of Section 99. This case is thus critically different from *Pullman,* where one of the parties actually argued for an interpretation of state law that, if accepted in state court, would

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arrest-n103336; "Man charged with illegally videotaping Hardwick police," Kim Ring, Worcester Telegram & Gazette (July 29, 2015) (secret recording via cellphone), *available at* http://www.telegram.com/article/20150729/NEWS/150729022.

have extinguished the federal question. 312 U.S. at 497-98. In contrast, it would be odd to send this case to state court to address an argument that none of the parties has advanced.

Second, even if Conley were willing to champion the narrow constructions of Section 99 hypothesized in his brief, there would still be no "reasonable possibility" of an SJC decision capable of resolving this case. It is unlikely the SJC would interpret Section 99 to exempt cellphones or embrace permanent presumed knowledge of cellphone recordings, given that either interpretation would authorize essentially *all* secret recordings via cellphone, not just those involving police officers. *Hyde* already refused to adopt an interpretation of Section 99 that would exempt "virtually every encounter or meeting between a person and a public official," based on the SJC's conclusion that "it is not our function to craft unwarranted judicial exceptions to a statute that is unambiguous on its face." 434 Mass. at 603-04. But even if the SJC were willing to reverse course and judicially limit Section 99, its holding still would not "sufficiently limit [the] scope" of the statute to obviate the need to adjudicate plaintiffs' constitutional challenge, *Houston v. Hill,* 482 U.S. 451, 469 n.18 (1987), which is not restricted to cellphone recordings. The Complaint seeks to protect plaintiffs' constitutional right to record police officers in circumstances that are "secret" under Section 99.[4] Simply narrowing the universe of what constitutes "secret"—either via presumed knowledge or exempting particular devices—cannot address plaintiffs' claim because they *want* to record secretly due to safety concerns and a desire to accurately capture police behavior. Compl. ¶¶ 6, 47-49, 56, 58, 60, 72, 79, 80, 84.

[4] In fact, people have been prosecuted for secretly recording police officers with devices other than smartphones. *See, e.g.*, *Manzelli*, 68 Mass. App. Ct. at 691-94 (tape recorder); *Damon*, 964 F. Supp. 2d at 128 (camera with audio). And plaintiffs never state that they want to secretly record police officers only with smartphones. Compl. ¶¶ 1, 6, 46, 48, 56, 57, 60, 70, 72, 79, 80, 84.

District Attorney Conley suggests that if the SJC "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." Conley Mem. 13. But the only "manner" in which the SJC could so construe Section 99 is to find that it does not prohibit *any* secret recording of police officers performing their duties in public. Because Conley does not suggest that is possible, abstention is inappropriate.

C. *Pullman* abstention is particularly inappropriate here because it would exacerbate the First Amendment harms alleged by plaintiffs.

Abstention is particularly unwarranted in light of "the nature of the constitutional deprivation alleged and the probable consequences of abstaining." *Harman*, 380 U.S. at 537.[5] Abstention would delay resolution of the First Amendment issues, which in turn would burden plaintiffs' exercise of their First Amendment rights by continuing to chill the protected conduct they seek to undertake. Although District Attorney Conley suggests that delay would not burden plaintiffs at all, the case on which he relies does not support that proposition. Conley Mem. 15, citing *Barr v. Galvin*, 626 F.3d 99 (1st Cir. 2010).

In *Barr*, the First Circuit abstained to allow Massachusetts courts to interpret the state law governing ballot access to non-party Presidential and Vice-Presidential candidates. 626 F.3d at 108. But the state statute was "admittedly unclear," and the asserted First Amendment right to be placed on the ballot would not become relevant until elections nearly two years later. 626 F.3d at 107, 108 n.3. Here, Section 99 is operating *right now* to prohibit the secret recording of police officers performing their duties in public, and it therefore *presently* chills plaintiffs' exercise of

[5] Conley's citation to proposed bills to amend the wiretap law does not change this analysis. Conley Mem. 16-17. Conley points to no evidence that these bills are likely to pass, or that any of them would end Section 99's ban on secretly recording police performing their duties in public.

their constitutional rights. Compl. ¶¶ 46-51, 54-60, 64-65, 70-72, 75-84, 88-89. This present chilling effect renders abstention inappropriate. *See Mangual v. Rotger-Sabat*, 317 F.3d 45, 64, 69 (1st Cir. 2003) (refusing to abstain in challenge to criminal libel statute as applied to statements about public officials because "the delay involved in abstention is especially problematic where First Amendment rights are involved").[6]

II. Plaintiffs have standing because there is a credible threat that Section 99 will be enforced against them.

Just as this Court is the proper forum for this case, Mr. Pérez and Mr. Martin are proper plaintiffs to bring it. Defendant Conley's contrary argument turns on one element of Article III standing, namely, whether plaintiffs have alleged a harm sufficiently imminent to constitute an "actual injury."[7] They have. Courts use different adjectives to describe imminence, including a harm that is "certainly impending" or of which there is a "substantial risk." *Susan B. Anthony List*, 134 S. Ct. at 2341 (quoting *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147, 1150 n.5 (2013)). But, no matter which term is used to *articulate* that a harm is "sufficiently imminent," that standard is *satisfied* when plaintiffs bringing a pre-enforcement challenge to a criminal

[6] Courts in other circuits have similarly refused to abstain in as-applied First Amendment challenges. *See Bad Frog Brewery, Inc. v New York State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir 1998); *Louisiana Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1492 n.12 (5th Cir. 1995); *Garvin v. Rosenau*, 455 F.2d 233, 236-37(6th Cir. 1972); *Porter v. Jones*, 319 F.3d 483, 493-94 (9th Cir. 2003); *but see Chez Sez III Corp. v. Twshp. of Union*, 945 F.3d 628, 633-34 (3d Cir. 1991) ("[W]hile the Supreme Court has been particularly reluctant to abstain in cases involving facial challenges . . . an 'as applied' challenge present different considerations.") (internal quotation marks omitted).

[7] Conley does not contest that Plaintiffs have established "a sufficient causal connection between the injury and the conduct complained of and [] a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List*, 134 S. Ct. at 2341 (internal quotation marks omitted) (finding causation and redressability with no discussion once the court had found an injury in fact); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010) (same). Nor does Conley dispute that plaintiffs' injuries are concrete and particularized, or that plaintiffs satisfy prudential standing requirements. *See also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 46 (1st Cir. 2011) (prudential requirements are relaxed in First Amendment challenges).

statute allege three things: (1) "an intent[] to engage in a course of conduct arguably affected with a constitutional interest," that is (2) "proscribed by a statute," and (3) "a credible threat of prosecution thereunder." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298); *see Blum*, 744 F.3d at 796 (same). Plaintiffs satisfy this test.[8]

A. Plaintiffs allege an intent to engage in the constitutionally protected activity of secretly recording police officers performing their duties in public.

Plaintiffs' detailed allegations establish their intent to engage in constitutionally protected activity. First, plaintiffs' desired behavior is covered by the "unambiguous[]" First Amendment right to record police officers carrying out their duties in public, *Glik*, 655 F.3d at 82, and indeed District Attorney Conley's brief assumes for the purposes of this motion that "the First Amendment 'arguably affect[s]' the Plaintiffs' actions," Conley Mem. 21 n.9.[9] Second, plaintiffs plausibly allege their intent to engage in this behavior. Specifically, they are both civil rights activists in Boston who regularly participate in demonstrations and otherwise see police officers on the street, Compl. ¶¶ 41-42, 66-67, and who provide detailed accounts of circumstances in which they have wanted and will want to secretly record police officers performing their duties in public.

Mr. Martin alleges that he has wanted and will continue to want to secretly record police officers performing their duties in public about once a month. *Id.* ¶ 46. He wants to do so when he seeks an accurate account of police behavior, *id.* ¶¶ 57-60, and when he is alone, *id.* ¶¶ 48-49,

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[8] Because the First Amendment injury "which attends the threat of enforcement" and that which exists "when the plaintiff is chilled from exercising her right to free expression," "both hinge on the existence of a credible threat that the challenged law will be enforced," plaintiffs analyze these injuries simultaneously. *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13-14 (1st Cir. 1996); *see also Blum*, 774 F.3d at 796.

[9] *See also* Plaintiffs' Opposition to Defendant Evans' Motion to Dismiss at Part I (discussing First Amendment protection).

56. He describes particular episodes when he has wanted to secretly record police officers—including when a BPD officer shoved him to the ground and yelled at him to stop taking pictures, and several others where he has seen BPD officers interacting with homeless individuals in Downtown Crossing—and alleges that he would want to do so again in similar circumstances. *Id.* ¶¶ 55-57, 59-60. Mr. Pérez similarly alleges that has wanted and will continue to want to secretly record police officers performing their duties in public. *Id.* ¶ 70. He wants to do so when he seeks an accurate account of police behavior, *id.* ¶ 80, when he feels that he cannot openly exercise his rights to record without police disruption, *id.* ¶ 81-84, and during traffic stops, *id.* ¶72. He describes particular episodes—including one instance when a BPD officer screamed at him and grabbed his recording device while he was openly recording police interactions with protesters outside of Secretary of State John Kerry's house—where he has wanted to and will continue to want to engage in secret recording. *Id.* ¶¶ 77-79, 82-84. District Attorney Conley hones in on Mr. Pérez's reference to traffic stops, arguing that Mr. Pérez cannot show that future stops are imminent. Conley Mem. 21-22. But that argument ignores Mr. Pérez's intention to secretly record police in other circumstances, Compl. ¶¶ 80, 83, as well as his allegation that he participates in demonstrations in Boston and sees BPD police officers on the street, *id.* ¶¶ 66-67.

In addition, both plaintiffs teach Know Your Rights trainings about recording the police. *Id.* ¶¶ 61-62, 85-86. They allege that they want to instruct individuals that they should secretly exercise their right to record police officers performing their duties in public when they are alone or otherwise feel unsafe openly recording. *Id.* ¶¶ 64-65, 87-89. These intentions yield an even greater threat of prosecution under Section 99 because, unlike secret recording, *instructing* individuals to secretly record is a violation of Section 99 that occurs in the open.

Plaintiffs not only allege *when* they want to secretly record, but *why* they want to do so: they are sometimes afraid to openly record police officers. ¶¶ 1, 6, 44, 49, 56, 68, 72, 76. Mr. Martin and Mr. Pérez describe instances where police have yelled at them or physically assaulted them for openly recording or photographing a police officer, ¶¶ 55, 77-78, 83, or simply during a traffic stop or while walking down the street, ¶¶ 52-53, 73-75. Defendant Conley is correct that the out-of-state interactions "bear[] little relevance" to establishing "the likelihood of prosecution in Massachusetts." Conley Mem. 22. But they are relevant to describe the basis of plaintiffs' fear of openly recording the police performing their duties in public, which underscores their intent to secretly record police officers in such circumstances.

The detail of these allegations belies any claim that they are "vague", "conclusory", or "lack specificity." *Id.* Although Conley points out that plaintiffs have not said what kind of device they will use, *id.*, motions to dismiss do not hinge on a plaintiff's preferred consumer electronic. What matters are plaintiffs' particularized allegations about when and why they want to secretly record, coupled with their allegations regarding the frequency with which they interact with police officers. These allegations rise far beyond a "highly attenuated chain of possibilities," *Clapper*, 133 S. Ct. at 1148; Conley Mem. 22, and adequately establish plaintiffs' intent.

B. Section 99 proscribes secretly recording police officers performing their duties in public.

As described in detail above, the plain language of Section 99 proscribes secretly recording police officers performing their duties in public, an interpretation that both the SJC and BPD have adopted, and which defendant Conley nowhere rejects. Plaintiffs describe at length their desire to engage in exactly this behavior. No further explanation of how their conduct

"might be an illegal interception as defined in Section 99," Conley Mem. 21, is necessary. "Under these circumstances," this Court should "have no difficulty concluding that [plaintiffs'] intended speech is 'arguably proscribed' by the law." *Susan B. Anthony List,* 134 S. Ct. at 2344.

C. Plaintiffs allege a credible threat of prosecution under Section 99.

When a plaintiff challenges a non-moribund statute, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996); *see Hedges v. Obama*, 724 F.3d 170, 197-200 (2d Cir. 2013) (collecting cases in support of the proposition that the Supreme Court "presume[s] that the government will enforce" a non-moribund criminal statute). "*Clapper* does not call into question th[is] assumption," which the government generally overcomes only by explicitly disavowing enforcement against the specific plaintiff. *Blum*, 744 F.3d at 798 n.11; *see also Susan B. Anthony List*, 134 S. Ct. at 2345. Thus, if a pre-enforcement challenge targets a non-moribund law, the plaintiff has standing unless *the government* carries its burden to show that the law will not be enforced. *Hedges*, 724 F.3d at 197.[10] Conley fails to carry that burden.

Section 99 is anything but moribund. There have been at least six Section 99 prosecutions and arrests across Massachusetts in the past 15 years. *Compare* Compl. ¶¶ 33-39 *with Poe v. Ullman*, 367 U.S. 497, 501-02, 508 (1961) (statute moribund when only one prosecution over 80 years) *and Johnson v. District of Columbia*, 71 F. Supp. 3d 155, 161 (D.D.C. 2014) (statute moribund where it had gone "unenforced for nearly four decades" and "in fact it seems likely that the government has never enforced the statute *at all*"). It does not matter that Conley

[10] *Hedges* emphasizes that although "the executive branch enjoys prosecutorial discretion with regard to traditional punitive statutes" because "Congress generally does not mandate or direct criminal prosecution," it is "appropriate to presume for standing purposes that the government will enforce the law against a plaintiff covered by a traditional punitive statute." 724 F.3d at 201.

prosecuted only one of these cases. Conley Mem. 22-23. This recent history makes apparent that Section 99 is not a "dead letter" from the Commonwealth's perspective. *See New Hampshire Right to Life*, 99 F.3d at 17.

The burden thus shifts to District Attorney Conley to "convincingly demonstrate" that his office will not enforce this statute against plaintiffs. *Id.* at 16. In *Blum*, the government satisfied this standard by stating "the statute simply does not prohibit the actions plaintiffs intend to take." 744 F.3d at 800.[11] But Conley does not similarly disavow enforcement of Section 99 against plaintiffs or anyone else who secretly exercises their right to record police officers performing their duties in public. Indeed, there is every reason to believe that the plaintiffs would be in severe danger of prosecution if they were caught engaging in the secret recording described in their Complaint. Because defendant Conley fails to show that the statute "simply will not be enforced" against Mr. Martin and Mr. Pérez, their pre-enforcement challenge is "entirely appropriate." *New Hampshire Right to Life*, 99 F.3d at 16.

Citing *Blum*, defendant Conley asserts that the dearth of Section 99 prosecutions in Suffolk County "undermines any argument by the Plaintiffs that a prosecution of them is certainly impending." Conley Mem. 23. That is not so. To begin, *Blum* noted a near-total absence of prosecutions *nationwide* for the conduct in which the plaintiffs sought to engage, as opposed to the absence of prosecutions in one district. 744 F.3d at n.13. If anything, this approach suggests that weight can be given to the entire Commonwealth's enforcement history as a whole. More important, *Blum*'s determination that plaintiffs lacked standing hinged on the government's

[11] *See also id.* at 793 n.3 (government stated "flatly" in its motion to dismiss that the plaintiffs did not allege any activities "that will possibly subject them to [prosecution]," and insisted at oral argument "there is no intent to prosecute plaintiffs for their intended conduct").

express disavowal of enforcement against the plaintiffs, which was "even more potent" in light of a statutory provision "inhibit[ing] prosecution of First Amendment activities." *Id.* at 798; *see id.* at 793, 798-800 & n.3 (referencing government's disavowal six times). Here, because Section 99 has been enforced against the secret recording of police officers performing their duties in public, and because District Attorney Conley does not disavow such enforcement in Suffolk County, *Blum* confirms that Plaintiffs have established a credible threat of prosecution.

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument on defendant Conley's motion to dismiss under Local Rule 7.1(d).

CONCLUSION

For the foregoing reasons, this Court should deny defendant Conley's motion to dismiss.

Respectfully submitted,
Plaintiff, K. ERIC MARTIN
Plaintiff, RENÉ PÉREZ

By their attorneys,

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Dated: December 19, 2016

LOCAL RULES 7.1(A)(2) CERTIFICATION

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

DATE: December 19, 2016 */s/ Jessie J. Rossman*
Jessie J. Rossman

CERTIFICATE OF SERVICE

I certify that on this day I caused a true copy of the above document to be served upon the attorney of record for all parties via CM/ECF.

DATE: December 19, 2016 */s/ Jessie J. Rossman*
Jessie J. Rossman