10-1764

IN THE

United States Court of Appeals for the First Circuit

SIMON GLIK,
Plaintiff-Appellee,

v.

JOHN CUNNIFFE, in his individual capacity; PETER J. SAVALIS, in his individual capacity; JEROME HALL-BREWSTER, in his individual capacity; CITY OF BOSTON,
Defendants-Appellants

On Appeal from a Judgment of the United States District Court for the District of Massachusetts

BRIEF OF CITIZEN MEDIA LAW PROJECT, DOW JONES & COMPANY, INC., GATEHOUSE MEDIA, INC., GLOBE NEWSPAPER COMPANY, INC., THE MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION, METRO CORP., NBC UNIVERSAL, INC., NEW ENGLAND NEWSPAPER AND PRESS ASSOCIATION, INC., THE NEW YORK TIMES COMPANY, NEWSPAPERS OF NEW ENGLAND, INC., THE ONLINE NEWS ASSOCIATION, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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STATEMENT PURSUANT TO FED. R. APP. P. 29(c)(5)

Pursuant to Fed. R. App. P. 29(c)(5), *Amici Curiae* state as follows:

(A) no party's counsel authored this brief in whole or in part;

(B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) no person — other than the *Amici Curiae*, their members, or their counsel — contributed money that was intended to fund preparing or submitting the brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the issue of whether the First Amendment forbids the government from prosecuting citizens for collecting and disseminating accurate information about alleged acts of official misconduct, specifically when those acts occur in a public place where there is no reasonable expectation of privacy. Although Defendants-Appellants[1] claim the answer to this question remained unsettled some 215 years after the ratification of the Bill of Rights, the First Amendment clearly establishes otherwise.

The events at issue occurred on the Boston Common, the very place where British Forces were encamped during the Revolutionary War. The incident filmed by Plaintiff-Appellee Simon Glik ("Glik") took place not far from the location of the Boston Massacre, in which British troops killed five colonists. The Founders relied on accounts of the event to gain support for their cause. *See generally* Neil L. York, *The Boston Massacre: A History with Documents* ch. 19-22 (2010).

To permit the arrest of Glik under the Massachusetts Wiretap Statute, Mass. Gen. Laws ch. 272, § 99 (West 2010) (the "Wiretap Statute" or "Statute") would be tantamount to suggesting that the Framers were less than explicit about whether the Constitution protects citizens who gather and disseminate information about

[1] Although all defendants appealed, only officers Cunniffe, Savalis, and Hall-Brewster (referred to herein as "Defendants-Appellants") pursued their appeal.

alleged abuses of official power. This suggestion runs counter to the text, history, and longstanding interpretation of the First Amendment.

The Wiretap Statute advances the valuable goal of safeguarding the interests of Massachusetts citizens in having their private conversations remain private. The Statute does this by criminalizing secret interception of conversations. As applied by police in this case and others, however, the Statute has become a tool of suppression rather than protection. This Court should ensure that the purpose of the Statute—protection of privacy—guides its interpretation and limits its scope to cases where privacy is actually at stake in order to avoid infringing upon fundamental liberties.

The First Amendment protects freedoms of the press and of speech and, as a corollary, safeguards the rights of journalists to gather news and information. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). That protection applies no less forcefully to citizen journalists. *Cf. id.* at 684 ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."). This Court has recognized that the Statute must be applied with sensitivity to First Amendment rights. *See Jean v. Mass. State Police*, 492 F.3d 24, 30 (1st Cir. 2007) (upholding First Amendment right to publish surreptitiously recorded video of police misconduct).

In a situation where parties to an intercepted conversation do not have a reasonable expectation of privacy, it cannot be said that any state interest is advanced by criminalizing recording of that conversation. Thus, such criminalization burdens the First Amendment right to record public events. For this reason, the Court should hold that using the Wiretap Statute to impose criminal liability where there is no reasonable expectation of privacy violates a constitutional right, and that such use of the Statute is thus forbidden. So limiting the Statute's application would be judicially administrable and familiar and would do much to avoid a chill on socially valuable—sometimes crucial—recording activities.

STATEMENT OF INTEREST OF *AMICI CURIAE*

As set forth more fully in the accompanying motion for leave to file this brief, *Amici Curiae* Citizen Media Law Project, Dow Jones & Company, Inc., GateHouse Media, Inc., Globe Newspaper Company, Inc., The Massachusetts Newspaper Publishers Association, Metro Corp., NBC Universal, Inc., New England Newspaper and Press Association, Inc., The New York Times Company, Newspapers of New England, Inc., The Online News Association, and The Reporters Committee for Freedom of the Press (collectively, the "*Amici*" or "*Amici Curiae*") have a strong interest in ensuring that the Statute does not impede the vital role that journalists, publishers, and others play in promoting discussion of

matters of public concern. *Amici* request that this Court find Glik's clearly established First Amendment rights were violated when he was arrested under the Statute and that the Statute cannot be applied consistently with the First Amendment in a situation where the parties to an intercepted communication do not have a reasonable expectation of privacy. The Court should affirm the lower court's denial of Defendants-Appellants' motion to dismiss.

SUMMARY OF FACTS

Amici rely on the statement of facts set forth in Glik's brief. Pls. Br. 5-6. By way of short summary, Glik was arrested after visibly and openly using his cellular phone to make an audiovisual recording of police officers arresting a man on the Boston Common and, in Glik's opinion, using excessive force. The police, who plainly observed Glik and his phone, asked whether the phone had audio recording capabilities and arrested Glik after he told them it did. Glik was charged with, *inter alia*, violation of the Statute. Those charges were dismissed, and Glik filed a complaint in federal district court, alleging that the police and the City of Boston violated his civil rights. Defendants-Appellants moved to dismiss the case, the lower court denied that motion, and Defendants-Appellants appealed such denial based on qualified immunity.

ARGUMENT

I. Absent a requirement that the subject of an intercepted conversation have a reasonable expectation of privacy, the Wiretap Statute is unconstitutionally overbroad.

The Wiretap Statute criminalizes "interception of any wire or oral communication." Mass. Gen. Laws ch. 272, § 99(C)(1). The Statute defines "interception" as "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." *Id.* § 99(B)(4).

The state interest promoted by the Statute is the privacy of Massachusetts citizens. The Statute's preamble makes clear that its purpose is to counteract threats to privacy posed by the proliferation of eavesdropping technology:

> The general court finds that . . . the increasing activities of organized crime constitute a grave danger to the public welfare and safety. . . . [L]aw enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized criminal activities. The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime.

Id. § 99(A). This Court recently recognized that the state interest advanced by the Statute is in "protecting the privacy of its citizens." *See Jean*, 492 F.3d at 29–30.

The Massachusetts Supreme Judicial Court has affirmed that "[i]t is apparent from the preamble that the legislative focus was on the protection of privacy rights and the deterrence of interference therewith by law enforcement officers' surreptitious eavesdropping as an investigative tool." *Commonwealth v. Gordon*, 422 Mass. 816, 833, 666 N.E.2d 122, 134 (1996). Application of the Statute, especially when other substantial interests are at stake, must be guided by that purpose. That purpose is plainly *not* served if the Statute is applied to criminalize recording of communications as to which parties have no reasonable expectation of privacy.

A. To the extent that it fails to require a reasonable expectation of privacy, the Wiretap Statute is anomalous and excessively broad.

Massachusetts is one of the only states whose wiretap statute does not explicitly require parties to the intercepted communication to have an expectation justified under the circumstances that the communication is not subject to interception in order for the interception to be criminal. *See* Lisa A. Skehill, Note, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for Surreptitious Recording of Police Officers*, 42 Suffolk U. L. Rev. 981, 991 (2009).[2] But, the fact that the text of the Statute omits the

[2] Indeed, more than three dozen states, the District of Columbia, and the federal government recognize that the subject of a recording must have a reasonable expectation of privacy in their criminal wiretapping statutes. *See* 18 U.S.C. § 2510(2) (2010); Ala. Code § 13A-11-30(1) (2010); Ariz. Rev.Stat. Ann. § 13-3001(8) (2010); Cal. Penal Code § 632(a) & (c) (Deering 2010); Colo. Rev. Stat. §

limiting phrase, "reasonable expectation of privacy" does not mean it should be applied without reference to such limitation.

The privacy tort context in Massachusetts provides an instructive analogy and illustrates the importance of limiting the scope of liability based on privacy interests at stake. The Massachusetts legislature created a statutory cause of action "against unreasonable, substantial or serious interference with . . . privacy." Mass. Gen. Laws ch. 214, § 1B (West 2010). Like the common law right that exists in other states, this statutory right has been cabined by reference to reasonable expectations of privacy. *See Gauthier v. Police Comm'r of Bos.*, 408 Mass. 335, 339, 557 N.E.2d 1374, 1376 (1990) (dismissing action by discharged police cadet

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18-9-301(8) (2010); Del. Code Ann. § 2401(13) (2010); D.C. Code § 23-541(2) (2010); Fla. Stat. § 934.02(2) (2010); Ga. Code Ann. § 16-11-62(1) (2010); Haw. Rev. Stat. § 803-41 (2010); Idaho Code Ann. § 18-6701(2) (2010); Iowa Code § 808B.1(8) (2010); Kan. Stat. Ann. § 22-2514(2) (2010); Ky. Rev. Stat. Ann. § 526.010, (LexisNexis 2010); La. Rev. Stat. Ann. § 15:1302(14) (2010); Me. Rev. Stat. tit. 15, § 709(4)(B) & 709(5) (2010); Md. Code. Ann., Cts. & Jud. Proc. §10-401(2)(i) (2010); Mich. Comp. Laws § 750.539a (2010); Minn. Stat. § 626A.01(4) (2010); Miss. Code Ann. § 41-29-501(j) (2010); Mo. Rev. Stat. § 542.400(8) (2010); Neb. Rev. Stat. § 86-283 (2010); Nev. Rev. Stat. § 179.440 (2010); N.H. Rev. Stat. Ann. 570-A:1 (2010); N.J. Stat. Ann. § 2A:156A-2(b) (West 2010); N.C. Gen. Stat. § 15A-286(17) (2010); N.D. Cent. Code § 12.1-15-04(5) (2010); Ohio Rev. Code Ann. § 2933.51(B) (LexisNexis 2010); Okla. Stat. tit. 13, § 176.2(12) (2010); 18 Pa. Cons. Stat. Ann. § 5702 (West 2010); R.I. Gen. Laws § 12-5.1-1(10) (2010); S.C. Code Ann. § 17-30-15(2) (2010); S.D. Codified Laws § 23A-35A-1(10) (2010); Tenn. Code Ann. § 40-6-303(14) (2010); Tex. Code Crim. Proc. Ann. art. 18.20(2) (West 2010); Utah Code Ann. 77-23a-3(13) (LexisNexis 2010); Va. Code Ann. § 19.2-61 (West 2010); Wash. Rev. Code § 9.73.030(1)(b) (2010); W. Va. Code § 62-1D-2(h) (2010); Wis. Stat. § 968.27(12) (2010); Wyo. Stat. Ann. § 7-3-701(a)(xi) (2010).

under § 1B, noting the "diminution of the cadets' reasonable expectation of privacy due to the obvious physical and ethical demands of their employment"). That is true even though the privacy statute does not expressly refer to such an expectation.

Interpreting privacy laws in Massachusetts to incorporate limitations based on reasonable expectations of privacy accords with the history of the protection of privacy interests. Use of the phrase "reasonable expectation of privacy" probably did not become widespread until after the Supreme Court's *Katz* decision, which pertained to Fourth Amendment jurisprudence. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). But, the idea of such an expectation is a familiar one in privacy law. Indeed, since the right of privacy was first recognized as a distinct concept and independent cause of action in tort law, authorities have held that privacy tort liability should be limited by reference to reasonable social expectations. *See, e.g.*, *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 201, 50 S.E. 68, 72-73 (1905) (right of privacy "must be made to accord with . . . the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern"). In their seminal article about privacy rights, Warren and Brandeis noted, "[t]he general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private . . . to that extent the protection is to be withdrawn."

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 215 (1890). *See also Restatement (First) of Torts* § 867 cmt. c (1939) ("One who is not a recluse must expect the ordinary incidents of community life of which he is a part"); William Prosser, *Privacy*, 48 Cal. L. Rev. 383, 391 (1960) ("It is clear also that the thing into which there is prying or intrusion must be, and be entitled to be, private.").

Because the Statute gives rise to criminal liability (and thus potential loss of liberty), it is even more crucial than in the tort context that it be narrowly directed to the privacy interest it serves. Accordingly, this Court should hold that the Statute cannot be used to prosecute those who record activities and conversations when the subjects of such recordings do not reasonably expect those activities and conversations to be private.

B. There is a clearly established First Amendment right to record public events like the one at issue.

1. Supreme Court precedent clearly provides that the First Amendment protects the right to gather information.

Evaluating Defendants-Appellants' qualified immunity argument requires a determination of whether the act at issue (1) "violated a constitutional right" that (2) was clearly established. *Saucier v. Katz,* 533 U.S. 194, 201–02 (2001), *overruled in part on other grounds*, *Pearson v. Callahan*, 129 S. Ct. 808 (2009).[3]

[3] *See* discussion *infra* Sec. I(B)(4).

As to the first prong, the First Amendment rights to *disseminate* and *receive* information are well recognized. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both."); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it."). But, the constitutional guarantee of freedom of the press begins with the right to *gather* information. Indeed, the Supreme Court has noted that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg*, 408 U.S at 681.

Taken together, these three rights are links in a chain that ensures a free press; a burden on a single link burdens press freedom in its entirety. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion) ("In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."); *cf. First Nat'l Bank of Bos. v. Belotti*, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting

the stock of information from which members of the public may draw."); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) ("Neither the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of pure speech . . . and the product of these processes . . . in terms of the First Amendment protection afforded."). The right to gather news is thus among those freedoms that, "while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (holding public exclusion from criminal trial unconstitutional under strict scrutiny analysis); *see also Pell v. Procunier*, 417 U.S. 817, 834 (1974) (recognizing right to gather news, but holding that government has no affirmative duty to provide non-public information to newsgatherers); *Saxbe v. Wash. Post*, 417 U.S. 843, 850 (1974) (same).

2. The First Amendment right to gather information must at a minimum encompass the right to record matters of public interest.

Numerous courts have helped to define the right to gather news, recognizing that—at the very least—there is a "First Amendment right to film *matters of public interest*." *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (emphasis

added).[4] The Eleventh Circuit similarly noted that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding plaintiffs "had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct"). *See also Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (noting prohibition on recording a public meeting "touched on expressive conduct protected by the Free Speech Clause"). And, following *Fordyce* and *Cumming*, the United States District Court for the District of Massachusetts recognized "a constitutionally protected right to record matters of public interest." *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 94 (D. Mass. 2002).[5]

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[4] While the *Fordyce* court found no clear violation of this right, it did so on the basis that the recording at issue captured a conversation that could reasonably have been considered private. *Fordyce*, 55 F.3d at 439-440.

[5] *Cf. Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (finding, in the Third Circuit, the right to videotape police officers not clearly established in the particular, narrow context of "inherently dangerous" traffic stops); *ACLU v. Alvarez*, 2011 U.S. Dist. LEXIS 2088 (N.D. Ill. Jan. 10, 2011) (finding, in analysis of standing, no right to audio-record police, based in part on misplaced reading of *Potts v. City of Lafayette, Indiana*, 121 F.3d 1106, 1111 (7th Cir. 1997), which held simply that banning persons without media passes from bringing objects that could potentially be thrown, including tape recorders, into a KKK rally was a narrowly tailored restriction justified on safety grounds).

3. Citizens like Glik should be afforded no less information-gathering protection than traditional media organizations.

The right to gather news is not limited to journalists employed by established media organizations. Citizen journalists have played an important role in informing the public throughout this country's history, counting among their number Benjamin Franklin with his *Pennsylvania Gazette*, Thomas Paine with his well-known pamphlets, and the authors of the Federalist Papers. *See generally* Dan Gillmor, *We the Media: Grassroots Journalism by the People, for the People* (2006). Now that modern technology has given even citizens of modest means the ability to capture news using inexpensive digital cameras and publish their findings on the Internet, distinctions between citizen journalism and "traditional" journalism have become blurred. The First Amendment right to gather information must protect both private citizens and traditional journalists.

Supreme Court jurisprudence already recognizes that the press has no greater right to access government information than the public at large. *See Pell*, 417 U.S. at 834 ("[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."); *Saxbe*, 417 U.S. at 849 (holding access restriction constitutional because "the Bureau of Prisons visitation policy does not place the press in any less advantageous position than the public

generally"). Affording Glik First Amendment protections in this context is thus consistent with legal precedents.

4. This Court should clearly enunciate its recognition of a constitutional right to record even if it holds in favor of Defendants-Appellants on their qualified immunity claim.

The Supreme Court has indicated that courts may exercise discretion in deciding whether to address the first prong of the qualified immunity analysis (evaluating whether the conduct in question violated a constitutional right) if the second prong (evaluating whether the right was clearly established) is not satisfied. *See Pearson*, 129 S. Ct. at 818 (2009). *Amici* submit that, in this case, the second prong has been satisfied.[6] That said, *Amici* request that this Court acknowledge the existence of a constitutional right *regardless of* its opinion on the applicability of qualified immunity. A clear statement that the First Amendment encompasses the right to record would deter an officer who might otherwise arrest a future Glik and would thereby prevent repeated infringement upon the freedoms at issue. Even if

[6] Addressing the second prong, Defendants-Appellants suggest that an extremely specific right—the right to record police conduct—must be clearly established in order to overcome their qualified immunity. Def.'s Br. 8. This argument is too narrow; "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Applying that standard, it is enough to show that a reasonable officer would know that it is lawful to make recordings that do not contravene reasonable privacy expectations, particularly when the recording is of a matter of public interest. *Cf.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761–62 (1985) (distinguishing between matters of public and private interest).

this Court determines the right at issue was not clearly established at the time of Glik's arrest, the value in acknowledging this right outweighs the efficiency and prudential values served by abstaining from addressing the issue. *Id.* at 818–20.

C. As a restriction on newsgathering activities, the Wiretap Statute can only be applied consistently with the First Amendment where there exists a reasonable privacy interest.

Enforcement of the Statute must occur within the boundaries of the First Amendment right to gather information. Whether it is viewed as a content-based restriction (subject to strict scrutiny) or a content-neutral restriction (subject to intermediate scrutiny),[7] the Statute cannot be constitutional if it criminalizes the recording of events as to which there is no reasonable expectation of privacy. Under such circumstances, the Statute would significantly burden expressive and constitutionally protected activity while serving *no* governmental interest in privacy, let alone a "compelling" (or even "substantial") one.

This Court recognized in *Jean* that enforcement of the Statute must strike a balance between the privacy interests at stake and the First Amendment interests implicated. The *Jean* Court relied on the First Amendment to uphold a preliminary injunction enjoining police officers from using the Statute to interfere with

[7] Speech restrictions based on viewpoint are prohibited, and restrictions based on content must satisfy strict scrutiny and thus be narrowly tailored to serve a compelling government interest. *See Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125, 1132 (2009). Content-neutral restrictions must serve a substantial government interest. *See Ward v. Rock Against Racism*, 491 U.S. 781, 789-792 (1989).

appellee's dissemination of a third-party's recording of an arrest and warrantless search. *Jean*, 492 F.3d at 25. The Court held that, "where the intercepted communications involve[d] a search by police officers of a private citizen's home in front of that individual, his wife, other members of the family, and at least eight law enforcement officers," the privacy interest was "virtually irrelevant." *Id*. at 30. In *Bartnicki v. Vopper*, the privacy interests were more compelling (the case involved a private phone call), but the Supreme Court nevertheless reversed a conviction under the federal wiretap statute for disclosure of intercepted communications, because "privacy concerns give way when balanced against the interest in publishing matters of public importance." 532 U.S. 514, 516 (2001).

It should be noted that these cases dealt with prohibitions against disclosure of recorded communications, and not with the primary act of recording.[8] They nonetheless illustrate that, in applying a statute that restricts gathering and dissemination of information and evaluating privacy interests, courts must be sensitive to First Amendment considerations. The reasoning applies just as easily to the recordation itself: "whether [the] conduct [falls] within the statute is not determinative. . . . Rather, the determinative question is whether the First

[8] The *Bartnicki* court cautioned that its holding "[did] not apply to punishing parties for obtaining the relevant information unlawfully." 549 U.S. at 532 n.19. The federal wiretap statute considered in *Bartnicki*, however, contains an explicit limitation to situations in which there is an expectation of privacy. *See* 18 U.S.C. § 2510(2) (2006).

Amendment . . . permits Massachusetts to criminalize [the] conduct." *Jean*, 492 F.3d at 31. And, even assuming, *arguendo*, that the First Amendment protection of recording is more attenuated than its protection of dissemination, it cannot be said that any compelling or substantial governmental interest is served when the Statute is applied to criminalize the former where there is no reasonable expectation of privacy on the part of the recorded subject. The pertinent interest is the privacy of Massachusetts citizens, and the balancing of interests required by First Amendment jurisprudence becomes trivial when one side of the scale is empty.[9] *Amici* therefore urge this Court to ensure that enforcement of the Statute is limited to situations in which those recorded have reasonable expectations of privacy.

II. Failure to limit the Statute to communications over which there is no reasonable expectation of privacy will chill socially valuable newsgathering and watchdog activities and suppress the spread of important information.

Modern technology has hastened the flow of information and broadened sources for newsgathering, allowing individuals to record and distribute content in ways that were once unimaginable. *See* Roy S. Gutterman, *Chilled Bananas: Why Newsgathering Demands More First Amendment Protection*, 50 Syracuse L. Rev.

[9] Nothing in the Statute's legislative history indicates that prosecution of individuals like Glik—for recording events that did not implicate citizens' privacy interests—was contemplated by the legislature. *See Commonwealth v. Hyde*, 434 Mass. 594, 607–08, 750 N.E.2d 963, 972–73 (2001) (Marshall, C.J., dissenting) (reviewing legislative history).

197, 211 (2000). Through online platforms such as YouTube, citizens now participate in dynamic information-sharing communities "on issues ranging from the truly global to the hyper-local." Brian Lehrer, *A Million Little Murrows: New Media and New Politics*, 17 Media L. & Pol'y 1, 3 (2008). Absent adequate consideration for First Amendment interests, the Wiretap Statute will chill the creation of recordings that serve evidentiary functions, spread news and other important information, and enhance the ability of individuals to scrutinize public issues, self-govern, and participate in civic affairs.

A. Criminalizing the recording of public events as to which there is no reasonable expectation of privacy will chill recordings that provide critical evidence on which both the public and police rely.

In the early morning hours of New Year's Day, 2009, Bay Area Rapid Transit ("BART") police officers arrived at an Oakland subway platform to respond to reports of a fight. Jack Leonard, *Dramatic Video of BART Shooting Released by Court*, L.A. Times Blog, (June 24, 2010, 5:13 PM), http://latimesblogs.latimes.com/lanow/2010/06/dramatic-video-of-bart-shooting-released-by-court.html. One officer pinned the unarmed, 22-year-old, Oscar Grant to the ground, drew his gun, and fired, killing Grant. *Id.* Bystanders watched in horror and used their cell phones to record the scene through the windows of an idle train. *Id.* In Massachusetts, under the interpretation of the Wiretap Statute

advocated by Defendants-Appellants, the bystanders who recorded those events could have been charged with felonies.

Audiovisual recordings like those of Oscar Grant can be necessary to initiate investigations into police misconduct, prove misconduct, and ensure fair trials. *See Hyde*, 434 Mass. at 606–14, 750 N.E.2d at 970–974 (Marshall, C.J., dissenting) ("Whether there even would have been a Los Angeles Police Department investigation [into the Rodney King beating] without the video is doubtful, since the efforts of King's brother . . . to file a complaint were frustrated, and the report of the involved officers was falsified.") (quoting Report of the Independent Commission on the Los Angeles Police Department at ii (1992)). Indeed, there are countless examples of citizen-recorded video serving important evidentiary functions. *See, e.g.*, Demian Bulwa, *Mehserle Convicted of Involuntary Manslaughter*, S.F. Chronicle, July 9, 2010, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/07/08/BAM21EBDOD.DTL (BART police officer convicted of manslaughter based on video depicting shooting); Amanda Covarrubias & Stuart Silverstein, *A Third Incident, A New Video: A Cellphone Camera Captures UCLA Police Using Taser on a Student who Allegedly Refused to Leave the Library Tuesday Night*, L.A. Times, Nov. 16, 2006, at B1 (cell phone camera video leads to review of incident); John Eligon, *Former Officer Is Found Guilty of Lying About Confrontation With Bicyclist*, N.Y. Times, April 30, 2010, at

A19 (widely-disseminated video of NYPD officer attacking cyclist leads to ex-officer's false statement conviction); Sara Jean Green & Steve Miletich, *Video of SPD Officer Kicking Prone Man Sparks Internal Investigation*, Seattle Times, May 7, 2010, http://seattletimes.nwsource.com/html/localnews/2011807341_copinvestigation08m.html (freelance photographer captures Seattle police using excessive force and racial epithets against suspect, leading to investigation); Milton J. Valencia, *Video of Roxbury Arrest Reviewed*, Bos. Globe, Oct. 28, 2010 (video of officers severely beating unarmed 16-year-old leads to investigation); *see also* Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 Hastings L.J. 753, 764–65 (1993) (claiming § 1983 is ineffective because of lack of eyewitnesses, coupled with jury bias toward police); Skehill, *supra.* at 1008 (arguing that where video evidence is available, jurors more likely to base verdicts on facts instead of on witness credibility).

Audiovisual recordings can also benefit the police. *See Scott v. Harris*, 550 U.S. 372, 381 (2007) (relying on video footage to hold police officer justified in ramming fleeing vehicle and causing plaintiff to suffer permanent paralysis); Robert Santiago, *Taser Incident: Report Clears Campus Police at UF*, Miami Herald, Oct. 25, 2007, at B1 (reporting officers involved in taser incident cleared); Jason Trahan & Tanya Eiserer, *Cameras a Candid Witness: In-Car Video More*

Likely to Clear Police Officers Accused of Misconduct, Experts Say, Dallas Morning News, Mar. 26, 2009, at 1A; Stephen T. Watson, *Police Going to the Replay,* Buffalo News, Apr. 6, 2009, at A1 (explaining recordings of police "more often exonerate an officer accused of misconduct"); *see also* Skehill, *supra*, at 1008 ("Police-citizen recordings would also be invaluable to police training by providing real life scenarios to aid in educating and training police officers."). *See generally* Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. Marshall J. Computer & Info. L. 771, 772 (2005) (describing increasing use of recording devices in police practices).

Police and citizen recordings can preserve judicial resources. *See* Skehill, *supra*, at 1008. Recordings allow plaintiffs' attorneys to better assess whether their clients have viable civil rights claims, thus thwarting frivolous lawsuits, and may encourage prompt settlements by revealing the existence of bona fide claims. *Id.*

The evidentiary benefits of audiovisual recordings extend beyond the arena of police activities. *See, e.g., Commonwealth v. Rivera*, 445 Mass. 119, 120, 833 N.E.2d 1113, 1115 (2005) (surveillance camera recordings of murder in convenience store used by police to help identify defendant, introduced in evidence, and played at trial); DNAinfo, Manhattan Local News, *Lawyer Hopes Video will Exonerate Chinatown Teen Accused of Murder*, Dec. 7, 2010,

http://www.dnainfo.com/20101207/lower-east-side-east-village/lawyer-hopes-video-will-exonerate-chinatown-teen-on-trial-for-hester-street-murder (video to be presented to jury reveals teen accused of murder on opposite side of street when murder occurred); *Teacher Accused of Hitting Student Exonerated*, WSVN-TV, Mar. 13, 2008, http://www1.wsvn.com/news/articles/local/MI79758/ (Florida jury dropped charges against teacher after cell phone video footage exonerated him of accusations of attacking student).

Modern technology has revolutionized the ability of victims of injustice to vindicate their rights and demand reform. Unless this Court ensures the Statute criminalizes recordings of communications *only* over which the subjects have reasonable expectations of privacy, the Statute will significantly interfere with this revolution in Massachusetts.

B. The Statute should not be read to inhibit newsgathering and hamper public discourse.

Citizens' recordings are fundamental to newsgathering. Consider, for instance, the videos that flooded the Internet during the protests following the Iranian elections in June 2009. *See, e.g.,* Brian Stelter, *Honoring Citizen Journalists*, N.Y. Times, Feb. 22, 2010, at B5 (reporting on Polk Award given for video capturing death of Iranian protestor). These videos provided insights into injustices suffered by the people of Iran, and footage depicting the death of Neda

Agha-Soltan, a young woman shot and killed in the aftermath of the elections, galvanized viewers worldwide.

Citizens' videos provide more than information and insight; the sounds and sights of a scene allow viewers to *feel* devastation through their computer screesn and force them to accept the reality of a situation. *See, e.g.* CBSNewsOnline, *Moments after Haiti Quake*, YouTube (Jan. 18, 2010), http://www.youtube.com/watch?v=KzcHWuPjyiI (cell phone footage taken moments after earthquake by Brazilian soldier lying next to what was formerly Haiti's main cathedral); maxisdx, *Virginia Tech Shooting Rampage*, YouTube (Apr. 16, 2007), http://www.youtube.com/watch?v=cSbZmd-l8n8 (cell phone footage capturing sound of gunfire that took lives of 32 students at Virginia Tech).

Audiovisual recordings play an increasingly significant role in public discourse. New media make it easier than ever for voters to educate themselves about civic and national affairs. S*ee* Lehrer, *supra*, at 1–7. Videos of events such as co-op board and neighborhood association meetings are often easily accessible online, and political conventions and debates are now available "[i]n full, all the time, and on multiple sites, with a thousand citizen editors choosing what excerpts to highlight on YouTube." *Id.*

Citizens' videos have also been instrumental in revealing characteristics and biases of our country's leaders, allowing voters to make more informed decisions.

See, e.g., bobetheridgeassault, *Complete, Un-edited Bob Etheridge Assault on Student Video*, YouTube (June 17, 2010), http://www.youtube.com/watch?v=UNfH76TS8d8 (Bob Etheridge (D-NC) accosting student journalist outside a Nancy Pelosi fundraiser in June 2010 after student asks whether he fully supports Obama agenda); NRAVideos, *Barack Obama – "Bitter Gun Owners"*, YouTube (May 21, 2008), http://www.youtube.com/watch?v=VZWaxjiQyFk (Barack Obama remarking at private fundraiser during primary campaign in 2008 that people "cling to guns or religion or antipathy towards people who aren't like them"); zkman, *George Allen Introduces Macaca*, YouTube (Aug. 15, 2006), http://www.youtube.com/watch?v=r90z0PMnKwI (Senator George Allen making "macaca" comments in 2006); powerclam, *Joe Biden's Racist Slip*, YouTube (July 6, 2006), http://www.youtube.com/watch?v=sM19YOqs7hU (Senator Joseph Biden stating in 2006, "You cannot go to a 7-11 or a Dunkin Donuts unless you have a slight Indian accent").

"[I]n the country that promotes itself as the global model of democracy in action, we should be able to strive for the world's best system of media that serves, rather than subverts, democracy." Lehrer, *supra*, at 12. But, the Statute—by criminalizing the mere failure to overtly display a recording device at a public event—will prevent media from serving democracy in Massachusetts unless its

application is limited as set forth herein. *See Hyde*, 434 Mass. at 613–14, 750 N.E.2d at 977 (Marshall, C.J., dissenting).

C. Absent limitation, the Wiretap Statute will lend itself to ambiguous application and misconstrual and will chill more recordings than intended.

Although the Statute states that only secret recordings are prohibited, and the *Hyde* court agreed that a recording made "in plain sight" would not violate the Statute,[10] the distinction between a "secret" and a "plain sight" recording is not always readily discernible. *See* Skehill, *supra*, at 984; *see also Gouin v. Gouin*, 249 F. Supp. 2d 62, 79 (D. Mass. 2003) (refusing to consider whether officers should have noticed recording); Mike Miliard, *Sound Off*, Bos. Phoenix (Dec. 13, 2006), http://thephoenix.com/boston/news/29700-sound-off (reporting cases involving Wiretap Statute convictions with recorder held in plain view); Daniel Rowinski, *Police Fight Cellphone Recordings*, Bos. Globe, Jan. 12, 2010, at A1 (same); Harvey A. Silvergate & James Tierney, Op-Ed., *Preventing Oversight for Police Misconduct*, Mass. Law. Wkly., Jan. 28, 2008

[10] *Hyde*, 434 Mass. at 605, 750 N.E.2d at 971 ("The problem here could have been avoided if, at the outset of the traffic stop, the defendant had simply informed the police of his intention to tape record the encounter, or even held the tape recorder in plain sight. Had he done so, his recording would not have been secret, and so would not have violated G.L. c. 272, § 99."). In *Hyde*, although a divided Massachusetts Supreme Judicial Court rejected a reading of the Statute that included a reasonable expectation of privacy element, it did so without addressing the First Amendment considerations addressed herein. *See Hyde*, 434 Mass. 594, 750 N.E.2d 963 (upholding defendant's conviction under the Statute for secretly recording a police traffic stop)

(predicting future difficulty in determining whether recordings are furtive). "The holding in *Hyde* presumes that when an individual holds a recording device in plain view the officer becomes automatically aware of the recording," Skehill, *supra*, at 984, but as is especially likely to be true when the recording device is a phone, the officer may not realize that he is being recorded until after the recording has begun. In such cases, practical application of the holding in *Hyde* becomes problematic. *Id.* Moreover, because the categorization of a recording as "secret" or "in plain sight" may hinge on an officer's subjective awareness, the Statute enables and may incentivize police officers to avoid punishment for misconduct by denying knowledge of recordings and arresting citizen journalists. *Id.* at 985.

In fact, Massachusetts citizens have been arrested and convicted for making recordings at public events, despite their assertions that the recordings were made in the open. *See* Rowinski, *supra*, at A1. Jeffrey Manzelli, who was convicted for recording the MBTA police at an antiwar rally on Boston Common in 2002, and Peter Lowney, who was convicted for using a camera that police alleged was hidden in his coat during a protest on Commonwealth Avenue in 2007, were convicted under the Statute after their recordings were determined to be "secret." *Id.*

If the Statute allows citizens to be arrested and convicted for making public recordings, it runs the risk of chilling the production of valuable recordings. The

Statute could be applied consistently while avoiding this chilling effect if this Court ensures it applies only to recordings of communications where a reasonable privacy expectation exists.

The "reasonable expectation of privacy" standard is judicially administrable and familiar. Justice Harlan first articulated the two-prong test to determine when a person has a reasonable expectation of privacy in *Katz*, 389 U.S. 347 (Harlan, J., concurring), explaining:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Id. at 361. The *Katz* test is well-established in federal and state courts. *See, e.g., United States v. Bucci*, 582 F.3d 108, 116–17 (1st Cir. 2009) (finding no subjective or objective expectation of privacy for Fourth Amendment purposes over front of individual's home plainly visible from street); *United States v. Dunbar*, 553 F.3d 48, 57 (1st Cir. 2009) ("[T]he back of a police car is not a place where individuals can reasonably expect to communicate in private."); *United States v. Hawkins*, 139 F.3d 29, 32 (1st Cir. 1998) (noting it is "beyond cavil" that a tenant lacks a

reasonable expecation of privacy in the common area of an apartment building); *Wishart v. McDonald*, 500 F.2d 1110, 1113–14 (1st Cir. 1974) (explaining that the reasonable expectation of privacy held by an individual in the privacy in his home is surrendered once he is in the public eye); *Nelson v. Salem State Coll.*, 446 Mass. 525, 533–35, 845 N.E.2d 338, 346–47 (2006) (finding subjective expectation, but not objective reasonable expectation of privacy in work area that was open to the public); *Rivera*, 445 Mass. at 128–29, 833 N.E.2d at 1121 (applying federal wiretap statute and stating, "[A]ny expectation the defendant claimed of privacy in his statements objectively was unreasonable in the circumstances: he shouted threats and obscenities at a clerk in a convenience store open to the public."). *See generally United States v. Jacobsen*, 466 U.S. 109 (1984) (incorporating two-prong reasonable expectation of privacy test into legal analysis).

Justice Harlan's well-established test has come to be applied in a variety of contexts. Most states have incorporated the test into their privacy statutes. *See* sources cited *supra* n.2 and accompanying text. Moreover, the First Circuit and Massachusetts courts already apply the *Katz* test to evaluate claims under the federal wiretap statute. *See United States v. Larios*, 593 F.3d 82, 92 (1st Cir. 2010); *United States v. Sparks*, 2010 U.S. Dist. LEXIS 120257, *8 (D. Mass. Nov. 10, 2010). Thus, clear precedent exists to guide Massachusetts courts in applying the Statute in the manner suggested by *Amici*. Interpreting the Statute to include a

reasonable expectation of privacy and thus permit recordings of public occurrences that take place in public places would be straightforward, fair, and consistent with the goals of the Statute and would save the Statute from overbreadth.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court affirm the lower court's ruling denying Defendants-Appellants' motion to dismiss and find that Glik's clearly established First Amendment rights were violated when he was arrested under the Wiretap Statute and that the Statute cannot be applied in a manner consistent with the First Amendment when there exists no reasonable expectation of privacy as to an intercepted communication.

Dated: Cambridge, MA
January 23, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I, Christopher T. Bavitz, as counsel for *Amici Curiae*, certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the foregoing Brief of Citizen Media Law Project, Dow Jones & Company, Inc., GateHouse Media, Inc., Globe Newspaper Company, Inc., The Massachusetts Newspaper Publishers Association, Metro Corp., NBC Universal, Inc., New England Newspaper and Press Association, Inc., The New York Times Company, Newspapers of New England, Inc., The Online News Association, and The Reporters Committee for Freedom of the Press as *Amici Curiae* in Support of Plaintiff-Appellee: (1) complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B), because, in reliance on the word count function of Microsoft Word, the word processing software used to create the brief, excluding those portions of the brief exempted from the count by Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 6,993 words; and (2) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2011, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that counsel for Plaintiff-Appellee (David Milton, Howard Friedman, and Sarah Wunsch) and counsel for Defendant-Appellants (Ian D. Prior and Lisa A. Skehill) are registered as ECF Filers and that they will be served by the CM/ECF system.

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