UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

PLAINTIFFS' OPPOSITION TO DEFENDANT CONLEY'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

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INTRODUCTION

Mr. Martin and Mr. Pérez have substantial histories of recording police officers performing their duties in public. The undisputed facts also establish that, but for the Massachusetts Wiretap Statute, M.G.L. ch. 272 § 99 (Section 99), they would undertake these recordings in secret when, in their view, doing so would protect their safety or more accurately document police behavior. But the law does not require Mr. Martin and Mr. Pérez to violate Section 99, and thus risk arrest, pretrial detention, conviction, and imprisonment, just to secure a ruling that Section 99 is unconstitutional as applied to their intended conduct. Instead, the law permits this preemptive, as-applied challenge. And, as this Court has already explained, and as set forth in plaintiffs' summary judgment memo, the First Amendment protects the secret recording plaintiffs seek to undertake.

District Attorney Conley argues that plaintiffs' claim is not ripe, on the theory that they do not intend to secretly record police officers right now—while this lawsuit is pending—and have not specified a "particular officer, in a particular place saying or doing a particular thing" they will record in the future. Conley Mem. 10, ECF No. 114. This Court should reject these contentions.

Ripeness in the First Amendment context requires a reasonable fear of enforcement and intent to engage in the challenged behavior. *See Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 9 (1st Cir. 2012). That standard is easily satisfied here. Defendants Conley and Evans have repeatedly sought charges and pursued arraignments against individuals for secretly recording police officers performing their duties in public, and they have refused to disavow doing the same against plaintiffs. SUMF ¶¶ 42, 46-49. Plaintiffs have shown that they wish to record police officers in secret, and they have explained that they do not presently intend

to act on that wish simply because *it is illegal*. SUMF ¶¶ 9-18, 26-36; Pltfs. Resp. Evans SUMF ¶¶ 5, 9; Pltfs. Resp. Conley SUMF ¶¶ 36, 37, 40; ECF No. 111-14 at 9. They need not break the law—and face imprisonment—to ripen their constitutional claim. *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 297-98 (1979). As for specificity, plaintiffs have described more than a dozen scenarios where they have wanted to secretly record police officers performing their duties in public. SUMF ¶¶ 10, 27. Case law makes clear that this is more than sufficient to define the scope of plaintiffs' claim, and for good reason. Since we cannot predict the future, requiring plaintiffs to predict exactly how they will violate an unconstitutional statute would essentially eliminate pre-enforcement challenges.

On the merits, Conley asserts that plaintiffs' First Amendment claim falters because applying Section 99 to the secret recording of police officers is narrowly tailored to the government's professed interest in making people aware that they are being recorded. But Conley ignores the central issue here: the recording of *police officers*. To the extent there is a government interest in ensuring that *civilians* are not unknowingly recorded when they speak in public with or near a police officer—which the government may not have, *see* ECF No. 122, at 12-13—that interest is addressed by Section 99's application to recording civilians, not police officers. If anything, the government has a particular interest in holding police accountable because police officers are empowered to use force against civilians." In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). One burden is the possibility of being recorded, without notice, when performing their duties in public.

As the City of Boston has acknowledged, its "police officers have no expectation of privacy when performing their job in public." City of Boston's Opp. to Plaintiff's Mtn. for a

Prelim. Injunc., at 17 n.8, *Boston Police Patrolman's Association v. City of Boston,* No. 16-cv-02670, (Super. Ct. Suffolk County Sept. 6, 2016) (hereinafter, BWC Brief) attached as Exhibit 5 to Rossman Supp. Decl. The Commonwealth cannot claim otherwise, at the expense of plaintiffs' First Amendment rights.

ARGUMENT[1]

To overcome a motion to dismiss on ripeness grounds, plaintiffs "must state a claim to relief that is plausible on its face." *Labor Relations Division of Construction Industries of Massachusetts, Inc. v. Healey*, 844 F.3d 318, 326 (1st Cir. 2016). In a challenge to the sufficiency of a plaintiff's ripeness demonstration, the court "must credit the plaintiff's well-pleaded factual allegations" and draw all reasonable inferences from them. *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001). Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On a summary judgment motion, the Court "must view the evidence in the light most favorable to the opposing party." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam) (cleaned up). Where the parties cross-move, the Court rules on "each motion independently" and "decid[es] in each instance whether the moving party has met its burden under Rule 56." *F.D.I.C. v. Hopping Brook Tr.*, 941 F. Supp. 256, 259 (D. Mass. 1996). Under these standards, Conley's motions to dismiss and for summary judgment should be denied.

I. Plaintiffs' claim is ripe because they have shown intent to engage in prohibited conduct, a step in furtherance of that intent, and a reasonable fear of enforcement.

The "basic function" of the ripeness doctrine is "to prevent the courts, through avoidance of adjudication, from entangling themselves in abstract disagreements." *Rhode Island Ass'n of*

[1] Pursuant to Local Rule 56.1, plaintiffs separately filed a concise statement of the material facts as to which there is a material dispute of fact and previously filed a statement of undisputed facts in support of their own motion for summary judgment. Plaintiffs also incorporate by reference arguments in their memo in support of their motion for summary judgment. ECF No. 122.

Realtors, Inc. v. Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999) (cleaned up). Here, the disagreement between plaintiffs—who wish to secretly record police officers performing their duties in public and have identified more than a dozen specific instances when they wanted to do so in the past—and defendants—who have refused to disavow enforcement against such behavior—is anything but abstract. Because this Court does not need any more facts to adjudicate plaintiffs' challenge to the blanket application of Section 99 against the secret recording of police officers in public, it is ripe.

A. The standard for ripeness in a First Amendment declaratory judgment action turns on reasonable fear of enforcement.

There are two ripeness components: fitness and hardship. Fitness asks "whether there is a sufficiently live case or controversy, at the time of the proceedings, to create jurisdiction in the federal courts" and "whether resolution of the dispute should be postponed in the name of judicial restraint from unnecessary decision of constitutional issues," whereas hardship "concerns the harm to the parties seeking relief that would come to those parties from [the] withholding of a decision at this time." *Project Veritas Action Fund v. Conley*, 270 F.Supp.3d 337, 340-41 (D. Mass. 2017) (cleaned up). Conley does not deny that chilling First Amendment expression is an "irretrievable loss" that satisfies the hardship prong. *Sindicato*, 699 F.3d at 9.[2] As set forth below, plaintiffs also easily satisfy the fitness prong.

The fitness analysis is especially flexible in declaratory judgment actions and free speech cases. There are limits to the details one can provide about an action that, by definition, has not yet occurred. *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 692 (1st Cir.

[2] The First Circuit has "stated that although both prongs of the test must be satisfied, 'a strong showing on one may compensate for a weak one on the other.'" *In re Cushman*, No. 14-10692, 2017 WL 818254, at *4 (D. Me. March 1, 2017) (quoting *McInnis-Misenor v. Me. Med. Ctr.*, 319 F.3d 63, 70 (1st Cir. 2003)). Even if the plaintiffs did not have a strong showing on fitness—though they do—the grave damage to their First Amendment rights means their claim is ripe.

1994). And "when free speech is at issue, concerns over chilling effect call for a relaxation of ripeness requirements." *Project Veritas*, 270 F. Supp. 3d at 341 (cleaned up); *see also Sullivan v. City of Augusta*, 511 F.3d 16, 31 (1st Cir. 2007) (same). As a result, "when First Amendment claims are presented, reasonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim." *Sindicato*, 699 F.3d at 9 (cleaned up); *Whitehouse*, 199 F.3d at 33. At most, courts also require some showing of intent to engage in behavior that violates the challenged application of the statue and evidence of a step towards that behavior. *Sindicato*, 699 F.3d at 9-10. The demonstration necessary to satisfy these requirements is "not high." *Project Veritas*, 270 F. Supp. 3d at 343.

For example, *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), involved a pre-enforcement challenge to the Illinois Wiretap Statute as applied to the audio recording of police officers performing their duties in public.[3] Although Conley suggests the claim was justiciable because plaintiffs had proposed a "specific plan," Conley Mem. 15 n.3, the plan was in fact quite general. The plaintiffs did not—and could not—predict *who* or *what* they would record. *Alvarez,* 679 F.3d at 593. But it was sufficient that (1) "the organization intend[ed] to use its employees and agents to audio record on-duty police officers in public places," (2) "the ACLU claim[ed] a First Amendment right to undertake this recording, but the eavesdropping statues prohibit[ed] it from doing so," and (3) "the ACLU itself, and certainly its employees and agents [would] face prosecution for violating the statute." *Id.* at 593. "Nothing more is needed for pre-enforcement standing." *Id*.

[3] Because standing and ripeness in pre-enforcement cases "boil down to the same question," *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 n.5 (2014), this memo uses standing precedent to enhance its understanding of the ripeness question here. *See, e.g.*, *Sindicato*, 699 F.3d at 9 n.5.

B. Plaintiffs' First Amendment claim for a declaratory judgment is ripe.

Because Mr. Martin and Mr. Pérez's evidentiary showing goes well beyond the plaintiff's showing in *Alvarez*, they have "done enough to show a reasonable predictability of enforcement sufficient to satisfy the relaxed ripeness standard applicable to the present case." *Sindicato*, 699 F.3d at 9. Plaintiffs face a credible threat of prosecution. The Supreme Judicial Court has held that Section 99 applies to secretly recording police officers performing their duties in public, *Commonwealth v. Hyde*, 434 Mass. 594, 599-600 (2001), defendants refuse to disavow applying Section 99 to plaintiffs for exactly this behavior, SUMF ¶ 42, and the undisputed record shows the BPD has applied for a criminal complaint on Section 99 charges against at least nine individuals for secretly recording police officers performing their duties in public over the past seven years, while the Suffolk County District Attorney has pursued arraignment for at least four individuals for the same reason during this period, SUMF ¶¶ 48, 49.

At the same time, plaintiffs have not "simply dashed off" a potential action in which they have little interest or history. *Project Veritas,* 270 F. Supp. 3d at 343. Plaintiffs testified that they want to secretly record police officers performing their duties in public without fear of arrest and prosecution, and they have taken concrete steps to further this intent, including bringing this lawsuit, bringing their phones whenever they leave the house, and placing a shortcut for recording on their phone's homepage so that is easier to access. ECF No. 111-14 at 8-9; ECF No. 111-2 at 19; Pltfs. Resp. Conley SUMF ¶¶ 45, 38; Pltfs. Resp. Evans SUMF ¶ 8.[4] As confirmation of their intent, plaintiffs have also collectively listed more than a dozen specific

[4] As Plaintiff Pérez explained, "I want to secretly record police officers performing their duties in public, but I have not done so because I am afraid of getting arrested or prosecuted under the Wiretap Statute and I will not do so until the Court affirms that it is legal and stops the District Attorney and the Police Commissioner from enforcing the Wiretap Statute against this behavior." ECF No. 111-14, at 9.

instances in which they previously wanted to secretly record police officers performing their duties in public, as well as dozens more where they openly recorded the police. SUMF ¶¶ 8, 10, 25, 27; *cf. Project Veritas*, 270 F.Supp.3d at 343 (openly recording police officers performing their duties in public supports finding that Section 99 chilled secret recordings); *Sullivan,* 511 F.3d at 31 (testimony that plaintiff was previously chilled from applying for parade permit after the 30-day advance notice requirement demonstrates ripeness).

C. Defendant Conley's argument that plaintiffs' claims are not ripe misapprehends the law and the record.

Conley's argument that the Court is still "missing details" necessary to "determine whether plaintiffs are entitled to relief" is wrong for at least three reasons. Conley Mem. 15.

First, Conley suggests that this case cannot be ripe unless plaintiffs answer a series *Green-Eggs-and-Ham*-style questions about whether they could or would secretly record police officers in certain scenarios.[5] But because Section 99 bans secretly recording police officers anywhere, this case's ripeness does not hinge on whether plaintiffs will do it everywhere. It is sufficient that they have shown a sincere desire and concrete means to undertake recording that is in at least some situations prohibited by Section 99.

Distinct hypothetical scenarios would be relevant in this case only to the extent they would matter to this Court's determination of the merits. And here, they do not. *Glik* firmly established that the right to record police officers performing their duties in public is protected by the First Amendment, which means *every* such recording implicates that right. *Martin v. Evans*, 241 F. Supp. 3d 276, 287 (D. Mass. 2017). Accordingly, the question is whether Section

[5] *See* Dr. Seuss, *Green Eggs and Ham* (1960); Conley Mem. 15-17. Conley's description of the record evidence concerning these scenarios is often incorrect. Pltfs. Resp. Conley SUMF ¶ 41. For example, Mr. Pérez did not "refuse to rule out," lying about whether he is making a recording, but simply stated "I don't know" in response to an unbounded and hypothetical question which was properly objected to as to form. *Id.*

99's wholesale prohibition against secret recording is constitutionally permissible, as applied to the right to record police officers performing their duties in public. Although Conley's ripeness argument implies that this merits question could depend on the particular circumstances of a given secret recording, Conley's merits argument makes no such claim. Instead, it broadly defends Section 99 based on the notion that "the only way" to protect the Commonwealth's interest "in assuring that people are aware of when they are being recorded" is to impose a wholesale requirement "that recording be done openly." Conley Mem. 27. While this argument demonstrates a disagreement about whether plaintiffs' as-applied challenge to Section 99 should succeed, it also removes any doubt that this question is properly before this Court.

Second, even if this Court wanted additional detail, plaintiffs have provided far more facts than Conley acknowledges. Mr. Martin has listed nine specific occurrences, falling into roughly five factual categories, in which he has wanted to secretly record police officers performing their duties in the past. SUMF ¶¶ 10-16. For example, he wanted to secretly record a group of police officers who stopped him when he was on his own on the street at night in the Spring of 2011 to accurately document their behavior because he was afraid it would escalate the situation if he took out his phone to record them. ECF No. 111-2, at 13-14. Mr. Pérez listed ten specific occurrences, falling into roughly six factual categories. SUMF ¶¶ 27-34. For example, he wanted to secretly record a police officer who pulled him over when he was driving on his own in Boston a few years ago to accurately document the police officer's interaction with him because he was afraid openly recording might cause the police officer to react violently. ECF No. 111-13, at 11-12. These occurrences necessarily shed meaningful light on the situations in which plaintiffs want to secretly record police officers performing their duties in public in the future.

Plaintiffs' acknowledgment that they do not intend to secretly record police officers right now, *while it is illegal to do so*, simply underscores the chill caused by the challenged application of Section 99. Conley Mem. 15. So too does their statement that the opportunity to secretly record police officers could arise "at any time, in any number of situations, and in any number of places," Conley Mem. 15, as this highlights the number of instances in which the Section 99 unconstitutionally inhibits their behavior. Contrary to Conley's assertion that plaintiffs have not "taken any steps toward making a particular surreptitious recording," Conley Mem. 15, plaintiffs have taken every step they can, short of prosecutable conduct, towards secret recordings. ECF No. 111-14 at 8-9; ECF No. 111-2 at 19; Pltfs. Resp. Conley SUMF ¶¶ 45, 38; Pltfs. Resp. Evans SUMF ¶ 8 (carrying a phone with them whenever they leave the house, placing a shortcut for recording on their phone's homepage, and bringing this lawsuit); *cf. Whitehouse*, 199 F.3d at 30-34 (plaintiff took sufficient first step in challenging Rhode Island's prohibition of commercial use of records obtained under the public record law by obtaining documents that it said it wanted to use for commercial purposes but would not do so for fear of prosecution). Indeed, it is hard to imagine how Mr. Martin and Mr. Pérez could have provided more information or taken more steps within the context of a pre-enforcement suit.

True, plaintiffs cannot now name a "particular officer, in a particular place, [or] doing or saying a particular thing" they will secretly record. Conley Mem. 15. But "[p]re-enforcement suits always involve a degree of uncertainty about future events." *Alvarez*, 679 F.3d at 594; *see also Narragansett*, 19 F.3d at 692 (noting ripeness evaluated differently in declaratory judgment actions because they involve "an ex ante determination of rights"). Plaintiffs do not even know the year in which this litigation will be resolved, so they can hardly be faulted for failing to detail the secret recordings they will make when that happens. In other cases, it has been sufficient for

plaintiffs to allege that they had wanted to engage in the prohibited behavior and wanted to do so in the future. *See Act Now to Stop War and End Racism Coalition and Muslim American Society Freedom Foundation v. District of Columbia*, 846 F.3d 391, 401-02 (D.C. Cir 2017); *281 Care Committee v. Arneson*, 638 F.3d 621, 629-32 (8th Cir. 2011). The same is true here.

Third, the cases cited by Conley bear out that plaintiffs have more than satisfied their burden. The allegedly "comparable" *Texas v. United States*, 523 U.S. 296 (1998), is anything but. Conley Mem. 17-18. A voting rights case, *Texas* did not involve the First Amendment's special ripeness considerations or any allegations of chill, and plaintiffs explicitly stated they hoped there was no need to take the action which might trigger their potential liability. 523 U.S. at 297, 300-301. This stands in stark contrast to Mr. Martin and Mr. Pérez's claim.

Conley's First Amendment citations fare no better. The record of repeated applications for criminal complaints and prosecutions under Section 99 and defendants' refusal to disavow enforcement against plaintiffs sets this case apart from both *Kines v. Day*, 754 F.2d 28 (1st Cir. 1985), and *Reddy v. Foster*, 845 F.3d 493 (1st Cir. 2017), where the plaintiffs did not allege *any* chilling of constitutionally-protected behavior from a credible threat of enforcement, and there was no indication that such a threat would ever arise.[6] Similarly, in *Renne v. Geary*, 501 U.S. 312, 323 (1991), the plaintiffs could not demonstrate a credible threat of enforcement because the statute had never been applied in the manner suggested by plaintiffs, and there was nothing to suggest it would be when the legislature had not yet interpreted the unclear statute. None of these cases resemble this one.

[6] In *Kines*, the incarcerated plaintiff who brought an as-applied challenge to MCI-Walpole's rule to only admit books from publishers —which explicitly included an exception for where the Superintendent approved a book—had never made a request for Superintendent approval. 754 F.2d at 31. And in *Reddy*, protesters were not chilled because they could protest outside of abortion clinics until a clinic designated a buffer zone, no clinic had yet designated such a zone, and clinic directors indicated they did not intend to do so. 845 F.3d at 502.

Finally, given the likelihood that Section 99 will be enforced against plaintiffs if they secretly record police officers performing their duties in public, this case does not resemble the *Babbitt* plaintiff's challenge to a provision stipulating that employers need not furnish facilities for labor organizations. The Supreme Court deemed that claim unripe in part because, in the Court's view, "it [was] conjectural to anticipate that access will be denied." 442 U.S. at 304. In fact, plaintiffs' claim here is more akin to a *different* claim in *Babbit,* which was deemed ripe. The Court held that a challenge to a new limitation on consumer publicity was justiciable even though the provision had never been applied and the union could not identify a specific statement they would make that would trigger it. *Id.* at 301-02. It did so because "erroneous statement is inevitable in free debate," and the government had "not disavowed any intention of invoking the criminal penalty provision" against the union. *Id.* at 301-02. Based on a similar record, this Court should reach the same conclusion.

II. As applied to the secret recording of police officers performing their duties in public, Section 99 violates the First Amendment because it is not narrowly tailored to a significant government interest, and it does not preserve adequate alternatives.

Regardless of whether this lawsuit is deemed an as-applied challenge (as plaintiffs contend) or a facial challenge (as defendants contend), Conley must demonstrate that applying Section 99 to the secret recording of police officers performing their duties in public is narrowly tailored to a significant government interest and preserves adequate alternative channels of communication. *See Showtime Entertainment, LLC v. Town of Mendon,* 769 F.3d 61, 70-78 (1st Cir. 2014). Conley has not satisfied this burden.

A. Defendant Conley must satisfy his burdens under intermediate scrutiny to survive constitutional review.

Mr. Martin and Mr. Pérez do not question the application of Section 99 to the secret recording of any other government official or civilian, nor do they seek to invalidate the entire

statute. Instead, they challenge only Section 99's application to the secret recording of police officers performing their duties in public. As this Court already articulated, plaintiffs' exclusive focus on this particular application of Section 99 is properly understood as an as-applied challenge that triggers intermediate scrutiny. *Martin*, 241 F. Supp. 3d at 279, 287-88; *see also Project Veritas,* 244 F. Supp. 3d 256, 266 (D. Mass. 2017) ("*Martin* found Section 99 unconstitutional as applied to the recording of government officials in the discharge of their duties in public"); *United States v. Grace*, 461 U.S. 171 (1983) (analyzing and declaring statutory prohibition of displaying banners on Supreme Court grounds unconstitutional as applied to public sidewalks). [7]

But even if this case "does not fit neatly within [the] traditional concept" of either facial or as-applied challenges, *Showtime*, 769 F.3d at 70, plaintiffs and Conley agree that intermediate scrutiny should be used to analyze the constitutionality of Section 99 as applied to the secret recording of police officers. Conley Mem. 19-20.[8] While plaintiffs bringing claims with both facial and as-applied characteristics must satisfy standards "for a facial challenge to the extent of [the] reach" of their claim, this simply means courts must apply the constitutional test that is relevant to the substance of the case to the category of applications contemplated by plaintiffs' claims. *John Doe No. 1 v Reed*, 561 U.S. 186, 194 (2010); *Showtime*, 769 F.3d at 70.[9] For

[7] That Mr. Martin and Mr. Perez's claim is not a facial challenge is made all the more clear in comparison to *Project Veritas*, which does challenge the entirety of the statute through a facial overbreadth challenge. 244 F. Supp. 3d at 265-66.

[8] Defendant Conley "observes that a more lenient standard might in fact apply," Conley Mem. 20 n.4, but does not argue that it actually does. Nor could he. This Court has already held that Section 99 is a "content neutral restriction" "subject to intermediate scrutiny, which demands that the law be narrowly tailored to serve a significant governmental interest." *Martin*, 241 F. Supp. 3d at 287 (cleaned up).

[9] The "plainly legitimate sweep" language cited in Defendant Conley's brief is "not [] a separate test applicable to facial challenges, but a description of the outcome of a facial challenge in which a statute fails to satisfy the appropriate constitutional framework." *Cf. Doe v. City of*

example, after determining plaintiffs' claim exhibited both facial and as-applied characteristics, *Reed* applied the usual "exacting scrutiny" test used for electoral disclosure requirements to analyze plaintiffs' claim that the application of Washington's public records law to referendum petitions violated the First Amendment. *Reed*, 561 U.S. 194-202. And in another mixed as-applied/facial case, the First Circuit in *Showtime* used intermediate scrutiny to analyze plaintiff's claim that the application of the zoning bylaws to adult entertainment businesses violated the First Amendment. *Showtime*, 769 F.3d at 70-78; *see also id.* at 71-78. This Court should apply the same intermediate scrutiny test.

B. Defendant Conley has not satisfied his burdens under intermediate scrutiny.

The record confirms this Court's determination that the challenged application of Section 99 does not survive intermediate scrutiny. *Martin*, 241 F. Supp. 3d at 287-88.

1. Defendant Conley has not demonstrated a significant government interest in making police officers aware that they are being recorded.

Intermediate scrutiny "requires a very fact specific inquiry concerning the government's interest and how it will be served." *South Boston Allied War Veterans Council v. City of Boston*, 875 F. Supp. 891, 918-19 (D. Mass. 1995). To satisfy this standard, the government must "do more than simply posit the existence of the disease sought to be cured" and provide actual evidence of its alleged interest. *Asociacion de Educacion Privada de Puerto Rico, Inc. v. Garcia-Padilla*, 490 F.3d 1, 18 (1st Cir. 2007) (cleaned up). But that is precisely what Conley fails to do. Conley asserts that the Commonwealth's interest is "to assure that people are aware of when they are being recorded, including police officers and those who voluntarily interact with them."

Albuquerque, 667 F.3d 1111, 1123 (10th Cir. 2012) (describing meaning of the related "no set of circumstances" language); *Bruni v. City of Pittsburgh*, 824 F.3d 353, 363 (3rd Cir. 2016) (same); *see Showtime*, 769 F.3d at 70-78 (applying intermediate scrutiny to plaintiffs' claims to see if the challenged application of the statute did not have "a plainly legitimate sweep").

Conley Mem. 21. For two reasons, as applied to situations involving the recording of police officers performing their duties in public, Conley fails to demonstrate this interest is "real [and] not merely conjectural." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 624 (1994).

First, Conley has not shown how the government has an interest in making civilians aware of any recording that is created while they are speaking with or near police officers performing their duties in public. None of the Section 99 training materials created by the BPD focus on, or even mention, this interest. SUMF ¶¶ 100, 102, 106, 111.[10] And aside from a single dissent in *Alvarez*, none of Conley's citations suggest that a civilian retains a privacy interest in such situations, as they all address private conversations between civilians. *See, e.g.*, *Katz v. United States*, 389 U.S. 347 (1967) (FBI recording a civilian in a telephone booth); *United States v. White*, 401 U.S. 745 (1971) (government agent listened to a recorded conversation between two private individuals); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (unknown third party record telephone call between two private individuals). This makes sense. A private conversation with a friend in a park is different from a conversation with an on-duty officer on the street. *Cf. Jean v. Massachusetts State Police*, 492 F.3d 24, 30 (1st Cir. 2007) (noting the "interest in protecting private communication" "is virtually irrelevant[] where the intercepted communications involve a search by police officers of a private citizen's home in front of" family members "and at least eight law enforcement officers"); *Project Veritas*, 244 F. Supp. 3d at 266 (Section 99 constitutionally protects "conversations with governmental officials *in nonpublic settings or about non-official matters*") (emphasis added).

[10] For example, the Section 99 video does not discuss arresting someone for secretly recording conversations between officers and crime victims or informants, showing only that an officer can take out charges against an individual who secretly recorded him during a traffic stop. SUMF ¶¶ 93-95, 100.

Second, and more important, Conley provides no evidence that the Commonwealth has an interest in making police officers aware that they are being recorded while performing their duties in public. Nor could he. The statute itself makes no mention of police officer privacy, referring only to the privacy interests of citizens. The legislative history also focuses exclusively on personal conversations between civilians. *See* 1968 Senate Report of the Special Commission on Electronic Eavesdropping, No. 1132, attached as Exhibit 7 to Rossman Suppl. Decl.; *see also Hyde,* 434 Mass. at 608 (Marshall, C.J., dissenting) (noting "[t]here is no hint in the legislative history that the Legislature contemplated" protecting police officers performing their duties in public from secret recording). And none of the cases cited by Conley held that police officers must be made aware that they are being recorded while performing their duties in public. *See supra.*[11]

That is because the government interest cuts in the opposite direction, that is, in favor of civilians creating accurate records of what police officers say in public when they think no one is recording them. "There is a difference in kind, well recognized in our jurisprudence, between police officers, who have the authority to command citizens, take them into custody, and to use physical force against them, and other public officials who do not possess such awesome powers." *Hyde*, 434 Mass. at 613 (Marshall, C.J., dissenting). Police officers are "granted

[11] Defendant Conley's discussion of an "unwilling participant" doctrine has no basis in the law. Conley Mem. 22. Neither the Supreme Court nor the First Circuit has ever used this term. Each of the cited cases involved an unwilling *listener* or *viewer* who had no choice but to receive information. *See Hill v. Colorado*, 530 U.S. 703, 716 (2000) ("[T]he unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases"); *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("[T]here is simply no right to force speech into the home of an unwilling listener"); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) ("[T]he unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speaker except through the protection of the municipality."). That doctrine has no bearing on the instant case, where any recorded individual *voluntarily chose to speak*.

substantial discretion that may be misused to deprive individuals of their liberties," *Glik,* 655 F.3d at 82, or to use violence against civilians, *see, e.g.,* Washington Post National Police Shootings Database (519 people fatally shot by police in 2018 as of June 20; 987 people fatally shot by police in 2017).[12] It is in everyone's interest—the Commonwealth and civilians alike—to capture accurate recordings of these actions. Secretly recording police officers performing their duties in public is often the only mechanism to hold police accountable, both because it "aids in the uncovering of abuses" that would otherwise never be documented, and because the knowledge that recording is always possible may have a general "salutary effect." *Glik*, 655 F.3d at 82-83. Commissioner Evans himself emphasizes, "[w]e have nothing to hide."[13] There is therefore no legitimate reason why officers should be made aware that they are being recorded while performing arrests, traffic stops, stop-and-frisks, and other public actions, as the only motivation would be to allow officers to alter their behavior when they know it will be documented. "The purpose of G.L. c. 272 § 99 is not to shield public officials from exposure of their wrongdoings." *Hyde*, 434 Mass. at 975 (Marshall, C.J, dissenting).

Indeed, Conley does not even try to articulate a reason why the secret recording of these coercive actions should be illegal. Instead, he hypothesizes other potential interactions between police officers and civilians—such as meetings with confidential informants, victim interviews or discussions of operational plans—that do not involve one-on-one or involuntary police interactions. Conley Mem. 23. The record does not contain any evidence to suggest these hypothetical scenarios customarily take place in public, perhaps because "[p]olice discussions about matters of national and local security do not take place in public where bystanders are

[12] *Available at* https://www.washingtonpost.com/graphics/national/police-shootings/ (last visited July 8, 2018).
[13] Jan Ransom, *Police Head Says He Can Assign Body Cameras to Officers*, BOS. GLOBE, (Sept. 6, 2016)

within earshot." *Alvarez*, 679 F.3d at 607. "The government's burden is not met when a State offers no evidence or anecdotes in support of its restriction." *Rideout v. Gardner*, 838 F.3d 65, 73 (1st Cir. 2016) (cleaned up).

Given the ubiquity of recording devices, officers must assume that they are being recorded at all times. As the chairman of Washington D.C.'s police union explained: "In the District of Columbia, and in places like Boston, where there are so many cameras in public places, there's almost nowhere you can go where you're not being recorded. So we tell our officers, that's the way you should behave all the time – as if you're being recorded."[14] Even the BPD has recognized that "police officers have no expectation of privacy when performing their duties in public." BWC Brief at 17 n.8. Without any evidence to the contrary, this Court "cannot conclude that [the Commonwealth] has a legitimate state interest in fixing a problem it has not shown to exist." *Asociacion de Educacion Privada*, 490 F.3d at 18.

2. Defendant Conley has not demonstrated that Section 99's prohibition against secretly recording police officers performing their duties in public is narrowly tailored to any purported government interest.

The narrow tailoring test "demand[s] a close fit between ends and means," and requires the government to prove "alternative measures that burden substantially less speech would fail to achieve the government's interests." *McCullen v. Coakley*, 134 S. Ct. 2518, 2524, 2540 (2014). Here, Conley argues an interest in "assuring that people are aware of when they are being recorded," Conley Mem. 27, but the term "people" papers over the critical flaw in Conley's argument: the only people who the Commonwealth could plausibly want to protect from secret recordings are civilians. But even if there is a significant interest in making *civilians* aware that

[14] Robinson Meyer, *What to Say When the Police Tell You to Stop Filming Them*, The Atlantic (Apr. 28, 2015); *see also* Evan Allen, *City to Hold Hearings on Body Camera Pilot Program*, Boston Globe (Apr. 25, 2016) ("Evans said police are filmed on the job constantly, either by security cameras or private citizens, and have no problem being filmed.").

they are being recorded while they are interacting with police officers performing their duties in public, a prohibition on secretly recording *police officers* is not tailored to that interest. There are numerous instances where a civilian could secretly record a police officer performing their duties in public where no civilians would be recorded unknowingly. *See* ECF No. 122 at 15. And if an officer (unwisely) chooses to speak with a confidential informant in public, and if someone secretly records that conversation, nothing in this lawsuit would prevent the government from defending its interest in the informant. That interest would be vindicated by applying Section 99 to the recording of the civilian who spoke with or near a police officer.

Notably, "[a] complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The challenged application of Section 99 misses that mark. Conley's own cases demonstrate the stringency of this standard. Conley Mem. 27-28. For example, the Supreme Court upheld a complete ban on picketing "before or about" any residence to protect individuals from harassment by construing the ban to prohibit only "focused picketing taking place solely in front of a particular residence" and to continue to authorize "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses." *Frisby*, 487 U.S. at 483; *see also Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (upholding complete ban of political posters on public property to reduce visual blight when ordinance did not prevent speaking or distributing literature). Similarly, the First Circuit upheld a complete ban on news racks only when the government's actions "including survey[s], report[s] and public hearings – demonstrate that it carefully calculated the costs and benefits" and that its chosen path was "the most effective solution aimed at reducing visual clutter and preserving the District's historic character." *Globe*

Newspaper Co. v. Beacon Hill Architectural Com'n, 100 F.3d 175, 190 (1st Cir. 1996). Here, Defendant Conley has made no showing—let alone a carefully calculated one—that banning secret recording of police officers performing their duties in public targets an interest in ensuring civilians are aware they are being recorded. This failure demonstrates that Section 99's complete ban of secret recording of police officers performing their duties in public is not narrowly tailored.

3. Conley has not identified adequate alternatives to the secret recording of police officers performing their duties in public.

Although "the First Amendment does not guarantee the right to employ every conceivable method of communication at all time and in all places," "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." *Vincent*, 466 U.S. at 812. Such is the case here. Defendant Conley's suggested alternatives boil down to two options: non-audio recording and open recording. Conley Mem.29. Neither is adequate.

Regarding the first, audio recording is a "uniquely reliable and powerful method[] of preserving and disseminating news and information about events that occur in public," whose "self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes." *Alvarez*, 679 F.3d at 607. Without audio, the world would not have heard Eric Garner's 11-times repeated "I can't breathe" or Philando Castile calmly agreeing not to pull out his gun a mere 13 seconds before he was shot seven times. Conley himself acknowledges the power of audio recording, noting that "overhearing a conversation is qualitatively different" from "creating a precise, durable, and transferable recording of that conversation." Conley Mem. 25-26. "Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs." *Glik*, 655 F.3d at 82

(cleaned up). "This is particularly true of law enforcement officials[.]" *Id*. Audio recording is thus "a uniquely valuable [and] important mode of communication" with no adequate alternative. *Vincent*, 466 U.S. at 812.

With respect to the second, the record demonstrates that open recording often is not a viable option for individuals who fear police retaliation. Plaintiffs testified that in many situations, they do not feel safe openly recording police officer performing their duties in public based on their prior experiences. SUMF ¶¶ 19, 37. For example, a Boston police officer grabbed Mr. Martin's hand, ultimately spraining his wrist and fingers, when he saw Mr. Martin openly recording him in Jamaica Plain. SUMF ¶ 21. When the officer let go of Mr. Martin's hand, Mr. Martin didn't know if he was going to reach for his baton or mace or gun, and it was "one of the scariest moments of [his] life." SUMF ¶ 21. Mr. Pérez has also had experiences where police aggressively responded to his open recordings. SUMF ¶ 38. For example, an officer struck Mr. Pérez twice with his baton when he was openly recording police during a protest in Chicago, which caused his phone to stop recording and left Mr. Pérez with bruises. SUMF ¶ 40. In Boston, an officer yelled at Mr. Pérez and grabbed the recording device when he saw that Mr. Pérez was openly recording him. SUMF ¶ 39. Mr. Pérez was "terrified," and "left very shaken." SUMF ¶ 39.

Defendant Conley's suggestion that a "reasonable factfinder could interpret these facts to mean that officers who know they are being recorded will not respond with retaliation or intimidation" is not unsupported by the record. Conley Mem. 31; *Cf. Cherkaoui v. City of Quincy,* 877 F.3d 14, 24 (1st Cir. 2017) (noting that a genuine dispute cannot be based on "conclusory allegations, improbable inferences, and unsupported speculation"). What is more, "at the summary judgment stage, [] all reasonable inferences must be drawn for the non-

movant." *In re Marrama*, 445 F.3d 518, 522 (1st Cir. 2006). If the record left any doubt—though it does not—the relevant question would be whether a reasonable fact finder could find that the officers *would* respond with retaliation or intimidation. Because the answer is unquestionably yes, open recording is not an adequate alternative.

CONCLUSION

For the foregoing reasons and the reasons set out in plaintiffs' memorandum in support of their own motion for summary judgment, this Court should deny Defendant Conley's motions to dismiss and for summary judgment and should grant summary judgment in favor of plaintiffs.

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Respectfully submitted,

/s/ Jessie J. Rossman

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was filed via the Court's CM/ECF system and that and a copy will be sent automatically to all counsel of record on July 11, 2018.

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