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No. 89961-4

SUPREME COURT  
OF THE STATE OF WASHINGTON

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JASON DILLON, an individual,

*Respondent,*

v.

SEATTLE DEPOSITION REPORTERS, LLC, a Washington company;  
DAVIS WRIGHT TREMAINE, LLP, a Washington company, JAMES  
GRANT and Jane Doe Grant, individually and the marital community  
composed thereof if any,

*Petitioners.*

APPEAL FROM KING COUNTY SUPERIOR COURT  
THE HONORABLE BRUCE HELLER

PETITIONERS' RESPONSE TO BRIEF OF *AMICUS CURIAE*  
ACLU OF WASHINGTON REGARDING PRIVACY ACT

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ORIGINAL

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## I. INTRODUCTION

For more than two decades, this Court has interpreted “private” in the Privacy Act to mean “intended only for the persons involved.” The American Civil Liberties Union of Washington (“ACLU”) asks the Court to overrule this longstanding interpretation to conclude the interviews between DWT<sup>1</sup> (lawyers for a party in a lawsuit) and Dillon (a key witness who called DWT to “clear his conscience” and sign a declaration attesting to his company’s destruction and fabrication of evidence) were “private.” The ACLU’s proposed interpretation would dramatically expand the Act’s reach, making its penalties apply to “[a]ll conversations . . . unless they are patently public in nature,” even if the parties understood everything said would be disclosed publicly. *See* ACLU Br. at 6-7.

This reinterpretation of the Act would require the Court to unwind two decades of precedent. It would result in imposing penalties for recording or taking notes during conversations in which the parties had no reasonable expectation of privacy—as here. This would not only lead to perverse results but could render the statute unconstitutional: as the ACLU has argued successfully, a prohibition on recording communications that are not objectively private would infringe First Amendment rights.

This Court rejected the ACLU’s invitation to reconsider its interpretation of the Privacy Act earlier this year. It should do so again.

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<sup>1</sup> This brief refers to Petitioners Davis Wright Tremaine LLP and James Grant as “DWT” and to Petitioner Seattle Deposition Reporters as “SDR.”

## II. ARGUMENT

### A. This Court Has Long Held the Privacy Act Protects Only “Secret” Communications.

The Privacy Act applies “only to private communications or conversations.” *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996).

As DWT explained in its Supplemental Brief (at 14), this Court has defined “private” to have its “ordinary and usual meaning,” i.e.,

belonging to one’s self ... SECRET ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message; a private communication ... SECRETLY: not open or in public.

*State v. Kipp*, 179 Wn.2d 718, 729, 317 P.3d 1029 (2014) (quoting *Kadoranian v. Bellingham Police Dep’t*, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992), and WEBSTER’S THIRD NEW INT’L DICTIONARY 1804-05 (1969) (capitalization supplied in *Kipp*)). The Court has applied this definition in eight cases in the past 22 years.<sup>2</sup> And it has been Washington law since the Court of Appeals adopted it in 1978—thirty-six years ago.<sup>3</sup>

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<sup>2</sup> In addition to *Kipp* and *Kadoranian* the Court has applied this definition in the following cases: *State v. Roden*, 179 Wn.2d 893, 899, 321 P.3d 1183 (2014); *State v. Modica*, 164 Wn.2d 83, 87-88, 186 P.3d 1062 (2008); *Lewis v. State Dep’t of Licensing*, 157 Wn.2d 446, 458, 139 P.3d 1078 (2006); *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002); *State v. Christensen*, 153 Wn.2d 186, 192-93, 102 P.3d 789 (2005); *Clark*, 129 Wn.2d at 224-25.

<sup>3</sup> The Court of Appeals adopted the definition in *State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978), and has consistently used it since. *See, e.g., State v. Babcock*, 168 Wn. App. 598, 605, 279 P.3d 890 (2012); *State v. Mankin*, 158 Wn. App. 111, 118, 241 P.3d 421 (2010); *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 38, 226 P.3d 263 (2010); *State v. Faford*, 128 Wn.2d 476, 484, 910 P.2d 447 (1996); *State v. D.J.W.*, 76 Wn. App. 135, 141-42, 882 P.2d 1199 (1994), *aff’d, Clark*, 129 Wn.2d 211; *State v. Flora*, 68 Wn. App. 802, 806, 845 P.2d 1355 (1992); *State v. Slemmer*, 48 Wn. App. 48, 52, 738 P.2d 281 (1987).

As this Court has held, to establish a communication is “private,” a plaintiff must prove (1) the parties overtly manifested a subjective expectation that the communications be private or secret *and* (2) the expectation was objectively reasonable under the circumstances. *See State v. Modica*, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008); *State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d 789 (2005); *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002). Because a party invoking the Privacy Act predictably “will contend that his or her conversation was intended to be private,” as Dillon did here, a self-serving declaration will not suffice. *Clark*, 129 Wn.2d at 225; *Lewis v. State, Dep’t of Licensing*, 157 Wn.2d 446, 458-59, 139 P.3d 1078 (2006). Instead, the Court looks both to contemporaneous manifestations of intent and factors showing “the reasonableness of [an alleged] privacy expectation,” including “the duration and subject matter of the communication, the location of the communication and the presence or potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party.” *Kipp*, 179 Wn.2d at 729. The Court has repeatedly applied these factors since deciding *Clark* eighteen years ago. *See* 129 Wn.2d at 225-27; *see also Modica*, 164 Wn.2d at 88; *Lewis*, 157 Wn.2d at 458-59; *Christensen*, 153 Wn.2d at 193; *Townsend*, 147 Wn.2d at 673-74.

The Court has never varied from this interpretation of the Privacy Act. The ACLU offers no basis to do so now.

**B. The Court Should Reject the ACLU's New Request for Redefinition of the Term "Private" without Reaching Its Merits.**

The ACLU asks the Court to overrule its precedents and hold "[a]ll conversations should fall within the scope of the [Act] unless they are patently public in nature." ACLU Br. at 6. It admits its standard would expand the Privacy Act so it applies to the "vast majority of [all] conversations." *Id.* at 7. Instead of requiring a party invoking the Privacy Act to prove a private communication, the ACLU argues he should have to show only that he did not *intend* his communications to be "patently public." *Id.* at 6; *see id.* at 8. Under this purely subjective test, any party could invoke the Privacy Act merely by alleging a conversation was "intended only for the persons involved" and not "open to all." ACLU Br. at 7; *see id.* at 8.

The ACLU's interpretation would preclude courts from using the *Clark* factors to decide whether participants in a communication had an objectively reasonable expectation of privacy. Instead, the ACLU would have a court consider only "whether the participants intended to include the public in the conversation." *Id.* at 9. According to the ACLU, the factors relevant to that inquiry should be limited to the "actual visible presence of one or more third parties" and whether these "outsiders are strangers to the participants in the conversation." *Id.* at 8-9. Thus, the ACLU argues courts should *not* consider the context and substance of the conversation, the parties' relationship, or whether they knew or stated the

conversations would be communicated to others. *See, e.g., Kipp*, 179 Wn.2d at 729; *Clark*, 129 Wn.2d at 225-27.

To support its interpretation (and justify overruling eight decisions of this Court), the ACLU offers nothing but its own disagreement about the dictionary definition of “private” the Court has used. ACLU Br. at 7.<sup>4</sup> The ACLU admits it made the same arguments last year in *Kipp*, *see* ACLU Br. at 8 & n.4, but this Court (correctly) adhered to its decisions regarding both the definition of “private” and application of the *Clark* factors. *See Kipp*, 179 Wn.2d at 729-32.

The Court should reject the ACLU’s invitation to overrule its long-established interpretation of the Privacy Act for several reasons, without even reaching the merits of the argument:

*First*, neither Dillon nor the Court of Appeals challenged this Court’s definition of “private” or application of the *Clark* factors. *See* Appellant Br. at 25-26. The Court should not allow the ACLU to inject these issues, as an “[a]micus cannot raise an issue not properly raised by a party to the case.” *State v. Xiong*, 164 Wn.2d 506, 513 n.1, 191 P.3d 1278 (2008) (declining to address issue raised by ACLU). *See also State v. Davis*, 175 Wn.2d 287, 302 n.1, 290 P.3d 43 (2012) (granting motion to strike ACLU amicus brief attempting to raise issue for first time on

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<sup>4</sup> The ACLU objects that the Court’s definition of “private” improperly refers to “etymology,” “an obsolete definition of the noun ‘private,’” and “the adverbial phrase ‘in private.’” *See* ACLU Br. at 7 n.3. It does not explain how its views of lexicography bear on whether the Court’s decisions are wrong.

appeal); *State v. Hatchie*, 161 Wn.2d 390, 401, 166 P.3d 698 (2007) (declining to address issue raised by ACLU but not by the parties).

*Second*, the ACLU does not address the facts of this case, which belie any claim that Dillon’s call to DWT was a private communication. Dillon knew he was talking with T-Mobile’s lawyers and a non-lawyer who was present just to take notes, and he said that was “Okay.” CP 205 (2:8-15). Before he called, Dillon told *other* NetLogix employees he intended to speak with T-Mobile’s lawyers, and he reported “they were all on board with ... giving you guys the information you need ... to resolve this thing.” CP 205 (3:21-4:1); CP 212-13 (33:23-34:4). Several times during the calls Dillon said not only that he expected DWT would disclose his statements, but that he *wanted* that to happen to “resolve” the federal action and cause Akrie to “drop the case.” CP 205 (3:25-4:1); CP 206 (7:12-16). Thus, in the first call, Dillon agreed to provide a declaration for use in federal court; in the second, he said he had reviewed the declaration, and it was accurate. CP 213 (36:25-37:1); CP 224 (4:13-19). Further, Dillon *told* Akrie what he said in the calls, long before T-Mobile filed the transcripts. CP 87:15-16; CP 237; CP 448.

The ACLU addresses none of this.<sup>5</sup> Instead, it posits several hypotheticals with no relation to the facts here, essentially asking the

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<sup>5</sup> Dillon’s only “evidence” of an alleged expectation of privacy was his declaration from the federal case, which U.S. District Judge Ricardo Martinez found incredible based on Dillon’s testimony in open court—and which, in any event, has no bearing on whether his subjective expectation was objectively reasonable. Pet’rs Suppl. Br. at 17-19.

Court to “step[] into the prohibited area of advisory opinions.” *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004) (internal quotation omitted); *see also State v. Athan*, 160 Wn.2d 354, 368, 158 P.3d 27 (2007) (refusing to address issues raised by ACLU as amicus when facts of the case did not present the concerns it raised).

*Third*, under principles of *stare decisis*, this Court will not overturn “an established rule” without a “clear showing ... [it] is incorrect and harmful.” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (internal quotation omitted); *accord In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The ACLU offers no reason the Court’s longstanding interpretations of the Privacy Act are either incorrect or harmful. *See, e.g., Kipp*, 179 Wn.2d at 727-28 (refusing to change standard of review for rulings on motions to suppress under the Privacy Act because State failed to show the established rule was incorrect or harmful). Because the definition of “private” has significance for the ongoing administration of criminal justice (where the issue frequently arises in connection with motions to suppress evidence of a defendant’s conversations), the ACLU bears a heavy burden—which it has not even attempted to meet.

*Fourth*, “[t]he Legislature is presumed to be aware of judicial interpretation of its enactments, and where statutory language remains unchanged after a court decision the court *will not* overrule clear precedent interpreting the same statutory language.” *Riehl v. Foodmaker*,

*Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (emphasis added).

Although the Legislature has revised the Privacy Act many times since this Court construed the Act,<sup>6</sup> the Legislature has never taken issue with its definition of “private” as meaning “a secret message,” nor the requirement that an expectation of privacy be objectively reasonable.

As it did in *Kipp*, the Court should decline the ACLU’s invitation to revisit well-settled principles of law under the Privacy Act.

**C. The ACLU’s Interpretation Would Upset Well-Reasoned Case Law and Lead to Absurd Results.**

The ACLU’s proposed revision to the definition of “private” communications would abandon the requirement that parties to a communication have a reasonable expectation of privacy. The ACLU’s approach thus calls into question the holdings of many (or most) of the cases decided under the Act.

Applying the Court’s existing test, Washington courts have consistently held the Privacy Act does not apply when circumstances show the party reasonably should have known the conversation would be relayed to others. For example, in *Clark*, 129 Wn.2d 211, the Court held defendants’ conversations seeking to sell drugs to a police informant were not private, even if they occurred in a car with no one else present. “A communication is not private where anyone may turn out to be the recipient of the information or the recipient may disclose the information.”

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<sup>6</sup> See Laws of 1986, chs. 161-63; Laws of 1991, ch.1617; Laws of 2000, chs. 1226-28; Laws of 2004, chs. 36-37.

*Id.* at 227. In *Lewis*, 157 Wn.2d 446, the Court held police audio recordings of drivers stopped for suspected DUI offenses were not private because it was “not persuasive that ... the drivers ... would expect the officers to keep their conversations secret,” and they should have “reasonably expect[ed] the officers would file reports and potentially would testify at hearings about the incidents.” 157 Wn.2d at 459. In *State v. Bonilla*, 23 Wn. App. 869, 598 P.2d 783 (1979), a defendant’s call to police confessing he had murdered his wife was not private because “a reasonable person would expect the conversation to be reported to other police officers.” *See Clark*, 129 Wn.2d at 225 (discussing *Bonilla*).<sup>7</sup>

By advocating a subjective test (and abandoning the mooring of reasonable expectations), the ACLU asks the Court to unravel these holdings. It contends defendants’ reliance on these cases is “based on [an] improper conflation of ‘private’ and ‘secret.’” ACLU Br. at 9. But Washington courts consistently hold a conversation is “private” only if it was secret and between persons who manifest an intent *not* to share the conversation. This is not “conflation”; it is Washington law.

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<sup>7</sup> These are just a few examples. *See also Forrester*, 21 Wn. App. at 861-62 (defendant’s calls to police confessing a murder, seeking to extort \$10,000, and threatening to go to the press were not private because he “knew or should have known” his demands would be conveyed to others); *Mankin*, 158 Wn. App. at 118-19, 120 (defense counsel’s interviews of police officers were not within the Privacy Act; officers regularly participate in interviews, “are undoubtedly aware that [their] statements ... will be used for impeachment purposes” at trial, and could “not have had a reasonable subjective belief that what they said during a defense interview was ‘private’”); *Slemmer*, 48 Wn. App. at 52-53.

The ACLU also claims the Court has “flatly rejected” the principle that a party cannot claim conversations are private when he knows they will be conveyed to others. ACLU Br. at 9. It bases this argument on *Kipp*, in which the State argued one brother-in-law should have expected his confession to molesting his brother-in-law’s daughters to be disclosed. The Court found that this bore “little relevance to whether the recording itself is proper,” and found the defendant had a reasonable expectation of privacy given all the circumstances.<sup>8</sup> The ACLU also relies on *dicta* from *Modica*, 164 Wn.2d at 89-90, in which the Court of Appeals actually held a defendant’s calls to his grandmother on a jailhouse phone *were not private* because an automated message warned of the recording. *Id.* at 88. See ACLU Br. at 9-10 (quoting this *dicta*: “the mere fact that a portion of the conversation is intended to be passed on does not mean a call is not private and must be determined from a totality of the circumstances”).

But *Kipp* and *Modica* did not overrule or reject *Clark*, *Lewis*, or any other cases interpreting the Privacy Act. Rather, they underscored that whether a conversation is private—and an expectation of privacy is objectively reasonable—depends on the circumstances as a whole. *Kipp*, 179 Wn.2d at 729 (“The reasonable expectation standard calls for a case-by-case consideration of all the facts.”); *Modica*, 164 Wn.2d at 89-90.

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<sup>8</sup> The conversation took place in a private home; the men were alone; they were brothers-in-law; the conversation concerned a sensitive matter; and the defendant suggested they “continue discussing the matter privately.” 179 Wn.2d at 730-33.

Here, the circumstances as a whole demonstrate Dillon's interview calls were the opposite of private, and any claimed expectation of privacy is unreasonable. Dillon was not talking to a family member. Instead, he voluntarily contacted DWT, counsel for his former employer's adversary in ongoing litigation, to disclose that his employer had committed a wide-ranging fraud on the court.<sup>9</sup> He had no confidential relationship with DWT. In the calls, he explained that he, Akrie, and NetLogix had engaged in an extensive scheme to destroy evidence, fabricate evidence, and commit fraud. If Dillon wanted to keep this a secret, the *last people* he would call would be lawyers for the victim of the fraud. Dillon's communications, including his agreement to sign a declaration attesting to fraud, are inconsistent with any common sense notion of "private" conduct. They are far more analogous to the confessions to authorities in *Bonilla* and *Forrester* than to the conversations among family members in *Kipp* and *Modica*. But under the ACLU's implausible reading of the Act, the lawyers would be subject to criminal sanctions for taking good notes to accurately tell the court or their clients they had been the victims of Dillon's fraud.

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<sup>9</sup> The ACLU claims the Court in *Kipp* "clarif[ed] that the relationship of the participants only points towards a lack of privacy in [instances] involving either strangers or police officers," and "SDR does not continue to press this argument." ACLU Br. at 9 n.5. It is wrong. First, *Kipp* did not hold the parties' relationship to be relevant only in situations involving strangers or police; the Court merely cited these as *examples* of situations where it held conversations were not private. 179 Wn.2d at 732. Second, defendants have argued throughout this litigation that the fact that Dillon voluntarily contacted and disclosed information to an adverse party strongly indicates he had no expectation (much less a *reasonable* expectation) the calls would be private. *See, e.g.*, Pet'rs Suppl. Br. at 16.

The ACLU's proposed reinterpretation of the Privacy Act would lead to absurd results in other contexts. Consider a public official who telephones a journalist, encouraging him to publish a story about corruption and providing detailed information on the record. Even though the official knew and intended her statements would be publicly disclosed, according to the ACLU, if she later was unhappy with the story, she could sue the journalist for recording the phone call on the basis that no third parties were "visibly present." Similarly, a politician at a campaign event might object to an attendee capturing his comments on a cell phone and providing the recording for use in an unflattering television or radio spot. Under the ACLU's reading of the Privacy Act, the politician could swear out a criminal charge against the attendee by asserting he intended his comments only for the persons at the event, not the public at large.

The Court should adhere to its objective test for private communications.

**D. The ACLU's Interpretation Likely Would Render the Privacy Act Unconstitutional.**

The ACLU's effort to apply the Privacy Act to virtually all conversations absent all-party consent—without regard to whether the parties have any reasonable expectation of privacy—would likely render the Privacy Act unconstitutional under the First Amendment. Indeed, the ACLU has made this argument in other cases—and won.

Like Washington, "[m]ost states' electronic privacy statutes apply only to *private* conversations [and] contain (or are construed to include) an

expectation-of-privacy requirement that limits their scope to conversations that carry a reasonable expectation of privacy.” *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012). The Illinois statute, however, “is a national outlier” in omitting a privacy requirement. *Id.* The ACLU therefore sued to challenge that law because it wanted to make audio-visual recordings of police. *Id.* at 586, 587. The district court refused the ACLU’s request for an injunction and dismissed its complaint, but the Seventh Circuit reversed, finding the Illinois statute “very likely flunks” First Amendment analysis. *Id.* at 586. The court concluded “[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.” *Id.* at 595. It rejected the State’s argument that its interest in protecting conversational privacy justified the law. *Id.* at 605. “[B]y making it a crime to audio record *any* conversation, even those that are *not* in fact private—the State has severed the link between the eavesdropping statute’s means and its end.” *Id.* at 606.

After *Alvarez*, the ACLU lent amicus support in two cases seeking to invalidate the Illinois law. In *People v. Melongo*, 6 N.E.3d 120 (Ill. 2014), the ACLU supported a woman who surreptitiously recorded phone calls with a court reporter. 6 N.E.3d at 122-23.<sup>10</sup> The ACLU contended

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<sup>10</sup> Melongo had been charged with computer tampering in a prior case. She claimed that she had not been arraigned on the charge, but the court transcript showed she had been. Melongo complained to the court reporter, who refused to

Melongo's calls were not private because she was speaking to the reporter in the context of the reporter's "official duties [relating] to an open judicial proceeding," a matter of "quintessential public concern." Br. Amicus Curiae at 9, *People v. Melongo*, No. 114852 (Ill. Dec. 6, 2013) (App. A).<sup>11</sup> These conversations, the ACLU said, "fall[] squarely within the ambit of the First Amendment." *Id.* at 11. The Illinois Supreme Court agreed, holding the statute was overbroad and burdened more speech than necessary because it criminalized recording of conversations even if the parties could have had no expectation of privacy. 6 N.E.3d at 126-27.

In *People v. Clark*, 6 N.E.3d 154 (Ill. 2014), the ACLU provided amicus support to a defendant charged for audio recording a child custody proceeding in court and a separate conversation he had with opposing counsel. 6 N.E.3d at 156. Here too, the ACLU insisted the conversations were not private, in part because they "related to judicial proceedings" and fell "squarely within the ambit of the First Amendment." Br. Amicus Curiae at 8-9, 11-12, *People v. Clark*, No. 115776 (Ill. Nov. 26, 2013) (App. B). Again, the Illinois Supreme Court agreed, striking down the eavesdropping statute because it "essentially deems all conversations to be

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change the transcript. Melongo recorded three phone calls with the court reporter supervisor and posted the transcripts on a website. 6 N.E.3d at 122-23.

<sup>11</sup> Excerpts of the ACLU's briefs in other cases are provided in the Appendix to this brief. Excerpts of the ACLU's *Melongo* brief appear in Appendix A.

private and not subject to recording even if the participants have no expectation of privacy.” 6 N.E.3d at 160.<sup>12</sup>

The ACLU’s position here would undermine First Amendment rights—as the organization has argued in other states. If the Privacy Act criminalizes recording conversations when the parties have no reasonable expectation of privacy, the Act would be overbroad.

### III. CONCLUSION

The ACLU has provided nothing to show this Court’s long-standing interpretation of the Privacy Act is incorrect or harmful. It is not. By contrast, the ACLU’s effort to reinterpret the Act would disregard the statute’s plain terms, create ill-defined criminal liability for non-private conversations, and likely make the Privacy Act unconstitutional.

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<sup>12</sup> The ACLU took the same position in challenging Massachusetts’s electronic surveillance law, Mass. Gen. Laws ch. 272, § 99. In *Commonwealth v. Hyde*, 434 Mass. 594, 750 N.E.2d 963, 964-65 (2001), the defendant audiotaped an encounter with police. The ACLU argued the conversations were *not private* because police officers had no reasonable expectation of privacy concerning a traffic stop, Hyde’s recording was in furtherance of his right of petition because he submitted it to authorities to support claims of mistreatment, and applying the law infringed First Amendment rights. See Br. Amicus Curiae, *Commonwealth v. Hyde*, No. SJC-08429 (Mass. Nov. 1, 2000), 2000 WL 34610712, at \*26, \*36-39 & n.12 (App. C). The Massachusetts Supreme Court held, however, that the law precluded recording all speech, whether private or not. 750 N.E.2d at 966, 969, 971, 973 n.6. It did not consider whether the Massachusetts statute would be constitutional if construed to protect communications in which the participants had no reasonable expectation of privacy.



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I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

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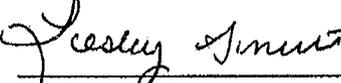
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Declared under penalty of perjury under the laws of the state of  
Washington this 17th day of September, 2014.

  
\_\_\_\_\_  
Lesley Smith

**APPENDIX**

<b>TAB</b>	<b>DOCUMENT</b>
Appendix A	Excerpts of Brief of Amicus Curiae American Civil Liberties Union of Illinois in Support of Defendant-Appellee, <i>People v. Melongo</i> , 6 N.E.3d 120 (Ill. 2014) (No. 114852), available at <a href="http://www.aclu-il.org/wp-content/uploads/2014/01/People-v-Melongo-ACLU-amicus-brief-final-12-6-13.pdf">http://www.aclu-il.org/wp-content/uploads/2014/01/People-v-Melongo-ACLU-amicus-brief-final-12-6-13.pdf</a> (accessed Sept. 17, 2014)
Appendix B	Excerpts of Brief of Amicus Curiae American Civil Liberties Union of Illinois in Support of Defendant-Appellee, <i>People v. Clark</i> , 6 N.E.3d 154 (Ill. 2014) (No. 115776), available at <a href="http://www.aclu-il.org/wp-content/uploads/2014/01/People-v-Clark-in-IL-sup-ct-ACLU-amicus-brief-filed-11-26-13.pdf">http://www.aclu-il.org/wp-content/uploads/2014/01/People-v-Clark-in-IL-sup-ct-ACLU-amicus-brief-filed-11-26-13.pdf</a> (accessed Sept. 17, 2014)
Appendix C	Excerpts of Brief of the Amicus Curiae American Civil Liberties Union of Massachusetts in Support of Appellant, <i>Commonwealth v. Hyde</i> , 434 Mass. 594, 750 N.E.2d 963, 964-65 (2001) (No. SJC-08429), 2000 WL 34610712

# **APPENDIX A**

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IN THE  
SUPREME COURT OF ILLINOIS

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THE PEOPLE OF THE STATE OF ILLINOIS, )  
 ) Appeal from the Circuit Court of Cook  
 ) County  
 )  
 ) Plaintiff-Appellant, )  
 ) No. 10 CR 8092  
 )  
 ) v. )  
 ) Honorable Steven J. Goebel,  
 ) Judge Presiding  
 )  
 ) ANNABEL MELONGO, )  
 )  
 ) Defendant-Appellee. )  
 )  
 )  
 )  
 )  
 )

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**BRIEF OF AMICUS CURIAE  
AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS  
IN SUPPORT OF DEFENDANT-APPELLEE**

---

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**POINTS AND AUTHORITIES**

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## INTEREST OF AMICI CURIAE

The American Civil Liberties Union of Illinois (“ACLU”) is a statewide, nonprofit, nonpartisan organization with more than 25,000 members and supporters dedicated to the principles of liberty and equality embodied in the Illinois and United States Constitutions. It is the state affiliate of the American Civil Liberties Union, a nationwide organization with more than 500,000 members. The ACLU is committed to protecting the freedoms guaranteed by the First and Fourth Amendments, and has appeared before this Court and the Supreme Court of the United States in cases involving free speech and privacy matters. Indeed, the ACLU was the plaintiff-appellant in the recent seminal decision from the United States Court of Appeals for the Seventh Circuit, *ACLU vs. Alvarez*, which curtailed the Eavesdropping Statute at issue here and undergirds the parties’ constitutional arguments in this case. The questions presented here are of significant concern to the ACLU because they involve the delicate balancing of free speech and privacy rights, which are of vital importance to all citizens of Illinois and the United States. Few courts have squarely addressed the constitutional implications at the confluence of these competing interests in these circumstances. The ACLU’s experience in these areas should be of value to the Court in answering these questions.<sup>1</sup>

## BACKGROUND

The Illinois legislature enacted an Eavesdropping Statute with the laudable goal of protecting the conversational privacy of Illinois citizens. *See* 720 ILCS § 5/14-1, *et seq.* Eavesdropping means “to listen secretly to what is said in private.” Merriam-

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<sup>1</sup> Neither party in this case nor their counsel authored this brief, in whole or in part, and no person other than the ACLU, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

public; the subject was a matter of public concern, namely the latter's complaints regarding the quality of public services provided by the former's office in connection with the latter's criminal prosecution; and no factors indicate that either party had any basis to believe that the conversations were private. The Circuit Court correctly found that the Eavesdropping Statute is unconstitutional as applied to Ms. Melongo because it fails intermediate scrutiny and unduly infringes Ms. Melongo's right to receive, gather, and publicize non-private information as protected by the First Amendment. Moreover, the Eavesdropping Statute violates substantive due process as applied to Ms. Melongo for similar reasons, and also because the Statute impermissibly punishes wholly innocent conduct. The Indictment should therefore be dismissed and the Circuit Court's judgment affirmed on either of these grounds. Because the Eavesdropping Statute is unconstitutional as applied to Ms. Melongo's alleged conduct there is no need for the Court to address the facial validity of the Statute.

#### ARGUMENT

**I. The Eavesdropping Act violates the First Amendment as applied to Ms. Melongo.**

The Eavesdropping Statute is unconstitutional as applied to Ms. Melongo because its means are not proportional to its ends as required by intermediate scrutiny. The purpose of the Statute is to protect conversational privacy. *See Alvarez*, 679 F.3d at 607 (finding "the eavesdropping statute is not closely tailored to the government's interest in protecting conversational privacy"); *see also* State's Br. at 11-12. Yet as applied to Ms. Melongo, the Eavesdropping Statute enables one party in a non-private conversation to prevent those with whom she is speaking from recording her own conversation for her own benefit — even where, as here, both parties should understand the conversation to be

non-private because it involves a public official acting in the course of her official duties and relates to an open judicial proceeding of quintessential public concern. It is nonsensical to “protect” conversational privacy by preventing parties in conversations with government officials in the course of their duties from recording their own, *non-private* conversations.

Thus, the Eavesdropping Statute’s means do not fit its ends. It unconstitutionally infringes Ms. Melongo’s right to receive, gather, and publicize non-private information, obtained from government officials in the course of their duties which the First Amendment protects as an essential step in the speech process. The Eavesdropping Statute may very well serve to protect the privacy of certain private conversations not at issue in Ms. Melongo’s case, but the First Amendment does not countenance its application to the recording or publication of the non-private conversations at issue here.

**I.A. The First Amendment generally protects the recording and publication by citizens of their non-private conversations with on-duty public officials, including the conversations recorded by Ms. Melongo.**

At a minimum, the Illinois Constitution protects freedom of speech and of the press at least to the same extent as the Constitution of the United States. *See* Ill. Const. Art. 1, § 4; *City of Chicago v. Pooch Bah Enters., Inc.*, 224 Ill. 2d 390, 446 (Ill. 2006).<sup>2</sup> In First Amendment cases, this Court looks to federal precedent in addition to its own

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<sup>2</sup> In fact, the Illinois Constitution is even more protective of free speech than the U.S. Constitution. *See Village of South Holland v. Stein*, 373 Ill. 472, 479 (Ill. 1940) (the Illinois Constitution is “even more far-reaching . . . in providing that every person may speak freely”); *Montgomery Ward & Co. v. United Retail, Wholesale & Dep’t Store Employees*, 400 Ill. 38, 46 (Ill. 1948) (the Illinois Constitution “is broader”); Sixth Ill. Constl. Convn., Pr. at 1403 (statement of Delegate Gertz, the chair of the Bill of Rights Committee, that the Illinois free speech clause would provide “perhaps added protections”); *People v. DiGuida*, 152 Ill. 2d 104, 122 (Ill. 1992) (“we reject any contention that free speech rights under the Illinois Constitution are in all circumstances limited to those afforded by the Federal Constitution”).

precedent. *See id.* at 419 (“elect[ing] to follow” precedent from the United States Court of Appeals for the Seventh Circuit).

As a matter of federal and Illinois law, the First Amendment generally protects audio recording as an important means of gathering information as part of the speech process. *See Alvarez*, 679 F.3d at 595 (“The act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (summarizing cases holding that the First Amendment protects the recording of matters of public interest, including statements made by public officials). “Any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny.” *Alvarez*, 679 F.3d at 600.

While the constitutional right to record audio as a means of gathering information obviously protects the press and media, it applies with equal force to the general public as well. *See United States v. Wecht*, 537 F.3d 222, 233-34 (3d Cir. 2008) (the media’s right of access to judicial proceedings and right to gather information relating to judicial proceedings “is no less important than that of the general public”) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-77 & n. 12 (1980)). Any such restriction on recording non-private communications invariably implicates the First Amendment. *Cf.* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 393 (2011) (“[W]here image capture [including audio recording] is regulated to protect privacy, the state cannot rely on inchoate invocations of that interest; a countervailing claim of privacy must be firmly

grounded in the facts of the case in which it is invoked,” and such regulations “must follow established legal rules that authoritatively recognize the scope of the privacy interest at stake and tailor the response to meet concerns of constitutional magnitude . . .”). This is especially true where, as here, the recorded conversations are non-private and involve public officials and matters of public concern.

Ms. Melongo was charged with recording and publicizing several telephone conversations with Pamela Taylor, a state officer working in the Cook County Court Reporter’s office. *See* C30-35. The conversations related to a perceived error in an important transcript from Ms. Melongo’s ongoing criminal prosecution. As such, the conversations involved a quintessential matter of public concern. *See Green v. Philadelphia Hous. Auth.*, 105 F.3d 882, 888 (3d Cir. 1997) (“[A]ll court appearances are matters of public concern. That is so because all court appearances implicate the public’s interest in the integrity of the truth seeking process and the effective administration of justice .”); *Meyers v. Nebraska Health & Human Servs.*, 324 F.3d 655, 659 (8th Cir. 2003) (similar); *Pro v. Donatucci*, 81 F.3d 1283, 1291 (3d Cir. 1996) (similar).

The recording of such non-private conversations for information gathering purposes and subsequent publication falls squarely within the ambit of the First Amendment. *See Alvarez*, 679 F.3d at 600 (“[T]he eavesdropping statute restricts a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process. As applied here, it interferes with the gathering and dissemination of information about government officials performing their duties in public.”). Indeed, the right to receive and gather information is at its zenith where a

because the Eavesdropping Statute as applied violates Ms. Melongo's right to substantive due process, this Court should affirm dismissal of the Indictment and there is no need to address Ms. Melongo's facial overbreadth challenge.

### CONCLUSION

For the reasons set forth above, this Court should hold that the Eavesdropping Statute, 720 ILCS § 5/14-1, *et seq.*, is unconstitutional as applied to Ms. Melongo and should therefore affirm the dismissal of the Indictment.

Respectfully submitted,

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# **APPENDIX B**

Case No. 115776

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IN THE  
SUPREME COURT OF ILLINOIS

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THE PEOPLE OF THE STATE OF ILLINOIS, )  
 ) Appeal from the Circuit Court of Kane  
 ) County  
 )  
 ) Plaintiff-Appellant, )  
 ) No. 11 CF 464  
 )  
 ) v. )  
 ) Honorable David R. Akemann,  
 ) Judge Presiding  
 )  
 ) DEFOREST CLARK, )  
 )  
 ) Defendant-Appellee. )  
 )  
 )  
 )  
 )  
 )

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**BRIEF OF AMICUS CURIAE  
AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS  
IN SUPPORT OF DEFENDANT-APPELLEE**

---

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## INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The American Civil Liberties Union of Illinois (“ACLU”) is its Illinois affiliate. The ACLU is committed to protecting the freedoms guaranteed by the First and Fourth Amendments, and has frequently appeared before this Court and the Supreme Court of the United States in cases involving free speech and privacy matters. Indeed, the ACLU was the plaintiff-appellant in the recent seminal decision from the United States Court of Appeals for the Seventh Circuit, *ACLU vs. Alvarez*, which curtailed the Eavesdropping Statute at issue here and undergirds the parties’ constitutional arguments in this case. The questions presented here are of significant concern to the ACLU because they involve the delicate balancing of free speech and privacy rights, which are of vital importance to all citizens of Illinois and the United States. Few courts have squarely addressed the constitutional implications at the confluence of these competing interests in these circumstances. The ACLU’s experience in these areas should be of value to the Court in answering these questions.<sup>1</sup>

## BACKGROUND

The Illinois legislature enacted an Eavesdropping Statute with the laudable goal of protecting the conversational privacy of Illinois citizens. *See* 720 ILCS § 5/14-1, *et seq.* Eavesdropping means “to listen secretly to what is said in private.” Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/eavesdrop>. Like similar laws in other states, the Illinois Eavesdropping Statute generally requires

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<sup>1</sup> Neither party in this case nor their counsel authored this brief, in whole or in part, and no person other than the ACLU, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

## ARGUMENT

### I. The Eavesdropping Act violates the First Amendment as applied to Mr. Clark.

The Eavesdropping Statute is unconstitutional as applied to Mr. Clark. The State fails to identify a legitimate governmental interest to justify criminalizing the recording of non-private conversations. Moreover, the application of the Statute here to non-private conversations concerning judicial proceedings, and in which the *pro se* Mr. Clark did not have the assistance of counsel, is not reasonably tailored toward protecting conversational privacy.

Notably, the State does not claim an interest in ensuring non-private conversations are not electronically recorded, or that the Eavesdropping Statute is intended to protect such an expectation. The State concedes the purpose of the Statute is not to prevent the recording of non-private conversations, *per se*. See Opening Brief of Plaintiff-Appellant People of the State of Illinois (“State’s Br.”) at 12 (recording non-private conversations “does not strictly present the evil that the General Assembly sought to address” with the Eavesdropping Statute). Rather, the State argues that extending the Eavesdropping Statute to include non-private conversations, as the legislature did in 1994, was nothing more than a means to facilitate enforcement of the Statute as to private conversations. *Id.* at 12-13 (the Eavesdropping Statute was expanded to cover non-private conversations because “it can be difficult to determine . . . whether the parties to a conversation intended it to be private, let alone whether the circumstances under which they spoke justified the expectation”); see also *id.* at 25 (same). In other words, according to the State, when the legislature amended the Eavesdropping Statute, it eliminated the expectation-of-privacy requirement that existed under *Beardsley* and *Herrington* in order

to eliminate Illinois' burden, assumed by at least 39 states and the federal government, to prove beyond a reasonable doubt that a conversation is of the type meant to be protected by the Statute — *i.e.*, private conversations. The Constitution does not permit such an end run by the legislature.

Even if eliminating the State's burden to prove the required elements of a criminal offense was a legitimate aim, which it is not, the sweeping scope of the amended Eavesdropping Statute is not reasonably tailored to its ultimate ends. The purpose of the Statute is to protect conversational privacy. *See Alvarez*, 679 F.3d at 607 (finding “the eavesdropping statute is not closely tailored to the government’s interest in protecting conversational privacy”); State’s Br. at 10 (agreeing “[t]he statute’s purpose [is] to protect conversational privacy.”). Yet, as applied to Mr. Clark, the Eavesdropping Statute enables one party in a non-private conversation to prevent those with whom he is speaking from recording their own conversation for their own benefit — even where, as here, the parties understand their conversation may be overheard and therefore possibly recorded without their knowledge by others not party to the conversation (albeit, ostensibly, illegally). It is nonsensical to “protect” conversational privacy by preventing parties from recording their own, *non-private* conversations, especially when, at the same time, because such conversations are not private, they very well may be overheard and thus possibly recorded by strangers or others.

Thus, the Eavesdropping Statute’s means do not fit its ends. It unconstitutionally infringes Mr. Clark’s right to receive and gather non-private information, which the First Amendment protects as an essential step in the speech process. The Eavesdropping Statute may very well serve to protect the privacy of certain private conversations not at

issue in Mr. Clark's case, but the First Amendment does not countenance its application to the recording of the non-private conversations at issue here.

**I.A. The First Amendment generally protects audio recording of non-private conversations by private citizens for information gathering purposes, including the conversations Mr. Clark allegedly recorded.**

At a minimum, the Illinois Constitution protects freedom of speech and of the press at least to the same extent as the Constitution of the United States. *See* Ill. Const. Art. 1, § 4; *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 390, 446 (Ill. 2006).<sup>3</sup> In First Amendment cases, this Court looks to federal precedent in addition to its own precedent. *See id.* at 419 (“elect[ing] to follow” precedent from the United States Court of Appeals for the Seventh Circuit).

As a matter of federal and Illinois law, the First Amendment generally protects audio recording as an important means of gathering information as part of the speech process. *See Alvarez*, 679 F.3d at 595 (“The act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (summarizing cases holding that the First Amendment protects the recording of matters of public interest, including statements made by public officials). “Any way you look at it, the eavesdropping statute burdens

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<sup>3</sup> In fact, the Illinois Constitution is even more protective of free speech than the U.S. Constitution. *See Village of South Holland v. Stein*, 373 Ill. 472, 479 (Ill. 1940) (the Illinois Constitution is “even more far-reaching . . . in providing that every person may speak freely”); *Montgomery Ward & Co. v. United Store Employees*, 400 Ill. 38, 46 (Ill. 1948) (the Illinois Constitution “is broader”); Sixth Ill. Constl. Convn., Pr. at 1403 (statement of Delegate Gertz, the chair of the Bill of Rights Committee, that the Illinois free speech clause would provide “perhaps added protections”); *People v. DeGuida*, 152 Ill. 2d 104, 122 (Ill. 1992) (“we reject any contention that free speech rights under the Illinois Constitution are in all circumstances limited to those afforded by the Federal Constitution”).

speech and press rights and is subject to heightened First Amendment scrutiny.” *Alvarez*, 679 F.3d at 600.

While the constitutional right to record audio as a means of gathering information obviously protects the press and media, it applies with equal force to the general public as well. *See United States v. Wecht*, 537 F.3d 222, 233-34 (3d Cir. 2008) (the media’s right of access to judicial proceedings and right to gather information relating to judicial proceedings “is no less important than that of the general public”) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)). Any such restriction on recording non-private communications invariably implicates the First Amendment. *Cf.* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 393 (2011) (“[W]here image capture [including audio recording] is regulated to protect privacy, the state cannot rely on inchoate invocations of that interest; a countervailing claim of privacy must be firmly grounded in the facts of the case in which it is invoked,” and such regulations “must follow established legal rules that authoritatively recognize the scope of the privacy interest at stake and tailor the response to meet concerns of constitutional magnitude . . .”). This is especially true where, as here, the recorded conversations are non-private and involve public officials and matters of public concern.

Mr. Clark was charged with recording two conversations on September 17, 2010: a hearing in open court before Judge Janes, an elected State official, and a conversation in a courthouse hallway with Colleen Thomas, an attorney licensed by the State as an officer of the court. *See Illinois Rules of Professional Conduct*, Preamble at ¶ 1 (“A lawyer, as a member of the legal profession, is . . . an officer of the legal system.”);

*Virgin Islands Bar Ass'n v. Gov't of Virgin Islands*, 648 F. Supp. 170, 181 (D.V.I. 1986) (“Attorneys have long been regarded as quasi-public officials — ‘officers of the court.’”), *aff'd in part, vacated in part on other grounds*, 857 F.2d 163 (3d Cir. 1988). “[T]he fact that [Ms. Thomas] spoke freely . . . in a manner that could be overheard by anyone else” in the public hallway outside of Judge Janes’s courtroom “supports the inference that [she] acquiesced in [her] comments not being private.” *People v. Young*, 2011 IL App (1st) 109738-U, \*13 (Ill. App. Ct. 1st Dist. 2011) (unpublished opinion), *appeal denied*, 968 N.E.2d 88 (Ill. 2012). There is generally no expectation of privacy “with respect to [a] common hallway,” *United States v. Villegas*, 495 F.3d 761, 767 (7th Cir. 2007), and to “communications which take place in . . . public space[s] in which government employees communicate with members of the public.” *Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145*, 545 F. Supp. 2d 755, 758 (N.D. Ill. 2007). Here, as in *Alvarez*, “the communications in question [are non-private]; they are not conversations that carry privacy expectations even though uttered in public places.” *Alvarez*, 679 F.3d at 606-07.

At the time, Mr. Clark was acting *pro se* in a child support matter before Judge Janes. Ms. Thomas represented the mother of Mr. Clark’s child in those proceedings. Both of the conversations allegedly recorded by Mr. Clark related to his hearing before Judge Janes, which was open to the public and a matter of public interest. *See Green v. Philadelphia Hous. Auth.*, 105 F.3d 882, 888 (3d Cir. 1997) (“[A]ll court appearances are matters of public concern. That is so because all court appearances implicate the public’s interest in the integrity of the truth seeking process and the effective administration of justice .”); *Meyers v. Nebraska Health & Human Servs.*, 324 F.3d 655, 659 (8th Cir. 2003) (“[T]estimony to a court concerning the proper placement of . . . foster brothers

was a matter of public concern . . . and was therefore protected by the First Amendment.”); *Pro v. Donatucci*, 81 F.3d 1283, 1291 (3d Cir. 1996) (testimony in divorce proceeding “was on a matter of public concern”). *See also County of Allegheny v. ACLU*, 492 U.S. 573, 579 (1989) (describing county courthouses as “a seat of government”); *Hodkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004) (emphasizing the First Amendment significance of free speech at seats of government); *Warren v. Fairfax County*, 196 F.3d 186, 190, 195-96 (4th Cir. 1999) (same). Significantly, a court reporter was not present at Mr. Clark’s hearing before Judge Janes. The conversations Mr. Clark allegedly recorded were of quintessential public concern in that they were non-private; involved public or quasi-public officials acting in their official duties; and related to judicial proceedings in open court pursuant to State law regarding child support obligations. *See* 750 ILSC § 5/505.

The recording of such conversations for information gathering purposes falls squarely within the ambit of the First Amendment. *See Alvarez*, 679 F.3d at 600 (“[T]he eavesdropping statute restricts a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process. As applied here, it interferes with the gathering and dissemination of information about government officials performing their duties in public.”). Indeed, the right to receive and gather information is at its zenith where a *pro se* litigant such as Mr. Clark records non-private conversations in order to preserve an accurate record of his own legal proceedings.<sup>4</sup>

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<sup>4</sup> Moreover, given the various factors discussed above, the two recorded parties implicitly consented to audio recording by Mr. Clark. *See People v. Ceja*, 204 Ill. 2d 332, 345-51 (2003).

## CONCLUSION

For the reasons set forth above, this Court should hold that the Eavesdropping Statute, 720 ILCS § 5/14-1, *et seq.*, is unconstitutional as applied to Mr. Clark and should therefore affirm the dismissal of the Indictment.

Respectfully submitted,

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# **APPENDIX C**

2000 WL 34610712 (Mass.) (Appellate Brief)  
Supreme Judicial Court of Massachusetts.

COMMONWEALTH OF MASSACHUSETTS,

v.

Michael HYDE.

No. SJC-08429.

November 1, 2000.

Commonwealth of Massachusetts Supreme Judicial Court Appeals Court #00-P-808  
On Appeal from the Brockton District Court

**Brief of the Amicus Curiae American Civil Liberties Union of Massachusetts in Support of Appellant**

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Q: So then why did you tell him that, that there's a lot of stolen cars if you don't suspect him of stealing \*11 cars? Why did, why did [inaudible] trespassing?

A: When I came to the scene, when I drove up to a [sic] scene, Detective Marquardt did, the car was pulled into a used car lot.

Tr. III:290.

Det. Sgt. Force also accused Mr. Hyde of illegal possession of crack cocaine ("blow"):

Q: What was this conversation you had with the defendant?

A: The conversation was, the defendant at that time was being extremely confrontational and combative. It was beginning to escalate and I asked him if [he] had any problem, and what the problem was, why he was acting the way he was acting, has he got any, is he doing anything wrong? He kept saying he didn't do anything wrong. Is there anything you have to hide? Why are you being this way, why are you acting the way you are, have you got "blow" in the car?

Tr.III:279.

At the very end of that statement the police officer added, "In a facetious manner." *Ibid.*

\*12 In sum, the police admitted -- given the existence of the tape there was little choice -- that one officer had called Mr. Hyde "an asshole" and another told him, "Don't lay that shit on me." Mr. Hyde was interrogated about committing three possible crimes - trespassing, car theft and possession of drugs. In addition, the police searched Mr. Hyde and searched his car. Mr. Hyde thought the reason for the police behavior was his pony tail and dress.

The passenger in the car, Daniel Hartesty gave un rebutted testimony that at the end of the encounter the police told Mr. Hyde that if he did not leave immediately, he'd be given a field sobriety test that Hyde would fail. Tr.III:326. Neither Mr. Hartesty nor Mr. Hyde had anything alcoholic to drink that night, \*13 nor did the police make any claim that they had.<sup>5</sup>

These facts indicate grounds for a citizen to request that the police investigate the conduct of the officers. Mr. Hyde thus made a formal complaint to the Abington Police Department and provided the tape to the Shift Supervisor, Sgt. Ambrose.<sup>6</sup> The police then exonerated the officers and charged Mr. Hyde with the criminal offense of making the tape without the officers' permission.

#### \*14 III. SUMMARY OF THE ARGUMENT

G.L.c. 272, §99 does not prohibit the recording of statements made by a police officer in the course of a traffic stop which takes place in a public area, where the purpose of the recording was to document those statements for use in judicial or administrative proceedings concerning the stop. Amicus Brief ("A.Br.") 16-43. A police officer has no expectation of privacy under these circumstances, and the legislature did not intend for the statutory restriction to apply. A.Br.17-35.

Recording of statements made by police officers in the course of their official and public duties is protected by the First Amendment and art. 16. A.Br. 36-40. Because application of G.L.c. 272, §99 to such a recording would raise serious constitutional \*15 questions, the statute should be interpreted to avoid such a result. A.Br. 36-40.

There are, in addition, significant public policy reasons for allowing the encounter to be tape-recorded as well as video-taped. Just as the tape-recording of custodial interrogations and administrative matters such as the “booking” of an arrestee contributes significantly to the administration of criminal justice, documentation of the details of an initial contact between the police and members of the public not only protects fundamental rights, but also provides an important check on police misconduct. A.Br. 41-43.

#### **\*16 IV. ARGUMENT**

#### **THE LAW IMPLIES THE CONSENT OF A POLICE OFFICER MAKING A TRAFFIC STOP TO AN AURAL RECORDATION OF THAT STOP AND RESULTING INTERROGATION FOR PURPOSES OF AN ADMINISTRATIVE OR JUDICIAL PROCEEDING.**

##### **A. Purpose of The Statute.**

A major purpose of G.L.c. 272, §99, is to protect citizens' privacy by inhibiting governmental intrusions. *Crosland v. Horgan*, 401 Mass. 271, 274 (1987).<sup>7</sup> Nothing in the \*17 statute either indicates a legislative intent to protect statements of police officers who are detaining a suspect or making an arrest, or specifically addresses the situation presented by this case. Indeed, it would be antithetical to the purposes of the statute for this law to be construed as a shield that protects improper or illegal governmental conduct.

##### **B. Consent Of Police Officers.**

Most individuals would be shocked to learn that making a recording such as Mr. Hyde's constitutes a crime. The notion runs contrary both to common sense and the general notion, infused in part by many popular \*18 television series and citizens' experience in booking rooms, that interactions with the police routinely are tape-recorded.<sup>8</sup>

To imply, as a matter of law, a police officer's consent to tape-recording of a detention is consistent with the established canon of statutory construction that a statute should not be interpreted to override common sense. *Commonwealth v. Dunn*, 43 Mass.App.Ct. 58, 59 (1997); nor should a statute be construed to produce an unreasonable result. \*19 *Atty. Gen. v. School Comm. of Essex*, 387 Mass. 326, 336-337 (1982).

Here we urge, the literal words of the statute do not cover the recording at issue. See, specifically, Defendant-Appellant's Brief at 13-16, and *supra* at pp. 16-17 and n.7. If, however, the literal words of the statute may apply, then under the facts presented -- where there is no express legislative intent and no specific directive in the statute to criminalize the recording -- the court should look beyond the literal words of the statute, *Champigny v. Commonwealth*, 422 Mass. 249, 251 (1996), to avoid an undesirable result. *Watros v. Greater Lynn Mental Health & Retardation Ass'n. Inc.*, 421 Mass. 106, 113 (1995) and cases cited therein; *Flaherty v. Contributory Retirement Appeal Bd.*, 48 Mass. App.Ct. 132, 135 (1999).

\*20 The construction that we urge is supported by the history of appellate interpretation of G.L.c. 272, §99. That line of cases, *Commonwealth v. Gordon*, 422 Mass. 816, 832-833 (1996), *O'Sullivan v. NYNEX Corp.*, 426 Mass. 261 (1997) and *Dillon v. Mass. Bay. Trans. Auth.*, 49 Mass.App.Ct. 309, 315-316 (2000), is reviewed in detail below at pages 29-35 of this brief.

Consent may, of course, be implied, in a statute or through statutory or judicial construction.<sup>9</sup>

\*21 With regard to recording police conversations that are part of the officer's duties “courts resoundingly have recognized the doctrine of implied consent.” *United States v. Amen*, 831 F.2d 373, 378 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988); *George v. Carisone*, 849 F.Supp. 159, 164 (D.Conn. 1994) (police officers who used phones held to impliedly consent to

recording in view of notice regarding phone system); \*22 *Griggs-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir. 1990), and cases cited therein (implied consent to recording broadly construed);

The testimony of the police officers who were the "victims" of the offense that they did not consent to recording should have no bearing on the outcome of this case.

Consent here is implied, not as a matter of the officers subjective feelings, but rather as a matter of law due to the officers' official position at a time when they were performing their public duties in a public place in plain view. *Broderick, supra*, 368 Mass. at 37.

Public employees, in particular, are deemed as a matter of law to have given up certain privacy rights with respect to actions taken and statements made during their public duties and matters related thereto, and during off-duty time as well. \*23 *Pereira v. Comm'r of Social Services*, 432 Mass. 251, 261-262 (2000) (public employee's off duty speech that relate to job function subjects employee to discipline).

In this case the court must strike the proper balance between the purported privacy right of a police officer during a detention and the rights of citizens. The police officers privacy interest in that situation is *de minimis*. On the other hand, the motorist and putative defendant's interest in being able to preserve evidence, confront witnesses, be free from unreasonable searches and seizures, be guaranteed due process, and be able to exercise the right to petition is constitutionally grounded and significant.<sup>10</sup>

\*24 Even more important, perhaps, is the public's and the judicial system's right to know, to be able to make reasoned judgments based upon the best possible evidence. To criminalize conduct such as Mr. Hyde's in \*25 effect would deny that evidence to the system of justice.

In this regard we invite the court's attention to *State v. Flora*, 68 Wash.App.Ct. 802, 845 P.2d 1355 (1992). In that case, the defendant, who tape-recorded his arrest, was convicted of violating a state statute which, similar to G.L.c. 272, §99, prohibited the tape-recording of private conversations. On appeal the court held that there was no violation of the statute because the officers had no expectation of privacy in the circumstances of an arrest. The court specifically rejected the state's invitation, such as that being made here, to "transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity." *Id.*, 845 P.2d at 1358.

\*26 The Massachusetts cases are in accord with the reasoning and holding of *Flora*. Under art. 14 of the Massachusetts Declaration of Rights an expectation of privacy is cognizable only if that expectation is "objectively reasonable, justified and legitimate," *Commonwealth v. Krisco Corp.*, 421 Mass. 37, 41 (1995) "based upon the facts and circumstances of the case." *Commonwealth v. One 1985 Ford Thunderbird Automobile*, 416 Mass. 603, 607-608 (1993).

Under our case law, a police officer who is performing a public duty in a public place in plain view, who understands that his actions and words during that time may be subject to intense judicial and/or administrative scrutiny, does not have a reasonable expectation of privacy concerning that encounter. *Commonwealth v. Price*, 408 Mass. 668, 678 (1990) (no expectation of \*27 privacy to be free from recording of conversation or a third party overhearing the conversation in a motel room not registered to defendant when conversation concerned a business transaction); *Commonwealth v. Cote*, 407 Mass. 827, 835 (1990) (no reasonable expectation of privacy in records of messages on answering machines); *Commonwealth v. Eason*, 427 Mass. 595, 600-601 (1998) (no expectation of privacy in not having telephone conversation overheard on extension telephone).

Given that the officer's expectation of privacy at a traffic stop and arrest is virtually nil and that the judicial system's need for such evidence is significant, the law should imply police consent to record a traffic stop and/or arrest for the purpose of aiding an official investigation or for use as evidence in a judicial proceeding. To deny a judge or jury the best, indeed sometimes often \*28 incontrovertible, evidence of what occurred not only denies a defendant (and in some instances, perhaps, the Commonwealth as well) of crucial evidence, it denies judges and juries, and all of the citizens of the Commonwealth, the

Although G.L.c. 272, §§99B4 and 99C1, can be read literally as making unlawful the audio-taping of booking procedures without the knowledge of the person being booked, and as subjecting the responsible police officers to severe penalties therefor, in the absence of more specific statutory language and in light of the preamble, we are unwilling to attribute that intention to the legislature... the legislature does not appear to have had in mind the recordation of purely administrative booking steps following an individual's arrest.

*Commonwealth v. Gordon, supra*, 422 Mass. at 832-833.

Similarly, in *Dillon v. Mass. Bay Trans. Auth.*, 49 Mass.App.Ct. 309, 315-316 (2000) the Appeals Court construed G.L.c. 272, §99 to permit secret tape-recording of MBTA employees without their permission -- a practice that the statute expressly prohibits. The court held:

We do not depart lightly from the express words of a statute, but in the unusual circumstances appearing here we agree. \*34 .that a deviation is justified ... to preserve the substance of a statute

rather than diminish it. ... [to not] override common sense... or produce unreasonable results. (citations omitted).

This case is like *Gordon* in that the statute does not specifically address the situation at issue. Here, unlike *Dillon* and *O'Sullivan*, there is no specific statutory prohibition. In all these cases the Massachusetts appellate courts have approved the recordation under G.L.c. 272, §99. The consent and/or an implied exception to G.L.c. 272, §99 in this case is at least as, and we suggest more, compelling as the rationales that are articulated in *Gordon*, *O'Sullivan* and *Dillon*. The legislature did not intend to protect the conversations of police officers performing their most public official function in a public place where they are subject to being video-taped. As in *Gordon*, *O'Sullivan*, \*35 and *Dillon*, the legislature did not intend to criminalize the recording at issue here.

#### **\*36 D. Infringement Of First Amendment Rights.**

It is a cardinal rule of statutory construction that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts about it upon that score." *Opinion of the Justices to the Governor*, 361 Mass. 897, 901 (1972) To hold that G.L.c. 272, §99 imposes criminal penalties on an individual who simply records words spoken by a police officer in the course of a traffic stop would, at the very least, raise "grave doubts" about its constitutionality. This is so because "[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).

\*37 Several courts have specifically addressed the recording of official conduct of police officers and have uniformly held that such recording is constitutionally protected. *Smith v. City of Cumming, supra* (First Amendment right to photograph or video-tape police conduct); *Connell v. Town of Hudson*, 733 F.Supp. 465, 468-471 (D.N.H. 1990) (photographing police at crime scene); *Channel 10, Inc. v. Gunnarson*, 337 F.Supp. 634, 638 (D.Minn. 1972) (same); see also, *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (First Amendment protects right to film public meetings); *Fordyce v. City of Seattle*, 907 F.Supp. 1446, 1447 (W.D.Wash. 1995) (recording statements made on a public street in a voice audible to passers-by); cf. *Lambert v. Polk County, Iowa*, 723 F.Supp. 128, 133 (S.D. Iowa 1989) (non-media photographer had First Amendment right to photograph a public event).

\*38 While such recordings may be subject to reasonable time, place and manner restrictions so as to not interfere with legitimate police activities, *Connell v. Town of Hudson, supra*, the prohibition embodied in §99 is not such a restriction. As applied in the circumstances of this case, the statutory constraint could only be justified in the interest of protecting the privacy of the police officers during a traffic stop or arrest. Such a contention, however, is fundamentally inconsistent with the

recognized First Amendment interest in recording an officer's conduct of his official duties. Such a contention, in any event, would appear to be foreclosed by the Supreme Judicial Court's decision in *Rotkiewicz v. Sadowsky*, 431 Mass. 748 (2000), where the court recognized the profound importance of public scrutiny of a \*39 patrol officer's performance of his official duties. Such performance, the court stated

can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss .... (citations omitted).

*Id.* at 754. Thus, the court concluded,

because of the broad powers vested in police officers and the great potential for abuse of those powers, as well as police officers' high visibility with and impact on the community, that police officers even patrol-level police officers ... are public officials for purposes of defamation.

*Id.* at 752.<sup>12</sup>

**\*41 E. *Burdening The Rights Of A Criminal Defendant.***

G.L.c. 272, §99, as applied by the Commonwealth, presents a defendant or complainant such as Mr. Hyde with a Hobson's choice: he can attempt to prove police misconduct with the best evidence available or he can convict himself of a crime. More often than not, the complaint will not be made, the official misconduct will go unnoted and unaddressed once the motorist learns -- usually to his surprise -- that not only has he been victimized by the police, but that if he tries to prove it, he faces imprisonment.

This choice necessarily results in defendants forfeiting their right to present evidence and their right to confront witnesses. It deprives defendants of a fair trial and deprives judges and juries of the ??st evidence. Such a result is wrong.

\*42 Public policy strongly favors disclosure of all evidence necessary for a trier of fact to make a reasoned and appropriate decision. Conversely, our judicial system strongly disfavors the suppression of concrete, relevant, probative evidence, particularly when the evidence is the best evidence of contested facts.

The purpose of G.L.c. 272, §99 was to protect the citizen from surreptitious electronic invasions of their reasonable expectations of their privacy. It was not intended to shield the police from their own wrongdoing or deny the system of justice important evidence.

Applicable here is the venerable rule of statutory construction that "due regard must be given to the statute's purposes considered in connection with the cause of its enactment, the pre-existing state of the law, the \*43 mischief to be remedied and the main object to be accomplished." *A. Belanger & Sons v. Joseph M. Concannon Corp.*, 333 Mass. 22, 25 (1955), quoting *Brown v. Robinson*, 275 Mass. 55, 57 (1931). As the court stated in *Somerset v. Dighton*, 12 Mass. 383, 384 (1815):

[I]n the exposition of statutes, such a construction should be given as will best effectuate the intention of the makers. In some cases, the letter of a statute may be restrained by an equitable construction; in others, enlarged; and, in others, the construction may be even contrary to the letter. For a case may be within the letter, and not within the meaning of a statute.

That principle, which was applied in *O'Sullivan*, *Gordon* and *Dillon*, should apply equally here.

- 10 Recording of a traffic stop is particularly appropriate because the motorist effectively is in custody and the officer possesses enormous discretion as to whether to arrest or cite him, or let him go, and further because the officer knows that his actions at such a stop may well be subjected to judicial scrutiny.
- Concerns about traffic stops, in particular concerns about racial profiling and gender harassment at those stops, recently led to enactment of "An Act providing for the collection of data relative to traffic stops," Chapter 228 of Acts of 2000. That legislation requires the police to record on each citation the race and gender of the motorist and to give to the driver a written notice of the number to call if he or she feels that he has been victimized by racial or gender profiling or harassment.
- The genius of the racial profiling bill is its prophylactic effect. Police officers who fear repercussions for racist or sexually harassing stops are less likely to engage in them due to the reporting requirements. Similarly, the possibility of recordation would discourage police misconduct. In this regard, Massachusetts has a paradigm. Since local police departments have introduced video and audio tapes into booking rooms, the experience of the ACLUM is that the number of complaints about police brutality in police stations have significantly decreased.
- 11 "Unlike NYNEX customers, police officers issuing a citation or making an arrest at a traffic stop understand that they will write a report about the exchange, a report that is ultimately subject to disclosure under the Public Records Act, and that their words and actions during that exchange may well be subject to judicial scrutiny at a later time.
- 12 When Mr. Hyde complained to the police officials, he was also exercising his right "to petition the Government for a redress of grievances." U.S. Const. Amend. I, a right similarly guaranteed by art. 19 of the Declaration of Rights of the Commonwealth. *Id.* at 752, n.4. This right, "implicit in the very idea of government republican in form," *United States v. Cruikshank*, 92 U.S. 542, 552 (1876), is particularly important with respect to citizen complaints of police misconduct. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991); *Houston, Texas v. Hill*, 482 U.S. 451, 461 (1987); similarly see, *Worthington v. Scribner*, 109 Mass. 487, 488 (1872) ("It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws."); *Draghetti v. Chmielewski*, 416 Mass. 808, 814 (1994) (dicta stating that statements concerning police officers conduct may be privileged if made to persons concerned with an investigation).
- The public has an interest in having a police force comprised of competent and able individuals." *Draghetti*, 416 Mass. at 814 quoting *Mulgrew v. City of Taunton*, 410 Mass. 631, 635 (1991). Effecting that interest would be seriously compromised if citizens were to fear criminal reprisals for bringing the best evidence of a police officer's misconduct or criminal behavior to the attention of superior officers or other law enforcement authorities.

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**Subject:** Supreme Court No. 89961-4 - Dillon v. Seattle Deposition Reporters, et al. - Petitioner's Response to Brief of Amicus Curiae ACLU of Washington Regarding Privacy Act

Attached for filing is Petitioner's Response to Brief of Amicus Curiae ACLU of Washington Regarding Privacy Act with an attached Appendix.

Case Name: Jason Dillon, Respondent v. Seattle Deposition Reporters, LLC, et al. Petitioners  
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Thank you for your assistance in filing.

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