UNITED STATES COURT OF APPEALS

for the

FIRST CIRCUIT

Case Nos. 19-1586, 19-1640
PROJECT VERITAS ACTION FUND,
Plaintiff-Appellee-Cross-Appellant,

v.

RACHAEL S. ROLLINS, in her Official Capacity
as District Attorney for Suffolk County
Defendant-Appellant-Cross-Appellant.

Case Nos. 19-1629
K. ERIC MARTIN & RENÉ PÉREZ,
Plaintiff-Appellees,

v.

RACHAEL S. ROLLINS, in her Official Capacity
as District Attorney for Suffolk County
Defendant-Appellant,

WILLIAM G. GROSS, in his Official Capacity
as Police Commissioner for the City of Boston
Defendant.

ON APPEAL FROM JUDGMENTS OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR *AMICI CURIAE* LAWYERS FOR CIVIL RIGHTS, CENTER FOR CONSTITIONAL RIGHTS & LATINOJUSTICE PRLDEF IN SUPPORT OF PLAINTIFF-APPELLEES K. ERIC MARTIN & RENÉ PÉREZ

OREN N. NIMNI (BAR NO. 1188821)
LAUREN A. SAMPSON
LAWYERS FOR CIVIL RIGHTS
61 Batterymarch Street, 5th Floor
Boston, MA 02110
(617) 988-0606

Counsel for Amici

UNITED STATES COURT OF APPEALS

for the

FIRST CIRCUIT

Case Nos. 19-1586, 19-1640
PROJECT VERITAS ACTION FUND,
Plaintiff-Appellee-Cross-Appellant,

v.
RACHAEL S. ROLLINS, in her Official Capacity
as District Attorney for Suffolk County
Defendant-Appellant-Cross-Appellant.

Case Nos. 19-1629
K. ERIC MARTIN & RENÉ PÉREZ,
Plaintiff-Appellees,

v.
RACHAEL S. ROLLINS, in her Official Capacity
as District Attorney for Suffolk County
Defendant-Appellant,

WILLIAM G. GROSS, in his Official Capacity
as Police Commissioner for the City of Boston
Defendant.

ON APPEAL FROM JUDGMENTS OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR *AMICI CURIAE* LAWYERS FOR CIVIL RIGHTS, CENTER FOR CONSTITIONAL RIGHTS & LATINOJUSTICE PRLDEF IN SUPPORT OF PLAINTIFF-APPELLEES K. ERIC MARTIN & RENÉ PÉREZ

OREN N. NIMNI (BAR NO. 1188821)
LAUREN A. SAMPSON
LAWYERS FOR CIVIL RIGHTS
61 Batterymarch Street, 5th Floor
Boston, MA 02110
(617) 988-0606

Counsel for Amici

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 *amici* Lawyers for Civil Rights, Center for Constitutional Rights and LatinoJustice PRLDEF have no parent companies and no publicly held corporation has an ownership interest in any of *amici*.

RULE 29(a)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part. No party contributed money that was intended to fund preparing or submitting this brief. Only *amici* or their counsel contributed money that was intended to fund preparing or submitting this brief.

INTERESTS OF AMICI

Lawyers for Civil Rights (LCR) is a non-profit, non-partisan organization that fosters equal opportunity and fights discrimination on behalf of people of color and immigrants. LCR engages in creative and courageous legal action, education, and advocacy in collaboration with law firms and community partners. LCR handles major law reform cases as well as legal actions on behalf of individuals. LCR has a long history of advocating on behalf of people of color, particularly regarding interactions with law enforcement. Currently, the organization is litigating a case against the Boston Police Department for the fatal shooting of Terence Coleman, an unarmed young Black man with a disability. The outcome of this appeal would affect LCR's client population in myriad ways, and thus LCR has an interest in ensuring that the Court has access to advocacy specifically focused on the impact of this case on communities of color.

The Center for Constitutional Rights ("CCR") is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966 to provide legal support for the civil rights movement, CCR has a long history of litigating landmark civil and human rights cases fighting for racial justice, law enforcement accountability, and First Amendment protections. CCR's recent work in these areas includes cases such as *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013), and *Color of Change v. Department of Homeland*

Security, 325 F.Supp.3d 447 (S.D.N.Y. 2018) and also includes an amicus brief in *Glik v. Cuniffe* (655 F.3d 78, 81 (1st Cir. 2011) on behalf of community groups who record police activity.

LatinoJustice PRLDEF (LJP) is a national not-for-profit civil rights legal defense fund that has advocated for and defended the civil and constitutional rights Latinos in the United States. Since its founding in 1972 as the Puerto Rican Legal Defense & Education Fund, LJP has engaged in, and supported, law reform cases around the country addressing basic civil rights in the areas of criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting and voting rights. LJP seeks to ensure that Latinos are not illegally or unfairly affected by discriminatory policing practices and has engaged in litigating claims against racial profiling by police departments in States throughout the Northeast, the Mid-Atlantic, and Southern regions of the country. The issues raised in this litigation go to the core of securing equal treatment and nondiscriminatory policing practices for all Latino populations in Massachusetts. They also speak to the larger issues of civic engagement for marginalized communities and the need to demand transparency and accountability for law enforcement in our communities.

INTRODUCTION

It is black letter law that, in the First Circuit, the First Amendment protects the individual right to record the conduct of government officials, including law enforcement officers, in the "discharge of their duties in a public space." *Glik v. Cunniffe*, 655 F.3d 78, 81 (1st Cir. 2011). This right is particularly critical for our country's most vulnerable communities; recordings can draw public attention to the use of excessive force against individuals and supplement an evidentiary record dominated by police testimony and incomplete body camera footage. However, in practice, these same communities face considerable barriers to the exercise of that right. The long shadow of over-policing, stop-and-frisk, and racial profiling has left immigrant communities and communities of color fearful of law enforcement and cautious of taking any step that may be perceived as threatening, even if that action would vindicate a constitutional right. This fear is compounded by the well-documented impact of implicit bias on decision-making and has meant that individual officers are more likely to interpret innocent actions taken by people of color—including the act of reaching for a cell phone—as hostile, and, as a result, are more likely to respond with force.

Amici join Appellees in their argument that the First Amendment protects not only open, but also secret, recording, as Appellants have failed to demonstrate that, as applied to the public conduct of law enforcement officers, the Wiretap Statute is narrowly tailored to a significant government interest and preserves adequate

alternatives. Mass. Gen. Laws Chapter 272 § 99. In addition, *amici* submit that the Wiretap Statute is unconstitutional because it forces people of color and immigrants to balance their First Amendment right to record police against their Fourth Amendment right to be free from unjustified arrest, restraint, confinement, or assault. *Amici* therefore encourage this Court to affirm the district court's decision and guarantee the right of all individuals to secretly and safely record law enforcement in the discharge of their official duties.

ARGUMENT

I. Recordings of Police Interactions Are Vitally Important for Communities of Color and Immigrants Seeking to Hold Law Enforcement Accountable to the Communities They Serve

Recording of public police activity is a critically important tool for communities of color and immigrant communities to hold police accountable. Since the 2014 deaths of Michael Brown in Ferguson, Missouri, and Eric Garner in New York City, there has been increased public scrutiny on the killing of Black men and women by police or while in police custody.[1] This scrutiny has been fueled, in large part, by the

[1] Lynne Peeples, *What the Data Say About Police Shootings*, Nature (Sept. 4, 2019) ("A pair of high-profile killings of unarmed black men by the police pushed this reality into the headlines in summer 2014. Waves of public protests broke out after the fatal shooting of Michael Brown in Ferguson, Missouri, and the death by chokehold of Eric Garner in New York City."); Mitch Smith, *Policing: What Changed (And Didn't) Since Michael Brown Died*, NYTimes (Aug. 7, 2019) (reporting that police aggression has "prompted a national reckoning since Michael Brown, an unarmed black teenager, was fatally shot by a white police officer" and that since the protests, "activists have marched in cities large and small" and "police chiefs have pledged sweeping reforms.").

proliferation of cell phones and other hand-held recording devices. These devices enable bystanders and victims to record encounters with police and share them with the world. For example, bystander footage showed Eric Garner telling New York police officers "I can't breathe" as he was wrestled to the ground and placed in a chokehold — from which he later died. *'I can't breathe': Eric Garner Put in Chokehold by NYPD Officer—Video,"* The Guardian, available at: https://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video. A video recorded by Philando Castile's girlfriend showed the moments after he had been fatally shot by a Minnesota police officer. CNN Tonight, *Combined Videos Show Fatal Castile Shooting*, CNN, available at: https://www.cnn.com/videos/us/2017/06/22/philando-castile-facebook-and-dashcam-full-mashup-video-ctn.cnn.

These videos, and others of similar incidents, were viewed hundreds of thousands of times and have helped shape the critical public debate about officer-involved shootings, as well as educate the general public, judges, prosecutors, and police themselves about the frequency and nature of police interactions with communities of color. *See, e.g., Thornton v. City of Columbus*, 2017 WL 2573252 at *12 n.10 (S.D. Oh. Jun. 14, 2017) (affirming that the use of "excessive force by police against civilians is not an insignificant problem and occurs with unsettling frequency," and noting that a "number of unarmed young men, a disproportionate number of whom were black" were killed by police in the past several years alone).

In addition to raising public awareness about problematic aspects of police interactions with communities of color, a recording controlled by a civilian can provide critical evidence in individual cases. As a law enforcement officer's use of deadly force, or even her decision to make an arrest or conduct a search, is reviewed for objective "reasonableness," a recording ensures that a charging or factfinding body does not have to rely solely on an officer's testimony in determining whether his or her belief that an individual was carrying a firearm was reasonable—notably, the man who captured Walter Scott's killing on his cell phone was only compelled to share his video with Mr. Scott's family after he realized the police report "did not mesh with what he saw." Melanie Eversley, *Man Who Shot S.C. Cell Phone Video Speaks Out*, USA Today (Apr. 8, 2015).

Such civilian-controlled recordings can also be an important compliment—and corrective—to body cameras worn by police officers. Although body cameras can "increase police transparency and accountability," these devices, which literally and exclusively embody the officer's perspective are not infallible. Eric Madfis & Jeffrey Cohen, *Critical Criminologies of the Present and Future: Left Realism, Left Idealism, and What's Left In Between*, 43 Social Justice 1, 11 (2016). Law enforcement may "limit or deny public access" to footage, and officers "often simply turn them off or on at advantageous times." *Id.* at 11-12. For example, although officers were wearing cameras in the shootings of Justine Damond in Minneapolis; Alton Sterling in Baton

Rouge; Keith Scott in Charlotte; Paul O'Neal in Chicago; and the shooting of Armand Bennet in New Orleans, footage of the deadly encounters was unavailable, with officers claiming the cameras "fell off" or that they failed to hit record. Mary D. Fan, *Missing Police Body Camera Videos: Remedies, Evidentiary Fairness, and Automatic Activation*, 52 Ga. L. Rev. 57, 60 (2017); Developments in the Law of Policing, *Chapter Four: Considering Police Body Cameras*, 128 Harv. L. Rev. 1794, 1806-07 (2015); *see also id.* (noting that, in the case of Mr. Bennet, officer had "apparently shut off her camera prior to the encounter," that the willful refusal to record is not a fireable offense in New Orleans, and that some officers "will also erase [dashboard-camera] footage prior to its review—an action unlikely to go unnoticed or unpunished by supervisors."). The ability of civilians to safely and secretly document police interactions precludes law enforcement from simply "circumvent[ing] the[ir] technology to insulate themselves from oversight." *Id.* at 1806. Such footage gives the public and the judicial system access to the (literal and figurative) perspective of those targeted by officers for enforcement.

II. Implicit Bias Endangers the Lives of People of Color and Immigrants Who Make Open Recording of Police Officers

Despite the many ways in which police recordings can help hold law enforcement accountable, many people of color and immigrants fear that they will endanger themselves if they openly record police officers. Although the First Circuit has recognized that a citizen's right to film government officials, "including law

enforcement officers," in the conduct of their duties in a public space is a "basic, vital, and well-established liberty safeguarded by the First Amendment," *Glik*, 655 F.3d at 81, in practice, there are myriad barriers to civilian recording of police. This is especially true for our most vulnerable communities: people of color and immigrants, who are both over-policed and face enormous imbalances of power when they interact with law enforcement.

For decades, courts and commentators alike have documented the fear in immigrant, racial minority, and other vulnerable communities regarding law enforcement. *See, e.g., Illinois v. Wardlow*, 528 U.S. 119, 132 (2000) (Stevens, J., concurring in part and dissenting in part) ("Among some citizens, particularly minorities . . . there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither 'aberrant' or 'abnormal.' Moreover, these concerns and fears are known to the police officers themselves and are validated by law enforcement investigations into their own practices." (footnotes omitted)); *Petit v. City of Chicago*, 352 F.3d 1111, (7th Cir. 2003) (observing that the "reality of urban policing is that minorities are frequently mistrustful of police," which can "reduce the willingness of some community members to cooperate with the police"); *Parada v. Anoka Cty.*, 332 F.Supp.3d 1229, 1235-36 (D. Minn. 2018) ("While the U.S. immigrant population is extremely vulnerable to crime, police mistrust is

common within immigrant communities." (citations and footnotes omitted)). This fear is compounded by the fact that the very act of removing a cell phone from one's pocket or glove compartment—in order to make an *open* recording, in compliance with present interpretations of Massachusetts law—may be perceived as threatening, leading a police officer to retaliate, or even react with violence. *See, e.g., Ickes v. Borough of Bedford*, 271 F.R.D. 458, 461 n.6 (W.D. Pa. 2010) (noting "rash of notorious arrests of citizens recording police officers" in Maryland).

Implicit bias both creates and heightens this risk. Put simply, implicit biases are "attitudes or stereotypes that can influence [human] beliefs, actions, and decisions," even if the individual in question is not consciously aware he or she holds such attitudes and never expresses them verbally. Kirsten Weir, *Policing in Black & White*, 47 Monitor on Psychology, 36, 36 (2016). Implicit biases can therefore influence a police officer's behavior, "even if he or she doesn't hold or express explicitly racist beliefs." *Id.* These biases may cause law enforcement agents "not only to pay more attention" to non-White actors than White actors, but also "to interpret identical acts differently based upon the race of the individual performing them." L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 Ind. L.J. 1143, 1155 (2012). In other words, implicit bias can induce a police officer to interpret innocuous behavior on the part of a person of color as threatening or criminal.

Such misperceptions can pose a deadly threat to the country's most vulnerable communities. For example, researchers examining the Philadelphia Police Department

in 2015 concluded that these misperceptions "more frequently explained the shootings of unarmed African-Americans compared to unarmed whites." *Id.* These results are mirrored in police departments across the country. For example, a four-year analysis of data from the U.S. Police-Shooting Database provided evidence of "significant bias in the killing of unarmed black Americans," in that the probability of being black, unarmed, and shot by the police is over three times the probability of being white, unarmed, and shot by the police. Cody T. Ross et al., *A Multi-level Bayesian Analysis of Racial bias in Police Shooting at the County-Level in the United States, 2011-2014*, 10 PLoS ONE (2015). In 2001, the Department of Justice reported that Black suspects were five times more likely to die at the hands of police than their White counterparts. Department of Justice, *Policing and Homicide, 1976-98: Justifiable Homicide by Police, Police Officers Murdered by Felons*, Bureau of Justice Statistics (NJC 180987) (2001).

Biases can also have non-lethal, but degrading ramifications. Research in Oakland, California revealed that even though Black residents make up less than one-third of the Oakland population, they represented 60% of traffic stops, while Black men were four times more likely than White men to be searched during a traffic stop, even though there was no corresponding likelihood of recovering contraband. Rebecca C. Hetey et al., *Data for Change: A Statistical Analysis of Police Stops, Handcuffings, and Arrests in Oakland, Calif., 2013-2014*, SPARQ: Social Psychological Answers to Real-World Questions, at 10 (2016). Most strikingly, during the thirteen-month study period, only

20% of the Oakland Police Department officers who made any stops stopped a White person, while 96% stopped a Black person. *Id.*

A paradigmatic example of implicit bias highlighted by both legal scholars and social science researchers is the documented tendency of police officers in "shooter bias" studies to perceive a cell phone in the possession of a person of color as a weapon, and then to act upon that perception. *See* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y. Rev. 149, 155 (2010) (noting relevance of these studies to shedding light on implicit bias in "critical law enforcement decision making"). In video simulations, Dr. Joshua Correll and his colleagues observed that implicit biases can lead an officer to, for example, shoot an unarmed black target "who is unarmed but holding an innocuous object[] such as [a] cellphone[] . . . more often and more quickly" than a white target. Weir, *supra* (*citing* Joshua Correll et al, *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals,"* 86 J. of Personality & Social Psych., 1314, 1314-29 (2002). In a study of both Denver area police officers and civilians, Dr. Correll and his team conducted a video simulation in which Black and White men were photographed holding either a gun or a non-gun object, including a small black or silver cell phone. Joshua Correll et al., *Across the Thin Blue Line*: *Police Officers and Racial Bias in the Decision to Shoot,* 92 J. of Personality & Social Psych. 1006, 1009 (2007). These images were flashed onto a screen as "targets" and players were instructed to press a button

labeled "shoot" if the target was armed and "don't shoot" if the target was unarmed. *Id.* at 1010. Replicating an earlier study, the team discovered that participants exhibited a "greater willingness to shoot" when the target was Black, rather than White; in particular, participants "shot armed targets more quickly" when they were Black *and* indicated "don't shoot" in response to unarmed targets more quickly when they were White. *Id.* at 1010, 1013-14. In short, implicit bias can lead an officer to "incorrectly perceive" that a suspect poses a deadly threat, "due to the *misperception* of an object (such as a cell phone) or an action (such as reaching for a cell phone)." Renée J. Mitchell & Lois James, *Addressing the Elephant in the Room: The Need to Evaluate Implicit Bias Training Effectiveness for Improving Fairness in Police Officer Decision-Making*, Police Chief Magazine, (n.d.), available at: https://www.policechiefmagazine.org/addressing-the-elephant-in-the-room/?ref=805f2482a67f556b22150760446857c9; *see also* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U.L. Rev. 795, 808 (2012) (noting impact of implicit bias findings on exercise of prosecutorial discretion, such that prosecutors might be "more likely to believe that the white victim was reaching for his cell phone" and that a shooter thus acted unreasonably); Bridgette Baldwin, *Black, White and Blue: Bias, Profiling, and Policing in the Age of Black Lives Matter*, 40 W. New Eng. L. Rev. 431, 446 (2018) ("Implicit bias endangers the lives of African Americans because these citizens' actions are given different meanings. Blackness means an unarmed man is armed, a cell phone is a gun,

and an individual held down by twenty cops in a chokehold could break loose at any moment and grab a cop's gun.").

The risks inherent in faulty threat perception have real life consequences. For example, in March 2018, two Sacramento police officers chased 22-year-old Stephon Clark, a Black man with an iPhone, into his grandmother's front yard and killed him, allegedly believing he was holding a gun. Amanda Sakuma, *Sacramento Police Officers Will Not be Charged for Fatally Shooting Stephon Clark*, Vox (Mar. 3, 2019), available at https://www.vox.com/2019/3/3/18248625/stephon-clark-sacramento-police-officers-shooting; *see also A.K.H. by and through Landeros v. City of Tustin*, 837 F.3d 1005, 1009 (9th Cir. 2016) (describing case where police officer killed Hispanic man during investigatory stop, testifying that he "believed that [the victim] had a weapon and he was going to use that weapon" and that the victim's right hand was "concealed in his sweatshirt pocket," where victim was unarmed and the "only heavy object in [his] sweatshirt pocket was a cell phone"); *McKnight v. Taylor*, 210 F.Supp.3d 1069, 1072-73 (S.D. Ind. 2016) (detailing police shooting where four officers reported to seeing a "silver and black object approximately five to six inches long" in the victim's hand and "all reported thinking that the object was a medium-sized handgun," when in fact, the victim was unarmed and was holding the handset of a telephone); *Sexton v. Mangiaracina*, 657 Fed. App'x. 928, 929 (11th Cir. 2016) (finding police officers' use of deadly force violated Fourth Amendment where victim dropped his cell phone, the "only thing in his hands," and was beginning to kneel when he was killed by police);

Carnaby v. City of Houston, 2009 WL 2633849 at *4 (S.D. Tex. Aug. 26, 2009) (stating Houston police officer who killed victim holding a cell phone testified that he "saw a dark, shiny object" in the victim's hands and thought he had a weapon); *cf. Delgado v. City of Riverside*, 2010 WL 4621515 at *7 (Cal. App. Ct. Nov. 16. 2010) (noting that "even if [the plaintiff] was actually holding a cell phone, the officers could properly use deadly force, as long as they reasonably believed that he was holding a gun").

III. Because Implicit Bias Underlies Police Interactions with Communities of Color, Criminalizing Secret Recording Subjects People of Color to a Forced Unconstitutional Choice

As explained by Appellees, the Wiretap Statute clearly violates the First Amendment as applied to secret recording of the police—it also places people of color and immigrants in an untenable position. If people of color were able to, for example, start an audio recording on their cell phones when pulled over by law enforcement as the officer walks to their car, the individual would not have to risk an officer confusing the phone for a gun, or face retaliation from an officer who did not want to be filmed. *See, e.g., Ickes*, 271 F.R.D. at 460 (noting that recordings of police officers have "drawn the ire of law enforcement agencies nationwide"). But according to Appellants, this ability should be denied to those residing in Massachusetts, since the Commonwealth's Wiretap Statute makes it a crime to record the police, or any government official, without their knowledge. *See* Appellee's Br. at 8-9 (stating that the Boston Police Department's training materials on the statute provide "examples instructing officers they may arrest and charge someone who secretly records police

officers" and noting that between 2011 and 2018, Boston police sought criminal complaints against "at least eight individuals" for secretly recording public police conduct).

If the district court's ruling is reversed, implicit bias will continue to place Massachusetts' communities of color in an unconstitutional position. If a person of color is stopped by the police, and he reaches for his cell phone to make an open record of his interaction with law enforcement, that action may be perceived as threatening, leading to his handcuffing, arrest, physical takedown or subduing, or even shooting, in violation of the Fourth Amendment. If, mindful of the dozens of incidents in which people of color have been fatally shot by police, he elects not to record the encounter, he will be foregoing his First Amendment right to "film government officials, including law enforcement officers, in the discharge of their duties in a public space." *Glik*, 655 at 85. Finally, if he activates a recording out of sight of a police officer, capturing audio or video but avoiding overt movements to preserve both his First Amendment liberty and his life, he will be subject to criminal prosecution under M.G.L. 272, § 99. *See Simmons v. United States*, 390 U.S. 377, 393-94 (1968) (holding that it is "intolerable that one constitutional right should have to be surrendered in order to assert another"); *see also New York v. United States*, 505 U.S. 144, 174-77 (1992) (observing that the choice between two unconstitutional choices is "no choice at all").

The U.S. Supreme Court has been clear that a government's objectives "cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." *U.S. v. Jackson*, 390 U.S. 570, 582 (1968); *see also id.* (observing that the question is "not whether the chilling effect is incidental, rather than intentional," but whether that effect is "unnecessary and therefore excessive." (quotation marks omitted)). Here, *amici* join Appellees in their argument that the Commonwealth has "no legitimate government interest, let alone a significant one, in preventing members of the public from making audio recordings of police officers performing their duties in public." Appellee's Br. at 34. But even if this Court finds that the Wiretap Statute *is* supported by significant government objectives, the statute must still be held invalid insofar as it creates an "unnecessary and therefore excessive" chilling effect on the First Amendment right of immigrants and people of color to record law enforcement officials in the public conduct of their official duties.

In construing the scope and limitations of the Establishment Clause, the Supreme Court has been clear that it is a "tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Lee v. Weisman*, 505 U.S. 577, 596 (1992). The same is true of the First Amendment's protections for speech. In the words of the *Simmons* Court, it is "intolerable" that Massachusetts residents of color must choose between violating state criminal law, risking their Fourth Amendment rights to be free from being unlawfully searched, detained, or shot, or

foregoing their "basic, vital, and well-established" First Amendment right to record the public, official conduct of law enforcement agents. *Glik*, 655 F.3d at 85.

CONCLUSION

For the aforementioned reasons, *amici* respectfully request that this Court affirm the decision of the District of Massachusetts.

Dated: October 4, 2019

Respectfully Submitted,

/s/Oren Nimni

Oren N. Nimni (Bar No. 1188821)
Lauren A. Sampson
61 Batterymarch Street, 5th Floor
Boston, MA 02110
(617) 988-0606
onimni@lawyersforcivilrights.org

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 29(a)(5) and 32(g)(1), I hereby certify that the foregoing amicus brief contains 3857 words, excluding the parts of the brief exempted by FRAP 32(f), and has been prepared in a proportionally spaced typeface using Garamond in 14 point size.

/s/Oren N. Nimni

Oren N. Nimni

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2019, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. All interested parties are registered CM/ECF users.

/s/ Oren N. Nimni
Oren N. Nimni