



Legal Update

June 2019

On May 22, 2019, Chief United States District Judge Patti B. Saris of the United States District Court for the District of Massachusetts entered a **Declaratory Judgment and Order** stating the following:

The Court declares [G.L. Chapter 272,] Section 99 unconstitutional insofar as it prohibits the audio recording of government officials, including law enforcement officers, performing their duties in public spaces. This prohibition is subject to reasonable time, place and manner restrictions. The Court orders that this declaration be provided to every police officer and to all assistant district attorneys within 30 days.

***Eric Martin & Rene Perez v. William Gross & Rachael Rollins*, (No. 16-11362-PBS); and *Project Veritas Action v. Rachael Rollins*, (No. 16-10462-PBS).**

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.

Procedural History:

In December 2018, the United States District Court for the District of Massachusetts considered whether the Massachusetts wiretap statute, G.L. c. 272, § 99, prohibits the willful interception or secret recording of any wire or oral communication through the use of an intercepting device. The District Court ruled that the secret audio recording of government officials, including law enforcement officials, performing their duties in public is protected by the First Amendment, subject only to reasonable time, place, and manner restrictions. *Martin and Perez v. William Gross & Dan Conley*, 340 F. Supp. 3d 87 (D. Mass. 2018). See also *Project Veritas Action v. Dan Conley*, 270 F. Supp. 3d 337 (D. Mass. 2017).

The First Circuit Court of Appeals previously found in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), that the First Amendment allows citizens to audio and video record government officials performing their duties in public. The *Glik* case only addressed whether a citizen can openly record a police officer in public. Following *Glik*, other plaintiffs filed lawsuits challenging the constitutionality of G.L. c. 272, § 99, and sought relief by way of injunction. Rather than issue an injunction, the District Court entered the Declaratory Judgment quoted above.

Scope of the Declaratory Judgement:

The District Court declined to define what is considered a “public space” and who qualifies as a “government official.” The District Court further stated it would leave “subsequent cases to define these terms.”

However, the District Court did clarify that citizens have a Constitutional right to secretly record police officers while performing their public duties in public and that the police have discretion to impose reasonable restrictions upon such recordings.

Commentary: Please see attached memorandum issued from Judge Saris.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department’s legal advisor or prosecutor.