No. 11-1286

IN THE
United States Court of Appeals
FOR THE SEVENTH CIRCUIT

THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS,

Plaintiff-Appellant,

v.

ANITA ALVAREZ,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Case No. 10-cv-5235, the Honorable Judge Suzanne B. Conlon

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BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWS EDITORS, ASSOCIATION OF CAPITOL REPORTERS AND EDITORS, CITIZEN MEDIA LAW PROJECT, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, RADIO TELEVISION DIGITAL NEWS ASSOCIATION AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are nonprofit associations representing newsgatherers and trade groups whose journalists and members regularly gather and disseminate news and information to the public through their newspapers, magazines, television and radio stations and the Internet.[1] *Amici*'s interest in this case is in assuring that the Illinois Eavesdropping Act ("Eavesdropping Act" or "Act") does not impede the crucial role journalists, publishers and others play in promoting discussion of matters of public concern. The disposition of this case is critically important in setting a precedent that will either protect or endanger newsgatherers' constitutional rights.

Amici are committed to preserving and ensuring broad media and public access to matters of public concern. This appeal addresses issues of direct interest to all members of the news media. Allowing newsgatherers to collect, distribute and receive information of public concern by recording events, under circumstances where there is no reasonable expectation of privacy, helps them inform the public and foster public discourse. Enforcement of the Act threatens to deprive the public of information.

Amici are concerned that, if this Court were to affirm the lower court's decision and find that Plaintiff-Appellant The American Civil Liberties Union of Illinois ("ACLU") has no constitutional right to record public events like those at issue, even when the acts occur in a public place where there is no reasonable expectation of privacy, robust First Amendment protections for newsgathering activities would be severely curtailed. As a result, efforts to gather information and inform the citizens of the state of Illinois about vital issues of public interest would be chilled.

[1] A complete description of each *amici* is set forth in the addendum to this brief.

SOURCE OF AUTHORITY TO FILE

All parties have consented to the filing of this brief *amici curiae*. Thus, *amici* are authorized to file it, in accordance with Fed. R. App. P. 29(a).

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

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

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

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

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

INTRODUCTION

The U.S. Constitution protects people who gather and disseminate information about matters of public interest. Yet, the arrest and prosecution of such people under the Illinois Eavesdropping Act violate this constitutional protection and run counter to the text, history and longstanding interpretation of the First Amendment. To be sure, the Eavesdropping Act advances the valuable goal of safeguarding Illinois citizens' interests in having their private conversations remain so by criminalizing the secret interception of conversations. However, the Act also criminalizes the interception of conversations to which parties have no reasonable expectation of privacy, thereby expanding its scope well beyond its purpose of protection of privacy and infringing on fundamental liberties. The Act is also a national outlier among the states, the overwhelming majority of which (along with the federal government and District of Columbia) require the subject of a recording to have a reasonable expectation of privacy in the communication. The explicit disavowal of such a requirement in Illinois, however, subjects any nonconsensual, nonexempt recording to criminal penalties. As such, the Act vests in law enforcement near-limitless discretion to decide which recordings should be concealed from public view and which may be conveyed to the public.

Moreover, numerous courts have recognized that the First Amendment right to gather news includes the right to record matters of public interest. That protection applies no less forcefully to non-journalists. *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.").

The Supreme Court has recognized that courts must be sensitive to First Amendment considerations when evaluating the constitutionality of a statute such as the Eavesdropping Act

that restricts the gathering and dissemination of information. Where parties to an intercepted conversation do not have a reasonable expectation of privacy, no state interest is advanced by criminalizing the recording of that conversation. Such criminalization burdens the First Amendment right to record public events. Although the Act contains an exemption for "incidentally overheard" conversations, this narrowly limited protection does little to remedy the impermissible criminalization of protected activity and thus does not save the statute from its unconstitutional restraint on the right to gather information.

For these reasons, *amici* urge the Court to hold that the Eavesdropping Act's criminalization of recording where there is no reasonable expectation of privacy on the part of the recorded subject is unconstitutional. Such a holding is necessary to avoid a chill on socially valuable — sometimes crucial — recording activities in the state of Illinois.

ARGUMENT

I. Because it explicitly disavows the requirement of a reasonable expectation of privacy, the Eavesdropping Act is excessively broad and anomalous.

A. The Eavesdropping Act criminalizes more activity than originally intended.

The Eavesdropping Act criminalizes use of an eavesdropping device "for the purpose of hearing or recording all or any part of any conversation . . . unless [done] with the consent of all of the parties to such conversation or electronic communication . . . ." 720 Ill. Comp. Stat. 5/14-2(a)(1) (2010). The Act defines "conversation" as "any oral communication between 2 [sic] or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." *Id.* § 14-1(d).

The state interest promoted by the Act is the privacy of Illinois citizens. Its legislative history makes clear that the Act's purpose is to protect individuals from the surreptitious recording and interception of *private* communications: "[T]he framers of the statute intended the term 'eavesdropping' to refer to the listening to or recording of those oral statements intended by the declarant to be of a private nature. Eavesdropping is not merely the listening to or recording of *any* oral communication." *People v. Klingenberg*, 339 N.E.2d 456, 459 (Ill. App. Ct. 1975) (emphasis added).

Accordingly, the Illinois Supreme Court found no violation of the Act in a pair of cases where the relevant conversation was recorded by one party to the communication, in contravention of the statute's all-party consent requirement. *See People v. Herrington*, 645 N.E.2d 957, 958–59 (Ill. 1994); *People v. Beardsley*, 503 N.E.2d 346, 350 (Ill. 1986). In each case, the court relied on the common law definition of eavesdropping, observing that it can only occur when parties intend their conversation to be secret or private. *See id.*; *Herrington*, 645 N.E.2d at 958. As such, the relevant factor in determining whether a defendant illegally

eavesdropped shifted from consent to the nature of and circumstances surrounding the recorded conversation, namely whether its parties reasonably expected it to be private. *See* Celia Guzaldo Gamrath, *A Lawyer's Guide to Eavesdropping in Illinois*, 87 Ill. B. J. 362, 364 (1999).

In response, the General Assembly amended the Act to include its current definition of "conversation," which expressly includes non-private communications and thereby explicitly disavows the significance of whether the parties had an objectively reasonable expectation of privacy.[2] The Senate sponsor of House Bill 356 stated that its purpose, among other aims, was to "reverse the Beardsley eavesdropping case" and to exempt law enforcement from the consent requirement in certain cases. *See* Senate Transcript of Regular Session Debate on H.B. 356, State of Illinois 88th General Assembly 56 (May 18, 1994) (statement of Sen. Dudycz). A concern about the amendment's effect on private, personal conversations was present during the floor debate.

[2] Although the Illinois Supreme Court has not ruled on the efficacy of the updated Eavesdropping Act, there are no cases rejecting the statute's clear language that a party commits eavesdropping when all parties to the conversation have not consented to its recording, regardless of the circumstances surrounding it. *See Int'l Profit Assocs., Inc. v. Paisola*, 461 F. Supp. 2d 672, 678 n.6 (N.D. Ill. 2006).

As one senator hypothesized, "if such a conversation is picked up that has nothing to do with crime but may be embarrassing to . . . your personal life or your family life . . . will it languish around for twenty or thirty years and come back and harm someone terribly . . . ?" *Id.* at 68 (statement of Sen. Hendon); *see also id.* at 60, 61 (statement of Sen. Shaw) (questioning the need to broaden law enforcement's authority to wiretap people's conversations and accusing the bill's sponsor of "eroding people's rights a little bit at a time on this wiretapping business"). Such concerns evince the Act's original legislative purpose to protect individuals' privacy rights and, additionally, to deter law enforcement officers' interference with those rights through their use of eavesdropping as an investigative tool. However, the perverse manner in which the statute is being enforced[3] against individuals who record police in the performance of their public duties plainly undercuts that purpose.

B. The Eavesdropping Act is anomalous and vests in law enforcement near-limitless discretion to decide which recordings should be concealed from public view and thus criminalized and which may be conveyed to the public.

Illinois is the only state where a wiretapping statute explicitly criminalizes the recording of conversations "*regardless of* whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." 720 Ill. Comp. Stat. §

[3] *See infra* Part I.B.

14-1(d) (emphasis added).[4] Thus, any nonconsensual, nonexempt recording of a conversation — regardless of the circumstances surrounding it — is subject to criminalization. And any law that provides such broad discretion is at risk of being enforced based solely on officers' content preferences. In arguing that the actions public officials take in their public capacities are not shielded from public exposure, a Massachusetts Supreme Judicial Court justice noted that the public's "role cannot be performed if citizens must fear criminal reprisals when they seek to hold government officials responsible by recording — secretly recording on occasion — an interaction between a citizen and a police officer." *Commonwealth v. Hyde*, 750 N.E.2d 963, 976 (Mass. 2001) (Marshall, C.J., dissenting).[5]

Indeed, an examination of the facts surrounding just a few relatively recent arrests and prosecutions under various states' wiretapping laws suggests a pattern of criminal reprisal for recordings like the following that somehow depict officers in a negative light:

- A Chicago woman was arrested last August for recording her conversation with police Internal Affairs investigators during which she reported a patrol officer who earlier

[4] While no other state explicitly criminalizes the recording of conversations regardless of the lack of a reasonable expectation of privacy, nine states' criminal wiretapping statutes are silent on the issue, neither explicitly criminalizing such recordings, nor expressly recognizing that the subject of a recording must have a reasonable expectation of privacy in the communication. *See* Alaska Stat. § 42.20.310 (2010); Ark. Code Ann. § 5-60-120(a) (2010); Conn. Gen. Stat. § 52-570d(a) (2011); Ind. Code § 35-33.5-1-5 (2011); Mass. Gen. Laws ch. 272, § 99(B)(4) (2010); Mont. Code Ann. § 45-8-213(1)(c) (2009); N.M. Stat. § 30-12-1(B) (2010); N.Y. Penal Law §§ 250.00(1), .05 (McKinney 2011); Or. Rev. Stat. § 165.540(1)(c) (2011). Interestingly, Connecticut recently became the first state nationwide to introduce legislation that would explicitly recognize the public's right to photograph and videotape police in the performance of their public duties, and also provide a cause of action for damages against officers who interfere with this right. *See* Radley Balko, *Short but Sweet*, Reason.com, Feb. 24, 2011, http://reason.com/blog/2011/02/24/short-but-sweet (reporting on Senate Bill 788).

[5] In *Hyde*, a divided Massachusetts Supreme Judicial Court rejected a reading of the state wiretapping statute that included a reasonable expectation of privacy element and upheld the defendant's conviction for secretly recording a police traffic stop. *Id.* at 963.

responded to a domestic violence call at the woman's home and fondled her during their private interview. According to the woman, the investigators tried to dissuade her from filing a complaint against the officer, stating he had a good record and guaranteeing he would not bother her again. Wanting to document the investigators' lack of assistance and attempts to convince her to forgo the filing of the report, the woman began secretly recording the conversation with her cellular telephone. When the investigators discovered the recording, they arrested the woman and charged her with two counts of eavesdropping, both of which are pending. *See* Don Terry, *Eavesdropping Laws Mean That Turning on an Audio Recorder Could Send You to Prison*, N.Y. Times, Jan. 23, 2011, at A29, *available at* 2011 WLNR 1376568.[6]

- Three Boston police officers arrested an attorney and confiscated his cell phone in October 2007 after he used it to record the officers on the Boston Common struggling to extract a plastic bag from a teenager's mouth; the lawyer wanted to document what he deemed as officers' use of excessive force for a drug arrest. *See* Daniel Rowinski, *Police Fight Cellphone Recordings: Witnesses Taking Audio of Officers Arrested, Charged with Illegal Surveillance*, Bos. Globe, Jan. 12, 2010, *available at* 2010 WLNR 610063. A Boston Municipal Court judge dismissed an illegal wiretapping charge against the man because the Massachusetts statute and case law require that an unlawful recording be secret, and the officers admitted that he publicly and openly recorded them.[7]

[6] To facilitate access to secondary sources, "WLNR," or Westlaw NewsRoom, citations are provided whenever possible.

[7] That man filed a complaint in federal court, alleging that the police and city of Boston violated his civil rights. Defendants moved to dismiss the case, the lower court denied that motion, and defendants appealed that denial based on qualified immunity. Because the trial court denied the

- In March 2010, a motorcyclist used a helmet-mounted camera to secretly record his interaction with two state troopers during an interstate traffic stop in Maryland. Ten days later, the motorcyclist posted the video — which depicted a plainclothes trooper jumping out of an unmarked car holding a gun and demanding that the biker get off the motorcycle before identifying himself as police — on YouTube. After they learned of the video, police executed a search warrant of the motorcyclist's home, seized his camera and computers and charged him with three felonies for violating the state wiretapping law, which requires the consent of all parties to record in a situation where there is a reasonable expectation of privacy. *See Often, You Can Film Cops; Just Don't Record Them*, NPR Morning Edition, Sept. 1, 2010, *available at* 2010 WLNR 17409886. Last September, a Maryland trial judge threw out the charges, holding that conversations at a traffic stop are not private and noting that "[i]n this rapid information technology era in which we live, it is hard to imagine that either an offender or an officer would have any reasonable expectation of privacy with regard to what is said between them in a traffic stop on a public highway." *See State v. Graber*, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *17 (Md. Cir. Ct. Sept. 27, 2010).

It hardly needs mentioning that none of these recordings depict officers in an overly positive light — chasing and apprehending a suspect or rescuing a motorist from a burning vehicle, for example.[8] Instead, they portray officers engaged in, at best, highly embarrassing

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motion from the bench, *amici* consulted the appellate briefs for this information. *See* Brief of Plaintiff-Appellee at 6, *Glik v. Cunniffe*, No. 10-1764 (1st Cir. Jan. 18, 2011).

[8] In addition to those who capture negative depictions of the police, people who challenge or confront officers as they carry out their public duties, or attempt to use their recordings against the police are also among those targeted for arrest under wiretapping laws. *See* Wendy McElroy,

conduct and, at worst, criminal conduct.[9] In the overwhelming majority of states, where application of the wiretapping law is limited to conversations where parties have a reasonable expectation of privacy, individuals are able to provide such "street-level oversight." Rowinski, *supra*. However, in Illinois, where the recording of even the most widely seen public conduct is criminalized, those same people face prosecution. As such, enforcement of the Illinois Eavesdropping Act is limited not by parties' reasonable expectation of privacy, as in most states, but instead by officers' decisions about which recordings they want shielded from public exposure and which recordings they deem suitable for public viewing.

II. There is a First Amendment right to record public events like those at issue.

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

The First Amendment rights to *receive* and *disseminate* information are well recognized. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both."); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it."). Moreover, the Supreme Court has held that this protection extends to publication of the content of recorded statements by those not involved in

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Are Cameras the New Guns?, Gizmodo, June 2, 2010, http://gizmodo.com/#!5553765/are-cameras-the-new-guns.

[9] The attorney for the woman charged under the Illinois Eavesdropping Act said he believes his client's conduct falls under the statutory exemption for recordings made by people who have reasonable suspicion that a party to the conversation is about to commit a crime against them, *see* 720 Ill. Comp. Stat. § 14-3(i), because "the Internal Affairs investigators were committing the crime of official misconduct in preventing her from filing a complaint." *See* Terry, *supra*.

the recording. *See Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (likening the delivery of a tape recording to the delivery of a pamphlet or handbill and thus finding that the former is the kind of "speech" the First Amendment protects). But the constitutional guarantee of freedom of the press begins with the right to *gather* information. Indeed, the Supreme Court has noted that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg*, 408 U.S at 681.

Taken together, these three rights are links in a chain that ensures a free press; a burden on a single link burdens press freedom in its entirety. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion) ("In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."); *cf. First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) ("[N]either the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of *pure* speech . . . and the product of these processes . . . in terms of the First Amendment protection afforded."). The right to gather news is thus among those freedoms that, "while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (holding public exclusion from criminal trial unconstitutional under strict scrutiny analysis).

B. The First Amendment right to gather information encompasses the right to record matters of public interest in public areas, including police activity.

Police activity in publicly accessible areas has been traditionally open to public view. Indeed, there is arguably no location in which First Amendment interests are stronger than on public streets and other open forums. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (Speech "on matters of public concern at a public place adjacent to a public street" is entitled to special First Amendment protection; "[s]uch space occupies a special position in terms of First Amendment protection. . . . We have repeatedly referred to public streets as the archetype of a traditional public forum, noting that time out of mind public streets and sidewalks have been used for public assembly and debate.").

Nor is there any doubt that permitting citizens to record public activity by law enforcement, in which there is no reasonable expectation of privacy, enhances the function of government. This case involves the gathering of information that could reveal serious allegations of misconduct by Chicago law enforcement officers — public officials who serve the community. "It would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety." *Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990). And clearly, "[t]he manner in which . . . allegations [of police misconduct] are investigated is a matter of significant public interest." *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997).

Accordingly, numerous courts have recognized that — at the very least — the right to gather news encompasses a "First Amendment right to film *matters of public interest*." *See*

Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (emphasis added).[10] The U.S. Court of Appeals for the Eleventh Circuit similarly noted that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding plaintiffs "had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct"); *see also Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (noting prohibition on recording a public meeting "touched on expressive conduct protected by the Free Speech Clause"). The U.S. Court of Appeals for the First Circuit likewise upheld a constitutional right to record official conduct. *See Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999) (affirming district court decision that police officer was not entitled to qualified immunity for violating plaintiff's clearly established First Amendment right to videotape public officials talking in lobby of municipal building).[11]

The U.S. Court of Appeals for the Seventh Circuit has ruled similarly, holding that the First Amendment right to gather news includes a right to record activities of public interest occurring in public places through photography and audio and video surveillance. *See Dorfman v. Meiszner*, 430 F.2d 558, 562 (7th Cir. 1970) (striking down on First Amendment grounds a ban on photographing and broadcasting in and around Chicago's federal courthouse and office

[10] While the *Fordyce* court found no clear violation of this right, it did so on the basis that the recording at issue captured a conversation that reasonably could have been considered private. *See Fordyce*, 55 F.3d at 439–40.

[11] *Cf. Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) (finding, in the U.S. Court of Appeals for the Third Circuit, that the right to videotape police officers is not clearly established in the particular, narrow context of "inherently dangerous" traffic stops). *But see Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005) (citing *Cumming* and noting that "videotaping or photographing the police in the performance of their duties on public property may be a protected activity").

building, including in the center lobby, outdoor plaza and other areas surrounding the building and non-courtroom floors); *Schnell v. City of Chi.*, 407 F.2d 1084, 1085–86 (7th Cir. 1969) (holding that a class of news photographers covering the 1968 Democratic National Convention and attendant demonstrations in Chicago stated a claim for permanent injunction preventing city and police officials from "interfering with [the photographers'] constitutional right to gather and report news, and to photograph news events"), *overruled on other grounds by City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

The U.S. District Court in this case found the ACLU had not alleged a cognizable First Amendment injury because "there is nothing in the Constitution which guarantees the right to record a public event." R. at 516. The court based this conclusion in part,[12] however, on a misreading of *Potts v. City of Lafayette, Ind.*, which held simply that banning persons without media passes from bringing objects that could potentially be thrown, including tape recorders, into a Ku Klux Klan rally was a narrowly tailored restriction justified on safety grounds. *See* 121 F.3d 1106, 1111–12 (7th Cir. 1997). Notably, that case addressed the use of tape recorders as weapons, not as a means to exercise a constitutional right.

[12] The court also found the ACLU's First Amendment rights were not implicated in this context because of the lack of a so-called "willing speaker." R. at 517. However, that analysis is inapplicable here. No one disputes that the public has a "fundamental" right under the First Amendment to "assemble in public places not only to speak or to take action, but also to *listen, observe, and learn*," regardless of whether the observed speech or conduct is undertaken willingly. *See Richmond Newspapers*, 448 U.S. at 578 (emphasis added). This case addresses whether that constitutional right extends to the recording of such observations. As such, the speaker's willingness or inability to communicate is irrelevant under the facts of this case. Indeed, a finding that the ACLU's right to record matters of public interest that occur in public places depends on a police officer's willingness to have his or her actions documented effectively eviscerates this right and severely undermines the newsgathering process.

C. Non-journalists should be afforded no less information-gathering protection than journalists.

The right to gather news extends to all people who disseminate information to the public. Indeed, nontraditional information gatherers have played an important role in informing the public throughout this nation's history, from revealing unsanitary and inhumane conditions in the meat packing industry in the early 20th century, to exposing the health hazards of tobacco, to shaping public opinion about the Vietnam War. *See* Leon Harris, *Upton Sinclair: American Rebel* 85–90 (1975); Carl Jensen, *Stories That Changed America: Muckrakers of the 20th Century* 78–81 (2000). Now that modern technology has given even individuals of modest means the ability to capture news using inexpensive digital cameras and cell phones and publish their findings on the Internet, the traditional definition of "journalism" has expanded. The First Amendment right to gather information must protect all people, whether journalists or not.

III. The Illinois Eavesdropping Act violates the First Amendment right to gather information.

A. The Act's explicit disavowal of the requirement of a reasonable expectation of privacy unconstitutionally burdens newsgathering activities.

Whether viewed as a content-based restriction (subject to strict scrutiny) or a content-neutral restriction (subject to intermediate scrutiny),[13] the Eavesdropping Act's criminalization of recording of events to which there is no reasonable expectation of privacy is unconstitutionally overbroad. The Act significantly burdens expressive and constitutionally protected activity while serving no government interest in privacy, let alone a "compelling" (or even "substantial") one.

[13] Speech restrictions based on content must satisfy strict scrutiny and thus be narrowly tailored to serve a compelling government interest. *See Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1132 (2009). Content-neutral restrictions must serve a substantial government interest. *See Ward v. Rock Against Racism*, 491 U.S. 781, 789–92 (1989).

The U.S. Supreme Court has recognized that enforcement of wiretapping statutes must strike a balance between the privacy interests at stake and the First Amendment interests implicated. In *Bartnicki*, the Court relied on the First Amendment to reverse a conviction under the federal wiretapping statute for disclosure of intercepted communications. *See* 532 U.S. at 532–35. The Court acknowledged that privacy of communication, in this case a private phone call (the recording of which *none* of the parties consented to), is an important interest but ultimately held that "privacy concerns give way when balanced against the interest in publishing matters of public importance." *See id.* at 534.

Amici recognize that *Bartnicki* dealt with a prohibition against *disclosure* of recorded communications, and its holding "does not apply to punishing parties for obtaining the relevant information unlawfully." *See id.* at 532 n.19. It nonetheless illustrates that, in enforcing a statute that restricts the gathering and dissemination of information and evaluating privacy interests, courts must be sensitive to First Amendment considerations. And even assuming, *arguendo*, that the First Amendment protection of recording is more attenuated than its protection of dissemination, no compelling or substantial government interest is served by the Act's criminalization of recording where there is no reasonable expectation of privacy on the part of the recorded subject. The pertinent interest is the privacy of Illinois citizens, and the balancing of interests required by First Amendment jurisprudence becomes trivial when one side of the scale is empty.

B. The Act's exemption for "incidentally overheard" conversations does not save the statute from its unconstitutional restraint on the right to gather information.

The Eavesdropping Act exempts from criminalization "[a]ny broadcast by radio, television or otherwise whether it be a broadcast or recorded for the purpose of later broadcasts

of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made." 720 Ill. Comp. Stat. § 14-3(c). While this provision protects news media and others in some situations where there is no reasonable expectation of privacy,[14] it does not do so in many others; the exemption thus fails to cure the Act's constitutional infirmities.

The exemption narrowly limits the protection from criminal liability to recorded conversations "overheard incidental" to the documentation of a publicly attended function. This restriction omits from statutory protection many important (and constitutionally protected) newsgathering activities journalists engage in regularly. For example, openly filming a public area to capture file footage — recordings of general scenes archived for use in future broadcasts — is subject to criminalization if a public function is not simultaneously occurring.[15]

Moreover, protection under the exemption seemingly extends only to recordings actually broadcast or recorded with an intent to broadcast, in violation of the First Amendment right to gather information irrespective of its dissemination or lack thereof. Indeed, as part of the newsgathering process, journalists and others often record conversations not for broadcast but for informational or research purposes only.

[14] The statutory exemption for "[r]ecording the proceedings of any meeting required to be open by the Open Meetings Act," 720 Ill. Comp. Stat. § 14-3(e), provides some additional protection to journalists and others. It does not, however, remedy the Act's impermissible criminalization of recording of other events to which there is no reasonable expectation of privacy and thus, like the "incidentally overheard" exemption, fails to save the statute from its unconstitutional restraint on the right to gather information.

[15] Significantly, the Act does not define a "function where the public is in attendance." In light of this lack of statutory guidance, *amici* assume for purposes of this discussion that the term "function" applies to a scheduled event or large gathering that spontaneously forms in response to some nonscheduled event, and not to individuals or small groups of individuals that independently gather at a public place.

For the foregoing reasons, the "incidentally overheard" exemption does little to remedy the Act's impermissible criminalization of protected activity and thus does not save the statute from its unconstitutional restraint on the right to gather information.

IV. The criminalization of communications to which there is no reasonable expectation of privacy chills socially valuable newsgathering and watchdog activities and suppresses the spread of important information.

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

In the early morning hours of January 1, 2009, Bay Area Rapid Transit ("BART") police officers arrived at an Oakland subway platform to respond to reports of a fight. Jack Leonard, *Dramatic Video of BART Shooting Released by Court*, L.A. Times Blog, http://latimesblogs.latimes.com/lanow/2010/06/dramatic-video-of-bart-shooting-released-by-court.html (June 24, 2010, 17:13 PST). One officer pinned the unarmed, 22-year-old Oscar Grant to the ground, drew his gun and fired, killing Grant. *Id.* Bystanders watched in horror and used their cell phones to record the scene through the windows of an idle train. *Id.* In Illinois, those bystanders could have been charged with felonies under the Eavesdropping Act.

Audiovisual recordings like those of Oscar Grant's death can be necessary to initiate investigations into police misconduct, prove misconduct and ensure fair trials. *Hyde*, 750 N.E.2d at 972 (Marshall, C.J., dissenting) ("'Whether there even would have been a Los Angeles Police Department investigation [into the Rodney King beating] without the video is doubtful, since the efforts of King's brother . . . to file a complaint were frustrated, and the report of the involved officers was falsified.'" (quoting Report of the Independent Commission on the Los Angeles Police Department ii (1991))). Indeed, countless examples of recorded videos serving important evidentiary functions exist. *See, e.g.*, Demian Bulwa, *Mehserle Convicted*, S.F. Chron., July 9,

2010, at A1, *available at* 2010 WLNR 13799185 (reporting BART police officer's conviction for manslaughter based on video depicting shooting); Amanda Covarrubias & Stuart Silverstein, *A Third Incident, a New Video: A Cellphone Camera Captures UCLA Police Using a Taser on a Student Who Allegedly Refused to Leave the Library Tuesday Night*, L.A. Times, Nov. 16, 2006, at B1, *available at* 2006 WLNR 19872437 (reporting that a cell phone camera video led to a review of a Taser incident); John Eligon, *Former Officer Is Found Guilty of Lying About Confrontation with Bicyclist*, N.Y. Times, Apr. 30, 2010, at A19, *available at* 2010 WLNR 23198931 (reporting that a widely disseminated video of a New York police officer attacking a bicyclist led to the ex-officer's false statement conviction); Sara Jean Green & Steve Miletich, *Uproar over Video: Cop Kicks, Swears at Detainee*, Seattle Times, May 8, 2010, at A1, *available at* 2010 WLNR 9702277 (reporting a freelance videographer's capture of Seattle police using excessive force and racial epithets against a suspect, leading to an internal investigation); Milton J. Valencia, *Video of Roxbury Arrest Reviewed*, Bos. Globe, Oct. 28, 2010, *available at* 2010 WLNR 21525808 (reporting that video of officers severely beating unarmed 16-year-old led to a police investigation).

Audiovisual recordings can also benefit the police. *See Scott v. Harris*, 550 U.S. 372, 381 (2007) (relying on video footage to hold police officer justified in ramming fleeing vehicle, which caused plaintiff to suffer permanent paralysis); Roberto Santiago, *Taser Incident: Report Clears Campus Police at UF*, Miami Herald, Oct. 25, 2007, at B1, *available at* 2007 WLNR 20930333 (reporting officers involved in Taser incident cleared); Jason Trahan & Tanya Eiserer, *Cameras a Candid Witness: In-Car Video Just as Likely to Clear Police Officers Accused of Misconduct*, Dall. Morning News, Mar. 29, 2009, at A1, *available at* 2009 WLNR 5912565; Stephen T. Watson, *Police Going to the Replay*, Buffalo News, Apr. 6, 2009, at A1, *available at*

2009 WLNR 6454014 (explaining that recordings of police "more often exonerate an officer accused of misconduct").

The evidentiary benefits of audiovisual recordings extend beyond the arena of police activities. *See, e.g.*, *Commonwealth v. Rivera*, 833 N.E.2d 1113, 1115–16 (Mass. 2005) (stating that surveillance camera recordings of a murder in a convenience store were used to help identify the defendant, introduced into evidence and played at trial); Shayna Jacobs, *Lawyer Hopes Video Will Exonerate Chinatown Teen Accused of Murder*, DNAinfo.com, Dec. 7, 2010, http://www.dnainfo.com/20101207/lower-east-side-east-village/lawyer-hopes-video-will-exonerate-chinatown-teen-on-trial-for-hester-street-murder (reporting that a video to be presented to a jury reveals the teenager accused of murder standing on the opposite side of the street when it occurred); *Teacher Accused of Hitting Student Exonerated*, WSVN-TV, Mar. 13, 2008, http://www1.wsvn.com/news/articles/local/MI79758/ (reporting that a Florida jury dropped charges against a teacher after cell phone video footage exonerated him of accusations of attacking a student).

B. The Eavesdropping Act inhibits newsgathering and hampers public discourse.

Individuals' recordings are fundamental to newsgathering. Consider, for instance, the videos that flooded the Internet during the protests in Egypt in early 2011. *See, e.g.*, *From WikiLeaks to Talk Radio, Who Is a Real Journalist?*, Providence J., Feb. 17, 2011, *available at* 2011 WLNR 3181083 (noting that "citizen journalists" broke the news of the protests, using camera phones to show the world what was happening in Tahrir Square). These videos provided insight into injustices suffered by the people of Egypt, and footage depicting flying rocks and whip-wielding Mubarak supporters using horses and camels to charge violently into a crowd galvanized viewers worldwide.

These videos provide more than information and insight; they allow viewers to experience the devastation of events on a visceral level. *See, e.g.*, Fresh Footage of Huge Tsunami Waves Smashing Town in Japan, YouTube, http://www.youtube.com/watch?v=TRDpTEjumdo&feature=BF&list=PLED998104683D12AF&index=8 (last visited Apr. 20, 2011) (depicting footage of the tsunami from a rooftop as the surge of water engulfed everything in its path); Virginia Tech Shooting Rampage, YouTube, http://www.youtube.com/watch?v=cSbZmd-l8n8 (last visited Apr. 20, 2011) (depicting cell phone footage capturing the sound of gunfire that killed thirty-two students and staff members at Virginia Polytechnic Institute & State University in April 2007).

Audiovisual recordings play an increasingly significant role in public discourse. New media make it easier than ever for voters to educate themselves about civic and national affairs. S*ee* Brian Lehrer, *A Million Little Murrows: New Media and New Politics*, 17 Media L. & Pol'y 1, 1–7 (2008). Videos of events such as co-op board and neighborhood association meetings are often easily accessible online, and political conventions and debates are now available "[i]n full, all the time, and on multiple sites, with a thousand citizen editors choosing what excerpts to highlight on YouTube." *Id.* at 7.

The public's videos have also been instrumental in revealing characteristics and biases of our country's leaders, allowing voters to make more informed decisions. *See, e.g.*, Complete, Un-edited Etheridge Video, YouTube, http://www.youtube.com/watch?v=o9RXyCVfeEI&NR=1 (last visited Apr. 20, 2011) (depicting Congressman Bob Etheridge accosting a student journalist outside a Nancy Pelosi fundraiser in June 2010 after the student asked Etheridge if he fully supported the Obama agenda); George Allen Introduces Macaca, YouTube, http://www.youtube.com/watch?v=r90z0PMnKwI (last

visited Apr. 20, 2011) (depicting Senator George Allen referring to an audience member as "macaca" in 2006); Joe Biden's Racist Slip, YouTube, http://www.youtube.com/watch?v=sM19YOqs7hU (last visited Apr. 20, 2011) (depicting then-Senator Joseph Biden in 2006 stating, "you cannot go to a 7-Eleven or a Dunkin' Donuts unless you have a slight Indian accent"); NRA: Barack Obama — "Bitter Gun Owners," YouTube, http://www.youtube.com/watch?v=VZWaxjiQyFk (last visited Apr. 20, 2011) (depicting Barack Obama remarking at a private fundraiser during his primary campaign in 2008 that people "cling to guns or religion or antipathy towards people who aren't like them").

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the lower court's ruling denying the ACLU's motion to file an amended complaint and find that the Illinois Eavesdropping Act's criminalization of recording of conversations to which parties have no reasonable expectation of privacy violates the First Amendment rights of all people, whether journalists or not, to gather information.

Dated: April 22, 2011
Arlington, VA

Respectfully Submitted,
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[16] *Amici* thank Harvard Law School Cyberlaw Clinic student Hamilton Simpson for his valuable contribution to this brief.

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

I hereby certify that the foregoing brief *amici curiae* complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,566 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Further, I certify that the foregoing brief *amici curiae* complies with the typeface requirements of Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2011, I

- Electronically filed in searchable Portable Document Format the foregoing brief *amici curiae* with the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system;
- Caused to be served for filing with the Court one original and fourteen true and correct copies of the digital version of the foregoing brief *amici curiae* by first-class mail, postage prepaid; and
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ADDENDUM

Descriptions of *amici curiae*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

With some 500 members, **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Association of Capitol Reporters and Editors was founded in 1999 and has approximately 200 members. It is the only national journalism organization for those who write about state government and politics.

Citizen Media Law Project ("CMLP") provides legal assistance, education and resources for individuals and organizations involved in online and citizen media. CMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media.

National Press Photographers Association ("NPPA") is a nonprofit organization dedicated to the advancement of photojournalism in its creation, editing and distribution.

NPPA's almost 9,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.