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, Cook County State's Attorney, in her official capacity, Defendant-Appellee.	)	Appeal from the United States District Court for the Northern District Of Illinois, Eastern Division No. 10 C 5235 The Honorable Suzanne B. Conlon, Judge Presiding

BRIEF OF PLAINTIFF-APPELLANT
THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS

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Dated: April 15, 2011

U.S.C.A.–7th Circuit
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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-1286

Short Caption: American Civil Liberties Union v. Anita Alvarez

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(3), and 1343(4). Plaintiff the American Civil Liberties Union of Illinois ("ACLU"), and putative plaintiffs Colleen Connell ("Connell") and Allison Carter ("Carter"), seek declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 because the Illinois Eavesdropping Act, 720 ILCS 5/14, as applied, violates the First Amendment to the U.S. Constitution.

The ACLU is incorporated as a not-for-profit in Illinois. Anita Alvarez ("Alvarez") is sued in her official capacity as the Cook County State's Attorney.

On October 28, 2010, the District Court granted Alvarez's motion to dismiss, denied as moot the ACLU's preliminary injunction motion, and entered judgment dismissing the case without prejudice. D. 32, A1-A8.[1] On November 18, 2010, the ACLU timely moved to amend judgment, to file an amended complaint, and for a preliminary injunction. D. 35. On January 10, 2011, the District Court denied amendment and declined to reach preliminary injunctive relief. D. 41, A9-A17. On February 4, 2011, the ACLU and the putative plaintiffs timely appealed. D. 43.

The District Court's dismissal in November 2010, and its denial of amendment in January 2011, are final judgments appealable under 28 U.S.C. §

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[1] Herein, "D" means the District Court's docket, "A" means the Required Short Appendix, "Compl." means the proposed Amended Complaint (D. 36-1), and "Connell Decl." means the Connell Declaration supporting amendment and preliminary injunction (D. 36-2).

1291. Both denials of preliminary injunctive relief are appealable under 28 U.S.C. § 1292. No claims remain before the District Court.

ISSUES PRESENTED

1. Does the Illinois Eavesdropping Act violate the First Amendment as applied to openly audio recording police officers without their consent when: (1) the officers are performing their public duties; (2) the officers are in public places; (3) the officers are speaking at a volume audible to the unassisted human ear; and (4) the manner of recording is otherwise lawful?

2. Did the District Court err by denying the ACLU's Rule 59(e) motion to amend judgment so the ACLU could move under Rules 15(a)(2) and 21 to amend its complaint and renew its Rule 65(a) motion for a preliminary injunction?

3. Did the District Court err by denying a preliminary injunction?

STATEMENT OF THE CASE

In August 2010, the ACLU filed its original complaint against Alvarez. D. 1. The ACLU alleged that the Act violates the First Amendment as applied to its program of promoting police accountability by openly audio recording police officers without their consent when: (1) the officers are performing their public duties; (2) the officers are in public places; (3) the officers are speaking at a volume audible to the unassisted human ear; and (4) the manner of recording is otherwise lawful ("the ACLU Program"). *Id.* ¶ 1. The ACLU will focus on policing in public forums during expressive activities. D. 1, p. 4. The ACLU alleged a reasonable fear that Alvarez would prosecute the ACLU under the Act, based on the text of the Act, its

legislative history, and recent prosecutions by Alvarez and other Illinois State's Attorneys under the Act of civilians who audio recorded police. *Id.* pp. 2, 6, 9-10. The ACLU sought injunctive and declaratory relief. *Id.* pp. 11-12.

On September 3, 2010, the ACLU moved for a preliminary injunction. D. 17. *See also* D. 18, 23, 26, 27. On September 9, 2010, Alvarez moved to dismiss under Rules 12(b)(1) and 12(6). D. 19. *See also* D. 26, 30.

On October 28, 2010, the District Court dismissed the complaint under Rule 12(b)(1). D. 32; A1, A7. The court held that the ACLU failed to show standing by not sufficiently alleging threatened prosecution. A4-A7. That day, the court denied as moot the ACLU's preliminary injunction motion (D. 32; A1, A7), and entered judgment dismissing the case without prejudice (A8).

On November 18, 2010, the ACLU moved under Rule 59(e) to amend the judgment so that the ACLU could move under Rules 15(a)(2) and 21 to amend its complaint and renew its preliminary injunction motion. D. 36. The ACLU filed a proposed Amended Complaint, which contains additional allegations regarding standing, and adds two putative plaintiffs (Connell and Carter) who are ACLU employees. Compl. ¶¶ 3, 8-9, 22-25, 39-42. *See also* D. 36, 39, 40. This proposed amendment was supported by declarations attesting to the details of the ACLU Program and the ACLU's fear of prosecution. D. 36-2, 36-3.

On January 10, 2011, the District Court denied the ACLU's motion to amend the judgment and file an amended complaint. A17. It held: "The ACLU has cured the limited standing deficiencies addressed in the memorandum opinion dismissing

the original complaint by sufficiently alleging a threat of prosecution." A15. However, the District Court then held that amendment would be futile because the ACLU had not alleged a cognizable right under the First Amendment. A17. The court effectively denied the ACLU's renewed motion for preliminary injunction by expressly declining to reach it. *Id.*

STATEMENT OF FACTS

A. The Illinois Eavesdropping Act.

1. The Act and its history.

The Act provides: "A person commits eavesdropping when he ... [k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation ... unless he does so ... with the consent of all of the parties to such conversation ...." 720 ILCS 5/14-2(a)(1)(A).

In 1986, the Illinois Supreme Court in *People v. Beardsley* held that under the then-existing version of this law, eavesdropping occurred only under "circumstances which entitle [the parties] to believe that the conversation is *private* and cannot be heard by others ...." 115 Ill. 2d 47, 53 (1986) (emphasis added). The court reasoned that the statute's Committee Comments stated that the Act's purpose was "to protect the privacy of the individual"; that "the generally accepted definition" of eavesdropping is "to listen secretly to what is said in private"; and that "the common law definition" of eavesdropping is "to stand under the eaves of another home to enable one to hear what was said within the privacy of the home." *Id.* at 52-53 (internal citation omitted). The *Beardsley* case involved a motorist who,

while detained in a police car, audio recorded two officers conversing in the car. *Id.* at 49. The court concluded that the motorist did not violate the Act because the officers' conversation was not private. *Id.* at 59. The court explained that the officers "plainly revealed" their words to the motorist; that the motorist was not "listening secretly"; and that the motorist "could have made notes or transcribed" the conversations and then "testified concerning it." *Id.* at 58-59.

In 1994, the Illinois General Assembly responded to *Beardsley* by extending the Act to conversations where there is no reasonable expectation of privacy. Specifically, Public Act 88-677 created the current definition of "conversation": "any oral communication between 2 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." 720 ILCS 5/14-1(d). The bill's sponsor stated that its purpose was "to reverse the Beardsley eavesdropping case." D. 18, Exh. A (leg. trans.), p. 42.

2. The Act's heightened penalty for civilian-on-police recording.

Recording police (or prosecutors or judges) is a class 1 felony, 720 ILCS 5/14-4(b), with a sentence of four to fifteen years, 730 ILCS 5/5-4.5-30. Recording others is a class 4 felony, 720 ILCS 5/14-4(a), with a sentence of one to three years, 730 ILCS 5/5-4.5-45.

3. The Act's exemptions for police-on-civilian recording.

The Act generally requires police to obtain a judicial warrant to record any oral conversation or electronic communication absent all-party consent. 720 ILCS

5/14-2(a)(1)(B). *See also id.* at 1(b). The Act, however, has a broad exception allowing uniformed police at their discretion and without a warrant to record their conversations with civilians during any "enforcement stop," an expansive statutory term that includes but is not limited to "traffic stops," "pedestrian stops," "motorist assists," "roadside safety checks," "emergency assistance," and "requests for identification." 720 ILCS 5/14-3(h). *See also id.* at 3(h-5), 3(h-10), 3(k), 3(l). Thus, uniformed police may record practically all of their conversations with civilians, while civilians are precluded from recording those same conversations.

The legislative sponsor of the 2009 expansions of these exemptions (Public Act 96-670) stated that they were sought "by local law enforcement." D. 18, Exh. B (leg. trans.), p. 83. Also, she explained that the audio recording of police-civilian encounters serves the public interest:

> When there's audio, then there is no question as to what was said or what wasn't said and if someone is accused of doing something or saying something, this is the proof that they would have as a citizen also, not only for protection of law enforcement, but for the citizens to have the proof in hand as to what actually happened ....

Id. pp. 83-84. *See also id.* p. 85 (endorsing "protection for both" police and civilians).

4. The Act is a national outlier.

The federal government, 39 states, and the District of Columbia each have a statute criminalizing the audio recording of certain in-person conversations – unlike Illinois – only if there is a reasonable expectation of privacy.[2] Two states other than

[2] 18 U.S.C. § 2510(2); Ala. Code § 13A-11-30(1); Ariz. Stats. § 13-3001(8); Cal. Pen. Code § 632(a) & (c); Colo. Stats. § 18-9-301(8); 11 Del. Code § 2401(13); D.C. Code § 23-541(2); Fla. Stats. § 934.02(2); Ga. Code § 16-11-62(1); Ha. Stats. § 803-41; Idaho

Illinois extend their prohibitions on audio recording to conversations whether or not there is a reasonable expectation of privacy, but they do so in a manner substantially narrower than in Illinois. In Massachusetts, the ban extends only to "secret[] record[ing]," Mass. Laws Ch. 272 § 99(B)(4), and does not include those who "inform[]" the speakers or just "h[o]ld the tape recorder in plain sight." *Commonwealth v. Hyde*, 750 N.E.2d 963, 971 (Mass. 2001). In Oregon, the ban does not apply if the speakers are "specifically informed" of the recording. Or. Stats. § 165.540(1)(c).

5. Prosecutions under the Act.

Alvarez is prosecuting two different incidents of civilian audio recording of on-duty police under the Act. *People v. Drew*, No. 10-cr-4601 (Cook County Cir.); *People v. Moore*, No. 10-cr-15709 (Cook County Cir.). *See also* Compl. ¶ 39; Connell Decl. ¶ 18(c); *id.*, Exhs. A & B.

The proposed Amended Complaint identifies seven more Illinois State's Attorneys who prosecuted nine other civilians under the Act for audio recording on-duty police in the recent past. *People v. Thompson*, No. 04-cf-1609 (6th Cir.,

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Code § 18-6701(2); Iowa Code § 808B.1(8); Ky. Stats. § 526.010, Commentary by Ky. Crime Comm'n; La. Stats. § 15:1302(14); 15 Maine Stats. §§ 709(4)(B) & 709(5); Md. Code, Cts. & Jud. Proc. §10-401(2)(i); Mich. Laws § 750.539a; Minn. Stats. § 626A.01(4); Mississippi Code § 41-29-501(j); Missouri Stats. § 542.400(8); Nebr. Stats. § 86-283; Nev. Stats. § 179.440; N.H. Stats. 570-A:1; N.J. Stats. § 2A:156A-2(b); N.Y. Penal Law § 250.05, Commentary by Donnino; N.C. Stats. § 15A-286(17); N.D. Code § 12.1-15-04(5); Ohio Code § 2933.51(B); 13 Okl. Stats. § 176.2(12); 18 Pa. Stats. § 5702; R.I. Laws § 12-5.1-1(10); S.C. Code § 17-30-15(2); S.D. Laws § 23A-35A-1(10); Tenn. Code § 40-6-303(14); Tex. Crim. Pro. Code § 18.20(2); Utah Code 77-23a-3(13); Va. Code § 19.2-61; Wash. Code § 9.73.030(1)(b); W.V. Code § 62-1D-2(h); Wisc. Stats. 968.27(12); Wy. Stats. 7-3-701(a)(xi).

Champaign Co.); *People v. Wight*, No. 05-cf-2454 (17th Cir., Winnebago Co.); *People v. Babarskas*, No. 06-cf-537 (12th Cir., Will Co.); *People v. Allison*, No. 09-cf-50 (2nd Cir., Crawford Co.); *People v. Parteet*, No. 10-cf-49 (16th Cir., DeKalb Co.); *People v. Biddle*, No. 10-cf-421 (16th Cir., Kane Co.); *People v. Fitzpatrick*, No. 10-cf-397 (5th Cir., Vermillion Co.). *See also* Compl. ¶ 40; Connell Decl. ¶ 18(e); *id.*, Exhs. C - I. After moving to amend, the ACLU learned of two more of these prosecutions. *People v. Lee*, No. 08-cf-1791 (12th Cir., Will Co.); *People v. Gordon*, No. 10-cf-341 (11th Cir., Livingston Co.).

Thus, in recent years, at least nine prosecutors have charged as least thirteen civilians with violating the Act by audio recording on-duty police. Five prosecutions were initiated in 2010 alone. The increasing frequency of prosecutions parallels the increasingly common ownership of mobile phones that record sound.

B. The ACLU Program.

The ACLU is a non-profit, non-partisan, statewide organization with more than 20,000 members and supporters dedicated to protecting the civil rights and liberties guaranteed by the U.S. and Illinois Constitutions and civil rights laws. Compl. ¶ 7; Connell Decl. ¶ 2. In advancing its associational goals, the ACLU regularly monitors police in public places. It does so at planned and spontaneous expressive events (such as parades, demonstrations, pickets, and leafleting) in public forums (such as streets, sidewalks, plazas, and parks), including when the ACLU engages in its own expressive activity. Compl. ¶¶ 2, 13-18; Connell Decl. ¶¶ 7-12. The ACLU now seeks to enhance its monitoring in light of technological

innovations. In addition to its current methods of documentation (principally note-taking and photography), the ACLU intends to make audiovisual recordings.

Specifically, the ACLU – along with putative plaintiffs Connell, the ACLU's Executive Director, and Carter, the ACLU's Senior Field Manager – would immediately begin the ACLU Program of openly audio recording police officers without their consent when (1) the officers are performing their public duties; (2) the officers are in public places; (3) the officers are speaking at a volume audible to the unassisted human ear; and (4) the manner of recording is otherwise lawful. Compl. ¶¶ 1, 3, 8, 19, 43; Connell Decl. ¶¶ 3, 9, 13-14; D. 36-3 (Carter Decl.), ¶ 5. The ACLU Program would focus on public forums during expressive activities. Compl. ¶¶ 19, 22-23; Connell Decl. ¶¶ 11, 15-16; D. 36-3, ¶¶ 6-8. Audio recording would be open and not secret (D. 40, p. 9 n.5), would not occur when officers are off-duty or in private places, and would not interfere with or endanger police or involve trespass.

Where appropriate, the ACLU would publish the information in such recordings to the general public, including through traditional print, broadcast, and cable media, and evolving internet and electronic media. Compl. ¶¶ 2, 3, 14, 18; Connell Decl. ¶¶ 5-6, 12-13. Moreover, the ACLU would use that information to petition government for redress of grievances, including before courts, legislatures, and administrative agencies. Compl. ¶¶ 2, 3, 14, 18; Connell Decl. ¶¶ 5-6, 12-13. Among the ACLU's goals are improving police practices, and detecting and deterring any police misconduct. Compl. ¶ 16; Connell Decl. ¶¶ 7, 10.

Only one thing is stopping the ACLU Program: the reasonable fear of prosecution by Alvarez under the Act. This reasonable fear rests on the Act's language and purpose; the prosecutions by Alvarez and numerous other Illinois State's Attorneys under the Act of civilians who audio record on-duty police; Alvarez's deliberate refusal to state that she would not prosecute the ACLU or its employees for carrying out the ACLU Program; and the legal discretion of Alvarez to charge the ACLU, Connell, and Carter under the Act, if Connell instructs Carter to record police and Carter does so. Compl. ¶¶ 8, 19-23, 25, 32-41, 45; Connell Decl. ¶¶ 9, 13-18; D. 36-3, ¶¶ 6-8, 8. For example, the ACLU on November 8, 2010, monitored police at a protest in downtown Chicago's Thompson Center plaza, and would have recorded police but for this threat. Compl. ¶ 22; Connell Decl. ¶ 15; D. 36-3, ¶7. Likewise, the ACLU will monitor police activity at various planned and spontaneous expressive events in various public forums in Cook County in the future, and would record police but for this threat. Compl. ¶ 23; Connell Decl. ¶ 16; D. 36-3, ¶ 8.[3]

SUMMARY OF ARGUMENT

This case presents a question of substantial importance: Whether the First Amendment protects people from criminal penalty for openly audio recording the conversations of police officers in the performance of their official duties in public places and forums, while speaking at an ordinary volume – that is, conversations

[3] After moving to amend, the ACLU monitored policing at demonstrations in Chicago on January 21, 2011, and February 13, 2011, and would have recorded police but for this threat.

where there is no reasonable expectation of privacy. This question is posed in the context of ACLU's Program of openly recording for the purposes of gathering accurate information on matters of public concern to disseminate to the general public and to petition government. In light of settled jurisprudence regarding the First Amendment right to gather and record information on matters of public concern, the right to petition government, and limits on the right to privacy, such recording enjoys First Amendment protection.

The basic tools used for gathering, recording, and disseminating expression are changing dramatically in free societies around the world. Citizens no longer are dependent upon government and private media organizations to obtain information necessary for effective participation in the processes of governance. Individuals and the organizations with which they choose to associate are empowered with new technologies to seek out information on their own, to incorporate that information into their own communications, and to quickly and economically disseminate that information to millions of their fellow citizens. Through low-cost audio-video digital technology and the internet, individuals can communicate the sights and sounds of their world on matters of public importance. The power of citizen groups to influence public policy has grown exponentially through the use of these modern technologies.

Nowhere is this citizen participation more important than in affecting the policies of domestic law enforcement. The authority we grant to the police in the interest of ensuring public safety is vast – from depriving us of our physical liberty to entering our homes, from listening to our private conversations to investigating

every aspect of our personal lives. For citizens to have a meaningful voice in helping to shape the policies of their law enforcement agencies, they must have the right to communicate and discuss publicly available information about the performance of law enforcement officials. And they must be allowed to do so in the most effective manner possible. If a picture is worth a thousand words, a picture with sound is worth a million. This case seeks nothing more than a determination that the First Amendment protects this important expressive activity as a means of securing transparency and accountability in the operation of government.

As we demonstrate below, speech about how government officials perform their duties lies at the core of the First Amendment. Such speech is particularly critical regarding the manner in which police perform their duty to protect expressive activity in public forums. *See infra* Part I(A). The First Amendment also protects the right to gather and record information, as a necessary part of creating and disseminating one's own speech, and petitioning and participating in government. *See infra* Parts I(B) & I(C). This First Amendment right must keep pace with the rapidly changing landscape of modern communication. These technologies are inescapably intertwined with subsequent communication with others and efforts to influence and change government and society. *See infra* Part I(D).

The challenged application of the Act comprises speaker-based and content-based discrimination, and thus is subject to strict scrutiny. *See infra* Part II. But even if the application of the Act to the ACLU Program was neutral and received

mid-level scrutiny, it would still violate the First Amendment, because it is not narrowly tailored to Alvarez's asserted interests. First, the ACLU Program does not implicate any government interest in conversational privacy. Police performing their official duties in public places and forums have no reasonable expectation of privacy regarding their conversations that can be heard by passersby. Nor do civilians who speak to police in these circumstances. Second, the application of the Act to the ACLU Program does not advance any government asserted interest in effective law enforcement. Rather, it is the ACLU Program that will advance effective law enforcement by promoting transparency, accountability, and public trust of police. *See infra* Parts III and IV.

STANDARD OF REVIEW

De novo review applies to Rule 12(b)(6) dismissal, *Johnson v. Rivera*, 272 F.3d 519, 520-21 (7th Cir. 2001), and legal conclusions underlying denial of a preliminary injunction. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). The abuse of discretion standard applies to denial of Rule 15(a) amendment of a complaint, *Bisciglia v. Kenosha Sch. Dist.*, 45 F.3d 223, 226 (7th Cir. 1995), and denial of Rule 59(e) amendment of a judgment. *Britton v. Swift Transp. Co.*, 127 F.3d 616, 618 (7th Cir. 1997). An error of law is an abuse of discretion. *FTC v. Trudeau*, 579 F.3d 754, 763 (7th Cir. 2009).

ARGUMENT

I. The First Amendment protects open audio recording of on-duty police in public places and forums.

A. The First Amendment provides special protection to speech about government officials, and speech in public forums.

1. Speech about government officials.

The First Amendment provides special protection for speech concerning the performance of government officials. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (limiting defamation actions brought by government officials, because of "the paramount public interest in a free flow of information to the people concerning public officials, their servants"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (same, to promote the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people"). *See also Bartnicki v. Vopper*, 532 U.S. 514, 539 (2001) (Breyer, J., with O'Connor, J., concurring) (protecting the publication of an unlawfully intercepted phone call, in part because the subjects were public figures with "a lesser interest in privacy than an individual engaged in purely private affairs"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (limiting intentional infliction of emotional distress ("IIED") claims brought by public figures, to promote "the free flow of ideas and opinions on matters of public interest").

Police officers are government officials who trigger these special First Amendment protections. *See, e.g., Coursey v. Greater Niles Twp.*, 40 Ill. 2d 257, 265 (Ill. 1968) (holding that a "patrolman" is a "public official" for defamation purposes, because "[t]he abuse of a patrolman's office can have great potentiality for social

harm"); *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 288-89 & n.5 (Mass. 2000) (same, and collecting cases).

Similarly, the First Amendment specially protects speech on matters of public concern. *See, e.g., Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (limiting IIED claims against speech on matters of public concern, because "speech on public issues occupies the highest rung of the hierarchy of First Amendment values" (internal citation omitted)); *Bartnicki*, 532 U.S. at 535 (protecting the publication of an unlawfully intercepted phone call, in part because it concerned "a matter of public concern"); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (striking down a ban on grand jury witnesses ever publicly disclosing their testimony, because "information relating to alleged governmental misconduct ... has traditionally been recognized as lying at the core of the First Amendment"); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (limiting defamation claims against speech on matters of public concern, because "speech concerning public affairs ... is the essence of self-government" (internal citation omitted); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978) (limiting restraints on election spending, because "matters of public concern" are "at the heart of the First Amendment's protection"); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968) (protecting speech by public employees on matters of public concern, because "free and unhindered debate on matters of public importance" is "the core value" of the First Amendment).

The subject of the ACLU Program is the manner in which on-duty police discharge their duties in public places and forums that are the site of expressive

activity, where police have a duty to protect speech. This is a core matter of public concern, both as to the ways that police officers implement department policies, and the ways that police may sometimes violate those policies and the law.

2. Speech in public forums.

The First Amendment provides special protection for expressive activities in public forums. *See, e.g., Boos v. Barry*, 485 U.S. 312, 318 (1988) (protecting speech on sidewalks abutting foreign embassies, because public forums, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"), quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939); *United States v. Grace*, 461 U.S. 171, 180 (1983) (protecting speech on sidewalks abutting the U.S. Supreme Court, because "[t]raditional public forum property occupies a special position in terms of First Amendment protection").

The public square is the stage of the proverbial "marketplace of ideas." Speakers come to express their ideas, and police are present to maintain order and to facilitate that expression. This is the most visible assignment carried out by police in protecting free speech. Unfortunately, public forums in Chicago have often been the sites of conflict between civilian speakers and police, both when police implement laws and department policies, and when police break them. *See, e.g., Vodak v. City of Chicago*, 2011 WL 905727 (7th Cir. March 17, 2011) (mass arrests at anti-war march); *Schirmer v. Nagode*, 621 F.3d 581 (7th Cir. 2010) (arrest of anti-war demonstrators under disorderly conduct ordinance); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (arrests at anti-segregation picket); *Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1969) (police-civilian discord at 1968 Democratic

National Convention), *overruled on other grounds by City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (arrests at rally). *See also, e.g., Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir. 2002) (ordinance banning certain expressive peddling in public ways); *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000) (security perimeter at 1996 Democratic National Convention); *Carey v. Brown*, 447 U.S. 455 (1980) (speaker-based ordinance banning residential pickets); *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (speaker-based ordinance banning school pickets).[4]

The ACLU has monitored, and seeks to audio record, police-civilian interactions during expressive activity in public forums. For more than half a century – from *Terminiello* through *Schnell* through *Vodak* – this Court has resolved disputes arising from these interactions. In many cases, such resolution is complicated by contested facts. *See, e.g., Vodak*, 2011 WL 905727 (remanding to determine whether police commanded dispersal before arresting marchers). Audio recordings would provide accurate documentation and help resolve these factual disputes.

B. The First Amendment right to gather information.

The First Amendment protects the right of a person to gather information on matters of public concern, as a necessary predicate to that person's own subsequent

[4] Public forums in other cities have also been the sites of conflict between civilian speakers and police. *See, e.g., Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) (mass arrests at demonstration at the U.S. Capitol); *Schiller v. City of New York*, 2009 WL 497580 (S.D.N.Y. Feb. 27, 2009) (mass arrests at the 2004 Republican National Convention).

protected exercise of speech, petitioning government, and participating as a citizen in democratic self-government. In the words of James Madison:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

9 Writings of James Madison 103 (Hunt ed. 1910), quoted in *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality).

Courts in myriad contexts protect the right to gather information for subsequent public dissemination. *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) (plurality) (in courtrooms, because "[f]ree speech carries with it some freedom to listen .... '[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated'" (internal citation omitted)); *Pico*, 457 U.S. at 867 (plurality) (in libraries, because "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.") (emphasis in original); *Pochoda v. Arpaio*, 2009 WL 1407543, at *4 (D. Ariz. 2009) (protecting "observation of [a] demonstration" in a public forum, because the "the right to hear" is "no less protected" than "the right to speak," especially where the observer "was there to safeguard or support the civil rights of the demonstrators" (internal citation omitted)); *Goldschmidt v. Coco*, 413 F. Supp. 2d 949, 952-3 (N.D. Ill. 2006) (note-taking in courtrooms, because it allows "courtroom monitors and evaluators of judicial performance representing public

interest groups," among others, to "revisit what they have heard or read," and thus to "more fully and accurately evaluate and communicate the subject matter").[5]

C. The First Amendment right to record information.

The general First Amendment right to *gather* information includes the more specific right to *record* information about the public activities of others, and to use that recorded information for purposes of expression, petitioning, and self-governance. The protected recording technologies include photography,[6] audio,[7] and video (often with audio).[8] The protected documentarians include traditional media,[9]

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[5] Moreover, the First Amendment protects the right to receive information, even if (unlike here) the recipient plans only private use. *See, e.g., Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (the "right to receive the advertising" to inform consumer choice); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (the "paramount" right of broadcast viewers "to receive" information); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (the "right to receive" obscenity at home); *Lamont v. Postmaster Gen'l*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (the "right to receive" foreign publications, because "[i]t would be a barren marketplace of ideas that had only sellers and no buyers"); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (the "right to receive" information from door-to-door leafleters); *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) at (the "right to receive" information about medical marijuana from a physician, because "the right to hear and the right to speak are flip sides of the same coin").

[6] *Dorfman v. Meiszner*, 430 F.2d 558, 561-62 (7th Cir. 1970); *Schnell*, 407 F.2d at 1086; *Connell v. Town of Hudson*, 733 F. Supp. 465 (D.N.H. 1990).

[7] *Dorfman*, 430 F.2d at 561-62; *Blackston v. State of Alabama*, 30 F.3d 117, 119-20 (11th Cir. 1994); *Thompson v. City of Clio*, 765 F. Supp. 1066 (M.D. Ala. 1991).

[8] *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Cuviello v. City of Oakland*, 2007 WL 2349325, at *3 (N.D. Cal. Aug. 15, 2007); *Davis v. Stratton*, 575 F. Supp. 2d 410, 421 (N.D.N.Y. 2008), *rev'd on other grounds,* 360 Fed. Appx. 182 (2d Cir. 2010); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005); *Lambert v. Polk County*, 723 F.Supp. 128 (S.D. Iowa 1989); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972).

private public interest groups,[10] and individual citizens.[11] The subjects of the protected recordings include on-duty police[12] and civilians[13] in public places and forums, and government officials at open government meetings.[14]

These right-to-record cases rest on the principles above; namely, the First Amendment's strong protection of speech about government officials and matters of public concern, speech in public forums, and gathering information necessary for one's own effective expression. These factors are all present here.

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[9] *Dorfman*, 430 F.2d at 560; *Schnell*, 407 F.2d at 1085; *Connell*, 733 F. Supp. at 466; *Channel 10, Inc.*, 337 F. Supp. at 635.

[10] *Cuviello*, 2007 WL 2349325, at *3.

[11] *Fordyce*, 55 F.3d at 438-39; *Blackston*, 30 F.3d at 119; *Davis*, 575 F. Supp. 2d at 421; *Robinson*, 378 F. Supp. 2d at 538-40; *Lambert*, 723 F. Supp. at 130.

[12] *Fordyce*, 55 F.3d at 438-39 (video of police); *Schnell*, 407 F.2d at 1086 (photos of police); *Smith*, 212 F.3d at 1333 (photos and video of police); *Robinson*, 378 F. Supp. 2d 534 (video of police); *Channel 10, Inc.*, 337 F. Supp. at 638 (video of an arrest). *See also Williamson v. Mills*, 65 F.3d 155 (11th Cir. 1995) (police violated the Fourth Amendment by arresting a person for photographing police).

[13] *Dorfman*, 430 F.2d at 561-62 (photo, audio, and video of persons in courthouse lobby and plaza); *Davis*, 575 F. Supp. 2d at 421 (video of students interacting with videographer); *Cuviello*, 2007 WL 2349325, at *3 (video of circus animal abuse); *Connell*, 733 F. Supp. 465 (photo of car crash); *Lambert*, 723 F. Supp. 128 (video of fight); *Channel 10, Inc.*, 337 F. Supp. at 638 (video of arrest). *See also Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82 (D. Mass. 2002) (public cable station violated the First Amendment by requiring waiver to broadcast a person's voice).

[14] *Blackston*, 30 F.3d at 119-20; *Thompson*, 765 F. Supp. 1066. *See also Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999) (police violated the Fourth Amendment by arresting person for audio recording government meeting); *Tarus v. Borough of Pine Hill*, 916 A.2d 1036, 1039 (N.J. 2007) (common law protects audio recording of government meeting).

First, the ACLU Program concerns both government officials and matters of public concern. *See, e.g., Smith*, 212 F.3d at 1333 (finding a right to "photograph or videotape police conduct" 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"); *Fordyce*, 55 F.3d at 439 (finding a right "to film matters of public interest," including police activity at a political rally); *Dorfman*, 430 F.2d at 562 (finding a right to take audio, video, and photos of demonstrations outside the Dirksen Courthouse); *Schnell*, 407 F.2d at 1085 (finding a right to photograph police at the 1968 Democratic National Convention); *Robinson*, 378 F. Supp. 2d at 541 (finding a right to film police, because "[t]he activities of the police, like those of other public officials, are subject to public scrutiny," including "the unsafe manner in which they were performing their duties"); *Demarest*, 188 F. Supp. 2d at 94 (finding a right to make audio and video recordings of "matters of public interest"). *See also Jean v. Massachusetts State Police*, 492 F.3d 24, 30 (1st Cir. 2007) (protecting activist's broadcast of homeowner's unlawful audio recording of police search, because "the event depicted on the recording – a warrantless and potentially unlawful search of a private residence – is a matter of public concern").

Second, the ACLU Program concerns policing in public forums and places. *See, e.g., Smith*, 212 F.3d at 1333 (recording police "on public property"); *Fordyce*, 55 F.3d at 438 (recording police in public forums); *Dorfman*, 430 F.2d at 562 (recording protests at federal plaza); *Schnell*, 407 F.2d at 1085-86 (recording "street activities"

of police, citing *Hague*); *Channel 10, Inc.*, 337 F. Supp. at 638 (recording police "in public places").

Third, the ACLU Program advances the ACLU's own effective expression and petitioning regarding police policies and practices. *See, e.g., Blackston*, 30 F.3d at 120 (ban on audio recording government meeting undermined "how they were able to obtain access to and present information about the Committee and its proceedings"); *Robinson*, 378 F. Supp. 2d at 541 ("Videotaping [on-duty police] is a legitimate means of gathering information for public dissemination and can often provide cogent evidence, as it did in this case."); *Thompson*, 765 F. Supp. at 1070 (ban on audio recording government meeting undermined "how he is able to obtain access to and present such information").[15]

D. The Act as applied must be assessed in light of evolving communication technologies.

Today, freedom of speech and petition are strongly linked with new, evolving, and commonly used communications technologies that gather and record both the sights and the sounds of our world. This is exemplified by the audio and video recording capabilities of smart phones and similar hand-held devices, by the uploading of information to YouTube and social networking sites, and even by the six o'clock news. People use ubiquitous technology – rapidly, cheaply, and easily –

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[15] Despite these many cases, two courts held, regarding qualified immunity from damages, that the right to record police is not clearly established. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3rd Cir. 2010); *Matheny v. County of Allegheny*, 2010 WL 1007859, at **4-6 (W.D. Pa. Mar. 16, 2010). These courts did not address the separate question here, to wit, whether such a right exists. *See Pearson v. Callahan*, 129 S. Ct. 808, 815-16 (2009). The ACLU submits that both cases are wrongly decided, for the reasons above.

to gather and record information occurring in public places and forums, including spoken words. People then share their recordings with others, often instantaneously. These recordings are more accurate and credible than memory or note taking. *See, e.g.,* David Bauder, *Cell-phone videos transforming TV news*, Wash. Post (Jan. 7, 2007) (discussing the impact on traditional news media of tens of millions of people using their phones to gather news).

Around the world, effective freedom of expression and petition increasingly depend upon these emergent technologies. For example:

> For some of the protesters facing Bahrain's heavily armed security forces in and around Pearl Square in Manama, the most powerful weapon against shotguns and tear gas has been the tiny camera inside their cellphones. By uploading images of this week's violence in Manama, the capital, to Web sites like YouTube and yFrog, and then sharing them on Facebook and Twitter, the protesters upstaged government accounts and drew worldwide attention to their demands. A novelty less than a decade ago, the cellphone camera has become a vital tool to document the government response to the unrest that has spread through the Middle East and North Africa.

Jennifer Preston, *Cellphones become the world's eyes and ears on protests*, N.Y. Times (Feb. 18, 2011). Many of the accounts coming from the Middle East in recent months include audio as well as video depictions of police activity.

Recording public events has long facilitated speech and petition on matters of public concern. *See, e.g,* John Lewis, *Walking with the wind: A memoir of the movement* 344-45 (1998) (stating that television footage of the "Bloody Sunday" attack in Selma, Alabama, "touched a nerve deeper than anything that had come before"), *cited in Demarest,* 188 F. Supp. at 96-97. But today, the participants in a

social movement can use their own phones to record and disseminate the transformative images and sounds, without relying on the traditional media.

With these evolving communication technologies, the ACLU seeks to enhance its associational goals of protecting and expanding civil liberties. The ACLU routinely makes audio and video recordings, crafts them into advocacy materials, and posts them on its website. The ACLU disseminates these and other materials by such means as Facebook, Twitter, and the ACLU's own "action alert" email network. In a suit challenging speech restraints in Chicago public forums during the 1996 Democratic National Convention, *Young*, 202 F.3d 1000, the ACLU recorded a silent video of those restraints and submitted it at trial. In sum, audio recording on-duty police in public places and forums would be a critical part of the ACLU's evolving methods to advance police accountability and free speech.

II. The Act as applied is subject to strict scrutiny.

The Act as applied to the ACLU Program comprises speaker-based and content-based discrimination. Each triggers judicial strict scrutiny.

A. Speaker-based discrimination.

The Act discriminates among speakers. It allows uniformed on-duty police at their discretion and without court approval to make virtually any audio recording of their conversations with civilians, while forbidding civilians from making virtually any audio recording of those same conversations. *See supra* pp. 5-6.

This violates both the Free Speech Clause and the Equal Protection Clause. *Mosley*, 408 U.S. at 95 ("the equal protection claim in this case is closely intertwined with First Amendment interests"). "Speech restrictions based on the

identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010). *See also Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another."); *Bellotti*, 435 U.S. at 784-85 ("the legislature is constitutionally disqualified from dictating ... the speakers who may address a public issue"). "[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner Broad., Inc. v. FCC*, 512 U.S. 622, 658 (1994).

Moreover, the Act on its face does not limit the discretion of officers to decide which conversations to record, at what point to start and stop recording, and which recordings of conversations to save or destroy, or to withhold or disclose. If a conversation casts an officer in a positive light, the officer may record it, and save and disclose the recording. But if a conversation casts an officer in a negative light, the officer may choose not to record it, or to destroy or withhold the recording. Thus, police exclusively control whether such recordings are heard by the public. The speaker-based discrimination patent in the Act thereby creates a danger of viewpoint discrimination: police but not civilians may make, save, and use audio recordings to advance their views of what occurred during contested incidents.

B. Content-based discrimination.

The Act discriminates based on content. It punishes civilian-on-police recording four to five times more severely than civilian-on-civilian recording (four to fifteen years in prison versus one to three years). *See supra* p. 5. Thus, prosecutors

making charging decisions under the Act must consider the content of the recording, *i.e.*, whether the recording includes the voices of police. Content discrimination triggers strict scrutiny. *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006); *Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005); Rodney Smolla, *Freedom of Speech* (2010) §§ 11:7, 11:8, 11:18.

Content discrimination exists when (as here) government officials must examine the content of a message to determine the applicability of a law. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (striking down as content discriminatory an ordinance allowing forum fees to vary depending upon the cost of keeping public order, because "the administrator must necessarily examine the content of the message that is conveyed, estimate the response of others to that content, and judge the number of police necessary to meet that response" (quotation omitted)); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987) (striking down as content-discriminatory a sales tax exemption for single-subject but not multi-subject magazines, because "enforcement authorities must necessarily examine the content of the message" to determine whether the tax applies), quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (striking down as content-discriminatory a ban on noncommercial broadcasters engaging in editorializing but not other messages). *See also Schultz v. City of Cumberland*, 228 F.3d 831, 840-41 (7th Cir. 2000) (explaining that a speech regulation is content-based if it "requires consideration whether the speech in

question refers to [a particular content] before it is possible to determine if the regulation applies").

C. Mid-level scrutiny is not proper under Ward or O'Brien.

First Amendment mid-level scrutiny for "time, place, and manner" regulations of speech in a public forum, or for conduct regulations of general applicability that incidentally burden speech, is not sufficiently protective where (as here) government discriminates based on speaker and content. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (forum regulations must be "justified without reference to the content" of speech); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (conduct regulations must be "unrelated to the suppression of free expression"). *See also Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723-24 (2010) (applying a test stricter than *O'Brien* when government "regulates speech on the basis of its content"); *Texas v. Johnson*, 491 U.S. 397, 403 (1989) ("a more demanding standard" than *O'Brien* applies if "the State's regulation is related to the suppression of free expression").

Moreover, the Act as applied to the ACLU Program is not a conduct regulation that incidentally burdens speech. *Cf. O'Brien*, 391 U.S. 367. Instead, it directly bans an expressive activity: openly recording spoken words in the absence of a reasonable expectation of privacy, and in particular the words of on-duty police in public places and forums. Such recording ordinarily is done (as here) to obtain accurate information to share with others. *See, e.g., BSA v. Dale*, 530 U.S. 640, 659 (2000) (applying a test stricter than *O'Brien* where statute "directly and immediately" burdened association); *Buckley v. Valeo*, 424 U.S. 1, 16 (1976)

(applying a test stricter than *O'Brien* because "[s]ome forms of communication made possible by the giving and spending of money involve speech alone").

Indeed, recording information with modern technologies and publishing that information are both necessary links in a unitary chain of expression. It would be erroneous to break off the first link (recording public officials) and treat it as unprotected conduct, as opposed to fully protected expression. As the Ninth Circuit recently wrote in a decision striking down a municipal ban on the tattoo process:

> [N]either the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded. Although writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation. Thus, we have not drawn a hard line between the essays John Peter Zenger published and the act of setting the type. *Cf. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,* 460 U.S. 575, 582 (1983) (holding that a tax on ink and paper "burdens rights protected by the First Amendment").

Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061-62 (9th Cir. 2010). *See also Citizens United*, 130 S. Ct. at 896-97 ("Laws enacted to control or suppress speech may operate at different points in the speech process."); Seth F. Kreimer, *Pervasive image capture and the First Amendment*, 159 U. Penn. L. Rev. 335, 381 (2011).

III. The Act as applied fails strict scrutiny.

First Amendment strict judicial scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 130 S. Ct. at 898. Under strict scrutiny, a

speech restriction is not narrowly tailored if "a less restrictive alternative would serve the Government's purpose." *Entm't Software Ass'n*, 469 F.3d at 646.

Before the District Court, Alvarez proffered two government interests in support of the Act as applied to the ACLU Program: "[t]o protect the privacy of private conversations"; and effective law enforcement. D. 23, p. 14. *See also id.* pp. 9, 13-15; D. 19, pp. 14-15. Alvarez cannot meet her burden of proving that application of the Act to the ACLU Program is narrowly tailored to either interest. The Act as applied does not advance conversational privacy. When on-duty police in public places and forums speak in a manner that can be heard by passersby, they have no reasonable expectation of privacy. Neither do civilians who speak to police in these circumstances. Moreover, the Act as applied to the ACLU Program does not advance public safety, and in fact diminishes it. Immediately following, the ACLU shows that Alvarez cannot meet her burden of proving narrow tailoring under mid-level scrutiny. *See infra* Part IV. Therefore, Alvarez cannot prove narrow tailoring under strict scrutiny, either.

IV. The Act as applied fails mid-level scrutiny.

Even if mid-level scrutiny were the proper standard,[16] Alvarez cannot satisfy it. Mid-level narrow tailoring is rigorous. *See infra* Part IV(A). The application of the Act to the ACLU Program is not narrowly tailored to either interest. *See infra* Parts IV(B) & (C). Moreover, it fails to leave open ample alternative channels of

[16] Alvarez below took the position that if the application of the Act to the ACLU Program implicates the First Amendment, then mid-level "time, place, or manner" scrutiny applies. D. 19, p. 13; D. 23, p. 8; D. 30, p. 10.

communication. *See infra* Part IV(D). The District Court's contrary decision lacks force. *See infra* Part IV(E).[17]

A. **The narrow tailoring test.**

Under the mid-level test for conduct regulations, a regulation passes muster only if "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of" the government's interest. *O'Brien*, 391 U.S. at 377. Likewise, under the mid-level test for "time, place, and manner" regulations of speech in public forums, a regulation must be "narrowly tailored to serve a significant governmental interest." *Ward*, 491 U.S. at 791. These two mid-level First Amendment tests (*O'Brien* and *Ward*) "embody the same standards." *Hodgkins v. Peterson*, 355 F.3d 1048, 1057 (7th Cir. 2004). *Accord* Ronald D. Rotunda, *Treatise on Constitutional Law* (2008) at § 20.49(a); Smolla at §§ 9:10, 9:13, 9:15 - 9:17. Under either formulation, government bears the burden of proof. *Heffron v. ISKCON*, 452 U.S. 640, 658 (1981); *Chicago Cable Commc'ns v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 (7th Cir 1989).

Mid-level narrow tailoring requires the government to prove that its speech restraint is "not substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 799. Further, government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad.*, 512 U.S. at

[17] The Act criminalizes both "recording" certain conversations, 720 ILCS 5/14-2(a)(1), and "divulg[ing]" those recordings, *id.* at 2(a)(3). Both provisions violate the First Amendment as applied to the ACLU Program, for the same reasons.

664. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (internal citation omitted) (under the mid-level test for commercial speech, holding that government failed to prove its restraint directly advanced its interests).

In free speech cases, courts apply mid-level scrutiny in a demanding manner in assessing the sufficiency of the nexus between the government's means and its ends.[18] Among other contexts, courts do so where (as here) an overly broad rule is challenged as applied. *See, e.g., United States v. Grace*, 461 U.S. 171, 181 (1983) (striking down ban on expression in and around the U.S. Supreme Court, as applied to signs and leaflets on adjoining sidewalks, given the "insufficient nexus" to the government's safety interests); *Vincenty v. Bloomberg*, 476 F.3d 74, 86-87 (2d Cir. 2007) (striking down ban on possessing spray paint by persons under 21, as applied to persons 19 or 20); *Dorfman*, 430 F.2d at 561-62 (striking down ban on photos, audio, and video in an around Dirksen Courthouse, as applied to lobby and plaza).

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[18] *See, e.g., Hodgkins*, 355 F.3d at 1060-62 (insufficient nexus between a juvenile curfew with an inadequate exception for First Amendment activity, and the interest in safety); *Porter v. Bowen*, 496 F.3d 1009, 1021-26 (9th Cir. 2007) (insufficient nexus between a ban on "vote swapping," and the interests in preventing voter fraud and corruption); *Conchatta Inc. v. Miller*, 458 F.3d 258, 267-68 (3d Cir. 2006) (insufficient nexus between a ban on nude performances in all facilities serving alcohol, and the interests in preventing prostitution and diminution in property values); *United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999) (insufficient nexus between a ban on anonymous harassing phone calls, as applied to a critic of government, and the interests in preventing harassment). *See also NAACP v. Alabama*, 357 U.S. 449 (1958) (striking down as applied to the NAACP the Alabama statute requiring out-of-state corporations to disclose member names and addresses, because of the severe burden on expressive association).

Alvarez faces three substantial barriers to carrying her burden of proving that the application of the Act to the ACLU Program is narrowly tailored to either of her asserted interests (privacy and law enforcement). First, "[i]n the context of a First Amendment challenge under the narrowly tailored test, the government has the burden of showing that there is evidence supporting its proffered justification." *Weinberg*, 310 F.3d at 1038. The self-serving and speculative testimony of defendant government officials will not suffice. *Id. See, e.g., Annex Books, Inc. v. City of Indianapolis*, 624 F.3d 368, 369-70 (7th Cir. 2010). Here, Alvarez below offered no evidence as to either interest.

Second, it is difficult for government to prove narrow tailoring when its policy restrains a category of expressive activity, but exempts a subset that is comparable to the covered activity. *Mosley*, 408 U.S. at 99-100 (where an ordinance exempted "peaceful labor picketing" from a ban on picketing at schools, the city "may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive"); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 638 (1980) (while the state asserts an interest in residential privacy, residents are "equally disturbed by solicitation" by the favored and disfavored solicitors). Here, the Act allows recording of virtually all conversations between civilians and uniformed police, so long as police do the recording. *See supra* pp. 5-6. There is no basis in logic or experience to conclude that police-on-civilian audio recording will not undermine privacy, but civilian-on-police audio recording will.

Third, "laws that foreclose an entire medium of expression" raise "particular concern" because they "can suppress too much speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). Thus, flat bans on expressive modes typically are struck down. *Id.* (ban on yard signs); *Martin*, 319 U.S. at 145-49 (ban on leafleting door-to-door); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (ban on leafleting on streets); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (ban on leafleting throughout city); *Loper v. NYPD*, 999 F.2d 699, 705 (2nd Cir. 1993) (ban on begging throughout city). Here, the Act is a total ban on audio recording conversations where there is no reasonable expectation of privacy, including but not limited to the conversations of on-duty police subject to the ACLU Program.

B. The Act as applied is not narrowly tailored to any privacy interest.

Government has an interest in protecting the privacy of some private conversations. *See Bartnicki*, 532 U.S. at 532 (recognizing this interest, and reasoning that privacy "encourag[es] the uninhibited exchange of ideas and information among private parties"). This interest undergirds statutes that regulate the audio recording of conversations where there is a reasonable expectation of privacy. *See, e.g.,* 18 U.S.C. § 2510(2). *See also supra* pp. 6-7 (collecting scores of others statutes).

However, on-duty police in public places and forums who participate in the conversations subject to the ACLU Program have no reasonable expectation of privacy. *See infra* Part IV(B)(1). Neither do the civilians who talk to police in this environment. *See infra* Part IV(B)(2). Thus, the Act as applied to the ACLU

Program does not advance, and thus is not narrowly tailored to, any government interest in protecting privacy. *See infra* Part IV(B)(3).

1. On-duty police have no reasonable expectation of privacy in these circumstances.

The ACLU Program of open audio recording extends only to conversations where: (1) an officer is performing their public duties; (2) the officer is in a public place; (3) the officer is speaking at a volume audible to the unassisted human ear; and (4) the person making the recording is acting in a manner that is otherwise lawful. *See* Compl., ¶ 1. The ACLU Program would be open, as opposed to secret. Monitoring would occur during expressive activity in public forums. It would not occur when officers are off-duty or in private places. It would not capture officers speaking at a volume used for private conversations in public places (such as whispers). It would not interfere with police activity, endanger or harass officers, or involve trespass.

In *Beardsley*, the Illinois Supreme Court held that police who were performing their official duties had no reasonable expectation of privacy as to their conversations in the presence of a civilian. 115 Ill. 2d at 58. The court reasoned that the officers "plainly revealed" their words to the civilian; that the civilian was not "listening secretly"; and that the civilian "could have made notes or transcribed" the conversation and then "testified concerning it." *Id.* at 58-59. These factors are all present here. While the Illinois General Assembly responded by extending the Act to conversations where there is no reasonable expectation of privacy (*see supra* p. 5), it did not diminish the force of the Illinois Supreme Court's well-reasoned

holding that on-duty police lack privacy as to the words they speak in the presence of civilians. Thus, Alvarez is simply wrong to argue that application of the Act to the ACLU Program advances privacy. Moreover, this argument reduces to the unacceptable proposition that in a police-civilian conversation in public, the officer has privacy interests that prohibit the citizen from audio recording the officer, but the citizen has no reciprocal privacy interest that precludes recording by the officer.

Beardsley rested in part on *Cassidy v. ABC, Inc.*, 377 N.E.2d 126 (Ill. App. Ct. 1978), which held that a TV station did not violate the common law tort of invasion of privacy by secretly recording a police officer making an undercover solicitation bust. The court reasoned:

> [The officer] was not a private citizen engaged in conduct which pertained only to himself. He was a public official performing a laudable public service and discharging a public duty. In our opinion, under these circumstances no right of privacy against intrusion can be said to exist with reference to the gathering and dissemination of news concerning discharge of public duties.

Id. at 131-32.

Many other courts have likewise held that statutory bans on audio recording do not apply to civilians who audio record on-duty police because those police have no reasonable expectation of privacy.[19] *See, e.g., Maryland v. Graber*, No. 12-K-10-647 (Cir. Ct. Harford County, Md.), slip op. of Sept. 27, 2010 (civilian recorded

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[19] Many eavesdropping statutes use the term "expectation that such communication is not subject to interception under circumstances justifying such expectation." *See, e.g.,* 18 U.S.C. § 2510(2). Courts interpret this term to mean "reasonable expectation of privacy." *See, e.g., Matter of John Doe Trader Number One*, 894 F.2d 240, 242-43 (7th Cir. 1990).

officer during traffic stop), *located at* D. 26, Exh. G; *Hornberger v. ABC, Inc.*, 799 A.2d 566, 593-594, 623, 625 (N.J. 2002) (TV station recorded officers during traffic stop; reasoning that police by their "status" have "restricted" privacy expectations, and that the location was "on the shoulder of a busy public highway"); *Johnson v. Hawe*, 388 F.3d 676, 683-84 (9th Cir. 2004) (civilian outside squad car recorded officer through window of car talking to another officer by radio); *State v. Flora*, 845 P.2d 1355, 1357-58 (Wash. App. 1992) (civilian recorded officer during traffic stop; reasoning that officer was "performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby"). *See also Bowens v. Ary, Inc.*, 2011 WL 956434 (Mich. 2011) (holding that rapper Dr. Dre's colleagues did not violate eavesdropping statute by audio recording their non-private conversation with police, concerning content of upcoming performance, in backstage room with open doors, people coming in and out, and "at least one cameraman openly and obviously filming"). *See generally* James G. Carr, *The law of electronic surveillance* (2010), § 3.5, p. 3:5 ("Law enforcement officers have no reasonable expectation of privacy concerning their utterances when they question suspects, [or] conduct a traffic stop or arrest ....").[20]

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[20] Likewise, police have no reasonable expectation of privacy, and thus are unprotected by bans on recording private conversations, when (1) they interrogate an officer suspected of misconduct, and they are recorded by that suspect, *Dep't of Agric. v. Edwards*, 654 So.2d 628, 632-33 (Fla. App. 1995); *Commonwealth v. Henlen*, 564 A.2d 905, 906 (Pa. 1989); and (2) they are recorded by their supervisors, *Angel v. Williams*, 12 F.3d 786, 790 (8th Cir. 1993); *F.O.P. v. Leggett*, 2008 WL 5678711 (Md. Cir. Ct. 2008).

While the Fourth Amendment limits only state action – for example, police-on-civilian audio recording – it nonetheless sheds light on whether, for purposes of civilian-on-police audio recording, there is a reasonable expectation of privacy. Under the Fourth Amendment, there is no privacy as to any conversation that "a person knowingly exposes to the public." *Katz v. U.S.*, 389 U.S. 347, 351 (1967). Whether a person has done so depends on such factors as the proximity of other people, whether the location is accessible to other people, and whether the conversation is at a volume that could be heard by the unassisted human ear. *See, e.g., Matter of John Doe Trader Number One*, 894 F.2d 240, 242-43 (7th Cir. 1990); *Kee v. City of Rowlett*, 247 F.3d 206, 213-14 (5th Cir. 2001). These factors show that the police conversations subject to the ACLU Program are not private.

2. Civilians talking to on-duty police have no reasonable expectation of privacy in these circumstances.

Under statutes that ban the audio recording of private conversations, civilians have no reasonable expectation of privacy when (as here) they knowingly converse with uniformed police. *See, e.g., Lewis v. State*, 139 P.3d 1078, 1080 (Wash. 2006); *People v. A.W.*, 982 P.2d 842, 847 (Colo. 1999). Similarly, under both the Fourth Amendment and statutes that ban audio recording of private conversations, civilians have no reasonable expectation of privacy when they knowingly converse in the presence of uniformed police, for example, when they are seated in marked police cars. *See, e.g., United States v. Dunbar*, 553 F.3d 48, 57 (1st Cir. 2009); *United States v. Turner*, 209 F.3d 1198, 1200-01 (10th Cir. 2000);

United States v. Clark, 22 F.3d 799, 801-02 (8th Cir. 1994); *United States v. McKinnon*, 985 F.2d 525, 527-28 (11th Cir. 1993).

Moreover, under the common law tort of invasion of privacy, civilians have no reasonable expectation of privacy as to their interactions with uniformed police in public places. *See, e.g., Haynik v. Zimlich*, 508 N.E.2d 195, 200 (Ohio Ct. C.P. 1986) (media published image of civilian's arrest); *Jackson v. Playboy Inc.*, 574 F. Supp. 10, 11-13 (S.D. Ohio 1983) (Playboy published photo of plaintiff youths talking to officer, next to nude photo of officer); *Harrison v. Washington Post Co.*, 391 A.2d 781 (D.C. Ct. App. 1978) (media published image of civilian's arrest); *Themo v. New England Newspaper Co.*, 27 N.E.2d 753, 755 (Mass. Supr. Jud. Ct. 1940) (media published image of man talking to police). Likewise, this tort is not violated by audio recording conversations in public places. *See, e.g., Stith v. Cosmos Broad., Inc.*, 1996 WL 784513, at *4 (Ky. Cir. Ct. Sept. 3, 1996) (conversation at public racetrack); *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 544 (Cal. Ct. App. 1993) (conversation at public beach). *See generally Munson v. Milwaukee Sch. Bd.*, 969 F.2d 266, 271 (7th Cir. 1992) (holding that this tort does not extend to video recording "from areas designated as public streets or highways").

3. The Act as applied is not narrowly tailored to any privacy interest.

Alvarez has not proven – nor could she – that the application of the Act to the ACLU Program will advance privacy "in a direct and material way," *Turner Broad.*, 512 U.S. at 664, or that the Act is "not substantially broader than necessary," *Ward*, 491 U.S. at 799, to advance privacy. As shown above, there is no reasonable

expectation of privacy when uniformed on-duty police in public places and forums converse with other police or with civilians in a manner audible to passersby.

When government fails on mid-level review to prove that its speech restraint was narrowly tailored to an asserted privacy interest, the restraint is deemed unconstitutional. *See, e.g., Watchtower Bible Soc'y v. Village of Stratton,* 536 U.S. 150, 168-69 (2002) (permit requirement for door-to-door advocacy not narrowly tailored to residential privacy); *Klein v. City of Laguna Beach,* 2010 WL 2232005, at *2 (9th Cir. June 4, 2010) (ban on sound amplification near schools not narrowly tailored to student privacy); *Pruett v. Harris County,* 499 F.3d 403, 414-15 (5th Cir. 2007) (ban on bail bondsmen calling potential customers within 24 hours of arrest not narrowly tailored to residential privacy); *Olmer v. City of Lincoln,* 192 F.3d 1176, 1181-82 (8th Cir. 1999) (ban on church protests not narrowly tailored to privacy at religious services); *U.S. West, Inc. v. FCC,* 182 F.3d 1224 (10th Cir. 1999) (ban on phone company marketing to customers based on current phone service not narrowly tailored to phone customer privacy); *Revo v. Disciplinary Bd.,* 106 F.3d 929, 934-35 (10th Cir. 1997)(ban on direct mail from lawyers to wrongful death victims not narrowly tailored to residential privacy); *Project 80's, Inc. v. City of Pocatello,* 942 F.2d 635, 638 (9th Cir. 1991) (ban on door-to-door solicitation not narrowly tailored to residential privacy).[21]

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[21] Similarly, in holding that the First Amendment protects the right to record people in public, courts rejected the argument that such recording harms these people. *Connell,* 733 F. Supp. at 471 (rejecting as "paternalistic" the argument that photography of car crash victims invaded their "privacy"); *Dorfman,* 430 F.2d at 562

C. **The Act as applied is not narrowly tailored to any law enforcement interest.**

Government has an important interest in effective law enforcement. However, there is no merit in Alvarez's arguments that the ACLU Program would diminish effective law enforcement. *See infra* Part IV(C)(1). In fact, the ACLU Program would advance this interest. *See infra* Part IV(C)(2).

1. **Alvarez's arguments lack merit.**

First, Alvarez asserted that the ACLU "[i]mplicitly ... intends ... actions which will provoke a police officer's response," *i.e.*, "lawless[]" ACLU actions such as "harassment" of police and "breach of the peace." D. 19, pp. 14-15. Similarly, Alvarez asserted that the ACLU Program would "interfere[]" with and "interrupt[]" police work. D. 30, p. 12. In fact, under the ACLU Program, "the manner of recording is otherwise lawful." Compl., ¶ 1; Connell Decl., ¶ 8. For example, the ACLU will not "obstruct[] the performance" of police, which is a crime in Illinois. 720 ILCS 5/31-1(a). In any event, mid-level narrow tailoring requires that a government ban on unlawful conduct not also ban lawful expressive activity. *See, e.g., City of Houston v. Hill*, 482 U.S. 451, 462-63, 465 (1987) (striking down as overbroad an ordinance criminalizing the "interruption" of police, because it was "not narrowly tailored to prohibit only disorderly conduct or fighting words," and "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state").

(rejecting the argument that audio, video, and photos of people at a courthouse plaza would have an "unstabling effect on witnesses, jurors, and parties").

Second, Alvarez asserted that under the ACLU Program, police will be "constantly recorded at any time" and at "every moment they are at work," which would "chill the efforts of police officers" and "discourage police from engaging in community service." D. 23, p. 14. *See also* D. 30, p. 12 (asserting that the ACLU Program would diminish an officer's "concentrat[ion]"). In fact, the ACLU Program is far narrower than Alvarez alleges. It does not apply, for example, when police are off-duty (*e.g.,* on lunch break), or when police are not in public places (*e.g.*, inside a stationhouse), or when police speak in a manner that cannot be heard by passersby (*e.g.*, when police whisper to each other at a modest distance from civilians). But as stated, government on mid-level review "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad.*, 512 U.S. at 664.

There is no basis in logic or experience to conclude that the actual ACLU Program would chill, discourage, or distract police officers from lawfully performing their duties. Civilians already have the right to listen to and take notes regarding the words of on-duty police in public places and forums, as Alvarez acknowledged below. D. 23, p. 8 (the ACLU "may watch and listen to encounters between citizens and police officers, as well as take notes recording such encounters"); D. 19, p. 14 (same). The addition of audio recording would simply improve the accuracy and reliability of existing civilian witnesses.

2. The ACLU Program would advance public safety.

The ACLU Program would contribute to accountability and transparency, which in turn would increase public trust in law enforcement—a *sine qua non* of

effective law enforcement. First, the ACLU Program would advance public understanding of controversial police department policies, and provide accurate information regarding how officers implement those policies. This is especially true as to policing of expressive activity in public forums. Audio recordings would, for example, help show whether officers are following department policies, and whether on-the-ground practices indicate a need for new formal policies. *See supra* pp. 15-17.

Second, the ACLU Program would assist the majority of police, who are doing their jobs lawfully, by potentially creating a record that would rebut false accusations against them.

Third, as to police who would do their jobs unlawfully, the ACLU Program might help deter such misconduct – which would advance effective law enforcement. If officers engage in misconduct, the ACLU Program might help identify the particular officers in need of additional training or discipline. Unfortunately, absent audio recordings, lack of reliable evidence frequently prevents government resolution of sworn civilian allegations of officer misconduct. For example, in the 24 months ending in September 2010, two-thirds of the sworn civilian allegations of police misconduct investigated by the City of Chicago could not be proven or disproven.[22]

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[22] D. 18, Exh. D, p. 29, & App. A p. iii (in 2009, Chicago's Independent Police Review Authority closed 1,013 investigations of sworn complaints, and found that 68% were "not sustained," *i.e.*, there was "insufficient evidence to either prove or disprove the allegation"); IPRA Annual Report 2009-10, pp. 28, 32-33, *at* http://www.iprachicago.org/IPRA_AnnualReport2009-2010.pdf (in 2010, IPRA

Civilian audio recording of on-duty police in public places and forums can provide critical information unavailable from testimony, notes, photos, and silent video. Done properly, it can provide an unassailable view of events. Indeed, "protection for both" police and civilians prompted the amendment to the Act allowing virtually any audio recording of police-civilian conversations by uniformed police. D. 18, Exh. B, p. 85. Civilian audio of police can help resolve police-civilian factual disputes regarding, for example, threats,[23] verbal abuse,[24] racial harassment,[25] whether an officer *Mirandized* a civilian before interrogating him,[26] whether police encouraged one civilian to threaten another,[27] and whether force was excessive.[28]

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closed 809 investigations of sworn complaints, and found that 69% were not sustained).

[23] Patrick O'Connell, *Officer in trouble over motorist's video*, St. Louis Post Dispatch (Sept. 11, 2007) (officer stated he will "come up with" a reason to jail civilian).

[24] Jeanne Meserve, *Passenger says TSA agents harassed him*, CNN.com (June 20, 2009) (officer called civilian a "smartass," and said, "I'm not going to play your f**king game").

[25] Bob Roberts, *Officers' comments captured during traffic stop*, WBBM (March 20, 2010) (officer said, "Normally when someone tells me why did I get pulled over, I tell them 'cause they're (expletive) black.'").

[26] Jim Dwyer, *A Switch Is Flipped, and Justice Listens In*, N.Y. Times (Dec. 8, 2007).

[27] *Video shows cops letting onlookers taunt suspect* CBS Chicago (March 23, 2011) (officer apparently said, "[g]et a closeup," to a crowd that was menacing an individual detained in a squad car).

[28] *Scott v. Harris*, 550 U.S. 372, 391 & n.4 (2007) (Stevens, J., dissenting) (in a dispute over a high speed car chase, opining that audio of the police car's siren tended to show that other motorists, in response to the siren, had pulled to the side of the road and out of danger).

Finally, the eavesdropping statutes enacted by the federal government and scores of other states extend only to private conversations. *See supra* at pp. 6-7. Courts in these jurisdictions repeatedly have held that conversations between civilians and uniformed police are not private, and thus that recording such conversations does not violate the eavesdropping statutes. *See supra* at pp. 34-38. Thus, virtually every state besides Illinois has determined that prohibiting civilian audio recordings of on-duty police is not an appropriate or necessary means to advance effective law enforcement.

D. The Act as applied fails the "alternative channels" test.

A "time, place, or manner" regulation must "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (internal citation omitted). Here, the issue is alternative channels of information gathering. As just explained, an audio recording of police-civilian encounters often will provide critical evidence not available from other sources, including testimony, notes, photos, and silent video. Government cannot command a documentary filmmaker to stop making a film on the grounds that she is free to write a book instead. Neither can it command such a filmmaker to make a silent movie when she wants to create a work that exhibits both the actions and the words of on-duty police in public places and forums. *See generally Virginia Bd. of Pharmacy*, 425 U.S. at 757 n.15 (government cannot restrain speech on the assertion that "the speaker's listeners could come by his message by some other means").

E. The District Court's contrary decision lacks force.

The District Court held that the ACLU failed to allege "a cognizable First Amendment injury," offering three reasons. A15. All lack force.

First, the District Court's reliance on *Potts v. City of Lafayette*, 121 F.3d 1106, 1111 (7th Cir. 1997), is misplaced. A15. *Potts* upheld as narrowly tailored a prohibition on the general public, but not the news media, bringing into a KKK rally items that could be used as weapons, including tape recorders. 121 F.3d at 1111. There, government sought to stop tape recorders from being used *as weapons* – a legitimate concern, because "personal items, such as a reporter's tape recorder, had been used to injure attendees" at prior KKK rallies. *Id.* at 1109. But here, government seeks to stop tape recorders from being used *as tape recorders* – an activity that poses no public safety hazard.

While *Potts* states that the Constitution does not "guarantee[] the right to record a public event," *id.* at 1111, it did so in evaluating a regulation that allowed representatives of the public – the media – to audio record the rally. Moreover, the ACLU seeks no absolute "guarantee" to record all conversations in public places, but just narrow protection as to on-duty police where there is no reasonable expectation of privacy and no threat to public safety. Indeed, in applying the mid-level "time, place, or manner" test, *id.*, the *Potts* court necessarily concluded that the First Amendment protects audio recording of public events.

Second, the District Court relied on two cases analyzing whether a statute created a right to gather information: *FEC v. Akins*, 524 U.S. 11 (1998) (campaign contribution information); and *Bensman v. U.S. Forest Serv.*, 408 F.3d 945 (7th Cir.

2005) (agency appeal information). A15. But these cases do not suggest that the First Amendment only protects information gathering if based on a statute.

Third, the District Court opined that police officers are not "willing speakers" as to the ACLU Program and thus the ACLU has no First Amendment right to audio record them. A16. This misinterprets controlling precedent. Where there is "a willing speaker," First Amendment protection extends "to the communication, to its source and to its recipients both." *Virginia Bd. of Pharmacy*, 425 U.S. at 756. Conversely, there is no right to receive information from a person who chooses not to speak. *Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545, 549 (7th Cir. 2007) (where no judicial candidate wanted to answer group's questionnaire, group lacked standing to challenge a ban on answering). Likewise, there is no right to receive information from someone else's conversation if there is a reasonable expectation of privacy. *Bond v. Utreras*, 585 F.3d 1061, 1078 (7th Cir. 2009) (where litigants agreed to protective order, non-party lacked standing to seek discovered records never filed in court).

But there is a right to openly gather information from on-duty police who, while performing their duties in public places and forums, speak in a volume that can be heard by others. If the law demands that the ACLU Program have a "willing speaker," these officers plainly qualify. Police may not stop passersby from listening and taking notes, as Alvarez acknowledged below. D. 19, p. 14; D. 23, p. 8. These officers' preference not to be audio recorded is legally irrelevant, for once they speak, the full scope of the right to listen – including the right to audio record –

belongs to the listeners. Illinois allows uniformed police to audio record civilians in these circumstances, whether or not the civilians consent to recording. There is no constitutional basis to allow police to record these non-private conversations, while banning civilians from doing so.

V. The ACLU is entitled to a preliminary injunction.

To obtain a preliminary injunction, the ACLU must demonstrate: (1) a reasonable likelihood of success on the merits; (2) no adequate remedy at law; (3) irreparable harm to the ACLU in the absence of injunctive relief that outweighs any irreparable harm to Alvarez if the injunction is granted; and (4) the injunction will not harm the public interest. *Goodman v. Illinois*, 430 F.3d 432, 437 (7th Cir. 2005). The court uses a "sliding scale," whereby "the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff's position." *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). The ACLU has a reasonable likelihood of success on the merits, as set forth above. The ACLU easily satisfies the other three elements, as set forth below.

The District Court denied as moot the ACLU's motion for preliminary injunction (A7), and declined to reach the ACLU's renewed motion (A17). These decisions are subject to appellate review. *See, e.g., St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 624-25 (7th Cir. 2007).

A. The ACLU is suffering irreparable harm and has no adequate legal remedy.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373

(1976). *See also Christian Legal Soc'y*, 453 F.3d at 859; *Nat'l People's Action v. Vill. of Wilmette*, 914 F.2d 1008 (7th Cir. 1990). The fact that the ACLU has not undertaken its Program "due to fear of prosecution" is "sufficient to demonstrate irreparable injury." *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 507 (7th Cir. 1998). Further, a later damages remedy would not cure the infringement of the ACLU's First Amendment freedoms. *Id.*; *Nat'l People's Action*, 914 F.2d at 1013; *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 63 F.3d 581, 585 (7th Cir. 1995).

B. The balance of hardships favors a preliminary injunction.

The irreparable harm that the ACLU is suffering because the preliminary injunction was denied is far greater than the harm that Alvarez will suffer if the preliminary injunction is granted. There is a substantial First Amendment right at issue, and the ACLU is deterred from beginning its program by a reasonable fear of prosecution under the Act by Alvarez. Connell Decl. ¶¶ 9, 13-18.

On the other hand, the ACLU Program will not harm the police. On-duty officers have no reasonable expectation of privacy when they converse with civilians in public places. *See supra* p. 29. Moreover, the ACLU Program will advance effective law enforcement by promoting transparency, accountability, and public trust. *See supra* p. 42. The Illinois General Assembly has already determined that the audio recording of such conversations is a public good (*see supra* p. 6) – though it has irrationally allowed police-on-civilian recording while banning civilian-on-police recording.

C. A preliminary injunction serves the public interest.

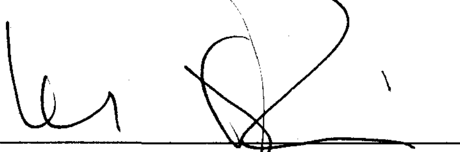
"[I]njunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y*, 453 F.3d at 859. *See also O'Brien v. Town of Caledonia*, 748 F.2d 403, 408 (7th Cir. 1984); *UFCWU, Local 1099 v. Sw. Ohio Transit Auth.*, 163 F.3d 341, 363-64 (6th Cir. 1998).

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests that this Court (1) hold as a matter of law that the Illinois Eavesdropping Act violates the First Amendment as applied to open audio recording of on-duty police in public places and forums pursuant to the ACLU Program; (2) reverse the District Court's denial of the ACLU's motion to amend judgment and file an amended complaint; (3) reverse the District Court's grant of Alvarez's motion to dismiss; (4) grant the ACLU's motion for a preliminary injunction; and (5) remand for further proceedings on the merits.

DATED: April 15, 2011

Respectfully submitted:



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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)(i)

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that this brief complies with the type-volume limitation for proportionally spaced briefs. It contains 13,502 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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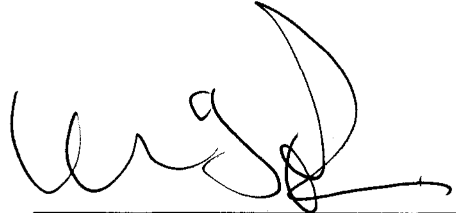

Richard J. O'Brien

CERTIFICATE OF COMPLIANCE WITH 7th CIR. R. 31(e)(1)

In accordance with 7th Cir. R. 31(e)(1), I certify that a digital version of the foregoing Brief (and Circuit Rule 30(a) Appendix of Plaintiff-Appellant and Circuit Rule 30(b) Separate Appendix of Plaintiff-Appellant) was generated by printing to PDF format from the original word processing file and not by scanning paper documents, and has been furnished to the court.

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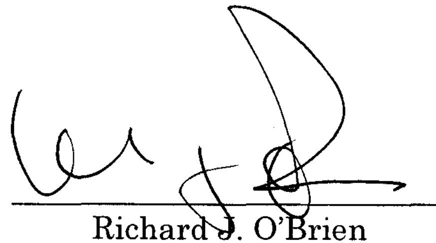

Richard J. O'Brien

CERTIFICATE OF COMPLIANCE WITH 7th CIR. R. 30(a) and (b)

In accordance with 7th Cir. R. 30(d), I certify that all documents required under 7th Cir. R. 30(a) and (b) are included in the Brief and Circuit Rule 30(a) Appendix of Plaintiff-Appellant.

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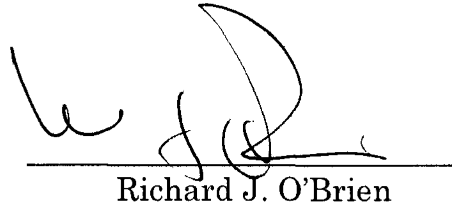
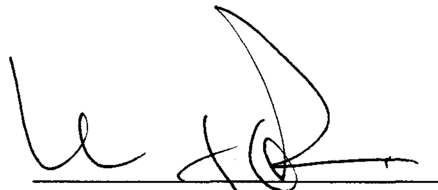


Richard J. O'Brien

CERTIFICATE OF SERVICE

I certify that I served the Brief of Plaintiff-Appellant The American Civil Liberties Union of Illinois by placing two bound paper copies and one computer disk containing the digital version in envelopes with sufficient postage affixed and directed to each person named below at the address indicated, and depositing each envelope in the United States mail box located at 180 N. Michigan Avenue, Chicago, Illinois, before 5:00 p.m. on April 15, 2011.



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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

The American Civil Liberties Union of Illinois,	)	
	)	
Plaintiff,	)	Civil Action No.: 10 C 5235
	)	
v.	)	Suzanne B. Conlon, Judge
	)	
Anita Alvarez,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The American Civil Liberties Union of Illinois ("the ACLU") seeks declaratory and injunctive relief against Anita Alvarez, in her official capacity as the Cook County State's Attorney, with respect to the Illinois Eavesdropping Act, 720 ILCS 5/14 ("the Act"). The State's Attorney moves to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), while the ACLU moves for a preliminary injunction. For the reasons set forth below, the motion to dismiss is granted for lack of jurisdiction, and the motion for preliminary injunction is denied as moot.

BACKGROUND

The following facts are derived from the ACLU's complaint. The ACLU is a non-profit organization with more than 20,000 members; its asserted mission is to defend and expand certain rights under federal and state laws. Compl. ¶ 7. To that end, the ACLU gathers, receives and records information, which it then regularly publishes or disseminates to the general public, or presents to a governmental entity in order to petition for redress of grievances. *Id.* at ¶¶ 11-13. One category of information concerns police conduct in public places. *Id.* at ¶¶ 14-15.

The ACLU currently monitors or otherwise observes police practices. *Id.* The ACLU intends to "undertake a program to . . . audio record police officers, without the consent of the officers, when (a) the officers are performing their public duties, (b) the officers are in public places, (c) the officers are speaking at a volume audible to the unassisted human ear, and (d) the manner of recording is otherwise lawful." *Id.* at ¶¶ 3, 16, 32. The ACLU intends to disseminate the recordings of the police officers to the public and use the recordings to petition the government for redress of grievances. *Id.* The ACLU asserts that audio recordings will assist in both deterring and detecting police misconduct. *Id.* at ¶¶ 17- 21.

The ACLU has not undertaken its program, alleging fear of prosecution by the State's Attorney under the Act. *Id.* at ¶¶ 4, 33. The Act provides that a first offense of nonconsensual eavesdropping is a Class 4 felony. *Id.* at ¶ 23(d) (citing 720 ILCS 5/14-4(a)). "A person commits eavesdropping when he . . . [k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation . . . unless he does so . . . with the consent of all of the parties to such conversation. . . .". *Id.* at ¶ 23(a)(citing 720 ILCS 5/14-2(a)(1)(A)). The ACLU cites to one current and three prior state prosecutions against civilians pursuant to the Act. *Id.* at ¶¶ 30-31.

The ACLU brings this pre-enforcement action contending that the Act violates its First Amendment right to free speech, petition the government for redress of grievances and freedom of the press to audio record police officers without their consent (and presumably without the consent of third parties with whom police officers speak). *Id.* at ¶ 39. The State's Attorney moves to dismiss the complaint contending, in part, that the ACLU lacks standing, and the

decision in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 756, 27 L. Ed. 2d 669 (1971) requires this court to abstain from ruling on the merits of the First Amendment claim.

ANALYSIS

I. Legal Standard

A Rule 12(b)(1) motion to dismiss requires a determination of whether there is subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The ACLU bears the burden of establishing standing, and thus subject matter jurisdiction. *Pollack v. United States Dep't of Justice*, 577 F.3d 736, 739 (7th Cir. 2009), *cert. denied*, – U.S. –, 130 S. Ct. 1890, 176 L. Ed. 2d 364 (2010); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) ("[t]he party invoking federal jurisdiction bears the burden of establishing these elements [of standing]"). In determining whether the ACLU has met its burden, all well-pleaded allegations are accepted as true, and all reasonable inferences are drawn in its favor. *Disability Rights Wisconsin, Inc. v. Walworth County Bd. of Supervisors*, 522 F.3d 796, 799 (7th Cir. 2008); *Defenders of Wildlife*, 504 U.S. at 561, 112 S. Ct. at 2137 ("[a]t the pleading stage, . . . we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'") (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889, 110 S. Ct. 3177, 3189, 111 L. Ed. 2d 695 (1990)); *Warth v. Seldin*, 422 U.S. 490, 518, 95 S. Ct. 2197, 2215, 45 L. Ed. 2d 343 (1975) (plaintiff must allege facts "demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers").

II. Subject Matter Jurisdiction

Under Article III of the United States Constitution, federal courts are limited to deciding cases and controversies. *Defenders of Wildlife*, 504 U.S. at 559-60, 112 S. Ct. at 2136. As one of

the limits, a plaintiff must have "a personal stake in the outcome" of the case. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983); *Warth*, 422 U.S. at 498-99, 95 S. Ct. at 2205. To satisfy this requirement, "a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Institute*, -- U.S. --, 129 S. Ct. 1142, 1149, 173 L. Ed. 2d 1 (2009); *Defenders of Wildlife*, 504 U.S. at 560-61, 112 S. Ct. at 2136.

Accepting the well-pleaded allegations of the complaint as true, the ACLU has not satisfied its burden of showing that it has standing. As the ACLU alleges, a violation of the Act occurs when a person knowingly and intentionally uses an eavesdropping device to hear or record a conversation without the consent of the parties to the conversation. Compl. at ¶ 23(a)(citing 720 ILCS 5/14-2(a)(1)(A)). Creating the ACLU program is not, in itself, a violation of the Act. *Shirmer v. Nagode*, No. 09-2332, 2010 WL 3431627, at *5-*6 (7th Cir. Sept. 2, 2010) (standing is lacking where statute does not cover intended conduct). The State's Attorney has not threatened the ACLU with prosecution if its program is implemented, and the ACLU has not cited any case where an organization has been prosecuted for violating the Act. The four cases the ACLU cites for its alleged fear of prosecution were all brought against individuals, and the Cook County State's Attorney filed only one of those cases. The others were filed by the Champaign County State's Attorney in 2004, the Crawford County State's Attorney in 2009, and the DeKalb County State's Attorney in 2009. *Id.* at ¶¶ 30-31. Unlike *Holder v. Humanitarian Law Project*, – U.S. –, 130 S. Ct. 2705, 2717, 177 L. Ed. 2d 355 (2010), litigation that was pending for 12 years at the

time of the decision on standing, the State's Attorney has neither prosecuted numerous individuals under the Act, nor suggested that it would (or would not) prosecute the ACLU.

Even if the ACLU were prosecuted, there is no allegation that prosecution is imminent. The ACLU has not alleged any time frame within which it intends to implement its program once the program parameters are established, nor has it shown that its members intend to participate in the program. *Defenders of Wildlife*, 504 U.S. at 564, 112 S. Ct. at 2138 n.2. Based upon the complaint, the State's Attorney does not appear to be actively pursuing prosecutions of the Act, and the ACLU has not alleged that an organization could or would be prosecuted under the Act. "When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99, 99 S. Ct. 2301, 2309, 60 L. Ed. 2d 895 (1979) (quoting *Younger*, 401 U.S. at 42, 91 S. Ct. at 749). No imminent threat of injury to the ACLU is alleged.

In addition, while an organization may aver standing of its members and act in a representative capacity, *Summers*, 129 S. Ct. at 1149, the ACLU has not done so. At least one member of the ACLU who would suffer harm must be identified by allegation, and for purposes of a preliminary injunction, by affidavit. *Id.* at 1151-52; *see also Defenders of Wildlife*, 504 U.S. at 563, 112 S. Ct. at 2137-38 (as a result of failing to "submit affidavits . . . showing, through specific facts . . . that one or more of respondents' members would . . . be 'directly' affected . . .," the organization lacked standing) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734, 735, 739, 92 S. Ct. 1361, 1366, 1368, 31 L. Ed. 2d 636 (1972)); *Warth*, 422 U.S. at 516, 95 S. Ct. at 2214 (association lacked standing because it failed to allege facts sufficient to allow it to serve as the

representative of its members). The complaint is devoid of an allegation that any of the ACLU's 20,000 members or employees desires to participate in the ACLU program.[1]

The court recognizes that a party is not required to violate the Act before challenging its constitutionality. *Babbitt,* 442 U.S. at 302, 99 S. Ct. at 2310-11. In this case, though, the ACLU's allegations regarding fear of prosecution are wholly speculative. In addition, the ACLU has not alleged organizational standing. Accordingly, the motion to dismiss for lack of jurisdiction must be granted.[2]

The State's Attorney also contends that the *Younger* doctrine applies. Under *Younger,* "principles of judicial economy, as well as proper state-federal relations, preclude federal courts from exercising equitable jurisdiction to enjoin ongoing state prosecutions." *Wooley v. Maynard,* 430 U.S. 705, 710, 97 S. Ct. 1428, 1433, 51 L. Ed. 2d 752 (1977) (citing *Younger*, 401 U.S. at 43, 91 S. Ct. at 750). There is no ongoing state prosecution of the ACLU with respect to the Act. The Seventh Circuit has recognized, though, that a federal court may abstain if a state prosecution is imminent. *520 S. Michigan Ave. Associates, Ltd. v. Devine*, 433 F.3d 961, 963 (7th Cir. 2006) (emphasis in original). Because the ACLU lacks standing, the applicability of *Younger* and *520 South Michigan* need not be addressed. Similarly, the court does not reach the other asserted grounds for dismissal, namely that the ripeness doctrine precludes review of this

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[1]Even if this court were to consider the declaration of Colleen K. Connell, Executive Director of the ACLU, filed in support of the preliminary injunction motion, Ms. Connell does not state that she would participate in the ACLU program.

[2]The court notes the ACLU's allegation that "[u]nless enjoined by this Court, defendant will continue to prosecute, pursuant to the Act, people who audio record police officers performing their public duties in public places." Compl. ¶ 34. Yet, "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth,* 422 U.S. at 499, 95 S. Ct. at 2205; *Defenders of Wildlife*, 504 U.S. at 573-74, 112 S. Ct. at 2143.

case, and the ACLU fails to state a claim upon which relief can be granted because there is no First Amendment right to audio record speech of parties without their consent.

CONCLUSION

For the reasons set forth above, the motion to dismiss is granted pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. As a result, the ACLU's preliminary injunction motion is moot.

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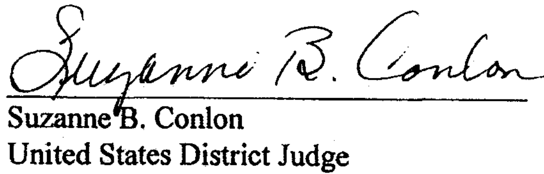

Suzanne B. Conlon
United States District Judge

October 28, 2010

UNITED STATES DISTRICT COURT
for the
Northern District of Illinois

The American Civil Liberties Union of Illinois,
Plaintiff
v.
Anita Alvarez, Cook County State's Attorney, in her official capacity
Defendant

Civil Action No. 10 C 5235

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

☐ the plaintiff *(name)* ______ recover from the defendant *(name)* ______ the amount of ______ dollars ($ ______), which includes prejudgment interest at the rate of ______ %, plus postjudgment interest at the rate of ______ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* ______ recover costs from the plaintiff *(name)* ______

☒ other:
The case is dismissed without prejudice.

This action was *(check one)*:

☐ tried by a jury with Judge ______ presiding, and the jury has rendered a verdict.

☐ tried by Judge ______ without a jury and the above decision was reached.

☒ decided by Judge Suzanne B. Conlon on a motion to dismiss

Date: 10/28/2010

Michael W. Dobbins, Clerk of Court

/S/ Alberta Rone, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

The American Civil Liberties Union of Illinois,	)	
	)	
Plaintiff,	)	Civil Action No.: 10 C 5235
	)	
v.	)	Suzanne B. Conlon, Judge
	)	
Anita Alvarez,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The American Civil Liberties Union of Illinois ("the ACLU") sues Anita Alvarez, in her official capacity as Cook County State's Attorney, seeking declaratory and injunctive relief with respect to the Illinois Eavesdropping Act, 720 ILCS 5/14 ("the Act"). The case was previously dismissed for lack of standing [33]. The court entered a judgment dismissing the case without prejudice [34]. The ACLU moves to alter the judgment, file an amended complaint, add two individuals as plaintiffs and obtain a preliminary injunction.

PROCEDURAL ISSUE

The judgment at issue dismissed the case without prejudice. Fed. R. Civ. P. 41(b). As a result of the entry of a final judgment, the ACLU lost the right to amend its complaint. *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008) ("the district court lacks jurisdiction to entertain a motion for leave to amend the complaint unless the plaintiff also moves for relief from the judgment") (quoting *Camp v. Gregory*, 67 F.3d 1286, 1289-90 (7th Cir. 1995)); *Paganis v. Blonstein*, 3 F.3d 1067, 1070, 1072-73 (7th Cir. 1993) (dismissal of the case causes the plaintiff to choose between filing an appeal or moving to alter the judgment and amend the complaint).

Pursuant to Rules 59(e) and 15(a), the ACLU moves for leave to alter judgment and file the amended complaint attached to its motion. *Sparrow v. Heller*, 116 F.3d 204, 205-06 (7th Cir. 1997). The ACLU timely filed its motion within 28 days of the entry of judgment. Fed. R. Civ. P. 59(e). In order to decide whether to grant Rule 59(e) relief, the court must consider the merits of the ACLU's motion for leave to amend its complaint. *Harris v. City of Auburn*, 27 F.3d 1284, 1287 (7th Cir. 1994); *Paganis*, 3 F.3d at 1073, n.7. Leave to amend should not be granted if amendment would be futile, the ACLU acted with undue delay, bad faith or dilatory motive, the ACLU repeatedly failed to cure deficiencies by amendments previously allowed, or undue prejudice to the State's Attorney would occur if amendment were permitted. *Barry Aviation Inc. v. Land O'Lakes Municipal Airport Com'n*, 377 F.3d 682, 687 (7th Cir. 2004). The relevant inquiries here are whether the ACLU's amended complaint cures deficiencies in its initial complaint related to the issue of standing, and whether amendment would be futile.

BACKGROUND

The following facts are derived from the amended complaint. The ACLU is a non-profit organization with more than 20,000 members; its asserted mission is to defend and expand federal and state rights. ACLU Memo, Ex. 1 (Am. Compl.) at ¶ 7. To that end, the ACLU gathers, receives and records information, which it then publishes or disseminates to the general public, or presents to a governmental entity in order to petition for redress of grievances. *Id.* at ¶¶ 13-14.

To assist in deterring and detecting police misconduct, the ACLU has developed a program to "audio record police officers, without the consent of the officers, when (a) the officers are performing their public duties, (b) the officers are in public places, (c) the officers are

speaking at a volume audible to the unassisted human ear, and (d) the manner of recording is otherwise lawful." *Id.* at ¶ 3. The ACLU was prepared to audio record police while monitoring a Chicago Police Department program of suspicionless container searches on Chicago's lakefront on June 10, 2010, and during a protest at the James R. Thompson Center on November 8, 2010. *Id.* at ¶ 22. The ACLU, Colleen Connell, ACLU executive director, and Allison Carter, an ACLU employee, are prepared to immediately audio record police officers in public places, whether planned or spontaneous. *Id.* at ¶¶ 3, 17. Connell would direct Carter to audio record police at an annual anti-war protest in spring 2011, and Carter would do so. *Id.* at ¶ 23.

The ACLU, Connell and Carter have not carried out the ACLU's program due to fear of prosecution by the State's Attorney under the Act. *Id.* at ¶¶ 19, 23. The Act provides that a first offense of nonconsensual eavesdropping is a Class 4 felony. *Id.* at ¶ 32(d) (citing 720 ILCS 5/14-4(a)). "A person commits eavesdropping when he . . . [k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation . . . unless he does so . . . with the consent of all of the parties to such conversation. . . ." *Id.* at ¶ 32(a) (citing 720 ILCS 5/14-2(a)(1)(A)). The ACLU, Connell and Carter cite two pending prosecutions of individuals under the Act by the State's Attorney, seven other prosecutions under the Act by state's attorneys in other Illinois counties, and several prosecutions by the State's Attorney of private corporations for various criminal offenses other than violations of the Act. *Id.* at ¶¶ 25(c), 25(e), 25(h), 39, 40.

ANALYSIS

The original complaint failed to allege a credible, imminent threat of prosecution against the ACLU or its members by the State's Attorney under the Act [33]. The ACLU did not have standing and thus the court lacked jurisdiction. *Id.* The ACLU proposes an amended complaint with additional allegations and two individual plaintiffs that cure the limited ground for dismissal of the original complaint.

The ACLU bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992); *Pollack v. United States Dep't of Justice*, 577 F.3d 736, 739 (7th Cir. 2009), *cert. denied*, – U.S. –, 130 S. Ct. 1890, 176 L. Ed. 2d 364 (2010). In determining whether the ACLU has met its burden, all well-pleaded allegations of the amended complaint are accepted as true, and all reasonable inferences are drawn in its favor. *Defenders of Wildlife*, 504 U.S. at 561, 112 S. Ct. at 2137 (stating motion to dismiss standard); *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975) (same); *Disability Rights Wisconsin, Inc. v. Walworth County Bd. of Supervisors*, 522 F.3d 796, 799 (7th Cir. 2008) (same). The ACLU must show that it "is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Institute*, – U.S. –, 129 S. Ct. 1142, 1149, 173 L. Ed. 2d 1 (2009).

The State's Attorney contends the ACLU's amended complaint remains speculative, citing *Boyle v. Landry*, 401 U.S. 77, 91 S. Ct. 758, 27 L. Ed. 2d 696 (1971), *O'Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974) and *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.

Ct. 1660, 75 L. Ed. 2d 675 (1983). *Boyle* challenged Illinois statutes prohibiting mob action, resisting arrest, aggravated assault, aggravated battery and intimidation. 401 U.S. at 78, 91 S. Ct. at 758-59. The Supreme Court found the *Boyle* complaint failed to allege any threat to arrest or prosecute any of the plaintiffs, and that the plaintiffs challenged state statutes and city ordinances believing they may be relied upon for future, bad-faith prosecutions against them. 401 U.S. at 81, 91 S. Ct. at 760. *O'Shea* was a civil rights case contesting illegal bond setting, sentencing and jury fee practices in criminal cases before a county magistrate and a county circuit court associate judge; the threat of injury was deemed speculative. 414 U.S. at 488, 491-92, 94 S. Ct. at 669, 674. The plaintiffs did not assert any constitutional right to engage in proscribed conduct or indicate an intention to do so. 414 U.S. at 498, 94 S. Ct. at 677. *Lyons* involved an allegation the plaintiff was illegally choked by police during a prior traffic stop; the Court found no immediate threat that he would be subjected to a chokehold during a future traffic stop. 461 U.S. at 105-06, 103 S. Ct. at 1667. He lacked standing to seek injunctive relief. 461 U.S. at 110, 103 S. Ct. at 1669-70.

Unlike *Boyle, O'Shea* and *Lyons*, the ACLU alleges it has been and continues to be deterred in carrying out the ACLU program. The ACLU intended to audio record police activity at events on June 10 and November 8, 2010. ACLU Memo, Ex. 1 at ¶¶ 22, 44. The ACLU, as well as Connell and Carter, intend to immediately audio record police activities, including at an anti-war protest in spring 2011. *Id.* at ¶¶ 3, 23. The ACLU, Connell and Carter have not audio recorded police officers without their consent due to fear of prosecution by the State's Attorney under the Act. *Id.* at ¶¶ 19, 23. The ACLU relies upon the State's Attorney's current prosecution of two individuals

under the Act and cites prosecutions of corporations for violating other criminal statutes.[1] *Id.* at ¶¶ 25(c), 25(h), 39. The State's Attorney has declined to state she would forego prosecution if the ACLU audio records police officers without their consent. *Id.* at ¶¶ 25(d), 46.

The State's Attorney contends that the ACLU, Connell and Carter cannot assure they will be arrested or prosecuted for violating the Act. A guarantee of injury is not required. *Brandt v. Village of Winnetka, Illinois*, 612 F.3d 647, 649 (7th Cir. 2010). Prosecution of the ACLU, Connell and Carter under the Act is at least "remotely possible," and they are not required to expose themselves to arrest or prosecution to challenge the Act. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99, 99 S. Ct. 2301, 2309, 60 L. Ed. 2d 895 (1979) (quoting *Younger v. Harris*, 401 U.S. 37, 42, 91 S. Ct. 746, 749, 27 L. Ed. 2d 669 (1971)); *see also Kucharek v. Hanaway*, 902 F.2d 513, 516 (7th Cir. 1990) (even though no prosecutions under a new obscenity statute occurred, standing existed where plaintiffs demonstrated they wanted to sell materials and were deterred due to fear of prosecution), *cert. denied*, 498 U.S. 1041, 111 S. Ct. 713, 112 L. Ed. 2d 702 (1991).

The ACLU is not required to show the State's Attorney has threatened prosecution. *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003). The same holds true for Connell and Carter, if added as plaintiffs. *Id.* The threat of prosecution is credible and imminent. *Commodity Trend Service, Inc. v. Commodity Futures Trading Com'n*, 149 F.3d 679, 687 (7th Cir. 1998) (credible threat existed where the government declined to affirm it would not enforce statute in issue).

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[1]The ACLU also cites prosecutions by seven other Illinois state's attorneys of individuals under the Act. Because the ACLU alleges it intends to audio record police only in Cook County, prosecutions in other counties are not considered.

The ACLU has cured the limited standing deficiencies addressed in the memorandum opinion dismissing the original complaint by sufficiently alleging a threat of prosecution. However, the credible, imminent threatened injury must implicate a constitutional right. The ACLU has not alleged a cognizable First Amendment injury. The ACLU cites neither Supreme Court nor Seventh Circuit authority that the First Amendment includes a right to audio record. *Cf.*, *Potts v. City of Lafayette, Indiana*, 121 F.3d 1106, 1111 (7th Cir. 1997) ("there is nothing in the Constitution which guarantees the right to record a public event"). Amendment would therefore be futile.

The ACLU relies on *Federal Election Comm'n v. Akins*, 524 U.S. 11, 21, 24-25, 118 S. Ct. 1777, 1784, 1786, 141 L. Ed. 2d 10 (1998). In *Akins*, the Supreme Court recognized a failure to receive information may constitute a constitutional injury. *Akins* considered whether a group of voters had standing to challenge the Federal Election Commission's dismissal of their complaint. 524 U.S. at 13-14, 118 S. Ct. at 1780-81. The voters contended the American Israel Public Affairs Committee constituted a "political committee" required by the Federal Election Campaign Act to disclose information regarding its membership, contributions and expenditures. *Id.; see also Bensman v. United States Forest Service*, 408 F.3d 945, 955-57 (7th Cir. 2005) ("[t]he 'inability to obtain information' required to be disclosed by statute constitutes a sufficiently concrete and palpable injury to qualify as an Article III injury-in-fact") (quoting *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003) (quoting *Akins*, 524 U.S. at 21, 118 S. Ct. at 1784)). Unlike *Akins*, no statute requiring the disclosure of information is in issue here. The ACLU seeks to implement its own program of audio recording conversations of police officers without their consent (and presumably without the consent of other participants in the conversations). Denial of

access to statutorily required disclosures is not analogous to a purported First Amendment right to non-consensual audio recording of policies activities.

The State's Attorney argues that a "willing speaker" must exist to implicate the First Amendment's right to free speech. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756, 96 S. Ct. 1817, 1823, 48 L. Ed. 2d 346 (1976). In *Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545 (7th Cir. 2007), an organization failed to find a judicial candidate willing to answer the organization's questionnaire regarding various legal issues. *Id.* at 549. Because there were no candidates who were willing, but constrained, to speak, the court found the organization did not have standing. *Id.* at 549-50; *see also Bond v. Utreras*, 585 F.3d 1061, 1078 (7th Cir. 2009). The ACLU intends to audio record police officers speaking with one another or police officers speaking with civilians. The ACLU's program only implicates conversations with police officers. The ACLU does not intend to seek the consent of either police officers or civilians interacting with police officers. ACLU Memo., Ex. 1 at ¶ 3. Police officers and civilians may be willing speakers with one another, but the ACLU does not allege this willingness of the speakers extends to the ACLU, an independent third party audio recording conversations without the consent of the participants. The ACLU has not met its burden of showing standing to assert a First Amendment right or injury.

CONCLUSION

Amendment would be futile. The ACLU has not alleged a constitutional right or injury under the First Amendment. Rather, the ACLU proposes an unprecedented expansion of the First Amendment. The court does not reach other asserted grounds for relief or the ACLU's renewed motion for preliminary injunction. Accordingly, the ACLU's motion to alter judgment and amend its complaint is denied.

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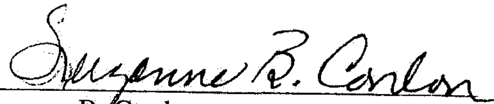

Suzanne B. Conlon
United States District Judge

January 10, 2011