Case No. 115776

IN THE
SUPREME COURT OF ILLINOIS

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

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

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POINTS AND AUTHORITIES

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INTEREST OF AMICI CURIAE

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

BACKGROUND

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

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

some manner of consent to record the conversations of others. Under § 5/14-2(a), "[a] person commits eavesdropping when," among other things, he "[k]knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication," unless he obtains "the consent of *all the parties* to such conversation or electronic communication . . ." (emphasis added). An "eavesdropping device" is defined in relevant part as "any device capable of being used to hear or record oral conversation or intercept, retain, or transcribe electronic communications . . ." § 5/14-1(a). In Illinois, eavesdropping is a felony punishable by up to fifteen years in jail. *See* § 5/14-4; 730 ILCS § 5/5-4.5-30(a).

Contrary to the generally accepted meaning of "eavesdropping," *see* Merriam-Webster, *supra*, Illinois' Eavesdropping Statute expressly applies to any recorded conversation "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.*" § 5/14-1(d) (emphasis added). The Illinois Statute stands nearly alone among eavesdropping and wiretapping laws in this respect. The federal government, at least 39 states, and the District of Columbia each have a statute criminalizing the audio recording of certain in-person conversations only if there is a reasonable expectation of privacy.[2] Illinois, on the other hand, requires the consent of all

[2] 18 U.S.C. § 2510(2); Ala. Code § 13A-11-30(1); Ariz. Stats. § 13-3001(8); Cali. 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); Haw. Stat. § 803-41; Idaho Code § 18-6701(2); Iowa Code § 808B.1(8); Baldwin's Ky. Rev. Stat. § 526.010, 1974 Kentucky Crime Comm'n/Legislative Research Comm'n Commentary to 1974 c 406, § 227; La. Stats. § 15:1302(14); 15 Maine Stats. §§ 709(4)(B) & 709(5); Md. Code, Cts. & Jdl. Proceedings §10-401(2)(i); Mich. Comp. Laws Ann. § 750.539a; Minn. Stat. Ann.

parties being recorded, and, at the same time, purports to prohibit the recording of private and non-private conversations alike; that is, whether or not the parties intend their conversation to be private. The Seventh Circuit thus concluded: "[T]he Illinois statute is a national outlier. Most state electronic privacy statutes apply only to *private* conversations; that is, they contain (or are construed to include) an expectation-of-privacy requirement that limits their scope to conversations that carry a reasonable expectation of privacy." *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 607-08 (7th Cir. 2012) (internal citation omitted, emphasis in original), *cert. denied*, 133 S. Ct. 651 (U.S. 2012). Whether the First Amendment allows such restrictions on the recording of non-private conversations is the primary issue in this case.

Prior to 1994, the Eavesdropping Statute did not by its terms encompass non-private conversations. Accordingly, in 1986, this Court held that the Eavesdropping Statute applied only when circumstances "entitle [the conversing parties] to believe that the conversation is private and cannot be heard by others who are acting in a lawful manner." *People v. Beardsley*, 115 Ill. 2d 47, 53 (Ill. 1986). Eight years later, this Court reaffirmed *Beardsley* and further held that "there can be no expectation of privacy by the declarant where the individual recording the conversation is a party to that conversation." *People v. Herrington*, 163 Ill. 2d 507, 510 (Ill. 1994). The result of *Beardsley* and

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§ 626A.01, Subd. 4; Miss. Code Ann. § 41-29-501(j); Vernon's Ann. Mo. Stat. § 542.400(8); Neb. Rev. Stat. § 86-283; Nev. Rev. Stat. § 179.440; N.H. Rev. Stat. § 570-A:1(II); N.J. Stat. Ann. § 2A:156A-2(b); N.Y. Penal Law § 250.05, Commentary by Donnino; N.C. Gen. Stat. Ann. § 15A-286(17); N.D. Century Code Ann. § 12.1-15-04(5); Baldwin's Ohio Rev. Code § 2933.51(B); 13 Okl. Stat. Ann. § 176.2(12); 18 Pa. Stat. § 5702; R.I. Gen. Law § 12-5.1-1(10); S.C. Code Ann. § 17-30-15(2); S.D. Cod. Laws § 23A-35A-1(10); Tenn. Code Ann. § 40-6-303(14); Vernon's Tex. Stat. & Code Ann., Code Crim. Proc., Art. 18.20(2); Utah Code Ann. § 77-23a-3(13); Va. Code Ann. § 19.2-61; Rev. Code Wash. § 9.73.030(1)(b); W.V. Code § 62-1D-2(h); Wisc. Stat. Ann. § 968.27(12); Wy. Stat. Ann. 7-3-701(a)(xi).

Herrington was that, despite the all-party consent requirement in § 5/14-2(a), the Eavesdropping Statute was interpreted not to "prohibit . . . a party to [a] conversation or one known by the parties thereto to be present" from recording without consent, even if the parties intended the conversation to be private among themselves. *Herrington*, 163 Ill. 2d at 509-10.

The legislature responded by amending the Eavesdropping Statute to overrule *Beardsley* and *Herrington*. The legislature did so by adding § 5/14-1(d), which states that the Eavesdropping Statute applies to all recorded conversations, "regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." This language closely tracks the *Beardsley* opinion, which held that "[t]he primary factor in determining whether the defendant in this case committed the offense of eavesdropping is . . . whether the [other parties to the recorded conversation] intended their conversation to be of a private nature under circumstances justifying such expectation." *Beardsley*, 115 Ill. 2d at 54. Thus, on its face, the amended Eavesdropping Statute prohibits all non-consensual audio recording, even if the parties do not intend for their conversation to be private among themselves – for instance, a conversation in a public place where others are visibly present, spoken in an ordinary conversational volume within normal ear shot of persons not party to the conversation.

In 2012, the United States Court of Appeals for the Seventh Circuit held that Illinois' Eavesdropping Statute was likely unconstitutional as applied to the open but non-consensual recording of "police officers performing their duties in public places and speaking at a volume audible to bystander." *Alvarez*, 679 F.3d at 605.

* * *

Defendant-appellee DeForest Clark was charged with two counts of eavesdropping in violation of § 5/14-2(a)(1)(A). *See* C2-3, Indictment (Jan. 18, 2012). Both charges arose from a September 17, 2010 child support hearing before Judge Robert Janes in Kane County Circuit Court. *See* C48, Defendant's Motion to Dismiss at 5 (Aug. 15, 2012); R9, Transcript of Hearing on Motion to Dismiss at 9 (Mar. 18, 2013). Mr. Clark represented himself *pro se* at the hearing. The hearing was conducted in open court and no court reporter was present. Mr. Clark recorded the hearing in order to preserve a true and accurate record of public proceedings in which he was representing himself without the assistance of counsel and without the benefit of a court reporter. For the same reason, Mr. Clark also allegedly recorded a conversation between himself and opposing counsel, Colleen Thomas, prior to the hearing in a public hallway in the Kane County Judicial Center. *See* C56, State's Response to Defendant's Motion to Dismiss at 1 (Oct. 26, 2012). Mr. Clark apparently does not claim that he obtained consent from Ms. Thomas or Judge Janes to record either conversation.

Count 1 of the Indictment charged that Mr. Clark committed a Class 4 felony offense "in that [he], knowingly and intentionally used an eavesdropping device for the purpose of recording a conversation between himself and Colleen Thomas without the consent of Colleen Thomas." C2. Count 2 charged that Mr. Clark committed a Class 1 felony offense "in that [he], knowingly and intentionally used an eavesdropping device for the purpose of recording a conversation between himself and Judge Robert Janes and Colleen Thomas, while Judge Janes was acting in performance of his official duties, without the consent of Judge Janes or Colleen Thomas." C3.

Citing the Seventh Circuit's *Alvarez* decision, Mr. Clark moved to dismiss the charges against him because, he argued, the Eavesdropping Statute violates his First Amendment and substantive due process rights. *See* C44-51, Defendant's Motion to Dismiss (Mar. 18, 2013). The Circuit Court agreed and dismissed the indictment, finding the Eavesdropping Statute "is unconstitutional on its face and as applied to the case *sub judice*," and "cannot reasonably be construed in a manner that would preserve its validity." C88-89, Findings and Order at 13-14 (Feb. 13, 2013). The State appealed directly to this Court.

SUMMARY OF ARGUMENT

It is axiomatic that conversational privacy is not advanced by restricting the recording of conversations that are not private. The Circuit Court correctly found that the Eavesdropping Statute is unconstitutional as applied to Mr. Clark because it fails intermediate scrutiny and unduly infringes Mr. Clark's right to receive and gather non-private information as protected by the First Amendment and as a means of facilitating his rights as a *pro se* litigant to access to the courts. Moreover, the Eavesdropping Statute violates substantive due process as applied to Mr. Clark for similar reasons, and also because the Statute impermissibly punishes wholly innocent conduct. The Indictment should therefore be dismissed and the Circuit Court's judgment affirmed on either of these grounds. Because the Eavesdropping Statute is unconstitutional as applied to Mr. Clark's alleged conduct there is no need for the Court to address the facial validity of the Statute.

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The same would be true even if the conversations Mr. Clark allegedly recorded did not involve public officials or matters of public concern. The right to record and gather information is a fundamental and necessary means of fostering individual expression, autonomy, and accountability. Although there may be "alternative ways [other than audio recording] to register and express the content in question," there is "a serious problem with forcing people to fall back on that ultra-low tech alternative." John A. Humbach, *Privacy and the Right of Free Expression*, 11 First Amend. L. Rev. 16, 53-54 (2012). "[A]udio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public. Their self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes." *Alvarez*, 679 F.3d at 607. *See also* Kreimer, *Pervasive Image Capture*, 159 U. Pa. L. Rev. at 380-81 ("Pervasive image capture allows individuals to record memories. Legal interference with recording abridges such individuals' freedom to reflect effectively on those experiences, truncating the freedom of thought that the principles of the First Amendment guarantee."). Accordingly, the Eavesdropping Statute raises serious First Amendment concerns as applied to Mr. Clark, even putting aside the fact that he recorded non-private conversations in public places involving public and quasi-public officials engaged in matters of public concern.

Of course, a constitutional concern is not necessarily a constitutional violation. *See Reporters Comm. for Freedom of Press v. AT&T Co.*, 593 F.2d 1030, 1051 (D.C. Cir. 1978) ("[T]he freedom to gather information guaranteed by the First Amendment is the freedom to gather information [s]ubject to the general and incidental burdens that arise

from good faith enforcement of otherwise valid criminal and civil laws that are not themselves solely directed at curtailing the free flow of information."). The fact that the First Amendment generally protects audio recording of non-private conversations does not prevent the State from regulating such recording so long as the regulation passes constitutional muster. *See Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) ("[T]he right to record matters of public concern is not absolute; it is subject to reasonable time, place, and manner restrictions, as long as they are 'justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information.'") (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

It goes without saying the State may impose reasonable time, place, and manner restrictions on audio recording in public court rooms. Indeed, this Court and the Circuit Court of Kane County have done so. *See* Illinois Supreme Court Rule 63A(7); Kane County Local Rule 1.14A. These restrictions are not at issue here. Mr. Clark was charged with felony eavesdropping under 720 ILCS § 5/14-2(a), punishable by a minimum of four years and up to fifteen years in prison. *See* 730 ILCS § 5/5-4.5-30(a) (Class 1 felony sentences). Mr. Clark was not charged with violating a court order regarding audio recording in court rooms. The question is whether *the speech regulation Mr. Clark was charged with violating* complies with the First Amendment. The Eavesdropping Statute is unconstitutional as applied to Mr. Clark for the following reasons.

I.B. As applied to Mr. Clark, intermediate scrutiny requires that the Eavesdropping Statute must address an important governmental purpose as to non-private conversations, and must be sufficiently tailored with a reasonable fit between the Statute's means and its ends.

Content-neutral speech regulations such as the Eavesdropping Statute are subject to intermediate scrutiny. *See People v. Masterson*, 2011 IL 110072, ¶ 24 (Ill. 2011). "Intermediate scrutiny requires a showing that the statute is substantially related to an important governmental interest." *Id*. "Substantially related" means there must be, at the very least, a "reasonably close fit between the law's means and its ends," *Alvarez*, 679 F.3d at 605 (applying intermediate scrutiny to Eavesdropping Statute), such that the "regulatory technique" chosen by the legislature is "in proportion to the interest served" by the statute, *People v. Davis*, 408 Ill. App. 3d 747, 749 (Ill. App. Ct. 1st Dist. 2011) (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)). Intermediate scrutiny 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 800. 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. System v. FCC*, 512 U.S. 622, 664 (1994). "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). *See also FTC v. Trudeau*, 662 F.3d 947, 952-53 (7th Cir. 2011) (in commercial speech case, intermediate scrutiny requires the government to "show that (1) there is a substantial interest supporting the restriction, (2) the restriction directly advances that substantial interest, and (3) the restriction is 'narrowly drawn'").

Importantly, intermediate scrutiny places the onus on the State — "both the burden of production and persuasion" — to demonstrate that a speech restriction is constitutional. *J & B Entm't, Inc. v. City of Jackson, Miss.*, 152 F.3d 362, 370-71 (5th Cir. 1998). Whereas the challenger normally bears the burden of proving a law is unconstitutional, *People v. Madrigal*, 241 Ill. 2d 463, 466 (Ill. 2011), in a First Amendment challenge, intermediate scrutiny shifts the burden to the State to "prov[e] the constitutionality of its actions . . . when [it] restricts speech." *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 170 (2002) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)). *See also Trudeau*, 662 F.3d at 953 ("[I]t is the [government's] burden to show" that each requirement of intermediate scrutiny is satisfied.); *Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir. 2002) ("In 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."); *Deegan v. City of Ithaca*, 444 F.3d 135, 142 (2d Cir. 2006) ("In a First Amendment challenge, the government bears the burden of showing that its restriction of speech is justified under [intermediate scrutiny].") (quoting *United States v. Doe*, 968 F.2d 86, 90 (D.C. Cir. 1992)). Thus, Mr. Clark need not prove the Eavesdropping Statute violates the First Amendment; to the contrary, the State must conclusively show it does not.[5]

[5] The State does not contest the burden of proof under intermediate scrutiny. The State cites *Madrigal* and *Hollins* for the proposition that Mr. Clark bears the burden of proving the Eavesdropping Statute violates substantive due process under the *rational basis test*, *see* State's Br. at 9, but provides no authority to refute the State's burden under *intermediate scrutiny*.

I.C. The Eavesdropping Statute fails intermediate scrutiny as applied to Mr. Clark.

The Eavesdropping Statute fails both prongs of intermediate scrutiny as applied to Mr. Clark. It fails the important purpose prong because extending the scope of the Statute to prohibit the recording of non-private conversations serves no legitimate governmental interest, let alone an important one. It also fails the substantially related prong because, by extending the Statute to encompass non-private conversations, the legislature obliterated the fit between the Statute's ends and its means.

I.C.1. Facilitating prosecution by eliminating the State's constitutionally required narrow tailoring is not a legitimate much less important purpose.

Restrictions on audio recording such as the Eavesdropping Statute must serve an "an important governmental interest." *Masterson*, 2011 IL 110072 at **¶24**; *see also Alvarez*, 679 F.3d at 605 (there must be "an important public-interest justification for the challenged regulation"). In this case, the State fails to identify any legitimate purpose whatsoever for restricting the recording of conversations which the parties themselves do not intend to be private. It is the State's burden to establish an *important* governmental purpose, but the only justification offered by the State for prohibiting the recording of non-private conversations is to avoid the State's necessity of proving at trial that the conversation was private. The State concedes the purpose of the Eavesdropping Statute is to protect conversational privacy among Illinois citizens, a goal which is not furthered by policing the recording of conversations which lack an expectation of privacy to begin with. *See* State's Br. at 8, 12-13 ("[The] recording . . . of conversations that the parties *intended to be private* . . . [is the] evil that the General Assembly sought to prevent [with the Eavesdropping Statute].") (emphasis added). The Eavesdropping Statute was

amended to encompass non-private conversations despite the fact that the recording of non-private conversations is *not* "the evil that the General Assembly sought to address." *Id.* at 12. The scope of the Statute was expanded only because, according to the State, "it can be difficult to determine . . . whether the parties to a conversation intended it to be private, let alone whether the circumstances under which they spoke justified the expectation." State's Br. at 12-13; *see also id.* at 25 (similar).

Broadening a speech regulation to criminalize admittedly innocent conduct simply to facilitate prosecution is neither an important purpose nor a legitimate one. Such machinations fly in the face of the First Amendment's requirement of narrow tailoring, as discussed below. Thus, the sole purpose offered by the state does not rise to the level of an "an important governmental interest." *Masterson*, 2011 IL 110072 at **¶24**. Because the State fails to identify a sufficient purpose to justify prohibiting the recording of non-private conversations, the Eavesdropping Statute fails intermediate scrutiny as applied to Mr. Clark. *See Alvarez*, 679 F.3d at 605; *Trudeau*, 662 F.3d at 952-53; *Deegan*, 444 F.3d at 142.[6]

I.C.2. The means of the Eavesdropping Statute do not fit its ends.

The Eavesdropping Statute also must be tailored such that it is "substantially related" to its ultimate purpose with a "reasonably close fit between the law's means and its ends." *Masterson*, 2011 IL 110072 at **¶24**; *Alvarez*, 679 F.3d at 605. At a minimum,

[6] The result might be different as to the first prong of intermediate scrutiny if the State identified a valid reason to criminalize the recording of non-private conversations (although in all events the Eavesdropping Statute would still fail intermediate scrutiny because it is not reasonably tailored to protecting conversational privacy). But it was the State's burden to demonstrate such a purpose and it has failed to do so. The State's silence shows that any other conceivable or theoretical purpose for restricting the recording of non-private conversations is not, in fact, an actual governmental interest capable of justifying the Eavesdropping Statute in these circumstances.

this means the "regulatory technique" chosen by the legislature must be "in proportion to the interest served" by the Statute. *Davis*, 408 Ill. App. 3d at 749 (quoting *Central Hudson*, 447 U.S. at 564). Under intermediate scrutiny, speech restrictions must be "narrowly drawn" and not "substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800. The Eavesdropping Statute is not adequately tailored to its purpose and fails intermediate scrutiny.

Unrelated conduct. The purpose of the Eavesdropping Statute is to protect conversational privacy but it expressly punishes the recording of conversations that are not private. *See* § 5/14-1(d) (Statute applies "regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation"); State's Br. at 12-13 (the purpose of the Statute is to protect conversational property but it intentionally targets conduct unrelated to that purpose). "By definition, a person cannot have a reasonable expectation of privacy in public matters." *People v. Bailey*, 232 Ill. 2d 285, 291 (Ill. 2009). In general, "conversations in the open [are] not . . . protected against being overheard, [and] the expectation of privacy . . . would be unreasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The Eavesdropping Statue prohibits recording non-private conversations even though they may be overheard by others. Prohibiting the recording of non-private conversations does not protect conversational privacy because that which does not exist cannot be protected.

Moreover, the Eavesdropping Statute anomalously prevents individuals such as Mr. Clark from recording their own non-private conversations for their own benefit, even though they may be overheard and thus recorded by strangers without the knowledge or

consent of the parties to the conversation. To be sure, the Eavesdropping Statute prohibits all non-consensual recording, including recording by strangers. But as a practical matter, if the parties choose to conduct a conversation in a non-private manner in public places, there will generally be no way for them to know if others are listening or recording. As the Seventh Circuit put it, while eavesdropping on "*private* communications . . . clearly implicates recognized privacy expectations," "these privacy interests are not at issue here." *Alvarez*, 679 F.3d at 605 (emphasis added).

No reasonable fit. As the Seventh Circuit observed, "by legislating this broadly — by making it a crime to audio record any conversation, even those that are not in fact private — the State has severed the link between the eavesdropping statute's means and its end. Rather than attempting to tailor the statutory prohibition to the important goal of protecting personal privacy, Illinois has banned nearly all audio recording without consent of the parties—including audio recording that implicates no privacy interests at all." *Alvarez*, 679 F.3d at 606. Thus, "the eavesdropping statute is not closely tailored to the government's interest in protecting conversational privacy." *Alvarez*, 679 F.3d at 607.

Consent requirement. Allowing recording with the consent of the parties being recorded does not make the Eavesdropping Statute's means proportional to its ends as applied here. It will often be impractical to obtain consent to record non-private conversations, either because the speakers are inaccessible or because they refuse. The consent requirement thus operates as a de facto ban on recording many non-private conversations. It allows speakers to unilaterally override the First Amendment rights of

those who wish to record non-private conversations, even though the speakers themselves have no countervailing privacy interest in such conversations.

Secret vs. open recording. The State argues that *Alvarez* is inapposite and the First Amendment is inapplicable in these circumstances because Mr. Clark's recording was allegedly surreptitious rather than open. *See* State's Br. at 18-19. That is incorrect. The Seventh Circuit specifically stated in *Alvarez*, "[w]e are not suggesting that the First Amendment protects only *open* recording." *Alvarez*, 679 F.3d at 606-07 n.13 (emphasis in original). Indeed, an audio recording plays the same critical role in the process of creating expression, and thus advancing accountability, whether the recording is open or secret. Here, Mr. Clark sought to create a true and accurate record of a public judicial proceeding in which he was representing himself without the assistance of counsel or the benefit of a court reporter. Likewise, as a *pro se* litigant, he wanted to create a true and accurate record of his conversation about his case with the opposing counsel, an officer of the court and a trained professional, while standing in the courthouse hallway outside this proceeding. If he had his own attorney, he would not even have been talking to the opposing attorney. In both cases, his goal was to facilitate his access to the courts. *See Williams v. Illinois State Scholarship Comm'n*, 139 Ill. 2d 24, 44 (Ill. 1990) ("[L]egal rights which a litigant might seek to exercise or protect exist only to the extent they are enforceable through the court system. Depriving a litigant of the opportunity to use the courts effectively makes these legal rights worthless."). Moreover, requiring that non-private conversations must be recorded "openly" would be unrealistic and impractical because the term "open" is vague and ambiguous. Must a party recording a public conversation or event hold a sign over his head for the duration of the recording? Is

holding the recording device in plain view enough? Is a cell phone held at someone's side in plain view? Such questions illustrate why an "open" recording requirement for non-private conversations is impractical and why the touchstone of privacy from recording must instead be a coterminous expectation of conversational privacy.

The Seventh Circuit observed that secret recording "may make a difference in the intermediate-scrutiny calculus because surreptitious recording brings stronger privacy interests into play." *Alvarez*, 679 F.3d at 606-07 n.13. Here, any secrecy of recording would not make any difference, because all other considerations clearly demonstrate that the recorded conversations were not private: the recorded parties were public and quasi-public officials; there was an inherently and obviously adverse legal relationship between Mr. Clark (a pro se civil litigant) and Ms. Thomas (the lawyer opposing him); the site of recording was an open courtroom and a public courthouse hallway, where passersby could easily listen to the pertinent conversations; and no other factors indicate that any party to these conversation thought they were private.

* * *

In sum, the Eavesdropping Statute fails intermediate scrutiny as applied to Mr. Clark because the State has not met its burden to show an important governmental purpose to justify restricting the recording of non-private conversations, and, independently, because here the Statute is not reasonably tailored to its ultimate purpose. Because the Eavesdropping Statute is unconstitutional as applied to Mr. Clark, the Court should affirm the dismissal of Mr. Clark's Indictment, and need not invalidate the Statute on its face.

II. The Eavesdropping Statute also violates substantive due process as applied to Mr. Clark

Alternatively, the Eavesdropping Statute violates substantive due process as applied for much the same reason it violates Mr. Clark's First Amendment rights, and also because the Statute punishes wholly innocent conduct. This "as applied" conclusion turns entirely on the particular facts at issue here: Mr. Clark's innocent audio recording of judicial proceedings of public concern, for purposes of making a true and accurate record and thereby advancing his access to the courts. This "as applied" conclusion need not consider any other possible applications of the Eavesdropping Act to facts not at issue here. The Illinois courts have addressed "as applied" challenges to criminal prosecutions on substantive due process grounds, examining just the particular actions of the accused defendant. *See, e.g.*, *People v. Williams*, 394 Ill. App. 3d 286, 291-92 (Ill. App. 1st Dist. 2009). Constitutional challenges to a criminal statute may be raised at any time. *People v. Wright*, 194 Ill. 2d 1, 23 (Ill. 2000).

As explained above, the application of the Eavesdropping Act to Mr. Clark burdens his fundamental rights. Thus, under substantive due process analysis, this application of the Eavesdropping Act must be subjected to heightened judicial scrutiny. As explained above, this application of the Eavesdropping Act fails such scrutiny.

Even if the application of the Eavesdropping Act to Mr. Clark did not burden his fundamental rights, substantive due process would still require that this application of the Eavesdropping Act must "bear[] a reasonable relationship to a public interest to be served," and that the "means adopted" are "a reasonable method of accomplishing the desired objective." *Madrigal*, 241 Ill. 2d at. This is the so-called "rational basis test." *Id*. A "statute fails the rational basis test [if] it does not represent a reasonable method of

preventing the targeted conduct." *Id*. at 468. Rational basis review is more deferential than intermediate scrutiny under the First Amendment. Nevertheless, in this case, the chasm between the Eavesdropping Statute's ends and its means — protecting conversational privacy by barring the recording of non-private conversations — is so wide that it lacks any rational basis and fails even under the more lenient rationality standard. *See supra* § I.C.2.

Moreover, this Court has specifically held that a statute lacks a rational basis and therefore violates substantive due process if it "potentially subjects wholly innocent conduct to criminal penalty without requiring a culpable mental state beyond mere knowledge." *Madrigal,* 241 Ill. 2d at 467. Mr. Clark's substantive due process argument is thus independent and distinct from his First Amendment argument, in that a statute which punishes wholly innocent conduct violates substantive due process regardless of its overall fit or tailoring. For example:

In *Madrigal,* an identity theft statute violated substantive due process because it "would potentially punish . . . doing a computer search through Google . . . or through a social networking site such as Facebook," or "such innocuous conduct as . . . using the internet to look up how [a] neighbor did in the Chicago Marathon." 241 Ill. 2d at 471-72.

In *People v. Carpenter*, 228 Ill. 2d 250, 269 (Ill. 2008), a statute prohibiting hidden compartments in motor vehicles violated substantive due process, even though the statute required knowledge of the hidden compartment, because it nevertheless "potentially criminalizes innocent conduct" in that "the contents of the compartment do not have to be illegal for a conviction to result."

In *Wright*, 194 Ill. 2d at 28, a statute requiring junk yards to maintain certain records violated substantive due process because "even a slight lapse in record keeping . . . with no criminal purpose may be punished," such as, for example, "fail[ing] to record the color of a single vehicle . . . [due to] a disability, family crisis, or incompetence."

In *People v. Zaremba*, 158 Ill. 2d 36, 38-42 (Ill. 1994), a statute addressing theft of police property violated substantive due process because it did "not require a culpable mental state" and therefore "a police evidence technician who took from a police officer for safekeeping the proceeds of a theft which the officer had recovered" could be punished under the statute.

In *People v. Wick*, 107 Ill. 2d 62, 66 (Ill. 1985), an aggravated arson statute providing increased penalties if "a fireman . . . is injured as a result of the fire or explosion" violated substantive due process because it might punish "innocent conduct" if, for example, "a farmer [] demolishes his deteriorated barn to clear space for a new one . . . [and] a fireman standing by is injured at the scene."

And in *People v. Tolliver*, 147 Ill. 2d 397, 401-02 (Ill. 1992), this Court read a "criminal purpose" mens rea requirement into a statute prohibiting possession of vehicle title "without complete assignment," because the statute would otherwise unconstitutionally punish innocent conduct such as, for example, a wife signing a title at home and giving it to her husband to take to a buyer, or a vehicle owner signing a title prior to a potential buyer backing out of the sale.

Thus, even if the means of the Eavesdropping Statute fit the Statute's ends of protecting conversational privacy, which they do not, the Statute would still violate substantive due process as applied to Mr. Clark because his alleged recordings lacked

criminal intent. *Amicus* for the State is therefore wrong to suggest "there was no need for the court to consider defendant's due process argument in the first place." *See* Brief for Amicus Curiae The Illinois State's Attorneys Association in Support of Plaintiff-Appellant ("State's Amicus Br.") at 11 (mistakenly conflating Mr. Clark's First Amendment and substantive due process arguments). Substantive due process prevents the state from sweeping in wholly innocent computer searches in attempting to prevent identify theft; wholly innocent omissions in attempting to enforce recording keeping requirements aimed at preventing auto theft; or wholly innocent possession in attempting to prevent property theft. *See Madrigal*, 241 Ill. 2d at 471-72; *Wright*, 194 Ill. 2d at 28; *Zaremba*, 158 Ill. 2d at 38-42. It likewise prevents the state from punishing a lawfully set fire that unexpectedly results in injuries, and from punishing the innocent possession of potential contraband receptacles if not used for smuggling. *Wick*, 107 Ill. 2d at 66; *Carpenter*, 228 Ill. 2d at 269. In each of these cases, this Court found a constitutional violation where the broad language of a criminal statute encompassed innocent conduct wholly unrelated to the purpose of the statute.

The same is true here. The Eavesdropping Statute violates substantive due process as applied to Mr. Clark by punishing the innocent recording of non-private conversations, unrelated to the purpose of protecting conversational privacy, in order to ensure his access to the courts by making a true and accurate recording of judicial proceedings. Thus, because the Eavesdropping Statute as applied violates Mr. Clark's right to substantive due process, this Court should affirm dismissal of the Indictment and there is no need to address Mr. Clark's facial overbreadth challenge.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief conforms to the requirements of Rules 345, 341(a) and 341(b). The length of this Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 27 pages.

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CERTIFICATE OF FILING AND SERVICE

The undersigned, an attorney, certifies that before 4:00 PM on November 26, 2013, he caused the foregoing Amicus Brief to be filed with the Supreme Court of Illinois by delivering said Reply Brief to FedEx, with delivery charges prepaid, for next business-day delivery, addressed to:

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The undersigned further certifies that on November 26, 2013, he caused three copies of the foregoing Amicus Brief to be served upon counsel for Plaintiff-Appellant and Defendant-Appellee by delivering said copies to FedEx, with delivery charges prepaid, for next business-day delivery, addressed to:

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