

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

PROJECT VERITAS ACTION FUND,)
)
 Plaintiff,)
)
 v.)
)
 DANIEL F. CONLEY, IN HIS OFFICIAL)
 CAPACITY AS SUFFOLK COUNTY)
 DISTRICT ATTORNEY,)
)
 Defendant.)

C.A. No. 1:16-cv-10462-PBS

**FIRST AMENDED VERIFIED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff Project Veritas Action Fund respectfully brings this action for declaratory and injunctive relief and complains as follows:

INTRODUCTION

1. Project Veritas Action Fund (“PVA”) is a national media organization on the forefront of undercover investigative journalism.
2. Because Massachusetts maintains an unconstitutional recording law, PVA is prohibited from exercising its First Amendment right to engage in undercover newsgathering and journalism. *See G.L. c. 272, §99.*
3. PVA’s undercover investigative journalism reports have averaged over 100,000 views online and PVA’s stories are often reported by other news outlets. Through its undercover

investigative journalism, PVA is able to educate and inform the public about newsworthy topics of public concern and government accountability.

4. However, PVA's undercover newsgathering and reporting could result in criminal charges and civil lawsuits if undertaken in Massachusetts. PVA would focus its efforts on various issues within the Commonwealth, but is unconstitutionally restrained by an overbroad statute prohibiting the interception and disclosure of oral communications. *See* G.L. c. 272, §99.

5. Based on past experience, PVA has not uncovered newsworthy matters to report by publicly announcing its recording efforts and seeking the consent of all parties to be recorded. Rather, PVA has uncovered newsworthy matters to report through secretive recording of discussions, often in areas held open to the public such as voting places, sidewalks, and hotel lobbies. Without utilizing such techniques, PVA is unable to exercise its First Amendment rights to engage in undercover newsgathering and journalism in Massachusetts.

6. Across the United States, the First Amendment interests in free speech and a free press have provided ample protection to investigate and report issues of public concern. This protection includes preventing interception laws from going beyond the legitimate protection of individual privacy. Court decisions in the United States Court of Appeals for the First Circuit have curtailed such abuses on a case-by-case basis. *See, e.g., Jean v. Mass. State Police*, 492 F.3d 24, 29–30 (1st Cir. 2007) (recognizing First Amendment right to publish recording of illegally intercepted communications over the prohibition in G.L. c. 272, §99); *Glik v. Cuniffe*, 655 F.3d 78, 82–84 (1st Cir. 2011) (recognizing “a constitutionally protected right to videotape police carrying out their official duties in public” under the First Amendment); *see also Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014). Although this precedent is welcome, it does not guarantee

the protection of additional instances where surreptitious recording would be protected under the First Amendment. Massachusetts maintains a facially overbroad eavesdropping law that must be declared unconstitutional to prevent a prior restraint on PVA's future efforts within Massachusetts. *See, e.g., Commw. v. Manzelli*, 68 Mass. App. Ct. 691, 694 (2007).

JURISDICTION AND VENUE

7. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiff's claims arise under the First and Fourteenth Amendments to the Constitution of the United States. This Court also has jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, and the Civil Rights Act, 42 U.S.C. § 1983.

8. This Court has jurisdiction to award attorneys' fees, in its discretion, in this action. 42 U.S.C. § 1988(b).

9. Venue is proper in this Court under 28 U.S.C. §§ 1391(b)(1)–(2) because Defendant resides in the District of Massachusetts and all of the events or omissions giving rise to the claims occurred in this division.

PARTIES

10. Plaintiff PVA is a nonprofit corporation organized under section 501(c)(4) of the Internal Revenue Code. It is headquartered in Mamaroneck, New York.

11. Defendant Daniel F. Conley is the Suffolk County District Attorney, whose office is located in Boston, Massachusetts. District Attorney Conley has the power to prosecute for illegal interception of oral communications under G.L. c. 272, §99 that occurs within the office's jurisdiction. *See* G.L. c. 12, §13.

STATEMENT OF FACTS

12. Massachusetts law requires consent of all persons who are party to a conversation for PVA to legally record, rather than illegally intercept, conversations. *See* G.L., c. 272, §99(B)(4) (“The term ‘interception’ means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person *other than a person given prior authority by all parties to such communication . . .*” (emphasis added)).

13. PVA’s undercover newsgathering techniques involve intercepting oral communications of persons using intercepting devices as defined in statute. *See* G.L. c. 272, §§99(B)(2) (defining “oral communication”); (B)(3) (defining “intercepting device”); (B)(4) (defining “interception”); (B)(13) (defining “person”).

14. PVA does not engage and has no intention of engaging in the interception of wire communications as defined in the statute. *See* G.L. c. 272, §99(B)(1).

15. PVA’s undercover newsgathering techniques would subject it to felony prosecution under Massachusetts law for prohibited interception of oral communications. G.L. c. 272, §99(C)(1).

16. PVA’s newsgathering techniques would subject it to misdemeanor prosecution under Massachusetts law for prohibited possession of interception devices. G.L. c. 272, §99(C)(5).

17. PVA’s news reporting would subject it to misdemeanor prosecution under Massachusetts law for prohibited disclosure of oral communications. G.L. c. 272, §99(C)(3).

18. A single PVA reporter's newsgathering and news reporting activities would subject most of PVA's staff to conspiracy or accessory charges that carry the same penalties for prohibited interception, prohibited possession of interception devices and prohibited disclosure of oral communications. G.L. c. 272, §99(C)(6).

19. PVA's newsgathering and news reporting activities would subject it to civil lawsuits under Massachusetts law from aggrieved persons, subjecting it to claims for actual damages, punitive damages, and attorney's fees. G.L. c. 272, §99(B)(6); (Q).

20. PVA and its respective journalists do not qualify for any exemptions under the statute. *See* G.L. c. 272, §99(B)(4), (D).

21. PVA would like to engage in undercover investigative journalism projects in Massachusetts. In particular, PVA would like to investigate instances of landlords taking advantage of housing shortages in Boston where students may live in unsafe and dilapidated conditions.

22. PVA would like to investigate and report on the public controversy over "sanctuary cities" in Massachusetts. But for the current prohibition under Section 99, it would secretly investigate and record interactions with Boston government officials in the discharge of their duties in public places, including police officers, to learn more about their concerns about immigration policy and deportation. Further, it would secretly investigate and record government officials who are discharging their duties at or around the State House in Boston and other public spaces to learn about their motives and concerns about immigration policy and deportation.

PVA's intention is that through secretly recorded, informal discussions with police officers and

legislative representatives that it will obtain more information about the impact of immigration policies in Massachusetts and share that with the public to better educate it.

23. In 2014, through undercover newsgathering, PVA uncovered a stark contrast between the public statements of a candidate for United States Senate in Kentucky and the statements of her campaign staff. *See Grimes' campaign workers caught on hidden camera: "It's a lying game"*, YOUTUBE, Oct. 6, 2014, https://www.youtube.com/watch?v=A1N3rbwRA_k. This exposé provided the citizens of Kentucky with relevant information about a candidate seeking election to federal office.

24. In September 2015, PVA exposed campaign finance violations in New York using undercover techniques. *See HIDDEN CAM: Hillary's National Marketing Director Illegal Accepting Foreign Contribution*, YOUTUBE, Sept. 1, 2015, <https://www.youtube.com/watch?v=-qxF7Z2N7Y4>.

25. Just one week later, PVA brought national attention to electoral malfeasance in Nevada using similar techniques. *See Hidden Cameras Capture Clinton Campaign Staff in Nevada not Only Skirting the Law but Mocking it*, PROJECT VERITAS ACTION FUND, <http://www.projectveritasaction.com/video/hidden-cameras-capture-clinton-campaign-staff-nevada-not-only-skirting-law-mocking-it>.

26. Recently, a PVA report detailed the weaknesses of voter registration laws in New Hampshire by focusing on the surreptitiously recorded statements of government officials. Chuck Ross, *EXCLUSIVE: New O'Keefe Video Shows How Easy It Is to Commit Voter Fraud in New Hampshire*, DAILY CALLER, Feb. 2, 2016, <http://dailycaller.com/2016/02/10/exclusive-new-okeefe-video-shows-how-easy-it-is-to-commit-voter-fraud-in-new-hampshire-video/>.

27. During the pendency of this lawsuit, PVA launched a secret investigation into the wrongdoings of political operatives connected to various campaigns during the 2016 presidential election. *Rigging the Election, Video 1: Clinton Campaign and DNC Incite Violence at Trump Rallies*, YOUTUBE, Oct. 17, 2016, <https://www.youtube.com/watch?v=5IuJGHuIkzY>. In the course of this investigation, PVA uncovered evidence of serious violations of federal election law. It detailed those violations to the public in its investigations and filed an appropriate complaint with the Federal Election Commission for redress. Notably, these secret recordings were of private political actors whose actions would have an effect on the outcome of the 2016 presidential election.

28. PVA's sister organization, Project Veritas, also uncovered evidence of potential terrorism and wrongdoing during the inauguration events in Washington, DC in a separate investigation. *Hidden Camera Investigation Uncovers Groups Plotting Violence at Trump Inauguration*, PROJECT VERITAS, Jan. 16, 2017, <http://projectveritas.com/2017/01/16/part-i-hidden-camera-investigation-uncovers-groups-plotting-violence-at-trump-inauguration/>. Because the evidence Project Veritas uncovered demonstrated a likelihood of danger to inaugural participants, it reached out to the Joint Terrorism Task Force and aided members of the Federal Bureau of Investigation, Secret Service, and DC Metro Police to help prevent it. To date, the DC Metro Police have secured three successful convictions based on the undercover, secret recordings created about private individuals. See Andrea Noble, *Police: Arrested activist featured in Project Veritas inauguration video*, WASH. TIMES, Jan. 20, 2017, <http://www.washingtontimes.com/news/2017/jan/20/police-arrested-activist-scott-ryan-charney-featur/>.

29. Undercover investigative journalism employing surreptitious recording is the sole method through which PVA is able to uncover newsworthy matters concerning government fraud, abuses in the political process and other areas of public concern. In a substantial amount of instances, the public's interest in being informed about such matters outweighs the government's interest in prohibiting all surreptitious newsgathering. Indeed, on a national basis, undercover journalism is responsible for uncovering police corruption, environmental pollution, poor airport security, and white collar crime.

30. PVA would like to undertake undercover investigation of public issues in Boston and throughout Massachusetts, including: (1) public officials discharging their duties in public spaces; (2) public officials in places with no expectation of privacy; and (3) private individuals in places with no expectation of privacy.

COUNT I

The Prohibition in G.L. c. 272, §99 Against Intercepting the Oral Communications of Government Officials in the Discharge of Their Duties in a Public Place is Unconstitutional Facially and as Applied to PVA.

31. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press[.]” U.S. CONST. amend. I. “[T]he First Amendment is applicable to the States through the Fourteenth [Amendment.]” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978). “The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within [the] principles [of the First Amendment].” *Glik*, 655 F.3d at 82.

32. “In the First Amendment context,” the Supreme Court “recognizes ‘a . . . type of facial challenge,’ whereby a law may be invalidated as overbroad if ‘a *substantial number* of its

applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.” *U.S. v. Stevens*, 559 U.S. 460, 473 (2010), citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (emphasis added).

33. G.L. c. 272, §99 prohibits PVA from recording and disclosing any conversation in Massachusetts without the consent of all parties, including government officials engaged in official duties in a public place. The Commonwealth's courts have affirmed this interpretation on numerous occasions. *Manzelli*, 68 Mass. App. Ct. at 694 (allowing conviction for public recording of police officers); *Commw. v. Hyde*, 434 Mass. 594, 605 (2001) (“Secret tape recording by private individuals has been *unequivocally banned* . . . unless and until the Legislature changes the statute[.]” (emphasis added)).

34. As applied, Section 99 fails First Amendment scrutiny by prohibiting the secret recording of government officials, including law enforcement officers, in the discharge of their duties in a public space. This infringes upon Plaintiff's articulated First Amendment protected activities as detailed in this First Amended Verified Complaint. *See, e.g.*, ¶¶22-27.

35. While prior First Circuit precedent has afforded limited protection on a case-by-case basis, particularly for the recording of police officers in public spaces, these cases do not protect PVA's First Amendment rights to engage in future exposés that would surreptitiously record other government officials in public areas.

36. The law “create[s] a criminal prohibition of alarming breadth.” *Stevens*, 559 U.S. at 474. It is unconstitutional, facially and as applied to PVA.

COUNT II

G.L. c. 272, §99's Prohibition Against Intercepting Oral Communications of Individuals Having No Reasonable Expectation of Privacy is Unconstitutionally Overbroad on Its Face and as Applied to PVA.

37. Even relying on the First Circuit's previous recognition of First Amendment protection for recording police officers engaged in their official duties in public places, PVA remains unconstitutionally burdened by G.L. c. 272, §99.

38. PVA is prohibited from secretly recording oral communications made in any conversation—even when the communications occur in circumstances with no reasonable expectation of privacy—without prior authority of all parties. G.L. c. 272, §§99(B)(2), (B)(4), (C)(1).

39. PVA is prohibited from secretly recording speeches made in public places by non-government officials without prior authority by the speaker. G.L. c. 272, §§99(B)(2), (B)(3), (B)(4), (C)(1).

40. PVA is prohibited from simply possessing intercepting devices and “evincing an intent to commit an interception not permitted or authorized by this section[.]” As discussed, despite First Circuit precedent, PVA remains “unequivocally banned” from engaging in all of its undercover newsgathering activities under the statute. *Hyde*, 434 Mass. at 605.

41. The unequivocal ban in G.L. c. 272, §99 cannot be overcome by prosecutorial discretion. *Stevens*, 559 U.S. at 480 (“[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”)

42. PVA retains the First Amendment right to publish information of public concern about political processes through its undercover journalism about governmental and non-governmental individuals involved in investigations. PVA should likewise be afforded prepublication protection as it gathers such information.

43. G.L. c. 272, §99 fails to survive constitutional scrutiny, prohibiting interception far beyond conversations undertaken with a reasonable expectation of privacy, and is invalid under the First Amendment, facially and as applied to PVA.

PRAYER FOR RELIEF

Wherefore, PVA prays for the following relief:

1. A declaratory judgment that G.L. c. 272, §99(B)(4), (C)(1), (C)(3), (C)(5) and (C)(6) are unconstitutional on their face and as applied to PVA.
2. Preliminary and permanent injunctive relief pursuant to 42 U.S.C. § 1983 against enforcement of G.L. c. 272, §99(B)(4), (C)(1), (C)(3), (C)(5) and (C)(6) against activity that constitutes the interception of oral communications of government officials engaged in their duties in public places.
3. Preliminary and permanent injunctive relief pursuant to 42 U.S.C. § 1983 against enforcement of G.L. c. 272, §99(B)(4), (C)(1), (C)(3), (C)(5) and (C)(6) against activity that constitutes the interception of oral communications of persons when such communications occur in circumstances with no reasonable expectation of privacy.
4. Plaintiffs' reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988 or any applicable statute or authority, and further relief this Court may grant in its discretion.
5. Any other relief that the Court deems just and appropriate.

Respectfully submitted,

PROJECT VERITAS ACTION FUND,

By its attorneys,

/s/ Stephen R. Klein

Stephen R. Klein (Pro Hac Vice)

500 Madison Street #419

Alexandria, VA 22314

734.233.1705 [Tel.]

stephen.klein.esq@gmail.com

admitted pro hac vice

Daniel J. Kelly, BBO# 553926

dkelly@mccarter.com

Gregory D. Cote, BBO# 645943

gcote@mccarter.com

McCarter & English, LLP

265 Franklin Street

Boston, MA 02110

617-449-6500 – o

617-326-3098 – f

Benjamin Barr (Pro Hac Vice)

12519 Carrington Hill Drive

Gaithersburg, MD 20878

202.595.4671 [Tel.]

benjamin.barr@gmail.com

admitted pro hac vice

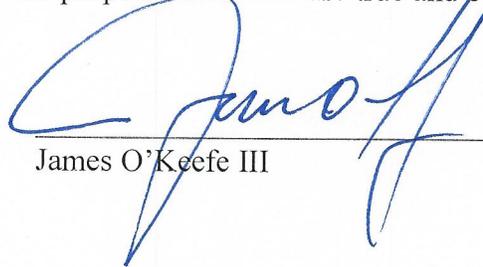
April 7, 2017.

PROJECT VERITAS ACTION FUND VERIFICATION

I, James O'Keefe III, declare as follows:

1. I am President of Project Veritas Action Fund.
2. Project Veritas Action Fund is headquartered in Mamaroneck, New York. Its mailing address is 1214 West Boston Post Road #156, Mamaroneck, NY 10543.
3. I have personal knowledge of PVA's activities, including those set out in this Verified Complaint, and if called upon to testify I would competently testify as to the matters stated herein.
4. I verify under penalty of perjury under the laws of the United States of America that the factual statements contained in this First Amended Verified Complaint concerning PVA's existing and proposed activities are true and correct.

Executed on April 6, 2017.



James O'Keefe III

CERTIFICATE OF SERVICE

I, Stephen R. Klein, hereby certify that on this 7th day of April, 2017, the foregoing First Amended Verified Complaint was electronically filed with the Clerk of the Court using the CM/ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Stephen R. Klein