Case No. 114852

IN THE
SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. ANNABEL MELONGO, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County No. 10 CR 8092 Honorable Steven J. Goebel, Judge Presiding

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

Harvey Grossman
Adam Schwartz
ROGER BALDWIN FOUNDATION
OF ACLU, INC.
180 North Michigan Avenue #2300
Chicago, IL 60601
(312) 201-9740
hgrossman@ACLU-il.org
aschwartz@ACLU-il.org

Richard J. O'Brien
Sean Siekkinen
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000
(312) 853-7036 (fax)
robrien@sidley.com
ssiekkinen@sidley.com

Attorneys for Amicus Curiae American Civil Liberties Union of Illinois

POINTS AND AUTHORITIES

Page

INTEREST OF AMICI CURIAE 1

BACKGROUND 1

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. The Eavesdropping Act violates the First Amendment as applied to Ms. Melongo. 8

I.A. The First Amendment generally protects the recording and publication by citizens of their non-private conversations with on-duty public officials, including the conversations recorded by Ms. Melongo. 9

I.B. Intermediate scrutiny requires that the application of the Eavesdropping Statute must be sufficiently tailored with a reasonable fit between the Statute's means and its ends. 13

I.C. The Eavesdropping Statute is not reasonably tailored as applied to Ms. Melongo. 14

II. The Eavesdropping Statute also violates substantive due process as applied to Ms. Melongo 17

CONCLUSION 21

INTEREST OF AMICI CURIAE

The American Civil Liberties Union of Illinois ("ACLU") is a statewide, nonprofit, nonpartisan organization with more than 25,000 members and supporters dedicated to the principles of liberty and equality embodied in the Illinois and United States Constitutions. It is the state affiliate of the American Civil Liberties Union, a nationwide organization with more than 500,000 members. The ACLU is committed to protecting the freedoms guaranteed by the First and Fourth Amendments, and has 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-

[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.

Webster Dictionary, available at http://www.merriam-webster.com/dictionary/eavesdrop. Like similar laws in other states, the Illinois Eavesdropping Statute generally requires some manner of consent to record the conversations of others. Under § 5/14-2(a)(1), "[a] person commits eavesdropping when [she] . . . [k]nowingly 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 she obtains "the consent of *all the parties* to such conversation or electronic communication . . ." (emphasis added). A person also commits eavesdropping if she "[u]ses or divulges . . . any information which [s]he knows or reasonably should know was obtained through the use of an eavesdropping device." 735 ILCS § 5/14-2(a)(3). 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 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 (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 and publication 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 *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, and the use or dissemination of any such recording, even if the parties do not intend for their conversation to be private among themselves – for instance, a conversation with a state officer regarding a matter of public concern.

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 Annabel Melongo, an immigrant from Cameroon, was charged with six counts of eavesdropping in violation of §§ 5/14-2(a)(1) and (a)(3). *See* C30-35, Indictment (April 2010). The charges arose from several telephone conversations Ms. Melongo recorded between herself and the Cook County Court Reporter's office between December 15 and 21, 2009. *Id*. The conversations related to the transcript of Ms. Melongo's June 18, 2008 arraignment on charges of computer tampering in another criminal case. *See* C48, Defendant's Motion to Dismiss Eavesdropping Charge at 1 (Aug. 11, 2010). The transcript stated that Ms. Melongo was present in court for her arraignment when Ms. Melongo claims she was not. *Id*.

Believing she had been unfairly prosecuted, and that the transcript of her arraignment contained a material error, Ms. Melongo called the Court Reporter's office in

an attempt to fix the error. *Id*. The Court Reporter's office informed Ms. Melongo it would not change the transcript. *See* R. at Q-25. Ms. Melongo therefore took the precaution of recording her subsequent calls with the Court Reporter's office. *Id*. C417-429, Transcripts of Conversations with Court Reporter's Office. Her apparent purpose in recording these conversations was to accurately document what she believed was the poor quality of public services provided by that office, thus advancing public scrutiny of those services. *See* C56. She posted these recordings to her website in order to notify the public of this problem. *See* C33-35, Indictment (April 2010).

Ms. Melongo was charged with three counts of "knowingly and intentionally [using] an eavesdropping device, to wit: an audio recording device, for the purpose of recording a conversation, to wit: recording a conversation conducted by telephone between Annabel K. Melongo and Pamela Taylor of the Cook County Court Reporter's Office . . ." C30-32. She was also charged with three counts of "us[ing] or divulg[ing] any information which she knew or reasonably should have known was obtained through the use of an eavesdropping device, to wit: devluged [sic] an audio recording of a conversation between Annabel K. Melongo and Pamela Taylor of the Cook County Court Reporter's Office in the form of an audio file and accompanying transcript and published said file and transcript to [her] website . . ." C33-35.

At trial, Ms. Melongo did not claim that she obtained consent from the Court Reporter's office to record their conversations. Rather, she argued the Eavesdropping Statute was unconstitutional. *See* C77, Defendant's Motion to Dismiss at 1 (Dec. 13, 2010). The court denied her motion to dismiss, the jury was unable to reach a unanimous verdict, and the court declared a mistrial on January 14, 2011. R. at R-16. Ms. Melongo

was incarcerated for more than a year at the Cook County Jail while awaiting trial on the eavesdropping charges. *See* C127, Motion to Appoint Standby Counsel or to Mandate House Arrest (noting that Ms. Melongo "has been incarcerated at Cook County Jail since April 14, 2010"); C132, Electronic Monitoring Order (Oct. 13, 2011) (releasing Ms. Melongo subject to electronic monitoring).

Ms. Melongo subsequently moved to dismiss the charges against her because, she argued, the Eavesdropping Statute violated her First Amendment and substantive due process rights, both facially and as applied. *See* C172-83, Amended Motion to Declare Statute Unconstitutional and to Dismiss (Nov. 30, 2011). On March 19, 2012, the trial court heard oral arguments from the State and Ms. Melongo, acting *pro se*, on the constitutionality of the Eavesdropping Statute under the First Amendment and under the Due Process Clause. R. at EEE-1 to 35. Two months later, on May 8, 2012, the United States Court of Appeals for the Seventh Circuit issued its opinion in *Alvarez*, holding that the Eavesdropping Statute likely violated the First Amendment as applied to audio recording police officers in the course of their public duties, and commanding the issuance of a preliminary injunction against enforcement of the Statute in such cases. *Alvarez*, 679 F.3d at 583.

On June 19, 2012, the trial court heard renewed arguments on Ms. Melongo's motion in light of *Alvarez*. *See* R. at QQQ-1 to 19. The *Alvarez* opinion and the parties' renewed arguments strictly addressed the First Amendment implications of the Eavesdropping Statute, although Ms. Melongo briefly reiterated her request that the Statute alternatively be struck down on substantive due process grounds. *Id*. at QQQ-5. "[R]elying on [the] language" in *Alvarez*, the trial court ruled from the bench that the

Eavesdropping Statute violated the First Amendment, thus granting Ms. Melongo's motion to declare the Statute unconstitutional and to dismiss. *Id.* at QQQ-12 to 13. The court also adopted the holding in *People v. Drew*, No. 10-CR-00046 (Mar. 2, 2012), which held that that the Eavesdropping Statute was unconstitutional because it violated substantive due process. *Id.*

A month later, at Ms. Melongo's request, the trial court codified its oral ruling with a written order intended to comply with Illinois Supreme Court Rule 18 (enumerating certain procedural requirements for invalidating a statute, ordinance, or regulation). *See* C406-411, Trial Court's Order (July 26, 2012). Consistent with the parties' arguments and the court's oral ruling, one-and-a-half of the court's three pages of written analysis discussed and adopted the *Alvarez* opinion, finding the Eavesdropping Statute unconstitutional on First Amendment grounds. *See* C408-410 (reiterating that "this court issued an oral opinion granting defendant's motion to declare the Illinois Eavesdropping Statute . . . unconstitutional," and "in making this decision, this court relied on [*Alvarez*] where the court held that the Statute was likely unconstitutional based on First Amendment considerations"). The court also reiterated that it was adopting Judge Sack's opinion in *Drew*, holding that the Eavesdropping Statute violated substantive due process. *See* C410. Accordingly, the court held that "the Illinois Eavesdropping Statute is unconstitutional on its face and as applied to defendant pursuant to Illinois Supreme Court Rule 18." *Id.* 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 conversations at issue here clearly were not private: the parties were an on-duty public official and a member of the general

public; the subject was a matter of public concern, namely the latter's complaints regarding the quality of public services provided by the former's office in connection with the latter's criminal prosecution; and no factors indicate that either party had any basis to believe that the conversations were private. The Circuit Court correctly found that the Eavesdropping Statute is unconstitutional as applied to Ms. Melongo because it fails intermediate scrutiny and unduly infringes Ms. Melongo's right to receive, gather, and publicize non-private information as protected by the First Amendment. Moreover, the Eavesdropping Statute violates substantive due process as applied to Ms. Melongo 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 Ms. Melongo'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 Ms. Melongo.

The Eavesdropping Statute is unconstitutional as applied to Ms. Melongo because its means are not proportional to its ends as required by intermediate scrutiny. 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"); *see also* State's Br. at 11-12. Yet as applied to Ms. Melongo, the Eavesdropping Statute enables one party in a non-private conversation to prevent those with whom she is speaking from recording her own conversation for her own benefit — even where, as here, both parties should understand the conversation to be

non-private because it involves a public official acting in the course of her official duties and relates to an open judicial proceeding of quintessential public concern. It is nonsensical to "protect" conversational privacy by preventing parties in conversations with government officials in the course of their duties from recording their own, *non-private* conversations.

Thus, the Eavesdropping Statute's means do not fit its ends. It unconstitutionally infringes Ms. Melongo's right to receive, gather, and publicize non-private information, obtained from government officials in the course of their duties 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 Ms. Melongo's case, but the First Amendment does not countenance its application to the recording or publication of the non-private conversations at issue here.

I.A. The First Amendment generally protects the recording and publication by citizens of their non-private conversations with on-duty public officials, including the conversations recorded by Ms. Melongo.

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 Enters., Inc.*, 224 Ill. 2d 390, 446 (Ill. 2006).[2] In First Amendment cases, this Court looks to federal precedent in addition to its own

[2] 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 Retail, Wholesale & Dep't 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. DiGuida*, 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").

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 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, 576-77 & n. 12 (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.

Ms. Melongo was charged with recording and publicizing several telephone conversations with Pamela Taylor, a state officer working in the Cook County Court Reporter's office. *See* C30-35. The conversations related to a perceived error in an important transcript from Ms. Melongo's ongoing criminal prosecution. As such, the conversations involved a quintessential matter of public concern. *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) (similar); *Pro v. Donatucci*, 81 F.3d 1283, 1291 (3d Cir. 1996) (similar).

The recording of such non-private conversations for information gathering purposes and subsequent publication 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

litigant such as Ms. Melongo records non-private conversations with on-duty public officials relating to her own criminal prosecution, as a matter of public concern.[3]

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)). In this case, the Eavesdropping Statute is unconstitutional as applied to Ms. Melongo for the following reasons.

[3] Moreover, given the various factors discussed above, Ms. Taylor implicitly consented to Ms. Melongo's recording. *See People v. Ceja*, 204 Ill. 2d 332, 345-51 (2003).

I.B. Intermediate scrutiny requires that the application of the Eavesdropping Statute 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. Sys., Inc. 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, 953 (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 Ent., 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, Inc. v. Vill. of Stratton*, 536 U.S. 150, 170 (2002) (quoting *United States v. Playboy Ent. Group, 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, Ms. Melongo need not prove the Eavesdropping Statute violates the First Amendment; to the contrary, the State must conclusively show it does not.

I.C. The Eavesdropping Statute is not reasonably tailored as applied to Ms. Melongo.

The Eavesdropping Statute fails intermediate scrutiny as applied to Ms. Melongo because by extending the Statute to encompass the non-private conversations at issue here, the legislature obliterated the fit between the Statute's ends and its means.

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 11-12 (the purpose of the Statute is to protect conversational privacy 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). The Eavesdropping Statue prohibits recording conversations such as those recorded by Ms. Melongo even though they are non-private due to their very nature, in this case because the conversations included an on-duty public official, and involved matters of public concern relating to the quality of public services provided by that official in the course of Ms. Melongo's ongoing criminal prosecution. Prohibiting the recording of non-private conversations does not protect conversational privacy because that which does not exist cannot be protected.

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 (original emphasis omitted). 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. Nor does the fact that Ms. Melongo recorded these conversations without Ms. Taylor's knowledge alter the analysis. 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, Ms. Melongo sought to create a true and accurate record of her dealings with a public official whom she believed to be providing inadequate public services.

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 party was an on-duty public official; there was an inherently and obviously adverse relationship between Ms. Melongo and Ms. Taylor; the subject of their conversations was Ms. Melongo's public criminal proceedings and her complaints regarding the quality of public services provided

by Ms. Taylor's office; and no other factors indicate that any party to these conversation reasonably believed they were private.

* * *

In sum, the Eavesdropping Statute fails intermediate scrutiny as applied to Ms. Melongo because the State has not met its burden to show that the Statute is reasonably tailored to its ultimate purpose. Because the Eavesdropping Statute is unconstitutional as applied to Ms. Melongo, the Court should affirm the dismissal of the Indictment, and need not address the validity of the Statute on its face.

II. The Eavesdropping Statute also violates substantive due process as applied to Ms. Melongo

Alternatively, the Eavesdropping Statute violates substantive due process as applied for much the same reason it violates Ms. Melongo'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: Ms. Melongo's innocent audio recording of non-private conversations with a government official conducting her official duties relating to criminal proceedings of public concern, for the purpose of accurately memorializing information provided by the government official. 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).

As explained above, the application of the Eavesdropping Act to Ms. Melongo burdens her 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 Ms. Melongo did not burden her 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 466. 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.

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. Ms. Melongo's substantive due process argument is thus independent and distinct from her 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 "[t]he contents of the compartment do not have to be illegal for a conviction to result."

In *People v. Wright*, 194 Ill. 2d 1, 28 (Ill. 2000), 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 (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, 64, 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 Ms. Melongo because her alleged recordings lacked the requisite criminal intent. 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 Ms. Melongo by punishing her innocent recording of non-private conversations, unrelated to the purpose of protecting conversational privacy. Thus,

because the Eavesdropping Statute as applied violates Ms. Melongo's right to substantive due process, this Court should affirm dismissal of the Indictment and there is no need to address Ms. Melongo'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 Ms. Melongo and should therefore affirm the dismissal of the Indictment.

Respectfully submitted,

Richard J. O'Brien
Sean Siekkinen
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000
(312) 853-7036 (fax)
robrien@sidley.com
ssiekkinen@sidley.com

Harvey Grossman
Adam Schwartz
ROGER BALDWIN FOUNDATION
OF ACLU, INC.
180 North Michigan Avenue #2300
Chicago, IL 60601
(312) 201-9740
hgrossman@ACLU-il.org
aschwartz@ACLU-il.org

Attorneys for Amicus Curiae American Civil Liberties Union of Illinois

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 21 pages.

_____

Sean Siekkinen

CERTIFICATE OF FILING AND SERVICE

The undersigned, an attorney, certifies that before 4:00 PM on December 6, 2013, he caused the foregoing Amicus Brief to be filed with the Supreme Court of Illinois by delivering two copies of said Amicus Brief to FedEx, with delivery charges prepaid, for next business-day delivery, addressed to:

Clerk of the Court
Supreme Court of Illinois
160 N. LaSalle Street
20th Floor
Chicago, IL 60601

The undersigned further certifies that on December 6, 2013, he delivered eighteen copies of said Brief to FedEx, with delivery charges prepaid, for next business-day delivery, addressed to:

Clerk of the Court
Supreme Court of Illinois
200 East Capitol Avenue
Springfield, IL 62701

The undersigned also caused three copies of the attached Amicus Brief to be served upon each counsel for Plaintiff-Appellant and Defendant-Appellee by delivering said copies to FedEx, with delivery charges prepaid, addressed to:

Lisa Madigan
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, IL 60601-3128
(312) 814-8812

Anita Alvarez
State's Attorney of Cook County
Alan J. Spellberg
Assistant State's Attorney
309 Richard J. Daley Center
Chicago, IL 60602
(312) 603-5496

Gabriel Bankier Plotkin
Daniel M. Feeney
Alexandra K. Block
MILLER SHAKMAN & BEEM LLP
180 North LaSalle Street #3600
Chicago, IL 60601
(312) 263-3700

Sean Siekkinen