IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 19-1586 & 19-1640

PROJECT VERITAS ACTION FUND,

Plaintiff-Appellee / Cross-Appellant,

v.

RACHAEL S. ROLLINS, in her official capacity as District Attorney for Suffolk County,

Defendant-Appellant / Cross-Appellee.

No. 19-1629

K. ERIC MARTIN & RENÉ PÉREZ,

Plaintiffs-Appellees,

v.

RACHAEL S. ROLLINS, in her official capacity as District Attorney for Suffolk County,

Defendant-Appellant.

WILLIAM G. GROSS, in his official capacity as Police Commissioner for the City of Boston,

Defendant.

On appeal from the U.S. District Court for the District of Massachusetts

BRIEF OF AMICUS CURIAE INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION IN SUPPORT OF PLAINTIFF-APPELLEES MARTIN AND PÉREZ AND SUPPORTING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that *amicus curiae*, the Institute for Constitutional Advocacy and Protection, has no parent corporations and no publicly held corporation owns 10 percent or more of their organization's stock.

/s/ Nicolas Y. Riley
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INTEREST OF AMICUS CURIAE

The mission of the Institute for Constitutional Advocacy and Protection is to use the power of the courts to defend American constitutional rights and values. Among its litigation work, the Institute regularly represents journalists and community organizations in First Amendment matters and other cases aimed at promoting public accountability and ensuring democratic self-governance. Much of this work focuses on the constitutional implications of government-imposed restrictions on the public's efforts to document the activities of public officials. The Institute therefore has a strong interest in the proper resolution of this challenge to Massachusetts's ban on "secretly record[ing] the contents of any . . . oral communication," Mass. Gen. Laws, ch. 272, § 99 ("Section 99"), as that ban applies to recording government officials.

All parties (in both of the consolidated appeals) consent to the filing of this brief.[1]

ARGUMENT

In *Glik v. Cunliffe*, this Court held that the First Amendment protects "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space." 655 F.3d 78, 85 (1st Cir. 2011). The

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* certifies that (1) this brief was authored entirely by counsel for *amicus curiae* and not counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to preparing or submitting this brief; and (3) no person other than *amicus curiae* contributed money to the preparation or submission of this brief.

District Attorney of Suffolk County now seeks to narrow that right by asking this Court to restrict the universe of "public spaces" where *Glik*'s protections apply. This Court should decline that invitation. As explained below, there is no need to re-define the term "public space" here and, even if there were such a need, the District Attorney's proposed framework for doing so is untenable.

I. This Court should reject the District Attorney's request to re-define the term "public spaces."

The district court properly held that Section 99 is "unconstitutional insofar as it prohibits the secret audio recording of government officials, including law enforcement officers, performing their duties in public spaces." *Martin v. Gross*, 380 F. Supp. 3d 169, 173 (D. Mass. 2019). The court's declaratory-judgment order—which adopts this Court's language from *Glik*—provides more than enough clarity to guide the parties' future conduct. For that reason, the district court acted well within its discretion in rejecting the District Attorney's proposal to further define the term "public spaces" to mean "traditional or designated public fora." *See id.* at 173. Indeed, as the court reasoned, the District Attorney's proposed definition is "narrower than the plain language of *Glik*," and nothing about this case requires any departure from *Glik*'s straightforward holding. *Id.*

II. To the extent this that Court is inclined to re-define "public spaces," it should reject the District Attorney's proposed framework for doing so.

Even if this case provided a basis for narrowing the right recognized in *Glik*—and, again, it does not—the District Attorney's proposal for doing so makes little sense. The District Attorney asserts that the right to record government officials' public activities should be analyzed under the public-forum doctrine. *See* Appellant's Br. 40-41. But invoking that doctrine—which was developed in a different context for a different purpose—would contravene this Court's reasoning in *Glik*, as well as its holdings in other cases. What's more, using public-forum principles to define the right recognized in *Glik* would inject more confusion than clarity into this area of First Amendment law.

A. *Glik* provides a clear framework for determining the scope of the right to record government officials in public.

This Court held in *Glik* that the First Amendment protects the "right to film government officials, including law enforcement officers, in the discharge of their duties in a public space." 655 F.3d at 85. The Court went on to explain that, while this right is not absolute, any limits imposed on the right must be narrow and must constitute "reasonable time, place, and manner restrictions." *Id.* at 84; *see also id.* at 84 (noting that the "peaceful recording of an arrest in a public space that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation").

Glik thus establishes a simple framework for assessing the scope of First Amendment protection for the act of recording a government official's public conduct. Under that framework, the government may not punish someone for unobtrusively recording the actions of a government official unless one of two conditions is satisfied: (1) the official's actions occurred outside of public view; or (2) the act of recording itself violated some "reasonable time, place, and manner restriction," *i.e.*, one that is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication. *E.g.*, *Casey v. City of Newport*, 308 F.3d 106, 110 (1st Cir. 2002) (articulating legal standard for time, place, manner restrictions).

B. The right recognized in *Glik* should not turn on what label the recording location would be given under the public-forum doctrine.

Rather than adhere to the straightforward inquiry set forth in *Glik*, the District Attorney suggests that the right to record government officials should be analyzed under the public-forum doctrine. *See* Appellant's Br. 40-41 & n.12. Under this "forum-based" approach, courts would apply a different level of constitutional scrutiny depending on whether the government is seeking to restrict recording in a public forum, in a non-public forum, or on publicly accessible private property. *See id.* There is no reason, however, why the government's authority to stop someone from recording a public official's conduct should turn on how a court would classify the location of that conduct under public-forum principles.

1. Courts rely on the public-forum doctrine to determine what level of First Amendment scrutiny to apply to restrictions on speech in different types of "government-controlled spaces." *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). The Supreme Court's public-forum jurisprudence "recognize[s] three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums." *Id.* In determining how to classify a particular space, courts typically examine the "physical nature" of the space, as well as "its history and purpose." *Del Gallo v. Parent*, 557 F.3d 58, 70 (1st Cir. 2009); *see also Mansky*, 138 S. Ct. at 1885 (outlining the distinguishing features of each type of forum). Focusing on these factors allows courts to weigh a speaker's constitutional interest in free expression against the risk that such expression will interfere with others' use of the same space or undermine some governmental function.

2. The public-forum doctrine can provide a useful framework for examining restrictions on certain types of expression, particularly those types that create a risk of disruption (e.g., parades, protests, and picket lines). But the doctrine is ill-suited to assess restrictions on other types of First Amendment activities—such as recording the public conduct of government officials—which implicate a broader range of constitutional interests beyond free expression. Indeed, as *Glik* explained, the right to record public officials derives not only from the First Amendment's protections for speech and expression but also from its protections for gathering news, disseminating truthful information, and discussing governmental affairs. *See*

655 F.3d at 82-83 (outlining the range of First Amendment interests implicated by restrictions on recording government officials). The public-forum doctrine, however, fails to account for this broader range of constitutional interests.

Consider, for instance, how poorly the doctrine would apply in a case where a journalist sought to record a police officer who assaults a private citizen in public. The First Amendment interests identified in *Glik* would counsel strongly in favor of protecting the journalist's ability to record the assault, regardless of where the assault occurred. There is no reason why the recording would be entitled to a greater level of constitutional protection if the arrest occurred in a public park or on a sidewalk (traditional public fora) than if it occurred at a state fair (a "limited" public forum), inside a polling place (a non-public forum), or at a shopping center (private property).[2] Yet, by focusing a court's attention on the "physical nature" and "history and purpose" of the assault's location, that is precisely what the District Attorney's forum-based approach would require.

The District Attorney's approach is also difficult to square with the approach this Court has taken in other cases addressing the right to record government officials. For example, this Court's decision in *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999)—

[2] *See generally Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (characterizing public parks as a "traditional public forums"); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (characterizing a state fair as a "limited public forum"); *Mansky*, 138 S. Ct. at 1886 (characterizing a polling place as a "nonpublic forum"); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 570 (1972) (rejecting argument that a privately owned shopping center is a public forum).

one of its first cases addressing the right to record government officials—did not turn on whether the recording at issue occurred in a public or non-public forum. *Iacobucci* arose from a police sergeant's refusal to allow a journalist to film local-government officials inside the hallway of a town hall. *See id.* at 17-18. Rather than examining how the hallway would be classified under the public-forum doctrine—a potentially thorny question—this Court simply concluded: "because [the journalist]'s activities were peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights, [the sergeant] lacked the authority to stop them." *Id.* at 25. A decade later, when this Court relied on that passage from *Iacobucci* in *Glik*, it once again declined to subject the town hall to any public-forum analysis.[3]

The Court took a similar approach in *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014), when it held that a private citizen had a First Amendment right to film a police traffic stop that occurred on the side of a highway. *Id.* at 7-9. As in *Iacobucci*, the Court reached that conclusion without examining whether the location of the traffic stop was a public forum. Nor did the Court apply a forum-based analysis to the middle-school parking lot from which the plaintiff sought to record the traffic stop. *See id.*

[3] Notably, *Glik* also cited favorably to other cases involving people who recorded subjects *outside* of traditional public forums. One of the cases cited in *Glik* involved a journalist who filmed officers who were conducting an investigation inside a sporting-goods store. *See Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 636-38 (D. Minn. 1972). And another involved a teacher who videotaped working conditions at her public high school. *See Cirelli v. Town of Johnston Sch. Dist.*, 897 F. Supp. 663, 665 (D.R.I. 1995).

at 3. Instead, the Court simply applied *Glik*'s framework and assessed whether the plaintiff had violated any reasonable time, place, or manner restriction on recording police activity. *See id.* at 8 ("*Glik*'s admonition that, '[i]n our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights' will bear upon the *reasonableness* of any order directed at the First Amendment right to film, whether that order is given during a traffic stop or in some other public setting." (emphasis added; citation omitted)). Examining the "physical nature" of the highway, as well as its "history and purpose," would not have added anything to this inquiry.

3. Rejecting the District Attorney's forum-based approach here would not, of course, preclude courts from considering the location of a government official's conduct in determining whether the public has a right to record that conduct. After all, the official's location may be relevant in assessing the reasonableness of any restrictions on the public's ability to record the official. *Cf. Ward*, 491 U.S. at 797 (examining government's interest in promoting "benefits the city parks have to offer" to uphold amplification regulation). But any such inquiry into the location of the official's conduct should focus narrowly on the government's *rationale* for restricting recording in that location—not on how the location would be labeled under the public-forum doctrine.

In short, the public-forum doctrine focuses on factors that are, at best, ancillary to the constitutional interests at stake when the government seeks to prevent

someone from recording its officials' public actions. Rather than focusing on the abstract characteristics of the place where those actions take place (as the District Attorney urges), courts should instead look to whether or not the recorded activity occurred in view of the public or, alternatively, violated some reasonable time, place, and manner restriction. Those are the relevant factors under *Glik*, and they should be the starting point in any judicial analysis of the First Amendment right to record government officials in public.

C. The District Attorney's forum-based approach would be especially inappropriate in the present case.

The District Attorney suggests that adopting a "forum-based" approach here would help to clarify the district court's use of the term "public spaces" in its declaratory-judgment order. But the District Attorney's approach would, in fact, have the opposite effect: it would take a simple term with a plain-language meaning and replace it with a difficult legal concept that even judges struggle to apply.

Indeed, as this Court has observed, the "utility and coherence of the forum analysis doctrine have been the subject of criticism." *Del Gallo*, 557 F.3d at 69 n.6. Jurists routinely acknowledge the difficulty of trying to distinguish between traditional public fora, designated public fora, and non-public fora. *See, e.g.*, *U.S. Postal Serv. v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981) (acknowledging that "the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a 'public forum' may blur at the edges"); *New*

England Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 20 (1st Cir. 2002) ("The problem of classification grows increasingly difficult in instances in which no presumption is available, and categorical distinctions are of little help in borderline cases."); *see also American Freedom Defense Initiative v. King County*, 136 S. Ct. 1022, 1023 (2016) (Thomas, J., dissenting from the denial of certiorari) ("Distinguishing between designated and limited public forums has proved difficult."). In light of these known challenges in applying the public-forum analysis, the District Attorney's claim that giving the term "public spaces" a forum-based definition would promote clarity is especially unpersuasive.

CONCLUSION

For the foregoing reasons, the district court's declaratory-judgment order should be upheld, without modification, and its judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 2,446 words and was prepared in 14-point Garamond font, a proportionally spaced typeface.

/s/ Nicolas Y. Riley
NICOLAS Y. RILEY

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2019, I electronically filed the foregoing corrected brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system, via electronic notice to:

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