Commonwealth of Massachusetts
Supreme Judicial Court

SJC-13557

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellant,
v.

THANH DU,
Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

BRIEF OF *AMICUS CURIAE* MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE THANH DU AND PARTIAL AFFIRMANCE AND PARTIAL REVERSAL

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CORPORATE DISCLOSURE STATEMENT

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STATEMENT OF INTEREST

The **Massachusetts Association of Criminal Defense Lawyers (“MACDL”)** is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions important to the administration of justice.

RULE 17(C)(5) DECLARATION

In accordance with Mass. R. App. P. 17(c)(5), amicus and their counsel declare that: (a) no party or party’s counsel authored this brief in whole or in part; (b) no party or party’s counsel contributed money that was intended to fund the preparation or submission of this brief; (c) no person or entity—other than amicus or their counsel—contributed money intended to fund the preparation or submission of this brief; and (d) neither amicus nor their counsel represent or have represented any of the parties to this appeal in any other proceeding involving similar issues, or

were a party or represented a party in any proceeding or legal transaction at issue in this appeal.

SUMMARY OF ARGUMENT

This case concerns the proper application of the Massachusetts Wiretap Statute, G. L. c. 272, § 99, to the audio-visual cellphone recording of an unsuspecting individual by a police officer. Despite offering scant evidence that the subject was aware of the recording, the Commonwealth urges this Court to allow the recording into evidence on the basis that the mere sight of a phone in "plain view" is sufficient to defeat an individual's privacy interests. *See* CW Br. 11.

This Court should reject that proposal. Considering the prevalence and use of cellphones today, the privacy consequences of the Commonwealth's interpretation would be devastating. *See infra* pp. 10–13. Thankfully for Massachusetts citizens, both legislative history or precedent point the other way. The idea that individuals should assume that any cellphone in "plain view" could legally be recording every conversation conflicts with the wiretap statute's animating purpose: to reassure citizens that the law in fact protects them from new forms of electronic surveillance, so that they can carry on personal conversations *without* fear that others may be listening in. In fact, the 1968 amendments to the wiretap statute sought to protect against these exact circumstances—electronic surveillance by law enforcement as an investigative tool. *See infra* pp. 13–15. Nor is the Commonwealth correct that the

"actual knowledge standard" in *Jackson* has been replaced with a lower "reasonable inference" standard. The Commonwealth simply misunderstands the relevant case law; a review of precedent confirms that *Jackson* provides the governing standard, and that the mere appearance of a cellphone does not meet it. *See infra* pp. 15–18.

The Commonwealth is likewise incorrect that the video portion of the recording is exempt from suppression in any event. To the contrary, because the recording was made secretly, without a warrant, and in violation of the wiretap statute, suppression of both the audio *and* video portions is required. The letter of the law, the liberty interests at stake, and the potential prejudicial effect of admitting the video portions of the recording all confirm that conclusion. Under the plain text of the statute, the video portion of a secret, warrantless audio-visual recording that shows a defendant speaking to others is part of the communication's "contents," G. L. c. 272, § 99(B)(5), and subject to suppression. *Id*. § 99(P). *See infra* pp. 18–19.

In fact, the surreptitious making of such content is the exact type of privacy invasion the Legislature meant this statute to prevent. By requiring knowledge and acquiescence from all parties, the wiretap statute guards an individual's ability to make informed decisions about the distribution of their speech; allowing someone else to secretly record and then expose their participation in a conversation would vitiate that autonomy. *See infra* pp. 19. Admitting such evidence may also unfairly prejudice criminal defendants and unfairly benefit prosecutors, by allowing

prosecutors to both benefit from recordings made in violation of the law and capitalize on jurors' natural cognitive biases. *See infra* pp. 20–21.

This Court has a laudable track record of safeguarding privacy from the expansion of new, potentially invasive technologies. That approach is evident in its previous cases about the wiretap statute itself, in disputes over cellphone privacy, and in other cases about technological change. *See infra* pp. 21–24. While the Commonwealth seeks to dilute Massachusetts's privacy protections, this Court should stand strong and honor its history of interpreting statutory and constitutional privacy protections to establish a bulwark against ever-encroaching electronic surveillance methods. *See infra* pp. 24.

ARGUMENT

This case presents two questions: Does making an audio-visual recording of a person in Massachusetts, without them knowing they are being recorded, violate the wiretap statute, G. L. c. 272, § 99, and if so, must the entire audio-visual recording be suppressed? The statutory language, case law, and common sense provide easy "yes" answers to both questions.

Yet the Commonwealth tries to resist that straightforward conclusion. It insists that anyone who is aware of a cellphone in their vicinity should assume they are being recorded and act accordingly. Put differently, the Commonwealth suggests that, as recording-capable devices become more common, the amount of legal

protection individuals have from eavesdropping shrinks. This Court should reject that perverse outcome and, as it has done many times before, interpret the wiretap statute in a way that preserves both the intent of the Legislature and the rights of Massachusetts residents.

I. The Commonwealth's position on secret recording undermines individuals' privacy rights, negates the wiretap statute's purpose, and conflicts with Massachusetts case law.

The Commonwealth argues that the mere presence of a phone in "plain view" during a conversation is enough to infer awareness that the conversation is being recorded. CW Br. 11. In a world where the vast majority of Americans have cellphones, adopting that position would effectively negate the Legislature's intent in passing the wiretap statute. It would also require this Court to adopt a lower standard for knowledge under the wiretap statute—a result that finds no support in the facts or reasoning of prior cases.

A. Permitting surreptitious recording whenever a cellphone is visible would drastically undermine Massachusetts residents' privacy.

The Commonwealth's argument in this case boils down to a simple rule: if you know someone in your vicinity has a cellphone, you are on notice that you could be recorded, and therefore, have no legal recourse if you are in fact being recorded. Because 97 percent of Americans have cellphones, *see Mobile Fact Sheet*, PEW

RESEARCH CENTER (Jan. 31, 2024),[1] the implications of this argument are staggering. The consequences border on dystopic: *every* visible cellphone that one might encounter throughout the day must be regarded with apprehension—because legally speaking, everyone is presumed to know that it could be recording every word.

Cellphones are ubiquitous. The Supreme Court has said as much, describing cellphones as "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. 373, 385 (2014). This Court has similarly acknowledged cellphones as "an indispensable part of modern [American] life" which "physically accompany their users everywhere." *Commonwealth v. Augustine*, 467 Mass. 230, 245–46 (2014). Unsurprisingly, they are often held or used in clear view of others. *See id.* at 246 ("As anyone knows who has walked down the street or taken public transportation in a city like Boston, many if not most of one's fellow pedestrians or travelers are constantly using their cellular telephones as they walk or ride[.]").

The Commonwealth equates seeing a person holding a cellphone with seeing them walking down the street holding a tape recorder, surveillance camera, or police bodycam. *See* CW Br. 11–12. This comparison is inapt. By contrast with tape

[1] https://www.pewresearch.org/internet/fact-sheet/mobile/ [https://perma.cc/WG22-T8LP]

recorders or bodycams, which are used solely as recording devices, cellphones serve many functions.[2] The Supreme Court acknowledges as much: "Even the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on." *Riley*, 573 U.S. at 394. And many of the most common uses of smartphones do not feature audio-visual recording at all. *See* Kate Fu, *Top 10 Smartphone Uses*, QUALCOMM (Apr. 7, 2023).[3]

As a result, unlike a tape recorder, surveillance camera, or police bodycam, the use of a cellphone as a "recording device" is not immediately obvious. For a phone to be recognized as such, its positioning is paramount. In *Glik v. Cunniffe*, 655 F.3d 78, 80 (1st Cir. 2011), for example, the plaintiff was holding his cellphone in such an open and unmistakable way that the police officers verbally acknowledged that he was recording them. Here, by contrast, the orientation of the undercover officer's cellphone changed constantly and often pointed away from the defendant. *See* CW Br. 13 (explaining that cellphone was pointed away from the

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[2] The Commonwealth cites *Glik v. Cunniffe*, 655 F.3d 78, 88 (1st Cir. 2011), to suggest that cellphones' multiple uses are irrelevant. *See* CW Br. 12. But as explained below in Section I.C, the cellphone in *Glik* was being held in a particular manner—away from the recording party's body and facing the subject. *See Glik*, 655 F.3d at 87. The true lesson of *Glik* is that one can often tell which of a cellphone's many capabilities is currently active from how it is being held.

[3] https://www.qualcomm.com/news/onq/2023/04/top-10-smartphone-uses-new-consumer-report-reveals-why-were-at-the-point-of-no-return [https://perma.cc/8K3E-EVDB]

defendant during first two transactions). Indeed, the uncertain location of the cellphone led the Appeals Court to conclude that there was "no evidence . . . as to how the cell phone was displayed by the undercover officer," leading to their conclusion that the phone was not "displayed in plain view in a manner that would lead the defendant to be on notice that he was being recorded." *Commonwealth v. Du*, 103 Mass. App. Ct. 469, 479 n.16 (2023).

Given the many functions of a cellphone, it is simply unreasonable to assume that every person checking email on the bus or listening to music on the street is also recording everyone else's speech. Yet that is exactly how the Commonwealth expects Mr. Du—and presumably every resident of Massachusetts—to operate. In a world where every visible cellphone—regardless of how it is positioned—is presumed to be a potential source of surveillance, the privacy interests that the wiretap statute guards all but vanish. This Court should not let that happen.

B. Permitting recording whenever a cellphone is visible would also negate the Legislature's clear intent to protect individuals from electronic surveillance.

The Commonwealth's position not only makes poor policy, but also conflicts with the wiretap statute's animating purpose. Although the statute was originally conceived as a one-party consent statute, a substantial amendment in 1968 strengthened the law, creating the modern all-party actual-knowledge standard. *See generally* G. L. c. 272, § 99. The statute's current incarnation resulted from the

Legislature's decision to safeguard individual privacy in the face of proliferating electronic surveillance devices. *See* The Report of the Special Commission on Electronic Eavesdropping, S. Doc. No. 1132, at 5 (1968). That intent is evident in both the statute's preamble and its legislative history.

The preamble states that "the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth" and therefore, law enforcement's use of these devices "must be conducted under strict judicial supervision and should be limited to the investigation of organized crime." G. L. c. 272, § 99. This Court has routinely relied on that language when interpreting the statute's scope. *See, e.g.*, *Commonwealth v. Rainey*, 491 Mass. 632, 642 (2023); *Curtatone v. Barstool Sports, Inc.*, 487 Mass. 655, 659–60 (2021); *Commonwealth v. Tavares*, 459 Mass. 289, 295–96 (2011); *Commonwealth v. Thorpe*, 384 Mass. 271, 276–77 (1981). Indeed, this Court has specifically cited the preamble as evidence that the Legislature intended the statute to protect against "law enforcement officers' surreptitious eavesdropping as an investigative tool." *Commonwealth v. Gordon*, 422 Mass. 816, 833 (1996).

The legislative history underscores the Legislature's specific concern with law enforcement's use of electronic surveillance devices. In 1964, the Legislature appointed a special commission "to pursue research and investigation into the laws

involving privacy, wiretapping and eavesdropping by law enforcement agencies." S. Doc. No. 1132, at 5. The commission's report expressed "concern over the commercial availability of electronic devices capable of intercepting wire or oral communications." *Commonwealth v. Hyde*, 434 Mass. 594, 598 (2001) (citing S. Doc. No. 1132, at 6). The Legislature was "concerned principally with the investigative use of surveillance devices by law enforcement officials to eavesdrop surreptitiously on conversations." *Rainey*, 491 Mass. at 645.

These circumstances capture the exact scenario that the 1968 amendments sought to prevent: warrantless surveillance by law enforcement enabled by the increasing availability of electronic recording devices. Unlike the 1968 Legislature, though, the Commonwealth argues that the proliferation of portable devices capable of—among many other things—recording audio should *weaken* privacy protections. Holding that a cellphone in plain view alone provides sufficient notice of being recorded would condone the very intrusions the Legislature sought to prevent. To fulfill the intent expressed by the statute's preamble and legislative history, this Court should reject the Commonwealth's position.

C. The Commonwealth's "plain view" test runs afoul of precedent.

To justify its implausible suggestion that the mere sight of a cellphone takes a recording out of the wiretap statute's scope, the Commonwealth questions the continued validity of the "actual knowledge" standard this Court set out in

Commonwealth v. Jackson, 370 Mass. 502 (1976). In *Jackson*, this Court held that an interception violates the wiretap statute if the person recorded does not have "actual knowledge of the recording." *Id.* at 507. Actual knowledge, in turn, requires "clear and unequivocal objective manifestations of knowledge." *Id.*

The Commonwealth suggests that cases since *Jackson* have replaced its "actual knowledge standard" with a lower "reasonable inference" one. *See* CW Br. 10–11 (citing, *e.g.*, *Commonwealth v. Morris*, 492 Mass. 498, 506–07 (2023); *Glik*, 655 F.3d at 88). Not so. The case law the Commonwealth cites simply recognizes that, as this Court has often explained, issues of "intent" or "state of mind"—including knowledge—are often simply "not susceptible of direct proof" and instead "must be inferred from all the circumstances." *Commonwealth v. Gollman*, 436 Mass. 111, 116 (2002) (citing *Commonwealth v. Kilburn*, 426 Mass. 31, 34–35 (1997)). In all events, though, the requisite "reasonable inference" is still one of *actual* knowledge. So, contrary to what the Commonwealth claims, *Jackson* still provides the governing standard—one that the mere appearance of a cellphone does not meet.

Commonwealth v. Morris, 492 Mass. 498, 506–07 (2023), is not to the contrary. In *Morris*, the Court held that the police did not violate the wiretap statute when they recorded the defendant's interrogation because, even though he may not have known about the electronic recording, he still "understood" that his

conversation "was being preserved for future use." *Id.* at 506. Contrary to the Commonwealth's assertion, the Court did not suggest that a mere "risk of being recorded" sufficed to defeat the secrecy element. CW Br. 10. Rather, it held that when a defendant "understands that officers are recording the statement" and voluntarily proceeds, the prosecutor need not prove knowledge of the specific *mode* of recording. *Morris*, 492 Mass. at 504. Proving that understanding, though, still requires objective manifestations of knowledge—such as the express warning given in *Morris*. *See id.* at 507. Those circumstances stand in stark contrast to this case, where all objective indications suggest that Mr. Du was unaware that his speech was being preserved in any fashion.

Nor does the Commonwealth's cherry-picking from the First Circuit's decision in *Glik* support its position that a cellphone in plain view alone makes a recording not secret. *See* CW Br. 11–12. In *Glik*, the First Circuit reasoned that secrecy turns on whether, "based on objective indicators, such as the presence of a recording device in plain view, one can infer that the subject was aware that she might be recorded." *Glik*, 655 F.3d at 87. But in that case, the officers "knew that Glik was using his phone to record them in some fashion." *Id.* at 88. How? Because Glik was "holding out a cell phone in front of his body" towards the officer. *Id.* at 87. Indeed, it was the officers' realization that they were being recorded that spurred Glik's arrest. *Id.* at 87. Had Mr. Du had a similar realization, he likely would have

avoided or immediately terminated any conversation between him and the undercover officer here.

The Commonwealth cannot prevail under *Jackson*'s still-controlling "actual knowledge" test. Decades of Massachusetts case law illustrates what suffices to show the requisite "clear and unequivocal objective manifestations of knowledge," and strongly suggests that the mere appearance of a cellphone does not qualify. The facts here do not suggest that the act of recording was obvious or that Mr. Du knew his statements were being captured. *Cf. Glik*, 655 F.3d at 80; *Rainey*, 491 Mass. at 643 (noting that victim gave a statement to an officer with a body camera while another officer took down her written statement); *Jackson*, 370 Mass. at 507 (relying on defendant's statement that "I know the phone is tapped").

Adopting the Commonwealth's novel standard would deviate from the rule set out in *Jackson* and preserved in cases since. The Court should reject this attempt to dilute the privacy protections that the Legislature put in place and that the residents of Massachusetts rely on.

II. Both the audio and video portions of the recordings should be suppressed under the wiretap statute.

As Mr. Du's brief explains in detail, both the audio and video portions of a warrantless, secret audio-visual recording are subject to suppression. Du Br. 28–37. Under the plain language of the wiretap statute, the video portions of the recordings contain "information concerning the identity of the parties" as well as the

"existence" of intercepted oral communications. *See id.* at 30–31 (citing G. L. c. 272, § 99(B)(5)). Suppressing only the audio portions of the recordings would not sufficiently deter future invasions of privacy. *See id.* at 36–37. And that in turn would undermine the wiretap statute's primary purpose: protecting Massachusetts residents from such invasions in the first place. *See* Section I.B, *supra*.

Two more reasons exist for suppressing both portions of the recordings. First, admitting video portions of unlawful audio-visual recordings into evidence would undermine important liberty interests protected by the wiretap statute. Second, admitting such evidence could unfairly prejudice criminal defendants and benefit prosecutors, even though police have violated the law.

To start, excluding the video portions of unlawful, warrantless audio-visual recordings best serves the interests the wiretap statute protects. Laws that require all parties to consent to or, as is the case in Massachusetts, to be aware of recording, protect not only privacy but the autonomy of individuals to make informed decisions about the distribution of their own speech. *See* Jake Tracer, *Public Officials, Public Duties, Public Fora: Crafting an Exception to the All-Party Consent Requirement*, 68 N.Y.U. ANN. SURV. AM. L. 125, 141 (2012). Exposing an individual's participation in a conversation, without a chance to object, undermines that interest—even when the words of the conversation are not exposed.

The potential prejudicial effect of video portions of audio-visual recordings also means that police and prosecutors would still benefit from recordings made in contravention of the law. Video evidence can provoke cognitive biases in jurors, which can in turn undermine its reliability. *See generally* Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333 (2010). Factors such as camera angle, speed, temperament of the viewer, and personal values can strongly influence how a video is perceived. *Id.* When a video shows a conversation, biases may cause a juror to "fill in the blanks" and judge the content of the communications based on incomplete information, personal experiences, or stereotypes. Additionally, as was the case here, a silent video presented alongside an officer's testimony could exacerbate the "silent presumption of reliability" that law enforcement already benefits from. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 498 (1999).

The Commonwealth brushes off this concern, saying that "any risk of prejudice could be negated by instructing the jury that they were not to speculate about the absence of audio." CW Br. 16. But both common sense and empirical evidence suggest that jurors in fact struggle to honor limiting instructions. *See* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 410–39 (2013). Such instructions should therefore be reserved for cases where no other remedy is available. Here, there is a better solution: the video evidence

should not come in to begin with. *See Commonwealth v. Jarabek*, 384 Mass. 293, 299 (1981) (explaining that the purpose of the wiretap statute is to "ensur[e] that no evidence of the existence of the interception comes to the attention of the factfinder").

Ultimately, the video portion of an audio-visual recording undoubtably contains information that identifies the defendant and is itself "evidence that [a] conversation was recorded." *Jarabek*, 384 Mass. at 298. Preventing law enforcement from using such excerpts deters the police from making illegal recordings in future cases. The potential prejudicial effect of admitting video portions of unlawful audio-visual recordings, and the negative impact on Massachusetts residents' liberty interests, only underscore the necessity of suppressing such evidence.

III. This Court should continue its commendable record of protecting, not weakening, privacy in the face of new technologies.

Beyond this specific evidentiary dispute, this case raises important questions about this Court's approach to expanding surveillance technology. As the Supreme Court has cautioned, when new technology challenges existing rights, courts must be careful not to uncritically accept the erosion of privacy. *See Carpenter v. United States*, 585 U.S. 296, 318 (2018).

Consonant with that principle, this Court has consistently interpreted Massachusetts law to protect privacy in the face of advancing technology. Three categories of cases showcase that approach: (1) those specifically related to the

wiretap statute, which highlight how the Court has interpreted the statute in light of new technologies; (2) those involving cellphones, where privacy concerns have been at the forefront of judicial decisions; and (3) those involving neither the wiretap statute nor cellphones, but which still serve as pertinent examples of the Court's approach to technological changes.

Although the wiretap statute has remained essentially the same since 1968, technology most certainly has not. Courts have thus had to apply the statute to forms of surveillance that the enacting Legislature could never have foreseen. For example, this Court has interpreted the term "wire communication" to include newer technologies. In *Commonwealth v. Moody*, 466 Mass. 196, 207 (2013), it read the wiretap statute to protect wireless communication through cellphones and text messaging, even though those technologies did not exist in 1968. In doing so, the Court maintained the intended purpose of the statute. See *id.* (discussing legislative intent). That approach embodies the more general principle that the law should be interpreted to maintain its intended scope and viability in modern contexts. *See Dillon v. Massachusetts Bay Transp. Auth.*, 49 Mass. App. Ct. 309, 315 (2000).

This Court has taken a similar approach to other forms of cellphone-based surveillance. In *Commonwealth v. Augustine*, 467 Mass. 230, 255 (2014), the Court held that individuals have a reasonable expectation of privacy in cell site location information (CSLI) and, therefore, that a warrant is required when law enforcement

seek that data to track cellphones in Massachusetts. Again, the Court took the changing technology landscape into account: "the nature of cellular telephone technology and CSLI and the character of cellular telephone use in our current society render the third-party doctrine . . . inapposite; the digital age has altered dramatically the societal landscape from the 1970s, when [the governing cases] were written." *Id*. at 245. The Court also pointed out the particularly invasive nature of cellphone surveillance, explaining that "because a cellular telephone is carried on the person of its user," it can travel anywhere. *Id.* at 249. Subsequent decisions have built on the reasoning in *Augustine* to provide greater privacy protections as cellphone-based surveillance became more widespread. *See Commonwealth v. Almonor*, 482 Mass. 35, 44–45 (2019) (pinging cellphone for real-time data requires a warrant); *Commonwealth v. Perry*, 489 Mass. 436, 452–53 (2022) (mass collection of CSLI in area around cellphone tower requires a warrant).

Lastly, this commendable track record of safeguarding privacy can be seen in other privacy-related decisions. As early as 2009, this Court held that the installation and use of a global position system device on a defendant's vehicle constituted a seizure under the protections afforded by article 14 of the Massachusetts Declaration of Rights—thus requiring a warrant. *Commonwealth v. Connolly*, 454 Mass. 808, 822 (2009). More recently, the Court held that a police department's use of a continuous, long-term pole camera to conduct surveillance on a private home

violated the state constitution. *See Commonwealth v. Mora*, 485 Mass. 360, 373 (2020); *see also Commonwealth v. McCarthy*, 484 Mass. 493, 507 (2020) (noting that widespread use of automated license plate readers may trigger constitutional privacy protections).

This Court has expressly articulated a policy "to guard against the 'power of technology to shrink the realm of guaranteed privacy' by emphasizing that privacy rights 'cannot be left at the mercy of advancing technology but rather must be preserved and protected as new technologies are adopted and applied by law enforcement.'" *Almonor*, 482 Mass. at 41 (quoting *Commonwealth v. Johnson*, 481 Mass. 710, 716 (2019)). In accordance with this policy, this Court has consistently interpreted statutory and constitutional privacy protections to establish a bulwark against ever-encroaching electronic surveillance methods. It should continue to do so here, and hold that the entirety of the warrantless audio-visual recording at issue must be suppressed.

CONCLUSION

For these reasons, this Court should affirm the order of the Superior Court insofar as it suppressed the audio portions of the recordings and reverse insofar as it declined to suppress the video portions of the recordings.

Dated: August 16, 2024 Respectfully submitted,

/s/ Mason A. Kortz

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[*] MACDL extends its heartfelt thanks to Harvard Cyberlaw Clinic Spring 2024 students Quentin Levin and Tomisin Olanrewaju for their indispensable research support and to summer interns Eve Zelickson and Lenisha Gibson for their invaluable contributions to this brief.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17(c)(9) of the Massachusetts Rules of Civil Procedure, I, Mason A. Kortz, hereby certify that the foregoing Brief of Amicus Curiae Massachusetts Association of Criminal Defense Lawyers in Support of Appellee Thanh Du and Partial Affirmance and Partial Reversal complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to:

Mass. R. A. P. 16(e) (references to the record);
Mass. R. A. P. 17(c) (cover, length, and content);
Mass. R. A. P. 20 (form and length of brief); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14 points and contains 4,438 total non-excluded words as counted using the word count feature of Microsoft Word 365.

Dated: August 16, 2024

Respectfully Submitted,

/s/ Mason A. Kortz

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13557

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff- Appellant,
v.

THANH DU,
Defendant- Appellee.

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(e), I, Mason A. Kortz, hereby certify, under the penalties of perjury, that on this date of August 16, 2024, I have made service of a copy of the foregoing **Brief of Amicus Curiae Massachusetts Association of Criminal Defense Lawyers in Support of Appellee Thanh Du and Partial Affirmance and Partial Reversal** in the above captioned case upon all attorneys of record by electronic service through eFileMA.

Dated: August 16, 2024

Respectfully Submitted,

/s/ Mason A. Kortz

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