No. SJC-13542

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

KATHLEEN VITA

Plaintiff-Appellee,

v.

BETH ISRAEL DEACONESS MEDICAL CENTER & another,

Defendants-Appellants

On Direct Appellate Review from an Order
of the Trial Court

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF APPELLANTS

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Dated: March 13, 2024

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. A. P. 17(c)(1), the New England Legal Foundation (NELF) states that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities. NELF does not issue stock or any other form of securities and does not have any parent corporation.

Pursuant to Mass. R. A. P. 17(c)(1), Associated Industries of Massachusetts (AIM) states that it is a 26 U.S.C. § 501(c)(6) nonprofit association incorporated in Massachusetts and headquartered in Boston. AIM is governed by a Board of Directors, the members of which serve solely in their personal capacities. AIM does not issue stock or any other form of securities and does not have any parent corporation.

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INTEREST OF AMICUS CURIAE[1]

The New England Legal Foundation (NELF) is a nonprofit, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's members and supporters include large and small businesses in New England, other business and non-profit organizations, law firms, and individuals, all of whom believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic and property rights.

Founded more than one hundred years ago, Associated Industries of Massachusetts (AIM) is a nonprofit association located in Boston. With over 3,400 employer members doing business in Massachusetts, it is the largest business association in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees and the prosperity of the Commonwealth by improving the economic climate of Massachusetts, proactively advocating for fair and equitable public

[1] No party or party's counsel nor any other individual or entity, aside from Amici and their counsel, authored this brief in whole or in part, or made any monetary contribution to its preparation or submission. Neither Amici nor their counsel has ever represented any party to this appeal on similar issues, and they have not been either a party or counsel to a party in a proceeding or transaction that is at issue in this appeal.

policy, and providing relevant and reliable information and excellent services.

The question presented in this case is of interest to NELF and AIM because it directly concerns the regulation of business in the Commonwealth and does so, we believe, in a unreasonable manner, with no benefit to the public. As we demonstrate in this brief, the trial court's construction of G.L. c. 272, §99, based as it is a very broad dictionary definition of the word "communication," is unhistorical and takes no account of how public discussion about electronic eavesdropping was framed in the era when the law was enacted. If allowed to stand, the trial court's decision will produce absurd and unreasonable results in dozens of cases already pending, creating unwarranted windfalls of liquidated damages that the Legislature could not have imagined, let alone have intended, in 1968.

In response to this Court's request for amicus briefing on this important legal question, NELF and AIM have filed this brief in order to provide a perspective that may assist the Court in reaching a just and sound decision.

ISSUE PRESENTED

Does the Massachusetts wiretap statute, which prohibits the secret interception of another person's "wire and oral communications," apply when a website is coded with traffic analytical and advertising software that collects user data and transmits it to a third party?

ARGUMENT

Introduction

This brief will argue that the wiretap statute, G.L. c. 272, §99, is limited to speech. In deciding otherwise, the judge cited her decisions in two similar cases in which she had relied on the broad definition of one word, "communication," as given in a 1991 dictionary. *Vita v. Beth Israel Deaconess Medical Center, Inc*., No. 2384cv00480, slip op. at 6 (Super. Ct. Oct. 31, 2023) (citing cases). While a dictionary is doubtless a helpful tool for discerning the meaning of a legal text, it must be used with caution and prudence.

As this Court has observed, "we should not accept the literal meaning of the words of a statute without regard for that statute's purpose and history." *Sterilite Corp. v. Continental Cas. Co*., 397 Mass. 837, 839 (1986). Further to the point, the Court has written:

> Statutes are to be interpreted . . . in connection with their development, their progression through the legislative body, the

> history of the times, [and] prior legislation. . . . . General expressions may be restrained by relevant circumstances showing a legislative intent that they be narrowed and used in a particular sense.

Sullivan v. Chief Justice for Admin. and Management of Trial Court, 448 Mass. 15, 24 (2006) (cleaned up).

An historically sensitive informed reading of the statute is required in order to understand the nature and scope of the ills the legislature sought to remedy in 1968. We hope to provide the Court with such a reading.

I. At the Time the Statute was Enacted, Public Concern Focused on the Interception of Speech as a Threat to Privacy.

By the 1950s, and certainly by the 1960s, the technology of the two principal forms of eavesdropping—i.e., eavesdropping on speech directly and eavesdropping on speech transmitted through wire via electricity—had advanced alarmingly in the public's view.

The late Professor Alan F. Westin was considered a preeminent authority on the subject of privacy and the law.[2] In 1960 he observed:

> By the 1950's, privacy from telephone tappers and microphone planters had been pressed into a desperate situation.

[2] "Through his work—notably his book "Privacy and Freedom," published in 1967 and still a canonical text—Mr. Westin was considered to have created, almost single-handedly, the modern field of privacy law. He testified frequently on the subject before Congress, spoke about it on television and radio and wrote about it for newspapers and magazines." Marglit Fox, *Alan F. Westin, Who Transformed Privacy Debate Before the Web Era, Dies at 83*, N.Y. Times, Feb. 22, 2013, at D7.

> Technologically, a vast breakthrough had occurred in eavesdropping techniques: parabolic microphones were constructed which could beam in on conversations from hundreds of yards away; resonator radio transmitters the size of match boxes could be planted under a table or bed to send conversations to receiving sets a mile away; telephone tap connections no longer had to be made by crude splicing of wires but were accomplished by refined induction coil devices (and even by metallic conductor paints applied close to the telephone connection and matched to the wall color to defy detection); tape recorders small enough to fit into a coat pocket were invented[.]
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> By 1955, concern over the problem had gone far beyond professional civil libertarians and the editors of liberal weeklies. Two national television networks in 1955 engaged in a race to put out the first drama condemning telephone snoopers. Reverend Billy Graham's organization produced a movie called Wiretapper, showing the religious conversion of a repentant sinner whose presalvation occupation had been that of a "professional earphones man." The mass media featured exposés of wire-tap scandals, and even Daddy Warbucks in the comic strip "Little Orphan Annie" learned to his anger that agents of "The Syndicate" were tapping his calls.

Wire Tapping: The Quiet Revolution, 29 Commentary 333 (1960).[3]

Again and again, authors of this period express their concern with these new threats to privacy, whether they framed the threat as one to the

[3] Available without pagination at https://www.commentary.org/articles/alan-westin/wire-tapping/ (last accessed March 4, 2024). *See also*, e.g., William J. Hoese, *Electronic Eavesdropping: A New Approach*, 52 Cal. L. Rev. 142, 142 (1964): "The electronic devices now available to the eavesdropper are frightening in light of the meager restrictions on their use. . . . Microwave beam devices, now well on the way toward being perfected, will be able to penetrate virtually any structure and return every word spoken within."

privacy of "speech" or of "conversation." They also agree on the fundamental distinction between the two ways in which this privacy may be compromised. Either the speech is intercepted as it is uttered or it is intercepted when it has been transformed into electricity and transmitted along a wire. Typically, these two approaches are called eavesdropping and wiretapping, respectively; while there is slight variation in the nomenclature used by authors, the underlying distinction itself is universally observed.[4]

Amici suggest that the distinction between "oral communication" and "wire communication" made in §99(B) is no more and no less than this distinction. It is the same distinction we have already seen Prof. Westin draw when he speaks of "microphone planters," who intercept the speech more or less directly, and "telephone tappers," who intercept speech transmitted through electrical wires; in their different ways, both kinds of interceptors gain surreptitious access to private "conversations." Elsewhere in the same article he speaks of eavesdropping and

[4] "Eavesdropping" is frequently also used as the general term comprehending both forms on interception, as appears in some writings quoted in this brief. *See*, e.g., Samuel Dash, Robert Knowlton, & Richard Schwartz, *The Eavesdroppers* 385 (1959) (wiretapping specialized form of eavesdropping).

wiretapping as the two obvious alternative modes of intercepting conversations. Westin, *supra*, (police may "side-step telephone tapping regulations" by simply "switch[ing] to wholesale use of hidden microphones"). *See also* Alan F. Westin, *Privacy and Freedom* 73-78 (1967) (discussing methods of intercepting speech in a room by means of microphone bugs and by tapping wire transmission of speech in telephone lines).

In their well-known book, *supra* n.4, at 323, 359, Dash et. al. described the eavesdropper and the telephone tapper alike as overhearing "speech or conversation" and likely recording it as well. Prof. Ralph S. Spritzer wrote in 1969 that "[i]ntrusions upon the privacy of communication" via "techniques of wiretapping and bugging . . . 'have become incredibly subtle,"' so that '"[i]t is now possible to overhear conversation held within a closed room by using a device which makes use of the vibrations in a window pane as it responds to sounds from within."' *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. Pa. L. Rev. 169, 169 & n.2 (1969) (citation omitted). *See also* Hoese, *supra* n.3 ("every word spoken"); Herman Schwartz, *Wiretapping and Eavesdropping: Pros and Cons*, 53 Current

History 31, 34 (1967) ("such devices inevitably pick up all the conversations on the wire tapped or room scrutinized").

In a 1962 article entitled *Public Policy and the Problem of Electronic Surveillance*, Charles B. Nutting, editor-in-charge of the American Bar Association Journal, discussed the separate policy issues raised by wiretapping and eavesdropping viewed as threats to the "right not to be overheard" in one's "conversations." 48 A.B.A. J. 676, 676-77 (1962).

The author of a 1965 note distinguished "eavesdropping in the traditional sense using only the physical senses of sight or hearing; electronic surveillance—eavesdropping aided by electronic devices; and wiretapping," but all were used to intercept "conversation." Minn. L. Rev. Editorial Bd., Note, *Eavesdropping and the Constitution: A Reappraisal of the Fourth Amendment Framework*, 50 Minn. L. Rev. 378, 380 (1965). After distinguishing the "auditory devices" used in these practices from "visual devices," the author concluded: "It now appears that the only way to be safe from eavesdropping is to hold all conversations inside a tent-like enclosure, or to line the room with aluminum foil and use special glass panes in all windows." *Id*. at 381.

The turning point in the law of voice electronic surveillance is *Berger v. State of New York*, 388 U.S. 41 (1967), in which the Supreme Court overruled *Olmstead v. U.S.*, 277 U.S. 438 (1928), and held that government eavesdropping on conversations implicates Fourth Amendment rights. The Supreme Court framed the matter in the same terms as we have described:

> Sophisticated electronic devices have now been developed (commonly known as "bugs") which are capable of eavesdropping on anyone in most any given situation. They are to be distinguished from "wiretaps" which are confined to the interception of telegraphic and telephonic communications. . . . And, of late, a combination mirror transmitter has been developed which permits not only sight but voice transmission up to 300 feet. Likewise, parabolic microphones, which can overhear conversations without being placed within the premises monitored, have been developed.

Id. at 46-47. *See also Dalia v. U.S.*, 441 U.S. 238, 241 n.1 (1979).

The public policy problem turned on the enormous value to police of intercepting conversations by one or the other means. For example:

> A review of the cases in which convictions were obtained through the use of wiretapping in New York reveals almost incredible conversations carried on over the telephone by persons engaged in criminal activity.

Dash, *supra* n.4, at 37.

The Supreme Court ruled that, in order to satisfy the Fourth Amendment, warrants authorizing interceptions by law enforcement

require not only judicial supervision, but also probable cause and particularity. *Berger*, 388 U.S. at 54-57.

Berger was decided in June of 1967 and, together with its companion case *Katz v. U.S.*, 389 U.S. 347 (1967), spurred legislative action to regulate the two forms of eavesdropping we have discussed. By June 19, 1968, the federal Wiretapping and Electronic Surveillance Act, Pub. L. 90-351, 82 Stat. 211, had been enacted, and only a month later Massachusetts law was modeled after the new federal law. St. 1968, c. 738. *See Dillon v. MBTA*, 49 Mass. App. Ct. 309, 333 (2000) (wiretap statute "modeled on the contemporaneous Federal wiretap statute").

II. In Section 99, the Oral and Wire Communications Protected Consist of Speech.

There can be little doubt that when remodeled G.L. c. 272, §99, was enacted in 1968, the Massachusetts legislature shared the thinking we have outlined above: there are two general categories of interception, eavesdropping by devices such as "bugs" and wiretapping, and they are both used to intercept speech in their different ways.

In 1964 the Legislature set up a special commission to investigate electronic eavesdropping and wiretapping. *See* Report of the Special Commission on Electronic Eavesdropping, S. Rep. No. 1132, at 5 (1968). In its 1968 report, "eavesdropping" and "wiretapping" are paired together

repeatedly, *id. passim*, and, significantly for this case, we encounter "wire or oral conversation" and "wire or oral communications" treated as equivalent expressions, *id.* at 6. The commission members, eight of the ten of whom were legislators, understood eavesdropping to intercept speech, while the interception of wire communications simply involved the speech converted into electrical energy along a wire for transmission from point to point. Hence, "conversation(s)" occurs repeatedly, *id*. at 6, 8, 9, 11, 12 (twice, once misspelt); *see also id*. at 11 ("secretly record the words of another"), and nothing other than speech is mentioned as an object of interception by either means. *See*, e.g., *id*. at 8 ("Wiretapping and eavesdropping by police officials will be limited to specified conversations and 'continuous searches' will be prohibited."). Significantly, the committee's observations were made with reference to a bill that is attached to the report and is identical to the present statute in its definition of "wire communication," "oral communication," and "interception" (minus the exception for a criminal investigation).

Before proceeding to examine the text of §99, it would be helpful to briefly examine the 1968 federal law on which it is modeled.

The federal law defines "wire communication" as "any communication made in whole or in part through the use of facilities for

the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception." 82 Stat. 212 §802. The rest of the definition goes on to describe the facilities of transmission.

"Oral communication" is awkwardly defined in terms of itself with the addition of a verb phrase: "oral communication" means "any oral communication uttered by a person" who has a reasonable expectation of privacy. *Id*.

"Intercept" is defined in needlessly technical terms as "the aural acquisition" of any wire or oral communication through the use of a device. *Id*.

The scope of the 1968 federal law was framed, then, albeit somewhat clumsily, in terms of speech ("oral" and "uttered") that is intercepted by being heard ("aural acquisition") in some way. Since the definition of "intercept" expressly applies to "any *wire* or oral communication" and since the interception must be "aural," *only wire communications that consist of speech come within the scope of the law, even though the definition of "wire communication" itself does not mention speech or use words like "oral" and "uttered*."

That makes sense. As we have seen, interception of wire communications was seen at this time as simply the alternative method by which to gain secret access to private conversations.

In short, the 1968 federal statute is entirely consistent with our earlier discussion of how the problem of eavesdropping was viewed at the time. The object of tapping into wire communications was understood to be the secret interception of *speech*.

We are now in a position to examine the cognate Massachusetts statute.

Section 99(B)(1) follows the federal definition of "wire communication" verbatim, except that language modifying "facilities" is moved to the definition given for "communications common carrier."

"Oral communication" is defined more simply and directly, without the awkward tautology, as "speech." §99(B)(2).

As relevant here, the noun "interception" is defined as "to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication." §99(B)(4).

We see that the Massachusetts statute tracks the language of the federal law, except where it adopts simpler, more direct wording. Crucial to this case is that the Massachusetts statute is also structured in the same

way logically. Like the federal statute, it clearly ties oral communication to "speech," while remaining silent on that question as pertains to wire communication. Rather, also like the federal statute, it restricts interception to *hearing* for both oral and wire communications, as it explicitly states.[5]

In other words, like the federal statute, the necessity for covered wire communications to be communications of *speech* is implicit in the definition of covered interceptions and thus need not be made explicit in the definition of wire communication itself. Once again, wire communication is regarded as simply speech communication transmitted along a wire to a destination point. *See United States v. New York Tel. Co*., 434 U.S. 159, 166-68 (1977) (deciding issue of protection of wire

[5] As we noted, it also includes the recording of speech as well ("to secretly hear, secretly record"). In this regard the Massachusetts legislature was ahead of Congress, which failed to clarify the relationship between "aural acquisition" (i.e., hearing) and recording. As a result, federal courts became confused as to whether recording speech without listening to it counted as unlawful or whether an unlawful interception occurs only when the audio recording is listened to by someone. *See* Ronni L. Mann, Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 Stan. L. Rev. 1411, 1415-17 (1974). *See infra*, pp. 22-23, for more on why "to record" is limited in §99 to the making of audio recordings.

communication on basis such protection is derivative of Congress's concern to protect "oral communications").

The ideas and the structure of the reasoning are the same in §99 as in the federal statute. The legislature merely chose to use common English words rather than wording that requires two years of high school Latin to understand ("aural acquisition").

Even aside from the cognate federal law, however, this interpretation of §99 is confirmed in the statute itself.

An application for a §99 warrant requires "[a] particular description of the nature of the oral or wire communications sought to be *overheard*"; it requires, too, "[a] statement that the oral or wire communications sought are material . . . and that such *conversations* are not legally privileged." §99(F)(2)(d), (e) (emphasis added). To make a lawful return, "the original recording of the oral or wire communications intercepted" must be returned to the judge; if no audio recording is made, return must be made of "a statement attested under the pains and penalties of perjury by each person who *heard* oral or wire communications as a result of the interception[,] . . . stating everything that was *overheard*."

§99(M)(d) (emphasis added).[6] The recordings are to be made on "tape or wire or other similar device."[7] §99(N)(1).

If the plaintiff's view of "wire communication" were correct, it would be impossible for law enforcement to obtain a warrant to intercept "wire communications" by using technology similar to the Java script used in this case. As the warrant requirements just recited demonstrate, however, the plaintiff's notion of an intercepted wire communication would not fit into the careful, detailed procedural requirements adopted to protect Fourth Amendment rights. There would be nothing to hear, overhear, or record; no lawful warrant could issue and no lawful return could be made.[8]

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[6] The version of the statute attached to the 1968 Massachusetts Senate Report even required a "verbatim transcript" of what was said on any recording. Senate Rpt. No. 1132 at 26.

[7] "Wire" refers to a now long obsolete technology that used magnetism to record sound onto extremely thin steel wire wound on spools. *See Wire Recording*, Preservation Self-Assessment Program, https://psap.library.illinois.edu/collection-id-guide/wire (last accessed Feb. 27, 2024).

[8] The arguments made here are consistent with the result in *Commonwealth v. Moody*, 466 Mass. 196, 208-09 (2013) because (i.) cell phone technology transmits communications in much the same way as wire communication does, i.e., by sending speech as electromagnetic energy through a medium (*see* §99(B)(1): "by the aid of wire, cable, *or other like connection*" (emphasis added)); and (ii.) speech coded as text

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III. The Court Should Recognize that Section 99 Lags Technology.

Already by the 1980s, the 1968 federal wiretap act, on which the Massachusetts law is modeled, was showing its age. Once again, as in the first two decades after the war, technology developed far more quickly than anyone had expected.

A House committee report acknowledged how much the law had lagged behind the times. Tellingly, the report focused on the fact that the law was limited to protecting speech from interception.

> Although it is still not twenty years old, the Wiretap Act was written in [a] different technological and regulatory era. Communications were almost exclusively in the form of transmission of the human voice over common carrier networks. Moreover, the contents of a traditional telephone call disappeared once the words transmitted were spoken and there were no records kept. Consequently the law primarily protects against the aural interception of the human voice over common carrier networks.
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> The statutory deficiency in Title III [i.e., Wiretapping and Electronic Surveillance] with respect to non-voice communications has been criticized by commentators, Congressional experts, and most recently by both the General Accounting Office and the Office of Technology Assessment.

U.S. House of Representatives, Committee on the Judiciary, Report 99-647 at 17, 18 (1986).

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messages is essentially indistinguishable from speech coded in telegraph messages, which is contemplated by the statute.

A U.S. Senate report from 1986 was no less candid about the problems created by the law's having an origin in a time when voice communications were dominant.

> It only applies where the contents of a communication can be overheard and understood by the human ear. [citing *New York Tel.*] . . . . It has not kept pace with the development of communications and computer technology. . . . These tremendous advances in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques.

U.S. Senate, Committee on the Judiciary, Report 99-541 at 2, 3 (1986).

By enacting the Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848, Congress massively updated the federal law. Of particular note is the addition of a new term to remedy the limited scope of the communications regulated. The term "electronic communication" is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system." 18 U.S.C. §2510(12).

Just as the 1968 federal act had, the Massachusetts statute became badly dated; unlike the federal law, it remains so.[9]

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[9] Plaintiff's attempt to show that the state legislators presciently allowed for future technological progress is unpersuasive. Expressions of

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In 2022, former Governor Charles D. Baker and former Attorney General, now Governor, Maura Healey sought "yet again" to persuade the Legislature to revise and update §99 in numerous ways.[10] The Governor's proposed bill, 2022 House Doc. No. 4347, would have not only eliminated the narrow requirement that §99 warrants be used to fight organized crime only, it would also have greatly expanded the meaning of "wire communication." The bill redefined the term to include "*any transfer* made in whole or in part through the use of facilities which allow for the transmission of communications by the aid of wire, cable, wireless, electronic, digital, radio, electromagnetic, satellite, cellular, optical or other technological means," as well as redefining the term to

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generalized anxiety about the future are not the same as foresightful legislating. *See*, e.g., Interim Report of the Special Commission on Electronic Eavesdropping, S. Rep. No. 1198 at 4 (1967) ("Clearly the future is frightening, and beyond the layman's comprehension."). We note that the fears expressed in the report are confined to refinements in established eavesdropping and wiretapping techniques; computers and programming languages are not even hinted at, needless to say. As discussed above, by the mid-80s Congress did not believe that the same "wire communication" language of the cognate 1968 federal law was any longer adequate to the technology.

[10] Samantha J. Gross, *Baker, Healey, and DAs say wiretapping law needs update to fight crime. If history is any guide, lawmakers will disagree*, Bos. Globe (Feb. 13, 2022), https://www.bostonglobe.com /2022/02/13/metro/baker-healey-das-say-wiretapping-law-needs-update-fight-crime-if-history-is-any-guide-lawmakers-will-disagree/ (last accessed March 8, 2024).

include "any transfer of signs, signals, writing, images, photographs, videos, texts, sounds, data or intelligence of any nature transmitted in whole or in part by using a cellular telephone, smartphone, personal data assistant or similar device."[11] 2022 House Doc. No. 4347 §2(1) (emphasis added.).

There can be little doubt concerning the technological limitations of a law dating from an era when the Beatles were still together, direct long-distance dialing was still a novelty, and DARPA (the Defense Advanced Research Projects Agency) had just started a top-secret research program that would lead, years later, to the modern internet.

CONCLUSION

The Court should reverse the decisions of the trial court.

[11] The late Chief Justice Ralph Gants twice lamented the baneful consequences of the Legislature's failure to amend the 1968 statute in order to eliminate "five words," i.e., "in connection with organized crime," whose presence, he said, rendered electronic surveillance "unavailable to investigate and prosecute the hundreds of shootings and killings committed by street gangs in Massachusetts." *Commonwealth v. Burgos*, 470 Mass. 133, 149 (2014) (concurring).

Respectfully submitted,

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By their attorneys,

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Dated: March 13, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. A. P. 16(k), I certify that this brief complies with the rules pertaining to the filing of an amicus brief, including, but not limited to, Mass. R. A. P. 16, 17, 18, 20, and 21, where pertinent. The document was composed on Microsoft Word 2013 in 14-point Times New Roman. As determined by Word's word-count tool, the number of **non-excluded words** in this brief is **3,932** and the number of **excluded words** is **1,459** *See* Rules 16(a)(5-11) and (k) and Rule 20(a)(2)(C), (D), and (F). Dated: March 13, 2024

/s/ John Pagliaro
John Pagliaro

CERTIFICATE OF SERVICE

In *Vita v. Beth Israel Medical Center*, pending in the Supreme Judicial Court, No. SJC-13542, I certify that on the date subscribed below, on behalf of New England Legal Foundation and Associated Industries of Massachusetts, I served the Brief of Amici Curiae New England Legal Foundation and Associated Industries of Massachusetts by e-file on party counsel as follows:

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