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COURT OF APPEALS
STATE OF NEW YORK

REYES,

Respondent,

-against-

NO. 59

CITY OF NY,

Appellant.

20 Eagle Street
Albany, New York
May 21, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Reyes v. City of New York.

3 MR. MECHANICK: May it please the court - - -

4 CHIEF JUDGE WILSON: Hold on one second. Let's
5 let everybody get settled. Okay.

6 MR. MECHANICK: May it please the court, Chase
7 Mechanick for the City of New York. I'd like to reserve
8 four minutes for rebuttal, please.

9 CHIEF JUDGE WILSON: Yes.

10 MR. MECHANICK: The question before this court is
11 whether the state and city Right to Record Acts permit
12 individuals like Mr. Reyes to violate NYPD's ban on
13 recording in police precinct lobbies, potentially creating
14 a permanent audio-visual record of the faces, identities,
15 and conversations of members of the public as they seek
16 police assistance in some of their most vulnerable moments.
17 The answer is no. The NYPD exercised its lawful authority
18 as a property owner to prohibit recordings in this precinct
19 - - -

20 JUDGE RIVERA: Let me ask you this. Let's start
21 out with the first part of the way we would usually analyze
22 these kinds of issues. Are - - - is the statute and the
23 administrative code, are they ambiguous or unambiguous as
24 to location?

25 MR. MECHANICK: As to location?

1 JUDGE RIVERA: Yes.

2 MR. MECHANICK: They are ambiguous as to
3 location, and they are more importantly ambiguous as to the
4 potential conflict between property rights exercised in a
5 particular location.

6 JUDGE RIVERA: No, that's your argument. So you
7 say they're ambiguous because it's not clear where they
8 apply; is that correct?

9 MR. MECHANICK: I would say that's correct. It's
10 not clear where they apply.

11 JUDGE RIVERA: So then we get to the legislative
12 history because that's the way our rules work. If it's
13 ambiguous, we move on to the legislative history. Why
14 don't you focus on that for a minute?

15 MR. MECHANICK: So I think the legislative
16 history tells us three things rather clearly. One, the
17 predominant problem that the legislatures were focused on
18 in the City Council and the state legislature were with
19 officers exercising a purely law enforcement function in
20 places where there were no property restrictions against
21 recording, the paradigmatic example being street sidewalks
22 and parks, but other examples could exist as well. They
23 were, of course, moved by the horrific murder of George
24 Floyd, which was filmed on a public sidewalk. They were -
25 - -

1 JUDGE SINGAS: They basically said, though,
2 public areas. So why couldn't a police precinct lobby be a
3 public area? Maybe I'm there to report my stolen phone,
4 and I'm watching something, some arrests go down that I
5 think is problematic, and I want to tape record it. Why
6 wouldn't that comply with what the legislature's intent
7 was?

8 MR. MECHANICK: So a few reactions to that.
9 First, I think it is helpful to begin answering your
10 question by stepping back to recall what the - - - what
11 we're looking for when we look at this legislative history.
12 We're looking for a clear and specific and unambiguous
13 statement to override preexisting property restrictions.
14 So I think it's notable with respect to Your Honor's
15 question, what the Second Circuit said. The - - -

16 JUDGE RIVERA: I think you've assumed there's
17 property restrictions. The question was it's a public
18 space. It's a public lobby.

19 MR. MECHANICK: Well, there are property
20 restrictions in public areas that - - - that public and
21 private owners can exercise.

22 JUDGE RIVERA: Yes, but the legislature may have
23 decided to supersede them with the law. That's the
24 question. It's a circular argument.

25 MR. MECHANICK: But the - - - but the may have, I

1 think, is the rub of it. When we apply the canon
2 correctly, as the court did in Ezrasons, as the court did
3 in - - - in - - -

4 JUDGE HALLIGAN: Do you need the property
5 restrictions to prevail. If we don't want to rely on the,
6 you know, authority to impose property restrictions as a
7 landowner, do you lose?

8 MR. MECHANICK: I - - - that is our main
9 argument. I don't think we necessarily lose, because it
10 was also clear from the legislative history that the
11 legislature intended to encode what they understood to be a
12 First Amendment right. However, our primary argument - - -

13 JUDGE HALLIGAN: I know, but if you would for a
14 minute, tell me what your view is with regard to the
15 indicia of legislative intent if we set aside the property
16 restrictions argument for a minute.

17 MR. MECHANICK: So I think one of the most clear
18 things that appears from the legislative history is that
19 the city and state lawmakers understood themselves to be
20 codifying a First Amendment right that had theretofore been
21 recognized in other circuits, but had not yet been clearly
22 established in the Second Circuit.

23 JUDGE HALLIGAN: In other words, the traditional
24 public places right?

25 MR. MECHANICK: So the - - - the different

1 circuits had had taken different approaches, but where
2 those rights had been recognized were all what we've called
3 quintessential public spaces. There was no indication that
4 the legislators intended to encode a theretofore,
5 unrecognized and unheard of right to film, either within a
6 police precinct where the where the - - - where NYPD had
7 prohibited such filming, or to permit filming of law
8 enforcement officers - - -

9 JUDGE CANNATARO: Limiting it to this whole
10 notion of public spaces, what is it about a police station
11 lobby that lacks the necessary indicia or characteristics
12 of a public space because they're open twenty-four hours a
13 day, for the most part, anyone's free to come in and do
14 what they want to do, free to leave? It sounds pretty
15 public.

16 MR. MECHANICK: Well, this gets back to our
17 argument. What makes police stations different is that the
18 owner of the police station has exercised lawful authority
19 to prohibit members of the public who are on that property
20 from filming. So our argument isn't really - - -

21 JUDGE CANNATARO: But if there's a statute in
22 place which, by your own admission, is intended to allow
23 filming in public of police activity, what better place to
24 find police activity than in a public lobby of a station?

25 MR. MECHANICK: Again, I think it's - - - it is

1 notable that the lawmakers were almost certainly aware of
2 this policy for years prior to the enactments. Nobody
3 raised their hand in the contemporaneous legislative record
4 and said that the precinct policy was something that the
5 Right to Record Acts were abolishing. Nobody mentioned any
6 situation where any kind of property owner in the
7 contemporaneous legislative history had trespassed someone
8 - - -

9 JUDGE CANNATARO: So we assume that the
10 legislature was aware of the policy banning recording in
11 those spaces, and had they intended to do away with that,
12 you would expect, I assume your argument is, to at least
13 see some indication in the legislative history that that
14 was one of the things that they were trying to target.

15 MR. MECHANICK: I think that's exactly correct.

16 JUDGE RIVERA: Why not just then, say, public
17 streets?

18 MR. MECHANICK: Because it was - - - it's not
19 limited to public streets. That's - - -

20 JUDGE RIVERA: What else is included?

21 MR. MECHANICK: Everywhere where there is no
22 property restriction against recording.

23 JUDGE RIVERA: Is that what it says?

24 MR. MECHANICK: It's not what it says. That is
25 how - - -

1 JUDGE RIVERA: Okay. So what then, otherwise,
2 fits this bill?

3 MR. MECHANICK: The - - - I - - - I - - -

4 JUDGE RIVERA: It's the streets. What else?

5 MR. MECHANICK: It could be within a person's own
6 home.

7 JUDGE RIVERA: Streets, parks, and so forth.

8 MR. MECHANICK: It could be within a person's own
9 home, which is an area not open to the public. It could be
10 when a person is on - - - is in another person's home, and
11 that person has not prohibited them from filming.

12 JUDGE RIVERA: Yeah. That's because people have
13 consent.

14 MR. MECHANICK: Right.

15 JUDGE RIVERA: So I'm not really understanding
16 this argument.

17 MR. MECHANICK: And so that consent is an
18 exercise of the relevant property restrictions. But by
19 contrast, if you have law enforcement activity taking place
20 in a private home, and the owner or tenant of that private
21 home doesn't want the law enforcement activity being filmed
22 - - -

23 JUDGE RIVERA: But that's - - - the legislative
24 history is clear. That's not the problem they were trying
25 to address.

1 MR. MECHANICK: Correct. That's not the problem
2 - - -

3 JUDGE RIVERA: I'm asking you to ground this in
4 that legislative history.

5 MR. MECHANICK: Well, it's an argument - - -

6 JUDGE RIVERA: I think you started out saying - -
7 - I may have misunderstood you, but the history - - - that
8 legislative history focuses on three problems, or did I
9 miss - - - mishear you at the beginning?

10 MR. MECHANICK: I said three things were clear.

11 JUDGE RIVERA: So let's get those three things.
12 Go ahead.

13 MR. MECHANICK: But I've sort of alluded to them
14 first was they were focused on places where there were no
15 relevant property restrictions. The paradigmatic example
16 being quintessential - - -

17 JUDGE RIVERA: Where do I find that in the
18 legislative history?

19 MR. MECHANICK: You can find it in the 2017 CCRB
20 report, which was cited by the 2020 Committee on Public
21 Safety report. And there from pages, I believe it's, 24 to
22 30. They run through numerous examples that the CCRB found
23 problematic. You can find it in many of the remarks in the
24 Assembly by Assemblymember Perry, who stated over and over
25 again, invoking that the quintessential example of where

1 this right would be exercised and needed to be protected
2 would be on public streets.

3 Other Assemblymembers - - - so for example
4 Assemblymember Walker discussed a situation where a police
5 officer had allegedly been disciplined after being recorded
6 interacting with protesters outside the Barclays Center. I
7 mean, this is what the - - -

8 JUDGE RIVERA: And again, these are all public
9 streets; are they not?

10 MR. MECHANICK: Correct. Correct. And that is
11 what - - - that is what the legislature was focused on.

12 JUDGE RIVERA: On public streets?

13 MR. MECHANICK: The - - -

14 JUDGE RIVERA: And public parks, those kinds of
15 public areas.

16 MR. MECHANICK: In the CCRB report, there was
17 also a case mentioned of officers being filmed within a
18 common area of a residential building. And unless the
19 residential building had some sort of weird rule that
20 prohibited people from recording the police in those common
21 areas, that would fit within our theory. The legislators
22 also talked about the Rodney King incident. The Rodney
23 King incident was filmed by an individual who was recording
24 within their own home, which is not an area accessible to
25 the public. The relevant criterion under our

1 interpretation - - -

2 JUDGE RIVERA: You don't have to give someone a
3 right to record in their home.

4 MR. MECHANICK: No, but you can withhold that
5 right. You can say that I don't want you filming what's
6 happening here. And we've provided examples after examples
7 in our brief where in hospitals - - -

8 JUDGE RIVERA: But a private home is completely
9 private. It's not like a public lobby. It's not the same
10 thing.

11 MR. MECHANICK: There's no textual basis to
12 distinguish between a private area and a public area. The
13 way you get to our reading of the statute is to apply the
14 nonderogation cannon to the text, and I'll point out that
15 our reading provides a - - - a stable interpretation that
16 answers other questions about where this right would apply
17 in other - - -

18 JUDGE HALLIGAN: What about a public park that is
19 owned by the city?

20 MR. MECHANICK: So I think in - - - in a park
21 that's owned by the city, that would be a place where - - -

22 JUDGE HALLIGAN: Can you prohibit recording
23 there?

24 MR. MECHANICK: So almost - - - almost certainly
25 not.

1 JUDGE HALLIGAN: Why not?

2 MR. MECHANICK: Under our rule, the property
3 rights have to be lawfully exercised. I think there would
4 be serious constitutional vulnerabilities if the city were
5 to - - -

6 JUDGE HALLIGAN: Even if it was content neutral,
7 you allowed it - - - you enforced it regardless of what the
8 conduct was.

9 MR. MECHANICK: That would - - - that would be
10 like Glik, which was one of the cases that the legislature
11 cited in the city and the state.

12 JUDGE HALLIGAN: And what about subways?

13 MR. MECHANICK: So again, subways are a place
14 where they are highly trafficked thoroughfares and whether
15 they are characterized as public fora or nonpublic fora - -
16 -

17 JUDGE HALLIGAN: So you can or couldn't - - - you
18 could or could not - - -

19 MR. MECHANICK: I could not think - - -

20 JUDGE HALLIGAN: - - - make a recording on a
21 subway?

22 MR. MECHANICK: I could not think of a way that
23 our interpretation would allow that.

24 JUDGE HALLIGAN: Okay. So why are subways
25 different than a, you know, very busy precinct station open

1 twenty-four/seven.

2 MR. MECHANICK: Because there are - - - the
3 constitutional analysis would be different in a subway. If
4 you look at the District Court's decision in our case, the
5 District Court identified reason after reason why recording
6 in a police precinct, even if it's a nonpublic forum would
7 be - - - would surmount the threshold of reasonableness for
8 the purpose of protecting people who come to record the
9 police. Those considerations, even if a subway were
10 characterized as a nonpublic - - - as a - - -

11 JUDGE HALLIGAN: It's not a function of your
12 rights as a property owner. It's a function of the
13 constitutional overlay, you're saying?

14 MR. MECHANICK: They have to be lawfully
15 exercised property rights. So there is - - - it is
16 potentially downstream of constitutional considerations.
17 But as we've expressed the rule in our brief, when there
18 are lawfully exercised property rights, those property
19 rights are not superseded by the statutory rights.

20 JUDGE TROUTMAN: What about a SUNY campus?

21 MR. MECHANICK: It would be the same answer as a
22 subway. I think there would be serious constitutional - -
23 -

24 JUDGE TROUTMAN: So you can limit recording on a
25 on a campus, even though public is invited to traverse

1 different areas of it?

2 MR. MECHANICK: No, Your Honor, that's not my
3 argument. To the contrary, I think that would be highly
4 suspect under the Constitution.

5 JUDGE CANNATARO: So if I can derive anything out
6 of your answers to these hypotheticals, it seems as if,
7 while these spaces might arguably qualify as public spaces,
8 including police station lobbies, there's an overlay of
9 property rights, obviously, you've been talking about that.
10 But something having to do with security, I guess, and
11 safety that somehow pushes these spaces outside the reach
12 of the statute; is that fair?

13 MR. MECHANICK: It - - - allow me to explain it.

14 JUDGE CANNATARO: Sure.

15 MR. MECHANICK: It potentially comes into play
16 when you're performing the constitutional analysis to
17 determine whether the rights were properly exercised - - -
18 were lawfully exercised. So safety and security
19 considerations factor into whether the prohibition is
20 reasonable under basically any - - - any kind of
21 constitutional scrutiny. If the restriction is
22 unconstitutional, then in the eyes of the law, it's a
23 nullity.

24 There's no conflict now between property rights
25 and statutory rights because the property rights are

1 unconstitutional. They've washed away as they would likely
2 be in a situation like a subway or in an open SUNY campus.
3 Police stations are different. And it is - - - it was the
4 District Court's finding in this case that recording
5 restrictions and - - - that there was no substantial
6 likelihood of success on the First Amendment claim with
7 respect to recordings in police stations.

8 You have crime victims. You have people seeking
9 to register as confidential informants who may be chilled
10 from entering the police station if they know that any
11 number of individuals could camp in the lobby and put a
12 camera phone in their face.

13 JUDGE RIVERA: But they can film from outside,
14 right?

15 MR. MECHANICK: They can film from outside. They
16 can film from outside.

17 JUDGE RIVERA: A chilling effect.

18 MR. MECHANICK: But as the District Court noted,
19 a person filming outside wouldn't be able to capture the
20 conversations that people are having when they report the
21 events that happened to them or that they witnessed to
22 members of service.

23 CHIEF JUDGE WILSON: I'm having a little trouble
24 because I, at some point, thought we were discussing how to
25 interpret the statute. And a lot of your answers have been

1 what the Constitution requires. And at least one way to
2 interpret what you've been saying is the statute would
3 prohibit a lot of things, but some of those things the
4 Constitution protects, and therefore, part the statute is
5 partially invalid, or we can't interpret the statute that
6 way so - - - because we have to confine it to the
7 constitutional bounds or something.

8 MR. MECHANICK: The - - - again, the rule is that
9 the statutory right does not supersede a lawfully exercise
10 - - - a lawful exercise of property rights. Lawful
11 exercise is a load bearing term that potentially could
12 include constitutional rights.

13 CHIEF JUDGE WILSON: That depends though, I guess
14 as you got asked this at the very beginning, that depends
15 on our agreement with you that these are property rights in
16 the conventional sense, rather than statutory. A lot of
17 the cases that you cite seem to be cases in which there was
18 a statute involved that provided the authorization for the
19 government to do something or not do something, not - - -
20 not a common law property right.

21 MR. MECHANICK: The - - - Your Honor, is, of
22 course, referring to the Penal Law. And yes, in most
23 situations - - -

24 CHIEF JUDGE WILSON: In some cases. But even,
25 you know, Central Park is closed after some particular hour

1 out at night, nominally at least, I think, 11 p.m. or
2 midnight, something like that. And that's not pursuant to
3 the Penal Law, I think.

4 MR. MECHANICK: So in - - -

5 CHIEF JUDGE WILSON: Parks authority has the
6 ability to regulate conduct in parks to some degree.

7 MR. MECHANICK: I see my time is up. Thank you.

8 CHIEF JUDGE WILSON: I know - - - yes.

9 MR. MECHANICK: I think the Martinez case, which
10 is a lower court case, but my friends on the other side
11 endorsed it as an accurate statement of New York law, I
12 think, lays out how the Penal Law looks to and is
13 legislated against the backdrop of common law property
14 rights in order to understand who was an owner and what an
15 owner can do. And that case involved a police precinct.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. CASE: May it please the court, Andrew Case
18 from LatinoJustice PRLDEF. I'm joined by my colleague
19 Namratha Somayajula on behalf of respondent, SeanPaul
20 Reyes.

21 The certified question can be broken into three
22 parts. First, absent any effort to regulate them, do the
23 Right to Record Acts as an initial matter cover the public
24 lobbies of police precincts?

25 Second, if they do, may the New York Police

1 Department use the trespass law and the common law right to
2 exclude to bar recording in those spaces.

3 And third, which my opponent did not address - -
4 -

5 JUDGE TROUTMAN: Is where defined in the statute?

6 MR. CASE: Is what?

7 JUDGE TROUTMAN: Where they have the right to
8 record specifically defined?

9 MR. CASE: The statute is provides specific - - -
10 broad language, people not under arrest have the right to
11 record. It doesn't say one place or another place.

12 JUDGE RIVERA: So then is it ambiguous?

13 MR. CASE: Well, to the extent it is ambiguous,
14 the interpretation from the NYPD about it when they put out
15 their policy is the right to lawfully observe and record
16 police activity extends to individuals in public places
17 such as streets, parks, sidewalks, as well as private
18 property in which the individual has a legal right to be
19 present, such as buildings, lobbies, workplaces, and
20 individuals own property.

21 The reading would be if you have the right to be
22 there to begin with, then you have the right to record
23 there. I don't think there's really any question of that
24 if the police department did not exercise this purported
25 rule that you would be able to record in precincts.

1 JUDGE RIVERA: What's the legislative history?
2 What is the problem that the legislature was intending to
3 address with the statute?

4 MR. CASE: The legislature was intending to
5 address the problem of civilians' lack of access to
6 evidence of police misconduct, and police misconduct can
7 take place in a precinct lobby, just as it can on the
8 streets. Just in February, Ofc. Quran McPhatter was
9 arrested by the Brooklyn - - - was indicted by the Brooklyn
10 District Attorney for an assault in a precinct lobby, the
11 only evidence of which was a civilian recording him in that
12 lobby. In the legal aid brief, you saw Patricia Rodney, a
13 sixty-two-year-old grandmother, was in the lobby of a
14 precinct trying to get - - -

15 JUDGE SINGAS: What about inside a private home?

16 MR. CASE: Inside a private home? Then you have
17 private property rights. And that's one of the things - -
18 -

19 JUDGE SINGAS: But where? The text doesn't say
20 that.

21 MR. CASE: No. The text that - - - if you have
22 the legal right to be inside a private home, then you can
23 record police officers - - -

24 JUDGE HALLIGAN: What about a public hospital?

25 MR. CASE: So if you have the right to be in a

1 place in a public hospital, you have the right to record,
2 and all of these regulations - - -

3 JUDGE HALLIGAN: So any privacy concerns that
4 might arise in the context of a public hospital, you think
5 the legislature intended to overcome with this statute?

6 MR. CASE: I think there's two answers to that.
7 First of all, when you talk about the public lobby of the
8 hospital, the intake area before people are restricted at
9 all is different. And secondly, there is a - - -

10 CHIEF JUDGE WILSON: But why is that different -
11 - -

12 JUDGE HALLIGAN: Why?

13 CHIEF JUDGE WILSON: Sorry. Why is that
14 different?

15 JUDGE CANNATARO: Why is that different?

16 MR. CASE: Well, because you can restrict someone
17 from recording if you can restrict them from going past - -
18 -

19 JUDGE CANNATARO: No, no, no. But why - - - if
20 the hospital has publicly accessible hallways and you know,
21 waiting areas that are within the building - - -

22 CHIEF JUDGE WILSON: Then you could record.

23 MR. CASE: Yes.

24 CHIEF JUDGE WILSON: Then you could record.

25 JUDGE CANNATARO: Why can't they have a policy

1 that says there's no recording on hospital property?

2 MR. CASE: Well, that policy - - - because if
3 it's - - - if they're a private hospital - - -

4 JUDGE CANNATARO: Public hospital.

5 JUDGE HALLIGAN: We're asking a public hospital.

6 MR. CASE: Then, a public hospital, then they
7 would be governed by Leonard, just as this is governed by
8 Leonard, and this court in Leonard held - - -

9 JUDGE RIVERA: But aren't the statutes only
10 allowing for recording of law enforcement activities? You
11 can't just be about the business of in a public hospital
12 and just recording anything you see.

13 MR. CASE: No, of course. The recording would
14 have to - - -

15 JUDGE RIVERA: It's about law enforcement
16 activities, correct?

17 MR. CASE: If you're walking up and down the
18 hospital, there's no law enforcement there - - -

19 JUDGE GARCIA: How broad is that - - -

20 MR. CASE: - - - this rule does not apply.

21 JUDGE GARCIA: How broad is that, though, law
22 enforcement activity? What if there are police in the
23 lobby? Can you record them?

24 MR. CASE: Yes.

25 JUDGE GARCIA: So what if there's a threat,

1 perhaps because of a particular procedure that's being
2 conducted in this facility and you have law enforcement in
3 the lobby, then you could record that?

4 MR. CASE: Yes, you can record law enforcement in
5 the lobby of a public - - -

6 JUDGE GARCIA: So you - - -

7 CHIEF JUDGE WILSON: And if I'm visiting a
8 patient in the ICU of a hospital that has a no recording
9 policy inside the ICU, but there's another patient right
10 next door in the ICU who is under police custody, I can
11 record that?

12 MR. CASE: Well, you're already past a secure
13 area once you're up in the ICU.

14 CHIEF JUDGE WILSON: I understand that.

15 MR. CASE: The doors are secure at that point.
16 And to get to Judge Halligan's - - -

17 CHIEF JUDGE WILSON: But I'm sorry, but I'm there
18 lawfully.

19 MR. CASE: The restrictions on property rights
20 are dependent for government property owner, and obviously
21 there's no impact on private property owners. And people
22 can kick people out of privately - - -

23 JUDGE HALLIGAN: Yeah, but there are significant
24 - - - I think the concerns you're hearing are because there
25 are substantial public facilities in the city. And so I

1 think the question is, I don't know whether an ICU is
2 secure or not secure, but let's assume an area of a public
3 hospital which doesn't need to be secured.

4 So let's, for example, take a chemotherapy ward,
5 and there is someone who is there under the supervision of
6 a police officer because of whatever reason that is, and I
7 come in to get chemotherapy, and I assume then that if I
8 pass by that law enforcement officer, I can be recorded.

9 MR. CASE: Yes.

10 JUDGE HALLIGAN: And my privacy concerns, maybe I
11 haven't disclosed to people, you know, my illness, whatever
12 it is. My question really is, what makes us think that the
13 legislature intended to sweep that broadly?

14 MR. CASE: The legislature intended to provide
15 the right to record law enforcement. That is not always -
16 - -

17 JUDGE TROUTMAN: So the right to record law
18 enforcement supersedes any privacy right of a cancer
19 patient?

20 MR. CASE: No.

21 JUDGE TROUTMAN: Is that what you're saying?

22 MR. CASE: The cancer patient's privacy rights
23 are contained in the publication, not in the recording.
24 There are - - - if you look at Chanko v. ABC, this court
25 heard about what the factual - - -

1 JUDGE GARCIA: But who keeps the recording? I
2 have the right under the statute to keep the recording. So
3 even if I don't put it online, I still have a recording of
4 you coming into the ward.

5 MR. CASE: Right. You need to be able to keep
6 your recording of the police activity.

7 JUDGE RIVERA: Why aren't there federal and state
8 laws? I thought there were.

9 MR. CASE: What?

10 JUDGE RIVERA: Why aren't there federal and state
11 laws, because I thought there were, that would prohibit
12 such conduct? So to the extent it sounds like your
13 argument is no, you can lawfully record, it strikes me that
14 there are other laws that supersede that related to health
15 matters specifically, HIPAA and other such statutes.

16 MR. CASE: So if there's a question of some kind
17 of conflict of law and some kind of, for example, health
18 privacy statute, that would override what's going on in a
19 building, then you have a conflict of laws, and - - -

20 JUDGE CANNATARO: I don't think anything in HIPAA
21 prohibits the recording of patients in a hospital,
22 necessarily, but it does give them a right to privacy. And
23 if your statement is correct that someone sitting in a
24 dialysis, chemotherapy, a ward in a hospital can be
25 recorded, I do see it implicating HIPAA, even though it

1 doesn't necessarily prohibit the recording.

2 MR. CASE: It might not - - - it might implicate
3 HIPAA, particularly if the hospital or the caregivers
4 involved, because HIPAA manages caregivers, not the
5 individuals.

6 JUDGE CANNATARO: It protects patient information
7 as well.

8 MR. CASE: Right. And if you publish it - - -

9 JUDGE CANNATARO: And the identity of a patient
10 is highly informative.

11 JUDGE RIVERA: You can't be in a dialysis center
12 if you are not a patient. That's just the bottom line.

13 MR. CASE: Yeah. The factual situations are
14 getting a little out of control, because if we look at the
15 actual regulations that they cited for this point, which
16 are from the Office of Mental Health, it's a multi-page,
17 detailed regulation limiting phones in program and
18 treatment areas. Patient rooms include patient accessible
19 areas. It doesn't say anything about public lobbies.

20 What Leonard held for SUNY Binghamton, as Judge
21 Troutman mentioned, and later for the subway, as Judge
22 Halligan mentioned, if a government holds a space out to
23 the public twenty-four hours a day, they are not permitted
24 to then use the trespass law to expel someone for
25 exercising a statutory or constitutional right.

1 And this whole question of how much the
2 Constitution versus the state under constitutional
3 avoidance, one should look first to the state law, the
4 state statute, and the state statute provides a right. So
5 once you've thrown it open to everybody, which you have
6 done in a police precinct, and by the way, police precincts
7 are absolutely quintessentially public spaces. You hear
8 public spaces throughout this. There seems to be some
9 distinction going on between indoors and outdoors.

10 JUDGE TROUTMAN: But that's only - - - but that's
11 only if you assume that the precinct is included because
12 you stated earlier the statute doesn't say where you can
13 record.

14 MR. CASE: No, the statute says that you have a
15 right to record, but it doesn't say anything about limiting
16 that right to record based on - - -

17 JUDGE TROUTMAN: Could that not lead to absurd
18 results? And that's why the hypotheticals were being asked
19 of you.

20 MR. CASE: Yeah, I think actually the City's
21 position leads to absurd results, because when you asked,
22 where are the other places. When Judge Halligan asked
23 about the subways, there's no question that under the
24 city's regulation, they could bar recording on subways.

25 JUDGE TROUTMAN: So by your definition, the right

1 to record, as long as there's a police officer, you can
2 record anywhere. And you said even if there are rights
3 that you can't publish the recording; if it's recording of
4 me, I have to trust that you're not going to release it. I
5 can't prevent you from recording.

6 MR. CASE: You can't record anywhere. You can
7 record in a place that you're already allowed to be and
8 where the right hasn't been restricted. And all of the
9 case law subsequent to Leonard, Martinez - - -

10 JUDGE CANNATARO: But aren't we talking about the
11 restriction? I mean that's what - - - that's what's
12 happening in these police lobbies. The NYPD has a policy
13 that you can't record in their lobbies.

14 MR. CASE: Right.

15 JUDGE CANNATARO: If you're willing to accept a
16 restriction because there's a restriction, then there's no
17 appeal here, right?

18 MR. CASE: But that's all - - - that's subsequent
19 to the fundamental holding the space open to the public.
20 That's the one - - -

21 CHIEF JUDGE WILSON: So I'm arrested for a crime.
22 I'm brought into an interview room to be interrogated. I
23 have the right to be there. Can I film it?

24 MR. CASE: No. You're already in a private
25 space. Again, how the government - - -

1 CHIEF JUDGE WILSON: Well, how - - - that's a
2 public space. It's your property rights, right?
3 Government property rights.

4 MR. CASE: You have been taken behind a closed
5 door. You have - - - the interview rooms are private
6 sections of the precincts, and they are places - - -

7 JUDGE GARCIA: I thought you said if you had the
8 right to be there, you could tape.

9 MR. CASE: As a preliminary matter. And then
10 once the property owners can restrict that, right, as you
11 see in Martinez and Reape, and the other cases - - -

12 CHIEF JUDGE WILSON: Oh, so then I think - - -

13 MR. CASE: - - - if you are interfering with the
14 use of a property. That's the common law of property - - -

15 CHIEF JUDGE WILSON: Why would that be - - - if
16 you were interfering with the use of the property?

17 MR. CASE: Yeah. So one of the ways that you
18 interfere with the use of the property, if you're recording
19 your own interrogation in an interrogation room, just as
20 the Hills case, which is the First Amendment case of cops
21 recording their interviews, is that you're interfering with
22 that process, like, that's a secure - - -

23 JUDGE TROUTMAN: Okay. What about the fact that
24 you have a reluctant victim? The victim doesn't want to
25 sign the complaint. The police finally convinced the

1 victim to sign. They come into the public lobby. So
2 you're saying there's a right to record that victim?

3 MR. CASE: So - - -

4 JUDGE TROUTMAN: Because the lobby is public.

5 MR. CASE: The police department testified at the
6 preliminary injunction hearing that they have private
7 spaces in precincts where if someone requests privacy, if
8 they need to have a private interaction, they can be taken
9 there. They have separate rooms for complaints.

10 JUDGE TROUTMAN: So they have to request it
11 before they step onto police property. Otherwise they're
12 fair game. So if the public knows that once you walk
13 across the threshold of a police station, if you're in the
14 lobby, you might be recorded, couldn't that have a chilling
15 effect on the prosecution of crimes - - -

16 MR. CASE: No more than - - -

17 JUDGE TROUTMAN: - - - and is that the intent of
18 the legislature?

19 MR. CASE: No more than the chilling effect of,
20 as Judge Rivera was saying, someone recording people
21 walking in and out of the precinct, there's plenty of ways
22 to contact the police without having to walk into the
23 precinct lobby if you're worried about being seen.

24 JUDGE CANNATARO: I don't know if that's
25 necessarily true. When you get into the police station and

1 start interacting with police personnel, you are discussing
2 topics disclosing information that are far, far less likely
3 to be exposed just walking into the station.

4 MR. CASE: That's almost certainly when you start
5 getting a private room. Right, you go up to the front
6 window. The person says, what do you want to do? You say,
7 I have a complaint, I'd like to make it in private. You're
8 taken to a private room.

9 JUDGE SINGAS: Yeah, but what if before you get
10 to the private room, let's say you're a domestic violence
11 victim and you want to come in to - - - you've just moved
12 to a new area because you want to get away from your
13 abuser, and you walk into a police precinct because you
14 want to say to them, look, I'm here, and here's an order of
15 protection that you should be aware of. And as you're
16 walking in, somebody videotaping, and now it's put on the
17 Internet, and now her abuser sees where she's living.

18 MR. CASE: Well, that's the same issue that would
19 happen with walking in. That person would be seen walking
20 in. That person would probably, at the window, be able to
21 say they want a secure place. Those are the sorts of
22 things - - - in fact, there's special intake rooms the NYPD
23 has for domestic violence where other people cannot even go
24 in. So they do take steps to protect those kinds of
25 privacy - - -

1 JUDGE SINGAS: You still have to go through the
2 lobby to get there is our - - - it's a different point.

3 MR. CASE: There's a whole different facility, if
4 you call. There's actually a different - - - if you have a
5 domestic violence, sexual assault, they have different
6 intakes rooms that aren't even at the precinct.

7 JUDGE CANNATARO: You do have to talk to someone
8 - - -

9 JUDGE SINGAS: No, they don't. Not all of them.

10 JUDGE CANNATARO: - - - when you walk in.

11 MR. CASE: No, not at every precinct, but the
12 NYPD has specialized units you can go to.

13 JUDGE SINGAS: Okay. But I'm just saying you're
14 a domestic violence victim. You just want to register your
15 order of protection. You may not know that there's a
16 separate room. You're just walking in before you even get
17 to that point.

18 CHIEF JUDGE WILSON: Not to mention that we're
19 talking about a state statute, and that applies not just to
20 the NYPD, right, but to every - - - this is the whole state
21 we're talking about, no?

22 MR. CASE: This - - - well, this is about spaces
23 that are held open to the public twenty-four hours a day.

24 JUDGE HALLIGAN: That would apply to facilities
25 across the state, not just in New York City.

1 MR. CASE: It would apply to state - - -
2 government owned, public accessible - - - public - - -

3 JUDGE TROUTMAN: So let me ask you this. There's
4 a statute about recording in courtrooms. If a police
5 officer is testifying, now, with this right to record, you
6 have the right to come into the courtroom regardless and
7 now start taping testimony because it's a police officer?

8 MR. CASE: This is not as held open to the public
9 as a police precinct. This is a highly regulated space.
10 It's regulated who's going to talk in which order. I can't
11 bring a sandwich in here. I went through a metal detector.
12 This is a highly regulated space.

13 JUDGE RIVERA: And you have the right to be here.
14 It's the public's house.

15 MR. CASE: So this gets to the point of the
16 regulations because the other - - - the other issue here is
17 all of these regulations, the courtroom regulations, the
18 OMH regulation are all passed through thorough, vetted
19 regulatory processes. And this rule itself was created in
20 twenty-four hours after a single embarrassing incident when
21 the NYPD called the press, put up a bunch of signs and
22 said, as of today, you can't record in precinct lobbies
23 anymore. That is a violation - - -

24 JUDGE RIVERA: That doesn't inform the legal
25 analysis about whether or not the statute covers that

1 particular space. So we can circle back to the legislative
2 intent. What animates the enactment of this statute does
3 seem to be about incidences on public streets, on outdoor
4 activities, not about what's going on in the lobby of a
5 police precinct.

6 MR. CASE: I think the lobby of a police precinct
7 is as much a public space as the outdoor space. It's a
8 space where the public can come in. The public - - - it
9 exists - - -

10 JUDGE RIVERA: But were there problems regarding
11 the precinct that the legislature was debating and
12 concerned about when they passed these statutes? Talk
13 about that.

14 MR. CASE: So Donovan Richards, who was the
15 sponsor of the bill, did in fact say in The New York Times
16 two years beforehand, yes, he was aware of the precinct
17 lobby rule. And yes, he did say that the law was going to
18 overturn it. He said he's going to eliminate the double
19 standard.

20 JUDGE RIVERA: Can I find it other than in a New
21 York Times article?

22 MR. CASE: He didn't say it in the legislative
23 history. You don't see people listing - - -

24 JUDGE RIVERA: One would think he would.

25 MR. CASE: Because you don't list every single

1 public space that you mean when you say public space.

2 JUDGE HALLIGAN: No, but usually you - - -

3 JUDGE RIVERA: Yeah, but that's crucial because
4 it is where the police are housed for part of the day. One
5 would think it would be included.

6 MR. CASE: I think the legislature thought it was
7 so obvious that if you say we're recording in public, then
8 this is public. This is a very public space where you see
9 police activity, you see police misconduct, and you see the
10 very things the statute is trying to prevent. And I know
11 Judge Halligan had a question.

12 JUDGE HALLIGAN: No.

13 MR. CASE: I would like to go back to this CAPA
14 question because I think it solves some of the questions
15 that we've been having. If there is some kind of
16 restriction or some kind of tailoring that this court sees
17 in the Right to Record Act in terms of these spaces, then
18 the proper thing would be to say under the certified
19 question, the question is, do they have the right to record
20 notwithstanding the NYPD's rule. The NYPD's rule is
21 invalid under CAPA. This is the second time in two days
22 that this court has heard a rule that the NYPD promulgated
23 that affects members of the public, simply because - - - in
24 the patrol guide, the shackling rule from yesterday was put
25 in the patrol guide as well. And that's a must rule. And

1 this rule is put in the patrol guide. The NYPD has been
2 avoiding the process of drafting rules - - -

3 JUDGE RIVERA: Okay. But we have - - - we have a
4 particular certified question before us.

5 MR. CASE: About this particular rule.

6 JUDGE RIVERA: Yes. So let's stick with the
7 question before us.

8 MR. CASE: So if this rule is invalid, and you
9 have questions about what the scope of the statute - - - of
10 the statute provides, you can give guidance to the NYPD
11 about what the scope of the statute is. Maybe - - - I
12 think, for example, they could limit secret recording. You
13 could certainly not being denied the right to record by
14 saying you can't - - -

15 JUDGE RIVERA: I don't know that we're about the
16 business of micromanaging what - - -

17 MR. CASE: Whatever.

18 JUDGE RIVERA: - - - the police department does
19 in its lobbies. It's just a question about this particular
20 certified question to us and whether or not, under these
21 statutes, private individual can walk into the police
22 precinct, start recording.

23 MR. CASE: We absolutely believe that they can.
24 And to the extent that there is some limitation that can be
25 put on it, they haven't done that here.

1 JUDGE RIVERA: Because even though it's
2 ambiguous, one would look to the legislative history and it
3 would be, as you said, obvious that this is one of those
4 spaces - - -

5 MR. CASE: The legislative history - - -

6 JUDGE RIVERA: - - - and it's covered by the
7 statute, and yet you can point to no place in the
8 legislative history that ever mentions police lobbies.

9 MR. CASE: It doesn't mention any specific place.
10 It mentions public spaces over and over and over again, and
11 it mentions taking control of the NYPD away from it, and
12 the sponsor said that we are holding it out to the greatest
13 extent possible, so long as you do not interfere.

14 JUDGE RIVERA: Does it mention why it's necessary
15 to pass a law at this time?

16 MR. CASE: The law was passed after widespread
17 police abuse in the George Floyd protests. That kind of
18 abuse happens in spaces - - -

19 JUDGE TROUTMAN: And those protests took place
20 outside, correct?

21 MR. CASE: There was testimony of people being
22 arrested on subway platforms for recording police. Subway
23 platforms do - - - no different under the City's analysis
24 than subway - - - than police precincts do, and there's - -
25 - under the property law issues.

1 JUDGE RIVERA: Except you pay to have access to
2 the subway platform, right?

3 MR. CASE: What?

4 JUDGE RIVERA: You pay to have access to the
5 subway platforms.

6 MR. CASE: In that sense, they are even more
7 limited. So the property is being used even more
8 restrictively there. Central Park is closed at night. So
9 can you record if you're trespassing in Central Park at
10 night. You already can be arrested for trespass. The
11 right to record is sort of separate and aside from these
12 other concerns. Yes, it's the city's property in a very
13 broad sense, but public property rights are more limited
14 than private ones. Thank you very much.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. MECHANICK: So in my friend's presentation,
17 he said that under his construction of the Right to Record
18 Acts, an individual inside a hospital seeking dialysis
19 treatment or cancer treatment, if they are accompanied by
20 or perhaps even near a law enforcement officer, might
21 potentially risk having those privacy interests
22 compromised.

23 A similar issue arises in police precincts
24 themselves. We talked a little bit about a person coming
25 in who's arrested for interrogation. A person might be

1 escorted to a nonpublic area of a precinct to give a
2 voluntary statement or to give a lineup identification.
3 And the only argument that I heard from my friend on the
4 other side, putting it as best as I can is that there's
5 some text - - - statutorily relevant distinction between
6 the area in front of a closed door and behind a closed
7 door.

8 JUDGE GARCIA: Counsel, these are all very real
9 concerns that you've heard expressed by various of my
10 colleagues. How would we read this statute to come up with
11 a comprehensive rule consistent with what we believe the
12 legislature intended to address those concerns?

13 MR. MECHANICK: You say that the legislature did
14 not clearly and specifically intend to override property
15 restrictions. That is - - - and that doesn't - - - that
16 isn't a privacy test or a policy test. It's a doctrinal
17 test, but it helps, I think, reach the results that - - -
18 that the court would be comfortable with in most of these -
19 - -

20 JUDGE RIVERA: There's no language to support
21 that in the statutes. Have you got something else?

22 MR. MECHANICK: The - - - there is the references
23 to the First Amendment throughout the legislative history.
24 And yes, the First Amendment is supple. It - - - we know
25 in constitutional litigation that there can be questions

1 about what's covered or not covered. I think it would be
2 less confusing than what I've heard on the - - -

3 JUDGE RIVERA: It could also be what animated the
4 passage at this particular time.

5 MR. MECHANICK: I beg your pardon?

6 JUDGE RIVERA: Can it be what animated the
7 passage, the enactment, at this particular time in our
8 history?

9 MR. MECHANICK: Absolutely. And I - - -

10 JUDGE HALLIGAN: In other words, can we ask what
11 is the mischief that the statute was aimed at?

12 MR. MECHANICK: The mischief - - - oh.

13 JUDGE HALLIGAN: And - - - and if so, perhaps
14 that's the scope. So what is the - - - I think your
15 adversary suggests that the goal was to sweep very broadly
16 in terms of what would be subject to recording. What's
17 your view about the scope of the public problem that the
18 legislature was responding to?

19 MR. MECHANICK: The legislature was responding to
20 what it perceived to be widespread violations of the First
21 Amendment right to record, as had been recognized by - - -

22 JUDGE HALLIGAN: Where, though? In what place?
23 In what kinds of places? Is it other than on public
24 streets or - - -

25 MR. MECHANICK: Yes.

1 JUDGE HALLIGAN: - - - out or public spaces
2 outside?

3 MR. MECHANICK: It could be in a person's own
4 home when they - - -

5 JUDGE HALLIGAN: Do you think the legislature was
6 concerned when it passed this statute about police activity
7 - - - about recording police activity in an individual's
8 home?

9 MR. MECHANICK: Yes. The legislatures
10 referenced, as I said, the Rodney King incident, which was
11 recorded from an individual's own home.

12 JUDGE CANNATARO: That's recording from. It's
13 not recording in.

14 JUDGE HALLIGAN: I'm saying, in.

15 JUDGE RIVERA: And it's recording something
16 external.

17 MR. MECHANICK: Yes.

18 JUDGE CANNATARO: That happened on a roadway.

19 MR. MECHANICK: Yes. Yes, it is. But the point
20 is what the - - - maybe I'm not understanding the - - -

21 JUDGE HALLIGAN: Let me try to ask the question
22 more clearly. Is it your view that the legislature was
23 concerned about recording activity where that activity
24 occurs inside a place as opposed to outside in a public
25 space, not what the - - - where the person doing the

1 recording was standing?

2 MR. MECHANICK: I think it - - - I think we don't
3 have a clear indication. That certainly wasn't their
4 primary concern. It might be compatible with it, but I
5 don't think we have any - - - I see my light is on. If I
6 could just finish my sentence?

7 CHIEF JUDGE WILSON: Yes.

8 MR. MECHANICK: I don't think we have any
9 indication that the legislature intended the right to sweep
10 as broadly, to cover the kinds of applications that we've
11 been discussing today.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. MECHANICK: Thank you.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Reyes v. City of NY, No. 59 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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