No. _____

In The Supreme Court of the United States

PROJECT VERITAS ACTION FUND,

Petitioner,

v.

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

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Massachusetts law prohibits all secret recording of oral communications by anyone who is not a law enforcement officer. This does great damage to an irreplaceable and important form of newsgathering. Project Veritas Action Fund regularly uses secret audio recording to capture newsworthy information and report it to the public. Realizing Massachusetts law banned it from operating in the state, Project Veritas Action Fund challenged the reach of Massachusetts General Laws chapter 272, section 99. After acknowledging Project Veritas Action Fund would make the secret recordings detailed in the case but for the law, the panel below ruled the law was not facially overbroad and determined the as-applied challenges were unripe and presented no live case or controversy.

The questions presented are:

1. Whether the First Circuit erred in holding—in direct conflict with the Illinois Supreme Court and in conflict with four other circuit courts of appeals—that a recording law which makes it a felony for individuals to secretly record under any circumstances is not facially overbroad under the First Amendment.

2. Whether the First Circuit erred in holding—in direct conflict with five other circuit courts of appeals—that a party challenging a speech-suppressive law has the burden to precisely articulate every type of contemplated speech activity to satisfy ripeness for as-applied challenges.

PARTIES TO THE PROCEEDING

Petitioner is: Project Veritas Action Fund.

Respondent is: Rachael S. Rollins, in her official capacity as District Attorney for Suffolk County, Massachusetts.*

Other parties to the proceeding in the First Circuit Court of Appeals were: Plaintiffs K. Eric Martin and René Pérez, and Defendant William G. Gross, in his official capacity as Police Commissioner for the City of Boston.

CORPORATE DISCLOSURE STATEMENT

Project Veritas Action Fund has no parent corporation and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

The proceedings in federal district and appellate courts identified below are directly related to the above-captioned case in this Court:

Project Veritas Action Fund v. Conley, No. 16-10462-PBS, 244 F. Supp. 3d 256 (D. Mass. Mar. 23, 2017).

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* Respondent Rollins became Suffolk County District Attorney on January 2, 2019. Her predecessor, Daniel F. Conley, was named as defendant in his official capacity in the district court.

RELATED PROCEEDINGS—Continued

Martin v. Gross, Nos. 16-11362-PBS & 16-10462-PBS, 340 F. Supp. 3d 87 (D. Mass. Dec. 10, 2018).

Martin v. Gross, Nos. 16-11362-PBS & 16-10462-PBS, 380 F. Supp. 3d 169 (D. Mass. May 22, 2019).

Project Veritas Action Fund v. Rollins, Nos. 19-1586, 19-1640 & 19-1629, 982 F.3d 813 (1st Cir. Dec. 15, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Project Veritas Action Fund ("PVA") respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS

The panel opinion of the Court of Appeals is published at 982 F.3d 813 (1st Cir. 2020) and included in Petitioner's Appendix ("App.") at 1. The relevant decisions of the district court are published at *Martin v. Gross*, 380 F. Supp. 3d 169 (D. Mass. 2019), *Martin v. Gross*, 340 F. Supp. 3d 87 (D. Mass. 2018) and *Project Veritas Action Fund v. Conley*, 244 F. Supp. 3d 256 (D. Mass. 2017) and included at App. 68, App. 78, and App. 120, respectively.

JURISDICTION

The district court had jurisdiction over this case under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. It granted the defendant's motion to dismiss PVA's facial challenge and one of its as-applied challenges on March 23, 2017 and entered declaratory judgment on PVA's remaining as-applied challenge on May 22, 2019. App. 120; App. 68. PVA filed a timely appeal to the First Circuit, and Suffolk County District Attorney Rachael Rollins filed a timely cross-appeal. On December 15, 2020, a panel of the First Circuit affirmed the district

court's dismissal of PVA's facial challenge, affirmed dismissal of one of PVA's as-applied challenges and reversed the district court's as-applied ruling in favor of PVA. App. 57–67. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment to the U.S. Constitution provides, in relevant part, "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]" U.S. CONST. amend. I. The Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1.

Massachusetts General Laws, chapter 272, section 99 is reprinted in the appendix to this petition. App. 138–164.

INTRODUCTION

The First Circuit ruled that Massachusetts General Laws, chapter 272, section 99 ("Section 99"), which threatens anyone other than a law enforcement officer with five years of imprisonment and a $10,000 fine for secretly recording anyone else's speech under any circumstances, is constitutional except for secretly

recording law enforcement officers engaged in their duties in public spaces. Consequently, individuals who secretly record oral communications under any other circumstances in Massachusetts commit a felony. Felonious acts include newsgathering protected at the core of the First Amendment, like secretly recording public events—such as a public speech, or a protest—or in a public forum. In short, any oral communications that PVA journalists would secretly record except for those of police are felonies.

The first issue presented is whether Section 99 is facially overbroad. This Court has never addressed the First Amendment implications of secret audio recording of oral communications by individuals, an activity that is an exercise of free speech and the free press. It has held that the First Amendment protects the "widest possible dissemination of information" as "essential to the welfare of the public. . . ." *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945). Moreover, this Court has frequently rejected censorship enacted in the name of privacy and has ruled that the subsequent receipt and publication of certain illegal wiretaps by third parties—recordings made via bona fide eavesdropping onto private communications—are protected by the First Amendment over governmental interests in privacy. *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001). So, too, does the First Amendment prevail over restrictive laws that directly prohibit the secret audio recording of speech outside of any legitimate definition of privacy. More fundamentally, this case presents a substantial contradiction between circuit courts of appeals as to the

application of the overbreadth doctrine with the First Circuit placing abnormal burdens on speakers who allege overbreadth.

Combined with its ruling on overbreadth, the First Circuit's as-applied holdings effectively insulate Section 99 from judicial review. PVA provided a detailed complaint and assembled an extensive evidentiary record detailing its plans to secretly record but for Section 99 and otherwise presented a clear-cut and concrete constitutional challenge. But the First Circuit found the challenge too speculative to survive ripeness concerns. This is in conflict with five other circuits—with two finding ripeness on nearly identical facts in pre-enforcement, First Amendment challenges.

Parties facing speech-suppressive laws in the First Circuit are blocked by unworkable ripeness and overbreadth standards that conflict with other circuits. This petition should be granted to clarify these standards and preserve First Amendment rights.

STATEMENT OF THE CASE

A. Factual Background

1. The Massachusetts Interception Statute

Since 1968, Massachusetts law has prohibited the interception, or secret recording, of oral communications by anyone but law enforcement. Mass. Gen. Laws ch. 272, § 99 (App. 138). Violation is a felony, outlawing a method of newsgathering that pre-dated the law's

enactment and endures elsewhere. App. 143; *see Biography of a Bookie Joint*, YOUTUBE, Oct. 31, 2015, https://youtu.be/7kAMVa3uMwo?t=1082 (1962 CBS Massachusetts rebroadcast). The Supreme Judicial Court of Massachusetts affirmed that under Section 99 "[s]ecret tape recording by private individuals has been unequivocally banned[.]" *Com. v. Hyde*, 750 N.E.2d 963, 971 (Mass. 2001).

Section 99 is more restrictive than any other law in the country governing audio recording of communications. Most state laws and federal law permit anyone to secretly record oral communications to which they are a party. *See, e.g.*, 18 U.S.C. § 2511(2)(d). At the very least, other regimes limit their prohibitions to oral communications uttered by a person in circumstances with a reasonable expectation of privacy, or with a reasonable expectation that their communications are not subject to interception. *See, e.g.*, 18 U.S.C. § 2510(2).

2. The Petitioner

PVA is a national media organization on the forefront of undercover investigative journalism. App. 166. Its newsgathering techniques involve secretly recording speech, or intercepting oral communications as defined in Section 99. App. 139, 169. Secret recording "is the sole method through which PVA is able to uncover newsworthy matters concerning government fraud, abuses in the political process and other areas of public concern." App. 175.

Since its founding in 2014, PVA has published numerous news reports with oral communications that were intercepted by its journalists as they conversed with subjects during investigations of, among other things, political campaigns and electoral integrity. App. 171–172. In 2016, PVA published an investigation that exposed ties between a presidential campaign and political consultants who endeavored to make protests coordinated with a political party appear to be grassroots activity and even aimed to provoke violence. App. 173. This report featured secretly recorded statements from political consultants who would not have spoken as candidly if they were aware of the recording. *See id.* One person, a contractor for the Democratic National Committee, described his method as follows:

> So if we do a protest and if it's branded a DNC protest, right away the press is going to say "partisan." But if I'm in there coordinating with all the groups on the ground and sort of playing field general but they are the ones talking to the cameras, then it's actually people. But if we send out press advisories with DNC on them and Clinton campaign it doesn't have the same effect.

Id. (linked video at 09:50-10:14). Another consultant summarized the motive behind planting political operatives at the opponent's rallies:

> If you're there and you're protesting and you do these actions, you will be attacked at Trump rallies. That's what we want. . . . The whole point of it is we know Trump's people

> will freak the [expletive] out, his security team will freak out, and his supporters will lose their [expletive].

Id. (linked video at 02:19-02:43). This report garnered millions of views on YouTube alone, and was excerpted in news outlets nationwide. *See, e.g.*, Rick Pearson & Bill Ruthhart, *Was rally violence provoked?*, CHICAGO TRIB., Oct. 20, 2016, at 6.

PVA has continued to investigate ties between political operations, public protests, and violence, particularly focusing on the activities of "Antifa," or the so-called "anti-fascism" movement. App. 173–174. A PVA journalist attended the infamous rally in Charlottesville, Virginia on August 12, 2017, and secretly recorded at the rally before, during and after the murder that occurred that day. *Id.* On August 19, 2017, just one week later, PVA journalists would have attended a rally in downtown Boston but did not because of the ban in Section 99. App. 174; App. 19. PVA would attend future events of this nature in Suffolk County, Massachusetts to continue this investigation. App. 174. It would also undertake a number of other investigations in Massachusetts but for Section 99. App. 175–176; *see also* App. 18–19.

As was pled repeatedly below and evinced in an extensive factual record, but for Section 99 PVA journalists would intercept oral communications in Massachusetts by secretly recording the speech of public officials in situations with no expectation of privacy, private individuals in situations with no reasonable

expectation of privacy, and of public officials engaging in public duties in public places. App. 175–176.

B. Legal Background

1. The District Court Proceedings

Facing unequivocal censorship of its most effective means of newsgathering, PVA brought suit seeking declaratory and injunctive relief against the Suffolk County District Attorney. 1JRA16.[1] PVA sought to halt enforcement of Section 99 because it violates the rights to free speech and free press under the First and Fourteenth Amendments facially and as applied. App. 176–180.[2] PVA also prayed for "[a]ny other relief that the Court deems just and appropriate." App. 180.

About four months later, two civil rights activists, K. Eric Martin and René Pérez, filed a separate suit challenging Section 99 as unconstitutional as applied strictly to recording police officers engaged in their official duties while in public places. 2JRA737; *see Martin v. Evans*, 241 F. Supp. 3d 276, 297, 286–88 (D. Mass. 2017).

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[1] "JRA" refers to the Joint Record Appendix in the First Circuit.

[2] PVA filed its suit on March 4, 2016. 1JRA16. Its amended complaints added details of investigations it could not undertake and honed PVA's challenge to the secret recording of government officials engaged in their duties in a public place. *See* App. 125–128. Thus, only the most recent complaint is necessary and included in the appendix. App. 165.

The district court dismissed PVA's claims that Section 99 is facially overbroad or that it is unconstitutional as applied to recording in situations with no reasonable expectation of privacy. App. 128–137. At summary judgment, PVA's suit and the *Martin* suit were consolidated. App. 78. The court ruled that Section 99 is unconstitutional as applied to the secret recording of government officials performing their duties in public spaces. App. 118.

2. The First Circuit's Panel Decision

This suit and *Martin* were consolidated on appeal. App. 1. The First Circuit understood the breadth of Section 99 by virtue of its text and interpretations of the Massachusetts Supreme Judicial Court. App. 6–11. The court noted the oral communications that the plaintiffs would intercept but for Section 99. App. 11–12, 18–19. After finding the *Martin* plaintiffs' claim to be ripe, the court addressed its merits, and found that secret audio recording implicates the First Amendment. App. 41. The court found Section 99 to be content neutral, and also considered its tailoring related to individual privacy. App. 48–51. It discussed this strictly in relation to secretly recording law enforcement officers and those in their vicinity. App. 51–57. "[A]n individual's privacy interests are hardly at their zenith in speaking audibly in a public space within earshot of a police officer." App. 55. The court unanimously affirmed the district court's decision for the *Martin* plaintiffs. App. 57.

The panel ruled that "[PVA] . . . has adequately shown that it has refrained from some secret recording that it would undertake but for Section 99's bar[.]" App. 58. The court then upheld Section 99 against PVA's overbreadth challenge. App. 58–59, 135–137. PVA named a number of examples of unconstitutional application, but the court found that these were not "'substantial' relative to the extensive range of applications [PVA] does not even challenge." App. 59.

The court then ruled that PVA's as-applied challenges were unripe, after reiterating that "but for Section 99, [PVA] would engage in the investigations it describes itself as intending to undertake." App. 59–65. It dismissed PVA's as-applied challenge arguing that Section 99 is unconstitutional as applied to the secret recording of individuals who lack a reasonable expectation of privacy, ruling that this claim was vague and not congruent to PVA's investigations. App. 61–63. The court similarly rejected PVA's challenge to Section 99 as applied to the secret recording of government officials engaged in their duties in public places because "[PVA] gives no indication that it intends to investigate every type of civil servant" and suggested that public officials' duties have different levels of privacy. App. 63–65; *but see* App. 175–176. After years of litigation, an extensive evidentiary record, and repeated acknowledgement by the First Circuit that PVA would undertake secret recording in Boston in a variety of investigations, the court found

no live case or controversy in this matter for PVA's as-applied challenges. App. 65.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted to Resolve Conflicts Regarding the First Amendment Overbreadth Doctrine

A. There Exists a Direct Conflict Between the First Circuit and the Illinois Supreme Court as to Whether an Unequivocal Ban of Secret Recording is Overbroad

The panel opinion below created a conflict on an important federal question. The First Circuit's opinion conflicts directly with the Illinois Supreme Court's unanimous decision in *People v. Clark*, 6 N.E.3d 154 (Ill. 2014), on the dispositive issue of whether a law that prohibits secret audio recording of oral communications under any circumstances by individuals is facially overbroad.

In *Clark*, the Illinois Supreme Court reviewed an indictment against a citizen who, in a child support matter, secretly recorded his own conversation with the opposing party's attorney and a courtroom proceeding in the case. 6 N.E.3d at 156. The statute defined "'[c]onversation' as 'any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.'" *Id* at 159 (quoting 720 ILCS 5/14-1(d)

(2010)). The Illinois Supreme Court interpreted the law to "essentially deem[] all conversations to be private and not subject to recording even if the participants themselves have no expectation of privacy." *Clark*, 6 N.E.3d at 160. This reading matched the interpretation of the Massachusetts statute—Section 99—by the commonwealth's court of last resort to "prohibit all secret recordings by members of the public" and that the law applies even in situations in which there is no reasonable expectation of privacy. *Hyde*, 750 N.E.2d at 967–68.

The Illinois Supreme Court found its state law to be content neutral and subject to intermediate scrutiny, which requires that a law "will be sustained under the first amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Clark*, 6 N.E.3d at 160 (citing *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 520 U.S. 180, 189 (1997)). The court determined that the governmental interest was the protection of "conversational privacy." *Clark*, 6 N.E.3d at 160. "However, the statute does not stop there. It criminalizes a whole range of conduct involving the audio recording of conversations that cannot be deemed in any way private." *Id.* at 161. The court noted four examples of conversations that one could not be constitutionally prohibited from recording secretly: "(1) a loud argument on the street; (2) a political debate in a park; (3) the public interactions of police officers with citizens . . . and (4) any other

conversation loud enough to be overheard by others whether in a private or public setting." *Id*. The court ruled that:

> Illinois' privacy statute goes too far in its effort to protect individuals' interest in the privacy of their communications. Indeed, by removing all semblance of privacy from the statute in the 1994 amendments, the legislature has "severed the link between the eavesdropping statute's means and its end." . . . The statute therefore burdens substantially more speech than is necessary to serve the interests the statute may legitimately serve.

Id. at 161–62 (quoting *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 606 (7th Cir. 2012)). Thus, the "statute is overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Clark*, 6 N.E.3d at 162.

The contrast between the Illinois Supreme Court and the First Circuit could not be starker. The former found the removal of "all semblance of privacy" from a statute governing secret audio recording to require the strong medicine of facial overbreadth. *Id.* at 161. The latter found minimal First Amendment concerns with a statute " 'protect[ing] private conversations in all settings' " *sans* any definition of privacy whatsoever. App. 18 (quoting App. 136). Although "[PVA] . . . identif[ied] ten examples of applications of Section 99 that it argues are unconstitutional"—four of which specifically reflected the examples presented by the

Illinois Supreme Court in the *Clark* decision—along with a history of enforcement against third parties, the First Circuit ruled that this did not demonstrate substantial overbreadth. App. 59; *see Clark*, 6 N.E.3d at 161. Throughout its ruling, the court provided next to no articulation of this plainly legitimate sweep—privacy. Nevertheless, the court found Section 99 to be constitutional in an "extensive range of applications[.]" App. 59.

The Illinois Supreme Court recognized, *contra* the First Circuit, the power of audio recording as a medium and its First Amendment implications: "The person taking notes may misquote us or misrepresent what we said, but an audio recording is the best evidence of our words." *Clark*, 6 N.E.3d at 161. The panel below made but the most pointed acknowledgement of the First Amendment. App. 39–41. PVA's record shows the value of secretly recorded audio as the best evidence of candid statements that are often unbelievable—or, at least, deniable—if merely transcribed. Regardless, it is clear that laws that govern audio recording are protected by the First Amendment, and the First Circuit erred by placing an abnormal burden upon would-be speakers. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010) ("Laws enacted to control or suppress speech may operate at different points in the speech process.").

The rulings from the Illinois Supreme Court and First Circuit both applied intermediate scrutiny. *Clark*, 6 N.E.3d at 160; App. 48–51. The opinions part ways over the governmental interest underlying the respective

statutes. The First Circuit's limited discussion of privacy upheld the district court's ruling that privacy is served because there are "types of conversations . . . where one might expect to be overheard, but not recorded and broadcast." App. 131. The Illinois Supreme Court correctly found this distinction meaningless. *Clark*, 6 N.E.3d at 161 ("If another person overhears what we say, we cannot control to whom that person may repeat what we said."). Nor has this Court ever taken privacy so far as the First Circuit. In the Fourth Amendment context, this Court has distinguished between the expectation of privacy from eavesdropping and from repetition or recording of communications knowingly disclosed to another party. *See U.S. v. White*, 401 U.S. 745, 749 (1971). For law enforcement, recording via electronic eavesdropping requires a warrant, but recording one's own (or an informant's) interactions with suspects does not. *Cf. id. with Katz v. U.S.*, 389 U.S. 347, 358–59 (1967). Even in the context of eavesdropping or wiretapping—bona fide invasions of privacy—this Court has ruled that First Amendment interests can exceed privacy concerns for third-party publication of such material. *See Bartnicki*, 532 U.S. at 535. A direct regulation of audio recording must, at the very least, provide some cognizable definition of the privacy it claims to protect, or some link between the statute's means and its end, to pass intermediate scrutiny.

Privacy is an important—perhaps even compelling—governmental interest, and conversational privacy may be properly protected by law. But one's oral

communications are not so private that they may be protected by a ban on secret audio recording under any circumstances. The First Amendment interests in candor, accuracy, public accountability and the free flow of information are far stronger here than those implicated by laws aiming to govern obscenity and displays of animal cruelty, statutes that this Court has nonetheless found facially overbroad. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246–51, 255 (2002); *U.S. v. Stevens*, 559 U.S. 460, 481 (2010). And without the protection of the overbreadth doctrine, capturing important historic events like the beating of Rodney King or today's Antifa protests becomes impossible.

> If judges have . . . by their own fiat today created a right of privacy equal to or superior to the right of a free press that the Constitution created, then tomorrow and the next day and the next, judges can create more rights that balance away other cherished Bill of Rights freedoms.

Time, Inc. v. Hill, 385 U.S. 374, 400 (1967) (Black, J., concurring).

A clear split on this fundamental question of free speech and the free press is reason enough to grant this petition.

B. The First Circuit's Overbreadth Doctrine Imposes an Insolvable Constitutional Calculus and is in Conflict with Four Other Circuits

The court below held that PVA failed to carry its burden demonstrating overbreadth because it did not analyze the legitimate reach of Section 99. App. 59. But this imposes an abnormal burden on challengers because it requires them to engage in an insolvable constitutional calculus—that is, estimating the entire universe of valid applications of a law. Where a law has been widely enforced against third parties, upheld by state courts, and broadly abridges First Amendment rights, overbreadth invalidation is appropriate.

Both *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), set forth the parameters of an overbreadth challenge. The overbreadth doctrine asks courts to examine the "likelihood that the statute's very existence will inhibit free expression." *Taxpayers for Vincent*, 466 U.S. at 799. Such a doctrine is invoked sparingly but is appropriate for a law that is "incapable of limitation." *Id.* at 801. Like the airport resolution reviewed in *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987), Section 99 makes all of Massachusetts a "First Amendment Free Zone" for undercover reporting—making this law especially appropriate for overbreadth invalidation.

This Court's overbreadth doctrine reflects the concerns that underlie substantive First Amendment principles. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 867 (1991). Its focus is the prophylactic protection of First Amendment values; the doctrine exists to protect large classes of speakers from truly far-reaching laws that lend themselves to "harsh and discriminatory enforcement. . . ." *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940). Rather than embrace case-by-case whittling away of such laws, this Court has recognized the importance of striking such laws down on their face to preserve important free speech interests. *Citizens United*, 558 U.S. 333–34 ("substantial time would be required to bring clarity to the application of the statutory provision . . . in order to avoid any chilling effect").

To be clear, PVA detailed how Section 99 unconstitutionally chilled its own speech. App. 106, 170–171, 174–176; *PVA v. Rollins*, 19-1586 (1st Cir.) Br. for Appellee/Cross-Appellant at 11, 25–30. PVA detailed how Section 99 reached large swaths of protected recording. *PVA v. Rollins*, 16-10462-PBS (D. Mass.), Dkt. 102 at 8–12, Dkt. 122 at 15–17; 19-1586 Br. for Appellee/Cross-Appellant at 15–17. And PVA described how Section 99 was plainly enforced and upheld by state courts against third parties. 16-10462-PBS, Dkt. 102 at 16; App. 177; 19-1586 Br. for Appellee/Cross-Appellant at 19–20. The respondent pled her own examples detailing what she believed to be the appropriate reach of the law. 1JRA1244–1247. For example, she hypothesized that "one parent's secret recording of telephone

conversations with the other parent" or placing secret cameras in employee bathrooms would be demonstrative of the law's appropriate reach. 1JRA1245. In response, PVA detailed exactly how myriad statutes and torts in Massachusetts already protect those kinds of truly private situations. 19-1586 Br. for Appellee/Cross-Appellant at 44–45, 56–57. This is an appropriate record upon which to gauge the overbreadth of Section 99.

In *Village of Schaumburg*, this Court invalidated an ordinance under the overbreadth doctrine that purported to protect against fraud and to promote residential privacy. 444 U.S. 620. In its analysis, the Court examined whether more narrowly drawn alternatives might reach the governmental interest at hand while preserving free speech rights. *Id.* at 638. The Court did not examine in detail each legitimate application of the law, nor did it expect the challenging party to do so.

The core focus of an overbreadth inquiry is whether a challenged law damages a substantial amount of speech "not tied to the Government's interest. . . ." *Ashcroft*, 535 U.S. at 256. In *Ashcroft*, this Court did not perform a numerical analysis as to how an anti-child pornography law might be appropriately applied. Indeed, imposing that burden on the challenging party would make the review of such speech restrictions impossible. A numerator and denominator approach to overbreadth might find hundreds of thousands of legitimate applications of the law applied to child pornography but perhaps only dozens of examples of its

inappropriate reach. Even so, this Court invalidated the challenged law on its face under the overbreadth doctrine.

Four circuits have faithfully followed the *Schaumburg—Ashcroft* approach, which conflicts with the First Circuit's approach here. For example, in *McCauley v. University of the Virgin Islands*, the Third Circuit analyzed the constitutionality of a college speech code under the overbreadth doctrine. 618 F.3d 232 (3d Cir. 2010). There, a code that regulated speech causing "emotional distress" was substantially overbroad, even though the law could be applied constitutionally to physically harassing conduct. *Id.* at 252. The court did not perform a numerical analysis. Similarly, the Sixth, Seventh, and Eighth Circuits ask a challenging party to demonstrate that the reach of the law is substantially overbroad. They do not place the burden on the challenger to examine the ways in which the law may be constitutionally applied. *Speet v. Schuette*, 726 F.3d 867 (6th Cir. 2013); *Bell v. Keating*, 697 F.3d 445 (7th Cir. 2012); *Ways v. City of Lincoln, Neb.*, 274 F.3d 514 (8th Cir. 2001).

Two of these circuits have gone so far to instruct that overbreadth should not be performed as an exercise in "mathematical calculation or numerical comparison." *Free Speech Coalition, Inc. v. Attorney General, U.S.*, 787 F.3d 142, 161 (3d Cir. 2015) (overruled on other grounds). The Sixth Circuit explains that substantial overbreadth is not determined by "placing, say, the number of overall applications of the statute in the denominator and the number of

unconstitutional applications of the statute in the numerator." *Connection Distributing Co. v. Holder*, 557 F.3d 321, 340 (6th Cir. 2009). This Court has never called for this kind of artificial, mathematical calculation—and for good reason. Requiring challengers to pore over each and every legitimate application of the law is a burdensome, perhaps impossible, exercise best left to the government body defending its constitutionality. It is then for the judiciary to compare the invalid reach of the law to its legitimate applications, which the courts below did not do.

PVA pled that the Commonwealth has enforced the law against third party reporters and political activists. The Massachusetts Supreme Judicial Court already deemed Section 99 an outright ban, making the law incapable of a limiting construction. Per the requirements of the Third, Sixth, Seventh, and Eighth Circuits, PVA carried its burden. Moreover, the Commonwealth argued the appropriate reach of the law before both lower courts. 1JRA1244–1247. As the Third, Sixth, Seventh, and Eighth Circuits—as well as *Ashcroft*—show, it was then the duty of the court to measure the breadth of the law, which the First Circuit refused to do. App. 59.

PVA does not ask that the overbreadth doctrine be invoked lightly. But where, as here, a blundering law is before a court and its reach extends widely to third parties, making Massachusetts a "First Amendment Free Zone," overbreadth should be readily applicable. *Jews for Jesus*, 482 U.S. 574. Today, all reporters or political activists nationwide wishing to investigate

stories using secret recording in Massachusetts are censored. It is as plainly unconstitutional as the Illinois statute struck down by the state's highest court. That the First Circuit would reject PVA's overbreadth claim because it did not examine how the law might be appropriately applied is plain error. The First Circuit should have compared the parties' contending claims about the law's valid and invalid applications. Instead, it shifted that entire burden to the challenging party. The First Circuit's approach departs from this Court's instructions in *Schaumburg* and *Ashcroft* in examining overbreadth and conflicts directly with four other circuits who would have at least measured and made an assessment as to the relative breadth of the law. Absent intervention by this Court, the First Circuit's approach only insulates oppressive laws—like the nation's only ban on secret recording—from review.

II. Certiorari Should Be Granted to Resolve a Conflict Between the Circuits over Ripeness Standards Governing As-Applied, Pre-Enforcement First Amendment Challenges

The First Circuit's opinion below creates an insurmountable burden for parties seeking pre-enforcement, First Amendment review. Instead of reviewing a speech-suppressive law following an objective demonstration of chill, the court deemed PVA's detailed plans too "hypothetical and abstract" for Article III purposes. App. 65. This directly conflicts with this Court's ripeness precedent and the approach of five other circuit courts of appeals.

The First Circuit found Article III justiciability for PVA's overbreadth claim, but not its as-applied claims. This contradicts the ordinary rule that it is easier to have standing to raise as-applied claims. *See, e.g.*, *Summers v. Earth Island Institute*, 555 U.S. 488, 493–94 (2009); *Winter v. Wolnitzek*, 834 F.3d 681, 687 (6th Cir. 2016) (for purposes of establishing Article III standing, "raising a narrow as-applied challenge is easier, not harder, than raising a facial challenge"). It also creates a Catch-22 for challengers: detailed plans supporting as-applied challenges are non-justiciable but far-reaching, facial claims satisfy Article III. How one pleads a proper pre-enforcement, First Amendment challenge in the First Circuit remains a mystery.

PVA offered a concrete legal question: may Massachusetts ban secret audio recording under any circumstances? To reach an answer, the First Circuit demands impossibly precise descriptions of recordings PVA has yet to make, and lengthy and burdensome discovery for each type of imaginable recording. Absent this, the court would find such a challenge non-justiciable. This forbidding approach slams the courthouse doors and prevents effective redress for citizens. This cannot be squared with basic First Amendment principles. *See, e.g.*, *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.* ("*WRTL*"), 551 U.S. 449, 469 (2007) (litigation must provide prompt resolution of First Amendment claims).

A ripeness inquiry asks whether the parties before the court face a "realistic danger of sustaining a direct injury as a result of the statute's operation or

enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The ripeness doctrine is drawn from both constitutional and prudential concerns. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 58 n.18 (1993). Constitutional ripeness focuses on whether the plaintiff's claimed injury is "conjectural or hypothetical." *Nat'l Organization for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013). A pre-enforcement challenge is ordinarily ripe where there is a "reasonable threat of prosecution." *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625 n.1 (1986).

The chill of a speech-suppressing law constitutes an injury for standing purposes. This is because "First Amendment interests are fragile. . . ." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). Where justiciability has been demonstrated, additional considerations about whether a factual record is sufficiently developed or articulated stands in "tension with [this Court's] recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014)).

To get to the heart of ripeness, this Court asks whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt*, 442 U.S. at 298 (quoting *Railway Mail Assn. v. Corsi*,

326 U.S. 88, 93 (1945)). So, for example, this Court held in *Babbitt* that an Arizona law sharply limiting false consumer publicity was ripe for review when challenged by a union that engaged in past publicity campaigns and wished to do similar ones. Although some false statements of fact may be proscribed under the First Amendment, the challengers were not required to detail each and every statement they might make for purposes of judicial evaluation. To do so would be overly burdensome for speakers seeking relief. Similarly, an organization's challenge to foreign terrorist designations was justiciable when the group provided support to such groups in the past and alleged it would provide "similar support" in the future. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15–16 (2010). More recently, this Court upheld justiciability in *Driehaus*, where speakers demonstrated past activities proscribed by the law along with pleading an intent to "engage in substantially similar activity in the future." 573 U.S. at 161.

Babbitt, *Holder*, and *Driehaus* stand for the proposition that sensitive First Amendment rights require an equally sensitive ripeness doctrine. Without it, courts are free to place insurmountable hurdles in the path of controversial social activists, undercover journalists, and other truth seekers facing censorship.

A. The Evidence Supporting Review Was Clear Cut, Concrete, and Congruent to the Relief Requested

To support its challenge to Section 99, PVA filed verified complaints. *See* App. 165. Through the complaint, depositions, affidavits, and exhibits, PVA demonstrated the history of its prior secret recordings and a time, place, and manner of its proposed secret recordings in Massachusetts. 1JRA142–144, 155–158, 161–162, 164, 180, 191–193, 195–200; 212–221.

1. PVA Offered Detailed Plans for Newsgathering

PVA included examples of its past investigations nationally. App. 171–174. The evidentiary record included intercepted audiovisual recordings of oral communications from past investigations in which PVA examined public rallies, including the deadly Charlottesville, Virginia "Unite the Right" rally on August 12, 2017. 1JRA232. The files include audio of the fatal car crash and subsequent police investigation on the scene. *Id.* PVA's verified complaints attested to the nature and method of that recording along with PVA's commitment to an extensive, ongoing series of similar investigations within Massachusetts. App. 174–176.

PVA proposed two counts for as-applied relief: (1) to secretly record the oral communications of public officials engaged in their duties in public spaces and (2) to secretly record anyone in circumstances that lack a reasonable expectation of privacy. App. 176–180. PVA

sought this relief in a flexible manner because its plans often change as an investigation opens up more leads. App. 175–176. Securing the right to record, for example, just police officers would sacrifice PVA's ability to record other government officials. Rather than continually return to court to secure the right to record different content, PVA asked for broader relief appropriate to its fluid, but detailed, investigations. Notably, it also sought "any other relief that the Court deems just and appropriate." App. 180; *see also* 1JRA140. Thus, PVA offered detailed plans while admitting the inherent unpredictability of future stories—making its relief congruent to its pleading.

The breadth of the remedy proved too much for the court below. But PVA's flexible prayer for relief was in accord with the breadth of remedy requested by petitioners in *Driehaus*. 573 U.S. 149; App. 179–180. There, one petitioner, the Coalition Opposed to Additional Spending and Taxes ("COAST") submitted a prayer for relief asking, among other things, that the Ohio law be declared "unconstitutional as applied to citizens and organizations taking positions on political issues." *Susan B. Anthony List v. Driehaus*, 10-cv-00720-TSB (S.D. Ohio), Dkt. 26 at 19. Its relief was not cabined to its planned political statements. This flexible remedy would allow COAST the ability to issue future political statements without having to return to court seeking additional relief.

PVA detailed four operational plans for investigations that have been censored by Section 99. App. 170–171, 173–176. PVA alleged it wants to investigate

landlords taking advantage of housing shortages in Boston where college students may live in unsafe and dilapidated conditions. App. 170. It wants to investigate government officials' stances on immigration policy and deportation. App. 171. It alleged it would record interactions with government officials in Boston and around the State House to investigate this issue. *Id.* PVA alleged its desire to record interactions between members of Antifa organizations and public officials. App. 174. It demonstrated its history of recording similar protest movements across America and pled its desire to "capture whether antifa public events and protests are peaceful, whether police or other public officials' interactions with antifa members are non-violent, and otherwise capture the events to report to the public." *Id.* PVA even included audiovisual evidence of similar, past recordings in other states. 1JRA232. Lastly, PVA pled that due to the spontaneous nature of its investigations, PVA "cannot predict (or plead) where these sorts of spontaneous investigations will lead and how they will develop." App. 175–176.

Through testimony, affidavits and its complaint, PVA provided evidence that it would not operate in Massachusetts due to the risk of enforcement of the felony provisions of the law. When asked in a deposition whether PVA had any plans to record in Massachusetts, PVA producer Joe Halderman stated:

> "Not in Massachusetts, no, that would be against the law. We can't do that. I would love to probably secretly record a whole bunch of people because that's what I do. I think it is a

> very important and valuable kind of journalism. We don't have any plans to because we can't. It's against the law, and we don't break the law."

App. 106 (1JRA366–367). Each project was supported by affidavits and sworn testimony to show the scope of investigations PVA was engaged in nationwide and its desire to act similarly in Massachusetts. 1JRA142–144; 155–158; 161–162; 164; 180; 191–193; 195–200; 212–221.

Such well-detailed plans are ordinarily sufficient to meet justiciability concerns for a pre-enforcement First Amendment challenge. As the First Circuit saw it, there was too great a difference between PVA's stated plans and the "breadth of remedy that it has requested"—leading to a finding that there was no Article III case or controversy before the court. App. 64–65. Like *Driehaus*, PVA's elected remedy was congruent with its detailed pleadings. Though presented with concrete plans and supporting evidence, PVA's claims were deemed "hypothetical." App. 65.

2. PVA's As-Applied Claims are Ripe Under This Court's Standards

PVA has "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest." *Driehaus*, 573 U.S. at 160 (quoting *Babbitt*, 442 U.S. at 298). It demonstrated its history of engaging in similar recording in the past. *Babbitt*, 442

U.S. at 301 (ripeness satisfied where appellant alleged it had "actively engaged in consumer publicity campaigns in the past"). PVA's planned activity—the use of secret recording for newsgathering purposes—is clearly proscribed by Section 99. The threat of future enforcement is substantial—as the record demonstrates a history of past enforcement. *See* App. 167. And newsgatherers who violate the law are subject to felony prosecution. Mass. Gen Laws. c. 272, § 99(B)(2), (B)(4), (C)(1) (App. 139–140, 143). On this complete record, the First Circuit found ripeness lacking.

Review is also appropriate because the controversy presented is "purely legal." *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 581 (1985). This case asks whether Massachusetts may constitutionally ban all surreptitious audio recording of oral communications. PVA has not specifically challenged *how* the Commonwealth might enforce the law in many nuanced applications—and, indeed, it need not. The Supreme Judicial Court of Massachusetts has long held that Section 99 constitutes an outright "ban on the public's clandestine use of [intercepting] devices." *Hyde*, 750 N.E. at 968–69; *cf.* App. 61 ("This lack of precision also prompts the concern that it is merely 'conjectural to anticipate' that Section 99 will ever be applied in many of the distinct contexts to which Project Veritas's challenge to that measure—by the organization's own terms—extends.") The Commonwealth has a long history of enforcing the law, including against someone who secretly recorded public happenings at a political rally. *Com. v. Manzelli*, 864 N.E.2d

566 (Mass. App. Ct. 2007). It has even been applied civilly in a lawsuit brought by an attacker against his victim, who secretly recorded the altercation. *Johnson v. Frei*, 103 N.E.3d 1239, 2018 WL 2223654 at *1-*2 (Mass. App. Ct. 2018); *see* App. 162–163. This record presents a focused, purely legal inquiry.

Like *Jews for Jesus*, there is no apparent saving construction of the law. 482 U.S. at 575. Where a state supreme court has already given an authoritative interpretation of a challenged law, it is "not within [the federal judiciary's] power to construe and narrow state laws." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). PVA's suit asked for the courts below to conduct a review of the legal question whether Massachusetts could ban all surreptitious audio recording.

Because of the breadth of the ban and its history of interpretation by state courts, it was correct for PVA to pursue broader and more flexible remedies—facially and as applied. That the First Circuit used petitioner's remedy against it in deciding its claims were non-justiciable has no support in First Amendment precedent. *See, e.g.*, *WRTL*, 551 U.S. at 469 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)) (standards for safeguarding speech must "give the benefit of any doubt to protecting rather than stifling speech").

B. The First Circuit's Holding Directly Conflicts with the Second, Fourth, Sixth, Seventh, and Tenth Circuit Courts of Appeals

The Second, Fourth, Sixth, Seventh, and Tenth Circuits recognize that when a party brings a pre-enforcement, First Amendment challenge, a claim will be ripe when: (1) there is evidence of past, similar speech, (2) affidavits or testimony support a present desire to engage in similar speech, and (3) there is a plausible claim that the party will not speak because of a credible fear of enforcement. The First Circuit's direct contradiction of these circuits supports granting review here. It is also appropriate to review the "actual injury" component of standing elucidated in *Lujan v. Defenders of Wildlife* due to the overlap of ripeness with injury-in-fact determinations. 504 U.S. 555, 560–61 (1992). That standard requires "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."

1. Three Other Circuits Would Find This Controversy Ripe

The Tenth Circuit has a well-established body of case law examining when pre-enforcement, First Amendment challenges are ripe or meet the actual injury component of standing. In *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495 (10th Cir. 1995), ripeness was found where a congressman challenged a state law forbidding use of federal campaign funds for

state campaigns. *Gonzales* was ripe where: (1) Richardson never filed to run for office, (2) never announced a position he would campaign for, and (3) never detailed any timeframe for running. *Id.* at 1503–04. The challenge was ripe because the law "created a direct and immediate dilemma regarding Congressman Richardson's fund raising activities." *Id.* at 1501. This is the crux of the constitutional ripeness doctrine—the existence of a direct and immediate dilemma implicating First Amendment rights. *See also Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1086 (10th Cir. 2006) (pleading the parties " 'have used the initiative process often in the past and are likely to in the future' " satisfied ripeness).

The Second Circuit has similarly found ripeness in pre-enforcement, First Amendment challenges without the additional burdens imposed by the First Circuit. In *Walsh*, the court explained that a "real and imminent fear of [] chilling is enough[.]" 714 F.3d at 689. There, the National Organization for Marriage included a copy of an advertisement it wanted to broadcast. *Id.* at 690. The Second Circuit realized that the proposed speech triggered credible fear by the group that it might be regulated as a political action committee. *Id.* Even under prudential ripeness, the court held that there were clear legal questions centered on a concrete legal dispute between the parties. *Id.* at 691. A desire to engage in "materially similar" speech was enough to pass ripeness concerns. *Id*.

The Sixth Circuit has also, post-*Driehaus*, followed a similar approach when considering pre-enforcement,

First Amendment challenges. In *Winter v. Wolnitzek*, the Sixth Circuit found a challenge to Kentucky's Code of Judicial Conduct ripe where one of the challengers issued reelection statements possibly in violation of the law and another candidate simply alleged he "want[ed] to give speeches supporting the Republican Party, to hold Republican fundraisers, to seek and receive endorsements from Republican candidates, and to donate to candidates and to the party." 834 F.3d at 686–87. This offered "plenty of detail" to evaluate the issue and demonstrated a "credible threat of enforcement" and satisfied ripeness concerns. *Id.* at 687–88.

Letting the First Circuit's ripeness doctrine stand would be to sacrifice First Amendment values for peculiar—perhaps impossible—pleading formalities. As summarized by Charles A. Wright, Arthur R. Miller & Edward H. Cooper, "First Amendment rights . . . are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss." FEDERAL PRACTICE AND PROCEDURE § 3532.3, at 159. That is, "First Amendment rights are fragile and can be destroyed by insensitive procedures"—including judicial ones. Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 551 (1970).

2. On Remarkably Similar Facts, the Seventh and Fourth Circuits Found Recording Challenges Justiciable

The Seventh Circuit dismissed justiciability concerns in *Alvarez*. 679 F.3d at 593. That case involved a

challenge to a similar ban of recording in Illinois as applied to recording the police. *Id.* at 588. The court could not find the ACLU's challenge to be " 'conjectural or hypothetical[.]' " *Id.* at 593. Indeed, the state argued that the challenge was too indefinite because the recordings would happen at " 'some indefinite future time' " and the " 'identities of the parties to the conversation that [the] ACLU and its members want to record is wholly unknown.' " *Id.* But it was justiciable because there were not "unknowable details about the manner in which the statutory violation will be committed or enforced." *Id.*

On each of these issues, the opinion below directly diverges from *Alvarez*. Contrary to the Seventh Circuit, the First Circuit would require that PVA plead each and every government official to be recorded for the case to be justiciable. App. 65 ("the First Amendment analysis might be appreciably affected by the type of government official who would be recorded"); *cf. Alvarez*, 679 F.3d at 594 (argument that ripeness is not satisfied because the identities of recorded subjects is unknown is a "nonstarter"). Contrary to the Seventh Circuit, the First Circuit demanded utmost certainty about specific subjects of recording, places, times, and manner—effectively requiring telepathy to satisfy ripeness concerns. App. 62 (concern over "types of conversations that are targeted" rendered matter unripe); *Alvarez*, 679 F.3d at 594 ("Preenforcement suits always involve a degree of uncertainty about future events").

In *People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 Fed. Appx. 122 (4th Cir. 2018), the Fourth Circuit found a pre-enforcement, First Amendment challenge to North Carolina's Property Protection Act to be justiciable. That case involved the plans of animal welfare groups to photograph and record conditions at animal facilities. The Animal Legal Defense Fund stated that it had engaged in investigations in the past, had investigators ready to conduct undercover work, and had a list of possible sites to investigate. The Fourth Circuit found this justiciable because the plaintiffs alleged an intention to engage in a course of conduct arguably affected with a constitutional interest—a general desire to investigate issues of animal welfare. *Id.* at 130 (quoting *Driehaus*, 573 U.S. at 159). This was further justiciable because the plaintiffs "refrained from proceeding for fear of being subjected to the severe civil remedies. . . ." *Stein*, 737 Fed. Appx. at 130.

On each of these issues, the opinion below directly diverges from *Stein*. Contrary to the Fourth Circuit, the First Circuit ignored PVA's examples of past investigations and recordings to support ripeness. *Id*. Contrary to the Fourth Circuit, the First Circuit ignored the many examples pled by PVA about how Section 99 carries a significant risk of enforcement. *Id.* at 130–31. And contrary to the Fourth Circuit, the First Circuit ignored that the injury and dilemma here is PVA's self-censorship—now exceeding half a decade. *Id.* at 131 ("they have refrained from carrying out their planned investigations based on their reasonable and well-founded fear that they will be subjected to significant

exemplary damages under the Act"); *cf.* App. 62 (describing PVA's plans as setting forth "hypothetical rather than real disputes").

This conflict between the Seventh and Fourth Circuits with the First Circuit on closely related facts warrants review. This division among circuits reflects a broader inter-circuit disagreement about proper standards of justiciability for pre-enforcement challenges. In the wake of this conflict, without review, speakers in the First Circuit will continue to have the courthouse doors slammed before them, leaving important First Amendment controversies unresolved.[3]

C. The First Circuit's Departure from Ripeness Determinations in First Amendment Cases Necessitates Review

Where the First Amendment is implicated, "we give the benefit of the doubt to speech, not censorship." *WRTL*, 551 U.S. at 482. The special place held by the First Amendment means that federal courts should not be empowered to avoid controversial constitutional

[3] In addition to the circuit splits noted in this petition, a slew of challenges against recording agricultural operations—so-called "ag-gag" challenges—have easily passed justiciability concerns in district courts across the nation. *See, e.g.*, *Animal Legal Defense Fund v. Reynolds*, 297 F. Supp. 3d 901, 914–15 (S.D. Iowa 2018); *Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193, 1200 (D. Utah 2017) (claims justiciable lacking "concrete plans" because of present desire to violate the law); *Animal Legal Defense Fund v. Kelly*, 434 F. Supp. 3d 974, 992 (D. Kan. 2020) (general plan to deceptively gain access to animal facility to take photographs justiciable).

questions simply by invoking an often arbitrary ripeness determination.

Just seven years ago, in a unanimous opinion, this Court provided clarity for pre-enforcement, First Amendment ripeness standards. *Driehaus*, 573 U.S. 149. That instruction reiterated the central truth of *Babbitt*, that where a party alleges "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution'" then the claim will be justiciable. *Id.* at 159 (quoting *Babbitt*, 442 U.S. at 298). Just one circuit continues to clutch tightly to a hostile ripeness doctrine.

The First Circuit's approach to pre-enforcement, First Amendment ripeness determinations is fundamentally inconsistent with free speech jurisprudence. Its addition of a "congruency" requirement makes ripeness determinations unworkable. This Court has never imposed so daunting of pleading or evidentiary requirements. This Court has never demanded a plaintiff specifically detail each and every proposed plan of First Amendment conduct down to their minutiae—details that might, as here, constitute conspiracy to commit a felony. *See* App. 143. Rather, the combined wisdom of *Babbitt*, *Holder*, and *Driehaus* stand for the proposition that the existence of a law alone, along with an intent to violate it, is sufficient to make a claim justiciable. Otherwise, challengers lack effective First Amendment redress.

To embrace the First Circuit's approach is to rubberstamp lengthy, burdensome, discovery-driven litigation to invalidate speech-infringing laws. The First Circuit's approach would also require piecemeal adjudication to secure a First Amendment right. That is, it would require initial litigation to secure the right to record the police, additional litigation secure the right to record union agents, and so forth for decades. This is not a sensible approach to preserve First Amendment freedoms.

Unless this petition is granted, the First Circuit will continue to invoke a ripeness doctrine hostile to the First Amendment and shirk its duty to hear and decide constitutional issues. This is manifestly wrong: free speech is not a privilege that federal courts may doll out by whim through *noblesse oblige*. *Stevens*, 559 U.S. at 480.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

DATED: May 12, 2021.

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