No. 20-1598

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

BRIEF OF THOMAS MORE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Attorneys for Thomas More Society:

MARY CATHERINE HODES
Special Counsel
THOMAS MORE SOCIETY
309 W. Washington Street, Suite 1250
Chicago, Illinois 60606
312-782-1680
mchodes@thomasmoresociety.org

CARL H. ESBECK
R. B. Price Professor Emeritus
Hulston Hall, Room 209
Ninth & Conley Streets
Columbia, Missouri 65211
573-882-6543
esbeckc@missouri.edu

TIMOTHY BELZ
Counsel of Record
J. MATTHEW BELZ
CLAYTON PLAZA LAW GROUP, LC
112 S. Hanley Road, Suite 200
St. Louis, Missouri 63105
314-726-2800
tbelz@olblaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

This is a pre-enforcement challenge to the Commonwealth of Massachusetts applying Mass. G.L. c. 272, § 99 ("Section 99") to prohibit Plaintiff media organization from conducting investigations that require surreptitiously recording journalists' conversations within Massachusetts. Plaintiff brings facial and as-applied challenges to Section 99, which makes a felony of all surreptitious recording within Massachusetts.

1. Was it error for the Court of Appeals to apply a novel "congruence" requirement in evaluating whether Plaintiff's as-applied claims were ripe for adjudication?

2. Was it error for the Court of Appeals to apply a novel ratio analysis in evaluating the "substantiality" of the facial overbreadth of Section 99?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTERESTS OF *AMICUS CURIAE*

The Thomas More Society ("TMS")[1] is a national public interest law firm dedicated to restoring respect in the law for freedom of speech and religious liberty. A 501(c)(3) nonprofit incorporated in Illinois with offices in Chicago and Omaha, TMS pursues its purposes through civic education, litigation, and related activities. In this effort, TMS has represented many parties in federal and state courts and filed numerous *amicus curiae* briefs in all courts, with the aim of protecting the rights of individuals and organizations freely to communicate political and social views and practice religion, as guaranteed by the First Amendment. In the course of this work, TMS's donors and attorneys provide *pro bono* representation to parties, including journalists, wrongly prosecuted under the recording laws of multiple jurisdictions. TMS therefore has an interest both in the constitutionality of recording statutes in all 50 states and in the justiciability of challenges to laws that unconstitutionally infringe on the right to record surreptitiously. TMS's purposes will therefore be hindered should the free speech claims of the Petitioner-Plaintiff be deemed nonjusticiable and/or fail to prevail on the merits.

[1] The Petitioner filed a blanket consent to the filing of *amicus curiae* briefs. In an email, legal counsel for Respondent consented to the filing of this *amicus*. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have been timely notified of the submission of this brief.

SUMMARY OF ARGUMENT

The First Amendment has long been understood to protect newsgathering. "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). This is a pre-enforcement action by professional journalists who intend to use surreptitious recordings of their conversations with others in the course of at least three undercover investigations within the Commonwealth of Massachusetts. Mass. G.L. c. 272, § 99 ("Section 99", Appendix E to the Petition) makes a felony of all surreptitious recording. Petitioner-Plaintiff Project Veritas Action Fund therefore seeks an injunction against enforcement of that statute, both as applied to its investigations and on its face.

1. The United States Court of Appeals for the First Circuit held that Project Veritas's as-applied claims were not ripe for review. As recently as 2014, this Court held that a pre-enforcement as-applied challenge to a law regulating speech is ripe when the plaintiff shows both (1) "fitness" of the issue for adjudication, and (2) "hardship" from delaying judicial review. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014). It was error for the Court of Appeals to add to the "fitness" and "hardship" requirements (or replace them with) a novel requirement that Project Veritas show "congruence" between the scope of three particularized investigations represented in the Complaint and the scope of the injunction requested. *See Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 841-44 (1st Cir. 2020) (Appendix A to the Petition).

2. In considering the claim for facial overbreadth, it was error for the Court of Appeals to hold that the "substantiality" of overbreadth was not measured by the sheer amount of First Amendment-protected speech chilled by Section 99. The Court of Appeals wrongly ignored the substantiality of the unconstitutional applications of Section 99 and required instead that a ratio comparing unconstitutional applications of Section 99 to constitutional applications be "substantial." *See Project Veritas*, 982 F.3d at 841. This Court's precedent does not support a court measuring the degree of a statute's overbreadth by a strict comparison between its unconstitutional and constitutional applications without regard to its overall unconstitutional impact.

ARGUMENT

In its Second Amended Complaint filed September 29, 2017 (Appendix F to the Petition), Project Veritas Action Fund established its background and experience in undercover investigative journalism. *See* ¶¶ 3, 5, 13-16, 23-29. More important, the Complaint made submissions concerning specific investigative journalistic projects that Project Veritas has avoided because of the criminal and civil restraints of Section 99, including investigations into:

- Instances of landlords taking advantage of housing shortages in Boston to cause students to live in unsafe and dilapidated conditions, with the aim of revealing any

ties between abusive landlords and government officials. Complaint ¶ 21.

- The controversy over "sanctuary cities" in Massachusetts, by initiating interactions with government officials in Boston, including police officers, on the subject of extending sanctuary to undocumented aliens, for the purpose of learning more about officials' objections to federal immigration policy and deportation. Project Veritas would further interact with government officials discharging their duties at or around the State House in Boston and at other public spaces to learn about their motives and concerns about immigration policy and deportation. One aim is that informal discussions with the police and elected legislative representatives would yield information about the impact of federal immigration policy in Massachusetts. Complaint ¶ 22.

- Any ties between groups that identify as "Antifa" (anti-fascist) and violence at political rallies. While such an investigation was ongoing, Project Veritas reported on events in Charlottesville, VA (August 12, 2017) and Atlanta, GA (August 13, 2017). But for Section 99, Project Veritas would have been engaged as undercover journalists at similar rallies in Boston (August 19, 2017), with a particular interest in possible violence by Antifa. Complaint ¶¶ 28-30.

The Complaint sets forth two counts: Count I (¶¶ 34-39) and Count II (¶¶ 40-46). Each Count states both facial overbreadth and as-applied claims. The facial overbreadth claims in both Counts are the same. Thus, conceptually, there are two as-applied claims and a single cause of action invoking the overbreadth doctrine. A straightforward summary of the claims is:

> Count I, as applied: Section 99 is unconstitutional insofar as it prohibits Project Veritas reporters from surreptitiously recording their oral communications with government officials who are discharging their duties in a public place.
>
> Count II, as applied: Section 99 is unconstitutional insofar as it prohibits Project Veritas reporters from surreptitiously recording their oral communications with individuals who have no reasonable expectation of privacy.
>
> Facial Overbreadth: Section 99 is unconstitutional because it criminalizes a substantial amount of First Amendment-protected speech.

Surreptitious audio recordings play an irreplaceable role in the reliable reporting of news stories. Audio recordings protect both the reporter and the recorded party. They are far more accurate than reporters' recollections of past conversations, so they prevent reporters from misrepresenting an interlocutor's statements, distorting them, or taking them out of context. And, of course, recordings prevent the recorded parties from later denying what they said.

Despite Project Veritas's incontestable history of using surreptitious recordings in investigative reports and its detailed descriptions in pleadings of proposed investigations that would be felonious under Section 99, the Court of Appeals for the First Circuit held that neither as-applied claim was ripe for review. Therefore, the panel did not go on to address the merits under the Free Speech Clause. *Project Veritas*, 982 F.3d at 841-44. This was legal error, as discussed in POINT III, below.

Correctly holding the facial claim justiciable, the Court of Appeals went on to wrongly dismiss Plaintiff's overbreadth claim on the merits. In doing so, it was legal error for the court to apply a novel test of overbreadth to conclude that the illegal applications of Section 99 were not "substantial," as discussed in POINT IV, below.

POINT I: The freedom of small, nonprofit online news sources like Project Veritas is increasingly important in a culture where investigative journalism at legacy media is in profound decline and social media algorithms are basically unchallenged in filling the vacuum left by reliable reporting.

"Investigative journalism has long been a fixture in the American press. . . ." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1189 (9th Cir. 2018). The "long, rich and proud historical record of undercover projects, dating back to the early 1800s, . . . ha[s] benefitted from the use of subterfuge and deception in their

efforts to expose wrongdoing, to extract significant information that is otherwise difficult or even impossible to obtain, or to create indelible, real-time descriptions of closed or hard-to-penetrate institutions or social situations that deserve the public's attention."[2]

Some of the first exposé-style journalism fueled the growth of the abolitionist movement. In the 1850s, the *New York Tribune* was uniquely influential in hastening the downfall of slavery because of its reporters' use of undercover newsgathering.[3] One reporter, Albert Deane Richardson, went South and posed as a resident of the New Mexico Territory. The tactic allowed Richardson to appear as though he had no particular sympathies, and people conversed freely with him. Southerners talked to him about secession, and Richardson said they told him "more, every day, of its secret working than as a mere stranger, I could have learned in a month."[4] By posing as potential buyers, Northern reporters were able to infiltrate slave auctions and even talk directly to slaves.[5]

Another example of powerful undercover reporting is Elizabeth Cochrane Seaman's work exposing the

---

[2] Brooke Kroeger, *Why Surreptitiousness Works*, 13 J. MAGAZINE & NEW MEDIA RESEARCH 1 (2012). The examples are many. *See Deception for Journalism's Sake: A Database*, https://undercover.hosting.nyu.edu/s/undercover-reporting/item-set (listing examples of undercover journalism).

[3] *See* Brooke Kroeger, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION 15 (Evanston, Ill., Nw. U. Press, 2012).

[4] *Id.* at 18.

[5] *Id.* at 21.

inhumane treatment of the mentally ill. Using the name Nellie Bly, Seaman wrote about how she posed as a mentally ill woman from Cuba.[6] She fooled doctors into declaring her insane and was committed to the Women's Lunatic Asylum on Blackwell Island, New York, for ten days.[7] She documented the lack of food, heat, medical care, and sanitary facilities, as well as abusive treatment. Her reporting led to a grand jury investigation. Once the jury got around to touring the facility, many of the deplorable conditions had been concealed, with only Seaman's word to the contrary.[8] No criminal charges resulted, but Seaman's reporting led to an increase in funding for asylums.[9]

Undercover reporting continues to raise public awareness and bring about reform, and journalists posing as others have been a critical tool for discovering truth that might have otherwise gone undiscovered. Novelist Upton Sinclair worked incognito in a meatpacking plant for seven weeks, resulting in *The Jungle*, his celebrated exposé of the U.S. meatpacking industry.[10] Using medication and a sunlamp, white journalist John Howard Griffin darkened his skin enough to pass as a Black man in the Jim Crow

---

[6] *See* Nellie Bly, TEN DAYS IN A MAD-HOUSE (New York: Ian L. Munro, 1877).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Jeffrey Vizcaino, *Sinclair's Nightmare: SLAPP-ing Down Ag-Gag Legislation as Content-based Restrictions Chilling Protected Free Speech*, 7 J. ANIMAL & ENVTL. L. 49 (2016).

South.[11] The book he wrote chronicling his experiences, *Black Like Me*, became a modern classic. It "told white Americans what they had long refused to believe" about the problem of racism in the United States.[12] In short, what "emerges from the record is that over and over again, going undercover has proved to be an indispensable tool in the high-value, high-impact journalism of changing systems and righting wrongs."[13]

As technology advanced, hidden recording devices have helped to ensure accuracy and prevent the cover-up problem Nellie Bly faced. Print reporters used miniature cameras as far back as the late 1940s, and hidden cameras have been used since at least the early 1960s.[14] More recently, "animal protection groups are turning to undercover video investigations to expose criminal and inhumane practices on factory farms that would otherwise go unnoticed by the public."[15] Thus, even now, "[u]ndercover reporting has . . . been at the forefront of important published and broadcast efforts to create awareness, to correct widespread misconceptions, to provoke outrage, and to give a human face . . . to any number of institutions and social worlds that

---

[11] *See* Bruce Watson, *Black Like Me, 50 Years Later*, Smithsonian Magazine, Oct. 2011.

[12] *Id.*

[13] Kroeger, *Why Surreptitiousness Works* at 4.

[14] *Id.* at 5.

[15] Vizcaino, *Sinclair's Nightmare* at 50.

otherwise would be ignored, misunderstood, or misrepresented for lack of open access."[16]

Despite its noble history and social value, investigative journalism at legacy media is in decline. From 2008 to 2019, newsroom employment in the United States dropped by 23%.[17] Newspapers in particular have borne the brunt of the decline: from 1990 to 2016, the number of newspaper employees in the United States dropped from 456,300 to about 183,000.[18]

The withering of investigative journalism can be seen in concrete terms in Washington, D.C. The number of journalists at Congressional hearings dropped 85% from the 1970s to the 2000s. Freedom of Information Act requests by media outlets dropped by 25% between 2005 and 2010. FOIA requests by local newspapers dropped by nearly 50% in the same period.[19]

Though legacy media has suffered dearly, that is not due to reporters fleeing to thriving digital media outlets. These too have struggled. In a two-week stretch in 2019, BuzzFeed laid off 15% of its staff, Vice laid off 10% of its staff, and Verizon, which owns

---

[16] Kroeger, *Why Surreptitiousness Works* at 4.

[17] Elizabeth Grieco, *U.S. newspapers have shed half of their newsroom employees since 2008*, Pew Research Center, April 20, 2020.

[18] Steven Waldman and Charles Sennott, *Opinion: The crisis in local journalism has become a crisis of democracy*, The Washington Post, April 11, 2018.

[19] Keith Humphreys, *How the Decline in Investigative Journalism Is Making Congress Dumb*, Washington Monthly, Jan. 30, 2017.

Huffington Post and Yahoo, cut 800 workers in its media division.[20]

Consumers now get their news from social media platforms instead of news organizations, which means that advertising revenue that once supported professional news outlets is now going to social media companies. In the same week that BuzzFeed announced its layoffs, Facebook reported record revenues of almost $17 billion for the last quarter of 2018.[21] Roughly 68% of adults in the United States get at least some of their news from social media, and the majority of those adults cite Facebook as the primary source.[22] Facebook is not alone: in 2018, Google made almost as much money in digital advertising from news as all of the American news media outlets combined.[23] A business model that has shifted revenue away from traditional news sources and toward social media formats that rely largely on user-generated content makes the rise of nonprofit online news sources like Project Veritas all the more important.

Although the concept of a nonprofit news source is not new (the Associated Press and National Public Radio are both nonprofit), the ongoing media recalibration has created significant demand for the

---

[20] Emily Bell, *What 2,000 job cuts tell us: the free market kills digital journalism*, The Guardian, Feb. 2, 2019.

[21] *Id.*

[22] *Id.*

[23] Marc Tracy, *Google Made $4.7 Billion From the News Industry in 2018, Study Says*, N.Y. Times, June 9, 2019.

publications of newer nonprofit outlets like ProPublica and The Texas Tribune. "As for-profit news institutions continue to downsize and blink out of existence, nonprofits represent a promising path forward to continue producing the investigative journalism that our communities, to say nothing of our national democracy, so desperately need."[24]

The First Amendment protects the rights of nonprofit outlets like Project Veritas to continue to shine light into spaces that legacy media outlets can no longer afford to illuminate. This Court should therefore not shrink from applying the First Amendment's protections to limit or reverse Section 99's prohibition of surreptitious recording for the purposes of investigative journalism.

POINT II: Section 99 is the most restrictive prohibition on recording in the nation, wrongly shielding official and other public wrongdoers in the Commonwealth of Massachusetts from investigation, and unjustly tasking the judicial branch and private litigants with establishing the constitutional boundaries of the statute by trial-and-error.

Massachusetts is an outlier among the 52 United States jurisdictions in its total prohibition on private recording. Forty-nine states, the District of Columbia, and the federal government have regulated private

[24] Nicole Rupersburg, *Nonprofit Journalism Grows Up*, Medium, July 15, 2019.

recordings in various ways. None has gone nearly as far as Massachusetts (except Illinois, whose statute like Section 99 was overturned by the Illinois Supreme Court in *People v. Clark*, 6 N.E.3d 154 (Ill. 2014)).

Thirty-five states, the District of Columbia, and the federal government require only "single-party consent" for recordings, which generally means individuals may record any communication to which they are a party (*i.e.*, their own conversations, rather than those of only third parties).[25] In other words, in most of the United States, if someone entrusts information to you orally, you are permitted to make a recording of it. This liberty to record one's own conversations holds citizens accountable for the content of their speech and the scope of their audience, in public and private.

Thirteen states[26] have laws requiring that all parties consent ("two-party consent") prior to recording

---

[25] Justia.com, *Recording Phone Calls and Conversations* (last updated January 2018), https://www.justia.com/50-state-surveys/recording-phone-calls-and-conversations/ (inventorying state and federal recording laws); *see also* Allison B. Adams, *War of the Wiretaps: Serving the Best Interests of the Children?*, 47 Fam. L.Q. 485, 491-93 (2013).

[26] *See* Justia.com, *supra* note 25 (listing 15 states as "two-party consent" states, but taking out Massachusetts and Vermont, which has no recording statute). Illinois's two-party consent statute, which was similarly comprehensive to Massachusetts' Section 99, was invalidated by the Illinois Supreme Court in 2014 as unconstitutionally overbroad. *People v. Clark*, 6 N.E.3d 154 (Ill. 2014). Thereafter, the Illinois legislature adopted a recording statute that requires all parties to consent to recording only where there is a reasonable expectation of privacy. 720 ILCS 5/14-2.

certain communications: generally, communications made in situations with indicia of confidentiality, wherein the speaker can be said to have a reasonable expectation of privacy.[27] In these 13 states, legislatures have limited the power of individuals to record their own conversations out of respect for speakers *in particular situations*. These statutes aim to protect the vulnerable, for example, from blackmailers and confidence artists, who would use deception or artifice to induce incriminating confidences. However, even in these jurisdictions, speakers in most situations (and almost always in public or in the exercise of public office or responsibility) may be recorded without their knowledge.

The gap between Massachusetts' Section 99 and the rest of the United States raises the question of what justifies Section 99's criminalizing citizen and journalist documentation of communications and actions taken in public and arms-length conversations. Presumably, Massachusetts is capable of drawing meaningful lines around protected communications, like the 13 two-party-consent states. Their failure to do

---

[27] *See*, *e.g.*, Fla. Stat. 934.02(2) (defining "[o]ral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication"); 18 PA Cons. Stat. 5702 (2019) (limiting "oral communications" to those uttered by persons "possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation" and explicitly excluding statements made to law enforcement).

so suggests that perhaps the legislators intended to prohibit investigative reporting, in Massachusetts. This case alone suggests that worthy reporting exposing corruption in Massachusetts is deterred by the boundless scope of Section 99 and its zealous prosecution. This is no benefit to citizens of Massachusetts, but public figures may well be more comfortable with such protection. The ability of public figures to act and speak with impunity ought not to be enshrined in law.

Moreover, Section 99's blanket criminalization of all hidden recordings, even those that are plainly constitutional, is an abdication of the legislature's line-drawing responsibilities, leaving it to overtaxed courts and affected private parties to identify case-by-case the constitutional bounds of the recording prohibition. The Supreme Court should step in where the Court of Appeals demurred and reverse Section 99 as overly broad, forcing the Massachusetts legislature to do its job and stop relying on reporters and the federal courts to carve out exceptions to Section 99. Our nation offers 51 models of more reasonable limitations on surreptitious recording for the Massachusetts legislature to choose from. As this Court has recently held in overturning another indiscriminately broad Massachusetts statute, "[t]he point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is instead that Massachusetts has available to it a variety of approaches that appear capable of serving its interests, without" unnecessarily burdening individuals' First Amendment rights. *McCullen v. Coakley*, 573 U.S. 464, 493-94

(2014) (overturning Massachusetts statute imposing the most onerous restrictions in the nation on the First Amendment rights of protesters at abortion clinics).

POINT III: The Court of Appeals erroneously imposed a novel "congruence" test to evaluate the ripeness of Project Veritas's as-applied pre-enforcement actions.

Although the District Court had found that both of Project Veritas's as-applied claims were ripe for review, the Court of Appeals for the First Circuit held that neither as-applied claim was ripe. *Project Veritas*, 982 F.3d at 824, 841-44. Accordingly, the panel did not reach the merits of the two as-applied claims. This was reversible error.

A. Project Veritas's claims met the legal standard for ripeness.

To be ripe for review, an as-applied claim must satisfy the factors of "fitness" and "hardship." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

To establish "fitness," the Court asks whether the record is such that the issue presented is purely a legal question. The aim is to avoid cases where the central issue is factual (or a mix of facts and law), such that future events could change the situation and alter the analysis on the merits. *Thomas v. Union Carbide Agr.*

Products Co., 473 U.S. 568, 581 (1985). In this case, the central questions are purely a matter of law:

> Count I: Section 99 criminalizes the surreptitious recording by an undercover reporter of oral communications with government officials acting in the discharge of their duties in a public place. As such, is Section 99 unconstitutional when applied to the reporters at Project Veritas?
>
> Count II: Section 99 criminalizes the surreptitious recording by an undercover reporter of oral communications with individuals in circumstances in which they have no reasonable expectation of privacy. As such, is Section 99 unconstitutional when applied to the reporters at Project Veritas?

To establish "hardship," courts consider the burden on plaintiffs if they are not allowed to proceed with the pre-enforcement action. In the case of investigative reporters in Massachusetts, it is a cruel choice to have to either (a) forego one's First Amendment protected speech out of fear of prosecution or (b) proceed to investigate and risk arrest, costly litigation and trial, and criminal punishment. It also matters if the speech is "core political speech," like here, which merits the highest protection. *Susan B. Anthony List*, 573 U.S. at 168. In addition to being faced with a felony prosecution, Project Veritas is subject to civil liability and attorney fees. *See* G.L. c. 272, § 99(Q). Moreover, the possibility of criminal liability exposes Project Veritas to loss of donors and loss of valuable, experienced

employees who cannot afford involvement in criminal and civil litigation.

Moreover, Massachusetts has a history of vigorously enforcing Section 99. The Supreme Judicial Court of Massachusetts has by interpretation only barely tempered Section 99's outlier status, *see Commonwealth v. Hyde*, 750 N.E.2d 963, 967 (2001), and prosecutors enforce it zealously, *see*, *e.g.*, *Johnson v. Frei*, 93 Mass. App. Ct. 1111, 2018 WL 2223654 (2018); *Commonwealth v. Manzelli*, 68 Mass. App. Ct. 691, 864 N.E.2d 566 (2007); *Jean v. Massachusetts State Police*, 492 F.3d 24 (1st Cir. 2007); *see also Project Veritas*, 982 F.3d at 818-19 (collecting decisions by Supreme Judicial Court vigorously applying Section 99).

B. The Court of Appeals ignored the legal test for ripeness and the District Court's decision and introduced a novel test that goes beyond concerns about justiciability.

The Court of Appeals for the First Circuit did not dispute, disturb, or even discuss the District Court's implicit finding that Project Veritas's as-applied claims satisfied both the "fitness" and "hardship" tests for ripeness. Rather, the panel ignored those two factors altogether and instead found a lack of "congruence" between the scope of the three investigative tasks Project Veritas had foregone and the scope of the injunctive relief they proposed as remedies. In the view of the Court of Appeals, the foregone investigations were narrow (slum landlords, sanctuary cities, Antifa and

violence at protests), while the proposed declaratory relief was broad (a judgment permitting recording of all "government officials while acting within their official duties in a public place" and all "individuals without a reasonable expectation of privacy"). *See Project Veritas*, 982 F.3d at 841-42. To the Court of Appeals, this defeated "ripeness" and rendered the claims nonjusticiable.

A congruence requirement has no basis in the law of justiciability. The Court of Appeals cites no case to support its application of such a test, presumably because there is no such authority (which assiduous searches of ripeness case law confirm). *Cf. id.* at 841-42 (citing *Renne v. Geary*, 502 U.S. 312, 324 (1991), and *Bd. of Trustees of State University of New York v. Fox*, 492 U.S. 469, 484-85 (1989), both of which caution against abuse of the overbreadth doctrine).

Requiring congruence between hardship and remedy to render an as-applied pre-enforcement challenge "ripe" makes no sense. Ripeness is about timing; it requires that a dispute have matured to the point that the issues are stable and well-defined. "Fitness" and "hardship" are features of a mature claim, adequately focused to be justiciable. To be sure that a real controversy exists, litigants are held to a bar of defining their injury as specifically and concretely as possible. Project Veritas provided specific examples of investigations it had foregone because of the chilling effect of Section 99. This the Court of Appeals did not dispute, and this was sufficient to establish ripeness, as the District Court held.

By contrast, the Court of Appeals' congruence test does not speak to timing. It assesses whether the relief requested is appropriate to redress a litigant's injury. The question of appropriate relief comes at the end of a case, after a free-speech violation has been identified, rather than before a case has even been heard. If, after hearing Project Veritas's challenge to application of Section 99 to its proposed investigations, a trial court should determine that the requested relief is too broad, the court has the authority to narrow the injunction or declaratory relief. *See* Fed. R. Civ. P. 54(c) ("Every . . . final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."). There is no "ripeness" requirement applicable to a litigant's proposed relief.

C. The "congruence" test improperly burdens journalists.

In practice, imposing a congruence requirement even at the close of a case would effectively prevent pre-enforcement challenges. If journalists can only seek relief that is narrowly tailored to a certain proposed investigation, they will have to file a lawsuit each time they contemplate a new investigation. The litigation process would quickly exhaust any investigator's resources. Concomitantly, the government would escape scrutiny by tying up journalists in the courts. The burden of bringing a lawsuit before investigating in Massachusetts would send journalists to other states rather than waste their time and money in the Bay State. Moreover, secrecy is a necessary

element of any investigation that threatens to violate Section 99. Since a congruence requirement would force editors to first obtain a narrowly tailored injunction, each suit would reveal to the targets the impending investigation. This, in turn, would virtually ensure the failure of the investigative project.

D. Project Veritas's language was not vague or excessively broad.

The Court of Appeals for the First Circuit objected to terms in Project Veritas's requested relief that seemed broad and vague. In an answer to an interrogatory, Project Veritas defined the phrase "government officials" in Count I as "officials and civil servants," which would not only include elected officials, but also public school teachers and city park maintenance workers. *Project Veritas*, 982 F.3d at 843 (especially note 5). In a similar interrogatory, Project Veritas defined the phrase "reasonable expectation of privacy" in Count II as "a circumstance in which the parties to the communication may reasonably expect that the communication may not be overheard or recorded." *Id*. at 842.

These definitions are not overly broad or vague. They draw bright lines that are easy to apply, and their breadth is no greater than what is necessary to allow investigative reporting. The Court of Appeals objected to "government officials" including elementary school teachers and janitors, but it is wholly appropriate that those who work for the government, regardless of role, should expect to be accountable to taxpayers. After all,

the next secret investigation could be into the role of teachers' unions in demanding COVID-related school shutdowns or into allegations that janitors at the State House are undocumented aliens paid less than the minimum wage. Moreover, the question of whether a particular individual has a reasonable expectation of privacy is enforced by litigants and courts in 11 other states with no concern for unworkable overbreadth. *See supra* POINT II.

E. Project Veritas's claims for relief were reasonable in scope.

Even if it were relevant to "ripeness," the prayer for relief in the Complaint is not overbroad or beyond the scope of what is necessary to provide security to the free-speech efforts of investigative reporters. *See Project Veritas*, 982 F.3d at 842. Project Veritas asks for injunctive or declaratory relief against Defendant's enforcement of Section 99's paragraphs (C)(1), (C)(3), (C)(5) and (C)(6). It does not seek to enjoin provisions of Section 99 beyond what pertains to investigations using secret audio recordings. Much of Section 99 addresses balancing privacy and the needs of law enforcement. By limiting the requested injunction to certain sections, Project Veritas kept the scope of the requested remedy only as broad as it needs to be to permit undercover journalism in Massachusetts.

F. Without explanation, the Court of Appeals for the First Circuit treated Project Veritas's claims differently than those of the other Plaintiffs.

Once before the Court of Appeals, a parallel case brought by the Martin Plaintiffs was consolidated with Project Veritas's claims. The claim of the Martin Plaintiffs was similar to the as-applied claim of Project Veritas concerning "government officials while performing their duties in a public place." However, in lieu of "government officials," the Martin Plaintiffs sought only to make audio recordings of police officers. The Court of Appeals found the claim of the Martin Plaintiffs ripe for review. *Project Veritas*, 982 F.3d at 827-31. This is a glaring inconsistency. How can a claim to make audio recordings of police officers be ripe for review when a claim to make audio recordings of the mayor of Boston is not? To record the police is ripe, but to record an elected member of the Boston school board is not ripe? To record the police is ripe, but to record an official on the Boston rent control board that is subject to bribes is not ripe? This makes no sense. Ripeness requires that the claim be sufficiently developed to be heard. That the relief requested by the Martin Plaintiffs involved fewer or different government officials than the relief requested by Project Veritas has nothing to do with whether each claim is sufficiently developed to be justiciable.

The Court of Appeals for the First Circuit went on to find the free speech claim by the Martin Plaintiffs meritorious. *Id*. at 831-40. So, in the Commonwealth of

Massachusetts, there is currently a free speech right to record the police but not to record a mayor or an elected member of the Boston city council. The judgments awarded to the Martin Plaintiffs and to Project Veritas cannot be reconciled. True, the Martin Plaintiffs are politically liberal and Project Veritas politically conservative, but the First Amendment does not recognize that distinction.

POINT IV: In a claim of facial unconstitutionality, it was error to hold that the "substantiality" of Section 99's unconstitutional applications was not measured by the sheer amount of First Amendment-protected speech it chills but instead by an imagined ratio between the statute's unconstitutional and constitutional applications.

Both the District Court and the Court of Appeals held that the facial overbreadth claim was ripe for review. *Id.* at 840-41. To be found unconstitutionally overbroad, Section 99's restraint on speech protected by the First Amendment must be sweeping or substantial. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The Court of Appeals found that the overbreadth of Section 99 was not substantial. *Project Veritas*, 982 F.3d at 841. However, the panel measured substantiality by reference to an imaginary ratio comparing the statute's unconstitutional applications to its constitutional ones. The court put it this way:

> Project Veritas does identify ten examples of applications of Section 99 that it argues are unconstitutional and that "[o]ne can expand these ten examples almost exponentially to grasp the amazing breadth and reach of this law." But, by looking solely at one half of the equation, Project Veritas fails to show, as it must, that the unconstitutional applications are "substantial" *relative to the extensive range of applications it does not even challenge.*

Id. at 841 (emphasis added).

As other Courts of Appeals have recognized, to measure substantiality by simply dividing a numerator by a denominator is a misreading of Supreme Court overbreadth precedent. *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 340 (6th Cir. 2009) ("the Supreme Court has never gone down this road – and with good reason"); *see also Free Speech Coalition, Inc. v. Attorney General, U.S.*, 787 F.3d 142, 161 (3d Cir. 2015) (overruled on other grounds) (the measure is not a "mathematical calculation or numerical comparison").

"Substantial overbreadth involves not just an inquiry into the legitimate and illegitimate sweep of a statute; it also involves an inquiry into the 'absolute' nature of a law's suppression of speech." *Connection Distrib.*, 557 F.3d at 340. As the Court of Appeals acknowledged, Project Veritas offered a multitude of examples of the tremendous scope of Section 99's suppression of legitimate speech and projected many further examples in every direction. *Project Veritas*, 982

F.3d at 841. Without disputing the scope of these unconstitutional applications, the Court of Appeals for the First Circuit rejected Project Veritas's facial challenge because Project Veritas did not plead a satisfactory ratio between unconstitutional and constitutional applications of Section 99. *Id.* To ignore the clearly substantial, "absolute" scope of the unconstitutional applications was error.

CONCLUSION

By sweepingly prohibiting all concealed recording in Massachusetts, the legislators of the Commonwealth granted themselves immunity from unwanted scrutiny and foisted onto the federal courts and private parties the costly task of hammering out, one litigated case at a time, a prohibition that complies with the First Amendment. As a nonprofit law firm that regularly represents poorly resourced litigants seeking to vindicate their First Amendment rights, *Amicus* requests that the Petition for Writ of Certiorari be granted so that this Court might hold Massachusetts legislators accountable for drafting new, constitutional legislation (armed with 50 examples of constitutional recording statutes), in the meantime clarifying the tests for "ripeness" in as-applied pre-enforcement

challenges and "substantiality" in facial overbreadth claims.

Respectfully submitted,

Attorneys for Thomas More Society:

MARY CATHERINE HODES
Special Counsel
THOMAS MORE SOCIETY
309 W. Washington Street,
Suite 1250
Chicago, Illinois 60606
312-782-1680

CARL H. ESBECK
R. B. Price Professor Emeritus
Hulston Hall, Room 209
Ninth & Conley Streets
Columbia, Missouri 65211
573-882-6543

TIMOTHY BELZ
Counsel of Record
J. MATTHEW BELZ
CLAYTON PLAZA LAW
GROUP, LC
112 S. Hanley Road,
Suite 200
St. Louis, Missouri 63105
314-726-2800