No. 20-1598

In the Supreme Court of the United States

PROJECT VERITAS ACTION FUND,

Petitioner,

v.

RACHEL S. ROLLINS,
IN HER OFFICIAL CAPACITY AS
DISTRICT ATTORNEY FOR
SUFFOLK COUNTY, MASSACHUSETTS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMICUS BRIEF OF ACCURACY IN MEDIA, COOLIDGE-REAGAN FOUNDATION, LEADERSHIP INSTITUTE, AND PUBLIC INTEREST LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DAN BACKER*
CHALMERS & ADAMS LLC
441 N. LEE ST., SUITE 300
Alexandria, VA 22314
(202) 210-5431
dbacker@ChalmersAdams.com
Counsel of Record for
Amici Curiae

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INTERESTS OF AMICI CURIAE[1]

Amicus Accuracy in Media ("AIM") is a 501(c)(3) non-profit organization founded in 1969 to use investigative journalism and citizen activism to expose media bias, public corruption, and policy failings. The ability to make surreptitiously recordings is essential to its investigative journalism.

Amicus Coolidge-Reagan Foundation is a 501(c)(3) non-profit organization whose mission is to defend, protect, and advance liberty, particularly the principles of free speech enshrined in the First Amendment of the U.S. Constitution. It seeks to protect the marketplace of political ideas by promoting vigorous political expression, which surreptitious records can facilitate.

Amicus Leadership Institute, founded in 1979 by Morton C. Blackwell, is a 501(c)(3) group that provides training in grassroots organizing, youth politics, and communications. It teaches conservatives how to succeed in politics, government, and the media. Since 2009 its college news site CampusReform.org has worked with students to expose liberal bias and abuse in American higher education.

Amicus Public Interest Legal Foundation is a 501(c)(3) nonpartisan, public interest organization incorporated and based in Indianapolis, Indiana. The

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[1] Counsel for all parties have consented to the filing of this brief. Petitioner's letter of consent is on file with the Clerk; Respondent's consent is being filed with this brief. Pursuant to S. Ct. R. 37.6, amici curiae certify that no counsel for a party authored any part of this brief, nor did any person or entity, other than the amici, their members, or their counsel, make a monetary contribution to fund the preparation or submission of this brief.

Foundation's mission is to promote the integrity of elections nationwide through research, education, remedial programs, and litigation. It works with election administrators nationwide and educates the public to ensure that the nation's voter rolls are accurate and current. The Foundation has advanced its mission by producing and releasing investigative videos documenting investigative visits to non-residential addresses claimed by registered voters in southern Nevada and Pittsburgh, Pennsylvania.

SUMMARY OF ARGUMENT

This Court should grant certiorari to address a First Amendment issue of tremendous national importance that will only continue to grow more urgent: whether the First Amendment protects a person's right to surreptitiously make recordings in a place he has the right to be, and whether those recordings may be taken of anyone, any government officials, or instead only police officers. The First Circuit adopted a parsimonious interpretation of the First Amendment, concluding only that a person has the right to secretly record "police officers discharging their official duties in public spaces." Pet. App. 66.[2]

There is no question that videos produced through surreptitious recordings are generally a form of speech subject to full First Amendment protection, *United States v. Stevens*, 559 U.S. 460, 481-82 (2010), including when they are comprised solely of recordings

[2] "Pet. App." refers to the Appendix accompanying the Petition for Certiorari.

of third parties, *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 570 (1995). The act of recording the videos is likewise entitled to maximal First Amendment protection on a variety of grounds. Recording a video is itself an act of expression that falls directly within the First Amendment, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018); it is inextricably intertwined with the dissemination of the constitutionally protected videos themselves, *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988), and, alternatively, it is a necessary precursor for the eventual display of the videos, *Buckley v. Valeo*, 424 U.S. 1, 16-19 (1976) (per curiam). Under each of these theories, surreptitious recording of government officials should be subject to strict scrutiny, and Massachusetts' prohibition on it, Mass. Gen. Laws ch. 272, § 99(C), should be invalidated.

More broadly, this Court should resolve the circuit split over the extent to which the First Amendment protects the right to make surreptitious recordings. Some circuits have expressly upheld the right to make secret recordings. *Animal Legal Def. Fund*, 878 F.3d at 1205; *see also Kelly v. Borough of Carlisle*, 622 F.3d 248, 259 n.7 (3d Cir. 2010). Others, however, have expressed concerns that important differences exist for First Amendment purposes between overt and surreptitious recordings. *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *see also Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 343-44, 352-53 (5th Cir. 2017). This Court must grant certiorari to ensure all citizens throughout the nation enjoy the same First Amendment rights, and all government officials—

particularly federal officials—are subject to the same degree of public scrutiny and accountability.

This Court should also grant certiorari to clarify the proper scope of relief in First Amendment cases. The district court granted narrow relief by holding § 99(C) unconstitutional as applied to certain covert recordings of police officers in public areas. Pet. App. 66-67. It refused Petitioner Project Veritas Action Fund's request to hold the law facially unconstitutional. In crafting such narrow relief, the First Circuit not only has forced future rightholders to litigate to seek judicial protection for their First Amendment right to engage in surreptitious recordings, but also established content-based protections that squarely violates First Amendment principles. *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 165 (2015). This Court should grant certiorari to clarify the availability of facial relief in First Amendment cases. *Cf. Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 575-76 (1987).

STATEMENT OF THE CASE

Section 99 of the Massachusetts General Laws makes it illegal for "any person" to "willfully commit[]"or "attempt[] to commit an interception . . . of any wire or oral communication," or to "procure[] any other person" to do so. Mass. Gen. Laws ch. 272, § 99(C)(1). The term "interception" means "to secretly hear" or "secretly record . . . the contents of any wire or oral communication through the use of any intercepting device," or to "aid another" in doing so, without the prior consent of all parties to the communication. *Id*. § 99(B)(4).

The statute is sweepingly overbroad. The Supreme Judicial Court of Massachusetts has held, for example, that it prohibits a person from secretly recording a ransom call from a kidnapper. *Commonwealth v. Jackson*, 349 N.E.2d 337, 340 (Mass. 1976). Or a father from secretly recording conversations between his 15-year-old son and the 57-year-old pervert who had been molesting him for several years to provide to the police, *Commonwealth v. Barboza*, 763 N.E.2d 547, 551-52 (Mass. App. 2002). Massachusetts courts have emphasized the recorded "conversation or communication need not be intelligible"; a defendant may be prosecuted even where a recording incidentally picks up only "isolated words." *Commonwealth v. Wright*, 814 N.E.2d 741, 744 (Mass App. 2004).

The statute has repeatedly been used to punish Massachusetts citizens for attempting to record their interactions with government officials. The Massachusetts Supreme Court Judicial Court, for example, has upheld the convictions of a motorist who secretly recorded a "confrontational" traffic stop by local police officers, *Commonwealth v. Hyde*, 750 N.E.2d 963, 964-65 (Mass. 2001), and a political protestor who recorded his conversation with a police officer during a rally without expressly pointing out his lapel microphone, *Commonwealth v. Manzelli*, 864 N.E.2d 566 (Mass. App. 2007). In *Damon v. Hukowicz*, 964 F. Supp. 2d 120, 128, 139 (D. Mass. 2013), the court concluded that a reasonable jury could apply the statute to a bicyclist who recorded his interaction with police, even though the police had also recorded the same interaction. Likewise, a federal district court allowed police officers to sue a citizen for secretly

recording them during his "arrest, transport and booking." *Gouin v. Gouin*, 249 F. Supp. 2d 62, 79 (D. Mass. 2003); *cf. Commonwealth v. Camilli*, No. 10-P-1155, 2012 Mass. App. Unpub. LEXIS 477, at *3 (Mass. App. Apr. 17, 2012) (assuming a secret recording of paying extortion money to a police officer violated Section 99).

The statute's reach extends to interactions with government agents other than police officers, however. In *Denicola v. Potter*, No. 19-cv-11391-ADB, 2020 U.S. Dist. LEXIS 114540, at *2, 11-12 (D. Mass. June 30, 2020), the district court held that the statute validly applied to a citizen who attempted to generate a record of the information he was being told by a court clerk by recording a phone call; he had notified one of the employees with whom he spoke about the recording, but not others. In short, Massachusetts courts have vigorously applied the law in a variety of context to prevent citizens from generating accurate, incontrovertible records of their interactions with governmental officials.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO AFFIRM THE FUNDAMENTAL FIRST AMENDMENT RIGHT TO SURREPTITIOUSLY RECORD GOVERNMENT OFFICIALS AND EMPLOYEES.

Smartphones with audio and video recording capabilities have become ubiquitous. The Internet allows audio and video clips to be transmitted around the world in an instant. Within days, the dramatic video of George Floyd's death galvanized a nationwide movement for police reform, *see* Cheryl Corley, *1 Year Later, The Video of George Floyd Death Has Lasting Impacts*, NPR (May 7, 2021, 5:03 AM ET), https://www.npr.org/2021/05/07/994539600/1-year-later-the-video-of-george-floyds-death-has-lasting-impacts. The right to record interactions, conversations, and events—whether overtly or surreptitiously—in a place where a person has the right to be has evolved into a crucial aspect of the ability to engage in both political and public dialogue. This challenge squarely and concretely presents the question of whether the First Amendment protects the right to record one's observations and recollections not only in written form, but recorded media, as well.

This Court should grant certiorari to dispositively construe the First Amendment, establishing a uniform nationwide rule that recordings taken from a location where a person has the right to be are entitled to full First Amendment protection. A deep circuit split currently exists on the issue, leading to

disparities in constitutional rights for citizens in different jurisdictions. These inconsistent rulings likewise subject government officials—particularly federal officials—to varying degrees of public oversight, scrutiny and, ultimately, accountability for their actions. With the critical role that surreptitious recordings have come to play in our public discourse, certiorari is warranted.

A. This Court Should Hold that the Right to Record in a Place Where a Person Otherwise Has the Right to Be Present is a Form of Free Speech, and Restrictions are Subject to Strict Scrutiny.

The First Circuit reviewed the challenged prohibition on surreptitious recordings under intermediate scrutiny. Pet. App. 46-47. Applying this misguided approach, rather than flatly invalidating § 99(C), the court entered a narrow injunction preventing the statute from being applied only in the context of recordings of police officers in public places. This Court should grant certiorari because direct speech-related prohibitions such as § 99(C) are subject to strict scrutiny, and facially unconstitutional.

1. This Court has held that the First Amendment protects a wide range of expression,[3] including not only literal "speech," U.S. CONST. amend. I, recorded communications such as cable television shows,

[3] This Court has incorporated the First Amendment through the Fourteenth Amendment's Due Process Clause to be enforceable against the states. *See Near v. Minnesota*, 283 U.S. 697 (1931) (Press Clause); *Gitlow v. New York*, 268 U.S. 652 (1925) (Speech Clause).

United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000), videos, *United States v. Stevens*, 559 U.S. 460, 481-82 (2010), and movies, *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501-02 (1952). It also protects a person's decision to reproduce and re-convey "speech generated by other persons," *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995), including third parties' paid advertisements, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964). Under these precedents, the First Amendment guarantees the right to disseminate video and audio recordings involving the speech of other people. *See Barnicki v. Vopper*, 532 U.S. 514, 518-19, 534-35 (2001) (holding that the First Amendment protected the right of a radio commentator to play an illegally obtained recording of teacher's union leaders discussing contentious contract negotiations).

2. A person generally has a First Amendment right to discuss government officials and matters of public concern. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). They also have the fundamental right to transcribe verbatim accounts of their encounters with government officials or interactions they observe involving government officials. The First Amendment likewise protects the right to draw detailed artistic sketches of what they observe, including government officials' actions. *See Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("Pictures, films, paintings, drawings, and engravings . . . have First Amendment protection.").

The constitutional question here is whether the First Amendment allows the state to relegate those who see and hear events to their memories, written notations, and even sketches, or instead guarantees

the right to memorialize those observations in a more reliable, robust, and resonant format. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 409 (2011) ("[T]he First Amendment protects the right to record images we observe as part of the right to form, reflect upon, and share our memories."); *see also* Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 232 (2017) ("In a public forum, courts should acknowledge that the right to record exists, regardless of whether the subject of the recording is a matter of public concern."). "Like prohibitions on sketching, taking notes, or memorializing observations in a diary," laws such as § 99(C) "bar individuals who have already acquired information from preserving it for future review, reflection, and dissemination." Kreimer, *supra* at 391-92.

The First Amendment does not allow the Government to require citizens to memorialize their observations in a categorically less effective form, thereby hindering their future attempts to communicate and convey their experiences. *See United States v. Int'l Union United Auto., Aircraft & Agri. Implement Workers*, 352 U.S. 567, 596 (1957) (Douglas, J., dissenting) (declaring First Amendment protections should not be limited to "meaningless mouthings of ineffective speakers"). The very purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). Prohibiting speakers from being able to generate the types of communications—surreptitious videos—most likely to accurately convey truthful

information, particularly about governmental actors, is antithetical to First Amendment values. *See* Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 50-51 (2016). Videos can convey the full texture of a situation in a way that mere words cannot capture, and can appeal to a viewer in a more immediate manner than unadorned text. *Cf. Cohen v. California*, 403 U.S. 15, 26 (1971) ("We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may be often the more important element of the overall message sought to be communicated.").

This Court recognized the unique power of recordings in *Scott v. Harris*, 550 U.S. 372 (2007). When substantial disputes of material fact exist in a case, a court must deny summary judgment and allow the jury to resolve the issue. *See* FED. R. CIV. P. 56(c). Nevertheless, due to the unique probative qualities of a video, it can be powerful enough to entitle a movant to summary judgment. A video can make a jury's decision to disbelieve certain facts or adopt a contrary version of events unreasonable and erroneous as a matter of law. *Scott*, 550 U.S. at 380-81 ("Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals . . . should have viewed the facts in the light depicted by the videotape.").

The right to display audio and video recordings implies a generally concomitant right to create them. Without surreptitiously recording government officials' actions and statements, it is impossible for a citizen to indisputably convey what actually occurred.

Revealing the recording device often may often lead abusive officials to temporarily alter their speech and behavior to avoid generating evidence of their wrongdoing and evade accountability. *See* Kaminski, *supra* at 202 (explaining how the knowledge of being recorded can lead people to change their behavior). Failing to record the speech or interactions at all will lead to he-said, she-said situations in which government officials often enjoy the patina of credibility. *See* Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 618-19 (2009).

Allowing surreptitious recording of government actors also deters them from committing constitutional or statutory violations, or abusing their authority by acting rudely and dismissively. As with the right to a public trial, "the sure knowledge that anyone is free to" secretly record government officials "gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 508 (1984). It also empowers individual citizens, allowing them to offset the power imbalances that exist with government officials, including police. *See* Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1564 (2016).

3. At a minimum, surreptitious recordings of government officials are entitled to full First Amendment protection as conduct that is a necessary precursor to, and integrally intertwined with, speech. A person cannot show a video unless they are permitted to record it in the first place. The First Amendment must protect the creation of the video to

the same extent as the right to view it. The First Amendment is triggered by direct restrictions not only on expression, but also conduct that has "a close enough nexus to expression" or is "commonly associated with expression." *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988). For example, a licensing scheme which granted the mayor unbridled discretion over whether to allow newspaper racks on the municipality's public sidewalks was held unconstitutional, even though it did not directly regulate literal speech or the content of publications. *Id*. at 772. This Court reasoned it impermissibly burdened "conduct commonly associated with speech.' *Id*. at 759.

Likewise, this Court held a special use tax on ink and paper violates the First Amendment. *Minn. Star & Trib. Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 592-93 (1983). It explained that, although unused ink and paper are themselves neither speech nor press publications, the tax "burdens rights protected by the First Amendment." *Id*. at 582. In the landmark campaign finance case *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), this Court held independent expenditures were subject to full First Amendment protect as pure speech, and restrictions on them were generally subject to strict scrutiny. *Id*. at 44-45. The funds used for independent expenditures was not itself literally speech. Yet "the dependence of a communication on the expenditure of money" neither "operates itself to introduce a nonspeech element" nor "reduce[s] the exact scrutiny required by the First Amendment." *Id*. at 16.

Surreptitious recordings of government officials are likewise inextricably intertwined with important

political speech. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010) (pointing out this Court has never "drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or artwork) in terms of the First Amendment protection afforded"); *see also ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."). Prohibitions on such recordings inherently prevent such recordings from being displayed to others. Broad swaths of political communications are categorically barred from even coming into existence. Others are forced to take far less effective forms—oral recountings often resulting in "he-said, she-said" situations, in which the speaker's credibility is pitted against that of a government official who offers a very different version of events. *See* Kreimer, *supra* at 344 ("[B]roadly available and marginally costless image capture provides potential access to public dialogue for individuals and groups without firm economic or political bases or established public credibility."); Wasserman, *supra* at 618. As with other restrictions on activities integrally intertwined with speech, surreptitious recordings should be subject to strong constitutional protection.

B. Deep Schisms Exist Among Different Jurisdictions' Treatment of Recordings Under the First Amendment.

This Court should grant certiorari to address the First Amendment's applicability to secret recordings of government officials in places where a person has the right to be, since different jurisdictions have come to differing conclusions on the issue. Several circuits have recognized a right to record the police in public places. *See Fields v. City of Philadelphia*, 862 F.3d 353, 356, 360 (3d Cir. 2017) ("[T]he First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public. . . . subject to reasonable time, place, and manner restrictions." (quotation marks omitted)); *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017) ("First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions."). Some jurisdictions, however, have gone further, recognizing a broader right to "record matters of public interest," including those involving "public officials . . . on public property." *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *see also Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

Beyond these differences in the conception of the underlying right, sharper disagreement exists over the precise issue presented in this case—whether the First Amendment protects the right to make surreptitious recordings of public officials in places a person has the right to be. The Ninth Circuit has

expressly recognized that the First Amendment protects the right to make "secret[] film[s]" in places where the person creating the recording has permission to be. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190, 1205 (9th Cir. 2018). That court explained, in a case about secret recordings, "It defies common sense to disaggregate the creation of the video from the video or audio recording itself. The act of recording is itself an inherently expressive activity . . . ." *Id.* at 1203; *see also Kelly v. Borough of Carlisle*, 622 F.3d 248, 259 n.7 (3d Cir. 2010) ("[W]e fail to see how the covert nature of a recording would affect its First Amendment value . . . .").

The Seventh Circuit, in contrast, has explicitly drawn a "distinction between open and concealed recording," explaining "surreptitious recording brings stronger privacy interests into play." *Alvarez*, 679 F.3d at 607 n.13. And in *Brinsdon v. McAllen Independent School District*, 863 F.3d 338, 343-44, 352-53 (5th Cir. 2017), the Fifth Circuit held that the First Amendment did not protect the right to make "secret video recordings" of a public high school teacher in Texas making students recite the Mexican Pledge of Allegiance "with their right arms raised at a 90-degree angle" to celebrate Mexican Independence Day.

The ruling below from the First Circuit stakes out yet a different approach, affirming the right to secretly make "recording[s] of police officers discharging their official duties in public spaces," Pet. App. 5, but simultaneously refusing to hold more broadly that the First Amendment "bars the secret, nonconsensual audio recording of government officials discharging their official duties in public," *id.* Different circuits have come to different conclusions concerning the

existence and scope of a First Amendment right to secretly record government officials—particularly government officials other than police officers—in places a person has the right to be. This Court should grant certiorari to resolve this growing circuit split and establish a nationally uniform interpretation of the First Amendment.

C. This Issue is Important and Warrants Certiorari.

1. Surreptitious recordings have played a critical role in shaping American political discourse in recent years. Statutes such as § 99(C) and its counterparts in other states have a tremendous chilling effect, preventing citizen journalists and other ordinary Americans from bringing progressive corruption, liberal hypocrisy, and left-wing crime to light. For example, it was surreptitious recording by Petitioner Project Veritas itself that exposed the willingness of multiple employees of the Obama-affiliated group[4] ACORN—the Association of Community Organizations for Reform Now—to engage in illegal conduct. *See* Clark Hoyt, *The Acorn Sting Revisited*, N.Y. TIMES (Mar. 20, 2010), https://www.nytimes.com/2010/03/21/opinion/

[4] Among numerous other connections, then-Presidential candidate Barack Obama had paid $800,000 to an ACORN subsidiary to fund get-out-the-vote efforts, then attempted to obfuscate the transaction by misrepresenting the purpose of those payments to the FEC. *See* David M. Brown, *Obama to Amend Report on $800,000 in Spending*, TRIB, LIVE (Aug. 22, 2008, 12:00 AM), https://archive.triblive.com/news/ obama-to-amend-report-on-800000-in-spending/.

21pubed.html. Project Veritas' more recent secret recordings of CNN personnel unmasked the network's partisan biases, revealing CNN personnel of bragging the network purposefully created "propaganda" to get "Trump out" of office. Joseph A. Wulfsohn & Brian Flood, *CNN Staffer Admits Network's Focus was to "Get Trump Out of Office," Calls Its Coverage "Propaganda,"* FOX NEWS (Apr. 13, 2021), https://www.foxnews.com/media/cnn-staffer-networks-trump-office-coverage-propaganda; *cf. PBS Lawyer Resigns After Being Caught in Veritas Sting*, AP NEWS (Jan. 12, 2021), https://apnews.com/article/donald-trump-entertainment-coronavirus-pandemic-8f586d687ab332777a7a059457ff818e.

Amicus AIM has similarly relied on surreptitious recordings to uncover crime and fully inform the public. In 2020, for instance, an AIM reporter secretly recorded a staffer admitting the campaign of Democratic candidate for the U.S. Senate from Iowa, Theresa Greenfield, was allegedly violating federal campaign finance law by apparently misrepresenting illegal excessive in-kind contributions paid for by the Iowa Democratic Party as permissible volunteer services. Jonathan Garber, *Iowa Sen. Ernst's Democratic Challenger Accused of Breaking Campaign Finance Rules for 3rd Time*, FOX NEWS (Oct. 21, 2020), https://www.foxnews.com/politics/sen-ernst-dem-rival-fec-complaint-third-time.

AIM similarly used surreptitious recording to help Iowa voters make more fully informed choices when casting their ballots. Greenfield had refused to publicly take a position on Black Lives Matter, the group responsible for riots and destruction throughout

the nation over this past year. *See* Mike Gonzalez, *For Five Months, BLM Protestors Trashed American's Cities. After the Election, Things May Only Get Worse*, HERITAGE FOUND. (Nov. 6, 2020), https://www.heritage.org/progressivism/commentary/five-months-blm-protestors-trashed-americas-cities-after-the-election. Thanks to its surreptitious recording, AIM was able to show Iowa voters footage of both Greenfield and her husband declaring her enthusiastic support of the group. *Accuracy in Media Exposes Iowa Senate Candidate*, ACCURACY IN MEDIA (Oct. 13, 2020), https://www.aim.org/action-alert/accuracy-in-media-exposes-iowa-senate-candidates-support-for-black-lives-matter/. Amicus the Leadership Institute has similarly relied on surreptitious recordings to expose incidents of abuse against students for expressing conservative political views on college campuses.

2. This case deals with perhaps one of the most important constitutional issues of the Twenty-First Century. Video recordings of police specifically, and government officials and political candidates more broadly, are playing an ever-increasing role in both public discourse and democratic self-governance. Journalists and everyday citizens must have a clear understanding of the scope of their rights. These rights should be consistent across the nation, rather than varying from state to state based on differences in state law, or circuit to circuit based on conflicting precedents. National uniformity is especially critical insofar as citizens seek to surreptitiously record federal officials.

Such secret recordings can help citizens hold officials accountable. *See* Huma Khan & Z. Byron

Wolf, *NPR CEO Vivian Schiller Resigns After Hidden Camera Sting Snares Top Fundraiser*, ABC NEWS (Mar. 9, 2011, 7:04 AM), https://abcnews.go.com/Politics/npr-ceo-vivian-schiller-resigns-james-okeefe-orchestrated/story?id=13092007 ("NPR's embattled chief executive resigned today after the top fundraiser for NPR said offensive things about Republicans and the Tea Party during an undercover sting orchestrated by conservative activist James O'Keefe."). They can uncover and deter public corruption. *Cf.* Alex DeMarban, *Pebble CEO Tom Collier Resigns After Release of Secretly Recorded Videos that Show Him Talking About His Ties to Alaska Politicians and Regulators*, ANCHORAGE DAILY NEWS (Sept. 23, 2020), https://www.adn.com/business-economy/2020/09/23/pebble-ceo-tom-collier-resigns-after-release-of-secretly-recorded-videos/.

They can reveal far-left racist indoctrination of public school teachers and students. *See* Michael Lee, *San Diego School District Trains White Teachers that They "Spirit Murder" Black Children and Need "Antiracist Therapy,"* WASH. EXAMINER (Jan. 6, 2021, 2:15 PM), https://www.washingtonexaminer.com/news/san-diego-teachers-spirit-murder-black-children; *cf.* Michael Levenson, *A Psychiatrist Invited to Yale Spoke of Fantasies of Shooting White People*, N.Y. TIMES (June 6, 2021) (article based on unauthorized release of video of an online lecture to which Yale had restricted access), https://www.nytimes.com/2021/06/06/nyregion/yale-psychiatrist-aruna-khilanani.html. They can guide voters' electoral decisions. *See* Peter Wade, *Secret Recording Exposes Intelligence Chairman Warning*

Donors About Coronavirus 3 Weeks Ago, ROLLING STONE (Mar. 19, 2020, 2:05 ET), https://www.rollingstone.com/politics/politics-news/secret-recording-intelligence-chairman-warning-donors-about-coronavirus-weeks-ago-969767/. And they can even provide a foundation for civil rights suits under *Bivens v. Six Unnamed Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

This Court has recognized, "[F]reedom of speech and of the press. . . [are] among the fundamental personal rights and liberties." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). Citizens' rights to covertly record events and conversations—particularly those involving government officials—in places they have the right to be should not vary by jurisdiction. Similarly, federal officials should not enjoy fluctuating levels of protection from surreptitious recording based on where they happen to live or work. Such variation could lead to particularly pernicious consequences for elected officials, as U.S. Representatives and U.S. Senators from some states—but not others—would be asymmetrically subject to the possibility of public accountability and electoral repercussions from constitutionally protected surreptitious recordings. The First Amendment issues in this case warrant certiorari.

II. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE NEED FOR FACIAL RELIEF IN FIRST AMENDMENT CASES.

In addition to ruling whether the First Amendment protects the right to use the defining technology of our

era—the smartphone—to surreptitiously record government officials, this case presents the perfect vehicle for this Court to address important questions of constitutional remedies. The challenged provision, in relevant part, makes it a crime for "any person" to "willfully commit[]"or "attempt[] to commit an interception . . . of any wire or oral communication." Mass. Gen. Laws ch. 272, § 99(C)(1). The term "interception" means to use an "intercepting device" to "secretly hear" or "secretly record" any communication. *Id*. § 99(B)(4).

The First Circuit correctly recognized that, at a minimum, this law "violates the First Amendment by prohibiting the secret, nonconsensual audio recording of police officers discharging their official duties in public spaces." Pet. App. 5. It refused to hold § 99(C) facially unconstitutional, however, instead holding it unconstitutional as applied only in those circumstances. *Id*. at 59 (affirming rejection of First Amendment overbreadth challenge); *see also id*. at 66-67. This Court should grant certiorari to overturn this error and clarify the proper standard for facial relief in First Amendment cases.

The First Circuit's approach provides scant protection for First Amendment rights. The court embraced an approach where a citizen, reporter, or private group must bring an as-applied challenge to § 99(C) every time they wish to surreptitiously record a government official, other than a police officer in a public location. To prevail, the plaintiffs will generally be expected to describe in detail the nature of the conversation or event they anticipate recording and the location the recording will occur. As a practical matter, the First Circuit's wholly impracticable step-

by-step approach to the enforcement of fundamental constitutional rights will make it impossible, indefinitely, for most ordinary people to exercise their fundamental First Amendment rights.

First, the need to surreptitiously record a conversation, interaction, or event will often occur unexpectedly. Rightholders need assurance of their ability to record "at a particular time; eventual [permission] would come 'too little and too late.'" *Plain Dealer Publ'g Co.*, 486 U.S. at 772 (quoting *Freedman v. Maryland*, 380 U.S. 51, 56 (1965)). Relegating citizens, journalists, and others to case-by-case as-applied challenges renders First Amendment protection for surreptitious recording largely nugatory. In *Citizens United v. FEC*, 558 U.S. 310, 333 (2010), for example, this Court held the ban on independent expenditures by corporations was facially unconstitutional, rather than issuing a narrow, as-applied ruling based on the type of communication proposed by Appellant Citizens United. It explained:

> A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes . . . litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on . . . .

Id. at 334. These same considerations will often apply to surreptitious recordings of government officials. Requiring people to choose between protracted litigation to bring a pre-enforcement as-applied

challenge to § 99(C), and facing the prospect of prosecution for simply violating that law, is an impermissible burden on First Amendment rights.

Second, requiring plaintiffs to file as-applied lawsuits in order to obtains judicial declarations of their constitutional rights undermines the value of First Amendment protections for surreptitious recordings. The whole point of a covert recording is to generate a record of what a person naturally says and does when they do not know witnesses will be able to generate a dispositive record of events to show third parties. Requiring litigants to sue in advance to avoid the threat of prosecution will often provide notice to the targets of the recordings, defeating the point of surreptitious recordings.

Third, this Court's precedents require statutes with a broad, diverse range of unconstitutional applications such as § 99(C) to be held facially unconstitutional. *See Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 968 (1984). Requiring "case-by-case adjudication" of First Amendment challenges to § 99(C) through a "series of adjudications" is "intolerable," because it would give rise to a "chilling effect . . . on protected speech" as those cases are adjudicated. *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987).

Fourth, perhaps most importantly, the First Circuit's limited as-applied remedy creates unconstitutional content-based discrimination. Pet. App. 66-67. Content-based discrimination with regard to speech is generally unconstitutional. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign

motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). As discussed earlier, making recordings is a creative, expressive activity protected by the First Amendment, and such recordings are inextricably intertwined with—and generate—communications that are also protected by the First Amendment. *See Smith*, 212 F.3d 1333; *Fordyce*, 55 F.3d at 439. Under the lower court's ruling, a person may engage in surreptitious recordings only if the content of those recordings is police officers engaged in official activities in another place. Recordings of other governmental actors, or other people in public places, fall outside the scope of the ruling.

A restriction is content-based if it "target[s] speech based on its communicative content." *Reed*, 576 U.S. at 163. For example, "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Id*. at 169. Here, the First Circuit's ruling selectively has extend constitutional protection to surreptitious recordings with only one sort of content: police officers performing official functions in public spaces. In the guise of enforcing the First Amendment, the lower court has created a content-based discrimination repugnant to the First Amendment. This Court should grant certiorari to both remediate the lower court's constitutional violation and clarify the remedial principles that govern First Amendment cases.

CONCLUSION

For these reasons, this Court should grant the petition for certiorari in this case.

Respectfully submitted,

DAN BACKER*
CHALMERS & ADAMS LLC
441 N. LEE ST., SUITE 300
Alexandria, VA 22314
(202) 210-5431
dbacker@ChalmersAdams.com
Counsel of Record for
Amici Curiae

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