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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Massachusetts General Laws ch. 272, § 99(C)(1), ("Section 99") prohibits most "interceptions" of an oral or wire communication, with "interception" defined to mean the nonconsensual use of an "intercepting device" to "secretly hear, secretly record, or aid another to secretly hear or secretly record" such a communication. The questions presented are:

1. Whether the First Circuit correctly concluded that Section 99 is not facially overbroad in violation of the First Amendment; and

2. Whether the First Circuit correctly concluded that petitioner's challenges to two categories of applications of Section 99 were not ripe, where petitioner's claims far exceeded petitioner's own circumstances in scope, presented insufficient facts to decide the novel constitutional questions posed, and invited adjudication by abstraction and hypothetical.

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INTRODUCTION

This petition should be denied because neither of the two questions presented satisfies this Court's Rule 10.

Petitioner claims two splits of authority on its facial overbreadth question, but both are illusory. Although the First Circuit below and the Illinois Supreme Court respectively upheld and struck down Massachusetts's and Illinois's anti-eavesdropping statutes, they reached these different conclusions because of distinctions between the two statutes—most importantly, that Illinois's statute banned *all* nonconsensual recording, whereas Massachusetts's statute permits open recording and restricts only *surreptitious* nonconsensual recording. Nor has petitioner demonstrated any split concerning the proper analytical framework for overbreadth claims.

Nor is there any split of authority on petitioner's ripeness question. The principle applied by the First Circuit below—that a claim is not ripe for adjudication where its outcome depends on facts not presented—is black-letter law, not in dispute among the courts of appeals.

STATEMENT

1. Massachusetts criminal law prohibits most "interceptions" of an oral or wire communication, with "interception" defined to mean the use of an "intercepting device" to "secretly hear, secretly record, or aid another to secretly hear or secretly record" such a communication without "prior authority by all parties to such communication." *See* Mass. Gen. Laws ch. 272, § 99(C)(1); *see also id.* §§ 99(B)(1)-(4) (relevant

definitions). The statute recites the State Legislature's concern that "the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited." *Id.* § 99(A).

Section 99 was enacted in 1968, after a legislative commission recommended that Massachusetts abandon its preexisting "one-party consent" statute (permitting recording so long as one party to the communication consents) in favor of a prohibition on nonconsensual "secret[]" recordings. 1968 Mass. Senate Rep. No. 1132 at App'x A. A concurring report signed by two members of the commission elaborated on the rationale for this recommendation: Each individual, they wrote, must be allowed "to decide for himself whether his words shall be accessible solely to his conversation partner, to a particular group, or to the public, and, *a fortiori*, whether his voice shall be fixed on a record." *Id.* at 12.

2. Petitioner—an undercover journalism organization that relies heavily on surreptitiously recording its subjects—filed suit to challenge Section 99 in March 2016.[1] Pet. App. 15-16. Through a series

[1] Shortly after petitioner filed its complaint, a pair of civil rights activists separately filed suit in the District Court alleging that Section 99 violates the First Amendment insofar as it prohibits the surreptitious recording of police officers performing their duties in public places. Pet. App. 11-12. Although petitioner's case was never formally joined with the activists' case, the District Court issued a joint summary judgment order in both cases, Pet. App. 78, and the First Circuit issued a joint opinion in the appeals arising from both cases, Pet. App. 1.

of amended complaints, petitioner claimed: that Section 99's prohibition of surreptitious recording is facially overbroad; and that Section 99 violates the First Amendment insofar as it (1) prohibits surreptitious recording of conversations in which the speaker lacks a reasonable expectation of privacy and (2) prohibits surreptitious recording of government officials performing their duties in public places. Pet. App. 16-19; *see* Pet. App. 165-81 (petitioner's final amended complaint). Petitioner sought corresponding declaratory and injunctive relief for each claim. *Id*.

The District Court dismissed petitioner's overbreadth claim, finding that petitioner had failed to state a claim because "the reach of the statute is limited and the majority of its applications are legitimate." Pet. App. 136-37. The court also dismissed petitioner's claim concerning the recording of conversations in which the speaker lacks an expectation of privacy, finding that to impose a "reasonable expectation of privacy" condition on Section 99 would be to insist on the least restrictive means of regulating electronic eavesdropping, which "is not required under intermediate scrutiny when the privacy of individual conversations is at stake." Pet. App. 134.

Following discovery, the District Court granted summary judgment in favor of petitioner's claim concerning the recording of government officials in public places. Pet. App. 118-19. Under intermediate scrutiny, the court concluded, "Section 99 is not narrowly tailored to protect a significant government interest when applied to . . . government officials performing their duties in public." Pet. App. 113. The court added, however, that "it [wa]s not prudential,

under the ripeness doctrine" to define either "public space" or "government official," instead "leav[ing] it to subsequent cases to define these terms on a better record." Pet. App. 117; *see also id.* ("[Cases] teach that a police officer falls within the ambit of 'government official.' But who are these other government officials?"); *id.* (acknowledging uncertainty because "'the term 'public space' seems to indicate something broader than 'public forum'").

Following the District Court's summary judgment ruling, the parties litigated the form of the judgment to be entered. The District Court again refused to define either "public space" or "government official" in its declaratory judgment finding Section 99 unconstitutional when applied to recordings of government officials performing their duties in public. Pet. App. 75; *see also* Pet. App. 72-73 (declining to enjoin enforcement of Section 99 vis-à-vis such recordings, in part because of this lack of clarity).

3. Petitioner and respondent each appealed. The First Circuit affirmed the District Court's dismissal of petitioner's overbreadth claim. Pet. App. 5. With respect to petitioner's claims concerning the recording of government officials in public places and of speakers who lack an expectation of privacy, the First Circuit held that petitioner's claims were not ripe, because the record was devoid of key facts necessary to adjudicate those claims. Pet. App. 5, 61-65.

Specifically, as to petitioner's overbreadth claim, the First Circuit explained that overbreadth analysis requires it to determine whether "a substantial number of [Section 99's] applications are unconstitutional, judged in relation to the statute's

plainly legitimate sweep." Pet. App. 59 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008))). Applying that precept, the First Circuit found that petitioner had "fail[ed] to show, as it must, that the unconstitutional applications [of Section 99] are 'substantial' relative to the extensive range of applications it does not even challenge." *Id*.

The First Circuit then found petitioner's remaining two claims to be not ripe and instructed the District Court to dismiss those claims without prejudice. Pet. App. 65. As to petitioner's claim concerning the secret recording of conversations in which the speaker lacks an expectation of privacy, the First Circuit noted that petitioner claimed that "reasonable expectation of privacy" meant "a circumstance in which the parties to the communication may reasonably expect that the communication may not be overheard or recorded." Pet. App. 61. But the breadth of this definition, the First Circuit found, displayed a "lack of precision" that both made it "conjectural" whether Section 99 would ever be applied in many of the contexts to which petitioner's challenge extended, and also raised concerns about "adjudication of hypothetical rather than real disputes," especially in view of "the ways in which the First Amendment analysis could be affected by the types of conversations that are targeted." Pet. App. 61-62. As such, the First Circuit found, this claim had failed to present a ripe controversy with "sharply defined" "contours." Pet App. 61, 63.

As to petitioner's claim concerning the secret recording of government officials in public places, the

First Circuit noted that petitioner's claim that the category of "government officials" encompasses all "officials and civil servants" was "as broad[] as [one] can imagine." Pet. App. 63. But, the First Circuit continued, the disconnect between the breadth of petitioner's claim and the narrowness of petitioner's planned investigations raised concern that the claim was "hypothetical and abstract rather than real and concrete"—a concern that was "compounded by the fact that the First Amendment analysis might be appreciably affected by the type of government official who would be recorded. It is hardly clear that a restriction on the recording of a mayor's speech in a public park gives rise to the same First Amendment concerns as a restriction on the recording of a grammar school teacher interacting with her students in that same locale while on a field trip or public works employees conversing while tending to a city park's grounds." Pet. App. 64-65.

REASONS FOR DENYING THE PETITION

The petition presents no question that warrants this Court's review. Petitioner's two claimed splits of authority with respect to the alleged overbreadth of anti-eavesdropping statutes are each illusory. And petitioner's attempt to claim a split of authority regarding ripeness fails because the First Circuit below simply applied a basic principle of ripeness long settled by this Court.

I. The Petition Does Not Present Any Question Concerning Facial Overbreadth Warranting This Court's Review.

Each of petitioner's claimed splits regarding the supposed overbreadth of anti-eavesdropping statutes

is illusory. On the first—related to the novel issue of a putative First Amendment right to record other persons surreptitiously—petitioner claims a split with only one other jurisdiction, regarding a defunct Illinois law so readily distinguishable from Massachusetts's that the Illinois Supreme Court itself highlighted the distinction. The second—related to the overall analytical framework for assessing overbreadth claims—presents no open question at all; the First Circuit below simply applied this Court's settled doctrine, echoing the other courts of appeals.

A. There Is No Actual Conflict Between the Two Lower Court Decisions Addressing Facial Overbreadth Challenges to Anti-Eavesdropping Statutes.

Petitioner contends that the First Circuit's decision below created a conflict with the Illinois Supreme Court concerning whether anti-eavesdropping statutes are facially overbroad. Pet. 11-16. Any such conflict is illusory.

The purported conflict involves an Illinois criminal statute that was in effect prior to 2014. That statute prohibited the use of an eavesdropping device to hear or record a conversation without the consent of all parties to the conversation. 720 Ill. Comp. Stat. 5/14-2(a)(1) (2010). The statute further defined "conversation" to mean "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[.]" *Id.* at 5/14-1(d).

In 2014, the Illinois Supreme Court declared that statute to be facially overbroad, but did so in part for reasons inapplicable to Massachusetts's Section 99. *See People v. Melongo*, 6 N.E.3d 120 (Ill. 2014); *People v. Clark*, 6 N.E.3d 154 (Ill. 2014). First, the court rejected the government's effort to justify the statute by reference to a general governmental interest in "protect[ing] conversational privacy," in view of the statute's explicit coverage of recordings of nonprivate conversations. *Melongo*, 6 N.E.3d at 126 ("Judged in terms of the legislative purpose of protecting conversational privacy, the statute's scope is simply too broad."); *Clark*, 6 N.E.3d at 160-61 ("Audio recordings of truly private conversations are within the legitimate scope of the statute . . . However, the statute's blanket ban on audio recordings sweeps so broadly that it criminalizes a great deal of wholly innocent conduct, judged in relation to the statute's purpose and its legitimate scope."). Second, the court criticized the statute for failing to distinguish between open and surreptitious modes of recording. *Melongo*, 6 N.E.3d at 126; *Clark*, 6 N.E.3d at 161 ("It matters not [for purposes of the statute] whether the recording was made openly or surreptitiously.").

In both of these respects, Massachusetts's Section 99 is unlike the Illinois statute. First, Section 99 is justified not by an inchoate "privacy" interest generally, but rather by the government's specific interest in "assur[ing] that its citizens are aware of when they are being recorded"—that is, "not freedom from being recorded, but rather notice of being recorded." Pet. App. 51. That interest fits the parameters of Section 99's proscription in a way that the asserted justification for the Illinois statute did not. Second, Section 99's proscription is limited to

surreptitious recordings. *Cf. Am. Civil Liberties Union v. Alvarez*, 679 F.3d 583, 595 n.4 (7th Cir. 2012) ("[T]he Illinois statute is the broadest of its kind; no other wiretapping or eavesdropping statute prohibits the open recording of police officers lacking any expectation of privacy."). As the Illinois Supreme Court observed, under such a law, a would-be recorder could "proceed legally by openly recording a conversation so that all parties are aware of the presence of an operating recording device" and might impliedly consent to the recording. *Melongo*, 6 N.E.3d at 126-27. That Illinois's law did not permit such a scenario was one reason that it was struck down. *Id.* Section 99, in contrast, exhibits no such shortcoming.

Petitioner's claimed split of authority with just one other jurisdiction is thus illusory. Moreover, given the evident paucity of other cases addressing a putative First Amendment right to record others surreptitiously, further percolation is warranted.[2]

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[2] While some appellate courts have previously recognized a First Amendment right to record certain government officials in certain circumstances, those decisions all concerned recordings that were made openly and in plain view of the persons being recorded. *See*, *e.g.*, *Glik v. Cuniffe*, 655 F.3d 78, 84-85 (1st Cir. 2011); *Alvarez*, 679 F.3d at 607-08 & n.13; *Turner v. Lt. Driver*, 848 F.3d 678, 683, 687-90 (5th Cir. 2017); *Fields v. City of Phila.*, 862 F.3d 353, 358-60 (3d Cir. 2017); *State v. Russo*, 407 P.3d 137, 146-49 (Haw. 2017); *cf. Frasier v. Evans*, 992 F.3d 1003, 1019-23 (10th Cir. 2021) (alleged right to record police officers in public places not clearly established as of 2014), petition pending, U.S. 21-57; *Clark v. Stone*, 998 F.3d 287, 302-04 (6th Cir. 2021) (pet. for reh'g en banc denied June 22, 2021) (alleged right to film social worker conducting home visit not clearly established as of 2019). Petitioner thus, appropriately, does not even attempt to claim a split of authority with respect to these decisions.

B. There Is No Split of Authority Concerning the Proper Analytical Framework for Facial Overbreadth Claims.

Petitioner next contends that, by requiring petitioner to "analyze the legitimate reach of Section 99" as part of its overbreadth claim, the First Circuit somehow diverged from the analytical framework prescribed by this Court and commonly applied by other courts of appeals. Pet. 17-22. But no such divergence exists. Rather, all courts—and this Court's precedents—agree that an overbreadth claimant must show that "a substantial number of [the challenged statute's] applications are unconstitutional, *judged in relation to the statute's plainly legitimate sweep*." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) (quoting *Stevens*, 559 U.S. at 473) (emphasis added).

Petitioner claims a split of authority based on the First Circuit's conclusion that petitioner had "fail[ed] to show, as it must, that the unconstitutional applications are 'substantial' relative to the extensive range of applications it does not even challenge," Pet. App. 59 (quoting *Stevens*, 559 U.S. at 473). *See* Pet. 21 (complaining that "[r]equiring challengers to pore over each and every legitimate application of the law is a burdensome, perhaps impossible, exercise"). But this Court's precedents do require an overbreadth claimant to analyze the extent of a challenged law's legitimate applications as part of demonstrating that the law's unconstitutional applications are disproportionate to its legitimate sweep. *See*, *e.g.*, *Virginia v. Hicks*, 539 U.S. 113, 123-24 (2003) ("[The claimant] has not shown, based on the record in this

case, that the [challenged] RRHA trespass policy as a whole prohibits a 'substantial' amount of protected speech in relation to its many legitimate applications."); *compare Stevens*, 559 U.S. at 481-82 (invalidating criminal statute on overbreadth grounds where government does not "seriously contest that the presumptively impermissible applications of [the statute] far outnumber any permissible ones") *with United States v. Williams*, 553 U.S. 285, 303 (2008) (refusing to invalidate criminal statute on overbreadth grounds where, "[i]n the vast majority of its applications, this statute raises no constitutional problems whatever").

Accordingly, the decisions of the Third, Sixth, Seventh, and Eighth Circuits from which petitioner contends the First Circuit diverged, Pet. 19-22, all also rested on some comparison between the challenged law's legitimate and illegitimate applications.[3] These decisions thus do not limn any split with the First Circuit here.

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[3] *See McCauley v. Univ. of the V.I.*, 618 F.3d 232, 247-50 (3d Cir. 2010) (provision of public university's code of conduct prohibiting "obscene, offensive, and unauthorized" speech is overbroad; although its application to "obscene" speech is "unproblematic," its applications to "offensive" and "unauthorized" speech "have no plainly legitimate sweep" and "overwhelm the legitimacy of the ban on [obscene] speech"); *Free Speech Coalition, Inc. v. Att'y Gen'l*, 787 F.3d 142, 161-65 (3d Cir. 2015) (federal statutes imposing recordkeeping requirements on producers of pornography are not overbroad where, after "compar[ing] the amount of speech that implicates the government's interest in protecting children with the amount of speech that is burdened but does not further the government's interest," "the invalid applications of the [s]tatutes . . . pale in comparison with the [s]tatutes' legitimate applications"); *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 337-40 (6th Cir.

Petitioner also argues that this Court itself, in *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), declined to perform a numerical analysis of a challenged law's legitimate and illegitimate applications. Pet. 19-20. But neither of these decisions is actually in any tension with the First Circuit's decision below. In *Schaumberg*, a charity challenged a municipal ordinance that required door-to-door charitable solicitors to first demonstrate that the charity devoted at least seventy-five percent of the solicitation's proceeds to "charitable purposes." 444 U.S. at 623-24. This Court found the ordinance to be insufficiently related to asserted governmental interests in

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2009) (federal statutes imposing recordkeeping requirements on producers of pornography are not overbroad where plaintiff provides "no record, and therefore no context, for assessing the *substantiality* of this [claimed] overbreadth problem" and "the overwhelming majority of applications of [the statute] do not offend the free-speech guarantees of the Constitution") (emphasis in original); *Speet v. Schuette*, 726 F.3d 867, 878 (6th Cir. 2013) (state statute prohibiting begging is overbroad because begging is protected speech and statute therefore is unconstitutional in all of its applications); *Bell v. Keating*, 697 F.3d 445, 457 n.6, 461 (7th Cir. 2012) (municipal ordinance prohibiting failure to disperse when in vicinity of group causing "substantial harm or serious inconvenience, annoyance or alarm" is overbroad because it "substantially encumbers protected expression vis-à-vis its legitimate scope"; "both the numerosity of the unconstitutional applications and the importance of the speech affected may inform the substantialness of a law's infirmity"); *Ways v. City of Lincoln*, 274 F.3d 514, 518-19 (8th Cir. 2001) (municipal ordinance prohibiting "sexual contact" by "performers" is overbroad where, although it legitimately applies to adult entertainers, it does not legitimately apply to "theater performances" and the like, and thus "swe[eps] further than necessary").

preventing fraud, protecting public safety, and ensuring residential privacy. *Id.* at 636-39. Accordingly, it concluded that the ordinance "purported to prohibit canvassing *by a substantial category of charities* to which the 75-percent limitation could not be applied consistent with the First and Fourteenth Amendments" and was thus overbroad. *Id.* at 633-34 (emphasis added). This analysis is fully consistent with *Hicks*, *Stevens*, and the First Circuit's insistence below that petitioner show that Section 99's purported invalid applications are substantial in relation to Section 99's legitimate scope.

So too in *Ashcroft*, where this Court considered a federal statute that prohibited the possession and distribution of sexually explicit images that appeared to depict minors, but that had been produced without using any real children. 535 U.S. at 239-40. From the very outset of its analysis, the Court acknowledged that the question presented was whether the statute was "constitutional where it proscribes a significant universe of speech that is neither obscene under [*Miller v. California*, 413 U.S. 15 (1973)] nor child pornography under [*New York v. Ferber*, 458 U.S. 747 (1982)]"—thus comparing the scope of plainly legitimate applications against the "universe" in question. *Id.* at 240; *see also id.* at 241-51 (comparing statute's reach to the unprotected categories of speech under *Miller* and *Ferber*). And the Court ultimately concluded that the statute "abridge[d] the freedom to engage in a substantial amount of lawful speech," and was therefore overbroad. *Id.* at 256. Again, this conclusion is fully consistent with the reasoning of the First Circuit's decision below, echoing this Court's settled precedent, that a plaintiff challenging a statute on overbreadth grounds must demonstrate

that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Pet. App. 59 (quoting *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange*, 552 U.S. at 449 n.6)).

In sum, the petition does not present a First Amendment question warranting this Court's review under Rule 10.

II. The Petition Does Not Present a Question Concerning Ripeness Warranting This Court's Review.

Although the petition asserts a supposed conflict with five courts of appeals, Pet. 32, that conflict is illusory, because it is premised on a misstatement of the basis on which the First Circuit ruled that petitioner's claims were not ripe.

Under this Court's longstanding ripeness doctrine stemming from *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), applied by the First Circuit below, courts consider both "the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'" *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (quoting *Abbott*, 387 U.S. at 149); *see* Pet. App. 23, 64 (citing *Abbott*, 387 U.S. at 148, and *Ohio Forestry*, 523 U.S. at 735). Here, the First Circuit found petitioner's claims concerning two large, ill-defined categories of surreptitious recordings (i.e., all circumstances in which a speaker lacks a reasonable expectation of privacy and all recordings of "government officials" in

"public places") to be not fit for review.[4] Pet. App. 5. It did so because those categories were far broader in scope than petitioner's own planned secret recordings, and because the First Amendment analysis of these claims might hinge on the specific types of conversations and government officials to be recorded. Pet. App. 60, 62, 65. The First Circuit emphasized that its conclusion did "not turn on any skepticism that, but for Section 99, [petitioner] would engage in the investigations it describes itself as intending to undertake." Pet. App. 60.

Despite the First Circuit's acknowledgement of petitioner's Article III injury, and its express holding that it was petitioner's broad *claims* that were not fit for review, petitioner eschews any mention of the fit-for-review element of ripeness under *Abbott*. Petitioner instead contends that the First Circuit somehow created a conflict with several other courts of appeals by failing to recognize its injury. Pet. 22-39; *see, e.g.*, Pet. 23 (arguing that "the court deemed PVA's detailed plans too 'hypothetical and abstract' for Article III purposes"); Pet. 32 (arguing that, under

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[4] Petitioner describes these two claims as "as applied." *See, e.g.*, Pet. i, 26-27. But, as the First Circuit recognized, the as-applied label is not accurate, because each of these claims sought relief "'reach[ing] beyond the particular circumstances of [petitioner],'" requiring petitioner to "'satisfy [the] standards for a facial challenge *to the extent of that reach*.'" Pet. App. 25-26 (quoting with emphasis *John Doe No. 1. v. Reed*, 561 U.S. 186, 194 (2010)). Accordingly, petitioner was obliged, with respect to each claim, to "'establish that no set of circumstances exists under which the [law] would be valid,'" *Ams. for Prosperity Found.*, 141 S. Ct. at 2387 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)), or "show that the law lacks 'a plainly legitimate sweep,'" *id.* (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

the law of other circuits, "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").

No such split exists, however, because none of petitioner's purportedly conflicting ripeness decisions involved an issue of fitness for review where a plaintiff failed to provide the concrete details necessary to adjudicate its claim. *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 691 (2d Cir. 2013) (challenge to state campaign finance statute is ripe where "[w]hat future contingencies remain are not determinative of the questions before [the court]"); *Winter v. Wolnitzek*, 834 F.3d 681, 687 (6th Cir. 2016) (challenge to state code of judicial conduct is ripe where "parties have described their conduct with plenty of detail"); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1504 (10th Cir. 1995) (facial challenge to state campaign finance statute is ripe where "it neither hinges on uncertain future events nor is further factual development required"); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098 (10th Cir. 2006) (challenge to state constitutional provision requiring supermajority to enact initiative law on certain topics is ripe where plaintiffs' "alleged injury does not depend on any uncertain, contingent future events, and the courts would gain nothing by allowing the issues in the case

to develop further").[5] To the contrary, each of those decisions recognized the need for such concrete facts. And the final decision cited by petitioner, *American Civil Liberties Union of Illinois v. Alvarez*, is not in conflict with the decision below because, there, the Seventh Circuit did not consider ripeness as such at all, and instead addressed only the plaintiff's Article III standing. 679 F.3d at 591-94. Moreover, and in any case, both *Alvarez* and the decision below found justiciable—and each actually upheld—a challenge to a state anti-eavesdropping statute to the extent it prohibited the recording of police officers in public places. 679 F.3d at 608; *see* Pet. App. 27-30, 62-63 (following *Alvarez* with respect to narrower recording-police-in-public claim, but distinguishing *Alvarez* with respect to petitioner's broader claims raising "concern about adjudication of hypothetical rather than real disputes").

Contrary to petitioner's contentions, the First Circuit's ripeness analysis was also fully consistent with this Court's precedents. *See* Pet. 23-25 (highlighting in particular *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014); and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010)). In *Babbitt*, this Court declined to adjudicate a pre-enforcement First Amendment challenge to a state statute that allowed agricultural employers to

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[5] The purportedly conflicting unpublished Fourth Circuit case cited by petitioner, Pet. 36, does not address ripeness at all. *See People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 Fed. Appx. 122, 129-31 (4th Cir. 2018) (per curiam) (reversing dismissal for lack of Article III standing because animal rights organizations sufficiently alleged injury-in-fact in challenge to state law forbidding certain undercover investigations).

deny labor organizers access to their employees, because the organizers' claim "depend[ed] inextricably upon the attributes of the situs involved" and, absent the identification of any particular site, "hypothesi[s]" is the "only . . . basis [upon which] the constitutional claim could be adjudicated at this time."[6] 442 U.S. at 303-04. *Susan B. Anthony List*, unlike the decision below, "present[ed] an issue that [was] 'purely legal, and [would] not be clarified by further factual development.'" Pet. App. 31 (quoting *Susan B. Anthony List*, 573 U.S. at 167). And this Court's justiciability analysis in *Humanitarian Law Project* is inapposite, because that case involved an "as applied" claim that the plaintiffs' own intended conduct could not constitutionally be prohibited under the challenged statute. 561 U.S. at 7, 14-15. Accordingly, that case did not present an analogous question of whether a broader, facial claim might be fit for review—and, indeed, the Court specifically reserved "resolution of more difficult cases that may arise under the statute in the future." *Id.* at 8.

Thus, here, the First Circuit—like this Court in *Babbitt*—properly declined to adjudicate broad First Amendment claims on a pre-enforcement basis where the nature of the claims required consideration of, and would be affected by, concrete facts that were not

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[6] Petitioner cites another holding from *Babbitt*, which found a pre-enforcement challenge to a different aspect of the Arizona Agricultural Employment Relations Act to be justiciable. Pet. 25, 29-30 (citing *Babbitt*, 442 U.S. at 300). But that other holding is not inconsistent with the decision below because, unlike here, the Court specifically found that "awaiting [the plaintiffs'] participation in an election [under the challenged procedures] would not assist [the Court's] resolution of" the particular "dispositive" issue in the case. *Babbitt*, 442 U.S. 300-01.

before the court. Pet. App. 61-65; *see also* Pet. App. 107 (District Court's acknowledgement that "the four investigations that [petitioner] proposes are described with such sparse detail that they could encompass a vast array of settings and subjects for secret recording," "creat[ing] serious ripeness concerns"). Petitioner errs in asserting that its claims presented only a "purely legal" issue of "whether Massachusetts may constitutionally ban all surreptitious audio recording of oral communications." Pet. 30. As noted above, petitioner's claims concerning the recording of conversations in which the speaker lacks an expectation of privacy and the recording of government officials in public places were facial claims to the extent of their reach. *See supra* note 4; *John Doe No. 1. v. Reed*, 561 U.S. 186, 194 (2010). As such, they required the courts below to analyze whether there was any set of circumstances within the scope of those claims under which Section 99 would be valid or would possess a plainly legitimate sweep. *Ams. for Prosperity Found.*, 141 S. Ct. at 2387. And, as the First Circuit correctly observed, factual variations—such as "the types of conversations that are targeted" and "the type of government official who would be recorded"—would affect the First Amendment analysis. Pet. App. 62, 65. The First Circuit therefore did not diverge from this Court's precedents in concluding that adjudication of petitioner's categorical facial claims would necessarily be "hypothetical and abstract rather than real and concrete." *Id*. at 65.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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