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

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

"Laws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010). Massachusetts did this by enacting and maintaining the nation's only unequivocal ban of secret recording. When a state takes such an extraordinary step to punish First Amendment conduct, it chills a multitude of persons from engaging in recording and reporting, including Project Veritas Action Fund ("PVA"). Most people, "rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech. . . ." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). This chill has thus remained in Massachusetts since 1968, under a statute that threatens everyone from victims of abuse to political protestors to undercover journalists who would otherwise secretly record events.

The overbreadth of Massachusetts General Laws, Chapter 272, Section 99 ("Section 99") is manifest: it prohibits secretly recording oral communications by individuals under any circumstances. The court below found the amount of censorship of this ban insubstantial, while the Illinois Supreme Court found just the opposite. Moreover, the First Circuit now stands in stark contrast to various other circuit courts of appeals as to how overbreadth is measured.

The First Circuit acknowledged inherent constitutional problems with Section 99 but evaded

substantive review by invoking overly burdensome standards for pre-enforcement, First Amendment challenges. Granting certiorari would improve redress and access to justice where states maintain oppressive laws censoring fundamental First Amendment conduct. And it would bring national clarity to contradictory ripeness standards among the federal circuit courts of appeals.

I. This Court Should Resolve the Fundamental Disagreement Among the Lower Courts as to Overbreadth

A. The Unequivocal Ban of Secret Recording in Massachusetts is Facially Overbroad

Apart from Illinois prior to the ruling in *People v. Clark*, no American jurisdiction has unequivocally banned secret recording by individuals except for Massachusetts. 6 N.E.3d 154 (Ill. 2014); PVA Appendix ("App.") at 138–164. Laws of the minority of states that also require something akin to "prior authority by all parties" to electronically record oral communications typically exempt this requirement in circumstances with no reasonable expectation of privacy.[1] App. 140. Oregon and Montana are the only other states that require the consent of all parties to record under almost any circumstances, but even those statutes provide

[1] *See* Cal. Penal Code § 632(c); Fla. Stat. § 934.02(2); Md. Code Ann., Cts. & Jud. Proc. § 10-401(13); N.H. Rev. Stat. Ann. § 570-A:1; 18 Pa. Stat. and Cons. Stat. Ann. § 5702; Wash. Rev. Code Ann. § 9.73.030(1)(b)

important exceptions. *See* Or. Rev. Stat. § 165.540(3), (5)(a) (exempting secret recordings made in one's own home or during a felony that endangers human life); Mont. Stat. § 45-8-213(2)(a) (exempting secret recordings made of public officials performing their duties and persons speaking at public meetings). The tailoring in the other all-party-consent statutes may be problematic, but at least there is tailoring. This cannot be said of Massachusetts. Section 99 is the nation's only unequivocal ban of secret recording by individuals. It is facially overbroad, and there is simply nowhere for this issue to "percolat[e]" any further. Brief in Opposition ("BIO.") at 9. The Court should grant certiorari.

Respondent argues that the split between the First Circuit and the Illinois Supreme Court is "illusory," but offers only two illusory distinctions. BIO.7–9. First, Respondent argues that "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[.]'" BIO.8 (quoting App. 51). The Respondent does not elaborate on this supposed distinction and, indeed, there is none. In *Clark*, the court broadly recognized "conversational privacy" as the governmental interest but specifically noted that "[a]ccording to the State, the purpose of the law is to assure Illinois citizens that their conversations would not be recorded by another person without their consent." 6 N.E.3d at 157, 160. Both Section 99 and the former Illinois statute thus served to provide "'notice of being recorded.'"

BIO.8 (quoting App. 51). To consider every oral communication to be so private as to require notice before another records it is the fundamental constitutional defect—not virtue—of Section 99.

Respondent also alleges that Section 99 is not in conflict with *Clark* because the former Illinois statute prohibited open recording, which was a factor in the court's overbreadth analysis. Notably, this contradicts her first alleged distinction. Nevertheless, this does not diminish the conflict between the Illinois Supreme Court and the court below. The Illinois court recognized that conversational privacy has limits as a regulatory interest for secret recording and open recording alike:

> [T]he statute prohibits recording (1) a loud argument on the street; (2) a political debate in a park . . . (4) any other conversation loud enough to be overheard by others whether in a private or public setting. *None of these examples implicate privacy interests*, yet the statute makes it a felony to audio record each one.

Clark, 6 N.E.3d at 161 (emphasis added). Following the case, the law was amended to limit restrictions on secret recording to communications with a reasonable expectation of privacy. 720 Ill. Comp. Stat. Ann. 5/14-1(d). Section 99 suffers from the same shortcomings as the former Illinois statute, which the court below failed to recognize. There is thus a stark split between the Illinois Supreme Court and the First Circuit as to

whether a statute that prohibits secret recording under any circumstances is facially overbroad.

B. The Circuits are Split Over How to Measure Overbreadth

Respondent argues that the First Circuit's overbreadth approach is consistent with other federal circuit courts of appeals. BIO.10–14. Yet these courts disagree with one another over how overbreadth is measured. Must a movant asserting free speech rights defend and articulate the entire universe of legitimate applications of a law? Or must the non-moving, government party defend the scope of a law's legitimate applications?

PVA alleged and discussed the appropriate applications of Section 99, but it understood its burden was to demonstrate the unconstitutional reach of the law. It necessarily focused its briefing on Section 99's substantial breadth, rather than defending the law's few legitimate applications. *See* App. 106, 170–171, 174–176; *PVA v. Rollins*, 19-1586 (1st Cir.) Br. for Appellee/Cross-Appellant at 11, 25–30; Pet. at 18–19.

Respondent clings to an artificial numeric formulation of the overbreadth doctrine, as if federal courts employed constitutional calculators. BIO.10–11. But this is not so. *See Free Speech Coalition, Inc. v. Attorney General*, *U.S.*, 787 F.3d 142, 161 (3d Cir. 2015) (overruled on other grounds) (overbreadth is not an exercise in "mathematical calculation or numerical comparison.") Rather, courts engage in weighted tests,

categorically favoring less drastic means of regulation to protect free speech interests. Martin H. Redish, *The Warren Court, The Burger Court and the First Amendment Overbreadth Doctrine*, 78 Nw. U. L. Rev. 1031, 1065–67 (1983); *see also Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984) (in overbreadth determinations, courts should weigh the likelihood that the statute's very existence will inhibit free expression).

The First Circuit's artificial approach is indeed inconsistent with approaches followed by the Third, Sixth, Seventh, and Eighth Circuits, all of which embrace weighted tests designed to protect free speech to measure overbreadth. Pet. at 19–20. Because PVA offered its own analysis of the relative breadth of the law, it would have met its burden in four other circuits. But its ability to have its First Amendment claims heard and decided were denied here due to the First Circuit's reliance on an overly rigid overbreadth interpretation. Granting review would help clarify this standard and preserve the ability of speakers to raise exceptional overbreadth claims when exceptional, censorial laws are present.

II. The Court Should Resolve the Important Question about Ripeness and the Continuing Vitality of Prudential Ripeness

PVA's as applied claims would have been ripe in the Second, Fourth, Sixth, Seventh, and Tenth Circuits. Pet. 32–37. This is because it pled a desire to engage in

constitutionally protected conduct similar to its past investigations along with specific details of recording it wished to undertake. Pet. 29–31. But because the First Circuit invented and imposed a unique congruence requirement for ripeness, these claims were not addressed.

A. Respondent's Distortion of PVA's Claims Does Not Make Them Unripe

The damage of elongated, sometimes indecipherable, ripeness considerations are well described in the instant challenge and throughout First Amendment jurisprudence. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167–68 (2014); *see also Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (standards governing speech "must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation"). PVA pled specific examples of investigations it would undertake but for the existence of Section 99: landlords offering dilapidated housing to college students, government officials' stances on immigration issues to be recorded around the State House, and interactions between public officials and members of "Antifa" organizations. App. 170–174. PVA also acknowledged that due to the spontaneous nature of many undercover investigations, it "cannot predict (or plead) where these sorts of . . . investigations will lead and how they will develop." App. 175–176. Respondent seizes on this

statement while ignoring PVA's detailed pleading of specific investigations it wished to undertake.

Respondent misdescribes the precedent relied on by PVA to demonstrate ripeness considerations in pre-enforcement, First Amendment challenges. BIO.16–17. In each of these cases, ripeness or standing concerns were met not because of incredibly detailed, concrete plans, but because the parties alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Animal Legal Defense Fund v. Vaught*, 8 F.4th 714, 718 (8th Cir. 2021) (quoting *Driehaus*, 573 U.S. at 159 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979))). PVA adequately met this standard because it alleged it had a history of engaging in similar operations, had avowed an interest to do substantially similar operations in Massachusetts, and pled several detailed undercover reporting plans. Pet. 6–8, 36–37. Even so, the First Circuit imposed its own congruence requirement, and decided the matter unripe. App. 60, 62–65.

After PVA filed its petition with this Court, the Eighth Circuit issued its opinion in *Vaught*. The case concerns, among other issues, whether injury in fact was met for animal welfare organizations intending to investigate slaughterhouses and pig farms. 8 F.4th at 717, 720. Like PVA, because the organizations alleged a desire to engage in a course of conduct proscribed by Arkansas law, injury in fact (and, by implication, ripeness) was met. *Id.* at 718–19. Notably, the dissent in

the case clings to an injury in fact approach like that adopted by the First Circuit—illustrating the contradictory perspectives on ripeness and injury in fact amongst the federal courts. *Id.* at 721–24.

Respondent also miscategorizes the nature of PVA's claims. BIO.15 n.4. PVA asked for relief both facially and as applied. App. 176–180. It asked for relief in a flexible manner because its plans often change as an investigation progresses. App. 175–176. Securing the right to record but one class of government officials would forgo PVA's ability to record other government officials. Rather than continually return to court to secure the right to record different situations, PVA asked for broader relief. The best it could plead were specific operations it would undertake while leaving room for related investigations. Accordingly, PVA also sought "any other relief that the Court deems just and appropriate." App. 180; 1JRA140; *see also* 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.")

PVA brought claims both as applied and facially because the state's highest court had already interpreted Section 99 to be an outright "ban on the public's clandestine use of [intercepting] devices." *Com. v. Hyde*, 750 N.E.2d 963, 968–69 (Mass. 2001); *cf.* App. 61. The First Circuit thought the appeal unripe as it wanted to detail the "ways in which the First Amendment analysis could be affected by the types of conversations that are targeted." App. 61–62. But the law before this Court does not weigh factors considering

expectations of privacy or the types of conversations recorded, as most all-party consent recording laws do. *See supra* note 1.

Because the Massachusetts Supreme Judicial Court has already issued an authoritative opinion interpreting Section 99 to be an outright ban of secret recording, it would be impossible to bring a claim for limited relief through a narrowing construction by a federal court. Asking that PVA be allowed to record, say, Representative Aciero on Sundays, Tuesdays, and Fridays at the corners of Beacon and Charles streets in Boston when five or more people were within 10 feet—but never on other days, at other locations, or of other similar government actors—was untenable. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (it is not within the federal judiciary's power to construe and narrow state statutes already interpreted by that state's highest court). Similarly, as applied relief would be difficult given the existing, broad interpretation of the law issued by the state supreme court.

To support its as applied challenge, PVA detailed the specific sort of recording it wished to undertake but could not predict exact individuals to be recorded or where those recordings might happen. Respondent's approach puts an insurmountable burden on challengers like PVA, requiring them to invoke a veritable crystal ball to satisfy the ripeness doctrine. This stands in contrast to *Driehaus* and *Babbitt*, and the First Circuit's requirement for exhaustive details puts these requirements in tension with the judiciary's obligation to hear and decide cases.

If left unchecked, this approach only invites ripeness roadblocks that prevent effective redress of First Amendment claims. Few litigants possess the funds necessary to engage in lengthy challenges of speech restrictive laws—in this case, lasting over half a decade. Recognizing that relaxed ripeness standards are appropriate in cases like this helps protect these rights and brings clarity to the confusing and contradictory standards employed by several circuit courts of appeals. *See* Pet. 22–39.

B. This Court Should Bring Clarity to Conflicting Ripeness Standards to Ensure Ease of Judicial Review

It remains unclear from the First Circuit's opinion whether it held that PVA's claims were unripe due to constitutional or prudential concerns. Respondent focuses her arguments on "fitness for review"—a factor usually attributed to prudential considerations. BIO.16. But the First Circuit couched its language in Article III concerns, then relied on ordinary fitness for review language used in prudential concerns. App. 61–65.[2] Still, the court did not overturn the district court's

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[2] The court below gave little attention to the hardship prong of prudential ripeness. But, as this Court recognized, "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). Thus, the chill emanating from speech-suppressive laws usually constitutes a hardship against would-be speakers. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755–57 (1988).

conclusion that PVA had standing to challenge Section 99, and this necessarily includes a determination that there was an injury in fact. App. 20. To then decide that standing was met, but ripeness was not, produces tension in deciding pre-enforcement, First Amendment challenges.

Speakers are left with an opaque ripeness doctrine that acts as the gatekeeper to whether foundational First Amendment claims will be heard and decided by courts. This sort of loose, hit-or-miss reliance on nebulous ripeness factors makes constitutional redress a sort of constitutional roulette. As this Court noted seven years ago, where claims are deemed nonjusticiable for prudential instead of constitutional reasons, such a "request is in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.' " *Driehaus*, 573 U.S. at 167 (internal citations omitted).

PVA filed its challenge in 2016, only to face five years of elaborate cat-and-mouse fitness considerations. As these considerations persist, speech is irretrievably lost, sacrificed to pleading niceties while substantive rights wither. Stories fade away, sources disappear, and new stories involving other facts emerge. *See Citizens United*, 558 U.S. at 334 ("Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary—long after the opportunity to persuade primary voters has passed.")

The First Circuit's invention of a congruence requirement for relief makes redress for pre-enforcement, First Amendment claims untenable by imposing far too strict of requirements. To correct this, certiorari should be granted to afford all speakers nationwide sensible standards for relief.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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