

No. 24-1061

In the Supreme Court of the United States

PROJECT VERITAS AND
PROJECT VERITAS ACTION FUND,
Petitioners,

v.

NATHAN VASQUEZ, IN HIS OFFICIAL CAPACITY AS
MULTNOMAH COUNTY DISTRICT ATTORNEY, AND DAN
RAYFIELD, IN OFFICIAL CAPACITY AS THE ATTORNEY
GENERAL OF OREGON,
Respondents.

**On Petition for a Writ of Certiorari to the U.S.
Court of Appeals for the Ninth Circuit**

**BRIEF OF AMICI CURIAE LAW PROFESSORS
ALAN CHEN AND JUSTIN MARCEAU
IN SUPPORT OF PETITIONERS' PETITION
FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

Did the Ninth Circuit err by holding that Oregon’s prohibition of unannounced recordings—which expressly exempts recordings of police activity and discussions during certain felonies—is content neutral and thus subject only to intermediate scrutiny, in conflict with this Court’s decisions in *Reed v. Town of Gilbert* and *City of Austin v. Reagan National Advertising* and with the Fourth, Seventh, Eighth, and Tenth Circuits?

Even if Oregon’s law is content neutral, does it fail intermediate scrutiny because it restricts unannounced audio recording in wholly public settings where privacy interests are minimal or non-existent?

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INTEREST OF AMICI CURIAE¹

Amici curiae are:

Alan K. Chen is the Thompson G. Marsh Law Alumni Professor of Law at the University of Denver Sturm College of Law.

Justin Marceau is the Brooks Institute Research Scholar at the University of Denver Sturm College of Law.

Amici are scholars who publish and teach on the First Amendment and privacy law, with a particular focus on undercover investigations and the legal, ethical, social, and technological dimensions of these investigations. Through academic publications, Amici have shown that undercover investigators have been celebrated as critical conduits of political speech and essential protectors of transparency. But undercover investigators have also been derided as intrusive and spy-like, inconsistent with private property rights, and morally or ethically questionable. In Amici's book *Truth and Transparency, Undercover Investigations in the Twenty-First Century* (Cambridge 2023), they rigorously examine this duality and provide a socio-legal context for understanding these varying views by concretely defining undercover investigations and distinguishing the practice from investigative journalism and whistleblowing. The book also provides a comprehensive legal history of undercover investigations in this country. In 2024, *Truth and*

¹ No party's counsel authored this brief in whole or in part, and no person or entity other than Amici, their counsel, or their members made a monetary contribution intended to fund the brief's preparation or submission. All parties were given notice of Amici's intent to file this brief.

Transparency was awarded the Tankard Book Award, an award that recognizes the most outstanding book in the field of journalism and communication.

Amici's scholarly work emphasizes the public need for investigations and the rights of investigators, while paying close attention to the types of investigations that fall beyond the scope of constitutional protection. Amici have also provided concrete empirical evidence of the broad, bipartisan support for undercover investigations and champion the practice as an essential component of the transparency our democracy needs to thrive. Because First Amendment doctrines as applied to modern journalistic and investigative practices are underdeveloped and in need of clarity, Amici urge the Court to grant Petitioners' petition and decide the questions presented.

SUMMARY OF THE ARGUMENT

The gathering and dissemination of information about matters of public concern is no longer reserved for a small number of newspapers, journalists, or authors. The ubiquity of personal recording devices has turned the public into newsgatherers capable of recording audio and video efficiently and inexpensively. These individuals, in turn, can share their recordings to an expansive audience through low-cost social media and online platforms. This notion of the citizen-journalist has a prized history in constitutional doctrine; the "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

The role of recording matters of public concern in generating discourse and debate protected by the First Amendment has been recognized by lower courts across the country. More than a decade ago the First Circuit explained, “The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.” *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

The First Amendment seeks “to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government,” *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982), and to render public debate well-informed, *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972). Modern history is replete with examples in which audiovisual recordings have contributed to public debate. These recordings are expressive conduct “inextricably intertwined” with the resulting speech itself and are thus entitled to First Amendment protections. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018) (citing *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010); *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3rd Cir. 2017)).

Oregon’s sweeping prohibition on non-consensual audio and video recordings of conversations conflicts with these First Amendment principles by presumptively outlawing an important medium of newsgathering and speech creation. Given the role that

surreptitious recordings of conversations have played in fostering public discourse, accountability, and safety, this Court should grant certiorari and hold that the broad sweep of Oregon’s prohibition on surreptitious audio and video conversational recordings violates the First Amendment. Under Oregon’s eavesdropping statute, individuals are chilled from and penalized for documenting crucial and newsworthy events that include audio recordings. Such a result is antithetical to the First Amendment.

ARGUMENT

I. Undercover Investigations and Recordings Are Central to Public Discourse and Democratic Accountability.

Undercover investigations have been a time-honored tradition of American journalism.² Undercover newsgathering of firsthand facts and observations has resulted in important and sometimes history-making reporting. For example, abolitionist activists and Northern journalists reported on conditions of Southern slaves by concealing their identities and purposes in observing the slaves’ circumstances.³ One such undercover journalist documented—in horrific detail—the sale of 436 black men, women, children, and infants at a slave auction near Savannah, Georgia, in 1859, for a series in the *New York Tribune*.⁴ That

² See generally Alan Chen & Justin Marceau, *Truth and Transparency, Undercover Investigations in the Twenty-First Century* (Cambridge 2023).

³ See generally *Reporting Slavery – The New York Tribune*, Undercover Reporting, <https://bit.ly/3q5PR55>.

⁴ *American Civilization Illustrated: A Great Slave Auction*, *New York Tribune* (Mar. 5, 1859), at 5, <https://bit.ly/2NHC0nT>.

undercover reporter's true name was Mortimer Thompson. He wrote under the pen name "Q.K. Philander Doesticks" and described for his readers why he needed to conceal his identity and the means by which he did so:

Your correspondent was present at an early date, but as he easily anticipated the touching welcome that would, at such time, be officiously extended to a representative of *The Tribune* ... and not desiring to be the recipient of a public demonstration from the enthusiastic Southern populations ... he did not placard his mission and claim his honors. Although he kept his business in the background, he made himself a prominent figure in the picture, and, wherever there was anything going on, there was he in the midst. At the sale might have been seen a busy individual, armed with pencil and catalogue, doing his utmost to keep up all the appearance of a knowing buyer This gentleman was much consoled with by some sympathizing persons, when the particularly fine lot on which he had fixed his critical eye was sold and lost to him forever, because he happened to be down stairs at lunch just at the interesting moment.⁵

Months later, another journalist, Henry Olcott with the *New York Tribune*, volunteered to go undercover to report on the execution of John Brown, the prominent abolitionist who advocated for armed insurrection to free slaves and who was the first person in the history of the United States to be executed for

⁵ *Id.*

treason.⁶ Olcott posed as a member of the Petersburg Grays, a regiment sent to Charles Town, West Virginia, to guard Brown's body.⁷

After Reconstruction, journalists used similar methods to report on industry. In the late 1800s, a journalist named Elizabeth Jane Cochran, working under the pen name Nellie Bly, routinely used false identities to gain access to institutions and businesses engaged in unlawful activity.⁸ Her most famous exposé resulted from her posing as a mentally ill person to gain access to Blackwell's Island Insane Asylum for Women, where she uncovered and later wrote about abusive and violent staff, fire hazards, extremely cold temperatures, unsanitary practices, terrible food, and the treatment of foreign-born women who were not mentally ill but had been committed because others, including the asylum's staff, could not understand them and assumed them to require treatment.⁹

At the turn of the 20th century, written eyewitness accounts of the meatpacking industry, including Upton Sinclair's novel *The Jungle*, triggered a nationwide debate that led to a regulatory regime to protect public health and ensure worker safety.¹⁰ Sinclair

⁶ *The Execution of John Brown*, New York Tribune (Dec. 3, 1859), at 7, <https://bit.ly/3pI9bVN>.

⁷ *John Brown's Hanging – Henry S. Olcott – New York Tribune*, Undercover Reporting, <https://bit.ly/2ZKJ06m>.

⁸ See generally Brooke Kroeger, *Nellie Bly: Daredevil, Reporter, Feminist* (1994).

⁹ See generally Nellie Bly, *Ten Days in a Mad-House* (1887).

¹⁰ See, e.g., David Greenberg, *How Teddy Roosevelt Invented Spin*, The Atlantic (Jan. 24, 2016), <https://bit.ly/4k6oGUz>; Karen

spent weeks undercover in Chicago’s meatpacking plants to research the novel, which, by exposing the industry’s harsh, inhumane, and unsanitary working conditions, produced an unprecedented response.¹¹ Congress enacted the Meat Inspection Act, Pub. L. No. 59-242, 34 Stat. 1260 (1907) (codified as amended at 21 U.S.C. §§ 601–695), and the Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) (codified as amended at 21 U.S.C. §§ 301–399i), following Sinclair’s work and recognizing the strong public interest in the safety of the Nation’s food supply.

Due to advances in technology, the modern-day Upton Sinclair, Nellie Bly, or Mortimer Thompson would not conduct their investigations relying solely on written notes based on memory and transcribing them into written work. Rather, recording devices (video and audio) have supplanted the pen, just as the word-processor replaced the typewriter, which replaced pen and paper. But Oregon’s statute would prohibit this practice and, in the process, forces questions under the First Amendment that have never been squarely addressed by this Court.

Take a modern example. In 2022, Los Angeles City Council President Nury Martinez was secretly recorded making “openly racist remarks, derid[ing] some of her council colleagues and [speaking] in unusually crass terms about how the city should be carved

Olsson, *Welcome to The Jungle*, Slate (July 7, 2006), <https://bit.ly/3um0Mur>.

¹¹ Brooke Kroeger, *Undercover Reporting: The Truth About Deception* 83–91 (2012).

up politically.”¹² Three days later, amidst public outcry, Martinez resigned.¹³

Quite often the audio portion of a recording is just as important as the visual imagery. The phrase “I can’t breathe” became the rallying cry of activists and reformers because of the audio recording of Eric Garner’s killing in 2014. While an image shows one what has happened, the sound allows one to experience it emotionally in addition to cognitively.

Reporters and investigators working with activist organizations have similarly used surreptitious recordings to prompt public debate, accountability, and policy changes. For example, an undercover investigator recorded video footage in a facility that supplied both the National School Lunch Program and a popular restaurant chain showing inhumane handling of cows, including some that could no longer walk after being shot in the head over and over, then having their mouths and nostrils stood upon until they suffocated to death. The video led the federal government to shut down the facility temporarily and the chain to sever ties with it.¹⁴ Likewise, two investigators for another group obtained employment at a Hormel Foods supplier in Iowa where they documented and exposed

¹² David Zahniser, et al., *Racist Remarks in Leaked Audio of L.A. Council Members Spark Outrage, Disgust*, LA Times (Oct. 9, 2022), <https://lat.ms/3xXGjSZ>.

¹³ David Zahniser, et al., *Nury Martinez Resigns From L.A. City Council in Wake of Audio Leak Scandal*, LA Times (Oct. 13, 2022), <https://lat.ms/49RWKhh>.

¹⁴ Tiffany Hsu, *In-N-Out Dumps California Slaughterhouse Accused of Abusing Cows*, LA Times (Aug. 21, 2012), <https://lat.ms/3Jvlpxp>.

misconduct and abuse.¹⁵ The supplier's employees were recorded beating pigs with metal rods, sticking clothespins into pigs' eyes, and kicking a young pig in the face, abdomen, and genitals to make it move while telling one investigator, "You gotta beat on the b--ch. Make her cry."¹⁶ The investigation led to a variety of legal proceedings, including 22 charges of livestock neglect and abuse.¹⁷ The audio portion of the recording was an integral part of the subsequent legal proceedings and the public campaign around the issues. The pictures may have been worth a thousand words, but the sounds of the animals and the employees revealed another set of equally important truths.

A 2018 and 2019 investigation into two Iditarod champion kennels exposed cruel conditions and intentional neglect of the dogs' injuries and also highlights the role of audio in addition to video recording.¹⁸ The investigation included audio recordings of candid statements by the former champions and their employees acknowledging the unnecessary pain and

¹⁵ *Undercover Video Shows Workers Abusing Pigs*, NBC News (Sept. 17, 2008), <https://nbcnews.to/380H2TU>.

¹⁶ *Mother Pigs and Piglets Abused by Hormel Supplier*, People for the Ethical Treatment of Animals, <https://bit.ly/3uJPery>.

¹⁷ *22 Charges Filed Based on PETA Investigation at Hormel Supplier*, People for the Ethical Treatment of Animals (Oct. 14, 2013), <https://bit.ly/2PmkczA>.

¹⁸ *Groundbreaking Expose Reveals Pain, Desolation, Abuse, and Systemic Neglect at Former Iditarod Champions' Kennels*, People for the Ethical Treatment of Animals, <https://bit.ly/3Wcnq9e>.

cruelty suffered by the dogs. As a result, many sponsors withdrew their support of the Iditarod.¹⁹

Not uncommon for targets of undercover investigations, kennel owners and Iditarod participants alleged the photos and videos were deceptively manipulated and are “fake news,” rather than take accountability for their conduct.²⁰ Audiovisual recordings are crucial to confirm eyewitness accounts, to dispel these allegations, and to allow viewers to assess those claims on their own. Indeed, without the audio it is often difficult to dispel claims of doctoring or manipulation of footage; the audio provides important context for understanding the full story.

In virtually all these examples, the undercover investigators recorded or otherwise documented the actions and speech of others without the latter’s knowledge or consent. As explained below, undercover investigations uniquely situate investigators in positions to secure information that would otherwise be unavailable to the public, but which involve profound matters of public concern.

There are many other examples, which will only proliferate exponentially as technology and the way we share information advance.

¹⁹ See, e.g., *Alaska Airlines Drops Sponsorship of Iditarod Sled Dog Race*, Associated Press (Mar. 4, 2020), <https://bit.ly/4aQvVLI>.

²⁰ Mitch Seavey, *PETA Spies, PETA Lies*, Must Read Alaska (Oct. 27, 2019) <https://bit.ly/4aN9bfv>; Craig Medred, *Fake News*, CraigMedred.news (Apr. 6, 2019), <https://bit.ly/3JxKEyR>.

II. Audiovisual Recordings Are a Critical and Accurate Means of Documenting Information During Undercover Investigations.

Oregon’s eavesdropping statute permits an individual to secretly *observe* conversations and republish those statements without written permission. It also permits surreptitious, non-consensual *filming* of an individual. Yet, it prohibits the recording of conversations, whether through audio or audiovisual means. While this distinction is constitutionally infirm, Amici further emphasize that the distinction undermines the significant role of undercover investigations in facilitating debate on matters of public concern.

First, hearing first-hand what is said by an individual being investigated is qualitatively different than reading a paraphrased summary of what was said. Pictures or silent video recordings will often be of limited value. The audio recording provides context that images cannot provide, and that have more value than a journalist’s memory or post-hoc notes. *See Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3rd Cir. 2017) (noting that audiovisual recordings “corroborate[] or lay[] aside subjective impressions for objective facts”).

Second, audiovisual recordings are more reliable than other methods of describing the sounds and nature of what was said at a particular moment. *See ACLU v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (“[A]udio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public. Their self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes.”). Given the

recent public skepticism of the media, a recording dispels doubt as to what was said and enhances the undercover investigator’s credibility. Justice Louis Brandeis famously quipped that sunlight is “the best of disinfectants,” but Amici would add that without audio there will often be no path to a true cure.

III. The Court Has Not Addressed the Important Question of Whether the First Amendment Protects Undercover Investigations and Newsgathering.

Whether states can impose broad prohibitions on undercover investigations and newsgathering, like criminalizing unannounced recordings, is an issue of pressing importance and one not previously decided by the Court. For over 50 years, the Court has accepted that “without some [First Amendment] protection for seeking out the news, freedom of the press could be eviscerated.” *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Yet, in the intervening years, the Court has not elaborated on these assumed constitutional protections. To make matters worse, conflicting views across the Circuits on the protections available under the First Amendment for this kind of activity leave undercover investigators and journalists—and those who advise them—confused and on perilous (criminal) ground.²¹ Having worked with more than a half-dozen entities that engage in or are considering engaging in undercover investigations, Amici have

²¹ The circuit split on the constitutionality of state “ag-gag” statutes are a prime example. Compare *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021), with *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed’n, Inc.*, 60 F.4th 815 (4th Cir. 2023), and *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021).

seen first-hand the chilling effect on speech and journalism that flows from the lack of Supreme Court caselaw on this point.

As scholars who research, publish, and litigate in this area of First Amendment law, Amici urge the Court to grant review and clarify the First Amendment's application to undercover investigations and newsgathering. The accepted rationales for robust free speech protections—competition of ideas, self-determination, and self-governance—all support recognizing that recording activity is protected by the First Amendment and that Oregon's statute criminalizes core speech activity. Simply, prohibiting recordings most likely to accurately convey truthful information is antithetical to the First Amendment's protections.

CONCLUSION

Amici respectfully request that the Court grant certiorari and answer the important First Amendment questions presented in this case.

Respectfully submitted,

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MAY 22, 2025