No. 24-1061

IN THE

Supreme Court of the United States

PROJECT VERITAS, ET AL.,

Petitioner,

v.

NATHAN VASQUEZ, IN HIS OFFICIAL CAPACITY AS MULTNOMAH COUNTY DISTRICT ATTORNEY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Or. Rev. Stat. § 165.540(1)(c) prohibits recording conversations unless all parties are notified, with some exceptions. The exceptions include recording a conversation "during a felony that endangers human life" and openly recording conversations with on-duty law enforcement officials.

1. Are those exceptions content neutral?

2. If the statute is subject to intermediate scrutiny under the First Amendment, does the state's interest in conversational privacy justify the restriction on secret recordings?

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF CONTENTS... ii

INTRODUCTION 1

BACKGROUND 2

REASONS TO DENY REVIEW 9

A. The court of appeals' ruling on content neutrality neither conflicts with decisions of this Court nor implicates a circuit split. 10

1. Neither *Reed* nor *City of Austin* addressed a law like the one here. 11

2. The decision here does not conflict with decisions invalidating Ag-Gag laws. 13

B. This case is a poor vehicle for addressing the questions presented. 16

1. Petitioners ignore the court of appeals' alternative holding on severability. 16

2. Petitioners seem to be pursuing only a facial challenge, which is easily answered. 17

C. The court of appeals' decision is correct. 21

1. Or. Rev. Stat. § 165.540 is content neutral.... 21

2. Or. Rev. Stat. § 165.540 is narrowly tailored to serve a significant government interest......... 25

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page(s)**

ACLU v. Alvarez,
679 F.3d 583 (7th Cir. 2012) 16
Animal Legal Defense Fund v. Kelly,
9 F.4th 1219 (10th Cir. 2021) 13
Animal Legal Defense Fund v. Reynolds,
8 F.4th 781 (8th Cir. 2021) 14, 19
Animal Legal Defense Fund v. Wasden,
878 F.3d 1184 (9th Cir. 2018) 5, 13, 19
Barr v. Am. Ass'n of Political Consultants, Inc.,
140 S. Ct. 2335 (2020) 22
Bartnicki v. Vopper,
532 U.S. 514 (2001) 28
Cahaly v. Larosa,
796 F.3d 399 (4th Cir. 2015) 15
City of Austin v. Reagan National Advertising,
596 U.S. 61 (2022) 5, 10, 11, 12, 21, 22, 24
Eldred v. Ashcroft,
537 U.S. 186 (2003) 28
Expressions Hair Design v. Schneiderman,
581 U.S. 37 (2017) 17
Harper & Row Publishers, Inc. v. Nation Enters.,
471 U.S. 539 (1985) 7, 28
Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.,
515 U.S. 557 (1995) 7
Members of City Council of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) 24
Norton v. City of Springfield,
806 F.3d 411 (7th Cir. 2015) 15

PETA v. N.C. Farm Bureau Fed'n,
60 F.4th 815 (4th Cir. 2023),
cert. den., 144 S. Ct. 325 (2023) 15
Project Veritas Action Fund v. Rollins,
982 F.3d 813 (1st Cir. 2020),
cert. den., 142 S. Ct. 560 (2021) 16, 20
Reed v. Town of Gilbert,
576 U.S. 155 (2015) 5, 6, 10, 11, 21, 22, 24
Snyder v. Phelps,
562 U.S. 443 (2011) 29
Texas v. Johnson,
491 U.S. 397 (1989) 20
Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 26
United States v. Hansen,
599 U.S. 762 (2023) 18, 19
Ward v. Rock Against Racism,
491 U.S. 781 (1989) 25, 26

Constitutional and Statutory Provisions

Or. Rev. Stat. § 165.540.................. 4, 5, 11, 12, 21, 25
Or. Rev. Stat. § 165.540(1) 3
Or. Rev. Stat. § 165.540(1)(c) .. 3, 17, 19, 20, 21, 22, 26
Or. Rev. Stat. § 165.540(3) 3
Or. Rev. Stat. § 165.540(5)(a) 3, 6, 23
Or. Rev. Stat. § 165.540(5)(b) 3, 6, 22
Or. Rev. Stat. § 165.540(6)(a) 27
Or. Rev. Stat. § 165.540(6)(a)(A) 29
Or. Rev. Stat. § 165.540(8) 3
US Const, Amend I ....
.... 1, 4, 5, 12, 14, 15, 18, 19, 20, 21, 26, 28, 29

INTRODUCTION

A recording of a conversation can be a form of speech protected by the First Amendment. But the speech belongs not just to the person who made the recording; it also belongs to the people whose words were captured. That basic insight makes this case—involving restrictions on secretly recording someone else's speech—both easy as a matter of constitutional law and different from the many other contexts that petitioners and their amici invoke, like filming agricultural operations, that do not inherently involve someone else's speech.

This Court has long recognized that the right to free speech encompasses the freedom to choose whether to speak, including the freedom to choose whether to speak publicly. Oregon law protects that freedom by requiring notice to all participants before most face-to-face conversations can be recorded. That requirement allows speakers to decide whether they want to speak to an audience broader than those within earshot. A person who is willing to speak in one context—an Alcoholics Anonymous meeting, a confessional booth, a hushed conversation with a close friend on a park bench—does not necessarily want the statement preserved in perpetuity so that it can be shared with others.

The court of appeals correctly upheld the Oregon law against a First Amendment challenge. To the extent it affects the creation of audio recordings as a form

of speech, Oregon's modest notification requirement is a valid time, place, or manner restriction. No decision from this Court or from another court of appeals holds that it is a content-based regulation of speech or that it fails intermediate scrutiny. And whatever quarrel petitioners and their amici may have with Oregon's policy decision to protect conversational privacy through a notice requirement, this case is a poor vehicle to address them. This Court should deny the petition.

BACKGROUND

1. Oregon law provides that a person may not record a "conversation"—oral communications that are not transmitted by phone or radio—unless all participants are "specifically informed" that it is being recorded:

> Except as otherwise provided * * *, a person may not:
>
> * * *
>
> (c) Obtain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all participants in the conversation are specifically informed that their conversation is being obtained.

Or. Rev. Stat. § 165.540(1). Violation of that provision is a misdemeanor. Or. Rev. Stat. § 165.540(9). (The full statute appears at App. 209a–217a.)

The prohibition against secretly recording conversations is subject to several exceptions, two of which are at issue here. The prohibition does not apply to "[a] person who records a conversation during a felony that endangers human life[.]" Or. Rev. Stat. § 165.540(5)(a). Nor does the prohibition apply to "[a] person who records a conversation in which a law enforcement officer is a participant" when the officer is performing official duties, the recording is made openly, the conversation is audible to the person by normal unaided hearing, and the person is in a place they lawfully may be. Or. Rev. Stat. § 165.540(5)(b).[1]

[1] Petitioners' amici betray a lack of familiarity with Oregon law or the facts of this case. Section 165.540(1)(c) does not require consent, only notice. Citizens News Guild Amicus Br. 2; Center for Medical Progress Amicus Br. 2; Law Professors Amicus Br. 3; Animal Advocacy Organizations Amicus Br. 14. Or. Rev. Stat. § 165.540(3) allows recordings made in one's home, which covers some of the domestic-violence and child-safety hypotheticals offered. Rutherford Institute Amicus Br. 5, 11. The law does not restrict video recordings without audio, which could include monitoring cameras. *Id.* at 11. And petitioners have not challenged various other statutory exceptions as content based. Liberty Justice Center Amicus Br. at 7–8.

2. Petitioners are a media organization that wants to conduct "undercover investigations" in Oregon by secretly recording conversations related to corruption at state agencies and violent protests in Portland. App. 3a, 6a. They sued respondents, the district attorney whose county includes Portland and the state's attorney general, arguing that the notice requirement in Or. Rev. Stat. § 165.540 violates their First Amendment rights. App. 6a.

The district court granted respondents' motion to dismiss those claims. App. 204a. The court determined that the law was a content-neutral regulation and thus applied intermediate scrutiny. App. 195a. It then concluded that Or. Rev. Stat. § 165.540 satisfies intermediate scrutiny because the law does not burden substantially more speech than is necessary to serve the government's significant interest in "safeguarding individual privacy." App. 203a.

3. On appeal, a divided panel initially held that the statute was facially unconstitutional. App. 96a. Applying circuit precedent, the majority concluded that the statute's exceptions made it content based and that it was not sufficiently tailored to satisfy strict scrutiny. App. 123a. Alternatively, the majority concluded that the statute would fail intermediate scrutiny even if it were content neutral. App. 127a–128a.

Judge Christen dissented, concluding that the exceptions were severable from the rest of the statute and

that the rest of the statute satisfied intermediate scrutiny. App. 139a.

4. The court of appeals granted en banc review and, by a 9-2 vote, affirmed dismissal of the complaint for failure to state a claim. App. 2a, 78a. The court treated the complaint as having raised both facial and as-applied challenges to Or. Rev. Stat. § 165.540, and it concluded that the as-applied challenge was ripe. App. 7a–14a. It also concluded that the statute regulates at least some speech subject to First Amendment scrutiny, because "recording conversations in connection with [] newsgathering activities is protected speech." App. 14a; *see also id.* at 22a (declining to decide whether other kinds of recordings also are protected speech). In so doing, it reaffirmed its previous holding in *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018), which held that a so-called Ag-Gag law barring undercover recording of certain animal facilities implicated the First Amendment. App. 20a–21a.

The court next concluded that Or. Rev. Stat. § 165.540 is a content-neutral, not content-based, regulation of speech. App. 30a. Applying this Court's test for content neutrality from *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), and *City of Austin v. Reagan National Advertising*, 596 U.S. 61 (2022), the court explained that the statute "does not draw distinctions based on the message a speaker conveys, and it was not adopted because of the government's disagreement with the speaker's message." App. 31a (cleaned up; quoting

Reed). It also concluded that neither of the exceptions to the ban on secret recording was content based. App. 32a. The exception for conversations recorded "during a felony that endangers human life," Or. Rev. Stat. § 165.540(5)(a), "turns on *when* a recorded conversation occurs, and not the subject matter of that conversation," App. 32a (emphasis in original). Similarly, the exception for openly recording certain conversations involving law enforcement, Or. Rev. Stat. § 165.540(5)(b) applies "regardless of what the conversation is about" and so "draws a line based on the circumstances in which a recording is made, not on the content of the conversation recorded." App. 33a.

Because it concluded that the statute is content neutral, the court subjected it to intermediate scrutiny. App. 35a. Under that test, a regulation of speech is permissible if it is "narrowly tailored to serve a significant government interest" and "leave[s] open ample alternative channels for communication of the information." App. 35a.

The court "easily" concluded that the state's interest in "ensuring that its residents know when their conversations are being record" qualifies as a "significant government interest." App. 36a. "[S]ecretly recording a conversation presents privacy concerns that are different in kind, and more corrosive, than merely having one's oral communications heard and repeated." App. 39a. For example, recordings "may be made easily, stored indefinitely, disseminated widely, and played repeatedly," and they may "create the

illusion of objectivity, even where the recording omits critical context due to selective editing or recording." App. 39a–40a. Secret recording also "may enable a party to disseminate another's oral comments in a way the speaker did not intend" and so implicate "the principle of autonomy to control one's own speech" including "the freedom *not* to speak publicly." App. 41a–42a (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 574 (1995), and *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985)) (emphasis in original). And even conversations that take place in public or semi-public locations may not be intended to be shared beyond the participants—for example, "twelve-step groups, bible study, and religious services." App. 42a–43a.

The court concluded that the statute is "sufficiently narrow" to be tailored to the state's interest in conversational privacy. App. 43a. The statute has "a relatively modest notice requirement" that allows a person to "choose to speak or remain silent" but does not require consent. App. 43a. The various exceptions to the notice requirement "accounts for some settings in which people cannot reasonably expect *not* to have their oral statements recorded," including meetings and classes. App. 44a. Although one might be able to conceive of situations that would not fall within a statutory exception but where the participants should expect to be recorded—"a loud argument on the street, a political provocateur on a crowded subway, or a drunk, hate-filled conversation in a parking lot"—those "fringe examples" are not enough to undermine the

law's narrow tailoring. App. 45a. Indeed, petitioners' "resort to niche examples reinforces the conclusion that the bulk of Oregon's protection against secret audio recording is targeted at achieving Oregon's significant interest." App. 45a–46a.

The court also concluded that the law leaves open ample alternative channels of communication. App. 46a. Petitioners "may employ all the traditional tools of investigative reporting," including "hav[ing] its reporters go undercover and report on what they have seen and heard—without secretly recording its targets—as journalists have done for centuries." App. 48a.

Finally, the court reached two alternative grounds for rejecting parts of petitioners' claims. First, the court held that even if the statute's exceptions were content based, as a matter of Oregon law they are severable from the rest of the statute, leaving in place the content-neutral general prohibition on secret recording. App. 49a–52a. Second, the court held that even if the law were unconstitutional as applied to the sort of investigative journalism that petitioners want to perform, the facial challenge to the statute still would fail because those circumstances are "plainly a tiny fraction of the whole" and "the ratio of unlawful-to-lawful applications is not lopsided enough to justify the strong medicine of facial invalidation for overbreadth." App. 55a (cleaned up).

Concurring in the judgment, Judge Bennett further emphasized that last point. App. 56a–57a & n.2. He explained that petitioners' facial challenge fails because

"there is no historical or precedential foundation to support that simply pressing record in secret or without announcement is always protected speech." App 56a. "Pressing a record button, whether in secret or without announcement, is purely mechanical. That conduct conveys no message." App. 63a. Thus, "even if some button pushing could amount to protected speech," *id.* n.8, the constitutional applications of the statute are not substantially outweighed by the potentially unconstitutional applications, App 74a.

Judges Lee and Collins dissented. App. 78a. They would have held that the exception for open recording of conversations involving law enforcement was not content neutral and was not severable as a matter of Oregon law. App. 87a–94a. They also would have held that the law did not survive intermediate scrutiny because it was not sufficiently tailored to protect conversational privacy. App. 81a–86a.

REASONS TO DENY REVIEW

The decision below does not conflict with any decisions from this Court or from other courts of appeals, none of which have addressed—much less struck down—a notice requirement for recording conversations like the one required by the Oregon statute at issue here. This case also suffers from significant vehicle problems that the petition ignores. First, the court of appeals' alternative ruling on severability—an issue of state law—means that the question whether the statute's exceptions are content neutral has no practical

effect on the resolution of this case. Second, petitioners now seem to be pursuing only a facial challenge to the statute, which is easily answered given the difficulty of mounting facial challenges generally. And if they were still pursuing an as-applied challenge, that would raise a serious ripeness question that the petition does not address. In any event, the decision below is correct and does not warrant further review.

A. The court of appeals' ruling on content neutrality neither conflicts with decisions of this Court nor implicates a circuit split.

Petitioners' first question presented asserts that the court of appeals' content-neutrality ruling here is "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." Pet. i–ii. That extravagant claim does not bear scrutiny.

To recap, the court of appeals here held that the Oregon statute is content neutral because it places "neutral, content-agnostic limits on the circumstances under which an unannounced recording of a conversation may be made." App. 30a. Although participants might choose to express themselves differently (or not at all) if they know they are being recorded, that does not make the facially neutral prohibition on secret recording content based. *Id.* at 31a. Nor do the exceptions to the prohibition transform it into a content-based regulation. *Id.* at 32a–34a. Each of the exceptions at issue—

for conversations "during" a life-endangering felony and conversations "in which" a law enforcement official is participating—"draws a line based on the circumstances in which a recording is made, not on the content of the conversation recorded." *Id.* at 33a.

1. Neither *Reed* nor *City of Austin* addressed a law like the one here.

The court of appeals' holding on content neutrality does not conflict with *Reed* or *City of Austin*, neither of which involved a law like Or. Rev. Stat. § 165.540. They involved the regulation of outdoor signs without a permit, not the recording of conversations. *Reed* held that the town's sign code was facially content based because it imposed different rules for "Ideological Signs," "Political Signs," and "Temporary Directional Signs"—categories that depended on the signs' "communicative content" and that singled out "specific subject matters for differential treatment." *Reed*, 576 U.S. at 164, 169. *City of Austin* reached the opposite conclusion when the distinction was between on- and off-premises signs, which "requires an examination of speech only in service of drawing neutral, location-based lines" and is "agnostic as to content." *City of Austin*, 596 U.S. at 69. This Court distinguished *Reed* because the law in *City of Austin* did not "single out any topic or subject matter for differential treatment" but rather drew a line "based on location." *Id.* at 71.

Neither *Reed* nor *City of Austin* addressed, much less resolved, whether a law like Or. Rev.

Stat. § 165.540 is content neutral. Neither case needed to confront the threshold question whether the act of secretly recording another person's speech is subject to First Amendment scrutiny at all. *See* App. 56a (Bennett, J., concurring) (noting that "there is no historical or precedential foundation to support that simply pressing record in secret or without announcement is always protected speech"). Neither case suggested that circumstance-based distinctions, like whether a felony is occurring or whether law enforcement is involved, are inherently content based.

Petitioners argue that the statutory exceptions single out "specific content for different treatment," Pet. 11, but they do not. The content of the speech—assuming that the recording is protected speech—is irrelevant. All that matters is the circumstances under which the recording was created. Indeed, it might not even be necessary to listen to the recording to determine whether an exception applies. A person who witnessed the recording being made might be able to determine whether it was lawfully made or not, regardless of whether they could also hear or understand any of the conversation being recorded. What matters is not what was said, but what was happening. That makes the analysis here even more straightforward than it was in *City of Austin*, where the law was content neutral even though it did require examining the signs' content.

2. The decision here does not conflict with decisions invalidating Ag-Gag laws.

Petitioners' claim of a circuit split is equally hyperbolic. They suggest that the decision below conflicts with decisions from the Eighth and Tenth Circuits about "Ag-Gag" laws, which restrict recording certain farm activities. Pet. 16–18. But the Ninth Circuit's ruling here does not conflict with either of those decisions. In fact, the Ninth Circuit too has struck down Ag-Gag laws. *See Animal Legal Defense Fund*, 878 F.3d 1184 (striking down a law that banned making a misrepresentation to enter a production facility or recording a facility's operations).

The Tenth Circuit struck down provisions of a Kansas law that made it a crime under certain circumstances to enter or exercise control over animal facilities "with the intent to damage the enterprise" if the person did not have "effective consent" from the owner. *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219, 1224–25 (10th Cir. 2021). The law provided that consent was not "effective" if it was induced by, among other things, "fraud" or "deception." *Id.* at 1225. The Tenth Circuit held that the law regulated speech, not conduct, because the fraud-or-deception exclusions "regulate what may be permissibly said to gain access to or control over an animal facility." *Id.* at 1232. And it held that the law was content based—in fact, viewpoint based—because the intent-to-damage-the-enterprise element "places pro-animal facility viewpoints above anti-animal facility viewpoints." *Id.* at 1233.

Similarly, it held that a subsection of the law that forbade video recording or photographs of animals involved speech and was viewpoint discriminatory for the same reason. *Id.* 1235–36.

Regardless of whether the Tenth Circuit's legal analysis was correct, *see id.* at 1246 (Hartz, J., dissenting), it has no bearing on whether the law at issue in this case is content neutral. Unlike Kansas's law, Oregon's law does not turn on whether a recording is made with the intent to promote or oppose a particular message, such as animal cruelty. The Kansas law also was not targeted at conversations that, by their nature, implicate someone else's freedom to speak.

The Eighth Circuit case is even less germane. The Eighth Circuit decision struck down a provision of an Iowa law that criminalized knowingly making "a false statement or representation" in an application for employment at an agricultural production facility, if the statement was made with the intent to commit certain unauthorized acts at the facility. *Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781, 783 (8th Cir. 2021). The provision indisputably constituted direct, content-based regulation of speech: It prohibited "statement[s]" based on whether they were "false." *Id.* at 784 (holding that the provision "constitutes a direct regulation of speech" and is content based because it "prohibits expression that is 'false,' and an observer must examine the content of the speech to determine whether it is prohibited"). The Eighth Circuit struck it down as overbroad because, although the First Amendment might

allow states to regulate "false claims to secure offers of employment," the statute "sweeps more broadly" by prohibiting even false statements that are not "material to the employment decision." *Id.* at 787. Other than the fact that both cases involve the First Amendment, there is nothing in common between that Eighth Circuit decision and this case. The statute at issue here does not regulate based on the truth or falsity of speech.

Petitioners' question presented also mentions the Fourth and Seventh Circuits, but they develop no argument in the body of the petition about any circuit split involving those courts. They mention a Fourth Circuit case in a footnote on page 11, but that case (like the ones discussed above) involved a viewpoint-discriminatory Ag-Gag law, not a ban on secret recordings of conversations. *PETA v. N.C. Farm Bureau Fed'n*, 60 F.4th 815, 828 (4th Cir. 2023), *cert. den.*, 144 S. Ct. 325 (2023). They also mention Fourth and Seventh Circuit cases in passing on page 13 of the petition, but those cases too are not on point. *Cahaly v. Larosa*, 796 F.3d 399, 402, 405 (4th Cir. 2015), held that a law prohibiting robocalls "of a political nature" was content based. *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015), held that an ordinance prohibiting panhandling—"an oral request for an immediate donation of money"—was content based. The laws in both cases drew distinctions based on the subject matter of the communication. The Oregon law at issue here does not.

There is no circuit split about whether a law like the one at issue here is content neutral. The closest decisions are those addressing other state's restrictions on eavesdropping and secret recording. Those decisions uniformly treat the laws as content neutral. *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 834–35 (1st Cir. 2020), *cert. den.*, 142 S. Ct. 560 (2021); *ACLU v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012).

B. This case is a poor vehicle for addressing the questions presented.

Even if petitioners' questions presented were otherwise certworthy, the petition suffers from significant vehicle problems that counsel against granting review.

1. Petitioners ignore the court of appeals' alternative holding on severability.

Petitioners' first question presented, about content neutrality, is based on the statutory exceptions for conversations involving a police officer and conversations during a life-endangering felony. As discussed further below, the court of appeals correctly held that those exceptions are content neutral. But it also reached an alternative holding, concluding that "[e]ven if we agreed with Project Veritas that the statutory exceptions it challenges are content based," as a matter of Oregon law those exceptions are severable from the rest of the statute. App. 49a, 52a; *see also* App. 145a–149a, 161a–166a (panel dissent discussing severability at greater length).

Petitioners ignore that part of the decision below. But its upshot is that their first question presented has no bearing on the outcome of this case. Even if they were right that the exceptions are not content neutral, the exceptions would be severed from the statute, the remaining prohibition on secret recording would be content neutral, and the analysis would proceed under intermediate rather than strict scrutiny. Petitioners' alleged circuit split regarding the test for content neutrality makes no difference to the result here.

Nor is the severability question one that warrants this Court's attention. As the majority and dissent below agreed, it is purely a question of state law. App. 49a, 92a. This Court "generally accord[s] great deference to the interpretation and application of state law by the courts of appeals" so as to "render unnecessary review of their decisions in this respect." *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 45 (2017). Petitioners have not asked for review of the state-law question of severability, and that makes their first question presented of only academic interest in the context of *this* case.

2. Petitioners seem to be pursuing only a facial challenge, which is easily answered.

The majority below generously construed petitioners' complaint as raising both facial and as-applied challenges to Or. Rev. Stat. § 165.540(1)(c). App. 7a–10a; *but see* App. 105a (panel decision construed it as raising only a facial challenge). The petition, however,

seems to pursue only the facial challenge, perhaps recognizing that the fact-specific application of the law to a limited set of circumstances would not warrant this Court's attention. *See, e.g.*, Pet. 19 ("Oregon's law is facially content based"). The petition does not use the phrase "as applied" even once, suggesting that petitioners have abandoned that part of their claim.

That choice sharply limits the analysis and effectively dooms their case on the merits. "[L]itigants mounting a facial challenge to a statute normally must establish that *no set of circumstances* exists under which the statute would be valid." *United States v. Hansen*, 599 U.S. 762, 769 (2023) (emphasis in original; cleaned up). In the First Amendment context where a party challenges a law as overbroad, courts will invalidate a law if "the statute prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." *Id.* at 770 (cleaned up). But the "unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep. In the absence of a lopsided ratio, courts must handle unconstitutional applications as they usually do—case-by-case." *Id.* (citations omitted).

Petitioners' concessions below make it exceptionally difficult for them to meet that high bar. As the majority below noted, petitioners "conced[ed] that the statute may permissibly apply where someone secretly records a private conversation," including "'a hushed conversation in a secluded hallway, the musings of a

friend whispering his life's woes to another friend, in confidence, in a secluded office, or colleagues discussing confidential medical options in a hospital visitation room.'" App. 53a (quoting 9th Cir. Appellants' Br. 52). Petitioners also conceded that they were not challenging the statute's application to "eavesdropping"—that is, secretly recording a conversation to which one is not a party. App 58a n.5. Even if the statute were unconstitutional in some applications—even if, as petitioners and some of their amici contend, it would be unconstitutional as applied to undercover reporting—"these applications represent only a sliver of the conversations to which section 165.540(1)(c) may apply." App. 55a. Petitioners' facial claim fails for that reason alone.

Beyond petitioners' concessions, Or. Rev. Stat. § 165.540(1)(c) also "encompasses a great deal of nonexpressive conduct—which does not implicate the First Amendment at all." *Hansen*, 599 U.S. at 782. Judge Bennett's concurrence below explores that point more fully. "[T]here is no historical or precedential foundation to support that simply pressing record in secret or without announcement is *always* protected speech." App. 56a (Bennett, J., concurring) (emphasis added). Recording someone else's speech is not inherently communicative. Pushing the button is conduct, not speech or a direct substitute for speech. Of course, some recordings may involve "decisions about content, composition, lighting, volume, and angles" that "are expressive in the same way as the written word or a musical score." *Animal Legal Defense Fund*, 878 F.3d at 1203. When those aspects of the conduct are "sufficiently

imbued with elements of communication," the act of recording may be entitled to First Amendment protection. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). But the act of recording by mechanical device is not inherently expressive. For that reason, "Project Veritas's facial challenge fails because, even assuming that there might be some circumstances when secret or unannounced audio recordings could be protected, those unconstitutional applications do not substantially outweigh the constitutional ones." App. 74a (Bennett, J., concurring).

For those reasons, a facial challenge to Or. Rev. Stat. § 165.540(1)(c) does not present a particularly difficult or interesting legal question, and it is not likely to develop First Amendment law in any meaningful way. This Court can reserve its review for a case that either challenges a statute that does not have a concededly lawful sweep or that more squarely presents a proper as-applied challenge.

If petitioners *were* still pursuing an as-applied challenge, they would face another formidable hurdle. Because respondents have not enforced, or even threatened to enforce, the law against them, there is a serious question whether their as-applied challenge is ripe. The court of appeals, applying circuit precedent, concluded that it was. App. 12a. But the First Circuit rejected almost identical as-applied challenges as unripe. *Project Veritas Action Fund*, 982 F.3d at 842–44. The First Circuit has the better analysis: An as-applied challenge necessarily depends on the nature, scope,

and circumstances of the conversation that petitioners wish to secretly record, but the specific facts needed to assess the constitutionality of a particular recording are not presented here. Regardless, however, the ripeness question (which is jurisdictional) is one this Court would have to decide if it were to grant review of an as-applied challenge. The briefing will likely devolve into a dispute about that issue, which the petition does not address.

C. The court of appeals' decision is correct.

On the merits, the court of appeals correctly answered both questions presented: Or. Rev. Stat. § 165.540(1)(c) and its exceptions are content neutral, and the law satisfies intermediate scrutiny. The First Amendment does not confer an unfettered right to secretly record someone else's speech without informing them, nor does it prevent states from imposing reasonable notice requirements to protect conversational privacy. Oregon's notice requirement is a tailored restriction that allows for recording conversations while respecting participants' autonomy to choose whether to create a new form of speech that can be shared with a broader audience.

1. Or. Rev. Stat. § 165.540 is content neutral.

This case presents no dispute about the legal standard for content neutrality; the parties agree that *Reed* and *City of Austin* set forth the governing principles. Pet. 10. "Government regulation of speech is content

based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. "[A] speech regulation targeted at specific *subject matter* is content based * * *." *Reed*, 576 U.S. at 169. On the other hand, regulations that are "agnostic as to content" and do not have "a content-based purpose or justification" are content neutral. *City of Austin*, 596 U.S. at 69.

As noted, Or. Rev. Stat. § 165.540(1)(c) prohibits recording face-to-face conversations "if not all participants in the conversation are specifically informed that their conversation is being obtained." That general prohibition is content neutral, because it applies regardless of the subject-matter of the conversation recorded. The law's application does not turn on "the topic discussed or the idea or message expressed," *Reed*, 576 U.S. at 163. The law governs the manner in which a recording can be made—only with notice to the participants—but it is entirely agnostic as to the content of the conversation being recorded.

Exceptions to a content-neutral statute can make it content based if the exceptions themselves are content based. *Barr v. Am. Ass'n of Political Consultants*, 591 U.S. 610, 618–21 (2020). But neither of the exceptions at issue here is.

The first is Or. Rev. Stat. § 165.540(5)(b), which allows recording a conversation in which a police officer is a participant if: (a) the recording is made while the officer is performing official duties; (b) the recording is made openly and in plain view of the participants in

the conversation; (c) the conversation being recorded is audible to the person by normal unaided hearing; and (d) the person is in a place where the person lawfully may be. None of those criteria have anything to do with the content of the conversation that is being recorded. Indeed, it is not necessary to listen to the audio recording to determine whether the criteria have been met. A person who witnessed the recording being made would be able to determine whether it was lawfully made or not, regardless of whether they could hear or understand any of the conversation being recorded. While the recording itself might also provide clues as to whether some of criteria were met, it is possible—even likely—that it will tell the listener nothing about whether any of the criteria were met. They turn not on what was said during the conversation but on the circumstances in which the recording was made.

Regardless, the practical significance of the police-officer exception is limited. As the court of appeals pointed out, it applies only when the conversation is recorded "openly and in plain view of the participants." App. 34a n.14. Petitioners are generally able to record the conversations they want to record openly; what they want to do is record secretly, which they could not even under this exception. *Id.* The police-officer exception does not draw a distinction that affects petitioners.

The second exception also turns on the circumstances of the recording, not its contents. Or. Rev. Stat. § 165.540(5)(a) allows recording a conversation "during a felony that endangers human life." Here too, the

content of the recording is not what determines whether the exception applies. A person who witnessed the recording being made would know if the exception applied on the basis of the circumstances in which it was made, even if that person could not hear or understand the conversation.

None of that analysis requires "resurrect[ing] the ghost of *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)," as petitioners claim. Pet. 12. It turns on the principles in *Reed* and *City of Austin*, along with a straightforward reading of the plain text of the state statute. The exceptions do not "single[] out any topic or subject matter for differential treatment," *City of Austin*, 596 U.S. at 71 (Pet. 13); they apply different rules to different factual circumstances that are wholly separate from the content of any speech. Because one need not know anything about the content of the recording to determine if the prohibition on secret recordings applies, it is content neutral.

Petitioners mention in passing some of the other exceptions to the statute—for example, the exception for recording in one's home (Pet. 5–6)—but they develop no argument about those exceptions, which are not within the scope of the questions presented. Regardless, they too all turn on circumstances rather than content.

2. Or. Rev. Stat. § 165.540 is narrowly tailored to serve a significant government interest.

Because the statute is not content based, it is subject to (at most) intermediate scrutiny. "[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (cleaned up).

Petitioners in this Court have narrowed their challenge to the narrow-tailoring prong of the analysis. Pet. 21. They do not take issue with much of the court of appeals' analysis: that the state has a significant governmental interest in protecting conversational privacy, that a notice requirement is an appropriate means to address that interest, and that it leaves ample alternative challenges for communication. But they argue that all that is true only for eavesdropping or for conversations in private settings, and that the law extends too far to the extent it restricts recording conversations in "wholly public settings" like cafes and sidewalks. Pet. ii, 21.

But a hushed conversation with a close friend at a cafe or on a park bench can be just as sensitive as a discussion at an AA meeting. Petitioners fail to appreciate that the "eavesdropping" concern applies just as much to both. A conversation that is recorded can be

heard by third parties who were not the intended audience. Just because the conversation takes place in public—which, in petitioners' view, apparently includes cafes and other places that intimate conversations take place—does not mean that it is meant to be shared with the whole world. Indeed, it is hard to see why the First Amendment would allow the state to protect, say, a quiet conversation by a hospital bed but not the same quiet conversation in a cafe booth. And while petitioners claim to see no meaningful difference between participants recounting conversations to others and recordings of speakers themselves (Pet. 22), the very premise of their case is that they need to be able to share the speaker's own statements rather than just reporting on them. *Cf.* App. 85a (Lee, J., dissenting) ("[S]omeone's voice—the sound, tone, and emphasis—can convey more meaning than mere written words on a piece of paper.").

To be narrowly tailored, "a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994). Rather, a law is narrowly tailored so long as the "'regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (*quoting Ward*, 491 U.S. at 799). Or. Rev. Stat. § 165.540(1)(c) promotes conversational privacy without burdening substantially more speech than is necessary to do so. It allows recording so long as the participants to the conversation have been notified. That is a modest requirement; the law does not require

consent, just notification. So long as notice is provided, recording of any conversation, even a private conversation, is allowed.

In addition, the law relaxes the notification requirement in contexts where recording is commonplace and would be expected. For example, as long as the recording is done openly, specific notice is not required in settings like public or semipublic meetings, including "hearings, trials, press conferences, public speeches, rallies and sporting or other events," classrooms, or even private meetings "if all others involved knew or reasonably should have known that the recording was being made." Or. Rev. Stat. § 165.540(6)(a). Those exceptions allow recording when a specific warning is unnecessary to prevent unfair surprise. The law is thus narrowly tailored to serve its purpose. To the extent the decision below turned on a contested interpretation of the scope of the statutory exceptions, *see* App. 46a n.23, that presents a non-certworthy question of state law.

Petitioners complain that the statute forbids recording—without notice—even "loud conversations in public." Pet. 31. But as the court of appeals explained, "fringe examples" like "a political provocateur on a crowded subway, or a drunk, hate-filled conversation in a parking lot" do not demonstrate that the law is not narrowly tailored. And if anything, those examples all reinforce the tailoring of the notice requirement. If petitioners mean to posit examples where the participants do not care who else hears them, giving them

notice of a recording is unlikely to change their behavior and they can be recorded. If they do care, they have an interest in knowing their audience. The law is quite well tailored to serve that interest.

Petitioners' arguments also fail to account for the fact that the speech they are creating—the recording of the conversation—is in part someone else's speech. "The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches." *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003). That limitation reflects that the person whose speech is at issue typically also has the freedom not to speak. Thus, for example, in *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 559 (1985), this Court held that the First Amendment did not give a news magazine the right to publish quotes from President Ford's unpublished autobiography about his decision to pardon President Nixon. The Court accepted that the subject matter was of significant public concern. *Id.* But it recognized that the First Amendment also embodies a "freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Id.* (emphasis in original); *see also Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (recognizing that "the fear of public disclosure of private conversations might well have a chilling effect on private speech").

Recording someone else's speech similarly implicates the freedom not to speak publicly. The act of

recording creates a work that is at least partly the speech of the person recorded. That person has a substantial interest in whether that work is created in the first place, not to mention whether it is shared with anyone outside of earshot. Any First Amendment analysis must account for those interests, which apply to conversations no matter whether they take place in private or in public.

There may be limits to the freedom not to speak, such as for recording public events that involve matters of legitimate public concern. *Cf. Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (explaining that speech on "matters of public concern" receives greater protection than "matters of purely private significance"). It is puzzling that petitioners think the decision below "undermines the consensus of many courts that recording public officials and events is protected expressive conduct." Pet. 20. The court of appeals included a whole section of its opinion concluding that it generally is. App. 14a–22a. And, as noted, the Oregon law allows open recording of government meetings and public speeches. Or. Rev. Stat. § 165.540(6)(a)(A). But even if there were other circumstances for which the First Amendment demanded an exception, that would not make the statute facially unconstitutional. At worst it would present a circumstance where the statute could not constitutionally be applied. That would not invalidate the statute's plainly legitimate sweep in the many circumstances where secretly recording a conversation is not essential to convey a message.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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