No. 24-1061

IN THE

Supreme Court of the United States

PROJECT VERITAS, *et al.*,

Petitioners,

v.

NATHAN VASQUEZ, IN HIS OFFICIAL CAPACITY AS MULTNOMAH COUNTY DISTRICT ATTORNEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

The brief in opposition captures the extremity of Oregon Revised Statutes § 165.540. Respondents Nathan Vasquez and Dan Rayfield (collectively "the State") inform the Court that "speech belongs not just to the person who made the recording; it also belongs to the people whose words were captured." Opp.1. Yet nowhere—not in Oregon, not in any state, not even in the footnotes of a fantastical law review article—has such a theory of conversational co-ownership ever existed. This "basic insight" to justify a blanket restriction of unannounced audio recording is akin to a blanket restriction of unannounced photography because it steals the subject's soul. *Id.* With such an extreme and wholly unsupported interest of individual or conversational privacy, Oregon's recording law fails any measure of scrutiny. *Compare* App.36-48, 196-203 *with* App.81-86, 117-123. This Court should grant certiorari to the petition of Project Veritas and Project Veritas Action Fund (collectively "Veritas") to reaffirm that the First Amendment protects individuals from governmental censorship masquerading as privacy.

ARGUMENT

I. This Case Presents a Strong Procedural Posture

A. The Questions Presented Fairly Include Facial and As-Applied Challenges

Veritas consistently pressed both facial and as-applied challenges to Oregon's recording ban, and both forms of its First Amendment claim are presented to this Court. *Contra* Opp.17-21. From the outset, Veritas's

complaint sought to enjoin application of the statute and to obtain a declaration that the law "is unconstitutional on its face and as applied." App.7. The record leaves no doubt that both aspects were raised: indeed, the court of appeals acknowledged that the complaint "plainly" included a facial challenge, as "the parties agree on this point." App.8. Throughout the litigation below, Petitioners pursued relief on both grounds, and the Ninth Circuit ultimately ruled that Oregon's law is constitutional.

This Court's precedent makes clear that whether a claim is styled as facial or as applied does not determine whether it may be heard or decided. Rather, it affects only how far reaching the relief will be if the claim succeeds. As this Court explained in *Citizens United v. Federal Election Commission*, "the distinction between facial and as-applied challenges is not so well defined" that it automatically controls the pleadings or outcome in every case. 558 U.S. 310, 331 (2010). Instead, "[t]he distinction is both instructive and necessary, for it goes to the breadth of the remedy . . . not what must be pleaded in a complaint." *Id.* Once a constitutional claim is properly before the Court, it may grant whatever remedy is appropriate—whether that means invalidating the law in its entirety or only in part—as long as the claim itself was raised and considered below. In this case, Veritas's First Amendment claim was squarely presented and decided at each step, so the Court has the authority to address the law's validity in either form.

Veritas is entitled to argue—as it has from the beginning—that Oregon's statute cannot be enforced consistent with the First Amendment, whether in whole or in part. Accordingly, the petition presents a proper and

important vehicle for resolving the constitutionality of this law. Upholding free speech rights here does not depend on a semantic classification of the challenge; it depends on recognizing that Oregon's ban cannot survive the required scrutiny. Both the facial and as-applied claims warrant correction of the Ninth Circuit's decision and merit this Court's intervention.

B. The Severability of the Law's Content Based Provisions is Fairly Included Within the Questions Presented

The State's severability gambit cannot erase the clear import of the statutory text challenged in this controversy.[1] *Contra* Opp.16-17. At the certiorari stage, the question is whether Oregon's ban raises a substantial First Amendment issue. It plainly does. By its terms, the law criminalizes virtually all unannounced audio recording of almost any conversation, with narrow exceptions for preferred content and circumstances. App.209-217. Those exceptions are woven into the statute's fabric. They define the scope of prohibited versus permitted speech. In evaluating content neutrality and tailoring, a court must consider the law as it stands, including its selective reach.

The State's briefing acknowledges that the issue of severability follows the content-based determination, or Veritas's first question presented. Opp.16-17. Indeed, the Ninth Circuit majority itself recognized that it could sever the exceptions only after determining whether any part

1. Relatedly, the State did not timely press a severability argument below. App.124; *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001).

of the law failed scrutiny. App.49-52. The State further acknowledges that, absent severability, "the analysis would proceed under intermediate rather than strict scrutiny." Opp.17. That is, the analysis would proceed under Veritas's second question presented. Severability is thus a "predicate to an intelligent resolution" of the second question presented and fairly included therein. *Ohio v. Robinette*, 519 U.S. 33, 38 (1996); Pet.i-ii.

C. This Case is an Ideal Vehicle for Review

The petition presents an excellent vehicle to resolve the important First Amendment questions surrounding audio recording laws. The issue is squarely presented on a full record. The en banc Ninth Circuit opinion definitively upheld Oregon's law, creating a direct conflict with multiple other circuits. The decision comes with a detailed majority opinion, a concurrence disputing whether recording is even speech, and a vigorous dissent highlighting the split with other courts—providing this Court a rich set of viewpoints. App.1-94. There are no factual disputes or procedural obstacles here: the case was decided as a pure question of law on a motion to dismiss, so the Court can cleanly address the First Amendment issues. App.177-204.

This case is an ideal vehicle because it encapsulates the issue in a straightforward way: Oregon's law is one of the nation's broadest restrictions of recording, enforced by criminal penalties. The conflict with other circuits is well developed, and there are no procedural anomalies. In short, this petition offers the Court the opportunity to protect core First Amendment values—the gathering and dissemination of information about matters of public concern—and to resolve conflicts in the lower courts on

how *Reed v. Town of Gilbert* and related precedent apply to laws restricting the creation of speech. 576 U.S. 155 (2015). The case is ready for review, and the question presented is of national importance. *See*, *e.g.*, Law Professors Amici Br. at 12 ("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"); The Center for Medical Progress Amici Br. at 8.

It proves too much for the State to even attempt to inject procedural problems into a case that raises serious issues of censorship and has reached this Court with starkly contrasting substantive opinions from an en banc panel of a court of appeals. The issue of severability and Veritas's applied challenges are fairly included in the two questions presented. Pet.i-ii. This case is a sturdy vehicle; the law at issue is not.

II. The En Banc Opinion was Wrongly Decided

A. Oregon Revised Statutes § 165.540 is Not Content Neutral

Respondents' content-neutrality claim misreads *City of Austin v. Reagan National Advertising*, 596 U.S. 61 (2022). Opp.21-24. There, this Court held only that a regulation distinguishing on-premises from off-premises signs was not aimed at the communicative topic of the sign. *City of Austin*, 596 U.S. at 71–72. This is a far cry from Oregon's law, which differentiates speech based on its subject matter and the speaker's identity. To know if a recording falls under the felony exception, one must assess what was happening and said during the conversation.

O.R.S. § 165.540(5)(a) (App.213). To invoke the law enforcement exception, one must identify the participants and the context. O.R.S. § 165.540(5)(b) (App.213-214). Telling journalists they can easily record some stories but not others is picking and choosing news by topic, which is content-based censorship in disguise. These are not content-neutral time, manner, place or "circumstances" rules. Opp. 10; App.29-30. This doctrinal error is one the Ninth Circuit is familiar with.

The en banc panel, for all its efforts, simply could not resist repeating the same mistakes made by the Ninth Circuit in *Reed*. Once again, it leapt directly to an examination of legislative intent and grasping desperately for benign justifications—without first taking "the crucial first step in the content-neutrality analysis: determining whether the law is content based on its face." *Reed*, 576 U.S. at 165; *see Reed v. Town of Gilbert, Ariz.*, 707 F.3d 1057, 1070–72 (9th Cir. 2013). The Ninth Circuit was rebuked by this Court yet stubbornly doubled down on the same approach here. App.27-35. A similar course correction is needed for a circuit in open rebellion against this Court's settled First Amendment standards.

B. Oregon Revised Statutes § 165.540 Does not Address any Recognizable Government Interest

The State conjures a phantasmic privacy right to conflate the hushed reverence of a confessional booth with sidewalk chatter. Opp.25-29. Indeed, Oregon's novel definition of privacy (to the extent it is even defined) is oblivious to decades of First Amendment precedent confirming the fundamental value of speech openly uttered

in public. Such speech contributes meaningfully to public discourse precisely because it occurs in the public view, where listeners have the right not only to hear but also to document and disseminate information about it. A default interest in public privacy stretches the concept so thin it would cover a loud political debate on a sidewalk with the same confidentiality as whispered intimacies shared with a therapist. *See* Opp.25-26. But as this Court reiterated in *Snyder v. Phelps*, speech occurring in a public setting on matters of public concern receives heightened protection precisely because it is not private. 562 U.S. 443, 452 (2011); *see also Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 387–88 (1992). The State's attempt to transform every park bench and café patio into a sanctuary of privacy is as untenable constitutionally as it is fanciful in reality.

One of the most dangerous parts of the State's argument and the en banc majority opinion is its attempt to convert the technological ease and effectiveness of audio recording into a justification for governmental censorship. Opp.6-7. Audio recordings "'may be made easily, stored indefinitely, disseminated widely, and played repeatedly[.]'" *Id.* (quoting App.39-40). This is a big step up from the printing press. But the State twists the power of the medium into a privacy interest, regardless of the circumstances in which conversations are recorded. Bizarrely, the interest makes private even the words of a subject who knowingly speaks publicly. Opp.7. This is not a reasonable standard; it is no standard at all.

C. Oregon Revised Statutes § 165.540 is not Narrowly Tailored

Oregon's recording law has a demonstrable problem with fit. The law criminalizes unannounced recording of nearly all conversations, no matter how public or non-confidential, sweeping in a vast amount of speech that carries no plausible privacy expectation. As the Seventh Circuit observed in striking a similar law, Illinois "bann[ed] nearly all audio recording without consent of the parties—including audio recording that implicates no privacy interests at all." *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 606 (7th Cir. 2012). Oregon's ban applies to loud exchanges on a public sidewalk, to heated arguments at protests, or to a public official's remarks in a crowded restaurant—scenarios where speakers cannot reasonably claim privacy. By "legislating this broadly" and not limiting the ban to genuinely private communications, Oregon has burdened "substantially more speech than is necessary. *Id.*

The State leans on privacy as a talismanic interest, yet the law is fatally underinclusive and overinclusive with respect to any version of that interest. The law oddly permits unnoticed recording in some of the most sensitive scenarios (e.g., during life-endangering felonies or police-citizen encounters), while forbidding it in many less sensitive ones (e.g., noisy exchanges on a street or in a park). This patchwork undermines the State's argument that its notice rule serves privacy at all. *See also* Pet.31-32; *contra* Opp.24 (claiming the statute's other exceptions were only "mention[ed] in passing"). The lack of a reasonable expectation of privacy in many prohibited situations also shows the law is not narrowly

tailored because it sweeps in openly audible conversations and matters of public concern where privacy is minimal or nonexistent.

Crucially, Oregon has less restrictive means to protect legitimate privacy interests. Nearly a dozen states have all-party consent laws for audio recording, but they typically exempt conversations with no reasonable expectation of privacy. App.171-76. Oregon chose an exceptionally broad approach, even though privacy could be safeguarded by a narrower statute targeting only truly confidential circumstances. And the law's content-based exceptions further illustrate the poor fit: conversations during some felonies may be recorded, and police interactions may be recorded without notice, reflecting that Oregon is willing to breach privacy when it finds the content valuable. These carveouts eviscerate Oregon's claim that the law is appropriately tailored to privacy. Rather, they suggest the law favors certain recordings (select crime evidence or police monitoring) while arbitrarily suppressing others. In short, Oregon's blanket ban "include[s] audio recording that implicates no privacy interests at all," and thus "restricts far more speech than necessary" to achieve its aims. *Alvarez*, 679 F.3d at 606. Under strict or intermediate scrutiny, such a broadly stifling law cannot stand.

III. The Ninth Circuit's Ruling on Content Neutrality Conflicts with Decisions of this Court and Other Circuits

A. *Reed* Affirms That Oregon Revised Statutes § 165.540 is Facially Content Based

The State's key substantive defense of the law—that Oregon's blanket notice requirement for recording is a neutral "time, place, or manner" regulation—is untenable. Opp.2. By allowing some unannounced recordings, but not others, based on their content, Oregon's law regulates speech based on subject matter and speaker identity. *See* App.109-115. That triggers strict scrutiny, under which the law cannot survive. *Reed*, 576 U.S. 155.

The en banc panel and the State attempt to avoid that conclusion by contending that the law does not single out any viewpoint and is justified by an expansive interest in privacy. App.27-30; Opp.11-12. But *Reed* squarely rejects the notion that a lack of animus or the presence of a content-neutral motive can save a law that, on its face, draws distinctions based on the topic discussed or the circumstance of the speech. 576 U.S. at 165. In Oregon, whether a person may record and later publish truthful audio depends on what the recording is of—that is, its content. Far from being content agnostic, the law's operation turns on the subject and participants of the exchange being recorded. Because of this, there is no need to consider the government's justifications or purposes to determine that strict scrutiny applies. It is curious, however, that the State does not address what purpose the law enforcement or felony exceptions could possibly

serve other than the capture and preservation of certain content.

B. The Decision Below Deepens a Circuit Split Arising from Ag-Gag Laws

This challenge also presents a compelling jurisdictional map with circuit splits across the Fourth, Seventh, Eighth, and Tenth Circuits. Opening Br. 16-21; *see also* North Carolina Farm Bureau Federation Amici Br. at 7 (discussing a similar circuit split while adding the Fifth Circuit to its tally).

The Fourth Circuit in *People for the Ethical Treatment of Animals v. North Carolina Farm Bureau* enjoined North Carolina's ban on undercover recordings, noting that "scores of Supreme Court and circuit cases" protect the right to gather information and that recordings "fall[] squarely within the First Amendment right of access to information." 60 F.4th 815, 825 n.3 (4th Cir. 2023). The Fourth Circuit struck down North Carolina's "Property Protection Act" as content based, finding it discriminated by speaker identity and viewpoint. That law only penalized employees who record to harm their employer—a carveout targeting certain speakers and only negative, disloyal speech. *Id.* at 823-24. The court did not search for a benign legislative intent or purpose. The Fourth and Seventh Circuits have also expressly rejected the Ninth Circuit's search for benign legislative intent as an appropriate step in conducting a facial content-based analysis. *See Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015).

In *Animal Legal Defense Fund v. Reynolds*, the Eighth Circuit followed a strict content-based test and noted that Iowa's law criminalizing lies to gain access to agricultural facilities was content based because it turned on the falsity or truth of speech. 8 F.4th 781, 787 (8th Cir. 2021). And the Tenth Circuit in *Animal Legal Defense Fund v. Kelly* similarly held that laws prohibiting collecting or recording information on public lands were content or viewpoint discriminatory, because they penalized only those recordings with an intent to damage operations. 9 F.4th 1219, 1231 (10th Cir. 2021). These rulings mirror the consensus that recording is protected expressive activity and that laws targeting particular subjects or viewpoints must face strict scrutiny. In stark contrast, the Ninth Circuit allowed Oregon's selective ban to stand by labeling it content neutral—even when it discriminated against certain types of recordings. App.30-35. In fact, other circuits facing recording challenges—such as the Third Circuit in *Fields v. Philadelphia*, 862 F.3d 353 (3d Cir. 2017) and the Fifth Circuit in *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017)—have uniformly found a First Amendment right to record public officials and matters of public concern. By upholding Oregon's law, the Ninth Circuit parted ways with at least four other circuits over how the First Amendment applies to audio recordings and over content-based determinations, underscoring a clear split ripe for this Court's resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

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