

No.

In the
Supreme Court of the United States

KATHERINE FERNANDEZ-RUNDLE, IN HER OFFICIAL
CAPACITY AS STATE ATTORNEY, ELEVENTH JUDICIAL
CIRCUIT, STATE OF FLORIDA,

Petitioner,

v.

JAMES ERIC MCDONOUGH,

Respondent.

**On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a potential criminal defendant may obtain relief under 42 U.S.C. § 1983 by establishing only that a future state prosecution would run afoul of state law, without establishing any violation of a right secured by the Constitution or laws of the United States.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings below:

1. Petitioner Katherine Fernandez-Rundle, in her official capacity as State Attorney for Florida's Eleventh Judicial Circuit, was the appellee below.

2. Respondent James Eric McDonough was the appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Katherine Fernandez-Rundle, in her official capacity as State Attorney for the Eleventh Judicial Circuit of the State of Florida (the “State Attorney”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit’s opinion is published at 862 F.3d 1314 (11th Cir. 2017). Pet. App. 1a. The Eleventh Circuit’s order denying rehearing and rehearing en banc is unreported. Pet. App. 38a. The district court’s decision is also unpublished but is available at 2015 WL 13594408 (S.D. Fla. Sept. 17, 2015). Pet. App. 16a.

JURISDICTION

The Eleventh Circuit entered its judgment on July 12, 2017. Pet. App. 1a. On September 14, 2017, the Eleventh Circuit denied the State Attorney’s timely petition for rehearing and rehearing en banc. Pet. App. 38a. On December 8, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari until January 22, 2018. No. 17A609.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

INTRODUCTION

Congress enacted Section 1983 to allow federal courts to redress violations of federal rights committed by those acting under color of state law. The text of the statute, along with an unbroken line of precedent from this Court and every court of appeals to have construed it, establishes beyond peradventure that a Section 1983 claim must fail when a plaintiff demonstrates only a violation of state law, rather than a violation of a federal right. That such claims must fail is a necessary outgrowth of our federal system: Federal courts may not lecture state officials on how to conform their conduct to state law, particularly in the context of enforcing state criminal laws.

Honoring these basic principles, the district court held that James Eric McDonough, the Section 1983 plaintiff here, failed to establish the violation of any federal right. For that reason, the district court correctly granted summary judgment to the State Attorney. Yet instead of deciding the issue raised on appeal—whether the State Attorney violated McDonough’s First Amendment rights, thereby potentially giving rise to liability under Section 1983—the Eleventh Circuit refused to address the constitutional question and reversed the district court’s judgment on the basis that McDonough’s conduct did not violate *state* criminal law. The Eleventh Circuit’s decision squarely conflicts with both this Court’s precedents and those of every circuit to have considered the issue.

Resolving this conflict now is warranted. Not only did the Eleventh Circuit have no cause to decide the state-law question (it being irrelevant to liability under Section 1983) but doing so also violated bedrock principles of federalism. Those principles teach that a federal court has no power to interfere with a state prosecution by instructing a State Attorney not to prosecute someone under a state law *unless* doing so would violate that person's *federal* rights. The Eleventh Circuit's decision to the contrary threatens to flood the federal courts with Section 1983 suits seeking to bar state prosecutions that would purportedly violate state law. It also prevents state law-enforcement officials from performing their duty to enforce duly enacted and constitutional state criminal laws.

This Court should grant review to restore uniformity in Section 1983 cases and to redress the Eleventh Circuit's grave intrusion upon the State of Florida's sovereignty.

STATEMENT

1. On February 7, 2014, McDonough audio-recorded his conversation with the chief of the Homestead Police Department during a meeting in the chief's office. Pet. App. 2a. The chief was not aware of, nor did he consent to, the recording. Pet. App. 4a. After McDonough posted an edited version of the recording on the Internet, the State Attorney sent him a letter advising that the Florida Security of Communications Act (the "Florida SCA"), Fla. Stat. § 934.03, prohibited his

conduct and that “a future violation would expose [him] to criminal prosecution.” Pet. App. 6a.¹

2. McDonough then sued the State Attorney in the U.S. District Court for the Southern District of Florida under 42 U.S.C. § 1983. *See* Pet. App. 40a-45a. His single-count complaint alleged that the State Attorney’s threatened prosecution violated his First Amendment rights. Pet. App. 6a. McDonough claimed that the Florida SCA was unconstitutional both on its face and as applied to his conduct, and he requested an injunction blocking the State Attorney from enforcing it. Pet. App. 6a.

The parties filed cross-motions for summary judgment on McDonough’s as-applied First Amendment claim. Pet. App. 6a.² In his summary-judgment pleadings, McDonough conceded that his recording was “surreptitious.” *See* Pet.

¹ As relevant here, the Florida SCA prohibits (1) the intentional interception of “any . . . oral . . . communication” and (2) the intentional disclosure of the contents of any oral communication to any other person by someone who knows (or has reason to know) that the information was intercepted. Fla. Stat. § 934.03(1)(a), (c). The Florida SCA defines “[o]ral communication” as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.” *Id.* § 934.02(2).

² The district court had earlier granted the State Attorney’s motion to dismiss McDonough’s facial challenge. *See* Pet. App. 20a. McDonough did not press his facial challenge on appeal.

App. 17a n.3. “[B]ased on the undisputed material facts,” the district court found that McDonough’s “covert recording in a nonpublic forum present[ed]” a “circumstanc[e] in which” the Florida SCA “may operate constitutionally.” Pet. App. 36a. Thus, because McDonough had not established any violation of his federal rights, the district court granted the State Attorney’s summary-judgment motion. Pet. App. 36a-37a.

3. McDonough appealed to the Eleventh Circuit, arguing that applying the Florida SCA to his conduct would violate his First Amendment rights. Although the Eleventh Circuit ordered two rounds of supplemental briefing (on First Amendment issues and on Article III standing),³ it never requested additional guidance from the parties regarding the Florida SCA. And it was not until his reply brief that McDonough first suggested, in passing, that he could obtain relief under Section 1983 on the basis that, in his view, his conduct did not violate the Florida SCA.

³ Although the State Attorney argued before the Eleventh Circuit that McDonough lacked standing, the court rejected that argument based on McDonough’s allegation that he was forced “to choose between foregoing his First Amendment speech rights or risking a felony prosecution,” which choice was “directly traceable to the letter threatening prosecution.” Pet. App. 7a-8a n.2. Given the State Attorney’s adherence to her position that McDonough’s conduct violated the Florida SCA and that he is subject to criminal prosecution for future surreptitious recordings, *see* Pet. App. 68a, the State Attorney no longer contends that McDonough lacks standing.

By a 2-1 vote, the Eleventh Circuit reversed in a published opinion. *See* Pet. App. 1a. Deciding what it considered a “dispositive issue,” Pet. App. 8a, the court held that the State Attorney’s “threatened prosecution ha[d] no basis” in state law because “McDonough did not violate” the Florida SCA, Pet. App. 3a. Because the court purported to “resolve this case under state law,” it declined to “reach the constitutional issue of whether the recording is protected by the First Amendment.” Pet. App. 3a; *see also* Pet. App. 12a. The court then remanded “for further proceedings, if necessary, consistent with [its] opinion.” Pet. App. 12a.

4. Chief Judge Carnes dissented. In his view, “[t]o avoid deciding a First Amendment issue,” the majority “violate[d] the Eleventh Amendment.” Pet. App. 15a. As he saw it, if the State Attorney “prosecutes McDonough for his covert recording activities, . . . she will not be conforming her conduct to Florida law” (as interpreted by the majority), and, accordingly, “the district court will have to . . . enjoin the State Attorney from prosecuting him.” Pet. App. 14a.⁴ Because this Court “has unequivocally held that federal courts cannot . . . lecture state officials on state law,” Chief Judge Carnes refused to “join the constitutional avoidance effort in this case.” Pet.

⁴ Chief Judge Carnes also noted that the majority’s “view of state law . . . will come as news to the State Attorney and to some of us who have read the various (and varied) Florida appellate court decisions interpreting” the Florida SCA. Pet. App. 13a; *see also infra* at 20-23 & n.6.

App. 15a (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)). Although “federal courts ‘should avoid reaching constitutional questions if there are other grounds upon which a case can be decided,’” Chief Judge Carnes noted that they “cannot do so at the Eleventh Amendment’s expense.” Pet. App. 15a (quoting *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1176 (11th Cir. 2001)).

5. The State Attorney sought panel rehearing and rehearing en banc. See Pet. App. 46a. In her petition, she asked the Eleventh Circuit to consider “[w]hether a prospective criminal defendant’s claim that a threatened state prosecution is not authorized by state law, standing alone, supplies a basis for obtaining relief in a preemptive civil suit filed under 42 U.S.C. § 1983.” Pet. App. 53a. She also argued that the court’s decision to allow a Section 1983 plaintiff to survive summary judgment merely by establishing that his conduct did not violate state law conflicted with this Court’s precedents, the decisions of every other circuit, and earlier Eleventh Circuit precedent (*Knight v. Jacobson*, 300 F.3d 1272, 1276 (11th Cir. 2002)). Pet. App. 62a. The Eleventh Circuit denied the rehearing petition. Pet. App. 38a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted because the Eleventh Circuit's decision conflicts with the decisions of this Court and every other circuit on a critically important issue of federal law, and these conflicts will persist absent this Court's intervention.

For decades, this Court has held that the deprivation of a federal right is an indispensable element of a Section 1983 claim. It has rejected attempts to premise such claims on mere violations of law that do not amount to a deprivation of federal rights. Until the Eleventh Circuit rendered its decision in this case, every circuit had done so as well.

The Eleventh Circuit's conflict with virtually all other judicial authority construing Section 1983 merits this Court's review because of its grave implications for the balance of state and federal power. Federal courts violate the Eleventh Amendment when they instruct state officials how to conform their conduct to state law, and only a state's highest court can authoritatively construe its state's laws. Yet the Eleventh Circuit ignored both of these bedrock federalism principles; it reversed the district court's grant of summary judgment on the ground that the State Attorney misapprehended the requirements of the state statute she is charged with enforcing and, in so doing, gave the Florida SCA a construction contrary to that given by the Florida Supreme Court.

The Eleventh Circuit's unwarranted intrusion into Florida's sovereignty is all the more

problematic because it concerns state criminal, rather than civil, law. This Court has repeatedly cautioned federal courts not to interfere with state criminal proceedings unless federal rights are at stake. Indeed, it carefully crafted abstention doctrines to prevent them from unnecessarily reaching unsettled state-law questions, even when those questions provide a ground for deciding cases and avoiding constitutional issues. The Eleventh Circuit's opinion wandered far astray from the principles underlying these abstention doctrines. And if allowed to stand, the Eleventh Circuit's decision will open the floodgates to pre-enforcement challenges to anticipated state prosecutions.

This state of affairs will persist in the Eleventh Circuit unless this Court intervenes. In her petition for rehearing en banc, the State Attorney brought to the Eleventh Circuit's attention its departure from this Court's decisions and the decisions of its fellow circuits (as well as its own earlier precedent). By denying rehearing, the Eleventh Circuit refused to correct those conflicts. This Court's review is thus necessary to resolve them.

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S JURISPRUDENCE INTERPRETING SECTION 1983.

The Eleventh Circuit refrained from adjudicating the sole federal-rights question McDonough raised in his Section 1983 complaint. Instead, it purported to "resolve" McDonough's claim exclusively on "state law" grounds. Pet.

App. 3a. Certiorari is warranted because, in so doing, the Eleventh Circuit created an irreconcilable conflict with this Court’s jurisprudence.

A. In relevant part, Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983. Stated more succinctly, “Section 1983 provides a cause of action against state actors who violate an individual’s *rights* under *federal* law.” *Filarsky v. Delia*, 566 U.S. 377, 380 (2012) (emphases added). “By the plain terms of § 1983, two . . . allegations are required in order to state a cause of action.” *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). A Section 1983 plaintiff must first demonstrate that “some person has deprived him of a federal right.” *Id.* If, and only if, he does so, he is entitled to relief if he can then establish that “the person who has deprived him of that right acted under color of state or territorial law.” *Id.*; see also *West v. Atkins*, 487 U.S. 42, 48 (1988); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970).

B. Section 1983’s history, purpose, and constitutional underpinnings demonstrate why its two elements—and particularly the element requiring the deprivation of a federal right—are indispensable. “[O]riginally enacted as § 1 of the Civil Rights Act of 1871,” Section 1983 was created to allow for judicial enforcement of “the provisions of the Fourteenth Amendment.” *Ngiraingas v. Sanchez*, 495 U.S. 182, 187 (1990) (quotation marks omitted). Accordingly, Section 1983 “provide[s] access to a federal forum for claims of unconstitutional treatment at the hands of state officials,” *Heck v. Humphrey*, 512 U.S. 477, 480 (1994), and creates “‘a species of tort liability’ in favor of persons who are deprived of ‘rights, privileges, or immunities secured’ to them by the Constitution” of the United States, *Carey v. Phipps*, 435 U.S. 247, 253 (1978) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)). The history leading to its enactment, the harms it was created to remedy, and the federalism implications inherent in its passage, *see generally infra* at 16-25, underscore that Section 1983 does not provide a vehicle by which those purportedly aggrieved by *state-law* violations may obtain redress in *federal* court.

C. Consistent with Section 1983’s plain terms, history, and purpose, this Court has uniformly rejected attempts to expand Section 1983 to cover mere violations of law—whether federal or state—that do not amount to federal-right deprivations. For example, when construing Section 1983’s criminal counterpart, this Court held that “[t]he statute . . . is applicable

when and only when some one is deprived of a federal right by that action.” *Screws v. United States*, 325 U.S. 91, 108 (1945) (construing the predecessor to 18 U.S.C. § 242). The Court in *Screws* made plain that “[t]he statute does not come into play merely because the . . . law under which the officer purports to act is violated.” *Id.*; see also *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (“[A Section 1983] plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*.”); *Paul v. Davis*, 424 U.S. 693, 700 (1976) (“Violation of local law does not necessarily mean that federal rights have been invaded.”).

For that reason, the Court has emphasized that not “every departure by state officers from state law” amounts to “a violation of [a] federal right,” *Snowden v. Hughes*, 321 U.S. 1, 11-12 (1944); see also *id.* (“Mere violation of a state statute does not infringe the federal Constitution.”). And without “a violation of a federal right,” a Section 1983 claim cannot survive summary judgment.

D. The Eleventh Circuit expressly declined to “reach the constitutional issue of whether [McDonough’s] recording is protected by the First Amendment.” Pet. App. 3a, 12a. Instead, it purported to “resolve this case under state law” because, in its view, McDonough’s actions did not violate the Florida SCA. Pet. App. 3a; see also *id.* (“[T]he government’s threatened prosecution has no basis in the [state] law.”). By allowing McDonough’s Section 1983 claim to survive summary judgment even though he had not established an indispensable element—i.e., the

deprivation of a federal right—the Eleventh Circuit contravened this Court’s case law construing Section 1983. Review is warranted to resolve this conflict.

II. THE ELEVENTH CIRCUIT’S DECISION CREATES A CONFLICT WITH EVERY OTHER CIRCUIT.

Every other federal court of appeals with jurisdiction to review Section 1983 suits has held, in harmony with this Court’s jurisprudence, that a violation of state law—standing alone—cannot give rise to a Section 1983 claim. After all, “[i]f there is no violation of a federal right, there is no basis for a [S]ection 1983 action,” and it is reversible error for a court to allow “a [S]ection 1983 action . . . based alone on a violation of state law.” *Clark v. Link*, 855 F.2d 156, 161 (4th Cir. 1988); *accord, e.g., Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 831-33 (1st Cir. 1982); *Powers v. Coe*, 728 F.2d 97, 105 (2d Cir. 1984); *Elkin v. Fauver*, 969 F.2d 48, 52 (3d Cir. 1992) (Alito, J.); *Brown v. Sudduth*, 675 F.3d 472, 478 (5th Cir. 2012); *Stanley v. Vining*, 602 F.3d 767, 769 (6th Cir. 2010); *Archie v. City of Racine*, 847 F.2d 1211, 1216-18 (7th Cir. 1988) (en banc); *Ebmeier v. Stump*, 70 F.3d 1012, 1013 (8th Cir. 1995); *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1060 (9th Cir. 2012); *Jones v. Denver*, 854 F.2d 1206, 1209 (10th Cir. 1988); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988).

Over a decade ago, the Eleventh Circuit appeared to have aligned itself with this prevailing (and correct) view. In *Knight v. Jacobson*, the Eleventh Circuit concluded that

“Section 1983 does not create a remedy for every wrong committed under the color of state law.” 300 F.3d 1272, 1276 (11th Cir. 2002). After holding that “[t]here is no federal right not to be arrested in violation of state law,” the Eleventh Circuit rejected a Section 1983 claim brought by an individual arguing that his arrest violated the Fourth Amendment simply because it was not performed in accordance with state law. *See id.* at 1275. In seeking en banc review, the State Attorney asked the Eleventh Circuit to resolve the tension between its decision and *Knight*, Pet. App. 62a, but the court declined that invitation. Pet. App. 38a.

Thus, in the Eleventh Circuit, Section 1983 plaintiffs—at least as to First Amendment challenges to threatened prosecutions—may survive summary judgment by persuading a federal court that their conduct did not violate state law. They need not show that they have been deprived of any federal right. Because that holding squarely conflicts with the decisions of every other circuit, this Court’s intervention is warranted.

III. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS IMMEDIATE REVIEW.

The conflicts created by the Eleventh Circuit are sufficiently important to warrant this Court’s immediate review. In disregarding bedrock federalism principles, the decision below greatly expanded liability under Section 1983, with corresponding consequences for the federal courts and state law-enforcement efforts.

**A. The Eleventh Circuit’s Decision
Implicates Important Federalism
Principles.**

The Eleventh Circuit’s decision violates foundational principles of federalism that exist to appropriately balance power between the federal and state governments. The court’s intrusion upon Florida’s sovereignty underscores why this Court should immediately resolve the conflicts described above.

1. Federal courts are responsible for minding “the ‘special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.’” *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). This delicate balance is disturbed when a federal court commands a state official to adopt a disputed understanding of state law. Such a command “conflicts directly with the principles of federalism that underlie the Eleventh Amendment.” *Pennhurst*, 465 U.S. at 106. Indeed, “it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.” *Id.*

The logic of *Pennhurst* applies here. *Pennhurst* involved a class action challenging the conditions of confinement in a state institution. *Id.* at 92. One of the claims “charged that conditions” at the hospital “violated . . . the Pennsylvania Mental Health and Mental Retardation Act of 1966.” *Id.* After a trial, the

district court granted injunctive relief on multiple claims, including the state-law one. *Id.* at 93. The court of appeals concluded that state law “fully supported” the district court’s remedial order, so it affirmed without “reach[ing] the remaining issues of federal law.” *Id.* at 95-96.

This Court reversed, concluding that a “federal court’s grant of relief against state officials on the basis of state law . . . conflicts directly with the principles of federalism that underlie the Eleventh Amendment.” *Id.* at 106. The Eleventh Amendment, the Court explained, embodies a constitutional “affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority” in Article III. *Id.* at 98. “[I]t is difficult to think of a greater intrusion on state sovereignty,” the Court reasoned, “than when a federal court instructs state officials on how to conform their conduct to state law.” *Id.* at 106. Accordingly, the Court held, the district court’s judgment against various Pennsylvania officials could not be sustained “solely on the basis of” state law. *Id.* at 124-25.

As Chief Judge Carnes recognized in his dissent, the Eleventh Circuit did just what *Pennhurst* directs federal courts not to do—tell the State Attorney “how to conform [her] conduct to state law.” Pet. App. 14a (quoting *Pennhurst*, 465 U.S. at 106 (alterations in original)). After all, if the State Attorney “prosecutes McDonough for his covert recording activities, . . . she will not be conforming her conduct to Florida law” as understood by the majority. Pet. App. 15a. And here, as in *Pennhurst*, that state-law ruling forms

the sole basis for the court's judgment. *See* 465 U.S. at 124-25; *see also* Pet. App. 3a, 12a.

For several reasons, the Eleventh Circuit's reliance on state law is even more problematic than the state-law holding this Court disapproved in *Pennhurst*. First, unlike in *Pennhurst*, the court in this case could not invoke doctrines recognizing federal-court jurisdiction to address pendent state-law claims. The "amended complaint" in *Pennhurst* "charged that conditions at *Pennhurst* violated" state law. *Id.* at 92. McDonough's single-count complaint, however, like his motion for summary judgment, omitted any such state-law claim, and the district court never passed on any such claim. Thus, one of the principal rationales supporting the court of appeals' judgment in *Pennhurst* is not available here. *See* 465 U.S. at 117-23.

Second, the court of appeals in *Pennhurst* concluded that the Pennsylvania Supreme Court had "spoken definitively" to a case-dispositive legal issue. 465 U.S. at 95. Here, by contrast, the Eleventh Circuit cited no controlling precedent from the Florida Supreme Court, and the Eleventh Circuit's view that the State Attorney misunderstands state law "will come as news" to those "who have read the various (and varied) Florida appellate court decisions interpreting" the Florida SCA. Pet. App. 13a (Carnes, C.J., dissenting). Indeed, and as discussed below, *see infra* at 20-23 & n.6, the Eleventh Circuit's decision contravened, rather than relied on, caselaw of the Florida Supreme Court.

2. The federalism principle this Court articulated in *Pennhurst* carries particular force when, as here, a federal court is asked to interfere with state criminal proceedings. This Court has long been reluctant to restrain criminal proceedings. See *In re Sawyer*, 124 U.S. 200, 210 (1888).⁵ That reluctance is based in part on the “basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury.” *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). As this Court has explained, “the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered ‘irreparable’ in the special legal sense of that term.” *Id.* at 46. Thus, to justify federal interference with state criminal prosecutions, “the threat to the plaintiff’s federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.” *Id.* at 46; see *Deaver v. Seymour*, 822 F.2d 66, 68-70 (D.C. Cir. 1987) (applying same logic to suit seeking relief from an anticipated prosecution).

Consistent with those general principles, this Court has permitted preemptive civil litigation where criminal proceedings “threatened federal

⁵ See also *Deaver v. Seymour*, 822 F.2d 66, 68-70 (D.C. Cir. 1987) (citing authorities and providing overview of how the law in this area has evolved); accord, e.g., *Bacon v. Neer*, 631 F.3d 875, 879 (8th Cir. 2011); *Stolt-Nielsen v. United States*, 442 F.3d 177, 183 (3d Cir. 2006).

constitutional rights.” *Id.* at 68; see *Bacon v. Neer*, 631 F.3d 875, 879 (8th Cir. 2011). But “the traditional reluctance . . . to interfere with criminal proceedings,” *Deaver*, 822 F.2d at 70, may not be set aside based on a federal court’s view that there is no state-law basis for an anticipated state prosecution. To the contrary, “[this] Court has recognized that federal interference with a State’s good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework.” *Dombrowski v. Pfister*, 380 U.S. 479, 484 (1965).

The Eleventh Circuit’s ruling in this case cannot be squared with those principles. Under the court’s approach, a potential criminal defendant may file a preemptive suit under Section 1983 and may ask a federal court to anticipatorily adjudicate state-law defenses to a threatened state prosecution, so long as the plaintiff also alleges the prosecution would run afoul of the federal Constitution. The federal court tasked with resolving such a suit would not only have the *power* to adjudicate such state-law issues; it would be *obliged* to resolve them first, because federal courts “should avoid reaching constitutional questions if there are other grounds” for a decision. See Pet. App. 12a n.3.

3. It is also “fundamental to our system of federalism” that no “federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.” *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). That, however, is precisely what the Eleventh Circuit did when it held that

McDonough's conduct did not violate the Florida SCA.

In the Eleventh Circuit's view, McDonough did not violate the Florida SCA because the police chief did not "exhibit" his expectation of privacy. Pet. App. 9a-10a. Specifically, the Eleventh Circuit held that a person recording a conversation violates the Florida SCA only if the other participant expressly lets the recorder know that he intends the conversation to remain private. Pet. App. 10a. Because the police chief never "suggest[ed] that the meeting was confidential or 'off the record,'" the Eleventh Circuit concluded that McDonough did not violate the statute. Pet. App. 10a.

The Eleventh Circuit's interpretation of the Florida SCA cannot be reconciled with that of the Florida Supreme Court. True, "[t]he statute protects only those 'oral communications' uttered by a person exhibiting an expectation of privacy under circumstances reasonably justifying such an expectation." *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985). But in applying the Florida SCA, the Florida Supreme Court has made clear that the expectation of privacy need not be "expressly" invoked.

For example, in *State v. Mozo*, 655 So. 2d 1115 (Fla. 1995), police intercepted communications originating from a cordless home telephone. The Florida Supreme Court held that, merely because those conversations "originated within the [defendants'] home," the conversations "exhibited the required expectation of privacy

demanded” by the Florida SCA. *Id.* at 1117. In other words, the Florida Supreme Court has authoritatively construed the state’s privacy statute to mean that a party to a conversation may have a reasonable expectation of privacy in the contents of a communication even if that party has not affirmatively expressed any intent to keep such a communication private. *See also, e.g., McDade v. State*, 154 So. 3d 292, 298 (Fla. 2014); *State v. Walls*, 356 So. 2d 294, 296 (Fla. 1978).

Contrary to the decisions of the Florida Supreme Court, the Eleventh Circuit concluded that McDonough did not violate the Florida SCA because no participant to the conversation “exhibit[ed]” an expectation of privacy by expressly stating to another that he intended the conversation to remain private. Pet. App. 10a. Because the Florida Supreme Court does not require such a communication, the Eleventh Circuit’s decision conflicts with the authoritative construction of state law rendered by Florida’s highest court. Even worse, under the court’s approach, the Florida SCA’s protection of conversational privacy would disappear where it matters most—situations, like in-person conversations within a home or office, in which participants have no reason to suspect their conversation is being recorded and therefore have no reason to ask that it not be.⁶

⁶ As the State Attorney pointed out in her petition for rehearing and rehearing en banc, the Eleventh Circuit’s alternative state-law holdings, particularly its holding that the Florida SCA does not apply because McDonough’s

4. Finally, granting review in this case would afford the Court an opportunity to clarify important principles designed to ensure that federal courts do not inappropriately reach state-law issues when trying to avoid deciding constitutional questions. As this Court has explained, “the prudent exercise of this Court’s jurisdiction” dictates that it normally “will not decide a constitutional question if there is some other ground upon which to dispose of the case.” *NAMUDNO v. Holder*, 557 U.S. 193, 205 (2009). But when applying the canon of constitutional avoidance forces a federal court to decide a state-law question, caution is this Court’s watchword.

For example, in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the Court advised abstention “when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided.” *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). Abstention in that circumstance “avoid[s] both unnecessary adjudication of federal questions and ‘needless friction with state policies.’” *Id.* By applying *Pullman* abstention, federal courts “provid[e] the state courts the opportunity to settle the underlying state law issu[e],” whether by certification or in a criminal prosecution, rather than reaching the state-law issue itself.

surreptitious recording falls under the statutory exception for “communications ‘uttered at a public meeting,’” are also in substantial tension with Florida decisional law. *See* Pet. App. 67a (quoting Fla. Stat. § 934.02(2)).

Cuesnongle v. Ramos, 835 F.2d 1486, 1496 (1st Cir. 1987).

When applying the canon of constitutional avoidance, federal courts must thus take care not to unnecessarily resolve state-law questions, even if the state-law question provides an alternative basis for resolution. Here, though, the Eleventh Circuit set aside these well-settled principles of federalism to avoid reaching a federal constitutional issue. Indeed, the state-law question decided here did not even provide an alternative basis for decision, which is the central predicate for applying constitutional avoidance. *See supra* at 10-14. Nor was the state-law question here unsettled; the Florida Supreme Court has authoritatively interpreted the Florida SCA. *See supra* at 20-23 & n.6. Rather than exercising care to avoid unnecessarily deciding an unresolved state-law question, the Eleventh Circuit took the opposite approach and decided an irrelevant issue of state law in a way that contravened the state supreme court's earlier interpretation of the same state-law question.

In short, the Eleventh Circuit issued an "unnecessary ruling" on state law that created "needless friction with state policies," *Pullman*, 312 U.S. at 500; but that ruling was prompted by the court's apparent view that the canon of constitutional avoidance should trump the competing principle that federal courts should not presume to instruct state officials on the requirements of state law. This Court's review is warranted to clarify the relationship between those two important principles and to restore the

Constitution's careful balance between state and federal sovereigns.

B. If Left Standing, The Eleventh Circuit's Decision Will Have A Profound Effect On Federal District Courts And On State Prosecutions.

The decision below will have far-reaching practical consequences not only for the federal courts but also for state officials charged with prosecuting state criminal offenses. In addition, this Court's intervention would help to prevent any number of unfortunate consequences for the administration of criminal justice.

Under the Eleventh Circuit's approach, any person seeking to block a threatened state prosecution may file suit under Section 1983 and obtain relief by persuading a federal court that the plaintiff has not violated state law. And according to the Eleventh Circuit, this option is available whether or not the prosecution would violate any federal rights.

In all other circuits, courts resolve cases similar to McDonough's on summary judgment (or on a motion to dismiss) against the plaintiff for failure to establish a violation of his federal rights. The Eleventh Circuit's contrary approach would thus increase both the number of suits and the amount of judicial resources required to resolve them.

The "importance" of Section 1983 "in defining the role of the federal courts" "cannot be overstated." Erwin Chemerinsky, FEDERAL

JURISDICTION 500 (6th ed. 2012). As it now stands, “[m]ore than 10 percent of the federal court docket consists of § 1983 suits.” *Id.* Accordingly, caution is warranted before this Court allows the Eleventh Circuit to vastly expand the scope of relief available under Section 1983.

* * *

Review is warranted. The decision below violates foundational federalism norms by instructing state officials on how to conform their conduct to state law; by dictating which criminal prosecutions state officials may appropriately pursue under state law; by contradicting the highest state court’s construction of state law; and by refusing to abstain from unnecessarily opining on state law. The question presented is straightforward, so there is nothing to be gained from allowing further percolation. The Court should take it up now.

Adding to these federalism concerns are the practical consequences that will result if the decision below is left to stand. It will greatly increase both the number of Section 1983 suits and the resources necessary to adjudicate them. In addition, the decision will make it harder for state prosecutors to enforce state criminal laws. Because of these consequences, and because of the grave intrusion on Florida’s state sovereignty, resolving the conflicts with both this Court’s precedent and the decisions of every other circuit is immediately warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 22, 2018

APPENDIX

1a

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-14642

D.C. No. 1:15-cv-20038-CMA

JAMES ERIC MCDONOUGH,

Plaintiff-Appellant,

versus

KATHERINE FERNANDEZ-RUNDLE,
in her official capacity as State Attorney,
Eleventh Judicial Circuit, State of Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(July 12, 2017)

Before ED CARNES, Chief Judge, FAY, and PARKER,* Circuit Judges. PARKER, Circuit Judge:

Plaintiff-Appellant James Eric McDonough, proceeding *pro se*, appeals from a judgment of the United States District Court for the Southern District of Florida (Altonaga, J.) dismissing his complaint brought pursuant to 42 U.S.C. § 1983. After McDonough lodged a series of complaints of misconduct against an officer of the Homestead Police Department (“HPD”), he was invited by Alexander E. Rolle Jr., the Chief of Police, to a meeting in his office to discuss the complaints. Unbeknown to Chief Rolle, McDonough recorded a portion of the meeting on his cell phone and later posted portions of the recording on the internet. Shortly thereafter, he received a letter from Defendant Katherine Fernandez-Rundle, the Miami-Dade County State Attorney, informing him that his recording violated the Florida Security of Communications Act, and that the violation was a felony. *See* FLA. STAT. § 934.03 (2016). She forbade him from making future recordings and threatened him with prosecution if he did so.

McDonough then sued her under § 1983 alleging that the statute did not apply to him, was facially unconstitutional, and that the threat of prosecution violated his First Amendment right to free speech. The parties cross moved for summary judgment and the court granted Fernandez-Rundle’s motion. *See McDonough v. Fernandez Rundle*, No. 15-20038-CIV-ALTONAGA/O’Sullivan (S.D. Fla. Sept. 17, 2015). The court did not parse § 934.03, assuming that it applied

* Honorable Barrington D. Parker, Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

to the recording. Instead, it analyzed the recording under the First Amendment nonpublic forum principles because the recording took place in a police station. *Id.* at 8-11. The court held that § 934.03 as applied to McDonough did not violate the First Amendment because it was “reasonable and viewpoint neutral” and denied McDonough’s request for relief. *Id.* at 15-16. He appeals and we reverse.

We hold that McDonough did not violate § 934.03 and, consequently, the government’s threatened prosecution has no basis in the law. Because we resolve this case under state law, we need not reach the constitutional issue of whether the recording is protected by the First Amendment.

BACKGROUND¹

McDonough alleges that in October 2012 he complained to HPD officer Alejandro Murguido about his reckless driving and violation of traffic laws in the neighborhood where McDonough lived. McDonough alleges that Murguido then arrested him in retaliation for the complaints. In response to the arrest, McDonough filed a complaint against Murguido with the Internal Affairs Department of the HPD. Shortly thereafter, in April 2013, McDonough was again arrested for alleged incidents that Murguido claimed had occurred several months previously. Criminal charges were lodged against McDonough but were eventually dismissed. In January 2014, McDonough filed a complaint with the HPD specifically alleging that Murguido arrested and

¹ Except as otherwise noted, the relevant facts are not disputed.

harassed him in retaliation for his complaints about Murguido's conduct.

In response to these events, Chief Rolle invited McDonough to meet in his office to discuss the complaints regarding Murguido. McDonough agreed to the meeting and arrived at the HPD on February 7, 2014 accompanied by a friend, Albert Livingston, who allegedly witnessed some of the incidents involving McDonough and Murguido. Chief Rolle did not object to Livingston's attendance. A fourth person, Detective Antonio Aquino from the HDP Internal Affairs department, also joined the meeting at Chief Rolle's request. No ground rules of any sort were set for the meeting. Neither Chief Rolle nor anyone else from the HPD mentioned anything about the meeting being confidential in nature, or that recording or note taking was in any way discouraged or prohibited. At the start of the meeting, McDonough placed his cell phone in plain view on the desk between him and Chief Rolle and proceeded to record their conversation. Chief Rolle saw McDonough's cell phone but contends that he was unaware that McDonough was recording the meeting.

McDonough alleges that during the meeting he gave Chief Rolle documents containing witness statements about the incidents with Murguido, character references, and the personnel file of Murguido that contained various accident and injury reports. At the meeting, McDonough also filed another Internal Affairs complaint against Murguido. At one point, McDonough asked if there would be a record of their discussions, to which Aquino replied, "[W]e have all of this recorded" Appendix for Petitioner, *McDonough v. Fernandez Rundle*, No. 15-14642 (11th

Cir. Dec. 31, 2015) [hereinafter Appendix] at 165. After the meeting, McDonough filed a public records disclosure request for the documents concerning Murguido that he alleges he had given to Chief Rolle. However, when he received documents in response to his request, he discovered that certain ones concerning Murguido were not included. McDonough then filed another public records disclosure request specifically for those documents, but Chief Rolle denied having received them.

To prove that he had given the documents to Chief Rolle, McDonough published portions of the recording on YouTube. He alleged that the published portions of the transcript confirmed his account of giving the documents to Chief Rolle and proved that he was not candid when he denied having received them. A month later, McDonough received a letter dated December 9, 2014 from Fernandez-Rundel threatening him with arrest and felony prosecution under § 934.03. The letter stated:

A complaint has been filed with our office stating that on February 7, 2014, you recorded conversations you had with Chief Alexander Rolle and Internal Affairs Detective Antonio Acquino at the Chief's offices located at #4 South Krome Avenue in Homestead, Florida. Florida Statute § 934.03, Interception and Disclosure of Wire, Oral, or Electronic Communications prohibits any party from intentionally intercepting any wire, oral, or electronic communication without the consent of the other party.

Recording a conversation without the permission of the other party or parties is a violation of the statute and is a 3rd degree felony.

We are bringing this to your attention to prevent any further violation of Florida law, as a future violation would expose you to criminal prosecution. Enclosed is a copy of the pertinent law.

Appendix at 13.

In response to the threat of prosecution, McDonough sued under 42 U.S.C. § 1983, alleging that section 934.03 did not apply to him and that if it did, it violated the First Amendment. He sought injunctive relief barring the State Attorney from prosecuting him under the statute. As noted, the parties cross moved for summary judgment and the district court denied McDonough's motion and granted Fernandez-Rundle's motion, essentially on constitutional grounds. *See McDonough*, No. 15-20038-CIV-ALTONAGA/O'Sullivan at 16.

Because both parties agreed that McDonough had a right to record under the First Amendment, the district court reasoned that the dispositive issue was what level of scrutiny should apply under the First Amendment. The court concluded that the nonpublic forum analysis applied because the recording took place in the interior of a police station, a nonpublic forum. *Id.* at 5-11. Under the nonpublic forum analysis, a government's decision to restrict access "can be based on subject matter and speaker identity

so long as the distinctions drawn are reasonable . . . and are viewpoint neutral.” *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1280 (11th Cir. 2003); *United States v. Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986). Applying these principles, the court held that prohibiting covert recording in a police station is reasonable and viewpoint neutral because the purpose of a police station is to carry out law enforcement responsibilities. *See McDonough*, at 11. The district court granted summary judgment in favor of the State Attorney and this appeal followed. We review *de novo* a grant of summary judgment and the legal principles on which it is based. *See Smith v. Owens*, 848 F.3d 975, 978 (11th Cir. 2017); *Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005).²

² As an initial matter, Fernandez-Rundle contends that McDonough lacks standing. Standing requires that: (1) the plaintiff must have suffered an injury-in-fact; (2) there must be a causal connection between the injury and the challenged conduct; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). We conclude that McDonough has sufficiently alleged these elements because the State Attorney threatened to arrest and prosecute him if he made a similar recording in the future. The letter from the State Attorney warns explicitly that “a future violation would expose you to criminal prosecution,” and refers to the fact that McDonough recorded his conversation with Chief Rolle and Acquino. Appendix at 13. It also emphasized that his action was a “violation” of Florida Statute § 934.03 and is therefore “a 3[rd] degree felony.” *Id.* It is well-settled that “an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences.” *Harrell v. Fla. Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010) (citing *Pittman v. Cole*, 267 F.3d 1269, 1283 (11th Cir. 2001)). We have little difficulty concluding that McDonough

DISCUSSION

The district court did not reach what we determine is a dispositive issue: whether § 934.03 even applies to McDonough. We hold that it does not. The Section, titled “Interception and disclosure of wire, oral, or electronic communications prohibited,” provides:

- 1) Except as otherwise specifically provided in this chapter, any person who:
 - a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication; . . .
 - c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . . shall be punished as provided in subsection (4).

suffered an injury which would be redressed by an injunction. McDonough has alleged that he would have to choose between foregoing his First Amendment speech rights or risking a felony prosecution. This injury-in-fact is directly traceable to the letter threatening prosecution under § 934.03. Redressability is also sufficiently alleged because an injunction barring such prosecution would redress McDonough’s injury. *See Lujan*, 504 U.S. at 560. Accordingly, McDonough has standing to pursue his claim.

FLA. STAT. § 934.03 (2016). Section 934.02 in turn defines “oral communication” as

any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.

FLA. STAT. § 934.02 (2016) (emphasis added).

Section 934.02 does not apply to the recording of all oral communications. It is expressly limited to communications “uttered by a person exhibiting an expectation that such communication is not subject to interception” FLA. STAT. § 934.02 (emphasis added). “Exhibit” means “to show externally,” “to display” and “to demonstrate.” *See* WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY (3rd ed. 1994) (defining the word “exhibit”). The Florida Legislature’s choice of this verb is telling: it required that the expectations of privacy needed to trigger application of the statute must be exhibited; in other words they must be “shown externally” or “demonstrated.” The Legislature did not want expectations of privacy to count that remained unexpressed. Consequently, the Legislature imposed a simple requirement that the expectation be “exhibited”. At no point did Chief Rolle, or for that matter, any participant in the meeting exhibit any expectation of privacy. Although that easily could have been done, Chief Rolle set no ground rules for the meeting he elected to call. At no point did any one

from the HPD suggest that the meeting was confidential or “off the record.” Nor was there advance notice or published or displayed rules that established confidentiality and certainly none that prohibited note taking or recordings. It is therefore clear to us that because Chief Rolle failed to “exhibit” the expectation of privacy that is required by the statute, the government is not entitled to invoke it and McDonough did not violate it.

The recording also falls under an exception carved out in section 934.02 for communications “uttered at a public meeting.” FLA. STAT. § 934.02. McDonough was a member of the public who attended the meeting at Chief Rolle’s invitation. The public nature of this meeting became all the more evident when Chief Rolle allowed Livingston, a second and uninvited member of the public, to attend. In *Dept. of Ag. & Con. Servs. v. Edwards*, 654 So.2d 628, 632-33 (Fla. 1st DCA 1995), the court found that the fact that several people were present at a meeting rendered any subjective expectation of privacy unreasonable. Here, there were at least four participants present: two members of the public, and two public officials also attended the meeting in the performance of their official duties. Moreover, the topic of their meeting was one of acute public interest: citizens discussing allegations of possible police misconduct with the chief of police. The fact that the content of the meeting would likely be subject to public record disclosure is underscored by the fact that Aquino assured McDonough that “we have all of this recorded, what you stated . . .” Appendix at 165.

Furthermore, in addition to the fact that an expectation of privacy must be exhibited, the statute

also requires that the “circumstances” must “justify [an] expectation” of privacy. FLA. STAT. § 934.02. If no privacy-related ground rules were established in advance of this public meeting, then circumstances that could justify an expectation of privacy do not exist. This conclusion is firmly grounded in Florida law. All the attendees were charged with knowledge that the content of their conversation could be subject to public records disclosure laws. *See* FLA. STAT. § 286.011 (2012) (Florida’s Government in the Sunshine Law). As the Florida Supreme Court has emphasized, the “Florida Constitution contemplates that public business is to be conducted in the ‘sunshine.’” *Edwards*, at 631; *see also* FLA. CONST. art. II, § 8. Based on this open-government premise, the facts that all attendees of the meeting were either public employees acting in furtherance of their public duties, or members of the public discussing a matter of public interest, undermines any objective expectation of privacy.

The Florida Supreme Court has interpreted § 934.02 to require “a reasonable expectation of privacy,” which includes “one’s actual subjective expectation of privacy as well as whether society is prepared to recognize this expectation as reasonable.” *State v. Inciarrano*, 473 So.2d 1272, 1275 (Fla. 1985) (citing *Shapiro v. State*, 390 So.2d 344 (Fla. 1980), *cert. denied*, 450 U.S. 982 (1981)) (emphasis in original). Thus, in *Inciarrano*, a criminal defendant who murdered a victim in an office meeting moved to suppress a recording that the victim made of the meeting. The Florida Supreme Court held that even though the defendant had a subjective expectation of privacy, there was no reasonable objective expectation

of privacy because the meeting took place in an office, which the court noted as having a “quasi-public nature.” *Inciarrano*, 473 So.2d at 1274. Other Florida decisions support our conclusion. *See e.g., State v. Smith*, 641 So.2d 849, 852 (Fla. 1994) (no reasonable expectation of privacy where recorded conversation was held in the back of a police car); *Edwards*, 654 So.2d at 632-33 (no reasonable expectation of privacy where the recorded conversation was between three police officers in an office meeting about employment grievances).

CONCLUSION

We hold that because the recording on February 7, 2014 falls outside of the definition of “oral communication” in section 934.02, McDonough did not violate the statute and it imposes no restriction on his use of the recording he made at that meeting.³ For the foregoing reasons, the judgment of the district court is reversed and the matter is remanded to the district court for further proceedings, if necessary, consistent with this opinion.

³ We are not called on to reach the constitutional issue of whether the recording is protected by the First Amendment. *See BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1176 (11th Cir. 2001) (noting the “longstanding principle that federal courts should avoid reaching constitutional questions if there are other grounds upon which a case can be decided.”)(citing *Santamorena v. Ga. Military Coll.*, 147 F.3d 1337, 1343 (11th Cir. 1998)).

ED CARNES, Chief Judge, dissenting:

Because James McDonough covertly recorded a conversation with the police chief during a meeting, he received a letter from the State Attorney's Office threatening, in no uncertain terms, to prosecute him for violating Florida's Wiretap Act if he engaged in similar recording activity in the future. Because of the threat, McDonough filed this lawsuit seeking a declaratory judgment that it would violate the First Amendment to prosecute him for covertly recording the chief or other law enforcement authorities in the same or similar circumstances, and also asking for an injunction prohibiting the State Attorney from prosecuting him.

Instead of deciding whether the threatened prosecution violates the First Amendment and the State Attorney should be enjoined, the Court tells McDonough not to worry about it. He shouldn't worry about it because what he did before and wants to do again does not, in the Court's view, violate the Florida Wiretap Act. That will come as news to the State Attorney and to some of us who have read the various (and varied) Florida appellate court decisions interpreting that act.

The Court remands this case to the district court for further proceedings consistent with this opinion "if necessary." McDonough wants to do something that the State Attorney has threatened to prosecute him for doing. There are, I suppose, two possibilities about whether more will be necessary on remand and, if so, what more. One possibility is that the State Attorney will read the opinion and be persuaded by it, apologize for bothering McDonough, and assure him that he can continue to covertly record conversations in

circumstances like those that prompted her unfriendly letter to him in the first place.

The second possibility is that the State Attorney will not disavow her intent to prosecute McDonough if he commits this type of conduct again in the future. If that is the situation, McDonough will be back where he started, except that he has been told not to bother this Court with his constitutional claim. The only way for him to get protection from prosecution is for the district court to enjoin the State Attorney from prosecuting him on the ground that this Court has determined that his conduct does not violate Florida law. To conduct further proceedings “consistent with this opinion” the district court will have to declare that McDonough’s conduct does not violate the Florida Wiretap Act and enjoin the State Attorney from prosecuting him. Failing to do that would be “[in]consistent with this opinion” and its holding that the conduct in question is not contrary to Florida law.

In order to comply with this Court’s remand instructions, the district court will have to do what the Supreme Court has unequivocally held that federal courts cannot do, which is lecture state officials on state law. The reason they cannot do that, the Court has explained, is that: “[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.” Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S. Ct. 900, 911 (1984). This Court has done what Pennhurst instructs us not to do, which is tell the State Attorney “how to conform [her] conduct to state

law.” If she prosecutes McDonough for his covert recording activities, this Court says, she will not be conforming her conduct to Florida law.

To avoid deciding a First Amendment issue, the Court violates the Eleventh Amendment. While federal courts “should avoid reaching constitutional questions if there are other grounds upon which a case can be decided,” BellSouth Telecomms., Inc. v. Town of Palm Beach, 252 F.3d 1169, 1176 (11th Cir. 2001), we cannot do so at the Eleventh Amendment’s expense, see Pennhurst, 465 U.S. at 121–23, 104 S. Ct. at 919–20 (“[C]onsiderations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State.”). Because of Pennhurst and the principles it espouses, I cannot join the constitutional avoidance effort in this case. We should, as a Court, reach and decide the First Amendment issue and not instruct Florida officials how they must read the law of that state.

APPENDIX B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 15-20038-CIV-ALTONAGA/O’Sullivan

JAMES ERIC McDONOUGH,

Plaintiff,

v.

KATHERINE FERNANDEZ RUNDLE,
officially as State Attorney of Miami-Dade
County, Florida,

Defendant.

_____/

ORDER

THIS CAUSE came before the Court on Plaintiff, James Eric McDonough’s (“Plaintiff[s]”) Renewed Motion for Summary Judgment . . . (“Plaintiff’s Motion”) [ECF No. 47], filed July 2, 2015; and Defendant, Katherine Fernandez Rundle’s (the “State Attorney[s]”) Cross-Motion for Summary Judgment (“State’s Motion”) [ECF No. 59], filed July 23, 2015. Plaintiff filed a combined Response . . . And Reply . . . (“Plaintiff’s Response”) [ECF No. 63] on August 9, 2015; and the State Attorney filed a Reply . . .

(“State’s Reply”) [ECF No. 68] on August 17, 2015. The Court has carefully considered the parties’ written submissions,¹ the record, and applicable law.

I. BACKGROUND²

This case arises out of Plaintiff’s interaction with members of the Homestead Police Department (“HPD”). (*See generally* Pl.’s SMF). Plaintiff arranged to meet with HPD Chief Alexander E. Rolle, Jr. (“Rolle”) in February 2014 to complain about the actions of certain members of the HPD. (*See id.* ¶¶ 7–8; State’s SMF Resp. ¶ 7). During the meeting, Plaintiff surreptitiously³ recorded conversations on his

¹ The additional documents include Plaintiff’s Statement of Undisputed Material Facts (“Plaintiff’s SMF”) [ECF No. 48], filed July 2, 2015; the State Attorney’s Response . . . (“State’s SMF Response”) [ECF No. 58-1], filed August 9, 2015; Plaintiff’s Response to Defendant’s Statement of Undisputed Material Facts (“Plaintiff’s SMF Response”) [ECF No. 66], filed July 23, 2015; and the State Attorney’s Reply . . . (“State’s SMF Reply”) [ECF No. 68-1], filed August 17, 2015.

² Unless otherwise noted, the facts presented in this section are undisputed.

³ According to Plaintiff, when he entered Rolle’s office, he put his cell phone on binders he placed on Rolle’s desk and “tilted it at” Rolle “so he could look at it”; Plaintiff looked at his phone, looked at Rolle, the screen was on saying “record,” Rolle looked at Plaintiff and gave him a nod, so Plaintiff “figured” Rolle understood he was recording him. (McDonough Dep. [ECF No. 58-5] 42:4-12). Nevertheless, Plaintiff describes his own recording as “surreptitious” (Pl.’s Mot. 8), and it is undisputed Plaintiff did not obtain consent from any of the HPD personnel whose voices were recorded (*see* Pl.’s SMF ¶¶ 11, 12; State’s SMF Resp. ¶ 11).

phone, “anticipating the gathering of newsworthy evidence and ensuring that an objective record of the proceedings would be available.” (Pl.’s SMF ¶ 13). Plaintiff began recording while he was in a waiting room (*see* State’s SMF Reply ¶ 48), and over the course of the recording in Rolle’s office, Plaintiff captured not only his conversation with Rolle and another detective who participated in part of the conversation (*see* Pl.’s SMF ¶¶ 9–11), but also: 1) Rolle’s ten-minute phone conversation with his wife, which occurred while Plaintiff was in the office (*see* State’s SMF Resp. ¶ 32); 2) Rolle’s conversation with a female detective who briefly entered the office (*see id.* ¶ 35); and 3) two female voices engaged in an unrelated conversation outside the office (*see id.* ¶¶ 33–34).

After he published an edited version of the recording in a video online, the Office of the State Attorney threatened Plaintiff with possible arrest or prosecution. (*See* Pl.’s SMF ¶¶ 14–15). The State Attorney claimed recording under the same or similar circumstances as the February 2014 meeting constituted a violation of Florida Statute section 934.03 (*see id.* ¶ 15), which states in part:

- (1) Except as otherwise specifically provided in this chapter, any person who:
 - (a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;

[or] . . .

- (c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . .

shall be punished as provided in subsection (4).

* * *

- (4) (a) Except as provided in paragraph (b), whoever violates subsection (1) is guilty of a felony of the third degree

FLA. STAT. § 934.03 (alterations added) (hereinafter, the “Statute”).

Plaintiff “believes he has a right under the First Amendment to record speech by public officials during the course of their official duties.” (Compl. [ECF No. 1] ¶ 14). He wishes to exercise that right, but the threat of “possible prosecution for recording and publishing information of public interest” has caused him to refrain from doing so. (*Id.* ¶ 16). The Complaint contains a single cause of action, alleging the Statute “is unconstitutional on its face and as applied to Plaintiff’s actions, in violation of his rights under the First and Fourteenth Amendments to the U.S. Constitution.” (*Id.* ¶ 20). Plaintiff originally sought a declaration the Statute is unconstitutional

on its face, a declaration it is unconstitutional as applied to his actions, and an injunction prohibiting the State Attorney from enforcing the Statute. (*See id.* 4). In a February 10, 2015 Order (“Feb. 10 Order”) [ECF No. 17], the Court dismissed the facial challenge, leaving only the as-applied challenge. (*See generally id.*).

In support of his requested summary judgment, Plaintiff asserts intermediate scrutiny applies to all recordings of police, regardless of location, and under that standard, the State Attorney has not met her burden of showing the Statute’s restriction on his protected speech is essential to the furtherance of any substantial government interest. (*See Pl.’s Mot.* 12–13). While Plaintiff argues the analysis should be limited to the recording of Rolle because Plaintiff intended to record only Rolle, Plaintiff also insists none of the people recorded had a justified expectation of privacy. (*See id.* 7–8). The State Attorney seeks summary judgment in her favor, explaining under the applicable three-step analysis discussed below, the level of scrutiny is determined by the forum where the speech takes place, and in the nonpublic forum at issue here, the Statute is constitutional as applied because it is rationally related to a reasonable government interest and merely reserves a police station for its intended purposes. (*See State’s Mot.* 20). The State Attorney also argues the inadvertent capture of voices from other people who, like Rolle, had a justified expectation of privacy, only further demonstrates the reasonableness of the Statute’s restriction. (*See id.* 17–18).

II. LEGAL STANDARD

Summary judgment is rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(a), (c). “An issue of fact is material if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case.” *Burgos v. Chertoff*, 274 F. App’x 839, 841 (11th Cir. 2008) (internal quotation marks omitted) (quoting *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (internal quotation marks omitted)). “A factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Channa Imps., Inc. v. Hybur, Ltd.*, Case No. 07-21516-CIV, 2008 WL 2914977, at *2 (S.D. Fla. July 25, 2008) (internal quotation marks omitted) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

III. ANALYSIS

Pursuant to the First Amendment, “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I (alteration added). Under the Fourteenth Amendment, Plaintiff’s First Amendment right to freedom of speech is protected from infringement by state actors. *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947). An alleged free speech violation is examined in three steps. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788,

797 (1985). First, the court must decide whether the speech in question is protected speech. *See id.* Second, if it is, the court must determine what the relevant forum is — public or nonpublic — in order to analyze the extent to which the state actor may limit speech within that forum. *See id.* Third, the court assesses whether the reasons offered by the state actor in limiting a plaintiff's access to the forum comport with constitutional standards for that forum. *See id.*; *see also Parkland Republican Club v. City of Parkland*, 268 F. Supp. 2d 1349, 1352-53 (S.D. Fla. 2003) (summarizing three-step analysis).

A. Protected Speech

“Laws that restrict the use of expressive media have obvious effects on speech and press rights; the Supreme Court has ‘voiced particular concern with laws that foreclose an entire medium of expression.’” *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (collecting cases)) (other citations omitted). The parties do not contest the speech at issue is a form of expression that is protected. Audio and audiovisual recordings are media of expression commonly used for the preservation and dissemination of information and ideas, and thus are “included within the free speech and free press guaranty of the First and Fourteenth Amendments.” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding motion pictures are a protected form of speech). “The act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of

the right to disseminate the resulting recording.” *Alvarez*, 679 F.3d at 595 (emphasis omitted). Further, “[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.” *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (alteration added; citations omitted).

It is undisputed Plaintiff made an audio recording on his phone and published an edited version of that recording online. (See Pl.’s SMF ¶¶ 10, 14). Plaintiff’s recording and publication constitute protected speech under the First Amendment. See *Alvarez*, 679 F.3d at 597.

B. Forum Analysis

Constitutionally protected speech does not guarantee unlimited access to government property. See *Snowden v. Town of Bay Harbor Islands, Fla.*, 358 F. Supp. 2d 1178, 1190 (S.D. Fla. 2004) (citing *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581, 586 (7th Cir. 1995)). “The right to use government property for one’s private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (citation omitted); see also *United States v. Kokinda*, 497 U.S. 720, 726 (1990) (“[T]he extent to which the Government can control access depends on the nature of the relevant forum.”) (alteration added; quoting *Cornelius*, 473 U.S. at 800)).

Properly identifying the relevant forum requires an approach that considers the government property at issue as well as the type of access sought. *See Cornelius*, 473 U.S. at 801; *Summum v. City of Ogden*, 297 F.3d 995, 1001 (10th Cir. 2002) (noting the analysis requires “identification and classification of the relevant forum and then, depending upon the forum’s classification, application of the relevant standard of Free Speech Clause review”). In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), for example, a political candidate sought to display a campaign advertisement on a city-owned bus; the Supreme Court analyzed only the advertising space on the bus. *See id.* at 303–04. And in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983), the Supreme Court defined the forum at issue as an interschool mail system and teacher mailboxes that the plaintiff teacher group specifically sought to access. *See id.* at 47.

Here, the recording in question occurred in a limited area — primarily within Rolle’s office, as well as briefly in a waiting room and hallway inside a police station. (*See McDonough Dep.* 39). Nevertheless, Plaintiff sought, and indeed still seeks, general access to record within at least the entire police station: “The Plaintiff seeks the legal ability to record a police officer no matter where the conversation takes place. The location of that conversation and recording should be of no constitutional importance.” (Pl.’s Resp. 5). Because Plaintiff seeks general access to record conversations anywhere in the police station, the forum at issue in this as-applied challenge is appropriately defined as the entire HPD offices.

The Supreme Court has recognized three separate types of fora in which speech can take place: traditional public fora, limited public fora, and nonpublic fora. *See Perry*, 460 U.S. at 45–46. Traditional public fora include “streets and parks which ‘have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’” *Id.* at 45 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)). In a public forum, the government may not enforce a content-based restriction unless it is necessary to achieve a compelling state interest and is narrowly drawn to achieve that interest. *See id.* (citation omitted).

A limited public forum is an area the government “has opened for use by the public as a place for expressive activity.” *Id.* This forum “may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects” *Id.* at 46 n.7 (alterations added; internal citations omitted). In a limited public forum, reasonable time, place, and manner restrictions are permissible, and content-based restrictions must be narrowly drawn to further a compelling state interest. *See id.* at 46 (citation omitted).

A nonpublic forum is public property that is “not by tradition or designation a forum for public communication” *Id.* (alteration added). Within a nonpublic forum, “[i]n addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the

speaker’s view.” *Id.* (alterations added) (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129–130 (1981)). Restrictions on speech in nonpublic fora are reasonable when “consistent with the [government’s] legitimate interest in ‘preserv[ing] the property . . . for the use to which it is lawfully dedicated.” *Id.* at 50–51 (first alteration added) (quoting *Postal Serv.*, 453 U.S. at 129–130).

Applying the forum analysis framework to the facts, the Court must next determine what type of forum the HPD police station is. *See Parkland Republican Club*, 268 F. Supp. 2d at 1355. According to the State Attorney, the entire police station is a nonpublic forum. (*See* State’s Mot. 5–8). This position finds support in the case law. The Seventh Circuit has held the interior of a police station is not a public forum. *See First Def. Legal Aid v. City of Chicago*, 319 F.3d 967, 968 (7th Cir. 2003); *see also Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 231 (2d Cir. 1996) (holding even when a police department allows outside groups to use bulletin boards within a police station, the bulletin boards remain nonpublic fora); *Vincent v. City of Sulphur*, 28 F. Supp. 3d 651, 656 (W.D. La. 2014). The Tenth Circuit has suggested, at a minimum, there are nonpublic fora within a police department. *See Dill v. City of Edmond, Okl.*, 155 F.3d 1193, 1202 (10th Cir. 1998) (noting “Plaintiff chose a private forum within the police department” (alteration added)).

The Eleventh Circuit does not appear to have addressed this specific issue, but it has outlined its analytical process — consistent with *Cornelius* — by holding ingress and egress walkways to a post office building are nonpublic fora because they “are

intended to accommodate traffic to and from the post office for the conduct of postal business and have not traditionally been sites for expressive conduct.” *United States v. Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986). By the same logic, the interior of a police station, no less a police chief’s office and waiting room, in what Plaintiff describes as a restricted access, administrative area (*see* Pl.’s Dep. 34–43), has not traditionally been a site used for “assembly, communicating thoughts between citizens, and discussing public questions.” *Hague*, 307 U.S. at 515. The interior of a police station — its purpose — is to allow the performance of police functions. *See Huminski v. Corsones*, 396 F.3d 53, 90 (2d Cir. 2005) (“We are particularly reluctant to conclude that government property is a public forum ‘where the principal function of the property would be disrupted by expressive activity.’” (quoting *Cornelius*, 473 U.S. at 804)).

It is undisputed Plaintiff seeks access to record in the police station. (*See* Pl.’s Resp. 5). The Court agrees with the State Attorney the forum at issue is nonpublic.⁴

In his Motion, Plaintiff argues — without reference to the fora involved — intermediate scrutiny should apply by analogizing to other cases involving recordings of police officers. (*See* Pl.’s Mot. 5–7). Critically, the cases Plaintiff discusses analyzed recordings in public fora. (*See id.* (discussing *Glik v.*

⁴ Plaintiff argues the State Attorney’s forum analysis is incorrect because the cases discussed do not involve “the type of speech the Plaintiff is asking the Court to protect.” (Pl.’s Resp. 4). Yet Plaintiff fails to provide any support for the argument the type of speech decides or affects the forum determination.

Cunniffe, 655 F.3d 82, 84 (1st Cir. 2011) (affirming district court’s denial of qualified immunity defense asserted by police officers to section 1983 claims brought by plaintiff arrested for filming officers in “the oldest city park in the United States”); *Alvarez*, 679 F.3d 583, 586 (reversing dismissal and denial of preliminary injunction enjoining state from applying eavesdropping statute against people who openly planned to record police officers performing official duties in public))). Indeed, although he relies on these cases, Plaintiff tacitly concedes the differences in the fora: “Although in this case, the Plaintiff’s surreptitious recording of the police occurred in the Chief’s office and not in a space open to the public, it is a distinction without a constitutional difference.” (*Id.* 8 (alterations added)).

Plaintiff’s assertion, “The constitutional analysis should be the same as if the meeting took place in some public area,” repeated without support in Plaintiff’s Response (*see* Pl.’s Resp. 5), is unavailing.⁵

⁵ Plaintiff essentially argues recordings of police officers should be reviewed with the same level of scrutiny regardless of the fora in which the recordings occur. (*See* Pl.’s Mot. 9–10). Even if police recordings were accorded special constitutional protection, this finding would address only the first inquiry — whether that type of speech is protected. Plaintiff has not cited a single case that suggests this factor displaces the subsequent forum analysis and determines the level of scrutiny to apply. Furthermore, “[t]here is no clearly established, ‘unfettered’ constitutional right, in generalized terms, under the First, Fourth, or any other Amendment, to record police officers in the performance of their duties.” *Snyder v. Daugherty*, 899 F. Supp. 2d 391, 413–14 (W.D. Pa. 2012) (alteration added; citations omitted). Establishing recordings of police are protected is distinct from determining whether restrictions on protected speech are reasonable in a given forum.

The forum determines the standard of review. *See Kokinda*, 497 U.S. at 726. Especially in an as-applied challenge, focusing on the specific facts of this case, the forum simply cannot be ignored. Additionally, Plaintiff's argument his alleged invitation to the meeting alters the forum analysis by "tak[ing] this conversation out of the restrictions dealing with a non-public forum" (Pl.'s Mot. 4–5 (alteration added); *see also* Pl.'s Resp. 8), is without merit, and Plaintiff does not cite any legal authority supporting his position.⁶

⁶ Otherwise nonpublic fora may be deemed limited public fora when the government invites speakers to them for "types of expressive activity [that] are not incompatible with the forum." *Cornelius*, 473 U.S. at 820 (alteration added). Even if Plaintiff was invited to speak with Rolle (and it is disputed whether an agreed-upon meeting is an "invitation" (*see* Pl.'s Resp. 4 n.2)), examples of formally invited speakers in this context are inapposite. *See, e.g., Cornelius*, 473 U.S. at 820 (discussing how a military base became a limited public forum to the extent a speaker was invited to lecture about drug abuse.). Plaintiff provides no support for finding a personal meeting in a private office creates a limited public forum, invitation or not. Additionally, because Plaintiff insists on the right to record any conversation with police in any forum (*see* Pl.'s Resp. 5), the Court does not take the limited public forum analysis any further. The State Attorney rightly notes neither Rolle's status as a police officer, nor Plaintiff's access to a nonpublic forum, renders the HPD police station anything but a nonpublic forum. (*See* State's Mot. 7 (citing *Jacobsen v. Bonine*, 123 F.3d 1272, 1273 (9th Cir. 1997) ("[N]ot all publically owned property becomes a public forum simply because the public is permitted to come and go at the site." (alteration added)))).

C. Applying the Appropriate Level of Scrutiny

Having determined the relevant forum is nonpublic, the Court now turns to the appropriate level of scrutiny:

The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated.

Cornelius, 473 U.S. at 808 (citations omitted; emphasis in original). Further, "[t]he reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Id.* at 809 (alteration added).

The State Attorney offers several reasons why prohibiting covert recordings in a police station is reasonable: 1) victims or informants are better able to report or discuss criminal activity without fear of being revealed; 2) police personnel can more freely converse without fear of compromising the integrity or confidentiality of ongoing investigations; 3) privileged attorney-client discussions in a police station are more likely to remain private; and 4) police department employees who may communicate with others regarding their personal lives from or within the building may better retain their privacy. (See State's

Mot. 16). The State Attorney also cites the interest of insuring peace and avoiding controversy within the workplace, as recognized by the D.C. Circuit when it held speech within the Capitol building — a far more important traditional venue for expression than police stations, but a nonpublic forum nonetheless — “may be regulated in order to permit Congress peaceably to carry out its lawmaking responsibilities and to permit citizens to bring their concerns to their legislators.” (State’s Reply 5 (quoting *Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50, 55 (D.D.C. 2000))); *see also Cornelius*, 473 U.S. at 809–10.

Plaintiff’s arguments assailing the reasonableness of the Statute’s restrictions fail to persuade because they assume intermediate scrutiny, advocating for a result under an inapplicable standard. (See, e.g., Pl.’s Mot. 13 (“[T]he Statute’s blanket restriction is greater than is essential to the furtherance of any governmental interest.” (alteration added)). Plaintiff asserts the State Attorney “misunderstands and misapplies the holding in *Alvarez*” — despite Plaintiff’s own repeated misapplication of *Alvarez* without regard to fora — because “the ACLU program involved recordings in which they would not necessarily be a participant in the conversation. That is not the case here. The only recordings the Plaintiff wishes to make are those in which he is a party.” (Pl.’s Resp. 5). Plaintiff’s argument about his future intentions does not create a disputed material fact; the recording at issue undisputedly captured conversations to which Plaintiff was not a party. (See State’s SMF Resp. ¶¶ 32–35). Plaintiff further argues his intent to limit his recordings to conversations to which he is a party

“would not interfere with other civilians who wished to candidly speak with law enforcement” or risk recording matters of security or importance. (Pl.’s Resp. 5). To the contrary, Plaintiff’s inadvertent capture of other conversations despite his stated intention demonstrates the risk of covert recordings and, in turn, the reasonableness of the State Attorney’s concerns about allowing non-consensual recordings in a police station. (*See* State’s Mot. 16).

Plaintiff also makes two arguments regarding expectations of privacy (first as to Rolle and second as to the other people Plaintiff recorded), that are relevant here because the Statute defines covered “oral communication” as anything “uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation” FLA. STAT. § 934.02(2) (alteration added). According to Plaintiff, Rolle lacked a reasonable expectation of privacy because he is a police officer. (*See* Pl.’s Mot. 7–8; Pl.’s Resp. 8–9). Plaintiff does not cite a single case supporting that assertion.

Plaintiff also argues Rolle had no expectation of privacy in the other conversations that occurred in his office “in front of the Plaintiff, never asking him to leave.” (*Id.* 7). Yet Plaintiff is not threatened with prosecution for *overhearing* these conversations; rather, in this as-applied challenge, his threatened violation consists of *recording and publishing* those conversations overheard without consent. More importantly, even if Rolle had no expectation of privacy in the phone call he allowed Plaintiff to overhear one-half of, or his own conversation with Plaintiff for that matter, Plaintiff would still have

violated the Statute — and therefore be properly subject to prosecution under it — for recording the conversations that occurred outside Rolle’s office, provided the other people who were recorded had the requisite justifiable expectation their communications would not be intercepted. *See* FLA. STAT. § 934.02(2).

As to those other people, Plaintiff argues they forfeited any expectation of privacy by speaking loudly enough for those not involved in the conversations to overhear them. (*See* Pl.’s Resp. 7 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment Protection.”))). Again, these conversations did not occur “in the public;” they occurred in a nonpublic forum. Personal conversations within a restricted area of a police station — all of which Plaintiff concedes were surreptitiously recorded — were not knowingly exposed to the public. Even if Plaintiff’s arguments for unfettered access to record police officers were correct, and the Court does not find they are, Plaintiff offers no persuasive reason why the Statute’s prohibition of his recording these additional conversations would be unreasonable or unconstitutional. Thus, the State Attorney’s arguments based on the risk of capturing conversations beyond the intended conversation (*see* State’s Mot. 16), are rightly considered.

Additionally, the State Attorney argues not only is this restriction content-neutral, the Statute’s restriction on covert recordings in a police station leaves open alternate routes of expression. Members of the public are not prohibited from speaking about their conversations within a police station, taking

notes while such conversations are occurring, or even making consensual recordings. (See State’s Mot. 19–20 (citing *United States v. Hastings*, 695 F.2d 1278, 1280-82 (11th Cir. 1983) (holding a ban on electronic audio-visual recording devices in a courtroom does not restrict the public’s ability to report on court news))); FLA. STAT. § 934.03(2)(d). Plaintiff disagrees because he deems the ban on covert recording “a complete ban on recording” and “not a reasonable restriction.” (Pl.’s Resp. 5). Yet the Statute is not a “complete ban on recording” (*id.*); in this as-applied challenge, the Statute is challenged insofar as it restricts a *covert* recording within the nonpublic forum of a police station. (See Pl.’s SMF ¶¶ 10, 11). Recording in a police station with consent is not prohibited. See Fla. Stat. § 934.03(2)(d) (allowing interception when all parties have given prior consent).

Plaintiff also disputes the adequacy of the alternatives proposed by the State Attorney based on another tortured reading of *Alvarez*: “[I]n terms of the *privacy* interests at stake, the difference [between audio recording and notes] is not sufficient to justify criminalizing this particular method of preserving and publishing the public communications of these public officials.” (Pl.’s Resp. 9–10 (quoting 679 F.3d at 606 (emphasis in original; alterations added))). The court in *Alvarez* clarified the stated concerns of unreasonable intrusions into privacy and private lives were not at issue there because the “ACLU wants to openly audio record police officers . . . in public places” *Id.* at 605 (alterations added). Moreover, *Alvarez* noted the “proposed recording will be otherwise lawful — that is, not disruptive of public order or safety, and carried out by people who have a legal right to be in a

particular public location and to watch and listen to what is going on around them.” *Id.* These facts are simply inapposite to the present case. Not only was Plaintiff’s recording not open or in a public place, it would not otherwise be legal: the State Attorney has articulated reasonable concerns Plaintiff’s recording could be disruptive of public order or safety, and as Plaintiff laments, the Statute does not create an exception for police (*see* Pl.’s Mot. 6–7).

In light of the purpose of the forum and all the surrounding circumstances, *see Cornelius*, 473 U.S. at 809, allowing unfettered, covert recording within a police station, without the consent of all parties to a recorded conversation — no less every other person who is or may come within earshot during the course of the unknown recording — would jeopardize at least some of the various interests identified by the State Attorney.⁷ Therefore, the Court finds the Statute’s restriction on Plaintiff’s covert recording in a police station, as presented in this as-applied challenge, is reasonable and viewpoint neutral.

⁷ The State Attorney suggests slippery slope hypothetical situations militate against finding the Statute unconstitutional. (*E.g.*, State’s Mot. 10 (suggesting to allow Plaintiff the right to this recording would be to invite terrorists to spy in the White House); *id.* 14 (arguing to permit Plaintiff to record in the manner requested “would result in countless people” walking into any and every public office, even judges’ chambers)). The Court does not rely on these scenarios in entering judgment in this case.

IV. CONCLUSION

Throughout this as-applied challenge, Plaintiff attempts to broaden the scope of the narrow issue presented. Plaintiff invokes the recent nationwide coverage of tragic shootings involving police officers that have been, or could have been, resolved or prevented with better recordings of police officers. (See Pl.'s Mot. 10). Plaintiff argues his conduct is legal in a majority of states (*see* Pl.'s Resp. 12), and emphasizes the importance of being able to record police officers in uncovering and addressing abuses by public officials. (*See id.* 9–10, 12–13). Only the specific, undisputed facts of this case are before presently the Court. And just as the Court previously dismissed Plaintiff's facial challenge to the Statute because there are circumstances in which it may operate constitutionally (*see* Feb. 10 Order 4), the Court grants summary judgment in favor of the State Attorney because, based on the undisputed material facts, Plaintiff's covert recording in a nonpublic forum presents one of those constitutional circumstances. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) ("The right to speak and publish does not carry with it the unrestrained right to gather information." (emphasis omitted) (quoting *Zemel v. Rusk*, 381, U.S. 1, 16–17 (1965))).

Based on the foregoing, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion [ECF No. 47] is **DENIED**.

37a

2. The State's Motion [ECF No. 59] is **GRANTED**.
3. Final summary judgment will issue by separate order.

DONE AND ORDERED in Miami, Florida, this 17th day of September, 2015.

A handwritten signature in black ink, reading "Cecilia M. Altonaga". The signature is written in a cursive, flowing style.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-14642-GG

JAMES ERIC MCDONOUGH,

Plaintiff - Appellant,

versus

KATHERINE FERNANDEZ-RUNDLE,
in her official capacity as State Attorney,
Eleventh Judicial Circuit, State of Florida,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

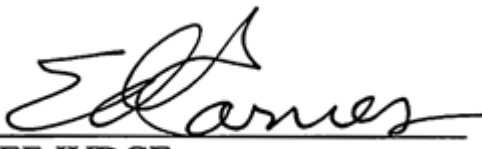
ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: ED CARNES, Chief Judge, FAY and PARKER,* Circuit Judges.

PER CURIAM:

The Petition(s) for rehearing are DENIED and no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:


CHIEF JUDGE

* Honorable Barrington D. Parker, Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami-Dade Division

DR. JAMES ERIC MCDONOUGH,
Plaintiff,

vs.

Case No.:15-20038

KATHERINE FERNANDEZ-RUNDLE, in her official
capacity as State Attorney, Eleventh Judicial Circuit,
State of Florida,

Defendant.

_____ /

COMPLAINT

INTRODUCTION

1. This action challenges the constitutionality of Florida Statute §934.03, which prohibits and criminalizes the recording of conversations under certain circumstances, as being overly broad and vague both facially and as applied to Dr. McDonough.
2. The Plaintiff has been threatened with prosecution by the Defendant and her assistants for recording conversations with members of the Homestead Police Department.
3. The Plaintiff had a meeting with Chief Alexander Rolle and Detective Antonio Aquino, at Homestead

Police Department (HPD) on February 7, 2014. He was there to file a complaint concerning Homestead Officer Alejandro Murguido, who had initiated an arrest of the Plaintiff without probable cause and Detective Aquino, who the Plaintiff believed had advised Officer Murguido to initiate an injunction and criminal complaint against the Plaintiff.

4. Plaintiff recorded this meeting, anticipating the gathering of newsworthy evidence and ensuring that an objective record of the proceedings would be available. The Plaintiff was later threatened with possible arrest and prosecution, under §934.03 after segments of the recording were published. Having received a letter from the Miami-Dade State Attorney threatening him with prosecution, the Plaintiff reasonably fears arrest and prosecution should he again record conversations with Homestead, or any other, police officers. The statute therefore chills the Plaintiff's exercise of his rights under the First Amendment.

JURISDICTION

5. Plaintiff brings this action pursuant to 42 U.S.C. § 1983 for violation of his rights under the First and Fourteenth Amendments to the United States Constitution.
6. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a) (3). Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202, and injunctive relief pursuant to Fed.R.Civ.P. 65.

PARTIES

7. Plaintiff Dr. James Eric McDonough is a resident of Miami-Dade County, Florida.
8. Defendant Katherine Fernandez-Rundle is the State Attorney for the Eleventh Judicial Circuit, State of Florida. Defendant Fernandez-Rundle's office is responsible for threatening Plaintiff with possible arrest and/or prosecution for his alleged violation of §934.03. Defendant Fernandez-Rundle is sued in her official capacity only for injunctive and declaratory relief.

FACTS

9. On February 7, 2014, the Plaintiff had a meeting with Chief Rolle and Detective Aquino of the Homestead Police Department. The Plaintiff was at the Homestead Police Department to formally complain about the actions of Officer Murguido and Detective Aquino towards the Plaintiff.
10. Plaintiff recorded this conversation in order to have a record of the meeting and later published the contents of this meeting.
11. After the contents were published, a complaint was filed with the Defendant, alleging that the Plaintiff had unlawfully recorded the conversation on that date.
12. In response to this complaint the Defendant, through Assistant State Attorney Jacci Seskin, sent the Plaintiff a cease and desist letter dated December 9, 2014, threatening possible arrest and/or prosecution, particularly for future

violations pursuant to §934.03.¹ The statute states in part:

934.03 Interception and disclosure of wire, oral, or electronic communications prohibited.—

1) Except as otherwise specifically provided in this chapter, any person who:

(a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;

(c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4).

(4)(a) Except as provided in paragraph (b), whoever violates subsection (1) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 934.41.

13. Under the interpretation of §934.03 as written in the letter by the Defendant, the Miami-Dade State Attorney would seek the arrest and prosecution of the Plaintiff if he continued to record under the

¹ The letter is attached and filed with the Complaint.

same or similar circumstances as on February 7, 2014.

14. The Plaintiff believes he has a right under the First Amendment to record speech by public officials during the course of their official duties.
15. Plaintiff desires to exercise that right.
16. Having been threatened with possible prosecution for recording and publishing information of public interest, the Plaintiff has refrained from exercising that right for fear of prosecution.
17. Unless the statute is declared unconstitutional by this Court, the Plaintiff will continue to be subject to arrest and prosecution, if he engages in protected speech. Plaintiff has been and will continue to be irreparably harmed by this threat, which results in the denial of the Plaintiff's constitutional rights.
18. Plaintiff has no adequate remedy at law because the denial of Plaintiff's constitutional rights cannot be remedied through legal relief.
19. The threatened arrest and prosecution of Plaintiff, and enforcement of the statute, by Defendants was under color of law and pursuant to Defendant's customs, practices and policies.

CAUSE OF ACTION

20. Fla. Stat. §934.03 is unconstitutional on its face and as applied to Plaintiff's actions, in violation of his rights under the First and Fourteenth Amendments to the U.S. Constitution. This violation may be redressed pursuant to 42 U.S.C. § 1983.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully request this Court:

- (a) Declare that Fla. Stat. §934.03 is unconstitutional on its face as a matter of law;
- (b) Declare that Fla. Stat. §934.03 is unconstitutional as applied to Plaintiff's actions as a matter of law;
- (c) Enter a preliminary and/or permanent injunction against Defendants, prohibiting Defendants and their agents, subordinates and employees from enforcing §934.03;
- (d) Award Plaintiff his cost, litigation expenses and attorneys' fees pursuant to 42 U.S.C. §1988; and
- (e) Grant Plaintiff such other and further relief as may, in the discretion of the Court, be just and proper.

Dated: January 7, 2015

Respectfully submitted,

Alan J. Greenstein, P.A.
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Phone: (305) 772-7083
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By: /s/ Alan Greenstein
ALAN GREENSTEIN
Florida Bar No.: 237817

APPENDIX E

No. 15-14642-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES ERIC MCDONOUGH,

Plaintiff–Appellant,

v.

KATHERINE FERNANDEZ–RUNDLE,

Defendant–Appellee.

**PETITION FOR PANEL REHEARING AND
REHEARING EN BANC**

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 1:15-CV-20038-CMA

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*Counsel for Defendant–Appellee
Katherine Fernandez–Rundle*

McDonough v. Fernandez–Rundle Eleventh Circuit
Case No. 15-14642-GG

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and the rules of this Court, Defendant–Appellee submits the following certificate of interested persons:

1. Agarwal, Amit, Solicitor General
2. Altonaga, Cecilia M., U.S. District Judge, Southern District of Florida
3. Bondi, Pamela Jo, Attorney General
4. Eaton, Carrol Cherry, Senior Assistant Attorney General
5. Eggers, Melissa, Assistant Attorney General
6. Fahlbusch, Charles M., former Special Counsel Assistant Attorney General
7. Fernandez–Rundle, Katherine, Defendant–Appellee
8. Florida Department of Financial Services
9. Funes, Freddy, court-appointed amicus curiae
10. Gelber, Schachter & Greenberg, P.A.
11. Glantz, David J., former Senior Assistant Attorney General

12. Greenstein, Alan, trial court counsel for Plaintiff–Appellant
13. McDonough, James Eric, Plaintiff–Appellant
14. O’Sullivan, John, U.S. Magistrate Judge, Southern District of Florida
15. Pratt, Jordan E., Deputy Solicitor General
16. Rolle, Alexander E., Chief of the Homestead Police Department

**RULE 35 STATEMENT REGARDING BASIS
FOR PETITION**

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: Whether a prospective criminal defendant’s claim that a threatened state prosecution is not authorized by state law, standing alone, supplies a basis for obtaining relief in a preemptive civil suit filed in federal court under 42 U.S.C. § 1983. “Section 1983 provides a cause of action against state actors who violate an individual’s *rights* under *federal law*.”

Filarsky v. Delia, 566 U.S. 377, 380 (2012) (emphases added). Under the panel decision in this case, a plaintiff may obtain relief under § 1983 without establishing a violation of *any* right—state *or* federal. That conclusion cannot be reconciled with the text of § 1983 or the caselaw construing it, *e.g.*, *Blessing v. Freestone*, 520 U.S. 329, 340 (1997); *Knight v. Jacobson*, 300 F.3d 1272, 1276 (11th Cir. 2002), and it has been uniformly rejected by the federal courts of appeals.

/s/ Jordan E. Pratt
Attorney of Record for Defendant-Appellee

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STATEMENT OF ISSUE MERITING EN BANC CONSIDERATION

Whether a prospective criminal defendant’s claim that a threatened state prosecution is not authorized by state law, standing alone, supplies a basis for obtaining relief in a preemptive civil suit filed under 42 U.S.C. § 1983.

STATEMENT OF THE CASE AND FACTS

1. On February 7, 2014, Appellant James McDonough met with Homestead Police Department

(“HPD”) Chief of Police Alexander Rolle to discuss his complaints against an HPD officer. DE47:3.¹ The meeting occurred at the police station in the police chief’s personal office. *Id.* McDonough brought a friend with him, and an HPD internal-affairs detective also participated. DE48:2.

McDonough conceded that he used his cell phone to surreptitiously record the conversation that took place. DE69:2 & n.3; DE47:3, 8; *see* DE48:2. McDonough did not allege, and the record does not indicate, that any other participant made an audio or video recording of that meeting.²

Without requesting or receiving Chief Rolle’s permission, McDonough published an edited version of his recording on the Internet. This prompted the State Attorney for the Eleventh Judicial Circuit, Katherine Fernandez–Rundle, to send McDonough a cease-and-desist letter. DE48:3. The letter advised him that his actions had violated the Florida Security of Communications Act (“SCA”), Fla. Stat. § 934.03, and that “a future violation would expose” him to “criminal prosecution.” DE1-3.

2. McDonough sued the State Attorney under 42 U.S.C. § 1983 for declaratory and injunctive relief. DE1 ¶¶ 5, 20. His single-count complaint claimed the SCA “is unconstitutional on its face and as applied to

¹ Record citations appear in the format DE [district court dkt. entry #]:[ECF pg. #]. Citations to “A:” refer to the panel opinion found in Appendix A to this petition.

² Although the internal-affairs officer stated “we have all of this recorded,” A:5, from context it is apparent that the officer was referring to notes that he was taking “[j]ust to make sure we’ve got” McDonough’s “specific complaint” so the complaint could be “addressed.” *See* DE58-4:96.

[his] actions.” DE1 ¶ 20. He did not allege that the State Attorney’s threatened criminal prosecution was not authorized by state law, nor did he invoke any cause of action other than § 1983. *See* DE1.

The district court dismissed McDonough’s facial challenge, DE17, and the parties filed cross-motions for summary judgment on his as-applied claim. In his renewed motion for summary judgment, McDonough confirmed that his “action was brought pursuant to 42 U.S.C. § 1983 for violation of the Plaintiff’s rights under the First and Fourteenth Amendments.” DE47:2. McDonough did not argue that the State Attorney’s view of state law was incorrect. Instead, he claimed that “Florida Statute §934.03 infringes on the Plaintiff’s First Amendment rights.” DE47:5.

The State Attorney filed a response in opposition, along with a consolidated cross-motion for summary judgment. DE58. At one point, the State Attorney took issue with McDonough’s suggestion that the First Amendment requires the SCA to exempt conversations with public officials. DE58:11–12. Florida’s statute, the State Attorney explained, “purposely does ... not except or differentiate the recording of public officials.” *Id.* Instead, it protects any person who has an “expectation of privacy,” and Chief Rolle, as McDonough conceded, “did not expect that Plaintiff would record their private conversation.” DE58:12; *see* DE47:3; DE48:2 ¶ 12.

In his consolidated response and reply, McDonough reiterated that “the precise issue presented by the Plaintiff’s complaint” was “whether Florida Statute 934.03 is constitutional as applied to the recording of police officers conducting their official duties, when one of the parties ... has consented to

the recording.” DE63:1. At one point, McDonough disputed the State Attorney’s argument that Chief Rolle had an expectation of privacy in his conversation with McDonough. DE63:8–9. Once again, however, McDonough did not claim that Florida law did not authorize the threatened prosecution that formed the basis for his § 1983 action; and still less did he argue that any such state-law dispute offered an independent basis for obtaining federal-court relief under § 1983.

The district court denied McDonough’s motion and granted the State Attorney’s. DE69:16. Applying forum-analysis principles, the court held that the First Amendment does not protect a right to surreptitiously record a conversation with a police officer in the interior of a police station. DE69:5–16. In keeping with “the narrow issue presented” by McDonough’s “as-applied challenge” under the First Amendment, DE69:16, the district court did not address whether the State Attorney’s threatened prosecution was based on a sound interpretation of state law.

3. Now proceeding *pro se*, McDonough appealed. DE71. In his opening brief, McDonough faulted the district court for “fail[ing] to recognize that, based on the specific facts of the case, FSS. 934.03 does not apply” to the conduct in which he engaged. Op. Br. 7. However, he did not claim that his view of state law provided a sufficient basis for obtaining relief under § 1983: “As the statute does not apply to the recording at hand, *and there is a First Amendment right to record police activity*, any retaliation for exercising of one’s First Amendment rights, including *threat of arrest, violates the First Amendment*. Therefore, [the

court] *must hold that FSS. 934.03 is unconstitutional* as applied to McDonough’s recording.” *Id.* (emphases added; internal citation omitted).

Consistent with the sole claim set out in McDonough’s single-count complaint, as well as McDonough’s formulation of the issue presented on appeal, the State Attorney’s answer brief addressed only McDonough’s First Amendment claim. Answer Br. 10–11, 12–21. In his reply brief to this Court, McDonough suggested—in passing, and for the first time—that the State Attorney’s allegedly mistaken view of state law supplied an independent ground for obtaining federal-court relief. Reply 17.

This Court ordered two rounds of supplemental briefing—one to address certain First Amendment issues, and another to address Article III standing. The panel did not ask the State Attorney to brief any disputed state-law issues, and the State Attorney never provided any such briefing.

The panel reversed, holding—as to what it saw as the “dispositive issue”—that the State Attorney’s “threatened prosecution has no basis” in state law. A:3, 8. The panel concluded the SCA did not prohibit McDonough’s conduct for three reasons. First, no participants at the meeting “exhibited” any expectation that the meeting would not be recorded, such as by a “suggest[ion] that the meeting was confidential or ‘off the record’” or the setting, advance notice, or publication of “ground rules.” A:9. Second, the “public meeting” exception of the statute was triggered because McDonough and his friend were “members of the public” and “the topic of their meeting was one of acute public interest,” with the meeting’s content likely subject to public-records laws.

A:10. Third, the circumstances did not justify any expectation of privacy, primarily because “no privacy-related ground rules were established in advance.” A:11.

Because the panel “resolve[d] this case under state law,” it declined to “reach the constitutional issue of whether the recording is protected by the First Amendment.” A:3. The Court reversed the district court’s judgment, remanding “for further proceedings, if necessary.” A:12.

Chief Judge Carnes dissented. A:13. “Instead of deciding whether the threatened prosecution violates the First Amendment,” he noted, “the Court tells McDonough not to worry about” his federal claims, because his conduct “does not, in the Court’s view, violate” the SCA. A:13. That view of state law, Chief Judge Carnes observed, “will come as news to the State Attorney and to some of us who have read the various (and varied) Florida appellate court decisions interpreting” the SCA. A:13.

At any rate, Chief Judge Carnes explained, the Court’s remand puts the district court in an untenable position. There are only “two possibilities about whether more [proceedings] will be necessary on remand.” A:13. First, the State Attorney might agree that her threatened prosecution was based on an incorrect understanding of state law. Second, she might not. If that happens, “[i]n order to comply with this Court’s remand instructions, the district court will have to do what the Supreme Court has unequivocally held that federal courts cannot do, which is lecture state officials on state law.” A:14 (citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984)). “To avoid

deciding a First Amendment issue,” Chief Judge Carnes stressed, “the Court violates the Eleventh Amendment.” A:15.

REASONS FOR GRANTING THE PETITION

I. THE PANEL DECISION CONTRAVENES THE ELEVENTH AMENDMENT, AS AUTHORITATIVELY CONSTRUED BY THE SUPREME COURT.

Addressing what it saw as a “dispositive issue,” the panel held that the State Attorney’s “threatened prosecution has no basis” in Florida law. A:8. That holding contravenes Supreme Court precedent prohibiting the federal courts from “instruct[ing] state officials on how to conform their conduct to state law.” *Pennhurst*, 465 U.S. at 106.

Pennhurst involved a class action challenging the conditions of confinement in a state institution. *Id.* at 92. One of the claims “charged that conditions” at the hospital “violated . . . the Pennsylvania Mental Health and Mental Retardation Act of 1966.” *Id.* After a trial, the district court granted injunctive relief on multiple claims, including the state-law one. *Id.* at 93. The Court of Appeals concluded that state law “fully supported” the district court’s remedial order, so it affirmed without “reach[ing] the remaining issues of federal law.” *Id.* at 95–96.

The Supreme Court reversed, concluding that a “federal court’s grant of relief against state officials on the basis of state law . . . conflicts directly with the principles of federalism that underlie the Eleventh Amendment.” *Id.* at 106. The Eleventh Amendment, the Court explained, embodies a constitutional

“affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority” in Article III. *Id.* at 98. “[I]t is difficult to think of a greater intrusion on state sovereignty,” the Court reasoned, “than when a federal court instructs state officials on how to conform their conduct to state law.” *Id.* at 106. Accordingly, the Court held, the district court’s judgment against various Pennsylvania officials could not be sustained “solely on the basis of” state law. *Id.* at 124–25.

As Chief Judge Carnes recognized in his dissent, the panel did just what *Pennhurst* directs federal courts not to do, which is to tell the State Attorney “how to conform [her] conduct to state law.” A:15. “If she prosecutes McDonough for his covert recording activities, the Court says, she will not be conforming her conduct to Florida law.” *Id.* And here, as in *Pennhurst*, that state-law ruling forms the sole basis for the panel’s judgment. *See* A:3, 12 & n.3; 465 U.S. at 124–25.

For several reasons, the panel’s reliance on state law is even more problematic than the state-law holding the Supreme Court disapproved in *Pennhurst*. *First*, unlike in *Pennhurst*, the panel in this case could not invoke doctrines recognizing federal-court jurisdiction to address pendent state-law claims. The “amended complaint” in *Pennhurst* “charged that conditions at Pennhurst violated” state law. *Id.* at 92. McDonough’s single-count complaint, however, like his motion for summary judgment, omitted any such state-law claim, and the district court never passed on any such claim. DE1; DE47; DE69. Thus, one of the principal rationales supporting the Court of Appeals’

judgment in *Pennhurst* is not available here. *See* 465 U.S. at 117–23.

Second, the Court of Appeals in *Pennhurst* had the benefit of full briefing on the disputed state-law issue. Here, however, the State Attorney had no cause to address state-law disputes in her answer brief to this Court, because McDonough failed to raise any state-law claim for relief in the district court and his federal constitutional claim does not turn on the meaning of state law.

Third, the Court of Appeals in *Pennhurst* concluded that the Pennsylvania Supreme Court had “spoken definitively” to a case-dispositive legal issue. 465 U.S. at 95. Here, by contrast, the panel cites no controlling precedent from the Florida Supreme Court, and the panel’s view that the State Attorney misunderstands state law “will come as news” to those “who have read the various (and varied) Florida appellate court decisions interpreting” the SCA. A:13 (Carnes, C.J., dissenting).

II. THE PANEL DECISION CONTRAVENES BINDING PRECEDENT ADDRESSING THE SCOPE OF LIABILITY UNDER 42 U.S.C. § 1983.

“Section 1983 provides a cause of action against state actors who violate an individual’s *rights* under *federal law*.” *Filarsky v. Delia*, 566 U.S. 377, 380 (2012) (emphases added). The panel expressly declined to decide whether McDonough had been deprived of any federal right. A:3 (“Because we resolve this case under state law, we need not reach the constitutional issue . . .”). Nevertheless, the panel reversed the district court’s judgment. A:12.

That disposition cannot be reconciled with § 1983's text or binding caselaw construing it. "In order to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." See *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). *A fortiori*, a § 1983 plaintiff may not seek redress by asserting a mere violation of *state law*. See *id.* "Violation of local law does not necessarily mean that federal rights have been invaded." *Paul v. Davis*, 424 U.S. 693, 700 (1976).

The panel's holding that a § 1983 plaintiff may obtain relief by establishing a violation of state law conflicts with this Court's precedent. In *Knight v. Jacobson*, for example, this Court explained that "Section 1983 does not create a remedy for every wrong committed under the color of state law, but only for those that deprive a plaintiff of a federal right." 300 F.3d 1272, 1276 (11th Cir. 2002). "There is no federal right," the Court held, "not to be arrested in violation of state law." *Id.* Similarly, there is no federal right not be prosecuted—or, as relevant here, threatened with prosecution—in violation of state law.

By reversing the district court's rejection of McDonough's claim without deciding whether the State Attorney's threatened prosecution violated the First Amendment, the panel decision could dramatically expand § 1983's coverage within this Circuit. Under the panel's approach, any person who disagrees with the way in which state officials are administering a state law may bring a federal constitutional challenge against the statute, no matter how tenuous, and then obtain relief based on

unpleaded, ancillary state-law claims—no showing of unconstitutionality needed.

The “importance” of § 1983 “in defining the role of the federal courts cannot be overstated.” Erwin Chemerinsky, *Federal Jurisdiction* 500 (6th ed. 2012). “More than 10 percent of the federal court docket consists of § 1983 suits.” *Id.* Accordingly, caution is warranted before this Court substantially expands the scope of relief available under that statute beyond what binding precedent allows.

III. THE PANEL DECISION CREATES SEVERAL NEW CONFLICTS AMONG THE FEDERAL COURTS OF APPEALS.

The panel’s § 1983 holding, in addition to its conflict with binding precedent, *see supra* Part II, also conflicts with decisions of almost every other court of appeals. The federal circuits uniformly recognize that a violation of state law does not establish a § 1983 claim. *See, e.g., Clark v. Link*, 855 F.2d 156, 161 (4th Cir. 1988) (“If there is no violation of a federal right, there is no basis for a section 1983 action A fundamental and fatal flaw in the decision [below] . . . is its assumption that a section 1983 action may be based alone on a violation of state law”).³

³ *Accord Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 831–33 (1st Cir. 1982); *Powers v. Coe*, 728 F.2d 97, 105 (2d Cir. 1984); *Kulwicki v. Dawson*, 969 F.2d 1454, 1468 (3d Cir. 1992); *Brown v. Sudduth*, 675 F.3d 472, 478 (5th Cir. 2012); *Stanley v. Vining*, 602 F.3d 767, 769 (6th Cir. 2010); *Archie v. City of Racine*, 847 F.2d 1211, 1216–18 (7th Cir. 1988) (en banc); *Ebmeier v. Stump*, 70 F.3d 1012, 1013 (8th Cir. 1995); *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1060 (9th Cir. 2012);

Similarly, at least three federal courts of appeals have applied *Pennhurst* to hold that the Eleventh Amendment bars a pre-enforcement suit challenging a prospective state criminal prosecution to the extent the plaintiff claims that prosecution is not authorized by state law. See *McKinley v. Abbott*, 643 F.3d 403, 406 & nn. 7–9 (5th Cir. 2011); *Bacon v. Neer*, 631 F.3d 875, 880 (8th Cir. 2011); *Vasquez v. Rackauckas*, 734 F.3d 1025, 1041 (9th Cir. 2013).

IV. THE PANEL DECISION THREATENS TO SUBSTANTIALLY IMPAIR THE ADMINISTRATION OF CRIMINAL JUSTICE.

A. Federal courts have long been reluctant to restrain criminal proceedings. See generally *Deaver v. Seymour*, 822 F.2d 66, 68–70 (D.C. Cir. 1987) (citing authorities and providing overview of how the law in this area has evolved); accord, e.g., *Bacon*, 631 F.3d at 879; *Stolt-Nielsen v. United States*, 442 F.3d 177, 183 (3d Cir. 2006). It is a “basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury” *Younger v. Harris*, 401 U.S. 37, 43–44 (1971). “[T]he cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered ‘irreparable’ in the special legal sense of that term. Instead, the threat to the plaintiff’s federally protected rights must be one

Jones v. Denver, 854 F.2d 1206, 1209 (10th Cir. 1988); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988).

that cannot be eliminated by his defense against a single criminal prosecution.” *Id.* at 46; *see Deaver*, 822 F.2d at 69 (applying same logic to suit seeking relief from an anticipated future prosecution).

Consistent with that general rule, the Supreme Court has permitted preemptive civil litigation where state criminal proceedings “threatened federal constitutional rights.” *Id.* at 68; *see Bacon*, 631 F.3d at 879. However, “the traditional reluctance . . . to interfere with criminal proceedings,” 822 F.2d at 70, may not be set aside based on a federal court’s view that there is not a state-law basis for an anticipated state prosecution. To the contrary, “the Court has recognized that federal interference with a State’s good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework.” *Dombrowski v. Pfister*, 380 U.S. 479, 484 (1965).

The panel’s ruling in this case cannot be squared with those principles. Under the panel’s approach, a potential criminal defendant may file a preemptive civil suit under § 1983, and may ask a federal court to anticipatorily adjudicate state-law defenses to a threatened state prosecution, so long as the plaintiff also alleges the prosecution would run afoul of the federal Constitution. The federal court tasked with resolving such a suit would not only have the *power* to adjudicate such state-law issues; it would be *obliged* to resolve them first, because federal courts “should avoid reaching constitutional questions if there are other grounds” for a decision. *See* A:12 n.3.

B. The panel’s interpretation of the Florida SCA substantially narrows its scope in a way that could cast doubt on many prosecutions. For example, citing a dictionary but no Florida caselaw, the panel

concluded that McDonough did not violate the SCA because no participant to the conversation “exhibit[ed]” an expectation of privacy. A:9. That conclusion was based on a plausible reading of the statutory text, but the Florida Supreme Court has held that the statute applies where the recorded person has “a subjective expectation of privacy” that “society is prepared to recognize as reasonable.” *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985). This test does not ask whether that “subjective” expectation is communicated to others.

In keeping with its test, the Florida Supreme Court has found SCA violations where no participant to the conversation communicated an expectation of privacy in the manner required by the panel. For example, the court held that police violated the statute when they wiretapped criminal defendants’ home-telephone conversations, reasoning that “the ‘intercepted’ conversations originated within the ... home *and thus exhibited the required expectation of privacy.*” *State v. Mozo*, 655 So. 2d 1115, 1117 (Fla. 1995) (emphasis added). Similarly, the court has held that the statute prohibits the surreptitious, nonconsensual recording of in-person conversations within the home. *See, e.g., McDade v. State*, 154 So. 3d 292, 298 (Fla. 2014); *State v. Walls*, 356 So. 2d 294, 296 (Fla. 1978). Nowhere on the face of the court’s opinions in those cases is there any suggestion that the recorded individuals set “ground rules,” “suggest[ed] that the [conversation] was confidential,” or gave “advance notice” of “rules that established confidentiality.” A:9; *see also LaPorte v. State*, 512 So. 2d 984, 986 (Fla. 2d DCA 1987) (SCA prohibits

recording conversation of women undressing in modeling studio).

Under the panel's approach, the statute's protection of conversational privacy would disappear where it matters most—situations, like in-person conversations within the home, in which participants have no reason to suspect their conversation is being recorded and therefore have no reason to ask that it not be.

Similarly, the panel concluded that McDonough's surreptitious recording falls under the statutory exception for "communications 'uttered at a public meeting.'" A:10 (quoting Fla. Stat. § 934.02(2)). Florida caselaw, however, does not support the proposition that a "public meeting" occurs whenever a state official meets with "members of the public." See *id.* The panel's reliance on *Department of Agriculture and Consumer Services v. Edwards*, 654 So. 2d 628 (Fla. 1st DCA 1995), is unpersuasive. The court there held that the public-meeting exception did *not* apply to the kind of meeting at issue here. Compare A:10 (concluding that a meeting can be deemed a "public" one by virtue of the number of attendees, nature of the topic, attendance by public officials performing their official duties, or potential applicability of public-records disclosure laws), *with* 654 So. 2d at 633 (public-meeting exception inapplicable despite existence of all these factors).

In sum, the panel's interpretation of the SCA is in substantial tension with Florida decisional law; and its holding casts doubt on an untold number of past, present, and future prosecutions under an important privacy-protecting statute. In holding that federal courts should not presume to instruct state

officers on the meaning of state law, the Supreme Court sought to avoid just such a result. *See Pennhurst*, 465 U.S. at 122 n.32.

C. Having carefully considered the panel’s opinion, the State Attorney is not prepared to “assure [McDonough] that he can continue to covertly record conversations” of the kind at issue in this case. A:14 (Carnes, C.J., dissenting). Thus, a remand to the district court would not resolve the controversy between the parties. In addition, the district court should not have to choose between defying Supreme Court precedent and failing to give any effect to a ruling of this Court. *See id.* The best way out of that predicament is for this Court to rehear the case now.

CONCLUSION

The petition for rehearing or rehearing en banc should be granted.

Dated: August 2, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2017, the foregoing petition was served on *pro se* Appellant James Eric McDonough electronically to his e-mail address, phd2b05@gmail.com, and also by postal mail to his address, 32320 Southwest 199th Avenue, Homestead, Florida 33030. I further certify that the foregoing petition was filed with the Clerk of Court via the CM/ECF system, causing it to be served on the following registered counsel of record:

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In addition, nineteen copies were sent by overnight courier, next business day delivery, to the Clerk of Court.

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CERTIFICATE OF COMPLIANCE

This document has been prepared in Microsoft Word using a proportionally spaced typeface (Garamond 14-point font) and complies with the type-volume limit of Fed. R. App. P. 32(c). This document also complies with the word limit of Fed. R. App. P. 35(b)(2)(A) because, excluding parts of the document exempted by applicable rules, this document contains 3,836 words.

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