No. 17-1034

IN THE
Supreme Court of the United States

KATHERINE FERNANDEZ-RUNDLE,

Petitioner,

v.

JAMES ERIC MCDONOUGH

Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

After Petitioner threatened to prosecute Respondent for recording a conversation with public officials and publishing it on the Internet, Respondent sued under 42 U.S.C. § 1983 alleging violation of his First Amendment rights. Petitioner conceded that the acts of recording and publishing a conversation are protected speech. Her sole argument was that her suppressive threat to prosecute was justified by a reasonable restriction on speech, pointing to Fla. Stat. § 934.03.

Did the court of appeals violate the Eleventh Amendment by accepting Petitioner's concession that the right to record and publish is protected by the First Amendment, and then rejecting Petitioner's justification for suppressing protected speech because the statute she relied upon, Fla. Stat. § 934.03, as interpreted by Florida courts, did not apply to the particular circumstances of this case?

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The opinion of the court of appeals (Pet. App. 1a-15a) is published at 862 F.3d 1314. The court of appeals' order denying panel rehearing and rehearing en banc (Pet. App. 38a-39a) is unreported. The district court's decision (Pet. App. 16a-37a) is unpublished, but available at 2015 WL 13594408.

JURISDICTION

The court of appeals entered its judgment on July 12, 2017. It then denied Petitioner's petition for panel rehearing and rehearing en banc on September 14, 2017. On December 8, 2017, Justice Thomas extended the time to file a petition for a writ of certiorari to January 22, 2017, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

On January 26, 2017, the court of appeals *sua sponte* ordered the parties and a court-appointed amicus to address whether the present case raised a justiciable controversy under Article III. Petitioner contended that this case did not satisfy the requirements of standing or ripeness under Article III. *See* Suppl. Br. of Appellee (Feb. 21, 2017). Respondent and the court-appointed amicus argued that the controversy was justiciable, *see* Suppl. Br. of Appellant (Feb. 8, 2017); Suppl. Br. of Amicus (Feb. 8, 2017), and the court of appeals agreed, Pet. App. 7a-8a n.2. Because this Court must always ensure it has Article III jurisdiction, it would have to consider this antecedent question before addressing Petitioner's question presented. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990) (recognizing that this Court is "required to address" standing "even if the parties fail

to raise the issue" and dismissing claim for lack of standing without reaching merits). Petitioner does not contend that this antecedent question raises any issue warranting this Court's review and has indicated that it will not provide adverse argument to assist the Court on the issue. *See* Pet. at 6 n.3; *see also Unite Here Local 355 v. Mulhall*, 571 U.S. 83, 85 (2013) (Breyer J., dissenting) (recognizing decision to dismiss case as improvidently granted where question presented might have been obstructed by questions concerning Article III jurisdiction).

STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . . .

Fla. Stat. § 934.03 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; [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. § 934.02(2) provides:

> "Oral communication" means 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.

STATEMENT

1. In October 2012, Respondent complained to Homestead Police Department ("HPD") officer Alejandro Murguido about his reckless driving and violation of traffic laws in the neighborhood where McDonough lived. Pet. App. 3a. Respondent alleged that Murguido thereafter arrested him in retaliation for the complaints. *Id*. In response to the arrest, Respondent filed a complaint against Murguido with HPD's Internal Affairs Department. *Id*. In April 2013, Murguido again arrested Respondent for incidents

that had allegedly occurred several months previously. *Id*. The criminal charges lodged against Respondent upon this arrest were dismissed. *Id*. In January 2014, Respondent filed a complaint with the HPD alleging that Murguido arrested and harassed him in retaliation for Respondent's complaints about Murguido's conduct. Pet. App. 3a–4a.

In response to these events, HPD Chief of Police Alexander E. Rolle, Jr. invited Respondent to meet to discuss his complaints about Murguido's conduct. Pet. App. 4a. Respondent met with Chief Rolle at the HPD station on February 7, 2014. *Id*. Respondent brought his friend, who had witnessed some of Murguido's conduct and Chief Rolle did not object to the friend's attendance. *Id*. At Chief Rolle's request, Detective Antonio Aquino from the HPD Internal Affairs department also joined the meeting. *Id*. No one set ground rules of any sort for the meeting. *Id*. 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. *Id*. At the start of the meeting, Respondent placed his cell phone in plain view on the desk between him and Chief Rolle and proceeded to record their conversation. *Id*. Chief Rolle saw Respondent's cell phone but contends that he was unaware that Respondent was recording the meeting. *Id*.[1]

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[1] Petitioner represents as fact that "[t]he chief was not aware of, nor did he consent to, the recording." Pet. at 4. However, as Petitioner's own statement of undisputed facts acknowledged, Petitioner has always maintained that Chief Rolle impliedly consented to the recording. ECF No. 58-1 at 3, 4.

Respondent alleged 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. *Id*. At the meeting, Respondent also filed another Internal Affairs complaint against Murguido. *Id*. At one point, Respondent asked if there would be a record of their discussions, to which Aquino replied, "[W]e have all of this recorded." *Id.* After the meeting, Respondent filed a public records disclosure request for the documents he had given to Chief Rolle during the meeting. Pet. App. 5a. When he received documents in response to his request, however, certain ones concerning Murguido were not included. *Id*. When Respondent filed another public records disclosure request specifically for those documents, Chief Rolle denied having received them. *Id*.

To prove to the public that he had given the documents to Chief Rolle, Respondent published portions of his recording on YouTube. *Id*. 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. *Id*.

A month after Respondent published his recording, he received a letter from Petitioner threatening him with arrest and felony prosecution under Fla. Stat. § 934.03. *Id*. The letter threatened that "any further violation of Florida law, as a future violation would expose you to criminal prosecution." Pet. App. 6a.

2. Respondent brought an action under 42 U.S.C. § 1983, alleging that Fla. Stat § 934.03 was facially

unconstitutional and that Petitioner's threat of prosecution upon publishing his recording violated his First Amendment rights. *Id.*

The parties filed cross motions for summary judgment. Petitioner did not contest that the First Amendment protects an individual's right to both record and publish information on the Internet. Her sole argument was that the conversation between Respondent, Chief Rolle, and the other invitees took place "in a nonpublic forum where the government may regulate speech" provided that such regulation is "reasonable and viewpoint neutral." Def.'s Cross-Mot. for Summ. J., ECF No. 58 at 5, 10-11; *see also id.* at 15-19. Petitioner argued that her threatened prosecution was justified by Fla. Stat. § 934.03, which she argued was a reasonable, viewpoint neutral restriction.

The district court granted summary judgment in favor of Petitioner. It observed that Respondent's complaint "contains a single cause of action" alleging that his First Amendment rights were violated by the "threat of 'possible prosecution for recording and publishing information of public interest.'" Pet. App. 19a.

The court specifically noted that Petitioner "d[id] not contest the speech at issue is a form of expression that is protected." Pet. App. 22a. The court agreed with the parties, concluding that Respondent had a First Amendment right to "recording and publication" of the meeting. Pet. App. 23a.

The district court then considered Petitioner's defense that this otherwise protected speech took

place in a nonpublic forum. The court agreed, concluding that because the meeting took place in the interior of a police station, it was in a nonpublic forum that was subject to reasonable, viewpoint regulations. Pet. App. 26a-27a. Without considering whether Fla. Stat. § 934.03, by its terms, applied to the circumstances of this case (and without citing a single state court decision interpreting the scope of Fla. § 934.03), the court concluded that it was reasonable to restrict the right to record in the interior of a police station.

3. Respondent appealed *pro se* and the court of appeals appointed an amicus to argue in support of Respondent.

On appeal, Petitioner again did not dispute that the First Amendment protects the right to record or publish conversations at a public meeting. Br. of Appellee at 14 (explaining that Petitioner does not dispute whether Respondent had a right to record communications uttered at a public meeting or publish a recorded conversation on the Internet). Furthermore, Petitioner distinguished cases that had recognized the right to record and publish information by offering her own interpretation of Fla. Stat. § 932.02 and § 934.03: "Fla. Stat. §932.02(2) does not make it a crime to intercept 'any public oral communication uttered at a public meeting,' which is excluded from the definition of an 'oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception.'" Br. of Appellee at 15. Citing a single state intermediate appellate court decision, Petitioner argued that Fla. Stat. § 934.03 applied to the present circumstances, Br. of Appellee at 19 (quoting *Cinci v. State*, 642 So. 2d 572, 573 (Fla. 4th DCA 1994)), and

argued again that her suppressive conduct was justified because "Fla. Stat. 934.03 is reasonable and content-neutral." Br. of Appellee at 17.[2]

The court of appeals reversed. The court again observed that before the district court, "both parties agreed that McDonough had a right to record under the First Amendment." Pet. App. 6a. Based upon the parties' agreement, the court of appeals considered it unnecessary to address the merits of whether the First Amendment protects the right to record. Pet. App. 3a, 12a ("We are not called on to reach the constitutional issue of whether the recording is protected by the First Amendment.").

The court of appeals concluded the district court failed to consider a "dispositive issue" by failing to consider whether the state statute invoked by Petitioner "even applies to [Respondent]." Pet. App. 8a.

The court thus examined the language of Fla. Stat. § 934.03, as interpreted by the Florida Supreme Court and intermediate state appellate courts. The court concluded that Fla. Stat. § 934.03 could not be invoked to justify the suppression of Respondent's speech for three independent reasons. First, the court observed that § 934.02 restricts the "oral communication" subject to regulation to statements "'uttered by a person exhibiting an expectation that such communication is not subject to interception.'" Pet. App. 9a (quoting Fla. Stat. § 934.02). Because it was undisputed that "Chief Rolle set no ground rules for the meeting he elected to

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[2] As described above, before the court of appeal, Petitioner argued that Respondent's claims were not justiciable because Respondent lacked standing and his claims were unripe. *See* Suppl. Br. of Appellee (Feb. 21, 2017).

call" and "[a]t no point did any one from the HPD suggest that the meeting was confidential or 'off the record,'" the court found it "clear" that "Chief Rolle failed to 'exhibit' the expectation of privacy that is required by the statute." Pet. App. 9a-10a.

Second, the court explained that Respondent's recording "also falls under an exception carved out in section 934.02 for communications 'uttered at a public meeting.'" Pet. App. 10a (quoting Fla. Stat. § 934.02). Relying upon Florida case law, the court concluded that the invitations to Respondent's friend and Chief Rolle's colleague to join the meeting; the "acute public interest" of the subject matter; and Detective Aquino's own assurance that "'we have all of this recorded'" established as a matter of state law that this was a public meeting within the meaning of the statute. *Id.*

Third, the court pointed to Florida Supreme Court precedent holding that § 934.02's definition of "oral communication" applies only where the speaker has "'a reasonable expectation of privacy'" and rejecting that such an expectation existed in the context of an office meeting of "a 'quasi-public nature.'" Pet. App. 11a-12a (quoting *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985)).

On these bases, the court of appeals concluded that, even if the recording took place in a nonpublic forum for federal constitutional purposes, Petitioner could not rely upon Fla. Stat. § 934.03 for suppressing Respondent's speech: "[T]he government is not entitled to invoke it and McDonough did not violate it." Pet. App. 10a; *see also* Pet. App. 3a ("McDonough did not violate § 934.03 and, consequently, the government's threatened prosecution has no basis in the law.").

In a dissenting opinion, Chief Judge Carnes argued that the majority's interpretation of Florida law contravened "Florida appellate court decisions interpreting that act," but did not cite any Florida case law in support of that proposition. Furthermore, he argued that the majority's act of interpreting Fla. Stat. § 934.03 to determine that it did not apply violated the Eleventh Amendment and *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Pet. App. 13a-15a.

SUMMARY OF ARGUMENT

1. Petitioner's question presented is based upon a mischaracterization of the decision below. The Eleventh Circuit did not conclude that a plaintiff may prevail under § 1983 based upon a violation of state law. Consistent with principles of judicial restraint, the court accepted Petitioner's concession that the recording and publication on the internet was protected speech, and thus it "need not" *sua sponte* address that conceded constitutional question. The court resolved the remainder of the First Amendment inquiry on the narrowest grounds available: that the sole justification Petitioner advanced for her suppressive conduct, Fla. Stat. § 934.03, did not apply to the particular facts of this case. Petitioner's argument that the Eleventh Circuit is in conflict with the other circuits ignores scores of Eleventh Circuit decisions recognizing the basic premise that § 1983 requires a violation of federal law.

2a. The decision below is correct and turned exclusively on the application of state law to the particular facts of this case. When faced with allegations that state law or state actors have violated the federal constitution, including the First Amendment,

this Court and lower courts are routinely required to interpret state law and are authorized to decide. Petitioner's appears to assume, without substantiation, that courts are required to accept as gospel a state actor's assertion that a state statute applies to a situation, even where that state actor's interpretation conflicts with the language adopted by the state legislature and the interpretation given to that language by state courts. That odd assumption would allow a state actor to call into constitutional doubt a state law that the state's legislature and courts did not intend to apply in the first place.

2b. The court of appeals' interpretation of state law is correct. The court of appeals provided three independent reasons why Fla. Stat. § 934.03 did not apply to the particular facts of this case and thus could not have justified Petitioner's suppressive threat to prosecute. Petitioner does not address two of those independent grounds, saying only in a footnote that they are "in substantial tension with Florida decisional law." Pet. at 22-23 n.6. Petitioner's response to the remaining ground relied upon by the court of appeals is unpersuasive and is premised upon state cases that Petitioner never even cited below. The court of appeals' application of state law to the particular facts of this case does not warrant this Court's review.

2c. Petitioner's contention that the decision below runs afoul of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1983), is unsound. *Pennhurst* recognized that a federal court violates the Eleventh Amendment when it issues an injunction against a State based upon a pendent state-law claim. *Id.* at 106. The Court expressly distinguished cases

like this, which are premised upon a federal constitutional violation. *Id*. at 102 ("[A] suit challenging the constitutionality of a state official's action is not one against the State" (citing *Ex parte Young*, 209 U.S. 123 (1908))). As both courts below recognized, Respondent alleged a single, federal claim under the First Amendment, Pet. App. 6a, 19a; he did not allege any pendent state law claim upon which relief was granted. *Pennhurst* does not preclude a federal court from interpreting a state statute in the course of adjudicating a federal claim.

3. Several features of this case would make it a poor record even for a question presented that actually did arise from the decision below and warrant this Court's attention: (i) the case is presently in an interlocutory posture, with no injunction having yet been issued; (ii) Petitioner's arguments appear to be a roundabout way to dispute issues that it affirmatively conceded below; (iii) Petitioner does not even attempt to argue that the antecedent jurisdictional questions she raised argued below warrant this Court's review.

ARGUMENT

I. No Circuit Holds That A Plaintiff May Prevail Under 42 U.S.C. § 1983 Based On A Violation Of State Law.

Petitioner contends that the decision below created a conflict over whether a plaintiff may prevail under 42 U.S.C. § 1983 based upon a violation of state law. That contention is based upon an account of the proceedings below that obscures issues that Petitioner has conceded since the start of these proceedings and mischaracterizes the court of appeals' decision.

The Eleventh Circuit has recognized in dozens of decisions that an action under § 1983 requires a violation of federal law. *E.g.*, *Martes v. Chief Exec. Officer of S. Broward Hosp. Dist.*, 683 F.3d 1323, 1325 (11th Cir. 2012) ("Section 1983 provides a remedy for violations of rights secured by federal statutory as well as constitutional law."); *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1265 (11th Cir. 2010) ("[A] § 1983 plaintiff must allege a specific federal right violated by the defendant."); *Robertson v. Hecksel*, 420 F.3d 1254, 1261 (11th Cir. 2005) ("[B]efore § 1983 and § 1988 can come into play, the plaintiff must still establish the existence of a federal right."); *Garvie v. City of Ft. Walton Beach, Fla.*, 366 F.3d 1186, 1191 (11th Cir. 2004) ("[I]n general, allegations that local officials failed to comply with state laws are not federal constitutional claims."); *Knight v. Jacobson*, 300 F.3d 1272, 1276 (11th Cir. 2002) ("While the violation of state law may (or may not) give rise to a state tort claim, it is not enough by itself to support a claim under section 1983."); *McKinley v. Kaplan*, 177 F.3d 1253, 1257 (11th Cir. 1999) (per curiam) ("In order to state a cause of action against a public official sued in his or her official capacity under § 1983, the plaintiff must allege . . . some person has deprived him or her of a federal right."); *Almand v. DeKalb Cty., Ga.*, 103 F.3d 1510, 1513 (11th Cir. 1997) ("[S]ection 1983 must not supplant state tort law; liability is appropriate solely for violations of federally protected rights."); *Circa Ltd. v. City of Miami*, 79 F.3d 1057, 1060 (11th Cir. 1996) (same); *Edwards v. Wallace Cmty. Coll.*, 49 F.3d 1517, 1522 (11th Cir. 1995) (same); *Key W. Harbour Dev. Corp. v. City of Key W., Fla.*, 987 F.2d 723, 727 (11th Cir. 1993) (same).

As Petitioner acknowledges, every other circuit recognizes the same. Pet. at 14; *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); *Clark v. Link*, 855 F.2d 156, 161 (4th Cir. 1988); *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. City & Cty. of Denver*, 854 F.2d 1206, 1209 (10th Cir. 1988); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988).

Petitioner omits the myriad Eleventh Circuit decisions above and contends that the decision below stands for the proposition that plaintiffs may prevail under § 1983 based upon "a violation of state law" and "need not show that they have been deprived of any federal right." Pet. at 14-15. It stands for no such thing.

To begin with, as both courts below recognized, Respondent's complaint contained a single, federal cause of action alleging violations of the First and Fourteenth Amendments. ECF No. 1 at 4; Pet. App. 19a ("The Complaint contains a single cause of action . . . under the First and Fourteenth Amendments to the U.S. Constitution"); Pet. App. 2a (recognizing that Respondent's claim arises under the First Amendment). The decision below therefore could not stand for the proposition that a plaintiff may prevail based upon a violation of state law, and it could not have

overruled the dozens of other Eleventh Circuit decisions recognizing that § 1983 requires a federal cause of action.

Petitioner's argument is premised upon a mistaken understanding of the court of appeals' decision. Although the court of appeals interpreted a state statute in the course of its analysis, its doing so was simply a step in resolving Respondent's First Amendment claim.

As this Court has explained, an alleged free speech violation of this nature generally triggers three inquiries: (1) whether the speech in question is protected speech; (2) what the relevant forum is—public or nonpublic; and (3) whether the reasons offered by the state actor in limiting the plaintiff's speech comport with constitutional standards applicable to that forum. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). In a nonpublic forum, the government is given greater latitude to restrict speech and may do "so long as the distinctions drawn are reasonable . . . and are viewpoint neutral." *Id.* at 806.

Before the district court, Petitioner conceded the first issue—that the First Amendment protects the recording and publishing of a conversation. *See supra* at 6-7. Both courts below acknowledged that concession. Pet. App. 6a, 22a. Petitioner's sole argument was that her threat to prosecute concerned speech in a nonpublic forum and that Fla. Stat. § 934.03 provided her the requisite reasonable basis upon which to restrict speech. *See supra* at 6.

In light of Petitioner's concession that the speech at issue was protected by the First Amendment, the

court of appeals found it unnecessary to *sua sponte* resolve that aspect of the First Amendment analysis. Pet. App. 3a, 12a n.3 ("We are not called on to reach the constitutional issue of whether the recording is protected by the First Amendment."). It then rejected Petitioner's invocation of Fla. Stat. § 934.03 to justify her suppressive conduct, holding that, as interpreted by the Florida Supreme Court, it did not even apply to the present circumstances. Pet. App. 9a-11a. Thus, even assuming Respondent's recording took place in a nonpublic forum, Petitioner's threat to prosecute him for protected speech was not based upon a reasonable restriction and violated the First Amendment.

Nothing in the court of appeals' decision suggests that a plaintiff prevails under § 1983 when he "demonstrates only a violation of state law, rather than a violation of a federal right." Pet. at 3. The court simply declined to address part of the constitutional inquiry that had been agreed upon by the parties, and then interpreted the state law that Petitioner herself invoked as a justification for suppressing concededly protected speech.

Petitioner's outlandish reading of the decision below is based exclusively on stripping from its context the court's statement that it "need not reach the constitutional issue of whether [Respondent's] recording is protected by the First Amendment" and could "resolve this case under state law." Pet. at 13. In doing so, Petitioner ignores that she had conceded this issue, Pet. App. 6a ("[B]oth parties agreed that [Respondent] had a right to record under the First Amendment."); Pet. App. 22a ("The parties do not contest the speech at issue is a form of expression that is protected."), and herself relied upon the state

statute as her reasonable restriction on speech. She effectively argues that a federal court of appeals is required to address a novel, non-jurisdictional constitutional question even when it is conceded by the parties and that a federal court may not reject a state actor's interpretation of state law, even when it conflicts with the interpretation provided by the state's highest court. As described in the next section, the state's argument conflicts with basic notions of judicial reasoning and restraint. But, in any event, the decision below concluded that Respondent prevailed on his sole, federal claim and does not present the question raised in the petition.[3]

Neither the court below nor any other circuit holds that a plaintiff may prevail under 42 U.S.C. § 1983 "without establishing any violation of a right secured by the Constitution or laws of the United States." Pet. at i. The question presented therefore does not arise on this record, let alone warrant this Court's review.

II. The Decision Below Is Correct And Its Dispositive Analysis Turns Exclusively On A Question Of State Law.

The decision below was correct. Given the parties' agreement that the First Amendment protects the right to record and publish conversations on the internet, the court of appeals concluded that it had not been "called on to reach" the issue, Pet. App. 3a, 12a, and proceeded to consider Petitioner's justification for her threat to prosecute Respondent for protected speech. The court ultimately concluded that the

[3] Petitioner raised the same implausible reading of the decision below in her petition for rehearing en banc and, not surprisingly, no judge requested even a poll.

statute invoked by Petitioner to justify her suppressive act, Fla. Stat. § 934.03, did not even apply to Respondent's conduct, as that statute has been interpreted by Florida courts. Thus, Petitioner's defense would fail even under the analysis applied to a nonpublic forum.

By declining to address a conceded, non-jurisdictional constitutional question (whether recording and publication are protected) and an unnecessary constitutional question (whether the speech took place in a public or nonpublic forum), and simply addressing Petitioner's flawed statutory interpretation, the court of appeals resolved this appeal on the narrowest possible ground. It undertook the sort of restrained, minimalist approach that this Court prefers.

1. "It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984). Consistent with that principle, this Court has routinely declined to issue judgment on the existence of a constitutional right *sua sponte* where the parties agree that the right exists, including in the context of the First Amendment. *See, e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) (accepting city's concession that certain conduct is protected by First Amendment, without *sua sponte* addressing the issue, and then holding that the regulation of such conduct was unconstitutional); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975) (accepting city's concession that its ordinance applied to protected conduct without *sua sponte* analyzing the issue); *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 260-61 & n.2 (1987)

(accepting concession that property interest is protected by the Fifth Amendment without *sua sponte* reaching the issue). Indeed, foregoing unnecessary adjudication of issues not in dispute is a critical feature of judicial restraint. *See Sessions v. Dimaya*, No. 15-1498, 2018 WL 1800371, at *25 (U.S. Apr. 17, 2018) (Gorsuch, J., concurring) (observing that "normally courts do not rescue parties from their concessions," especially a party fully capable of protecting its own interests). "[T]he crucible of adversarial testing is crucial to sound decisionmaking." *Id.*[4]

The court below acted accordingly. As it explicitly recognized, from the start of these proceedings "both parties agreed that [Respondent] had a right to record under the First Amendment." Pet. App. 6a; *see also* Pet. App. 22a ("The parties do not contest the speech at issue is a form of expression that is protected."). The court thus acted with restraint in determining that it was "not called on to reach the constitutional issue of whether the recording is protected by the First Amendment." Pet. App. 3a, 12a.

2. For similar reasons, the court of appeals acted with restraint in declining to unnecessarily consider whether the speech at issue in this case took place in

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[4] This general principle of restraint is, of course, also applied to other non-jurisdictional federal law. *See also, e.g.*, *Huntington v. Huntington Branch*, *NAACP*, 488 U.S. 15, 18 (1988) (per curiam) (where party conceded application of particular test under federal law, "we do not reach the question whether that test is the appropriate one"); *C. I. R. v. Idaho Power Co.*, 418 U.S. 1, 7 n.5 (1974) ("Since the Commissioner appears to have conceded the literal application of [the federal law at issue], we need not reach the issue[.]").

a public or nonpublic forum, given its conclusion that Petitioner's sole justification—the application of Fla. Stat. § 934.03 as a reasonable restriction—would have failed independent of forum analysis. *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

By arguing that "[f]ederal courts may not lecture state officials on how to conform their conduct to state law," Petitioner seems to assume, without substantiation, that when an individual state actor asserts that a particular state statute applies, federal courts must take the state actor's word for it and may not consult state judicial decisions to determine whether the statute, in fact, applies to the particular facts before the court. Not so. In analyzing whether a state statute or state actor's conduct violates the federal constitution, including the First Amendment, it is routine—indeed, often necessary—for courts to interpret relevant state laws to determine their application. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 381 (1992) (explaining, in context of a facial First Amendment challenge, that "[i]n construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court"); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1149 (2017) (beginning First Amendment analysis by analyzing

scope of state statute and deferring to court of appeals' interpretation).[5]

Where, as here, the question is whether a state statute provides a reasonable restriction on a pre-enforcement action to suppress speech, it is logical and routine to interpret the statute to determine whether it applied to the attendant circumstances. In *Dean v. Byerley*, 354 F.3d 540 (6th Cir. 2004), for instance, the court considered a § 1983 action alleging a violation of the First Amendment where a state actor threatened to disbar and arrest the plaintiff for picketing in a public place. *Id.* at 545. Acknowledging that the First Amendment permits reasonable time, place, and manner restrictions on such picketing, the Sixth Circuit reasoned that "it must interpret [the relevant state statute] in order to determine whether it is applicable." *Id.* at 547. As here, the court concluded that the state statute was "not applicable to the instant case" and, given the absence of an applicable reasonable time, place and manner restriction, the court held there was a genuine issue of fact as to whether the defendant's pre-enforcement threats violated the First Amendment. *Id.* at 547-52.

Similarly, in *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Department*, 533 F.3d 780, 791 (9th Cir. 2008), an anti-abortion organization

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[5] *See also* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As "Law" and the Erie Doctrine*, 120 Yale L.J. 1898, 1940 (2011) ("In many federal-question cases, one part of the case turns on an embedded and often preliminary question of state law."); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 254 (1994) ("In deciding federal questions, federal courts often make preliminary determinations of state law.").

brought an action under § 1983 alleging that state actors had violated the First Amendment by suppressing the organization's anti-abortion messages. *Id.* at 787-86. The Ninth Circuit acknowledged that the First Amendment tolerates reasonable time, place, and manner restrictions even in public forums. *Id.* at 787. As here, prior to analyzing whether the state statute asserted provided a reasonable restriction, the court found it necessary to consider whether the statute even applied to the speech at issue. *Id.* at 791. The court concluded that California courts would not interpret the state statute to apply to the plaintiff's anti-abortion speech, and thus the defendants could not invoke it as a basis for their suppressive conduct. *Id.* at 793. The Ninth Circuit explained, just as the court of appeals did here, that because the state law "was the only authority cited by Defendants in [suppressing the plaintiffs' protected speech], and thus provided the only possible source of a significant governmental interest necessary to restrict Plaintiffs' speech, . . . the [Defendants] violated Plaintiffs' First Amendment right of free speech." *Id.*

This approach—consulting state judicial decisions to determine whether a state statute invoked by a state actor actually applies to the attendant circumstances—is common sense. To treat a state actor's assertion that the state statute applies as determinative would mean that the state actor could call into constitutional doubt a statute that the state legislature never intended to apply to those circumstances in the first place. If, here, the court of appeals had simply taken Petitioner's word that the state statute applied, it would have had to consider

whether Fla. Stat. § 934.03 constituted a reasonable restriction on Respondent's speech under the First Amendment even though the state legislature never intended the statute to apply to Respondent's speech in the first place.

3. The court of appeals' interpretation of Fla. Stat. § 934.03 to exclude the specific circumstances of Respondent's recording in this case was correct and does not warrant this Court's review.

Fla. Stat. § 934.03, as interpreted by Florida courts, did not apply to Respondent's recording and publishing and thus could not be invoked by Petitioner as a reasonable basis for suppressing this concededly protected speech. As the court of appeals explained, this is so for three independent reasons.

First, Fla. Stat. § 934.02 specifically defines the "oral communication" subject to regulation under § 934.03 and limits that definition to communication "uttered by a person exhibiting an expectation that such communication is not subject to interception." Fla. Stat. § 934.02(2). The court of appeals correctly found that on the particular facts of this case, Chief Rolle failed to exhibit an expectation that the communication would not be subject to recording:

> 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.

Pet. App. 9a-10a. Indeed, during the meeting, Chief Rolle's colleague *specifically stated* that the meeting was being recorded. *Id.* at 10a.

Second, in addition to the statute's requirement that an expectation of privacy be "exhibit[ed]," the statute requires that the events take place "under circumstances justifying such expectation." Fla. Stat. § 934.02(2). The Florida Supreme Court has interpreted this language 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)). As the court of appeals explained, on the facts here, no such reasonable expectation of privacy existed. *Dep't. of Ag. & Con. Servs. v. Edwards*, 654 So. 2d 628, 632-33 (Fla. 1st DCA 1995) (no reasonable expectation of privacy where the recorded conversation was between three police officers in an office meeting about employment grievances); *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).

Third, Fla. Stat. § 934.02 excludes from the definition of "oral communication" statements that are "uttered at a public meeting." Fla. Stat. § 934.02. Florida courts have interpreted this exception to be met where several people are present in a meeting. *See*. As the court of appeals explained, 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."

Pet. App. 10a. "Moreover, the topic of their meeting was one of acute public interest: citizens discussing allegations of possible police misconduct with the chief of police." *Id.*

Petitioner claims that the court of appeals' analysis "cannot be reconciled with that of the Florida Supreme Court." Pet. at 21. First, even assuming that the court of appeals erred on a question of state law, it would not warrant this Court's review. *See* Sup. Ct. R. 10 (limiting the Court's certiorari jurisdiction to important federal questions). Even on federal questions that implicate the interpretation of a state statute, this Court "normally follows lower federal-court interpretations of state law," *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000), and has departed only "where the lower court's construction was 'clearly wrong' or 'plain error.'" *Expressions Hair Design*, 137 S. Ct. at 1150 (citation omitted).

Second, Petitioner's principal argument under state law—"that the expectation of privacy [required under Fla. Stat. § 934.02] need not be 'expressly' invoked"—was never even raised below. In its briefing to the court of appeals, Petitioner never cited any of *State v. Mozo*, 655 So. 2d 1115 (Fla. 1995), *McDade v. State*, 154 So. 3d 292, 298 (Fla. 2014), or *State v. Walls*, 356 So. 2d 294, 296 (Fla. 1978), the only cases it relies upon before this Court.

Finally, Petitioner offers no basis for rejecting the court of appeals' interpretation of Fla. Stat. § 934.03. Petitioner addresses only one of the three independent grounds for the court of appeals' conclusion that the statute did not apply to the particular facts of this case, offering in a footnote the unsubstantiated

assertion that the other two grounds are "in substantial tension with" Florida decisional law. Pet. at 22-23 n.6. Even with respect to whether Chief Rolle had exhibited an expectation of privacy under the statute, the court of appeals' reasoning was not contingent his failing to "expressly" invoke his expectation. As described above, the court found that, given the circumstances, he did not exhibit such an expectation implicitly—indeed, one of the participants specifically indicated that the events of the meeting were recorded. Pet. App. 9a-10a.

Petitioner is asking this Court to exercise its discretionary review to consider a question of state law based on an argument not raised below, which, even if correct, would not have been dispositive of the court's interpretation. The Court should decline that invitation.

4. Petitioner's argument that the court of appeals' analysis violates *Pennhurst*, 465 U.S. 89, is unfounded. In *Pennhurst*, the plaintiff brought an action against state officials under § 1983 seeking injunctive relief based upon federal claims and independent state-law claims alleging the defendants' failure to carry out certain duties under state law. *Id.* at 92. The court of appeals concluded that the Eleventh Amendment posed no obstacle to granting injunctive relief based exclusively on one of the pendent state law claims. *Id.* at 96; *see also id.* at 117 ("The crucial point for the Court of Appeals was that this Court has granted relief against state officials on the basis of a pendent state-law claim."). The Court reversed, holding that "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and

ordered has an impact directly on the State itself." *Id.* at 117; *id.* at 124-25 ("We hold that these federal courts lacked jurisdiction to enjoin petitioner state institutions and state officials on the basis of this state law.").

Pennhurst is irrelevant to this case. As the court of appeals, district court, and Petitioner all acknowledge, Respondent's complaint alleged a single claim under the federal constitution. Pet. App. 6a, 19a ("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.'"); Pet. at 18 (acknowledging that Respondent's complaint did not allege any claim under state law); *see also* Pet. App. 57a (Petitioner's briefing below, recognizing that Respondent's First Amendment claim was "the sole claim set out in [his] single-count complaint."). Although the court of appeals' reasoning involved the interpretation of a state statute to determine that Fla. Stat. § 934.03 did not apply to provide a reasonable restriction on speech, the import of that reasoning was that Respondent succeeds on his First Amendment claim, not that he succeeded on some non-existent pendent state law claim. As *Pennhurst* explicitly acknowledged, the Eleventh Amendment poses no obstacle to a federal court in providing prospective injunctive relief against a state official for federal constitutional violations. *Pennhurst*, 465 U.S. at 102 ("[A] suit challenging the constitutionality of a state official's action is not one against the State." (citing *Ex parte Young*, 209 U.S. 123 (1908))); *see also Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689

(1982) ("[T]he Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional.").

III. Several Features Of This Case Would Make It A Poor Vehicle Even For A Worthy Question Presented.

Apart from the fact that the decision below does not present any issue even remotely worthy of this Court's consideration, this record would be a poor vehicle to address any legal question.

First, Petitioner attempts to invoke this Court's certiorari jurisdiction in an interlocutory posture. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari). Petitioner claims that review is warranted that this case violates *Pennhurst*, which, as Petitioner herself acknowledges, concerned the constitutionality of issuing injunctive relief based upon a state law claim. Pet. at 16-17. However, Petitioner has sought certiorari before any such injunction has been entered. She does not provide any justification for seeking review of a purportedly unlawful injunction before any injunction has even been entered.

Second, Petitioner's characterization of the decision below appears to be a roundabout attempt to take back her affirmative concession that the First Amendment protects the right to record. Only by ignoring that concession can Petitioner characterize the court of appeals' decision as being based upon some

independent violation of state law, as opposed to a conclusion that Petitioner's suppression of that speech violated the First Amendment. The Court should reject Petitioner's attempt to withdraw a concession made before the district court, which was expressly relied upon by both courts below, and which Petitioner never sought to dispute until now. Indeed, Petitioner's concession was not just a forfeiture of the issue, but waiver. *See Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017) (explaining that waiver is "the 'intentional relinquishment or abandonment of a known right'" (citation omitted)).

Finally, as noted above, before the court of appeals, Petitioner argued that this record contains jurisdictional questions that would have to be considered prior to any issue related to the merits of this case. Petitioner does not contend that any of those jurisdictional questions merit this Court's review.

In sum, the sole and dispositive analysis of the decision below rested on the application of state law to the particular facts of this case, which now sits in an interlocutory posture and in which Petitioner appears, for the first time, to be taking issue with her earlier positions in these proceedings. It would be quite an exercise to imagine a worse candidate for this Court's review.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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