No. 24-

IN THE

Supreme Court of the United States

PROJECT VERITAS AND PROJECT VERITAS ACTION FUND,

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

STEPHEN R. KLEIN
BARR & KLEIN PLLC
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 804-6676
steve@barrklein.com

BENJAMIN BARR
Counsel of Record
BARR & KLEIN PLLC
444 North Michigan Avenue
Suite 1200
Chicago, IL 60611
(202) 595-4671
ben@barrklein.com

Counsel for Petitioners

120356

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Oregon's audio recording law—a national outlier—requires "specifically inform[ing]" anyone in almost any conversation that their words are being recorded. This peculiar requirement severely hampers modern investigative journalism, undermining the First Amendment's protection of free speech and newsgathering by effectively prohibiting the use of today's most powerful reporting tools—discreet audio recordings. Moreover, the law's inconsistent application permits and thereby favors recordings of select subjects, such as police officers or conversations during certain felonies, raising profound content-discrimination concerns.

Despite these constitutional infirmities, the United States District Court for the District of Oregon granted the state's motion to dismiss, finding no First Amendment injuries. A panel of the Ninth Circuit Court of Appeals found the law to be a content based and unconstitutional restriction of speech. An en banc panel vacated and ultimately reversed, contravening its own precedent, and upheld the law. This case presents a critical opportunity for this Court to clarify First Amendment doctrine, ensuring it aligns with the realities of modern journalism and the use of technology for effective speech and accountability.

The questions presented are:

Did the Ninth Circuit err by holding that Oregon's prohibition of unannounced recordings—which expressly exempts recordings of police activity and discussions during certain felonies—is content neutral and thus subject only to intermediate scrutiny, in conflict with this

Court's decisions in *Reed v. Town of Gilbert* and *City of Austin v. Reagan National Advertising* and with the Fourth, Seventh, Eighth, and Tenth Circuits?

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

PARTIES TO THE PROCEEDING

Petitioners are: Project Veritas and Project Veritas Action Fund.

Respondents are: Nathan Vasquez, in his official capacity as Multnomah County District Attorney, and Dan Rayfield, in his official capacity as the Attorney General of Oregon.

Other parties to the proceeding in the Ninth Circuit Court of Appeals were: Defendants Michael Schmidt, as the former Multnomah County District Attorney, and Ellen Rosenblum, as the former Attorney General of Oregon.

CORPORATE DISCLOSURE STATEMENT

Project Veritas and Project Veritas Action Fund have no parent corporations and no publicly held company owns 10% or more of their stock, respectively.

RELATED PROCEEDINGS

The proceedings in federal district and appellate courts identified below are directly related to the above-captioned case in this Court.

Project Veritas v. Schmidt, 553 F. Supp. 3d 831 (D. Oregon 2021).

Project Veritas v. Schmidt, 72 F.4th 1043 (9th Cir. 2023).

Project Veritas v. Schmidt, 125 F.4th 929 (9th Cir. en banc 2025).

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES:

Page

Page

Page

Page

Page

STATUTES AND OTHER AUTHORITIES:

Page

Page

PETITION FOR WRIT OF CERTIORARI

Petitioner Project Veritas and Project Veritas Action Fund (collectively "Veritas") respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS

The en banc opinion of the Court of Appeals is published at 125 F.4th 929 (9th Cir. en banc 2025) and included in Petitioner's Appendix ("App.") at 1. The panel opinion of the court of appeals is published at 72 F.4th 1043 (9th Cir. 2023) and included at App.95. The decision of the district court is published at 553 F. Supp. 3d 831 (D. Oregon 2021) and included at App.177.

JURISDICTION

The district court had jurisdiction over this case under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The district court granted the defendants' motion to dismiss on August 10, 2021. App.177. Veritas filed a timely appeal to the Ninth Circuit. On July 3, 2023, a panel of the Ninth Circuit reversed the district court's dismissal and facially invalidated the law. App.95. On January 7, 2025, an en banc panel reversed the earlier panel and declared the law constitutional. App.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment to the U.S. Constitution provides, in relevant part, "Congress shall make no law . . .

abridging the freedom of speech, or of the press[.]" U.S. Const. amend. I. The Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

Pertinent statutory provisions are reproduced in the appendix. App.209-219.

INTRODUCTION

In Oregon, journalists and citizens must give an "unequivocal warning" before capturing critical truths in public. *State v. Bichsel*, 790 P.2d 1142, 1145 (Or. Ct. App. 1990). This ensures scandals, abuses, and historic moments vanish into silence or staged fakery. Oregon is a place where a smartphone cannot capture candid conversations revealing the corrupt machinery behind closed-door government manipulation, or about a spontaneous act of political violence—such moments are simply erased by law. Oregon achieves precisely this dystopia with O.R.S. § 165.540 by imposing criminal penalties for unannounced or unnoticed recordings that document critical events and public officials unless preemptively disclosed.

Federal circuits are split in evaluating these restrictions. Journalists in Iowa or Kansas may freely record candid discussions, protected by strict First Amendment scrutiny, while their counterparts in Oregon become criminals for the same act. This constitutional inconsistency chills investigative reporting nationwide, turning critical news coverage into a geographic lottery. If left unresolved, journalists' freedom to uncover truth hinges arbitrarily on their state's interpretation of content

neutrality. Equally troubling is that Oregon attempts to shield most public discussions from newsgathering under the guise of protecting conversational privacy. Even under weakened scrutiny, this attempt should fail.

Only this Court can resolve the widening circuit confusion, protecting journalists nationwide from outdated statutes that forcibly extinguish the lights illuminating public discourse and newsgathering.

STATEMENT OF THE CASE

Oregon's recording law, O.R.S. § 165.540, criminalizes making audio recordings of conversations without a clearly announced notification, carving out narrow exceptions such as recordings of police officers carrying out public duties or conversations during specific felonies. Veritas sought to investigate possible gubernatorial misconduct involving the Oregon Public Records Advocate. App.6, 9, 23, 101. It also sought to investigate the rise of political violence and extremism by recording conversations in and around protest events in Portland. *Id.* Because the investigations required candid, unnoticed recordings—the most effective way to uncover sensitive truths—Veritas sought declaratory and injunctive relief against the law as unconstitutional under the First Amendment. These stories have remained on hold to this very day.

I. Legal and Historical Background

Oregon Revised Statutes section 165.540 was initially enacted as an anti-wiretapping law in 1955, regulating only how one could record (or "obtain") telecommunications or radio communications. The law has always permitted

participants in phone calls to obtain them without notice to another party. *Cf.* O.R.S. § 165.540(1)(a) (1955) *with* O.R.S. § 165.540(1)(a) (App.211). The statute was amended in 1959 and 1961, expanding the reach of the law to regulate obtaining a "conversation," which is central to this appeal. *See* O.R.S. §§ 165.535(1) (1961), 165.540(1)(c) (1961). A "conversation" is now "the transmission between two or more persons of an oral communication which is not a telecommunication or a radio communication, and includes a communication occurring through a video conferencing program." O.R.S. § 165.535(1) (App.209). One may not obtain a conversation without specifically informing all other participants. App.211.

Other amendments in 1959 included the first of many iterations of exceptions for law enforcement to obtain conversations without specifically informing all participants. *See* O.R.S. § 165.540(5)(a) (1961). For just over two decades, the only exception for citizens permitted "subscribers or members of their family [to] perform acts prohibited . . . in their homes." O.R.S. § 165.540(3) (1961); *see* O.R.S. § 165.540(3) (App.213). In 1983, the legislature added further exceptions, or situations in which one need not specifically inform participants to obtain a conversation but must instead provide constructive notice by using "an unconcealed recording device." O.R.S. § 165.540(6) (1983); *see* O.R.S. § 165.540(6) (App.215-216).

Section 165.543 was also enacted in 1983, regulating the interception of wire or oral communications when one "is not a party to the communication[,]" or what is generally understood as eavesdropping. O.R.S. § 165.543 (1983); *see* O.R.S. § 165.543 (App.219). In 1989, another exception was added, allowing one to "record[] a conversation during a felony that endangers human life." *See* O.R.S.

§ 165.540(6) (1989); O.R.S. § 165.540(5)(a) (App.213). In 2015, yet another exception was added, permitting one to "record[] a conversation in which a law enforcement officer is a participant" if, among other factors, "[t]he recording is made openly and in plain view of the participants in the conversation[.]" O.R.S. § 165.540(5)(b) (App.213-215).

Since the provisions at issue, particularly section 165.540(1)(c), have remained largely unchanged since enactment, the interpretations and applications of the law endure. For example, outside of specific exceptions in the law, "persons recording the conversations of others [must] give an unequivocal warning to that effect." *State v. Bichsel*, 790 P.2d 1142, 1145 (Or. Ct. App. 1990) (emphasis added). Aside from the law's exceptions, the circumstances of a conversation do not matter—all participants must be specifically informed for the recording to be legal. *See, e.g.*, *State v. Knobel*, 777 P.2d 985, 988 n.1 (Or. Ct. App. 1989) ("ORS 165.540(1)(c) includes no language indicating that a reasonable expectation of privacy is required."). This includes many situations in which one is openly displaying a recording device. *See Elkins v. Washington Cty.*, No. CIV 06-448-ST, 2007 WL 1342155, at *6 (D. Or. May 3, 2007).[1]

Yet even these few exceptions can have curious effects. The most private of conversations may be secretly obtained by "subscribers to telecommunications and radio services

1. Following the 2015 amendment to section 165.540(5)(b) it is likely that the recording at issue in *Elkins* would be legal since it was a conversation with law enforcement officers. App.213-214. But if one interacts with any other government official such as a prosecutor in a district attorney's office in the exact same circumstances, the recording remains a misdemeanor. *See State v. Delaurent*, 514 P.3d 113 (Or. Ct. App. 2022).

(and their family members) who, in their homes, engage in conduct otherwise prohibited by section 165.540(1)(c), regardless of whether the subscribed-to service is utilized to obtain the conversation." *State v. Evensen*, 447 P.3d 23, 32 (Or. Ct. App. 2019), *review denied*, 455 P.3d 41 (Or. 2019) (applying the exception in section 165.540(3)). The law is an eclectic mix of permissions and prohibitions, and these arbitrary twists and turns raise serious First Amendment concerns including underinclusiveness, overbreadth, and the suppression of speech based on its content.

II. Facts and Procedural History

Project Veritas and Project Veritas Action Fund are nonprofit national media organizations that engage almost exclusively in undercover investigative journalism. App.3. Undercover journalists working for Veritas have documented newsworthy matters by obtaining conversations through secret and unannounced recording, often in areas held open to the public such as sidewalks, restaurants, and hotel lobbies. App.101-102. Veritas has used open and secret recording to investigate a variety of matters of public concern, including protests in states such as Virginia. *Id.* Veritas seldom informs others they are being recorded since such an announcement damages the truthfulness of what is to be recorded. App.3. The restrictions in O.R.S. § 165.540 censor unannounced open recording and secret recording in Oregon, and, but for the law, Veritas would use both methods throughout the state. App.3, 101-102.

Importantly, none of Veritas's activities would constitute eavesdropping, or secretly recording the conversations of others. App.3, 144. They would only involve journalists obtaining their own conversations or

acting on the principle of one-party consent. App.144. Nevertheless, the law threatens to punish Veritas with a misdemeanor for any of these secret or open recordings that occur without specifically informing all participants. O.R.S. § 165.540(9) (App.217). This is, in fact, a broader prohibition than Oregon law separately placed upon bona fide eavesdropping with electronic devices. *See* O.R.S. §§ 133.721, 165.543 (App.218-219). The censorship of Veritas by section 165.540 is broad, preventing it from engaging in undercover journalism in Oregon.

Veritas challenged the unannounced open recording and secret recording provisions of section 165.540 as unconstitutional under the First Amendment in United States District Court for the District of Oregon. *See* App.177-204. Considering the State's motion to dismiss, the court ruled that the exceptions in the law, including those for openly recording law enforcement officers and secretly recording conversations during felonies that endanger human life, were content neutral and that the law withstands intermediate scrutiny. App.186-204. The court entered in final judgment and Veritas appealed. *See* App.102-103.

On appeal, a panel of the United States Court of Appeals for the Ninth Circuit reversed the district court, finding the law enforcement and felony exceptions for recording were content based, requiring strict scrutiny. App.111-112. Under strict scrutiny, the Ninth Circuit held Oregon's law facially violated the First Amendment and the panel invalidated O.R.S. § 165.540. On en banc review, the Ninth Circuit reversed course and held the law was content neutral, satisfying intermediate scrutiny due to its protection of "conversational privacy." App.4, 35, 47-49.

REASONS FOR GRANTING THE OPINION

I. The Ninth Circuit Erroneously Held that Oregon's Recording Ban is Content Neutral

The en banc Ninth Circuit panel upheld Oregon's selective prohibition of many unannounced audio recordings as a content-neutral law. The majority reasoned that the law's exceptions do not discriminate against journalistic content. Rather, they hinge on the recording's "circumstances." App.30, 31, 33. Because the exceptions purportedly do not "concern a particular viewpoint" or restrict an "entire topic" of speech—recordings of police are allowed regardless of subject, and a recorded conversation during a felony "could encompass any content whatsoever"—the court concluded the law "does not 'draw distinctions based on the message a speaker conveys'" and is thus content neutral. App.31-33 On that basis, the Ninth Circuit applied intermediate scrutiny, upholding the law as narrowly tailored to Oregon's significant interest in conversational privacy. App.46.

a. A Journalist's Decision of What to Record is Itself Content Determination

The Ninth Circuit fundamentally misunderstood the nature of the expressive act involved in recording, mischaracterizing it as mere conduct rather than an inherently editorial, content-based decision. App.17 (notice requirement is mere "incidental" regulation); 32-35. This Court made clear in *Miami Herald v. Tornillo* that a speaker's selection about what topics to address and what events to document is itself an expressive choice protected by the First Amendment. 418 U.S. 241 (1974).

Choosing what to capture through recording—what subject a journalist places behind a lens or microphone—is an inherently expressive, content-based choice. State-driven editorial interference in that process skews content selection. *Telescope Media Group v. Lucero*, 936 F.3d 740, 751 (8th Cir. 2019) (content selection includes making decisions about footage and dialogue to include in recording). It selectively privileges particular expressive choices (recordings of police activity or conversations about some felonies) while disfavoring other editorially significant subjects (recordings of political corruption or of the Public Records Advocate).[2]

Oregon's law imposes a mirror image of the *Tornillo* burden: by criminalizing recordings of disfavored subjects, the state forbids journalists from gathering information on those subjects and thus dictates which stories can or cannot be captured. This is a textbook content-based regulation that evaded the en banc panel's review. Even absent any explicit viewpoint discrimination, a law that singles out specific subject matter for different treatment is content based on its face. Indeed, the First Amendment's hostility to content-based laws "extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980).

---

2. *See, e.g.*, *Nieves v. Bartlett*, 587 U.S. 391, 429 n.5 (2019) (Sotomayor, J., dissenting) (citing Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right To Record the Police*, 104 Geo. L. J. 1559, 1564–65 (2016); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right To Record*, 159 U. Pa. L. Rev. 335, 340–41, 344–51 (2011)).

Oregon's law, by selectively determining which truths journalists may uncover and which must remain hidden, resembles Orwell's vision in *1984*, where government subtly but powerfully controls the narrative by deciding what information the public may see or hear. *See generally* George Orwell, 1984 (1949). Such state-driven editorial interference strikes at the heart of the First Amendment's protections against content-based regulation.

b. The Ninth Circuit's Flawed Content-Neutral Analysis Conflicts with *Reed* and *Austin* by Allowing Oregon to Pick Winners and Losers in Newsgathering

The Ninth Circuit's content-neutrality analysis conflicts with this Court's content-based speech doctrine as articulated in *Reed v. Town of Gilbert* and *City of Austin v. Reagan National Advertising*. In *Reed*, this Court set forth a "commonsense" rule: a law is content based on its face "if it 'draws distinctions based on the message a speaker conveys.'" 576 U.S. 155, 163 (2015) (internal citations omitted). This includes obvious distinctions by subject matter as well as more subtle distinctions defining speech by its function or purpose. A law that "single[s] out specific subject matter for differential treatment" is facially content based, even if it does not discriminate among viewpoints. *Id*. at 169. Crucially, *Reed* held that benign legislative motives or justifications cannot save a content-based law: "[i]nnocuous justifications" do not transform facial content discrimination into a content-neutral law, and courts must consider a law's text before its purpose. *Id*. at 166.

Under *Reed*'s test, Oregon's selective recording ban is difficult to classify as content neutral. The statute's

exceptions explicitly favor certain subjects of recording. They permit unannounced recording of communications that occur during the commission of a felony endangering human life and of conversations involving police officers, while prohibiting unannounced recordings of other conversations. In effect, Oregon has singled out specific content for different treatment, carving out those categories from the general ban. But selecting some categories of speech or speakers for exemption is the hallmark of a content-based law. For example, in *Carey v. Brown* this Court struck down a statute that banned residential picketing except for labor picketing; although even-handed as to viewpoint, the law "accord[ed] preferential treatment to expression concerning one particular subject" and was therefore content based. 447 U.S. 455, 461 (1980). Likewise, *Police Department of Chicago v. Mosley* held that a Chicago ordinance banning picketing near schools was unconstitutional because it exempted peaceful labor picketing. 408 U.S. 92, 98–99 (1972). Under these precedents, a broad speech restriction with subject-matter exceptions is facially content based.

The Ninth Circuit reasoned that Oregon's felony exception "does not address the content" of conversations because they "need not relate to the felony." App.32.[3] The only reason to limit the exception to conversations that occur during a life-endangering felony is to permit the unannounced recording of particular content of high

3. Other states have made similar claims in related "Ag-Gag" challenges, arguing that selective recording restrictions "regulate speech *function*, not content." *People for the Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Federation, Inc.*, 60 F.4th 815, 830 (4th Cir. 2023) (emphasis added). But courts, except the Ninth Circuit, regularly reject this approach, because it "fosters the same problem—and the same First Amendment violation." *Id.*

value—namely, evidence of deadly crimes. By contrast, an unannounced recording of a conversation about matters that do not threaten human life (say, an exposé on consumer fraud or Antifa protests) enjoys no exception. In practical enforcement, determining if the exception applies will require examining the recording's content: Was the recorded conversation part of life-threatening criminal activity or not? Similarly, the police-officer exception is inherently speaker- and subject-based: it authorizes unannounced recording only when one recorded speaker is a law enforcement officer performing official duties.

The en banc opinion blazes its own trail for deciding whether a law is content based, asking first whether government intends to favor or disfavor a particular message or speaker. App. 28. To justify this detour, it resurrects the ghost of *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), a decision whose interpretive vitality is at best questionable after decades in jurisprudential exile. This Court buried *Vincent*'s intent-based inquiry in *Reed*, declaring emphatically that a law is content based if it distinguishes speech on its face by topic, subject matter, or message, regardless of legislative intent or discriminatory application. 576 U.S. at 163–65. This reasoning is sound because a proper rule against content-based restrictions must protect against both intentional and inadvertent suppression of speech. This Court hammered another nail into *Vincent*'s coffin in *Austin*, reiterating that content neutrality depends first—and almost entirely—on statutory text, relegating intent-based inquiries to a distant second place. 596 U.S. at 69-72. *Vincent*'s intent-driven test for content neutrality is no longer merely questionable—it is dead. Other federal circuits have

already read *Vincent* its last rites, expressly recognizing *Reed*'s doctrinal shift toward a straightforward textualist inquiry. *See, e.g.*, *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (holding that *Reed* abrogated previous intent-based tests); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) (same). If *Reed* is to mean anything at all, it must mean that the Ninth Circuit's resurrection of *Vincent* is not just inappropriate, but profoundly wrong—and a direct invitation for this Court's correction.

The Ninth Circuit's approach cannot be squared with *Austin*, which clarified how a content-discrimination test should operate. *Austin* reaffirmed that the commonsense inquiry is whether a regulation "singles out any topic or subject matter for differential treatment" or instead distinguishes based on a content-neutral factor like location. 596 U.S. at 71. There, this Court upheld an on-/off-premises sign rule as content neutral because the distinction "did not single out any topic or subject" and was based on location, rather than the "sign's substantive message." *Id.* But the Oregon law does exactly what Austin forbids: it singles out specific categories of speech for different treatment. The exception for law enforcement recordings is not a location or manner regulation. And an exemption for recordings during certain felonies is not a neutral time, place, or manner rule—it is justified only by the subject of the activity being recorded. Indeed, *Austin*, reiterating *Reed*, cautioned that not every distinction tied to a speech's function or purpose escapes strict scrutiny—if a "function or purpose" classification is a proxy for content, it remains content based. *Id.* at 74.[4]

4. The en banc Ninth Circuit panel erroneously interpreted *Austin*, 596 U.S. 61, as relaxing the content-based standard

This Court's decision in *Barr v. American Association of Political Consultants* confirms that a content-defined exception makes a speech restriction content based. 591 U.S. 610 (2020). In *Barr*, the federal robocall statute's general ban had an exception for calls about government debt, privileging debt-collection speech over other content, such as political or charitable solicitations. The plurality there held that "a law that 'singles out specific subject matter for differential treatment'" is content based, exemplified by a rule banning sound trucks for political speech and no other speech. *Id.* at 619. The government-debt exception thus rendered the robocall ban content based and subject to strict scrutiny. Oregon's law has the same structure: a general ban on a medium of speech (unannounced recording) with exceptions carved out for specific subject matter (certain felonies and police encounters). By *Barr*'s logic, the Oregon law "targets speech based on its communicative content" per *Reed*, 576 U.S. at 163, because one must ask what the recording is about or who is involved to know if it is allowed. The Ninth Circuit's contrary finding effectively resurrects the kind of content classification that *Reed*, *Austin*, and *Barr* prohibit.

The Ninth Circuit's reasoning would flip this Court's content-based doctrine on its head. After all, this approach

---

established in *Reed*, 576 U.S. 155. However, *Austin* explicitly confined its holding to regulations governing off-premises billboards, emphasizing their "distinct safety and esthetic challenges" and the "history and tradition" of such regulation. *Austin*, 596 U.S. at 75. The decision did not diminish *Reed*'s core principles. The en banc panel's reliance on *Austin* to dilute *Reed*'s holding in a case unrelated to billboards or geographical distinctions constitutes clear error warranting reversal. *See id.* at 86–106 (Thomas, J., dissenting, joined by Gorsuch and Barrett, JJ.).

is just gamesmanship. Under this upside-down approach, *Reed* would hold that the law there merely regulated signs differently based on the *situation* in which they were used. A church's directional sign would be one posted in the *circumstance* of an upcoming event—entirely different from those placed during an election season (a political sign's circumstance) or the absence of any event (an ideological sign). In *R.A.V.*, the ordinance there would have been deemed content neutral since it was just targeting the *situation* in which fighting words provoked violence on certain bases. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The burning of a cross on a black family's lawn is not punished for its message; it is punished for the *circumstance* that the incident involves race-based intimidation. And *Simon & Schuster* would have deemed New York's Son of Sam law as content neutral because it did not matter what the criminal said—it only mattered that the speaker happens to be in the *circumstance* of being a convicted felon discussing his own crime. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 120 (1991).

Under this nonsensical spin, any state could argue it is not targeting any idea or message. It is just regulating particular circumstances of speech in different situations. If this Court permits this approach, the floodgates will open for all manner of content-targeted regulations: laws forcing authors of "dangerous" topics to forfeit profits or special taxes on publications about certain subjects—all excused as addressing circumstances of production or the speaker's status.

c. The Ninth Circuit's Decision Creates an Untenable Circuit Split, Criminalizing in Oregon What is Protected Journalism in Kansas and Iowa

This decision also creates a direct split with the Eighth and Tenth Circuits, which have taken a stricter view of analogous recording laws. In *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021), the Tenth Circuit struck down Kansas's "Ag-Gag" law that criminalized gaining access to agricultural facilities under false pretenses. That law, like Oregon's, contained an element that disfavored certain speech based on its purpose—it applied only to those who enter agricultural operations with the intent to damage the enterprise (*i.e.*, whistleblowers or critics). *Id.* at 1223. The Tenth Circuit held this was a content and viewpoint-based restriction, triggering strict scrutiny. *Id.* at 1233. Citing to *R.A.V.*, 505 U.S. at 391, the court confirmed that even if certain false speech or conduct could be proscribed, the state "may not limit the scope of the prohibition due to favor or disfavor of the message" conveyed. *Kelly*, 9 F.4th at 1236.

Similarly, the Eighth Circuit in *Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021), addressed Iowa's prohibition on undercover farm recordings. It upheld part of the law that was focused on lies causing tangible trespass harm, but it struck down a broader provision that swept in speech not tied to material harm. In doing so, the court agreed that a statute cannot criminalize speech based on its content or the speaker's motive without satisfying strict scrutiny. The panel warned that even within categories of unprotected speech (like false statements made to trespass), the state cannot

target a subclass of speech based on disfavored content without a compelling reason. *Id.* at 795 n.3.

Oregon's law suffers from the same defect as the Iowa law stricken in *Reynolds* by limiting its reach to exclude recordings of police or life-endangering felonies while continuing to ban other unannounced recordings. This kind of content selectivity "would trigger strict scrutiny (if not render the statute unconstitutional per se)" under the Eighth Circuit's reasoning. *Id.* Indeed, the conflict is stark in outcome: the Ninth Circuit's ruling upheld Oregon's recording ban, whereas the Tenth Circuit invalidated Kansas's, and the Eighth Circuit invalidated Iowa's analogous provisions that were not content neutral. So, journalists, whistleblowers, and activists face different First Amendment standards depending on the circuit. In the Ninth Circuit, a state can prohibit undercover recordings so long as its exceptions are framed as being based on "circumstances." State-disfavored content disappears. In the Eighth and Tenth Circuits, such a law would be recognized as content based and presumptively unconstitutional. This creates a patchwork of constitutional rights, leaving journalists to guess at their freedom: crossing state lines turns courageous reporting into criminal behavior. The Ninth Circuit's approach produces an intolerable paradox.

Imagine if the Eighth and Tenth Circuits had embraced the newly minted Ninth Circuit circumstances approach to content-based determinations. Iowa's law barring undercover videos at slaughterhouses would be deemed a simple regulation of the circumstances (private property employment)—nothing to do with the actual content of what is being recorded (depictions of animal

abuse). Kansas's law prohibiting entry to a facility under false pretenses to gather information would simply be a limit on the circumstances of deceit, supposedly unrelated to any particular speech topic. But such approaches would have been an analytical disaster for free speech. They would license lawmakers to target disfavored speech so long as they frame the law in terms of when, where, or how the speech is made rather than by its communicative content. That is nothing more than clever content-based discrimination that *Reed* cautioned against. If "function or purpose" classification is a clever proxy for content, the law should be deemed content based. 576 U.S. at 74. This Court had the prescience to forbid Oregon's approach in *Simon & Schuster, Inc.*, where it noted that this sort of "circular defense" would "sidestep judicial review of almost any statute" challenged as content based. 502 U.S. at 120.

If states can evade strict scrutiny by merely framing restrictive recording laws as regulating circumstances rather than content, journalists and whistleblowers will face severe risks when attempting to expose corruption, misconduct, or abuse of power. That is, after all, what happened in Oregon. Veritas sought to expose gubernatorial manipulation and rising political violence—stories critical to public accountability. App.6, 9, 23. Yet Oregon's recording law transformed their quest for transparency into criminal acts. Cloaked in the guise of neutral regulation, states will criminalize undercover reporting that threatens powerful interests, effectively silencing critical voices and shielding misconduct from public view. Left unchecked, Oregon's censorship threatens to erase crucial truths from public consciousness, leaving power unchecked, corruption concealed, and democracy impoverished.

d. This Case Presents an Ideal Vehicle to Clarify This Court's Content-Based Doctrine

The Ninth Circuit's decision flouts settled First Amendment law on content-based regulations. By declaring Oregon's exceptions content neutral, the Ninth Circuit circumvented strict scrutiny for a statute that explicitly favors certain speech. This approach cannot be reconciled with *Reed*. 576 U.S. at 165–66. Under *Reed*, Oregon's law is facially content based because it draws distinctions based on the content and context of conversations and permits unannounced recording in a select few subject areas while banning it generally. The en banc panel's focus on the government's benign motive (protecting privacy, not censoring a viewpoint) misapprehends *Reed*'s rule that any facial content preference triggers strict scrutiny "regardless of the government's benign motive[.]" *Id*. at 165. If allowed to stand, the Ninth Circuit's ruling provides a roadmap for states to evade strict scrutiny by framing content distinctions as circumstance based. This Court's intervention is needed to ensure courts confront and rigorously review content-based laws.

The decision below deepens a circuit split on an important First Amendment question. The content-based or content-neutral status of laws affecting newsgathering and undercover investigations is a recurring issue, and the circuits are now openly divided. The Ninth Circuit stands alone in upholding such a prohibition under intermediate scrutiny, whereas the Eighth and Tenth Circuits have demanded strict scrutiny for similar laws. The stark disagreement over Oregon's law—upheld in the Ninth Circuit but suspect under the approach of the Eighth and Tenth—presents precisely the kind of split warranting this Court's review. Resolving this conflict is essential to

ensure that fundamental speech freedoms do not vary by geography.[5]

The right to record matters of public interest is a critical component of investigative journalism and civic oversight recognized by the First Amendment. By upholding Oregon's ban, the Ninth Circuit has blessed a severe restriction on information gathering, one that this Court's precedent would ordinarily deem as a content-based discrimination. The decision below not only conflicts with *Reed*, *Austin*, and *Barr*, but also undermines the consensus of many courts that recording public officials and events is protected expressive conduct. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 529–34 (2001); *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). If left unreviewed, it invites states within the Ninth Circuit to enact or enforce similar bans, chilling undercover journalism. Meanwhile, in the Eighth and Tenth Circuits, journalism would receive full First Amendment protection. Such a patchwork of legal standards for speech is unworkable. This Court's review is needed to restore uniformity and uphold the principle that the First Amendment forbids laws that hinge on the content of speech without satisfying the most exacting scrutiny.

---

5. Alternatively, this Court could simply find that the en banc panel's reasoning as to content-based analysis is clearly erroneous and subject to summary reversal. *See, e.g.*, *City of San Diego v. Roe*, 543 U.S. 77 (*per curiam*) (2004); *Kisela v. Hughes*, 584 U.S. 100 (*per curiam*) (2018) (summary reversal of Ninth Circuit en banc panel).

II. Oregon's Law Absurdly Treats Public Spaces as Private, Failing Even Intermediate Scrutiny

Oregon's law does not protect genuine privacy—it creates privacy theater. It treats public streets like secret chambers, imagining conversations in cafes and sidewalks to be intimate confessions. But the First Amendment does not recognize expansive privacy interests as a basis to silence public speech. This only leads to the conclusion that Oregon's law is not tailored to privacy: it is tailored to censorship.

Setting aside the law's content restrictions, O.R.S. § 165.540 fails intermediate scrutiny. "[T]o survive intermediate scrutiny, a restriction on speech or expression must be '"narrowly tailored to serve a significant governmental interest."'" *Austin*, 596 U.S. at 76 (2022) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1980)). The statute is unmoored to any interest in conversational privacy and is thus unconstitutional.

a. There is No Significant Government Interest in Protecting the Privacy of Conversations Held in Public

Oregon maintains that its interest in its recording law is the preservation of conversational privacy. App.41-43. When regulating audio recording, any governmental interest in privacy should be straightforward and limited. If an individual voluntarily speaks with another person in public, they cannot reasonably expect the conversation to remain secret. Privacy concerns should instead focus on eavesdropping, where an unknown third party listens without consent. The First Amendment should

protect a known party's right to record conversations they participate in, as recording merely captures what they already have the right to share. Historically, both common law and Fourth Amendment principles affirm that speaking to someone carries no protection that the conversation will stay private. *See, e.g.*, *Katz v. U.S.*, 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"). Relatedly, the *law* may not, by default, prohibit a party to a conversation from sharing its contents: this would be anathema to free speech. *Smith v. Daily Mail Publ'ing Co.*, 443 U.S. 92, 102 (1979) ("state action to punish the publication of truthful information seldom can satisfy constitutional standards."). An audio recording by a party is little more than a more accurate record of what one party is already, in the overwhelming majority of circumstances, entitled to share in a free society. *See Sullivan v. Gray*, 324 N.W.2d 58, 60 (Mich. Ct. App. 1982); *see also* Rauvin Johl, *Reassessing Wiretap and Eavesdropping Statutes: Making One-Party Consent the Default*, 12 Harv. L & Pol'y Rev. 177, 182 (2018).

In the Fourth Amendment context, this Court drew a bright line between one-party consent and eavesdropping more than half a century ago in *U.S. v. White*, 401 U.S. 745 (1971). In that case, a government informant used a concealed radio transmitter to share with the police his conversations with a suspect. *Id.* at 746–47. The Court distinguished *Katz*, in which it found that the Fourth Amendment prohibited the government from certain electronic eavesdropping without a warrant—specifically, secretly "attaching a listening device to the outside of a public telephone booth and record[ing] the [suspect's] end

of his telephone conversations." *Id.* at 748; *see generally Katz*, 389 U.S. 347. Eavesdropping, however, is distinct from revealing or recording one's own conversation:

> [H]owever strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, "no interest legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." . . . No warrant to "search and seize" is required in such circumstances, nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused *. . . or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence.*

White, 401 U.S. at 749 (citations omitted) (emphasis added). The plurality emphasized that, for Fourth Amendment and privacy purposes, a one-party recording by a police officer is no different than "writ[ing] down for official use his conversations with a defendant and testify[ing] concerning them[.]" *Id.* at 750–51 (citing *Hoffa v. U.S.*, 385 U.S. 293 , 300–03 (1966)). Yet, the *reliability* of an audio recording was undeniable in comparison:

> Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording *will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent*. It may also be that with the recording in existence it is less likely that the informant will change his mind, less chance that threat or injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony. . . . [W]e are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against *a more accurate version of the events in question*.

Id. at 753 (emphasis added). This reliability rationale applies with even greater force under the First Amendment. Just as recordings provide accurate evidence crucial in criminal trials, they similarly protect accuracy in journalism, ensuring truthful reporting on matters of public concern. The First Amendment analysis here, though distinct, logically draws from established Fourth Amendment principles. Just as the Fourth Amendment recognizes diminished privacy expectations when voluntarily speaking to others, the First Amendment should likewise forbid states from imposing artificial privacy standards that silence accurate and truthful newsgathering—precisely the speech activity protected by constitutional guarantees.

Justice Douglas's dissent in *White* did not substantively engage the distinction between eavesdropping and

one-party recording and all but called for a warrant requirement for any form of government recording. *Id.* at 756–66 (Douglas, J., dissenting). Ironically, at points, his reasoning can be read to bolster the plurality opinion:

> The individual must keep some facts concerning his thoughts within a small zone of people. At the same time he must be free to pour out his woes or inspirations or dreams to others. *He remains the sole judge as to what must be said and what must remain unspoken*. This is the essence of the idea of privacy implicit in the First and Fifth Amendments as well as in the Fourth.

Id. at 763 (emphasis added). If Justice Douglas meant a party to a conversation is responsible for his own words, he was plainly correct. If he meant to suggest a party has absolute control of what "must remain unspoken" by those he confides in, he was plainly incorrect, both ethically and constitutionally. At least as to the Fourth Amendment, the one-party consent standard of *White* endures. *See, e.g.*, *U.S. v. Esqueda*, 88 F.4th 818, 825–30 (9th Cir. 2023), *cert. denied,* 145 S. Ct. 249 (2024).

Of course, the Fourth Amendment is a baseline for protecting the persons, houses, papers, and effects from unreasonable searches and seizures by the government. U.S. Const. amend. IV. Upon this, the federal and state governments may enact greater protection. Some state supreme courts have ruled that their state constitutions provide a greater right to privacy from government recording than the Fourth Amendment and require a warrant for one-party recordings. *See, e.g.*, *State v. Goetz*, 191 P.3d 489, 504 (Mont. 2008). Indeed, Oregon

could ban all wiretapping *by the government* or even one-party recording of conversations *by the government*. *But see* O.R.S. § 165.540(2)(a)(B), (5)(d), (5)(e) (App.214-215) (providing *exceptions* to the law's restrictions *for* the government). In that sense, the law could not be too protective of privacy against government recordings. But the First Amendment is different: it is a limit past which the government may not regulate speech activities. When it regulates free speech and the free press, *a law can be too protective of privacy*. This principle went unobserved by the court below. In sum, there is no significant governmental interest in the expansive conversational privacy that Oregon envisions. Oregon's reclassification of public spaces as private is a thinly veiled attempt to restrict the free flow of information—antithetical to any real interest in protecting conversational privacy.

b. There is No Significant Governmental Interest in Silencing the Press to Encourage Public Discourse

The Ninth Circuit held that Oregon's law promoted a significant government interest: making everyone feel comfortable to speak in public. It claims that suppressing audio recording somehow helps "the uninhibited exchange of ideas." App.36. The opinion below dangerously permits a state to restrict core First Amendment newsgathering rights simply to enhance the subjective comfort of bystanders. This reasoning—that a state can pursue an interest in limiting expressive activities because they may cause discomfort or unease to others—is fundamentally incompatible with this Court's established precedent.

This Court has repeatedly rejected the idea that the government may restrict one person's speech merely

to elevate or empower another's. In *Citizens United v. Federal Election Commission*, this Court repeated *Buckley*'s instruction that the government cannot suppress the speech of some participants in public discourse "to enhance the relative voice of others." 558 U.S. 310, 340–41 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976)). The First Amendment entrusts the marketplace of ideas to individual speakers, not the government, which must not engage in selective suppression of newsgathering to achieve a perceived comfort in speaking. Whether government has the power, as Oregon claims, to engage in such egalitarian, selective speech suppression is not a debatable question. As *Buckley* put it nearly 50 ago, such an approach is "wholly foreign to the First Amendment." 424 U.S. at 49.

Similarly, in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), this Court held unconstitutional a Vermont statute that restricted pharmaceutical marketers' access to prescription information to protect doctors from discomforting messages. Vermont argued the law would create a healthier information environment by limiting certain speech, but the Court rejected this rationale. Instead, it held that the state may not burden certain speakers solely to benefit or protect the comfort or prescribing doctors. *Id.* at 575–76. The government's paternalistic attempt to decide what information was beneficial or comfortable for doctors to hear was not merely misguided—it was constitutionally invalid as a governmental interest.

In *Rosenberger v. Rector and Visitors of the University of Virginia*, this Court again rejected governmental attempts to restrict some speech in order to promote a supposedly balanced or comfortable public dialogue.

515 U.S. 819 (1995). The university selectively denied funding to student publications expressing religious viewpoints to preserve neutrality or comfort among other student groups. Of course, neutrality by suppression is not neutral—it is censorship. This Court found selective funding to be impermissible viewpoint discrimination. *Id.* at 831–32. Just as the government may not silence one viewpoint to amplify another, it cannot suppress certain methods of newsgathering simply because some participants in a public conversation might feel uneasy.

In *McCullen v. Coakley*, this Court invalidated a Massachusetts law creating buffer zones around abortion clinics intended to shield patients from uncomfortable confrontations with protesters. 573 U.S. 464 (2014). Despite the state's claimed interest in creating a comfortable environment for patients, the Court emphasized that even content-neutral laws aimed at increasing listener comfort or balancing competing interests cannot justify substantially restricting speech rights. *Id.* at 476–77. Oregon's asserted goal—protecting the comfort and perceived conversational privacy of citizens—is an even weaker justification for burdening the fundamental right to gather news and information through recording.

Relatedly, the opinion below takes a sharp detour in examining peculiar future fears about deepfakes and artificial intelligence. App.40-41. The majority worries that recordings might be "selectively edited" or made such that "people appear to say things that they never actually said." *Id.* This Court has long disfavored front-end restrictions on speech imposed out of fear that the speech might later be misused. *See, e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("The mere

tendency of speech to encourage unlawful acts is not a sufficient reason for banning it"). The Ninth Circuit's reliance on worst-case scenarios like manipulation or selective editing cannot transform a conjectural risk into a constitutionally adequate interest for suppressing speech before any harm has materialized. Likewise, this Court has observed that "the normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it," not to silence speech in advance. *Id.* Oregon's notice mandate flouts these principles by imposing a broad prior restraint on the act of unnoticed recording based on speculative misuse. Fears about deepfakes or edited recordings can be addressed through narrow, post hoc remedies (such as laws against fraud, defamation, or evidentiary rules against fabricated evidence) without gagging truthful newsgathering at the outset.

The Ninth Circuit's endorsement of speech suppression to preserve public conversational comfort starkly conflicts with this Court's precedent. It effectively licenses states to chill investigative journalism whenever someone might prefer not to be documented or observed in any public place. If Oregon's theory of comfort-based censorship stands, nothing prevents states from similarly restricting other methods of newsgathering—hidden photography in public, anonymous notetaking, or covert witnessing—simply because these methods might make some individuals uneasy.[6] This creates a dangerous invitation

6. Indeed, many groundbreaking exposés in American history would never had occurred had similar notice requirements been imposed. Imagine Nellie Bly politely informing asylum administrators of her undercover intentions or Upton Sinclair alerting meatpacking managers to his journalistic endeavors.

that allows vague feelings of discomfort to override core speech freedoms. This just leaves polite, sanitized facades as the standard of public newsgathering and reporting. But free speech inherently makes people uncomfortable. This Court's First Amendment jurisprudence wisely recognizes discomfort as the necessary companion of freedom. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011); *Time, Inc. v. Hill*, 385 U.S. 374 (1967). Public newsgathering and discourse would otherwise collapse under the crushing weight of sensitivity or "wokeness" in today's parlance.

Certiorari is warranted to reaffirm that constitutional protections for expressive activities and newsgathering cannot be diminished to ensure the conversational ease of others.

c. When Everything is Private, Nothing is: Oregon's Law Lacks Narrow Tailoring

Section 165.540(1)(c) prohibits nearly all recordings of conversations to which one is a party unless others are "specifically informed" a recording is occurring, even if one is openly recording. But the law reaches too far and protects conversations that are far removed from any legitimate definition of privacy. It is notable that its provisions ordinarily apply in the most public of fora—

App.48. Such absurd constraints would ensure nothing but sanitized portrayals of reality. This would gut the First Amendment and deprive Americans of vital truths that thrive precisely because they are gathered without announcement or permission. Free speech, after all, exists to expose secrets—not preserve them.

sidewalks, streets, and public plazas.[7] Its bounds, while not limitless, are expansive, capturing areas of American life usually held out to public inspection. As recognized by the dissent in the court below, Oregon's law bans recording without notice even absurdly "loud conversations in public—where there is no expectation of privacy—[and] it is much broader than other states' recording laws." App.80. The law provides narrow exceptions in certain preferred circumstances that require "recording . . . openly and in plain view" or "us[ing] an unconcealed recording device." O.R.S. § 165.540(5)(b), (6) (App.213-216). But it does not recognize constructive notice for most open recording, which only further highlights that the law is not geared toward protecting conversational privacy, but to effectively shield accountability. Section 165.540(1)(c) thus fails to address any significant governmental interest in a manner that is narrowly tailored.

The lack of tailoring to privacy is also exemplified in the law's underinclusiveness. *See The Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989) ("When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly[.]"). Section 165.540(1)(a) permits a participant to record his own phone call without notice to the other party. Whether the other participant

7. It is also apparent that no legislative findings or evidence were introduced supporting Oregon's need for so cumbersome a law. This, of course, contradicts this Court's requirements in *McCullen* and elsewhere. 573 U.S. at 493–95 (especially far-reaching laws impinging on free speech rights must be supported by legislative findings or evidence that narrower alternatives are insufficient).

is calling from a mobile phone in the middle of a crowd in which third parties can hear all her words, or from a landline within her own home in which only the recording party can hear her words, Oregon law does not require her to be specifically informed of a recording over the phone line. Yet, the law requires specifically informing her before recording an in-person conversation within the same crowd as the phone call. O.R.S. § 165.540(1)(c). She must also be informed before a visitor records an in-person conversation within her own home, but *she* may record the conversation without notice in that setting: there, the conversation is private for only one party. O.R.S. § 165.540(3). This means that, according to the law, Oregonians have a greater expectation of privacy in a crowd than in another's home. Similarly, if the homeowner uses her mobile phone to join a Zoom meeting, that is a "conversation" for purposes of the law and, unlike a phone call with another person, she is generally entitled to be specifically informed before any recording occurs. O.R.S. §§ 165.535(1); 165.540(1)(c), (6) (App.2019, 211, 215-216). Oregon law goes so far as to include a much more limited restriction on bona fide eavesdropping with electronic devices as compared to the stark restrictions it places on the unannounced or secret recording of one's own conversations. *See* O.R.S. § 165.543 (App.218-219). Oregon's law is not narrowly tailored. It is a slapdash collage of exceptions and prohibitions that trivializes constitutional rights.

The state could employ myriad alternatives to protect conversational privacy that would be less damaging to First Amendment interests. *See, e.g.*, *McCullen*, 573 U.S. at 479 (considering "less-restrictive alternatives" for a content-neutral law). In fact, these alternatives already

exist. Oregon offers a wide host of privacy-protective measures to use against unruly journalists that do not censor speech in the first place. It maintains two statutory classifications for invasion of privacy. *See* O.R.S. §§ 163.700; 163.701. And reporters in other states who invaded truly private circumstances have had successful invasion of privacy claims raised against them. *See, e.g.*, *Sanders v. Am. Broadcasting Companies, Inc.*, 978 P.2d 67 (Cal. 1999). Overly zealous reporters can find themselves on the wrong side of stalking violations. *See* O.R.S. § 163.732. Like many other states, Oregon protects against false statements of fact that injure one's reputation through the tort of defamation. *See generally Neuman v. Liles*, 369 P.3d 1117 (Or. 2016). Similarly, Oregon law includes comprehensive protection against trade secret violations. *See Pelican Bay Forest Products, Inc. v. Western Timber Products, Inc.*, 443 P.3d 651 (Or. App. 2019). It is not as if, in the absence of section 165.540(1)(c), that privacy would be unguarded in Oregon. Rather, privacy safeguards would remain with the newly recognized ability to engage in newsgathering. These are the more narrowly tailored ways Oregon acts to protect privacy interests without damaging the First Amendment rights of citizens to record conversations of public import. In a previous review of recording law prohibitions, the Ninth Circuit relied on precisely these factors to decide Idaho's "Ag-Gag" law was not narrowly tailored. *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018).

The Ninth Circuit erred in its tailoring analysis by incorrectly accepting ineffective alternatives for newsgathering. According to the lower court, any minimally adequate option provided by the government resolves the constitutional question. App.46 (requiring

only a "merely adequate" alternative). Even under intermediate scrutiny, the lower court's observation that a reporter's option to simply record video clips without audio or tell people they are recording is farcical. App.47-49. Reporters could also hire transcriptionists to walk around and write down every moment of their interactions, or they could chisel notes in stone. But ignoring the burden placed on undercover journalists, while being overly deferential to government censorship, is not a proper analysis of alternative channels of communication.

In examining tailoring, the Ninth Circuit erred by concluding that reporters or citizens can simply use alternative, less effective means of newsgathering. *Id.* But this Court has long rejected this reasoning, consistently holding that the First Amendment safeguards not merely the abstract right to speak, but also the right to use effective, preferred methods of communication. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988) (striking down restrictions on paid petition circulators because there is a right "to select what [speakers] believe to be the most effective means for so doing").

The Ninth Circuit suggested that journalists could simply record silent video or openly announce their recording, disregarding the critical fact that effective journalism often depends on discretion and candor—qualities impossible to preserve under Oregon's mandate. The court's logic trivializes the importance of method in the practice of journalism, ignoring that this Court has emphasized the necessity of effective, direct, and impactful forms of communication. *See City of Ladue v. Gilleo*, 512 U.S. 43, 56–57 (1994) (rejecting city's argument that yard signs could be replaced by other communication methods,

because no alternative would effectively substitute the uniquely important medium chosen by the speaker).

Nor is it sufficient for the government merely to leave open some theoretical avenue for speech if that alternative significantly undermines the message's effectiveness. In *McCullen*, this Court struck down Massachusetts' abortion clinic buffer zone precisely because forcing speakers to convey their message from afar undermined their ability to communicate effectively. 573 U.S. at 489–90. Similarly, here Oregon's restrictions force journalists to abandon the powerful tool of candid audio recording, drastically weakening their ability to engage in effective, truthful reporting. Thus, the Ninth Circuit's analysis effectively compels journalists to engage in speech through artificially constrained means, violating core principles of the First Amendment by denying speakers the very methods essential to their expressive goals.

The Ninth Circuit's approach to tailoring transforms constitutional scrutiny into an exercise in constitutional conjecture. This substitutes genuine First Amendment safeguards with hypothetical alternatives that trivialize protected speech. By suggesting that silent video or overt announcements can replace candid, truthful recordings essential to journalism and public discourse, the Ninth Circuit drains narrow tailoring of its substance. Certiorari is necessary to reaffirm that narrow tailoring demands genuine protection for speech, not perfunctory gestures toward ineffective alternatives.

CONCLUSION

This Court should grant the petition.

Dated: April 7, 2025

Respectfully submitted,

STEPHEN R. KLEIN
BARR & KLEIN PLLC
1629 K Street, NW
Suite 300
Washington, DC 20006
(202) 804-6676
steve@barrklein.com

BENJAMIN BARR
Counsel of Record
BARR & KLEIN PLLC
444 North Michigan Avenue
Suite 1200
Chicago, IL 60611
(202) 595-4671
ben@barrklein.com

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 7, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-35271

PROJECT VERITAS; PROJECT VERITAS ACTION FUND,

Plaintiffs-Appellants,

v.

MICHAEL SCHMIDT, IN HIS OFFICIAL CAPACITY AS MULTNOMAH COUNTY DISTRICT ATTORNEY; ELLEN ROSENBLUM, IN HER OFFICIAL CAPACITY AS OREGON ATTORNEY GENERAL,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted En Banc June 25, 2024
Seattle, Washington

Filed January 7, 2025

Appendix A

Before: Mary H. Murguia, Chief Judge, and
Kim McLane Wardlaw, Morgan Christen,
Mark J. Bennett, Daniel P. Collins,
Kenneth K. Lee, Jennifer Sung, Gabriel P. Sanchez,
Roopali H. Desai, Anthony D. Johnstone
and Ana de Alba, Circuit Judges.

Opinion by Judge Christen;
Concurrence by Judge Bennett;
Dissent by Judge Lee

OPINION

CHRISTEN, Circuit Judge:

Appellants Project Veritas and Project Veritas Action Fund (collectively, "Project Veritas") argue that an Oregon statute prohibiting unannounced recordings of oral conversations violates the First Amendment. Project Veritas brings as-applied and facial challenges. It contends that the statute is a content-based restriction on expression that is subject to strict scrutiny and that the statute is facially invalid as overbroad. Because Oregon's statute does not discriminate on the basis of viewpoint or restrict discussion of an entire topic, we conclude it is content neutral, and that it survives intermediate scrutiny. Because Project Veritas fails to show that any unconstitutional applications of the statute substantially outweigh its constitutional applications, Project Veritas cannot establish facial invalidity. Accordingly, we reject Project Veritas's claims and affirm the district court's order dismissing the complaint.

Appendix A

I

Project Veritas is a nonprofit media organization that engages almost exclusively in undercover journalism. It employs both open and secret audiovisual recording to investigate matters of public concern, sometimes—but not always—in areas open to the public. Whether recording openly or surreptitiously, Project Veritas does not expressly inform individuals that their conversations are being recorded. According to Project Veritas, an announcement that a conversation is being recorded causes individuals to refuse to talk or to distort their story, thereby compromising the quality of Project Veritas's journalism. Project Veritas maintains that it does not engage in eavesdropping—*i.e.*, the interception, without prior consent, of wire or oral communications to which a Project Veritas reporter is not a party. *See* Or. Rev. Stat. § 165.543(1). Rather, Project Veritas seeks to conduct undercover investigations in Oregon, and it contends that Oregon's conversational privacy statute prevents it from doing so. *See* Or. Rev. Stat. § 165.540(1)(c).

Section 165.540(1)(c) of the Oregon Revised Statutes requires that notice be given before oral conversations may be recorded. Specifically, the statute provides that "a person may not . . . [o]btain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine, or apparatus, . . . if not all participants in the conversation are specifically informed that their conversation is being obtained." *Id.*[1] The statute does not define "specifically informed," and because

1. A violation of section 165.540(1)(c) is punishable as a misdemeanor. Or. Rev. Stat. § 165.540(9).

prosecutions pursuant to section 165.540(1)(c) are very infrequent, caselaw on this point is sparse at best.[2] A "[c]onversation" is defined as "the transmission between two or more persons of an oral communication which is not a telecommunication or a radio communication, and includes a communication occurring through a video conferencing program." Or. Rev. Stat. § 165.535(1). Thus, Oregon's conversational privacy statute prohibits unannounced audio-only recordings of oral communications between two or more persons, and the audio portion of audiovisual recordings of oral communications. It does not address video-only recordings or photographs.

Oregon's strong interest in protecting conversational privacy dates back to 1955. That year, the Oregon legislature enacted section 165.540(1)(a), a statutory provision that criminalized wiretapping.[3] In 1959, the legislature expanded Oregon's protection of conversational

---

2. The dissent cites *State v. Haase*, 134 Ore. App. 416, 895 P.2d 813 (Or. Ct. App. 1995), for the proposition that section 165.540(1)(c) "bans audiotaping even if the speaker notices that someone has a recording device in her hand." The dissent misreads *Haase*. There, the Oregon Court of Appeals *reversed* an order excluding audio recorded by a police officer's wearable microphone, concluding that the police officer did *not* violate section 165.540(1)(c) because the defendant was warned that he was being monitored by audio means and this warning reasonably informed the defendant that the conversation was being obtained. *Id.* at 815.

3. "The proponents of the bill were concerned about the increasing use of wiretaps, and the bill was intended to stop the practice by making it a criminal offense." *State v. Lissy*, 304 Ore. 455, 747 P.2d 345, 350 (Or. 1987).

privacy by adding what would become section 165.540(1)(c) —the subsection at issue here—to prohibit the secret "tape recording of face-to-face conversations." *State v. Lissy*, 304 Ore. 455, 747 P.2d 345, 350 (Or. 1987).

Oregon's general prohibition on unannounced recordings of face-to-face conversations has several exceptions, but Project Veritas focuses its challenge on two of them. The first, the felony exception, allows a person to "record[] a conversation during a felony that endangers human life." *See* Or. Rev. Stat. § 165.540(5)(a). The Oregon legislature enacted this exception in 1989, thirty years after passing the general prohibition on unannounced recordings of face-to-face conversations. Or. Rev. Stat. § 165.540(5)(a) (1989). This exception was enacted to "eliminate the requirement that police officers obtain prior court approval before using a 'body wire' where felony drug offenses or life-endangering felonies are being committed." Or. H.R. Staff Measure Summary, H.B. 2252, 65th Assemb., Reg. Sess. (Or. 1989).

The second, the law enforcement exception, allows a person to "record[] a conversation in which a law enforcement officer is a participant" if certain conditions are met. *See* Or. Rev. Stat. § 165.540(5)(b). The recording must: (1) be "made while the officer is performing official duties"; (2) be "made openly and in plain view of the participants in the conversation"; (3) capture a conversation that is "audible to the person by normal unaided hearing"; and (4) be made from "a place where

the person lawfully may be." *Id.*[4] The Oregon legislature passed the law enforcement exception in 2015, over 25 years after enacting the felony exception. Or. Rev. Stat. § 165.540(5)(b) (2015). The intent of this exception was to "address[] the situation where a private citizen is recording a police officer on the street," which most commonly occurs "when an individual is recording an officer making an arrest." Or. H.R. Staff Measure Summary, H.B. 2704 A, 78th Assemb., Reg. Sess. (Or. 2015).

In 2020, Project Veritas filed suit against the Multnomah County District Attorney, Michael Schmidt, and the Oregon Attorney General, Ellen Rosenblum (collectively, "Oregon"), raising a First Amendment challenge to section 165.540. The complaint alleges that but for Oregon's prohibition on unannounced audio recordings, Project Veritas would investigate allegations of corruption at the offices of the Oregon Public Records Advocate and the Public Records Advisory Council. It also avers that Project Veritas would investigate the rise in violent protests in Portland. These activities would involve Project Veritas reporters secretly recording conversations in which they are participants or openly recording without specifically informing all participants in the conversation that they are being recorded.

---

4. It is uncontested that, as a matter of federal law, an officer performing official duties in public may be recorded, *Askins v. United States Department of Homeland Security*, 899 F.3d 1035, 1044 (9th Cir. 2018), but without the law enforcement exception, the audio portion of such a recording would be unlawful under Oregon law.

Project Veritas seeks to enjoin application of the statute and to obtain a declaratory judgment that the law is unconstitutional on its face and as applied to Project Veritas. The complaint asserts that the statute violates free speech and free press rights, and also unlawfully prohibits obtaining or using recordings that are made in violation of the statute. Oregon moved to dismiss the complaint. The district court granted the motion in part, and the parties stipulated to dismissal of the remaining claims. Project Veritas timely appealed.

II

We review the district court's dismissal de novo. *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012).

III

A

We begin by addressing the scope of Project Veritas's constitutional claims. In particular, we consider whether Project Veritas raises facial or as-applied challenges.

The distinction between a facial and an as-applied challenge is important. Whether a challenge is classified "as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding 'breadth of the remedy.'" *Bucklew v. Precythe*, 587 U.S. 119, 138, 139 S. Ct. 1112, 203 L. Ed. 2d 521 (2019) (citation omitted). "An as-applied challenge

contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (citing *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 803, 104 S. Ct. 2118, 80 L. Ed. 2d 772 & n.22 (1984)). A facial challenge seeks to strike down a law in its entirety and must therefore meet a more rigorous standard. *Moody v. NetChoice, LLC*, 603 U.S. 707, 723, 144 S. Ct. 2383, 219 L. Ed. 2d 1075 (2024). In the First Amendment context, this standard requires a plaintiff to show that "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (alteration in original) (quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615, 141 S. Ct. 2373, 210 L. Ed. 2d 716 (2021)).

"The line between facial and as-applied challenges can sometimes prove 'amorphous,' . . . and 'not so well defined.'" *Bucklew*, 587 U.S. at 139 (citations omitted). But "[t]he label is not what matters." *Doe v. Reed*, 561 U.S. 186, 194, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). Instead, "[t]he important point" for identifying the nature of a challenge is whether a plaintiff's "claim and the relief that would follow . . . reach beyond the particular circumstances" of that plaintiff. *Id.*

Here, there is little doubt that Project Veritas's complaint includes a facial challenge to Oregon's statute, with and without its exceptions. Indeed, the parties agree on this point; Project Veritas's complaint plainly seeks a judgment that section 165.540(1)(c) "is unconstitutional on its face."

Project Veritas also challenges Oregon's conversational privacy statute on an as-applied basis. Its prayer for relief seeks a judgment that section 165.540(1)(c) is "unconstitutional as applied to PV and PVA," and in connection with each count, Project Veritas alleges the statute is unconstitutional as applied to it. Although these portions of the complaint do not expressly identify the speech activity at issue, we understand the as-applied challenge to pertain to the proposed conduct that Project Veritas explicitly identifies elsewhere in the complaint: (1) secret recordings of conversations between Project Veritas and members of the offices of the Public Records Advocate and the Public Records Advisory Council; (2) secret recordings of conversations between Project Veritas and police; (3) secret recordings of conversations between Project Veritas and protesters; (4) secret recordings of conversations arising from encounters between police and protesters; (5) open recordings of conversations between Project Veritas and protesters; and (6) open recordings of conversations between Project Veritas and members of the offices of the Public Records Advocate and the Public Records Advisory Council.[5] Given these allegations, we

5. At oral argument, Oregon agreed that its conversational privacy statute does not apply to the "open recordings" Project Veritas proposes in categories (5) and (6). This is because the statutory scheme broadly exempts recordings by "unconcealed recording device[s]" in "[p]ublic or semipublic meetings," and in "[p]rivate meetings" where other participants "knew or reasonably should have known that the recording was being made." Or. Rev. Stat. § 165.540(6)(a); *see also McCullen v. Coakley*, 573 U.S. 464, 485 n.4, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014) (noting "a plaintiff generally cannot prevail on an *as-applied* challenge

construe the complaint as raising both facial and as-applied challenges. We address each in turn, beginning with the as-applied challenge.

B

Oregon first argues that, to the extent Project Veritas raises an as-applied challenge, it is not sufficiently ripe. We disagree.

"The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction . . . .'" *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003) (citation omitted). "'[T]hrough avoidance of premature adjudication,' the ripeness doctrine prevents courts from becoming entangled in 'abstract disagreements.'" *Wolfson v. Brammer*, 616 F.3d 1045, 1057 (9th Cir. 2010) (alteration in original) (citation omitted).

The ripeness doctrine has both constitutional and prudential components. *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc).

---

without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him"); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 n.11, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (explaining that a court "will presume any narrowing construction or practice to which [a] law is 'fairly susceptible'" (citation omitted)). Our analysis therefore addresses only Project Veritas's arguments concerning its intention to make secret recordings of oral communications.

The constitutional component overlaps with the analysis of "injury in fact" for Article III standing and considers whether "the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Wolfson*, 616 F.3d at 1058 (quoting *Thomas*, 220 F.3d at 1138-39); *see also Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153 (9th Cir. 2017). The prudential ripeness inquiry is "guided by two overarching considerations: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Bishop Paiute Tribe*, 863 F.3d at 1154 (internal quotation marks omitted) (quoting *Thomas*, 220 F.3d at 1141).

We conclude that Project Veritas's as-applied First Amendment challenge satisfies constitutional ripeness concerns.[6] Where a plaintiff seeks to challenge a statute prior to enforcement, "there must be 'a *genuine* threat of *imminent* prosecution.'" *Clark v. City of Seattle*, 899 F.3d 802, 813 (9th Cir. 2018) (quoting *Bishop Paiute Tribe*, 863 F.3d at 1154). To determine whether a plaintiff has established such a threat, we consider: "[1] whether the plaintiffs have articulated a concrete plan to violate the law in question, [2] whether the prosecuting authorities

6. Oregon does not contest prudential ripeness. Regardless, we are convinced this appeal is prudentially ripe. Project Veritas's claims are fit for judicial decision because they are "primarily legal and do[] not require substantial further factual development." *Wolfson*, 616 F.3d at 1060. Withholding review would impose a hardship because Project Veritas alleges it has engaged in "the constitutionally-recognized injury of self-censorship" by foregoing its undercover journalism activities in Oregon while section 165.540(1)(c) remains in effect. *Id.*

have communicated a specific warning or threat to initiate proceedings, and [3] the history of past prosecution or enforcement under the challenged statute." *Id.* (quoting *Bishop Paiute Tribe*, 899 F.3d at 1154).

"Although the mere existence of a statute is insufficient to create a ripe controversy, we have applied the requirements of ripeness and standing less stringently in the context of First Amendment claims." *Wolfson*, 616 F.3d at 1058. "In an effort to avoid the chilling effect of sweeping restrictions" on First Amendment speech, "the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003).

We first consider whether Project Veritas has articulated a concrete intention to violate Oregon's conversational privacy statute. We are satisfied that it has. The complaint alleges that Project Veritas has specific plans to make unannounced recordings that are likely prohibited by section 165.540(1)(c). *See Wolfson*, 616 F.3d at 1059; *Bayless*, 320 F.3d at 1006-07; *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003). Second, although Oregon has never threatened Project Veritas with enforcement proceedings, Project Veritas alleges it has "self-censored to comply with the [statute]," which is a "constitutionally recognized injury." *Wolfson*, 616 F.3d at 1059-60. Where protected speech is at issue, "a plaintiff need not risk prosecution in order to challenge a statute." *Id.*; *Bayless*, 320 F.3d at 1006-07. Finally, we

note that neither party has argued there is any history of past prosecution or enforcement that is relevant to our analysis. *See Wolfson*, 616 F.3d at 1060.

Oregon insists that Project Veritas's as-applied challenge is not fit for adjudication because Project Veritas did not delineate the precise contours of its claims, relying on the First Circuit's decision in *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020). But *Rollins* is distinguishable. There, Project Veritas raised an as-applied First Amendment challenge to Massachusetts's conversational privacy statute "insofar as it bar[red] the secret recording of 'individuals who lack[ed] any reasonable expectation of privacy'" and to the extent it barred "nonconsensual audio recording of 'government officials discharging their duties in public spaces.'" *Id.* at 842-43. Because these broad categories of relief were vague and ill-defined, the First Circuit concluded there was a "disconnect" between Project Veritas's narrow "alleged intended action[s]" and its sweeping requested relief. *Id.* at 842. That disconnect rendered the dispute "hypothetical and abstract rather than real and concrete," and the court directed dismissal of Project Veritas's claims on ripeness grounds. *See id.* at 843-44.

Here, by contrast, Project Veritas's as-applied challenge concerns six specific courses of intended conduct, and we understand that Project Veritas's request for relief is limited to these particular activities. At least as to the four activities that involve secret recordings, Project Veritas's "plan [is] congruent to [its] request for relief." *Rollins*, 982 F.3d at 842; *see also ACLU v. Alvarez*, 679

F.3d 583, 593-94 (7th Cir. 2012) (concluding that, where a statute prohibited the ACLU's proposed audio recording plans, the ACLU's allegations were "easily sufficient to establish a credible threat of prosecution"). The as-applied claims are sufficiently ripe.

C

Another threshold question is whether Oregon's conversational privacy statute, as applied to Project Veritas, regulates speech protected by the First Amendment. *See Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th Cir. 2017). We conclude that it does.

It is well established that audio recordings and audiovisual recordings are generally entitled to First Amendment protection. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981) (noting that "programs broadcast by radio and television . . . fall within the First Amendment guarantee"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502, 72 S. Ct. 777, 96 L. Ed. 1098 (1952) (recognizing free speech protection for motion pictures). Here, however, we are confronted with a statute that places restrictions not on the distribution or presentation of a completed recording, but on the act of making an audio-only recording. Applying established First Amendment principles, we conclude that Project Veritas's recording of conversations in connection with its newsgathering activities is protected speech within the meaning of the First Amendment.

The Supreme Court has recognized that "[w]hether government regulation applies to creating, distributing,

or consuming speech makes no difference." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) (rejecting a distinction that "would make permissible the prohibition of printing or selling books," but "not the writing of them"); *see also Citizens United v. FEC*, 558 U.S. 310, 336, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) ("Laws enacted to control or suppress speech may operate at different points in the speech process."); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011) (noting that "the creation and dissemination of information are speech"). Moreover, the Supreme Court has expressly applied First Amendment protections to speech-creation processes. For instance, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, the Court addressed Minnesota's tax on paper and ink products used in the production of publications. 460 U.S. 575, 577-79, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983). The Supreme Court held that the law, which targeted activities directed to producing speech, violated the First Amendment because it applied only to large publications and thereby singled out the press for differential treatment. *Id.* at 583. In another case, the Supreme Court concluded that New York's Son of Sam law—which required that an accused or convicted criminal's income derived from works describing his crime be made available to victims and creditors—violated the First Amendment because it created a financial disincentive both to create and to publish written works that plainly constitute protected speech. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116-18, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).

If restrictions on speech-creation processes did not implicate the First Amendment, governments "could effectively control or suppress speech by the simple expedient of restricting an early step in the speech process rather than the end result." *Alvarez*, 679 F.3d at 597; *see also W. Watersheds Project v. Michael*, 869 F.3d 1189, 1195-96 (10th Cir. 2017) ("If the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by 'simply proceeding upstream and damming the source' of speech." (alterations accepted) (quoting *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015))). Rather than limiting the right to display a tattoo, the government could restrict the right to create one. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) (noting that, "as with writing or painting, the tattooing process is inextricably intertwined with the purely expressive product (the tattoo)"). Rather than banning the exhibition of a movie, the government could ban the celluloid film used to create it. The various links in the chain of speech creation present opportunities for suppression: "Control any cog in the machine, and you can halt the whole apparatus." *McConnell v. FEC*, 540 U.S. 93, 251, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) (Scalia, J., concurring in part and dissenting in part), *overruled by Citizens United*, 558 U.S. at 310.

We do not suggest that any conduct related in some way to speech creation, however attenuated, is necessarily entitled to First Amendment protection. A law that regulates logging may incidentally raise the

price of paper used to write a manuscript.[7] A law that regulates mining silica sand may incidentally raise the price of microprocessors used to facilitate the writing of an electronic article. It is certainly not obvious that the First Amendment would invariably provide protection for activities like these, where burdens on speech are merely incidental. *Cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991) (noting that "generally applicable laws do not offend the First Amendment simply because their enforcement . . . has incidental effects on [the] ability to gather and report the news"); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 n.3, 707, 106 S. Ct. 3172, 92 L. Ed. 2d 568 (1986) (affirming the constitutionality of a public health regulation applied to an adult bookstore engaged in prostitution because this "'nonspeech' conduct subject to a general regulation [bore] absolutely no connection to any expressive activity").

To decide this appeal, we need not precisely delineate the extent and contours of First Amendment protection for each constituent act that comprises speech creation. The question presented here is whether Oregon's direct regulation of Project Veritas's act of recording is an impermissible burden on Project Veritas's First Amendment rights. At the pleading stage, we accept Project Veritas's assertion that giving notice to conversation participants that they are being recorded may alter the contents of conversations in which Project Veritas's reporters participate. Accordingly, we accept

---

7. *See* Ashutosh Bhagwat, *Producing Speech*, 56 Wm. & Mary L. Rev. 1029, 1054, 1059 (2015).

that Oregon's conversational privacy statute burdens an act of speech creation in which Project Veritas seeks to engage. Protection for this act of speech creation is implicit in any right Project Veritas has to publish the resulting recording. *See Alvarez*, 679 F.3d at 595. "[N]either the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded." *Anderson*, 621 F.3d at 1061; *see also Brown*, 564 U.S. at 792 n.1; *Alvarez*, 679 F.3d at 595-97.

Project Veritas avers that it seeks to record newsworthy conversations involving public officials, police, and protesters. It asserts that it seeks to do so to educate and inform the public about newsworthy topics of public concern. The First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02, 60 S. Ct. 736, 84 L. Ed. 1093 (1940)). Put simply, "[s]peech on matters of public concern is at the heart of the First Amendment's protection." *Snyder v. Phelps*, 562 U.S. 443, 451-52, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) (alterations, internal quotation marks, and citation omitted). This protection "reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564

U.S. 721, 755, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011) (internal quotation marks omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)); *see also Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (affirming that "speech on public issues occupies the 'highest rung on the hierarchy of First Amendment values'" (citation omitted)); *Alvarez*, 679 F.3d at 599 (explaining that protection "for gathering information about the affairs of government is consistent with the historical understanding of the First Amendment"). Because Oregon's conversational privacy statute will directly regulate Project Veritas's act of creating speech that falls within the core of the First Amendment, it triggers First Amendment scrutiny.

This conclusion comports with our settled recognition—embraced by every circuit to have addressed the question—that the First Amendment protects the act of making at least some recordings. In *Fordyce v. City of Seattle*, we recognized that a man who created an audiovisual recording of a public protest for a local television station had a "First Amendment right to film matters of public interest." 55 F.3d 436, 439 (9th Cir. 1995). In *Askins v. United States Department of Homeland Security*, where plaintiffs sought to photograph and record border officers carrying out their duties, we again acknowledged that the "First Amendment protects the right to photograph and record matters of public interest." 899 F.3d 1035, 1044 (9th Cir. 2018).[8]

8. The First, Third, Fourth, Fifth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits have recognized that many acts of recording qualify as speech and are entitled to First Amendment

We have also affirmed protection for recording in the context of so-called "ag-gag" laws. In *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018), we addressed a statute prohibiting audio or video recordings of the "conduct of an agricultural production facility's operations," that Idaho's legislature enacted in response to the release of an undercover video depicting animal abuse at a dairy farm. *Id.* at 1190-91. We held that the plaintiffs' intended act of making an audio or video recording of an agricultural production facility's operations would be protected speech. *Id.* at 1203. In the process of

---

protection. *See, e.g., Alvarez*, 679 F.3d at 595-97 ("Audio recording is entitled to First Amendment protection."); *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017) (concluding that the First Amendment protects "the act of *creating*" photos, videos, and recordings); *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fedn., Inc.*, 60 F.4th 815, 836 (4th Cir. 2023) (concluding that visual "recording in the employer's nonpublic areas *as part of* newsgathering constitutes protected speech"); *W. Watersheds*, 869 F.3d at 1195-96 (holding that the "collection of resource data," including photos, "constitutes the protected creation of speech"); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688-90 (5th Cir. 2017) (concluding that "the First Amendment protects the act of making film"); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (concluding that "the First Amendment protects the filming of government officials in public spaces"); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (concluding that the First Amendment protects the right to visually "record matters of public interest"); *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) (concluding that the "acts of taking photographs and recording videos are entitled to First Amendment protection"); *Price v. Garland*, 45 F.4th 1059, 1071, 458 U.S. App. D.C. 825 (D.C. Cir. 2022) (noting that "prohibiting the recording of a public official performing a public duty on public property is unreasonable").

doing so, *Wasden* stated that "[t]he act of recording" is "inherently expressive" because "decisions about content, composition, lighting, volume, and angles, among others, are expressive." *Id.* At least one court interpreted this aspect of *Wasden* as an "expansive ruling," *People for the Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Federation, Inc.*, 60 F.4th 815, 837 n.9 (4th Cir. 2023), but that view overlooks that *Wasden* made its observation in the context of rejecting Idaho's argument that the intended act of recording was merely non-expressive conduct, not speech entitled to First Amendment protection. *See Wasden*, 878 F.3d at 1203. In other words, Idaho argued that the act of recording a video could be disaggregated from the video itself. *See id.* Against that backdrop, *Wasden* reasoned that it "defie[d] common sense to disaggregate the creation of the video," which may involve expressive decisions, "from the video or audio recording itself," because the video reflected the products of those decisions. *Id. Wasden*'s statement that the act of recording is "inherently expressive" is consistent with the rule that First Amendment protection extends "only to conduct that is inherently expressive," such that it is intended to be, and would reasonably be understood to be, communicative. *See Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984). *Wasden* did not conclude that every act of recording requires expressive decisions, nor that every act of recording implicates the First Amendment.

Appendix A

The different contexts in which recordings are made may be relevant to the First Amendment analysis. For example, although it is clear that Stanley Kubrick's *2001: A Space Odyssey* is the product of a recording process that was itself expressive, it is far from obvious that the same could be said of footage from a wall-mounted security camera in a retail space that is scheduled for regular deletion. Indeed, scholars have debated whether First Amendment protection is contingent on the eventual dissemination of recorded material,[9] or if protection might depend in part on whether the recording occurs in public or touches on a matter of public concern.[10] We need not now grapple with the challenges presented by hypothetical cases. To resolve this appeal, we need only decide that because Project Veritas seeks to make newsworthy audio recordings that undoubtedly constitute protected expression, the act of making those recordings is protected speech for purposes of the First Amendment.

---

9. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Disclosure, and the Right to Record*, 159 U. Pa. L. Rev. 335, 377 (2011) ("It is simply not the case . . . that an external audience is or should be a necessary condition of First Amendment protection."); Ashutosh Bhagwat, *Producing Speech*, 56 Wm. & Mary L. Rev. 1029, 1040, 1054, 1059 (2015) (arguing that "[s]peech requires an audience").

10. *E.g.*, Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 Colum. L. Rev. 991, 997-98 (2016); Joel R. Reidenberg, *Privacy in Public*, 69 U. Miami L. Rev. 141, 152 (2014); Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. Rev. 167, 232-43 (2017).

Appendix A

D

1

We next consider whether Oregon's conversational privacy statute is content based or content neutral. *See United States v. Swisher*, 811 F.3d 299, 311 (9th Cir. 2016) (en banc). The First Amendment "does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). Thus, laws "that suppress, disadvantage, or impose differential burdens upon speech because of its content" are subject to strict scrutiny. *Id.* at 642. A regulation that is content neutral, on the other hand, must only satisfy intermediate scrutiny. *Id.*

Project Veritas argues that Oregon's conversational privacy statute is facially content based because one must examine the content of an unannounced recording to determine whether it is lawful or unlawful. For example, Project Veritas reasons that to determine whether an audio recording is an *unlawful* unannounced recording of a conversation in which a Public Records Advocate is a participant, or a *lawful* unannounced recording of a conversation involving a police officer performing his duties in public, one must listen to the content of the recording. In other words, Project Veritas contends that because the statute imposes limits on what may be recorded, it is necessarily content based. This rigid conception of the content-neutrality inquiry is unsupported by precedent.

Appendix A

For decades, the Supreme Court routinely emphasized that "[t]he government's purpose" in regulating speech "is the controlling consideration" in "determining content neutrality." *Ward v. Rock Against Racism*, 491 U.S. 781, 791-92, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (finding content neutral a sound-amplification regulation that applied to an outdoor urban stage); *see also Turner*, 512 U.S. at 646 (finding content neutral a regulation requiring cable television operators to devote a portion of their channels to local broadcast stations because Congress's goal "was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming"). Put another way, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Hill v. Colorado*, 530 US. 703, 719, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) (quoting *Ward*, 491 U.S. at 791). Thus, "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (approving content discrimination, where speech is proscribable, if "there is no realistic possibility that official suppression of ideas is afoot").

Although the Supreme Court has acknowledged that "the mere assertion of a content-neutral purpose" would not "be enough to save a law which, on its face, discriminates based on content," *Turner*, 512 U.S. at 642-43, it has not adopted a bright-line rule that *any*

consideration of content mandates strict scrutiny. The Court noted in *Hill v. Colorado*, a decision issued in 2000, that it had "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *See* 530 U.S. at 721-22 (rejecting an argument that the examination of oral statements rendered a law content based).

In 2015, the Supreme Court decided *Reed v. Town of Gilbert*, a case concerning a sign code that imposed varying restrictions on different types of signs—ideological signs, political signs, and temporary directional signs. 576 U.S. 155, 159-60, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). The code imposed the most stringent restrictions on temporary directional signs. *Id.* at 160. A local church that had displayed temporary signs to direct people to its upcoming services challenged the statute after it was cited for violating the code's restrictions. *Id.* at 161.

The *Reed* Court held that the Town of Gilbert's sign code was facially content based because the restrictions that applied to a given sign "depend[ed] entirely on the communicative content of the sign." *Id.* at 164. "If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government." *Id.* Although the town may have had a benign purpose in enacting the

code, *Reed* stated that courts must "consider[] whether a law is content neutral on its face *before* turning to the law's justification or purpose." *Id.* at 166.[11]

We applied *Reed* in *Animal Legal Defense Fund v. Wasden*, where we held that Idaho's statute prohibiting recordings of the "conduct of an agricultural production facility's operations" was content based. 878 F.3d at 1203. *Wasden* concluded that the statute necessarily drew content-based distinctions on its face because one could only "make a determination about criminal liability" by "viewing the recording" of an agricultural production facility's operations. *Id.* at 1204.

The Supreme Court subsequently undercut this reasoning in *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61, 142 S. Ct. 1464, 212 L. Ed. 2d 418 (2022). In that clarifying decision, the Court considered a First Amendment challenge that centered on a distinction in Austin's sign code between off-premises signs (*i.e.*, signs that advertise goods or services available at a location separate from where the sign was installed) and on-premises signs (*i.e.*, signs that

11. Several Courts of Appeals interpreted *Reed*'s emphasis on facial neutrality as "a drastic change in First Amendment jurisprudence." *Free Speech Coalition, Inc. v. AG United States*, 825 F.3d 149, 160 n.7 (3d Cir. 2016); *Reagan Nat'l Adver. of Austin Inc. v. City of Austin*, 972 F.3d 696, 702 (5th Cir. 2020) (describing *Reed* as a "sea change"), *rev'd*, 596 U.S. 61, 142 S. Ct. 1464, 212 L. Ed. 2d 418 (2022); *see also, e.g., Cahaly v. LaRosa*, 796 F.3d 399, 405 (4th Cir. 2015); *Norton v. City of Springfield*, 806 F.3d 411, 412, 612 Fed. Appx. 386 (7th Cir. 2015).

advertise goods or services available at the location of the sign). *Id.* at 66. Because the regulatory scheme drew "distinctions based on the message a speaker convey[ed]," *Reed*, 576 U.S. at 163-64, the plaintiff argued it was content based. *City of Austin*, 596 U.S. at 69, 74. *City of Austin* firmly rejected the proposition that a "regulation cannot be content neutral if it requires reading the sign at issue," *id.* at 69, and emphasized "that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral," *id.* at 72. Ultimately, *City of Austin* held that Austin's sign ordinance was content neutral because it "require[d] an examination of speech only in service of drawing neutral, location-based lines." *Id.* at 69.

To further illustrate this controlling principle, *City of Austin* relied on earlier Supreme Court cases addressing restrictions on solicitation. "To identify whether speech entails solicitation, one must read or hear it first," but Supreme Court precedent has long held that "restrictions on solicitation are not content based and do not inherently present 'the potential for becoming a means of suppressing a particular point of view,' so long as they do not discriminate based on topic, subject matter, or viewpoint." *Id.* at 72 (citation omitted).

City of Austin cited the Court's prior decision in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981). *See City of Austin*, 596 U.S. at 72. There, the Court confronted a Minnesota statute that limited sale, distribution, and solicitation activities at the Minnesota State Fair to a

particular location within the fairgrounds. *Heffron*, 452 U.S. at 643-44. The case arose when Krishna practitioners were prohibited from distributing religious literature and soliciting donations outside the designated location at the fair. *Id.* at 646, 655. The Court observed that the statute was not "based upon either the content or subject matter of speech," noting that the statute applied "evenhandedly to all who wish to distribute and sell written materials or to solicit funds." *Id.* at 648-49 (citation omitted). Thus, although the statute implicated the content of speech—in the sense that its application turned on whether the speech could be characterized as "solicitation"—it did so in a manner that was neutral with respect to the message that individual speakers expressed. *Id.*; *see also City of Austin*, 596 U.S. at 73-74 (rejecting the view that examination of speech "inherently triggers heightened First Amendment concern"). The Minnesota statute did not evince an intent to favor or disfavor a particular message or speaker.

Further illuminating this threshold principle, *City of Austin* drew upon *Members of City Council of Los Angeles v. Taxpayers for Vincent. See* 596 U.S. at 73. There, the Court concluded that an ordinance prohibiting posting signs on public property was content neutral, even though the law included exemptions for, among other things, markers commemorating "historical, cultural, or artistic event[s]." *Taxpayers for Vincent*, 466 U.S. at 791 n.1, 804, 817. The Court noted that the "general principle" forbidding a government from "favor[ing] some viewpoints or ideas at the expense of others" had "no application" because there was "not even a hint of bias or censorship in the City's enactment or enforcement of" the ordinance

at issue. *Id.* at 804; *see also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43, 48, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) (concluding that a zoning ordinance that placed restrictions on the location of movie theatres based on whether they presented adult content was content neutral because it was not aimed at "suppress[ing] the expression of unpopular views").

These precedents recognize that the "the rationale [for] the general prohibition" on content-based regulations "is that content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007) (internal quotation marks omitted) (quoting *R.A.V.*, 505 U.S. at 387). This concern is present not only when a regulation discriminates on the basis of viewpoint, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), but also when a regulation restricts "discussion of an entire topic," *Consol. Edison Co. of N.Y. v. Pub. Comm'n of N.Y.*, 447 U.S. 530, 537, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980). *See Reed*, 576 U.S. at 168-69; *see also id.* at 182 (Kagan, J., concurring in the judgment).

Critically, *City of Austin* reaffirmed that this concern is not necessarily implicated by every regulation that depends on the content of protected speech. *See City of Austin*, 596 U.S. at 73-74. Put another way, not every regulation that turns on the content of speech in the loosest sense is content based in the constitutional sense. A regulation may remain content neutral despite touching

on content to distinguish between classes or types of speech—such as speech that constitutes solicitation, *Heffron*, 452 U.S. at 649-50, or speech that draws neutral, location-based distinctions, *City of Austin*, 596 U.S. at 69—so long as it does not discriminate on the basis of viewpoint or restrict discussion of an entire topic. *See City of Austin*, 596 U.S. at 73-74; *Reed*, 576 U.S. at 168-69. Thus, a regulation that restricts speech involving solicitation, or involving a police officer, may be content neutral. As the Supreme Court has plainly stated, regulations that "confer benefits or impose burdens on speech *without reference to the ideas or views expressed* are in most instances content neutral." *Turner*, 512 U.S. at 643 (emphasis added).

2

We conclude that section 165.540(1)(c) is content neutral. It places neutral, content-agnostic limits on the circumstances under which an unannounced recording of a conversation may be made.

The rule that emerges from the Supreme Court's caselaw is that "[a] regulation of speech is facially content based . . . if it 'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *City of Austin*, 596 U.S. at 69 (alteration in original) (quoting *Reed*, 576 U.S. at 163); *see also Turner*, 512 U.S. at 643 (stating that "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based"). Regulations of speech that are facially neutral may nevertheless be

content based *in their justification* if they "cannot be 'justified without reference to the content of the regulated speech,'" or "were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed*, 576 U.S. at 164 (alteration in original) (internal quotation marks omitted) (quoting *Ward*, 491 U.S. at 791); *see also Porter v. Martinez*, 68 F.4th 429, 438-39 (9th Cir. 2023).

Project Veritas first argues that section 165.540(1)(c), without consideration of its exceptions, is a content-based regulation as applied to Project Veritas's creation of audio recordings. Project Veritas alleges that because the announcement of a recording "itself alters the content of what will be recorded," the prohibition on unannounced recordings is content based. For support, Project Veritas relies on precedent addressing government-compelled speech. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018); *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749 (9th Cir. 2019) (en banc). This caselaw does not support Project Veritas's position because Oregon's conversational privacy statute does not "compel[] individuals to speak a particular message." *Becerra*, 585 U.S. at 766. Moreover, even though Oregon's statute limits the circumstances under which a conversation may be recorded, it is facially neutral. That is, it does not "draw[] distinctions based on the message a speaker conveys," *Reed*, 576 U.S. at 163, and it was not adopted because of the government's "disagreement with the [speaker's] message," *id.* at 164 (quoting *Ward*, 491 U.S. at 791).

Project Veritas also argues the statute is content based because it "establishes a general ban on speech, but maintains exceptions for speech on certain subjects." *See Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1155-56 (9th Cir. 2003). These "certain subjects" are embodied, according to Project Veritas, in the felony exception, Or. Rev. Stat. § 165.540(5)(a), and law enforcement exception, Or. Rev. Stat. § 165.540(5)(b).

We start with the felony exception, which applies when a conversation is recorded "during a felony that endangers human life." § 165.540(5)(a). This exception does not address the content of the audio recording. The plain language of the statute dictates that its application turns on *when* a recorded conversation occurs, and not the subject matter of that conversation. The conversation need not relate to the felony; indeed, it could encompass any content whatsoever. *See also State v. Copeland*, 323 Ore. App. 1, 522 P.3d 909, 913 (Or. Ct. App. 2022) ("It makes no difference that the victim also recorded a conversation that did not constitute a felony."). All that matters is whether a recording occurs "during a felony that endangers human life." § 165.540(5)(a).

We reach the same conclusion when considering the law enforcement exception. This exception applies to recordings of conversations "in which a law enforcement officer is a participant," provided certain other conditions are satisfied.[12] § 165.540(5)(b). Like the felony exception,

12. As noted, the recording must: (1) be "made while the officer is performing official duties"; (2) be "made openly and in plain view of the participants in the conversation"; (3) capture a

this exception is not content based within the meaning of controlling First Amendment precedent. Instead, as with *City of Austin*'s sign code ordinance, the law enforcement exception is "agnostic as to [the] content" of a recording. 596 U.S. at 69. It does not concern a "particular viewpoint[]" or prohibit discussion of "an entire topic." *Reed*, 576 U.S. at 169 (quoting *Consol. Edison*, 447 U.S. at 530, 537).[13]

The exception in section 165.540(5)(b) applies to conversations that involve law enforcement officers, regardless of what the conversation is about. Put another way, it draws a line based on the circumstances in which a recording is made, not on the content of the conversation recorded. *See Porter*, 68 F.4th at 441-43 (concluding that a vehicle regulation prohibiting honking except when

---

conversation that is "audible to the person by normal unaided hearing"; and (4) be made from "a place where the person lawfully may be." § 165.540(5)(b).

13. In *Consolidated Edison*, the New York public utilities commission's decision to prohibit all utilities from using power bill inserts to discuss political matters, "including the desirability of future development of nuclear power," was deemed content based because it removed an "entire topic" from public discussion, even though it did "not favor either side of a political controversy." *Id.* at 532, 537; *see also Simon & Schuster*, 502 U.S. at 117. In contrast, the requirement in section 165.540(5)(b) that a law enforcement officer be involved in the conversation does not regulate a "topic" because the statute is unconcerned with the content of the conversation in which an officer participates. *Cf. Turner*, 512 U.S. at 643-45 (noting that although must-carry rules favored certain speakers in the television market, they did so without regard to the messages carried).

reasonably necessary to ensure safe vehicle operation permissibly drew a line that was not content based). Like the permissible solicitation prohibition in *Heffron*, Oregon's exception allowing audio recordings of police officers in public "applies evenhandedly" to any recording of an oral communication involving a law enforcement officer (that otherwise meets the requirements of the exception), regardless of the subject matter of the conversation. 452 U.S. at 649; *see also Hill*, 530 U.S. at 722-23 (finding content neutral a regulation that established a restriction on a "broad category of communications," but did not draw distinctions based on the subject matter of messages). It does "not inherently present 'the potential for becoming a means of suppressing a particular point of view.'" *City of Austin*, 596 U.S. at 72 (quoting *Heffron*, 452 U.S. at 649).[14]

14. There is another reason Project Veritas cannot rely on the law enforcement exception to frame the conversational privacy statute as content based. As Oregon points out, the law enforcement exception only applies to recordings "made openly and in plain view of the participants in the conversation," when participants would have notice of the recording anyway. § 165.540(5)(b)(B). Oregon agrees that the statutory scheme generally permits the open recordings in which Project Veritas seeks to engage. *See* Or. Rev. Stat. § 165.540(6)(a); *see also McCullen*, 573 U.S. at 485 n.4 (noting that a plaintiff raising an as-applied challenge must show that the law has been, or is sufficiently likely to be, unconstitutionally applied to him). Thus, as applied to Project Veritas, the relevant distinction is not between recordings that involve law enforcement officers and recordings that do not, but between secret and open recordings. This is a content-neutral distinction.

Having concluded that the felony exception and the law enforcement exception are not facially content based, we also reject any suggestion that these exceptions "cannot be 'justified without reference to the content of the regulated speech,'" or that they were "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed*, 576 U.S. at 164 (alteration in original) (internal quotation marks omitted) (quoting *Ward*, 491 U.S. at 791). We see no indication that Oregon sought to "proscrib[e] speech . . . because of disapproval of the ideas expressed," or that it legislated "based on hostility—or favoritism—towards the underlying message expressed." *R.A.V.*, 505 U.S. at 382, 386. Project Veritas does not argue otherwise.

We conclude that Oregon's conversational privacy statute "confer[s] benefits or impose[s] burdens on speech without reference to the ideas or views expressed." *Turner*, 512 U.S. at 643. Both with and without its exceptions, the statute is content neutral. *See id.*

E

To survive intermediate scrutiny, a content-neutral regulation of speech must be "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293). We conclude that Oregon's statute satisfies intermediate scrutiny.

Appendix A

1

Oregon argues that it has an important interest in ensuring that its residents know when their conversations are being recorded. We easily conclude this is a significant governmental interest.

The Supreme Court has expressly acknowledged that "[p]rivacy of communication is an important interest." *Bartnicki v. Vopper*, 532 U.S. 514, 532, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001); *see also id.* at 518 (describing "fostering private speech" as an interest "of the highest order"). It is also well recognized that protecting this interest "encourage[s] the uninhibited exchange of ideas and information among private parties," and that "the fear of public disclosure of private conversations might well have a chilling effect on private speech." *Id.* at 532-33 (citation omitted); *see also Alvarez*, 679 F.3d at 605 (concluding that conversational privacy "is easily an important governmental interest").

Project Veritas does not dispute this point as a general matter, but it insists that Oregon's interest in conversational privacy is effectively limited to preventing eavesdropping— *i.e.*, the situation where one, without consent, intercepts communications to which it is not a party, Or. Rev. Stat. § 165.543(1). According to Project Veritas, if an undercover reporter surreptitiously recording a conversation is a participant in that conversation, the other parties to the conversation have only a minimal privacy interest in not being recorded. To support this assertion, Project Veritas relies on the proposition that

the secret recording of one's speech imposes no greater burden on privacy than having one's speech heard.

We cannot so easily discard Oregon's interest in conversational privacy. Where one "impart[s] information to strangers, one inevitably risks its secondhand repetition," but "there is 'a substantial distinction between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device.'" *Med. Lab'y Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 815 (9th Cir. 2002) (alteration omitted) (quoting *Sanders v. Am. Broad. Cos.*, 20 Cal. 4th 907, 85 Cal. Rptr. 2d 909, 978 P.2d 67, 72 (Cal. 1999)). In a world where one knows that any conversation can be secretly recorded at any time, and subsequently disseminated, it is easy to imagine that there might be a deleterious effect on the "uninhibited exchange of ideas," and a pervasive "chilling effect on private speech." *Bartnicki*, 532 U.S. at 532-33 (citation omitted).[15] As Justice Harlan noted over half a century ago, "[a]uthority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed." *United States v. White*, 401 U.S. 745,

15. *See also* Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. Rich. L. Rev. 465, 484 (2014) ("[P]rivacy may be important for the development of new ideas, for challenges to the status quo, for change, and for a vigorous democracy."); M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 Ind. L. Rev. 1131, 1159 (2011).

787, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971) (Harlan, J., dissenting). If all that is heard may be recorded, such a regime "might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life." *Id.* Oregon professes an interest in avoiding such a world, and the Supreme Court has identified it as an important one. *See Bartnicki*, 532 U.S. at 532-33.

Acknowledging this distinction between being recorded and merely being heard, other courts have endorsed—in the context of privacy torts—an expectation of limited privacy whereby "a person may reasonably expect privacy against the electronic recording of a communication, even though he or she had no reasonable expectation as to the confidentiality of the communication's contents." *Sanders*, 978 P.2d at 72 (concluding that although an individual's voice may be audible to some group of people, the individual may nevertheless reasonably expect his voice to remain secluded from the public at large).[16] These courts have reasoned that privacy "is not a binary, all-or-nothing characteristic," such that the utterance of a statement to one party precludes any expectation of privacy in that statement; rather, "[t]here are degrees and nuances to societal recognition of our expectations of privacy." *Id.*

16. *See also, e.g., Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325, 340-41 (Utah 2005); *In re Marriage of Tigges*, 758 N.W.2d 824, 828 (Iowa 2008); *Huskey v. Nat'l Broad. Co.*, 632 F. Supp. 1282, 1288-89 (N.D. Ill. 1986); *but see Med. Lab'y Mgmt. Consultants*, 306 F.3d at 815 (concluding that Arizona law would not recognize such a right).

Contrary to Project Veritas's position, our precedent has long discerned a distinction between merely being heard and being recorded. In our seminal case of *Dietemann v. Time, Inc.*, where reporters for *Life Magazine* secretly recorded the plaintiff who practiced quack medicine in his home without a license, we considered the plaintiff's privacy interest in not being secretly recorded. 449 F.2d 245, 249 (9th Cir. 1971) (recognizing the viability of a privacy tort under California law and that the First Amendment "is not a license . . . to intrude by electronic means into the precincts of another's home or office"). We concluded that although "[o]ne who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves," one "does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording . . . to the public at large." *Id.*; *see also Theofel v. Farey-Jones*, 359 F.3d 1066, 1073 (9th Cir. 2004). A contrary rule, we reasoned, "could have a most pernicious effect upon the dignity of man and it would surely lead to guarded conversations and conduct where candor is most valued." *Dietemann*, 449 F.2d at 249.

We have no hesitation in concluding that secretly recording a conversation presents privacy concerns that are different in kind, and more corrosive, than merely having one's oral communications heard and repeated. Recordings are uniquely reliable and powerful methods of preserving and disseminating information, but they are also uniquely reliable and powerful methods of invading privacy. Recordings may be made easily, stored indefinitely,

disseminated widely, and played repeatedly. Recordings also may be selectively edited, presented without context, manipulated, and shared across the internet. Because an audio recording device reliably captures the sound that it detects, its usage may also create the illusion of objectivity, even where the recording omits critical context due to selective editing or recording.[17] Thus, the transmission of an accurate recording may nevertheless obscure historical truth.[18]

Moreover, with the rise of accessible artificial intelligence technologies, anyone can use secret recordings to create convincing audio "deepfakes" in which people appear to say things that they never actually said.[19]

---

17. *See* Nancy D. Zeronda, *Street Shootings: Covert Photography and Public Privacy*, 63 Vand. L. Rev. 1131, 1137 (2010).

18. *See also* Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America*, 8 (2000) ("Privacy protects us from being misdefined and judged out of context in a world of short attention spans, a world in which information can easily be confused with knowledge."); Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 Stan. L. Rev. 1003, 1031 (2000) ("[T]he question of truth is not simply a matter of whether certain isolated statements are true. The question is whether the truth counts as a fair and accurate abridgment of the entire record."); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L.J. 967, 1038-39 (2003).

19. Robert Chesney & Danielle Citron, *Deepfakes and the New Disinformation War*, Foreign Affs. (Dec. 11, 2018), https://www.foreignaffairs.com/articles/world/2018-12-11/deepfakes-and-new-disinformation-war.

With this technology, "the only practical constraint on one's ability to produce a deepfake [is] access to training materials—that is, audio and video of the person to be modeled."[20]

Oregon's interest in conversational privacy also extends to ensuring that its residents retain control of their own speech. A party's "secret monitoring denies the speaker an important aspect of privacy of communication—the right to control the nature and extent of the firsthand dissemination of his statements." *Sanders*, 978 P.2d at 72 (citation omitted). A secret recording may enable a party to disseminate another's oral comments in a way the speaker did not intend. Appropriating another's speech implicates what the Supreme Court has described as the "principle of autonomy to control one's own speech." *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). "The First Amendment securely protects the freedom to make—*or decline to make*—one's own speech," and "it bears less heavily when speakers assert the right to make other people's speeches." *Eldred v. Ashcroft*, 537 U.S. 186, 221, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003) (emphasis added) (rejecting a First Amendment challenge to the Copyright Term Extension Act); *see also Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (recognizing the "right to speak freely and the right to refrain from speaking at all"). Oregon's statute "directly enhance[s] private speech" by allowing individuals to choose not to speak, and thereby protects

20. *Id.*

the "freedom *not* to speak publicly." *Bartnicki*, 532 U.S. at 537 (Breyer, J., concurring) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985)).

Project Veritas asserts that most—but not all—of its secret recordings will be made in public places such as cafes and parks. But Oregon's significant interest in protecting private conversations includes private conversations that occur in public or semi-public locations. There is little doubt that "private talk in public places is common." *Alvarez*, 679 F.3d at 606 (citation omitted). "Even in public spaces, people do not expect that their sometimes-sensitive discussions with friends and family members will be available for anyone who wants to record them."[21] Thus, even if a conversation may be overheard in public, Oregon maintains an interest in preventing its recording. *Cf. Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) ("But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."); *Carpenter v. United States*, 585 U.S. 296, 310, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018) ("A person does not surrender all Fourth Amendment protection by venturing into the public sphere.").

Oregon's brief on appeal identifies numerous examples of events that it contends are open to and attended by members of the public, but are still associated with

21. Marc Jonathan Blitz et al., *Regulating Drones Under the First and Fourteenth Amendments*, 57 Wm. & Mary L. Rev. 49, 94 (2015).

an expectation that attendees will not make secret recordings, such as twelve-step groups, bible study, and religious services. We agree. For these, and the other reasons identified, we conclude that Oregon has a significant interest in protecting conversational privacy.

2

The next step is deciding whether Oregon's statute is narrowly tailored to its significant interest. We conclude that the statute is sufficiently narrow.

A regulation "need not be the least speech-restrictive means of advancing" a governmental interest. *Turner*, 512 U.S. at 662; *see also Ward*, 491 U.S. at 798. To further its interest in preserving conversational privacy, Oregon adopted a relatively modest notice requirement. Absent an applicable exception, Project Veritas must inform participants in a conversation that they will be recorded before initiating a recording. *See* Or. Rev. Stat. § 165.540(1)(c). Keeping the purpose of the statute in mind, section 165.540(1)(c) is exceptionally well tailored to protecting Oregonians' private conversations. By requiring that participants in a conversation be informed before an audio recording begins, but *not* requiring that they consent to the recording, the statute minimizes the infringement upon Project Veritas's journalistic efforts while still protecting the interviewees' right to knowingly participate in Project Veritas's speech—or not. Once a person is on notice that she will be recorded, she may choose to speak or remain silent. Either way, a noticed recording does not violate a privacy interest. Moreover,

consistent with Oregon's interest in conversational privacy, the statute does not sweep in photography or video recordings; it applies only to recordings of face-to-face oral communications.

Oregon's statutory scheme is well tailored because it also accounts for some settings in which people cannot reasonably expect *not* to have their oral statements recorded. The Oregon legislature crafted several exceptions to account for those situations:

> The prohibitions in subsection (1)(c) of this section do not apply to persons who intercept or attempt to intercept oral communications that are part of any of the following proceedings, if the person uses an unconcealed recording device . . . :
>
> (A) Public or semipublic meetings such as hearings before governmental or quasi-governmental bodies, trials, press conferences, public speeches, rallies and sporting or other events;
>
> (B) Regularly scheduled classes or similar educational activities in public or private institutions; or
>
> (C) Private meetings or conferences if all others involved knew or reasonably should have known that the recording was being made.

Or. Rev. Stat. § 165.540(6)(a). These exceptions permit open recordings at public gatherings, including protests, and private meetings in which participants should reasonably expect that they will be recorded.

Project Veritas and the dissent argue that these carveouts do not render section 165.540(1)(c) perfectly tailored to Oregon's stated purpose because the law prohibits recording in some situations where participants lack any expectation that their conversation would not be recorded—for example, a loud argument on the street, a political provocateur on a crowded subway, or a drunk, hate-filled conversation in a parking lot.[22] We are not persuaded. The limited question before us is whether Oregon's conversational privacy statute is sufficiently tailored as a constitutional matter; it is not whether we can conceive of applications of the statute that may appear objectionable if viewed in isolation. Even if fringe examples constitute "conversations" within the meaning of section 165.540(1)(c) and Oregon's notice requirement is overbroad as applied to them, that does not demonstrate that a "substantial portion of the burden on speech does not serve to advance [Oregon's] goals." *Ward*, 491 U.S. at 799. Moreover, Project Veritas's resort to these niche examples reinforces the conclusion that the bulk of Oregon's

22. Although we consider Project Veritas's as-applied challenge, the regulation "need not be judged solely by reference to the [conduct] at hand." *Clark*, 468 U.S. at 296-97; *see also Ward*, 491 U.S. at 801 (noting that the validity of a regulation "depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case").

protection against secret audio recording is targeted at achieving Oregon's significant interest.[23] Where, as here, a governmental interest "would be achieved less effectively absent the regulation" and the regulation achieves its aim "without . . . significantly restricting a substantial quantity of speech that does not create the same evils," the regulation is sufficiently narrowly tailored. *Id.* at 799 & n.7 (citation omitted); *see also Galvin v. Hay*, 374 F.3d 739, 753 (9th Cir. 2004).

3

We are also persuaded that section 165.540(1)(c) leaves open ample alternative channels of communication for Project Veritas to engage in investigative journalism and to communicate its message.

It is well established that an alternative channel need not be ideal, but merely adequate. *See Heffron*, 452 U.S. at 654-55. "[T]he First Amendment does not guarantee

---

23. The dissent erroneously posits that we assume Oregon's conversational privacy statute does not apply to any scenarios involving "open recordings." We do not. Rather, we have interpreted the exception embodied in section 165.540(6)(a) to encompass certain open recording activities in which Project Veritas seeks to engage. *See supra* note 5. The Oregon Court of Appeals's decision in *State v. Bichsel*, 101 Ore. App. 257, 790 P.2d 1142 (Or. Ct. App. 1990), cited by the dissent, is not to the contrary. There, decades before Oregon adopted the law enforcement exception, the court ruled that a police officer's investigatory stop of the defendant in an alley was not a "meeting" within the meaning of section 165.540(6)(a) because it was a "mere encounter[]." *Id.* at 1143, 1144 n.3. Nothing in our opinion conflicts with *Bichsel*.

the right to communicate one's views at all times and places or in any manner that may be desired." *Id.* at 647. The Supreme Court "generally will not strike down a governmental action for failure to leave open ample alternative channels . . . unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." *Menotti v. City of Seattle*, 409 F.3d 1113, 1138 (9th Cir. 2005) (citation omitted).

A restriction runs afoul of the "alternative channels" requirement if it eliminates the only method of communication by which speakers can convey their message to a particular audience. *See, e.g., Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229-30 (9th Cir. 1990). But a regulation does not fail intermediate scrutiny merely because the other available channels of communication would convey the same message somewhat less conveniently or effectively. *See, e.g., Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1298-99 (9th Cir. 2015); *One World One Fam. Now v. City & County of Honolulu*, 76 F.3d 1009, 1014 (9th Cir. 1996). An alternative channel is adequate if it "permits the more general dissemination of a message." *Frisby v. Schultz*, 487 U.S. 474, 483, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988).

We reject Project Veritas's argument that it will be unable to engage in investigative journalism to communicate its message "across the landscape of a particular community or setting," *Menotti*, 409 F.3d at 1138 (citation omitted), or to reach a particular audience,

if it cannot secretly record face-to-face conversations. Project Veritas retains numerous alternative channels to engage in its journalistic speech activities. It may employ all the traditional tools of investigative reporting, including talking with sources, reviewing records, taking photographs, recording videos openly during public and semi-public meetings and events, recording videos that do not capture oral conversations, recording conversations after announcing it is doing so, and making use of Oregon's freedom-of-information laws. *See, e.g.*, Or. Rev. Stat. §§ 165.540(6)(a)(A), 192.311-.431, 192.610-.695.

Project Veritas may have its reporters go undercover and report on what they have seen and heard—without secretly recording its targets—as journalists have done for centuries. Powerful exposés authored by people like Nellie Bly,[24] Gloria Steinem,[25] and John Howard Griffin[26] clearly demonstrate what our court has long recognized: "hidden mechanical contrivances" are not "'indispensable

---

24. Diane Bernard, *She went undercover to expose an insane asylum's horrors. Now Nellie Bly is getting her due*, Wash. Post (July 18, 2019), https://www.washingtonpost.com/history/2019/07/28/she-went-undercover-expose-an-insane-asylums-horrors-now-nellie-bly-is-getting-her-due/.

25. Rachel Chang, *Inside Gloria Steinem's Month as an Undercover Playboy Bunny*, Biography.com (Mar. 23, 2020), https://www.biography.com/authors-writers/gloria-steinem-undercover-playboy-bunny.

26. Bruce Watson, *Black Like Me, 50 Years Later*, Smithsonian Mag. (Oct. 2011), https://www.smithsonianmag.com/arts-culture/black-like-me-50-years-later-74543463/.

tools' of newsgathering." *Dietemann*, 449 F.2d at 249 (rejecting the argument that the First Amendment accorded journalists immunity from invasion of privacy torts). These many approaches to traditional investigative reporting remain available to Project Veritas and they satisfy the alternative-channels requirement.

F

Even if we agreed with Project Veritas that the statutory exceptions it challenges are content based, the proper next step would be to consider whether the exceptions may be severed rather than striking down the entirety of Oregon's conversational privacy statute, as Project Veritas urges us to do.[27]

The severability of a state statute is a matter of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139, 116 S. Ct. 2068, 135 L. Ed. 2d 443 (1996) (per curiam). Under Oregon law, "when one part of a statute is found unconstitutional," the court should "sever the offending part and save the remainder of the statute, [1] unless the legislature has directed otherwise, [2] unless the parts of the statute are so interconnected that it appears likely that the remaining parts would not have been enacted without the

27. If the exceptions were content based, strict scrutiny would apply. *Turner*, 512 U.S. at 641-42. Under strict scrutiny, a regulation is constitutional only if it "is necessary to serve a compelling state interest" and "is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). Oregon concedes that it cannot satisfy strict scrutiny.

unconstitutional part, or [3] unless the remaining parts are incomplete and cannot be executed in accordance with legislative intent." *Outdoor Media Dimensions, Inc. v. Dep't of Transp.*, 340 Ore. 275, 132 P.3d 5, 18 (Or. 2006) (applying Or. Rev. Stat. § 174.040).[28] The "legislative preference for severing the offending language and saving the remainder of the statute is conditioned only upon [these] three circumstances." *City Univ. v. State*, 320 Ore. 422, 885 P.2d 701, 704 (Or. 1994).

None of Oregon's three severability exceptions apply here. The first circumstance identified in *Outdoor Media* is plainly inapplicable because Oregon's legislature has not issued any specific direction negating its preference for severability. *See* § 165.540. As for the second and third *Outdoor Media* circumstances, there can be no question that the felony exception and the law enforcement exception are not so intertwined with the freestanding conversational privacy statute that it could not survive on its own. In fact, it *did* exist on its own for decades. Oregon established its conversational privacy statute in 1959 and did not enact the felony exception and law enforcement exception until 1989 and 2015, respectively. Oregon's general protection against unannounced recordings was operational for thirty years before the modern-day amendments were added to address police

28. This is consistent with the Supreme Court's longstanding recognition of a "strong presumption of severability." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 625, 140 S. Ct. 2335, 207 L. Ed. 2d 784 (2020); *see also Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-31, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006).

officers' concealed recording devices and over fifty years before a consensus emerged in federal caselaw that the First Amendment protects the right to film police officers in public. *See, e.g., Askins*, 899 F.3d at 1044.

The dissent recognizes that we apply Oregon law to determine severability, cites the correct test from *Outdoor Media*, and then fails to apply it. Instead, the dissent insists that it is "impossible to sever" the law enforcement exception because, without that exception, the conversational privacy statute would fail to account for the First Amendment right to photograph and record matters of public interest. Our dissenting colleagues' unstated assumption is that the conversional privacy statute is "so essentially and inseparably connected with and dependent upon the [law enforcement exception] that it is apparent that [it] would not have been enacted without [that exception]." § 174.040(2). But there is no hint that the Oregon legislature would have considered the law enforcement exception so essential that it would have opted to repeal its conversational privacy statute—which existed for over half a century and for several decades after courts began to recognize a right to record matters of public interest, *see Fordyce*, 55 F.3d at 439—rather than be without the exception. Moreover, the dissent's view would place Oregon in an insoluble dilemma: If a legislature carves out an exception to accommodate speech that is protected by the First Amendment, as Oregon did here, the dissent would strike down the entire law as unconstitutional; and if a legislature enacts a freestanding prohibition on unannounced recordings, the dissent would deem the law unconstitutional for failing to recognize First Amendment rights.

Even if the exceptions to section 165.540(1)(c) did not survive scrutiny, the appropriate next step would be to sever them, leaving in place the general prohibition on concealed recordings in the applications of section 165.540(1)(c) challenged by Project Veritas.[29] *See, e.g., State ex rel. Musa v. Minear*, 240 Ore. 315, 401 P.2d 36, 39 (Or. 1965) (concluding that an amended statute was invalid and reverting it to its pre-amendment form).

G

Having concluded that section 165.540(1)(c)—with and without its exceptions—survives intermediate

29. Because "a ruling of unconstitutionality frustrates the intent of the elected representatives of the people" and thereby undermines a state's sovereign interests, federal courts should be exceptionally cautious before striking down a state statute as unconstitutional. *Ayotte*, 546 U.S. at 329 (alteration accepted) (citation omitted). Accordingly, "the normal rule" is that "partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985). Project Veritas contends that Oregon did not brief severability in the district court and relies on our prior decision in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 951 n.10 (9th Cir. 2011) (en banc), to argue that we may not reach it. Even if some part of Oregon's conversational privacy statute were constitutionally infirm, we doubt this would be the proper course. Indeed, the Supreme Court has previously faulted our court for failing to consider severability before invalidating an entire state statute. *See Brockett*, 472 U.S. at 507; *see also Ayotte*, 546 U.S. at 328-31; *New York v. United States*, 505 U.S. 144, 186, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). Because we conclude that no portion of section 165.540(1)(c) is unconstitutional, we need not resolve this issue here.

scrutiny as applied to Project Veritas, we next consider Project Veritas's separate facial overbreadth challenge. In its complaint, Project Veritas seeks a declaration that the statute is unconstitutionally overbroad on its face. Because Project Veritas pursues relief that "reach[es] beyond [its] particular circumstances," *Doe*, 561 U.S. at 194, Project Veritas must satisfy the requirements for a facial challenge.

In most cases, "a plaintiff cannot succeed on a facial challenge unless he 'establish[es] that no set of circumstances exists under which the [law] would be valid,' or he shows that the law lacks a 'plainly legitimate sweep.'" *Moody*, 603 U.S. at 723 (alterations in original) (citations omitted). Project Veritas acknowledges that it cannot carry this burden, conceding that the statute may permissibly apply where someone secretly records a private conversation. For instance, in Project Veritas's view, section 165.540(1)(c) may legitimately apply to recording "a hushed conversation in a secluded hallway, the musings of a friend whispering his life's woes to another friend, in confidence, in a secluded office, or colleagues discussing confidential medical options in a hospital visitation room."

In our First Amendment analysis, we employ a more lenient though still rigorous standard for facial overbreadth challenges, where "[t]he question is whether 'a substantial number of [the law's] applications are unconstitutional judged in relation to the statute's plainly legitimate sweep.'" *Moody*, 603 U.S. at 723 (alterations in original) (citation omitted). In other words, "the

law's unconstitutional applications" must "substantially outweigh its constitutional ones." *Id.* at 724. "[I]nvalidation for overbreadth is strong medicine that is not to be casually employed." *United States v. Hansen*, 599 U.S. 762, 770, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (2023) (internal quotation marks and citation omitted). "In the absence of a lopsided ratio, courts must handle unconstitutional applications as they usually do—case-by-case." *Id.* The party asserting substantial overbreadth bears the burden of establishing it. *Virginia v. Hicks*, 539 U.S. 113, 122, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003); *see also Hansen*, 599 U.S. at 784.

"The first step in the proper facial analysis is to assess the state laws' scope." *Moody*, 603 U.S. at 724; *see also Hansen*, 599 U.S. at 770. This step is relatively straightforward here. As we have explained, absent the application of an exception, section 165.540(1)(c) requires one to specifically inform participants in a conversation that they are being recorded.

"The next order of business is to decide which of the laws' applications violate the First Amendment, and to measure them against the rest." *Moody*, 603 U.S. at 725. To meet its burden, Project Veritas relies on applications of the statute to its own speech. Throughout its complaint and briefing, Project Veritas's arguments about the constitutionality of section 165.540(1)(c) focus on conversations in which its reporters will be participants, or oral communications of others that Project Veritas reporters will hear. We do not confine our facial overbreadth analysis to the "heartland applications" alleged by the parties; instead, we must "address the full

range of activities" that the statute covers. *Id* at 724-26. Even putting aside that we have already concluded the statute is constitutional as applied to Project Veritas, these applications represent only a sliver of the conversations to which section 165.540(1)(c) may apply. Project Veritas fails to meet its burden because it makes little effort to identify and weigh the conversational privacy statute's lawful and unlawful applications, and the conversations it wishes to record are plainly a tiny fraction of the whole.

Project Veritas makes passing references to other applications it contends are unconstitutional—*e.g.*, recording a loud argument on the street or a political provocateur on a subway. The dissent does the same, imagining a public official berating a Chipotle employee or uttering a racial slur on a sidewalk. But even assuming that these examples qualify as face-to-face conversations within the meaning of section 165.540(1)(c) and that the statute is unconstitutional as applied to them, "the ratio of unlawful-to-lawful applications is not lopsided enough to justify the 'strong medicine' of facial invalidation for overbreadth." *Hansen*, 599 U.S. at 784 (citation omitted); *see also Moody*, 603 U.S. at 723. We therefore reject Project Veritas's facial overbreadth challenge and affirm the district court's judgment.

AFFIRMED.

BENNETT, Circuit Judge, concurring in the judgment:

In 2018, when evaluating the creation of audiovisual recordings, we declared that "the recording process is itself expressive," meaning that "the creation of audiovisual recordings is speech entitled to First Amendment protection as purely expressive activity." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018). The breadth of that statement is rooted neither in the history of the Free Speech Clause of the First Amendment nor in any decisions from the Supreme Court. The practical implications of our untethered statement in *Wasden* are easily seen here. Using *Wasden* as a jumping-off point, Project Veritas[1] contends that the First Amendment categorically protects *purely mechanical* activity: pressing an audio record button either in secret or without announcement to record all conversations.

The majority holds that "*Wasden* did not conclude that every act of recording requires expressive decisions, nor that every act of recording implicates the First Amendment." Maj. at 23. But it stops short of holding that the act of pressing an audio record button either secretly or without announcing to record all conversations is not per se "speech" protected by the First Amendment. For this reason, I write separately. Because there is no historical or precedential foundation to support that simply pressing record in secret or without announcement is always protected speech, I would hold that such an act

1. I refer to Plaintiffs-Appellants as "Project Veritas."

is not per se "speech" protected by the First Amendment. With that understanding, Project Veritas's facial challenge fails.[2]

I.

Project Veritas brings a facial challenge to Oregon Revised Statutes § 165.540, which, with some exceptions,[3] prohibits "[o]btain[ing] or attempt[ing] to obtain the whole or any part of a conversation[4] by means of any device, contrivance, machine or apparatus . . . if not all participants in the conversation are specifically informed that their conversation is being obtained." Or. Rev. Stat. § 165.540(1)(c). On its face, the provision regulates conduct: a person pressing a record button secretly or openly (but without announcing that he is recording) to record a conversation. The provision applies only to audio recordings, as it prohibits only the obtaining of

2. As the majority notes, Project Veritas also brings an as-applied challenge. Maj. at 12. I concur in the majority's holding that such challenge is ripe. Maj. at 13. I also concur in the majority's judgment that the as-applied challenge fails for the reasons explained in the majority's opinion. Maj. at 24-50.

3. There are several exceptions, including for recording a conversation during a felony that endangers human life and for recording conversations with police officers performing their official duties. Or. Rev. Stat. § 165.540(5)(a)-(b).

4. A "'[c]onversation' means the transmission between two or more persons of an oral communication which is not a telecommunication or a radio communication, and includes a communication occurring through a video conferencing program." Or. Rev. Stat. § 165.535(1).

conversations. *See id.* § 165.535(1). While there are some exceptions, the statute generally does not distinguish between public and private conversations, and it generally does not matter where the conversations occur. But the statute still allows for audio recording, just not secret or unannounced recording.

Project Veritas argues that § 165.540(1)(c) is facially unconstitutional because there is a First Amendment right to press record—secretly or openly without announcing—to capture any conversation. A facial challenge requires us to "determine a law's full set of applications." *Moody v. NetChoice, LLC*, 603 U.S. 707, 144 S. Ct. 2383, 2394, 219 L. Ed. 2d 1075 (2024). Section 165.540(1)(c) generally prohibits a person from using a recording device to eavesdrop on all private conversations in both public and private locations.[5] This includes, for example, preventing a person from leaving a recording device in a public place to secretly record conversations between others. Under the statute, a person also cannot record in secret, or record without announcement, conversations to which he is a party, unless an exception applies. Nor may a person openly record all conversations between others without announcing that he is recording, unless, again, an exception applies.

5. Project Veritas clarified at oral argument that it does not challenge the prohibition on eavesdropping. Oral Argument at 15:55-16:04.

Appendix A

A.

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) (quoting U.S. Const. amend. I). The Free Speech Clause went through several iterations before its adoption as part of the First Amendment. The initial version of the Free Speech Clause as drafted by James Madison was much more specific: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." 1 Annals of Cong. 451 (1789) (Joseph Gales ed., 1834). A special committee of the House of Representatives rewrote the Free Speech Clause to read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed." *Id.* at 759. The Senate then finalized the language of the First Amendment. Cong. Rsch. Serv., *The Constitution of the United States of America: Analysis and Interpretation* 1396 (2023).

The Free Speech Clause, however, received little debate in the House and there is no record of debate over the clause in the Senate. *Id.* at 1397 & n.5. Ultimately, the Founders elected to enumerate "simple, acknowledged principles" because "the ratification [of specific abstract propositions would] meet with but little difficulty." 1 Annals of Cong. 766 (1789). The freedom of the press

"was everywhere a grand topic for declaration, but the insistent demand for its protection on parchment was not accompanied by a reasoned analysis of what it meant, how far it extended, and under what circumstances it might be limited." Leonard W. Levy, *Legacy of Suppression* 214-15 (1960). The lack of specificity in the First Amendment almost immediately led to controversies about what was and was not permitted by the Free Speech Clause.

One such controversy followed Congress's passage of the Sedition Act of 1798, which made it a crime for "any person [to] write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them . . . into contempt." Ch. 74, 1 Stat. 596. Even the Founders were divided on whether the law was constitutional under the First Amendment, with Thomas Jefferson condemning the Act and President John Adams using it to prosecute his political opponents. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1006 (7th ed. 2023). The Sedition Act expired in 1801 before its constitutionality could be challenged in the Supreme Court,[6] but the fact that even the drafters of the Constitution debated the bounds of the Free Speech Clause shows that the "simple, acknowledged principles" underlying the Clause are not so easily put into practice.

---

6. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the Supreme Court noted that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* at 276 & n.16 (footnote omitted).

The Supreme Court has made clear that it "reject[s] the view that freedom of speech . . . , as protected by the First and Fourteenth Amendments, are 'absolutes.'" *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961); *see Stromberg v. California*, 283 U.S. 359, 368, 51 S. Ct. 532, 75 L. Ed. 1117 (1931) ("The right [of free speech] is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom."). "Line-drawing is inevitable as to what speech will be protected under the First Amendment . . . . Lines also must be drawn in defining what is speech." Chemerinsky, *supra*, at 1007. That line drawing is even more difficult when, as here, what is sought to be protected is not speech in the traditional sense but *conduct*.

"It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989). When an individual does not express views through printed or spoken words it is necessary "to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974) (per curiam). The Supreme Court asks whether non-speech conduct carries elements of communication because the Court "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person

engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

That inquiry depends on "the nature of [the individual's] activity, combined with the factual context and environment in which it was undertaken." *Spence*, 418 U.S. at 409-10. For instance, conduct that has involved forms of symbolism, such as conduct involving flags, consistently has been found to be expressive and protected by the First Amendment. *See, e.g., Stromberg*, 283 U.S. at 369-70 (striking down a law that prohibited the display of a flag as a symbol of opposition to organized government, because that statute "embrac[ed] conduct which the State could not constitutionally prohibit," such as "permit[ting] the punishment of the fair use of [an] opportunity" to display a sign and protest the government); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (invalidating a law requiring students to salute the American flag and noting "[s]ymbolism is a primitive but effective way of communicating ideas").

Additionally, the context "for purposes of expression is important, for the context may give meaning to the symbol" or conduct. *Spence*, 418 U.S. at 410. The wearing of black armbands in school could convey a clear message about an issue of public concern, like the Vietnam War, and be subject to First Amendment protections. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). Affixing a peace sign to an upside-down flag "at a time of national turmoil," such as after the killing of students at Kent State University,

also rises to the level of expressive conduct amounting to speech under the First Amendment. *Spence*, 418 U.S. at 410, 414 n.10. In both instances, there was "[a]n intent to convey a particularized message," and "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11.

The text of the First Amendment is silent on what exactly is meant by "speech." The history of the Free Speech Clause offers little guidance, and the Founders themselves had different understandings of what was prohibited by the Clause. But in drawing the bounds of "speech," the Supreme Court has differentiated between conduct intended to convey a message and expressionless conduct.[7] Pressing a record button, whether in secret or without announcement, is purely mechanical. That conduct conveys no message. Thus, it is not per se "speech" under the First Amendment.[8]

---

7. Even for expressive conduct, the Supreme Court has clarified that conduct is not immune from government regulation simply because it might communicate a message. *O'Brien*, 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

8. And as explained below, even if some button pushing could amount to protected speech, Project Veritas's facial challenge would still fail given that the default should be that secret and unannounced recordings are not per se protected under the First Amendment.

B.

Even when conduct relates to speech, Supreme Court cases counsel that that conduct may not be speech protected by the First Amendment, particularly when the regulation of such conduct still permits the speaker to express his desired message and there are important countervailing interests.

For example, in *Zemel v. Rusk*, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965), the appellant claimed that the Secretary of State's "refusal to validate his passport for travel to Cuba," because of the United States's breaking of diplomatic ties with Cuba and implementation of a travel ban, "denie[d] him rights guaranteed by the First Amendment." *Id.* at 16. This was allegedly so because the travel ban "direct[ly] interfere[d] with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies." *Id.* Although the Court acknowledged that the ban did burden the free flow of information, it did not implicate the First Amendment because the ban was ultimately "an inhibition of action." *Id.* The Court observed:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to

> gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. *The right to speak and publish does not carry with it the unrestrained right to gather information.*

Id. at 16-17 (emphasis added).

In *Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), the Court relied on *Zemel* and held that requiring journalists to testify before grand juries did not violate the First Amendment—even though "news gathering may be hampered" by the requirement. *Id.* at 684; *see also id.* at 684 n.22 (quoting *Zemel*'s proposition that there must be limits on the types of conduct protected by the First Amendment). And though the Court acknowledged that requiring journalists to testify would burden some of their newsgathering, the Court nevertheless found that the requirement imposed no burden on their protected speech:

> [T]hese cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news

> from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

Id. at 681-82.

The *Branzburg* Court explained that sometimes conduct, even when it might further speech, must be regulated to protect important countervailing interests:

> Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.

Id. at 691-92.

Branzburg reiterated *Zemel*'s holding that there must be limits on the types of conduct protected by the First Amendment. It established that the regulation of some conduct—even when it may impact speech—simply does not implicate the First Amendment, particularly

when the speaker is still allowed to express his desired message and the regulation is needed to protect important countervailing interests.

In two cases following *Branzburg*, the Court again confirmed that some speech-related conducted is not protected by the First Amendment. In *Pell v. Procunier*, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974), journalists challenged a California Department of Corrections regulation that "prohibit[ed] face-to-face interviews between press representatives and individual inmates whom they specifically name and request to interview." *Id.* at 819. Even though this regulation "clearly restrict[ed] one manner of communication," *id.* at 823, the Court held that it did not violate the First Amendment, *id.* at 835. The Court focused on considerations similar to those identified in *Branzburg*: there must be limits on protected conduct under the First Amendment, *id.* at 834 n.9 (quoting *Zemel*, 381 U.S. at 16-17); this was the "sole limitation on newsgathering in California prisons," *id.* at 831; and the regulation was adopted to mitigate "disciplinary problems caused, in part, by [the department's prior] liberal posture with regard to press interviews," *id.* at 832.

Saxbe v. Washington Post Co., 417 U.S. 843, 94 S. Ct. 2811, 41 L. Ed. 2d 514 (1974), involved a similar regulation that "prohibited any personal interviews between newsmen and individually designated federal prison inmates." *Id.* at 844. The *Saxbe* Court found the case "constitutionally indistinguishable" from *Pell* and thus held that the regulation did not violate the First Amendment. *Id.* at 850.

These cases support that all secret or unannounced audio recordings cannot be per se protected speech under the First Amendment, even if some of those acts of secret or unannounced recording could be indirectly linked to speech. First, we know that, even if the act of recording might be related to speech, the act itself does not automatically qualify as protected speech. There must be limits. *See Zemel*, 381 U.S. at 16-17. We have expressed this sentiment. *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office.").

Second, a prohibition on secret and unannounced audio recording permits a speaker to use other means of "capturing" the audio contents of a conversation. He can still record, so long as he announces that he is doing so. And, without any announcement, he can still write or type notes during the conversation; he can still write or type notes immediately after the conversation; and he can still dictate the contents of the conversation using a recording device after the conversation. The prohibition on secret and unannounced audio recording also does not restrict his ability to communicate the information that he obtained from the conversation.

Finally, there is a strong countervailing interest protected by the regulation of secret or unannounced audio recording: the interest in maintaining the privacy of communication. "Privacy of communication is an important interest," as it "encourage[es] the uninhibited exchange of ideas and information among private parties." *Bartnicki*

v. Vopper, 532 U.S. 514, 532, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) (citation omitted). Indeed, "[t]here is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Id.* at 532 n.20 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985)). The Court has acknowledged:

> In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.

Id. at 533 (quoting President's Comm'n on L. Enf't & Admin. of Just., *The Challenge of Crime in a Free Society* 202 (1967)). Permitting a person to audio record in secret or record without announcing all conversations—word for word—would inhibit the free exchange of ideas and information, particularly given the reality that audio recordings can be instantly broadcast to the world using the internet.

Given these considerations, the secret or unannounced audio recording of all conversations is not per se protected speech under the First Amendment. Thus, neither the text or the history of the First Amendment, nor Supreme Court precedent interpreting the Free Speech Clause,

supports that the act of pressing an audio record button to record all conversations—either in secret or without announcement—is per se speech protected by the First Amendment. Our precedent also offers no persuasive reason to conclude otherwise.

C.

In *Wasden*, we stated that "the recording process is itself expressive" and "the creation of audiovisual recordings is speech entitled to First Amendment protection." 878 F.3d at 1204. In making those broad statements, we primarily relied on *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010). *See Wasden*, 878 F.3d at 1203-04. But *Anderson* never addressed whether all recordings—let alone secret and unannounced audio recordings—are protected speech.

Anderson involved tattooing. 621 F.3d at 1055. There, we held that "the *process* of tattooing is purely expressive activity" protected by the First Amendment. *Id.* at 1061-62. In reaching that conclusion, we likened the process of tattooing to "the processes of writing words down on paper, painting a picture, and playing an instrument," which "are purely expressive activities entitled to full First Amendment protection." *Id.* at 1062. And we emphasized that tattoos, which could not be divorced from the process of tattooing itself, involves "skill, artistry, and care"—expressive elements. *Id.* at 1061. Tattooing, writing, painting, and producing music by playing an instrument all convey messages and are thus all forms of expressive conduct. *Id.* at 1062. *Anderson*, however, never considered whether all audio recordings, even those

lacking expressive elements because the recorder simply pushes a button and nothing more, are speech protected by the First Amendment. And pushing a record button is different from the activities *Anderson* identifies as expressive: unlike painting or writing, pressing a record button requires no such "skill, artistry, and care." *Id.* at 1061. Thus, *Anderson* does not support *Wasden*'s broad statements.

Indeed, in addressing recordings, our sister circuits have not gone so far as holding that all recordings are protected speech. In *People for the Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Federation, Inc.*, 60 F.4th 815 (4th Cir. 2023) ("*PETA*"), the Fourth Circuit expressly declined to adopt the view that all recordings are protected:

> Our main point of disagreement centers around the [district] court's belief that all "recording is protected speech." We do not think it wise to go that far where the case itself does not call for a categorical pronouncement and where the briefing is, understandably, agnostic on the potential implications of such an absolute decision. Should posting a hidden camera in a CEO's office—or her home—per se constitute protected expression? How about photographing proprietary documents to tap into trade secrets, with no intent of creating a work of art? Recording private telephone conversations?

Id. at 836 (citation omitted).

The Fourth Circuit explicitly declined to follow *Wasden*, questioning *Wasden*'s "expansive ruling." *Id.* at 837 n.9 ("Nor has the Ninth Circuit been able to stress-test the outer limits of its expansive ruling—*Wasden* itself concerned only recordings of 'the conduct of an agricultural production facility's operations.'" (quoting *Wasden*, 878 F.3d at 1204)). Instead, the *PETA* court followed other circuits that had declined to hold that all recordings are protected. *Id.* at 836-37. For example, *PETA* explained that the Third Circuit had "prudently declined to 'say that all recording is protected or desirable.'" *Id.* at 836 (quoting *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017)). *PETA* also noted that the Tenth and Seventh Circuits had taken similar "circumscribed" approaches. *Id.* at 836-37 (discussing *W. Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017), and *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012)). Even the dissenting opinion by Judge Rushing expressed that the *PETA* majority had "rightly reject[ed]" *Wasden* because "the mere act of recording by itself is not categorically protected speech." *Id.* at 845 (Rushing, J., dissenting).

In short, our precedent provides no persuasive basis for finding that all audio recordings, including secret and unannounced ones, are categorically protected speech.[9] No

9. The majority discusses two other cases from our court that involved recordings. Maj. at 21. But neither held that all audio recording, including secret and unannounced audio recording, is per se speech. *See Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest"); *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (recognizing that the "First Amendment protects the right to photograph and record matters of public interest").

other circuit has come to that conclusion.[10] Beyond *Wasden*, the parties point to no cases holding that the mere act of pushing record is categorically protected speech. And, as discussed above, while no Supreme Court case has dealt with secret or unannounced audio recordings, Supreme

10. The majority states that "[t]he First, Third, Fourth, Fifth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits have recognized that many acts of recording qualify as speech and are entitled to First Amendment protection," Maj. at 21 n.8, but none of the cited cases established a categorical rule that all audio recording, including secret and unannounced audio recording, is speech. *See Alvarez*, 679 F.3d at 586 (addressing only an as-applied challenge to the open "audiovisual recordings of police officers performing their duties in public places and speaking at a volume audible to bystanders"); *Fields*, 862 F.3d at 359-60 (declining to find that the "act of recording" is "inherently expressive conduct" like making art, *id.* at 359, and explaining that "[w]e do not say that all recording is protected or desirable," *id.* at 360); *People for the Ethical Treatment of Animals*, 60 F.4th at 836 (declining to hold that "all 'recording is protected speech'" (citation omitted)); *W. Watersheds*, 869 F.3d at 1197 ("This is not to say that all regulations incidentally restricting access to information trigger First Amendment analysis."); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688-90 (5th Cir. 2017) (concluding that "the First Amendment protects the act of making film"); *Glik v. Cunniffe*, 655 F.3d 78, 83-84 (1st Cir. 2011) (concluding that "the First Amendment protects the filming of government officials in public spaces," *id.* at 83, but "the right to film is not without limitations," *id.* at 84); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (concluding that the First Amendment protects the right to visually "record matters of public interest"); *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) (concluding that taking photographs and recording videos to document alleged noncompliant uses of a public park are entitled to First Amendment protection); *Price v. Garland*, 45 F.4th 1059, 1071, 458 U.S. App. D.C. 825 (D.C. Cir. 2022) ("[P]rohibiting the recording of a public official performing a public duty on public property is unreasonable . . . .").

Court cases addressing the regulation of conduct do not support finding that all such recordings are protected speech under the First Amendment. The majority notes that it "do[es] not suggest that any conduct related in some way to speech creation, however attenuated, is necessarily entitled to First Amendment protection." Maj. at 18-19. I do not disagree, but I would go further and hold that, when the conduct is purely mechanical, and by itself neither conveys nor contains a message, it is categorically not speech. There should be no general presumption that pushing a button is itself speech.

* * *

Based on the above, I would hold that the act of pressing a record button secretly or openly but without announcement that one is recording is by itself not categorically protected speech under the First Amendment. Under that premise, Project Veritas's facial challenge fails because, even assuming that there might be some circumstances when secret or unannounced audio recordings could be protected, those unconstitutional applications do not substantially outweigh the constitutional ones.

II.

In *United States v. Hansen*, 599 U.S. 762, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (2023), the Supreme Court set forth a demanding standard for evaluating whether a statute is facially overbroad in violation of the First Amendment. *Id.* at 769-70. Hansen had argued that a

federal law prohibiting "encourag[ing] or induc[ing]" illegal immigration was facially overbroad under the First Amendment. *Id.* at 766. To address Hansen's argument, the Court stated that "[t]o justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be *substantially disproportionate* to the statute's lawful sweep." *Id.* at 770 (emphasis added). "In the absence of *a lopsided ratio*, courts must handle unconstitutional applications as they usually do—case-by-case." *Id.* (emphasis added).

In applying that standard, the Court first determined what conduct is covered by the statute, *i.e.*, whether "encourage" and "induce" as used in the statute refer to "criminal solicitation and facilitation (thus capturing only a narrow band of speech) or instead as those terms are used in everyday conversation (thus encompassing a broader swath)." *Id.* at 770-71. Because the Court held that the statute "reaches no further than the purposeful solicitation and facilitation of specific acts known to violate federal law," it "does not 'prohibi[t] a substantial amount of protected speech' relative to its 'plainly legitimate sweep.'" *Id.* at 781 (alteration in original) (quoting *United States v. Williams*, 553 U.S. 285, 292, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)). The Court then compared the statute's constitutional applications to its unconstitutional ones. On the one hand, the statute "encompasses a great deal of nonexpressive conduct—which does not implicate the First Amendment at all." *Id.* at 782 (citing as examples "smuggling noncitizens into the country, providing counterfeit immigration documents, and issuing fraudulent Social Security numbers to noncitizens"

(citations omitted)). On the other hand, "Hansen fail[ed] to identify a single prosecution for ostensibly protected expression in the 70 years since Congress enacted [the statute]'s immediate predecessor." *Id.*

Thus, the Court concluded that Hansen failed to show that the statute's overbreadth is "'*substantial* . . . relative to [its] plainly legitimate sweep.'" *Id.* at 784 (alterations in original) (quoting *Williams*, 553 U.S. at 292). The Court further reasoned that "[e]ven assuming that [the statute] reaches some protected speech, and even assuming that its application to all of that speech is unconstitutional, the ratio of unlawful-to-lawful applications is not lopsided enough to justify the 'strong medicine' of facial invalidation for overbreadth." *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)).

As discussed, I would find that the act of recording conversations, in secret or without announcement, is not per se protected "speech" under the First Amendment. With this understanding, and applying *Hansen*'s demanding test, I agree with the majority that Project Veritas's facial challenge fails. Even assuming that Project Veritas has identified some unlawful applications of § 165.540(1)(c), such "applications represent only a sliver of the conversations to which § 165.540(1)(c) may apply." Maj. at 52. Indeed, they cannot be "substantially disproportionate to the statute's lawful sweep," *Hansen*, 599 U.S. at 770, given that the default should be that secret and unannounced recordings are not per se protected under the First Amendment. Thus, as in *Hansen*, "[e]ven assuming that [§ 165.540(1)(c)] reaches some protected

speech, and even assuming that its application to all of that speech is unconstitutional, the ratio of unlawful-to-lawful applications is not lopsided enough to justify the 'strong medicine' of facial invalidation for overbreadth." *Id.* at 784 (quoting *Broadrick*, 413 U.S. at 613). For this reason, Project Veritas's facial challenge fails.

III.

I concur that Project Veritas's facial challenge fails. But I believe that it fails because the act of pressing an audio record button either in secret or without announcement to record all conversations is not per se "speech" protected by the First Amendment.

LEE, Circuit Judge, dissenting, with whom COLLINS, Circuit Judge, joins.

Journalists, as well as regular citizens, routinely record the powerful and the privileged behaving badly. Today's decision imperils the right to capture such abuses of power and other newsworthy events.

Oregon does not just ban surreptitious recordings that may implicate privacy concerns: It also criminalizes audio-recording someone—even conversations in public with no reasonable expectation of privacy—if "not all participants in the conversation are specifically informed that their conversation is being obtained." Or. Rev. Stat. § 165.540(1)(c). So, for example, a citizen in Oregon cannot lawfully audiotape a public official berating an employee at a Chipotle or uttering a racial slur on a public sidewalk—unless that citizen expressly tells that official he is being recorded.

We have held that the First Amendment protects the act of recording as an "inherently expressive" activity. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018). The majority opinion, however, upholds the Oregon law under intermediate scrutiny, ruling that the law is narrowly tailored to further the government's important interest in conversational privacy.

I respectfully dissent because Oregon's law is grossly overbroad and not narrowly tailored to advance the state's interest in conversational privacy (even assuming intermediate scrutiny applies). Oregon prevents citizens

from recording even in public areas if they do not announce that they are audiotaping. Oregon thus tramples on people's ability to record and report on a large swath of public and newsworthy events. And because the law bans the taping of conversations where there is no reasonable expectation of privacy, Oregon's statute is not narrowly tailored to further the state's interest in conversational privacy.

In any event, Oregon's law should be subject to strict scrutiny, not intermediate scrutiny, because the statute is not content-neutral. The statute has a law-enforcement exception that allows citizens to legally record law enforcement officials—but no one else—without announcing that they are recording them. Oregon has essentially carved out only law enforcement matters from its ban on unannounced recording. Because this is a content-based restriction, strict scrutiny applies—and Oregon's law must fall to the wayside.

* * * *

Under Oregon's recording statute, a person may not record a conversation unless "all participants in the conversation are specifically informed" that they are being recorded. Or. Rev. Stat. § 165.540(1)(c). "Conversations" include any "transmission between two or more persons of an oral communication which is not a telecommunication or a radio communication, and includes a communication occurring through a video conferencing program." *Id.* § 165.535(1).

Because Oregon's law even bans recording loud conversations in public—where there is no expectation of privacy—it is much broader than other states' recording laws. *Project Veritas v. Schmidt*, 72 F.4th 1043, 1050 n.1 (9th Cir. 2023), *vacated* 95 F.4th 1152 (9th Cir. 2024). As one Oregon state court recognized, the law was intended to "protect[] participants in conversations from being recorded without their knowledge." *State v. Neff*, 246 Ore. App. 186, 265 P.3d 62, 66 (Or. Ct. App. 2011).

But despite its breadth, the law contains an exception for taping law enforcement. It permits recording "a conversation in which a law enforcement officer is a participant, if (A) The recording is made while the officer is performing official duties; (B) The recording is made openly and in plain view of the participants in the conversation; (C) The conversation being recorded is audible to the person by normal unaided hearing; and (D) The person is in a place where the person lawfully may be." Or. Rev. Stat. § 165.540(5)(b).[1]

* * * *

1. Oregon also exempts recording "a conversation during a felony that endangers human life," even if the recording begins before the felony. *Id.* § 165.540(5)(a); *State v. Copeland*, 323 Ore. App. 1, 522 P.3d 909, 912-13 (Or. Ct. App. 2022). This exception allows police officers who wear wires to record "situation[s] [that] involve[] felon[ies] where drugs are involved or human life is endangered." H.B. 2252, 65th Assemb., Reg. Sess. 1 (Or. 1989).

I. Even under intermediate scrutiny, Oregon's law cannot survive because it is not narrowly tailored to further conversational privacy.

The First Amendment prohibits laws "abridging the freedom of speech." U.S. Constit. amend I. That right includes the process of writing, drawing, and (in the modern era) creating a video or audio recording. We have recognized that the act of creating an expressive work—whether writing, drawing, or recording—is itself a form of protected speech. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010). And for good reason: If the government can regulate or ban the process of creating speech, then it wields the power to regulate or ban speech itself. *Id.*

As the majority recognizes, we held that this right to record extends to surreptitious and non-consensual recordings in *Wasden*, 878 F.3d at 1203 (holding unconstitutional a state law that banned people "from entering a private agricultural production facility and, without express consent from the facility owner, making audio or video recordings of the 'conduct of an agricultural production facility's operations'") (citing Idaho Code § 18-7042(1)(d)).

Despite *Wasden*'s holding, the majority upholds Oregon's law, ruling that only intermediate scrutiny applies because the law is content-neutral (more on that later—it is not). But even assuming intermediate scrutiny applies, Oregon's law does not pass constitutional muster because it is not narrowly tailored to further the state's

interest in conversational privacy. The statute does not ban just secret recordings in which someone believes that he or she is having a private conversation with someone—only to discover later that someone has been taping it. It also bans taping most conversations—even loud ones that happen in public or when there is no reasonable expectation of privacy—if a citizen has not alerted the speaker that he is being taped.

Oregon's law thus not only bans undercover journalism, it also might prohibit much of our modern-day news reporting. If, say, an innocent passerby records a local mayor loudly uttering a racial slur at someone on a public street, that person has violated Oregon's law unless she announces to the mayor beforehand that she is recording it. So, too, for a patron who tapes an elected official launching a tirade against a Starbucks employee for failing to use organic, fair-trade coffee beans in his latte. These recordings are the types of newsworthy events that we would expect to see on the evening news or trending on social media. Yet Oregon, under the guise of advancing conversational privacy, criminalizes citizens for taping these events. But someone yelling on a public street or loudly causing a scene at a coffee shop has no reasonable expectation of privacy. Simply put, Oregon's law is egregiously overbroad and is not narrowly tailored to protect conversational privacy, as it sweeps in all sorts of public and newsworthy events in which no privacy interest is at stake. *See Berger v. City of Seattle*, 569 F.3d 1029, 1059 (9th Cir. 2009) (explaining that under intermediate scrutiny "any regulation of speech" must be "carefully calibrated to solve those problems").

Indeed, Oregon's law is so broad that it bans audiotaping even if the speaker notices that someone has a recording device in her hand. *State v. Haase*, 134 Ore. App. 416, 895 P.2d 813, 815 (Or. Ct. App. 1995).[2] The speaker would understand that there is no reasonable expectation of privacy when the other person has a tape-recorder. Yet Oregon bans such recordings unless the other person affirmatively announces that she is taping the conversation, despite the lack of any privacy interest in that situation.

The lack of narrow tailoring becomes even more apparent when we see Oregon's different and more permissive treatment of taping phone calls. For telephone calls, Oregon has adopted a single-party consent rule. It is lawful to tape a phone conversation so long as one participant in the call "consents" to taping it (*i.e.*, one person decides to tape the phone call). Or. Rev. Stat. § 165.540(1)(a). But Oregon's single-party consent rule violates the principle of conversational privacy that the state invokes to justify the law here, as the other person on the telephone call never consented to being taped. If anything, people have a stronger privacy interest in a private phone call than a loud conversation in the public

2. The majority states that we misread *Haase*, noting that the state appellate court had reversed an order excluding an audio-recording made by a police officer's wearable microphone. Maj. Op. 7, n.2. But the court did so because the officer had announced before taping, "I need to tell you before you start that this conversation is being monitored by camera and by audio means." *Haase*, 895 P.2d at 816.

or at a store.[3] Oregon's different and illogical treatment between telephone and in-person conversations highlights how Oregon's laws are badly misaligned with the state's conversational privacy interest—and how Section 165.540(1)(c) is not narrowly tailored to that interest.

It is no answer to say that a journalist or citizen can avoid criminal liability by announcing that she is recording the conversation or encounter. That government-mandated intrusion into a conversation will almost certainly distort its candid and authentic nature. We recognize this reality even in our profession: One of our bedrock principles—the attorney-client privilege—turns on the belief that people will not speak candidly if they believe that someone else may hear that conversation. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009) ("assuring confidentiality . . . encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice. . . ."). So too here. The government will essentially alter the content of a conversation if it requires someone recording it to make an announcement that he or she is taping the speakers. A recorded conversation after an announcement may be as candid as a scripted reality television show.

---

3. Oregon presumably justifies its single-party consent rule for telephone calls on the basis that there is a difference between a recording made by a participant in the call and a third-party (who is not involved in that conversation). Maybe that is a reasonable distinction based on the state's weighing of privacy interests and news value of disclosing telephone conversations. But Oregon oddly does not apply that same distinction to in-person conversations, underscoring that the law is not narrowly tailored.

Nor is it sufficient to say, as the majority does, that a citizen has "alternative channels to engage in journalistic speech activities" by using "traditional tools of investigative reporting" such as "talking with sources" and "reviewing records." Maj. Op. 46. Perhaps journalists can still manage to report the news through other means, but Oregon is still confiscating an arrow out of their quiver. The government should not meddle in the methods of journalists and dictate how they can do their job. Talking with self-interested sources or reviewing records cannot substitute for rare moments of candor that may be captured and revealed on tape. Further, someone's voice—the sound, tone, and emphasis—can convey more meaning than mere written words on a piece of paper. For example, the contempt (or jocular nature) in someone's tone can alter the meaning of a statement. That is why recordings represent a "significant medium for the communication of ideas." *See Wasden*, 878 F.3d at 1203 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 72 S. Ct. 777, 96 L. Ed. 1098 (1952)). An audiotape recording can also carry more weight than just words on a piece of paper, as a subject will find it harder to claim that he never said something or that he was misquoted (or conversely the audiotape may undercut the journalist's characterization of a conversation).

Faced with the prospect that Oregon's law would impede a large chunk of everyday news reporting, the majority accepts the state's unfounded assertion that its statute does not apply to "open recording" scenarios, citing to Section 165.540(6)(a)'s exceptions. But those exceptions do not broadly apply to any "open recordings."

Rather, the exceptions to the ban are specifically limited to narrow factual scenarios: (a) "[p]ublic or semipublic meetings such as hearings before governmental or quasi-governmental bodies, trials, press conferences, public speeches, rallies and sporting or other events," (b) "[r]egularly scheduled classes or similar educational activities in public or private institutions," and (c) "[p]rivate meetings or conferences if all others involved knew or reasonably should have known that the recording was being made." Or. Rev. St. § 165.540(6)(a)(A)-(C). Oregon courts have interpreted those statutory terms under their ordinary and specific meaning, holding that the word "meetings" does not include "mere encounters." *State v. Bichsel*, 101 Ore. App. 257, 790 P.2d 1142, 1144 n.3 (Or. Ct. App. 1990) ("mere encounters are not 'meetings' within the meaning of [the statute]. Defendant's argument that her taping of the confrontation with police was exempt either as a 'public or semipublic meeting,' or as a 'private meeting or conference,' . . . is without merit.").

Therefore, these "open recording" exceptions would not apply to any of the examples mentioned earlier because all of them are "mere encounters," not "meetings" that are exempt from the ban. Oregon citizens thus could not, without an announcement, tape an elected official who bullies a barista at a Starbucks, a mayor who screams racial epithets on a public street, or a city council member who makes a damaging admission to a constituent at a mall even after seeing that the person has a tape-recorder in her hand. Audiotapes capturing these newsworthy events would never see the light of day under the majority opinion.

II. The recording statute is content-based because it carves out an exception for law enforcement matters.

A. The law-enforcement exceptions are not content-neutral and fail under strict scrutiny.

As noted earlier, Oregon's law cannot survive intermediate scrutiny, even assuming that is the proper tier of scrutiny. But we should be applying strict scrutiny here because the law is content-based. *Barr v. Am. Assoc. of Pol. Consultants, Inc.*, 591 U.S. 610, 618, 140 S. Ct. 2335, 207 L. Ed. 2d 784 (2020). The First Amendment prohibits the government from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). Any law that "target[s] speech" based on its message, ideas, subject matter, or content is "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). A law is content-based, and thus presumptively unconstitutional, if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* To determine whether a law is content-based, we look to whether the law "single[s] out any topic or subject matter for differential treatment." *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 596 U.S. 61, 71, 142 S. Ct. 1464, 212 L. Ed. 2d 418 (2022).

Oregon's law-enforcement exceptions are necessarily content-based because they "single out a[] topic or subject matter"—law enforcement—"for differential treatment."

Id. By its plain language, the statute allows citizens to record—without making an announcement—a police officer performing his or her official duties. Or. Rev. Stat. § 165.540(5)(b). No similar exception exists for any other profession or field. It is unlawful for citizens to tape (without an announcement) elected officials, schoolteachers, public housing agency administrators, environmental services employees, tax collectors, department of water and power representatives, child welfare investigators, and anyone else. But it is lawful to record law enforcement officials—and only law enforcement officials—without any announcement.[4]

The majority argues that the statute is not content-based because "the requirement in § 165.540(5)(b) that a law enforcement officer be involved in the conversation does not regulate a 'topic' because the statute is unconcerned with the content of the conversation in which an officer participates." Maj. Op. 33, n.13. That assertion defies common sense and the statutory language. That is like saying that a law that bans Hollywood from featuring law enforcement officers—or anti-police brutality activists—in its movies is not content-based because it does not

4. Oregon's law thus may not just be content-based but also viewpoint-based, because critics of the police are given a speech tool that the statute denies to critics of other officials. *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination") (internal citation omitted).

regulate a specific topic or conversation in the movie. The whole point of the statutory exception is to carve out law enforcement as a subject matter by allowing citizens to tape officers during their official duties without making an announcement.

Notably, the Oregon statute does not create a blanket exception to tape anything that a law enforcement officer may say at any time; it only applies to taping a law enforcement officer "performing official duties." Or. Rev. Stat. § 165.540(5)(b)(A). And if a police officer is "performing official duties," what else could he or she be talking about other than law enforcement matters? Law enforcement matters are thus the very "topic" or "content" that the law targets. The majority's contention that the law "draws a line based on the circumstances in which a recording is made, not on the content of the conversation recorded" (Maj. Op. 34) is belied by the statute's exception for only "official duties." Consider this example: It would be illegal to audio-record a police officer at a coffee shop countertop loudly talking about *Portlandia* (because the officer is not "performing official duties"), but someone can lawfully record that same police officer if he interrogates a suspect at that same coffee shop (because he is performing "official duties"). The only difference between the two scenarios is that the officer is talking about a TV show in the first example but about law enforcement matters in the second example. In sum, recording a police officer performing his or her official duties will necessarily be about that officer's law enforcement duties—and thus law enforcement will be the "topic" or "content" that Oregon's law targets. That is a content-based restriction.

Appendix A

The content-based nature of Oregon's law becomes even clearer if we consider other analogous scenarios. Assume Oregon enacts a similar carve-out for labor union officials—it is lawful to record a labor union official while he or she is "performing official duties" (but nobody else). It would be obvious that the law is content-based, *i.e.*, topics pertaining to labor unions are treated differently from other topics. Or assume that Oregon bans non-consensual audiotaping except that citizens can lawfully record officials at the University of Oregon's Division of Equity and Inclusion who are "performing their official duties." Such a distinction would be content-based, as it treats some topics differently from others. We would not say such a law is not content-based because "the statute is unconcerned with the content of the conversation in which [a labor union official or DEI personnel] participates." *Cf.* Maj. Op. at 33, n. 13.

The majority also argues that the Oregon law does not discriminate based on content, relying on *City of Austin*. Maj. Op. at 33. But that case is easily distinguishable. The Supreme Court held only that, when a "substantive message" is "irrelevant to the application of" a law, the need to consider the message itself does not necessarily make the law content-based. *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61, 71, 142 S. Ct. 1464, 212 L. Ed. 2d 418 (2022). And that makes sense: In *City of Austin*, a municipality had set different rules for on-site and off-site business advertisements. *Id.* A business argued that, because an enforcer would need to read a sign to see whether it was advertising an on-site or off-site business, the law was content-based. *Id.*

But the Supreme Court rejected this argument because the content of the sign "matter[ed] only to the extent" it matches the location of the sign. *Id.* In other words, the *City of Austin* regulations were not targeting content—they were regulating the placement of content. *Id.* And the Supreme Court has long held that time, place, and manner restrictions like those are content-neutral.

Oregon argues that, just as in *City of Austin*, its law turns on a content-neutral distinction—the activity of recording. But what "activity" does the law target? It is not the manner of recording—the law applies equally to someone who wears a wire, uses a tape recorder, live-streams on Instagram, or takes out a tripod and professional camera. *Cf. Bartnicki v. Vopper*, 532 U.S. 514, 526, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001). Nor is it the way someone acts while recording a conversation—the law applies the same to someone who fails to announce that he or she is recording a loud argument while standing on a sidewalk as it does to someone who, while out to eat, secretly records a nearby dinner table's quiet conversation.

Because Oregon's law imposes content-based restrictions on speech, it is unconstitutional unless Oregon shows that it can survive strict scrutiny. *Reed*, 576 U.S. at 166. To do so, Oregon must show that the law is narrowly tailored—meaning, necessary—to serve a compelling interest. *R.A.V. v. St. Paul*, 505 U.S. 377, 395-96, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). As noted earlier, Oregon's law is not narrowly tailored. The law covers conversations in which there is no privacy interest or in which the privacy interest is outweighed by the newsworthiness of

the conversation. The law thus applies to more speech than is necessary to serve its interest, and it cannot survive strict scrutiny.

B. The law-enforcement exceptions are not severable.

The majority concludes that, even if the law-enforcement exceptions are content-based, they are severable and thus do not require that we find the law unconstitutional. Maj. Op. at 47-50. We look at state law to determine severability. *Leavitt v. Jane L.*, 518 U.S. 137, 139, 116 S. Ct. 2068, 135 L. Ed. 2d 443 (1996). And under Oregon law, we look at whether "parts of the statute are so interconnected that it appears likely that the remaining parts would not have been enacted without the unconstitutional part, or . . . [if] the remaining parts are incomplete and cannot be executed in accordance with legislative intent." *Outdoor Media Dimensions, Inc. v. Dep't of Transp.*, 340 Ore. 275, 132 P.3d 5, 18 (Or. 2006). In our case, we must ask whether Oregon would have enacted its ban on non-consensual recording if it could not retain its exceptions for recording law enforcement officers and acts of felony that endanger human life.

It is impossible to sever those two content-based carve-outs. We have held that citizens have a right to "record law enforcement officers engaged in the exercise of their official duties in public places." *Askins v. U.S. Dept. of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018). We held that this right was "include[d]" within the broader First Amendment "right to photograph and

record matters of public interest." *Id.* Severing this law enforcement exception would thus merely substitute one constitutional deficiency for another. *See id.* There is no basis to conclude that the Oregon Legislature would have enacted the much broader—and constitutionally deficient—statute that would result from severing this content-based exception.

The majority notes that Oregon enacted this ban on non-consensual recording in 1959—and only much later did it enact the two exceptions. Maj. Op. at 48. The majority thus reasons that Oregon would enact this statute without the exceptions (because it did so). But in 1959 we had not issued a decision stating that there is a right to record law enforcement officers performing their official duties. Oregon later enacted the law enforcement exception because it recognized that its broad law raised constitutional issues under judicial precedent (but in doing so it created a different problem of imposing a content-based restriction). Likewise, severing the felony exception could not save the law, as the law would still unconstitutionally prohibit "record[ing] matters of public interest." *Id.*

Finally, the majority argues that Oregon would be placed in an "insoluble dilemma" under this dissent's reasoning because its law would be struck down as unconstitutional either on content-based or broader First Amendment grounds. Maj. Op. at 49. Not so. Oregon could have enacted a narrowly tailored law that limited its audio-recording ban to conversations where there is a reasonable expectation of privacy. But it declined to

do so. In any event, under Oregon's limited severability analysis, we only look at whether the state would have enacted this statute without the unconstitutional content-based carve-out. It does not appear Oregon would have done so because it would have then faced potential First Amendment problems without such a carve-out. In short, this statute cannot be saved by severability.

CONCLUSION

Oregon's law violates the First Amendment by barring unannounced taping of conversations that occur loudly in public or in which no privacy interest is at stake. I fear that it will hamper basic reporting of public and newsworthy events. I thus respectfully dissent.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 3, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-35271

D.C. No. 3:20-cv-01435-MO

PROJECT VERITAS; PROJECT VERITAS ACTION FUND,

Plaintiffs-Appellants,

v.

MICHAEL SCHMIDT, IN HIS OFFICIAL CAPACITY AS MULTNOMAH COUNTY DISTRICT ATTORNEY; ELLEN ROSENBLUM, IN HER OFFICIAL CAPACITY AS OREGON ATTORNEY GENERAL,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted December 7, 2022,
Pasadena, California

Filed July 3, 2023

Before: Carlos T. Bea, Sandra S. Ikuta,
and Morgan Christen, Circuit Judges.

Appendix B

Opinion by Judge Ikuta;
Dissent by Judge Christen.

OPINION

IKUTA, Circuit Judge:

Oregon law generally prohibits unannounced recordings of conversations, subject to several exceptions. We conclude that Oregon's law is a content-based restriction that violates the First Amendment right to free speech and is therefore invalid on its face.

I

A

Section 165.540(1)(c) of the Oregon Revised Statutes provides: "[A] person may not . . . [o]btain or attempt to obtain the whole or any part of a conversation by means of any device . . . if not all participants in the conversation are specifically informed that their conversation is being obtained." Or. Rev. Stat. § 165.540(1)(c). [1] The statute defines "[c]onversation" as "the transmission between two or more persons of an oral communication which is not a telecommunication or a radio communication, and includes

1. Oregon is one of a few outliers in enforcing such a broad prohibition on unannounced recordings of conversations. Only five states, including Oregon, prohibit individuals from making recordings without providing notice to or obtaining the consent of the recording's subjects in a place open to the public where the subjects lack a reasonable expectation of privacy. *See* Appendix A.

a communication occurring through a video conferencing program." Or. Rev. Stat. § 165.535(1). Because this section explicitly applies to the recording of a video conference and bars individuals from obtaining a conversation "by means of any device," it applies to both audio and video recordings of a conversation. Indeed, the Oregon courts have interpreted the statute as applicable to video recordings of conversations and other conduct.[2] *See State v. Copeland*, 323 Ore. App. 1, 522 P.3d 909, 911-12 (Or. Ct. App. 2022) (applying section 165.540(1)(c) to "the video and audio recording of [a] shooting taken by the victim on his body camera").[3]

This general rule is subject to numerous exceptions. *See* Or. Rev. Stat. § 165.540(2)-(7), (9).[4] Two are relevant

---

2. Because both the statutory text and judicial opinions confirm that section 165.540(1)(c) applies to video recordings of conversations, the dissent's assertion that "the statute does not sweep in . . . video recordings" is incorrect. Dissent at 59.

3. Contrary to the dissent's argument that section 165.540(1)(c) applies only to oral communications, Dissent at 48 n.6, *Copeland* did not differentiate between the video recording of a "heated discussion," 522 P.3d at 911, and the video recording of a shooting, *id.* at 912 (noting that "[t]he state sought to introduce the video and audio recording of the shooting taken by the victim on his body camera").

4. The statute provides that section 165.540(1)(c) does not apply to: (1) "subscribers or members of their family who perform the acts prohibited in [§ 165.540(1)] in their homes," Or. Rev. Stat. § 165.540(3); (2) "[p]ublic officials in charge of and at jails, police premises," and "other penal or correctional institutions," *id.* § 165.540(2)(a)(B); or (3) persons who use unconcealed recording devices to "intercept oral communications that are part of" specified "[p]ublic or semipublic

here. First, section 165.540(1)(c) does not apply to a "person who records a conversation during a felony that endangers human life." *Id.* § 165.540(5)(a). This exception applies even if the recording "was initiated before the felony began." *Copeland*, 522 P.3d at 912. Second, section 165.540(1)(c) allows "[a] person [to] record[] a conversation in which a law enforcement officer is a participant" if the recording is "made while the officer is performing official duties" and meets other criteria.[5] Or. Rev. Stat. § 165.540(5)(b). The Oregon courts have not yet interpreted this exception.

The general rule in section 165.540(1)(c) and the two relevant exceptions to the rule evolved over a lengthy period of time. According to the Oregon Supreme Court,

---

meetings," "[r]egularly scheduled classes or similar educational activities in public or private institutions," or "[p]rivate meetings or conferences if all [participants] knew or reasonably should have known that the recording was being made," *id.* § 165.540(6).

5. The exception from section 165.540(1)(c) applies only if:

> (A) The recording is made while the officer is performing official duties;
>
> (B) The recording is made openly and in plain view of the participants in the conversation;
>
> (C) The conversation being recorded is audible to the person by normal unaided hearing; and
>
> (D) The person [recording] is in a place where the person lawfully may be.

Or. Rev. Stat. § 165.540(5)(b). "Law enforcement officer" is generally defined as a person authorized to enforce criminal laws. *Id.* §§ 133.726(11); 165.540(10)(b).

the state legislature first enacted section 165.540(1)(a) in 1955 "to allow the police to record telephone conversations when one party consents to the recording." *State v. Lissy*, 304 Ore. 455, 747 P.2d 345, 347-49, 347 n.3 (Or. 1987). In 1959, the legislature amended section 165.540 to add section 165.540(1)(c), which prohibited tape recording of face-to-face conversations without all participants' consent. *Id.* at 350 & n.4. Twenty years later, in 1979, some legislators attempted to amend this provision because of concerns "that a person who tape records a public meeting, public speech or classroom lecture without 'specifically informing' all participants that the discussion is being taped is guilty of a Class C felony." *Id.* at 351 (citation omitted). This effort to amend the law failed. *See id.*

But in 1989, legislators succeeded in making an exception to section 165.540(1)(c) for felonies endangering human life, resulting in section 165.540(5)(a). Or. Rev. Stat. § 165.540(5)(a) (1989). According to the legislative history of this amendment, the change was made to enable police officers to use a body wire to record a "situation [that] involves [a] felony where drugs are involved or human life is endangered" without first obtaining a court order. A-Engrossed H.B. 2252, 65th Assemb., Reg. Sess. 1 (Or. 1989); *see also Or. H.R. Staff Measure Summary*, H.B. 2252, 65th Assemb., Reg. Sess. (Or. 1989) ("This measure would eliminate the requirement that police officers obtain prior court approval before using a 'body wire' where felony drug offenses or life-endangering felonies are being committed."); *Hearing on H.B. 2250, 2251, 2252 Before the Subcomm. on Crime & Corrs. of the H. Comm. on the Judiciary*, 65th Assemb., Reg. Sess. 11-12 (Or. 1989)

(statement of Cap. Will Hingston, Or. State Sheriffs' Ass'n) (stating that section 165.540 "causes a great deal of concern for officer safety and informant safety during a narcotics transaction" because "there is little consistency in obtaining a court order for a body wire before a transaction goes down," and the "amendment will afford officers in their performance a great deal more safety and rapid support when doing a narcotics transaction").

In 2015, the legislature added another exception to section 165.540(1)(c) to allow a person to record a conversation in which a law enforcement officer is a participant, resulting in section 165.540(5)(b). Or. Rev. Stat. § 165.540(5)(b) (2015). According to testimony by the ACLU submitted to the state judiciary committee in support of this amendment, this change was necessary because otherwise the statute was "inconsistent with the vast and developing consensus among courts and legal scholars confirming that the right to record on-duty police is constitutionally protected." *Hearing on H.B. 2704 Before the H. Comm. on the Judiciary*, 78th Assemb., Reg. Sess. 1 (Or. 2015) (testimony of Kimberly McCullough, ACLU Leg. Dir.). The ACLU further testified that "because it is common knowledge that the public has a right to record on-duty police, people all over Oregon are unintentionally violating Oregon's eavesdropping statute when they openly record without a warning." *Hearing on H.B. 2704 A Before the S. Comm. on the Judiciary*, 78th Assemb., Reg. Sess. 1 (Or. 2015) (testimony of Kimberly McCullough, ACLU Leg. Dir.).

Appendix B

B

Project Veritas is a non-profit media organization that engages in undercover investigative journalism. Project Veritas stated that it documents matters of public concern by making unannounced audiovisual recordings of conversations, often in places open to the public. In the past, Project Veritas journalists have used undercover recordings to document the "Unite the Right" rally in Charlottesville, Virginia, to record campaign workers for presidential candidates, to capture the efforts of campaign staff to stir up violence at rallies of the opposing candidate, and to interview the staff for a gubernatorial candidate who confirmed the candidate's more controversial views and efforts to conceal them.

Project Veritas stated that it would conduct similar investigations in Oregon but for Oregon's prohibition on unannounced in-person audiovisual recordings. Among other things, Project Veritas alleged it would investigate corruption at the state agency responsible for enforcing Oregon's public records law by recording undercover interviews with officers and staff in locations open to the public, like restaurants, parks, and sidewalks. In addition, Project Veritas alleged it would investigate the "rise in violent protests in Portland between the police and members of Antifa and other" groups by secretly recording interactions between police officers and protesters. Project Veritas would also send undercover journalists into groups of police and protesters to engage them in conversation and record their candid remarks.

Outside of organized rallies, Project Veritas would "do most of its [undercover] recording on public sidewalks, public parks, or in other areas held open to the public." Project Veritas alleged that the safety and even lives of its journalists would be endangered if they were to record conversations openly and in plain view or to inform participants that they are being recorded.

Project Veritas sued the Oregon Attorney General, Ellen Rosenblum, and the District Attorney of Multnomah County, Oregon, Michael Schmidt (collectively, Oregon), challenging section 165.540 as an unconstitutional restriction of protected speech. Project Veritas's complaint alleged that because section 165.540 favored recording some subjects, but disfavored others, the differential treatment rendered section 165.540(1)(c) and its exceptions unconstitutional. For instance, the complaint alleged that under Oregon law, an individual could record the police in particular circumstances, *see* Or. Rev. Stat. § 165.540(5)(b), and make a "secret audio recording" during a felony that endangers human life, *see id.* § 165.540(5)(a), but "may not openly record the conversations of city council members, school board members, or any other government actors without specifically notifying them," *see id.* § 165.540(5)(b). Project Veritas sought to enjoin defendants from enforcing section 165.540(1)(c) and to obtain a declaratory judgment that the law is unconstitutional on its face and as applied to Project Veritas.

Oregon moved to dismiss the complaint. The district court partially granted the motion, and the parties agreed

to dismiss the remaining claims with prejudice.[6] Project Veritas timely appealed.

II

We review de novo a district court's dismissal of a complaint for failure to state a claim. *See In re Cutera Sec. Litig.*, 610 F.3d 1103, 1107 (9th Cir. 2010). "[W]e have an independent obligation to ensure that we have subject matter jurisdiction," which includes a determination that Project Veritas has standing to bring its pre-enforcement claim. *Airline Serv. Providers Ass'n v. L.A. World Airports*, 873 F.3d 1074, 1078 (9th Cir. 2017).

Project Veritas's allegations are sufficient to establish standing for a First Amendment pre-enforcement claim. Under Article III of the Constitution, plaintiffs must establish "the irreducible constitutional minimum of standing," by showing that they suffered an injury in fact, that there is "a causal connection between the injury and the conduct complained of," and that it is likely that "the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations and quotation marks omitted). "Because constitutional challenges based on the First Amendment present unique standing

6. Project Veritas's complaint challenged sections 165.540(1)(c) (making unannounced recordings), 165.540(1)(d) (obtaining such recordings from others), and 165.540(1)(e) (distributing such recordings). The district court denied Oregon's motion to dismiss with respect to Project Veritas's section 165.540(1)(d) and (1)(e) claims, but the parties later agreed to dismiss those claims with prejudice.

considerations, plaintiffs may establish an injury in fact without first suffering a direct injury from the challenged restriction." *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (cleaned up). In a pre-enforcement challenge, plaintiffs can show injury in fact by establishing that (1) they intend to violate the law; and (2) have shown a reasonable likelihood that the government will enforce the statute against them. *Id.*

For purposes of this pre-enforcement challenge, Project Veritas makes a clear showing of injury in fact. First, Project Veritas alleged that but for section 165.540(1)(c), it would make unannounced recordings of conversations in a manner that would violate the general prohibition and not fall within an exception, and described in great detail the persons, conversations, and events it would like to record. *See supra* p. 10-11. For its part, Oregon has prosecuted individuals for violating section 165.540(1)(c) in the past[7] and does not state that it would refrain from prosecuting Project Veritas for creating such recordings, if the recordings were made in violation of the law. Finally, Project Veritas alleged a causal connection between the challenged statute and its inability to carry on its undercover journalistic endeavors and that it is likely that its injury will be redressed by a favorable decision.[8]

---

7. *See, e.g., State v. Neff*, 246 Ore. App. 186, 265 P.3d 62, 63 (Or. Ct. App. 2011); *State v. Depeche*, 242 Ore. App. 155, 255 P.3d 502, 503-04 (Or. Ct. App. 2011); *State v. Bichsel*, 101 Ore. App. 257, 790 P.2d 1142, 1143 (Or. Ct. App. 1990); *State v. Knobel*, 97 Ore. App. 559, 777 P.2d 985, 987 (1989).

8. Because we conclude that section 165.540(1)(c) is facially unconstitutional, we do not evaluate Project Veritas's alternative challenge that the statute is overbroad.

We reject Oregon's arguments that we lack jurisdiction because Project Veritas asserts an as-applied challenge which is not ripe. Project Veritas's claim is properly construed as a facial challenge to section 165.540. "A facial challenge is an attack on a statute itself as opposed to a particular application," *City of Los Angeles v. Patel*, 576 U.S. 409, 415, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015), while "[a]n as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others," *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). Here, Project Veritas attacks the statute itself as an unconstitutional regulation of unannounced recordings of nearly all conversations held in places open to the public—not only those conversations that Project Veritas seeks to record.[9]

III

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend I. "While the First Amendment literally forbids the abridgment only of speech, the Supreme Court has long recognized that its protection does not end at the spoken or written word." *United States v. Swisher*, 811 F.3d 299, 310 (9th Cir. 2016) (cleaned up) (citation and quotation marks omitted). We have recognized there is no material "distinction between

9. Because we must analyze section 165.540(1)(c) with respect to the full scope of its prohibition, it is irrelevant that "Project Veritas seeks to record only in public places" or "avers only that *most* of its recording will occur in public places." Dissent at 49.

the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or artwork) in terms of the First Amendment protection afforded." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010). Indeed, "we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection." *Id.* at 1062.

A

Here, the state law at issue regulates individuals' conduct in making an audio or video recording. Under our case law, such conduct qualifies as speech entitled to the protection of the First Amendment. *See Animal Legal Def. Fund. v. Wasden*, 878 F.3d 1184, 1203-04 (9th Cir. 2018).

Wasden involved "a secretly-filmed exposé of the operation of an Idaho dairy farm," which showed dairy workers who "dragg[ed] a cow across the ground by a chain attached to her neck; twist[ed] cows' tails to inflict excruciating pain; and repeatedly beat[], kick[ed], and jump[ed] on cows to force them to move." *Id.* at 1189. This 2012 exposé distributed by an animal rights group, Mercy for Animals, resulted in the Idaho legislature enacting a statute targeting undercover investigation of agricultural operations, which criminalized, among other things, "a person from entering a private agricultural production facility and, without express consent from the facility owner, making audio or video recordings of the 'conduct of an agricultural production facility's operations.'" *Id.*

at 1203 (citation omitted). The statute defined its scope broadly and did not exclude audio or video recordings of conversations. *See id.* In enacting the law, members of the Idaho legislature "discussed the bill as protecting against two types of perceived harm to agricultural producers," specifically: "concerns about farm security and privacy" and concerns about damage caused by investigative reporting itself. *Id.* at 1192. One legislator "described the[] videos as used . . . 'publicly [to] crucify a company' and 'as a blackmail tool.'" *Id.*

After noting the "tension between journalists' claimed First Amendment right to engage in undercover investigations and the state's effort to protect privacy and property rights," *id.* at 1190, we held that the animal rights activist's conduct—creating an unannounced recording—was constitutionally protected First Amendment speech, *id.* at 1203-04. *Wasden* reached this conclusion in two steps.

First, *Wasden* extended our prior ruling that "there is 'a First Amendment right to *film* matters of public interest,'" *id.* at 1203 (emphasis added) (citing *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995), to hold that "[t]he act of recording is *itself* an inherently expressive activity" protected by the First Amendment, *id.* (emphasis added). We reasoned that audio and video recordings require "decisions about content, composition," and the like, which decisions are just as expressive as "the written word or a musical score" ultimately disseminated to the public. *Id.* "Because the recording process is itself expressive and is 'inextricably intertwined' with the

resulting recording, the creation of audiovisual recordings is speech entitled to First Amendment protection as purely expressive activity." *Id.* at 1204 (citation omitted).

Second, given that the act of recording is protected speech, *Wasden* held that the statute's prohibition of recording "the conduct of an agricultural production facility's operations" without "express consent from the facility owner" constituted a regulation of a form of protected speech, which triggered First Amendment scrutiny. *Id.* at 1203-04.[10]

Applying *Wasden*'s conclusion here, section 165.540 (1)(c) prohibits making audio and visual recordings unless all participants in the conversation are informed of the recording. Under *Wasden*, the recording itself is protected speech, and therefore the Oregon statute constitutes a regulation of protected speech. We conclude that section 165.540(1)(c) triggers First Amendment scrutiny.

---

10. *Wasden*'s conclusion is consistent with our sister circuits, which have held that creation of audio and video recordings constitutes First Amendment-protected speech. *See, e.g., People for the Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 821-23 (4th Cir. 2023) (rejecting argument that the creation of unauthorized recordings of "images or sound occurring within an employer's premises" as part of undercover investigations conducted by PETA to publicize animal cruelty was not speech protected by the First Amendment); *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of *making* an audio or visual recording is necessarily included within the First Amendment's guarantee of speech and press rights."); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that "[t]he First Amendment protects the . . . right to record matters of public interest").

B

Because we must determine the constitutionality of section 165.540(1)(c) under the First Amendment, we next turn to the question whether it is content based or content neutral. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). A law is content based if it "single[s] out any topic or subject matter for differential treatment." *City of Austin v. Reagan Nat'l Ad. of Austin, LLC*, 596 U.S. 61, 142 S. Ct. 1464, 1472, 212 L. Ed. 2d 418 (2022).

1

Wasden again guides our analysis. After holding that the creation of audio and video recordings was speech entitled to full First Amendment protection, *Wasden* held that the Idaho statute at issue in that case, which required the facility owner's consent to make unannounced recordings of "the conduct of an agricultural production facility's operations," was "an 'obvious' example of a content-based regulation of speech because it 'defin[es] regulated speech by particular subject matter.'" 878 F.3d at 1204 (citing *Reed*, 576 U.S. at 163). We gave two reasons for this conclusion. First, the statute drew "a distinction 'on its face' regarding the message the speaker conveys." *Id.* (citing *Reed*, 576 U.S. at 165). Specifically, it "would permit filming a vineyard's art collection but not the winemaking operation." *Id.* "Likewise, a videographer could record an after-hours birthday party among co-workers, a farmer's antique car collection, or a historic maple tree but not the animal abuse, feedlot operation, or slaughterhouse conditions." *Id.* Second, we reasoned that

"only by viewing the recording can the [state] authorities make a determination about criminal liability" because the application of the exception "explicitly pivots on the content of the recording." *Id.*

Our second rationale (that a law regulating the act of making specified recordings is content based if state authorities cannot apply the law without viewing or listening to the particular recording at issue) requires some further examination. After we decided *Wasden*, the Supreme Court rejected a per se rule "that a regulation cannot be content neutral if it requires reading the [speech] at issue." *City of Austin*, 142 S. Ct. at 1471. Instead, *City of Austin* held that location-based rules, such as a rule differentiating between signs on a premise that advertise an on-site business from signs that advertise some off-site matter, are not content based, even though city authorities had to review the sign's message to apply the rule. *Id.* at 1472. When a rule is merely a "location-based and content-agnostic on-/off-premises distinction," it does not "singl[e] out specific subject matter for differential treatment." *Id.* at 1475 (citation omitted). Instead, the sign's message merely "informs the sign's relative location." *Id.* at 1473. But as the Court clarified, this exception for location-based rules does not affect the Court's longstanding holding that "regulations that discriminate based on the topic discussed or the idea or message expressed . . . are content based." *Id.* at 1474 (citation and quotation marks omitted).

Wasden did not address a location-based rule akin to an "on-/off-premises distinction," but considered a rule that singled out "specific subject matter for differential

treatment" and discriminated based on "the topic discussed or the idea or message expressed." *Id.* at 1474-75. As a result, *City of Austin*'s analysis does not conflict with our holding in *Wasden*, which remains binding. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (holding that a three-judge panel is bound by precedent unless it "is clearly irreconcilable with the reasoning or theory of intervening higher authority"). Therefore, we continue to consider whether a law "pivots on the content of the recording," *Wasden*, 878 F.3d at 1204, in determining whether the law discriminates on the basis of "the topic discussed or the idea or message expressed" and is, therefore, content based, *City of Austin*, 142 S. Ct. at 1474 (citing *Reed*, 576 U.S. at 171).

Applying *Wasden* here, section 165.540 is a content-based restriction on speech. On its face, section 165.540 (1)(c) and its exceptions draw a distinction between topics. The speech regulated by section 165.540(1)(c) is the act of making a recording, which means that the activity captured by a recording constitutes the content or subject matter of that speech. Because the rules imposed by section 165.540 vary depending on the activity being recorded, the statute clearly draws content-based distinctions under *Wasden*. The law's applicability plainly "pivots on the content of the recording"—namely, what the recording captures. *Wasden*, 878 F.3d at 1204. For example, the law applies no restrictions to recording law enforcement officials engaged in their official duties, *see* Or. Rev. Stat. § 165.540(5)(b), but prohibits recording other government officials performing official duties unless they are informed that their conversation is being recorded.

Similarly, the statute distinguishes between recording felonies endangering human lives, *id.* § 165.540(5)(a), and recording similar conduct during the commission of a misdemeanor. These distinctions are "obvious" examples of a content-based regulation of speech because they "define regulated speech by particular subject matter." *Wasden*, 878 F.3d at 1204 (cleaned up) (citation omitted). In addition, state "authorities [can] make a determination about criminal liability" under the law "only by viewing the recording." *Id.* This serves as further evidence that the applicability of section 165.540(1)(c) pivots on the content of the recording, thereby demonstrating that the law is content based.

2

Oregon argues that section 165.540(1)(c)'s general prohibition on the act of making unannounced recordings is a content-neutral speech regulation for two reasons. Neither is persuasive.

Oregon first argues that the statute is content neutral because the statute's exceptions are not based on the words spoken and recorded, and therefore state authorities do not have to listen to and analyze the recording to determine whether an exception applies. We disagree. The statute at issue in *Wasden* did not distinguish based on the words spoken in a recording, but we nevertheless held that it was content based because it discriminated on the basis of subject matter to be recorded. 878 F.3d at 1204. For the same reason, it is the statute's differential treatment of recordings based on their subject matter (e.g., whether

the speaker's recording obtains the conversation of Oregon police officers or Oregon executive officers) that makes the statute content based, not the words exchanged in the conversation.

Second, Oregon argues that we can consider section 165.540(1)(c) as a stand-alone provision, and ignore the exceptions to the general prohibition. But this approach is foreclosed by binding precedent. To start, it is well-established that when a court evaluates the constitutionality of a general prohibition, it must consider any exceptions to the general rule. "[A] rule [is] content-based when it establishes a general ban on speech, but maintains exceptions for speech on certain subjects." *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1155 (9th Cir. 2003). Stated differently, where exceptions to a restriction of protected speech "are based on content, the restriction itself is based on content." *National Advertising Co. v. Orange*, 861 F.2d 246, 249 (9th Cir. 1988) (citation omitted); *see also Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347, 207 L. Ed. 2d 784 (2020) (plurality opinion) (holding that a prohibition of robocalls was content based due to its exception for robocalls collecting government held debts); *Foti*, 146 F.3d at 636 (holding that an ordinance's general ban of "*all* signs on *all* public property" was content based due to its "exemptions for open house signs and safety, traffic, and public informational signs").[11]

11. The district court concluded that the law enforcement exception did not render section 165.540(1)(c) content based because recordings of "conversations where a law enforcement officer is a speaker" is "government speech," which "is generally not subject

Moreover, any exception to a general restriction on protected speech—even if the exception applies to speech that our case law has recognized as receiving First Amendment protection, like recording police officers performing official duties in public, *see Fordyce*, 55 F.3d at 439; *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018)—necessarily renders the restriction content based. The Supreme Court analyzed a similar situation in *Reed*, where the challenged state law generally restricted the display of outdoor signs without a permit, but exempted signs that had ideological and political messages, which implicate speech that case law has recognized as receiving First Amendment protection. 576 U.S. at 164-65. Despite these exceptions, the Court held that the law as a whole was content based and subject to strict scrutiny, "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 165 (citation omitted). Therefore, under this precedent, we must analyze both the general prohibition and the exceptions as one regulatory regime. Doing so makes

---

to First Amendment challenges." Oregon does not rely on this argument, and we conclude the government speech doctrine is not applicable here. Although the Supreme Court has held that a government entity's expression of its own views does not violate the speech rights of individuals who disagree, *see Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009), this case does not involve a suit against the government for expressing its views. Rather, it involves a statute that impinges on a private individual's speech by restricting the ability to record public officials. The individual engaging in the speech being regulated is the private party that makes the recording—not the government. Therefore, the government speech doctrine is inapposite.

clear that section 165.540 is a content-based regulation of speech.[12]

C

Because we conclude that section 165.540(1)(c) and its exceptions constitute a content-based speech restriction, we can uphold the statute only if it survives strict scrutiny. *See Wasden*, 878 F.3d at 1204. Strict scrutiny requires the government to show that the speech restriction is "narrowly tailored to address the State's compelling governmental interests." *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1229 (9th Cir. 2019). Under strict scrutiny, the challenged law must be constitutional with respect to "each activity within the proscription's scope." *Berger v. City of Seattle*, 569 F.3d 1029, 1053 (9th Cir. 2009) (citing *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988)). It does not matter that a narrower restriction on speech activities could have been justified by the government's interest. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 168, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (2002). For instance, a law that generally prohibits canvassers from engaging in door-to-door advocacy without a permit is facially unconstitutional. *Id.* Although the government's "interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds," the interest in fraud prevention does not justify the ordinance insofar

12. The dissent concedes that the statutory exceptions to the general ban on unannounced recordings render section 165.540 content based. Dissent at 50.

as it applies "to [Jehovah Witnesses who offer religious literature], to political campaigns, or to enlisting support for unpopular causes." *Id.*

In *Wasden*, we applied strict scrutiny to the content-based Idaho statute. 878 F.3d at 1204. We assumed that Idaho's asserted interest in protecting both property and privacy interests in an agricultural production facility was a compelling government interest, *see id.*, but concluded that Idaho had not satisfied the narrow tailoring requirement because, among other reasons, there were "various other laws at Idaho's disposal that would allow it to achieve its stated interests while burdening little or no speech," *id.* at 1205 (cleaned up) (citation and quotation marks omitted). "For example, agricultural production facility owners can vindicate their rights through tort laws against theft of trade secrets and invasion of privacy." *Id.* And, as another example, "[t]o the extent the legislators expressed concern that fabricated recordings of animal abuse would invade privacy rights, the victims can turn to defamation actions for recourse." *Id.* Further, we explained, "'the remedy for speech that is false is speech that is true'—and not, as Idaho would like, the suppression of that speech." *Id.* (cleaned up) (citation omitted). Therefore, we struck down Idaho's ban on creating audio and visual recordings as failing to survive First Amendment scrutiny. *Id.*

Applying strict scrutiny to section 165.540(1)(c) in light of these precedents, we must consider whether that section is constitutional with respect to "each activity within the proscription's scope," *Berger*, 569 F.3d at 1053, which necessarily includes its regulation of protected speech in places open to the public, *see supra* pp. 14 n.9, 23-24.

Appendix B

1

We first consider the nature of Oregon's interest here. At the outset, Oregon does not assert it has a compelling interest, but argues only that it has a significant governmental interest in protecting individuals' conversational privacy. In analyzing this interest, we are bound by *Wasden*'s conclusion that "[t]he act of recording is itself an inherently expressive activity" that merits First Amendment protection. 878 F.3d at 1203. Therefore, prohibiting a speaker's creation of unannounced recordings in public places to protect the privacy of people engaged in conversation in those places is the equivalent of prohibiting protesters' or buskers' speech in public places for the same purpose. *See Berger*, 569 F.3d at 1054. Thus, we must analyze Oregon's interest in conversational privacy as protecting people's conversational privacy from the speech of other individuals, even in places open to the public.

In general, the government does not have a compelling interest in protecting individual privacy against unwanted communications (including the "speech" comprised of recording others) in areas open to the public unless the audience's "substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971); *see also Hill v. Colorado*, 530 U.S. 703, 717, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) (recognizing that the government's interest in protecting privacy "varies widely in different settings"). Courts have recognized such a compelling interest only when patients seeking medical care are bombarded by "the cacophony of political protests" and

individuals at their homes are confronted with unwanted speech. *Hill*, 530 U.S. at 716. The government's interest in protecting the public's privacy from unwanted speech (including recordings of people's conversations) "is far less important" for individuals engaging in recreational, social, or commercial activities in places open to the public, such as "strolling through Central Park," *id.*, or "waiting in line or having lunch outdoors in a public park," *Berger*, 569 F.3d at 1054. Indeed, we have held that the government does not even have a "significant interest in protecting [individuals] from unpopular speech" where those who constitute the intended audience are commercial patrons of "a place of public entertainment." *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 861 n.10 (9th Cir. 2004). Applying this framework here, Oregon does not have a compelling interest in protecting individuals' conversational privacy from other individuals' protected speech in places open to the public, even if that protected speech consists of creating audio or visual recordings of other people.

2

Nor is Oregon's rule narrowly tailored to be "the least restrictive or least intrusive means of" achieving the government's interest in conversational privacy, as required to pass strict scrutiny review. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99, 109 S. Ct. 2746, 105 L. Ed. 2d 661 & n.6 (1989). Under strict scrutiny, a speech restriction must "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485 (citation omitted). A law is not narrowly tailored if it restricts "speech that do[es] not cause the

types of problems that motivated the [law]." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948 (9th Cir. 2011) (en banc). In addition, a law is not narrowly tailored if it is over-inclusive because it suppresses more speech than is necessary to further Oregon's goal of protecting people's conversational privacy. *See Wasden*, 878 F.3d at 1205.

Applying this test, we conclude that section 165.540 burdens more protected speech than is necessary to achieve its stated interest. *See id.* The law regulates protected speech to avoid impinging on people's conversational privacy. But in public places, speech does not intrude on privacy unless it intrudes in "an essentially intolerable manner." *See Berger*, 569 F.3d at 1056 (holding that a statute prohibiting "passive and unthreatening acts" such as offering a handbill or displaying a sign, even if the communications were unwanted, was not narrowly tailored under intermediate scrutiny). As the Supreme Court has explained, "it is difficult, indeed, to justify a prohibition on *all* uninvited approaches . . . regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994). Section 165.540(1)(c) does not distinguish between "passive and unthreatening" acts and intolerable intrusions. Under our case law, that does not constitute narrow tailoring.

Moreover, where speech occurs in places open to the public, the privacy interest of other individuals in those public areas is implicated only if and where the speech

is unwanted. *See Hill*, 530 U.S. at 716; *Berger*, 569 F.3d at 1056. Yet section 165.540(1)(c) does not distinguish between wanted and unwanted speech (including wanted or unwanted recordings). [13] For example, protesters demonstrating in favor of their political views may have no objection to unannounced recordings of conversations, which would provide more publicity about their goals and beliefs. While some people may desire privacy for a conversation held in places open to the public, such instances cannot justify Oregon's wholesale restriction on protected speech (i.e., recordings) in public areas. *See Rock Against Racism*, 491 U.S. at 799 (stating that a speech restriction "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals").

The dissent argues that *Berger* and its progeny are inapplicable to section 165.540(1)(c) because "state action aimed at protecting people from unwanted commercial or political speech" is "qualitatively different" than state action protecting people "from speech-gathering activities like Project Veritas's . . . because they appropriate the speech of others." Dissent at 45. According to the dissent, the sort of speech that includes the "appropriation of another person's speech" (i.e., recordings) is qualitatively more burdensome than other types of speech that might intrude on a person's privacy. Dissent at 64.

This position is foreclosed by *Wasden*, which did not accord any special attention to the privacy interests of

13. For its part, the dissent apparently assumes without explanation that all unannounced recordings are unwanted speech and all announced recordings are welcomed speech. Dissent at 53-61.

people whose speech might be recorded. Rather, *Wasden* held that a state law prohibiting audio or video recordings of the conduct of an agricultural production facility's operations, which necessarily would include conversations, directions, and other forms of oral communications, "suppresse[d] more speech than necessary to further Idaho's stated goals of protecting property and privacy." 878 F.3d at 1205. *Wasden*'s analysis of recordings under the same framework applicable to other sorts of protected speech is consistent with precedent: for example, under our case law, we analyze expressive conduct that merits First Amendment protection as symbolic speech in the same manner as we analyze oral communications. *See Swisher*, 811 F.3d at 318 ("Content-based prohibitions of speech and symbolic speech are analyzed under the same framework.").[14]

Finally, as in *Wasden*, the rule is not narrowly tailored because "there are various other laws at [Oregon's] disposal that would allow it to achieve its stated interests while burdening little or no speech."

---

14. The dissent's reliance on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), for the argument that speech involving the creation of a recording that captures people's speech "implicates the 'principle of autonomy to control one's own speech'" is misplaced. Dissent at 57-58. *Hurley* held that the First Amendment prohibits the state from forcing a speaker to incorporate a message that the speaker does not want to convey. *See id.* at 559, 581. To the extent *Hurley* has any bearing on this case, it supports our view that a law raises serious constitutional issues if it prohibits a speaker from conveying the message the speaker wants to convey—candid responses to issues of controversy—by making unannounced recordings.

878 F.3d at 1205 (citation and quotation marks omitted). Individuals whose conversation is captured in public by unannounced recordings "can vindicate their rights" through an invasion of privacy tort. *See, e.g., Humphers v. First Interstate Bank of Oregon*, 298 Ore. 706, 696 P.2d 527, 531-32 (Or. 1985) (en banc) (noting that Oregon has recognized the common law privacy torts of appropriation, offensive publication of private facts, and intrusion upon exclusion); *State v. Lien*, 364 Ore. 750, 441 P.3d 185, 193 (Or. 2019) ("Tortious invasion of privacy is one of the limited number of torts in Oregon in which a plaintiff may be awarded damages consisting solely of mental suffering caused by the violation."); *Anderson v. Fisher Broad. Cos.*, 300 Ore. 452, 712 P.2d 803, 814 (Or. 1986) (explaining instances where a television program airing photographs of an accident victim could give rise to a tortious invasion of privacy claim); *McLain v. Boise Cascade Corp.*, 271 Ore. 549, 533 P.2d 343, 345-46 (Or. 1975) (holding that unannounced recordings of the plaintiff "engaged in various activities on his property outside his home" were not actionable as invasion of privacy torts because the recordings "were done in such an unobtrusive manner that plaintiff was not aware that he was being watched and filmed" and the plaintiff "could have been observed by . . . [a] passerby"). Or if the recording is fabricated, "the victims can turn to defamation actions for recourse." *Wasden*, 878 F.3d at 1205; *see also Neumann v. Liles*, 358 Ore. 706, 369 P.3d 1117, 1120-21 (Or. 2016).[15]

15. The dissent's concern regarding "deepfakes" is overblown. Dissent at 56-57, 72 n.16. As we explained in *Wasden*, victims of such fabrications can vindicate their rights through tort actions. *See* 878 F.3d at 1205. Moreover, deepfakes are not a problem unique

We conclude that section 165.540(1)(c) regulates protected speech (unannounced audiovisual recording), and is content based because it distinguishes between particular topics by restricting some subject matters (e.g., a state executive officer's official activities) and not others (e.g., a police officer's official activities). As a content-based restriction, the rule fails strict scrutiny review because the law is not narrowly tailored to achieving a compelling governmental interest in protecting conversational privacy with respect to "each activity within the proscription's scope," *Berger*, 569 F.3d at 1053, and there are other ways for Oregon to achieve its interests, *see Wasden*, 878 F.3d at 1205.

IV

The dissent agrees with our holding that section 165.540(1)(c) and its exceptions constitute a content-based speech restriction that fails strict scrutiny review. Dissent at 50, 63. This should end our analysis.

Instead, the dissent argues that section 165.540(1)(c)'s general prohibition should be analyzed as a stand-alone provision that, by itself, is a constitutional content-neutral speech restriction. Dissent at 53-54. To reach that conclusion, the dissent relies exclusively on its

---

to unannounced recordings. Such "deepfakes" can be created just as easily with announced recordings. As the dissent states, all one needs is "audio and video of the person to be modeled" to create a "deepfake." Dissent at 56-57, 72 n.16.

argument that the court should offer Oregon a remedy of severability. Dissent at 50-53. Oregon chose not to make this argument to the district court or to our court. But we briefly address it here. *Cf. Comite de Jornaleros de Redondo Beach*, 657 F.3d at 951 n.10 (declining to sever a subsection of a challenged statute "[b]ecause the City ha[d] [forfeited] any argument regarding severability by failing to raise it in its briefs or at oral argument").[16]

A

"Severability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139, 116 S. Ct. 2068, 135 L. Ed. 2d 443 (1996). To determine whether a state statute is severable, we are bound by state statutes and state court opinions. *See Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1325 (9th Cir. 2015) (en banc).

The Oregon Supreme Court addressed the "nature of severability" in *State v. Dilts*, 337 Ore. 645, 103 P.3d 95, 99 (Or. 2004) (en banc).[17] According to the Oregon Supreme Court, the relevant statute, "[section] 174.040[,] governs decisions regarding severability." *Id.* This statute provides that "it is the legislative intent, in the

16. The dissent cites several Supreme Court cases decided *before* we issued *Comite de Jornaleros*. Dissent at 51-52, 52 n.7. But we are bound by our precedent unless it is irreconcilable with a subsequent higher authority. *See Miller*, 335 F.3d at 893.

17. *Dilts* provided a generally applicable analysis of Oregon severability law. Nothing in the opinion suggests that this analysis would be different if a party proposed severing the unconstitutional portion of a civil statute, rather than a criminal statute. *But see* Dissent at 65.

enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force" unless an exception applies.[18] The exceptions to this presumption (that the legislature would prefer an unconstitutional part of a statute to be severed and the rest to remain in force) include circumstances where "parts of the statute are so interconnected that it appears likely that the remaining parts would not have been enacted without the unconstitutional part, or . . . [if] the remaining parts are incomplete and cannot be executed in accordance with legislative intent." *Outdoor Media Dimensions, Inc. v. Dep't of Transp.*, 340 Ore. 275, 132 P.3d 5, 18 (Or. 2006).

Based on this statute, and Oregon Supreme Court cases, severability analysis applies "when part of a statute is held to be unconstitutional." *Dilts*, 103 P.3d at 99. Under

18. Section 174.040 of the Oregon Revised Statutes provides in full:

> It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:
>
> (1) The statute provides otherwise;
>
> (2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or
>
> (3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.

such circumstances, a court must consider "whether *that* part of the statute can be severed and the remaining parts of the statute saved." *Id.* Namely, under this framework, a court must make two determinations. First, it must conclude that part of the statute is unconstitutional. Second, it must conclude that the rest of the statute can be "saved," meaning it would be deemed constitutional, if the unconstitutional part were severed. "When a party contends the entire act is unconstitutional," then "severability is not germane until the constitutional claim is . . . resolved." *Bernstein Bros. v. Dep't of Revenue*, 294 Ore. 614, 661 P.2d 537, 539 (Or. 1983).

As a general rule, under *Dilts* and section 174.040, a court's threshold determination is whether a part of the statute is unconstitutional. Indeed, *Dilts* rejected Oregon's severability argument in that case because no party alleged that the specific provision the state proposed to sever was unconstitutional. 103 P.3d at 99. Nevertheless, when a statute raises First Amendment concerns because it is content based, the Oregon Supreme Court has considered whether to sever a portion of the statute that singles out a topic or subject matter for differential treatment, even if that portion is not itself unconstitutional. *See Outdoor Media Dimensions, Inc.*, 132 P.3d at 19.

In this context, *Outdoor Media Dimensions* considered a state statute that "requir[ed] a permit for a sign whose message does not relate to the premises on which the sign is located while providing an exemption for a sign whose message does relate to the premises on which the sign is located." *Id.* at 7. The court first held that by exempting on-

premises signs from the permit requirement, the statute was, "on its face, an impermissible restriction on the content of speech" in violation of the Oregon constitution. *Id.* at 18. Turning to the issue of severability, the court explained that to remedy the constitutional violation it could either invalidate the permit requirement or sever the exception for on-premises signs. *Id.* at 19. The court determined that "faced with that choice, the legislature would not have been willing to extend the [statute's] permit and fee requirements to . . . on-premises signs," and, therefore, the court held that "the appropriate remedy" was to invalidate the permit requirement. *Id.*

B

1

Under *Outdoor Media*, we may consider whether severing the exceptions to section 165.540(1)(c) would "save" that section's general prohibition, even though the exceptions are not themselves unconstitutional. Assuming that section 165.540(1)(c), considered by itself, is content neutral, it can be "saved" as constitutional if it qualifies as a valid time, place, or manner restriction. Such a restriction must (1) be content neutral, (2) survive intermediate scrutiny review, and (3) "leave open ample alternative channels for communication of the information." *Hoye v. City of Oakland*, 653 F.3d 835, 844 (9th Cir. 2011) (citing *Rock Against Racism*, 491 U.S. at 791); *see also Regan v. Time, Inc.*, 468 U.S. 641, 648, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984). Assuming that section 165.540(1)(c) would be content neutral if it were a stand-alone provision and

would survive intermediate scrutiny review, we conclude it does not satisfy the third requirement.

"[A] regulation that forecloses an entire medium of public expression across the landscape of a particular community or setting fails to leave open ample alternatives." *United Bhd. of Carpenters & Joiners of Am. Loc. 586 v. NLRB*, 540 F.3d 957, 969 (9th Cir. 2008). Regulations may not hamper a speaker's preferred mode of communication to such an extent that they compromise or stifle the speaker's message. *See McCullen v. Coakley*, 573 U.S. 464, 487-90, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014). Alternatives that are "less effective media for communicating the [speaker's] message . . . . are far from satisfactory." *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977). "[F]ree speech protections extend to the right to choose a particular means or avenue of speech in lieu of other avenues." *United Bhd.*, 540 F.3d at 969 (cleaned up) (citation and quotation marks omitted). Thus, while the "[g]overnment may regulate the *manner* of speech in a content-neutral way," the government "may not infringe on an individual's right to select the *means* of speech." *Foti*, 146 F.3d at 641-42.

For example, in *City of Ladue v. Gilleo*, the Supreme Court held that an ordinance that prohibited displaying signs in front of one's residence did not leave open ample alternative channels of communication. 512 U.S. 43, 56, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994). In reaching that conclusion, the Supreme Court rejected the city's argument that the law left open ample alternative channels

of communication because "residents remain free to convey their desired messages by other means, such as *hand-held* signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings." *Id.* (citation and quotation marks omitted). In doing so, the Supreme Court explained that "[d]isplaying a sign from one's own residence often carries a message quite distinct form placing the same sign someplace else, or conveying the same text or picture by other means." *Id.* Indeed, it is "[p]recisely because of their location [that] such signs provide information about the identity of the speaker." *Id.* (quotation marks omitted). To illustrate, the Supreme Court noted that "[a] sign advocating 'Peace in the Gulf' in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile." *Id.* Likewise, "[a]n espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board." *Id.* at 56-57. Moreover, the intention behind placing a sign at one's residence may be "to reach neighbors, an audience that could not be reached nearly as well by other means." *Id.* at 57 (emphasis omitted). In some instances, barring a means of speech effectively eliminates a message. For speakers "of modest means or limited mobility, a yard or window sign may have no practical substitute." *Id.* And for others, "the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld

sign may make the difference between participating and not participating in some public debate." *Id.*

In light of this understanding of what case law requires for a speech restriction to leave open ample alternative channels for communication, it is clear that section 165.540(1)(c) does not meet the mark. It functions as "an absolute prohibition on a particular type of expression"—the creation of unannounced audiovisual recordings. *United States v. Grace*, 461 U.S. 171, 177, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983). Though section 165.540(1)(c) allows individuals to record conversations where participants are "specifically informed that their conversation is being obtained," such notification would effectively destroy the intended content of the recording. The subject matter of unannounced recordings is the subjects' candid responses to issues of controversy. Because the protected speech is the recording of subjects' unfiltered responses, *see Wasden*, 878 F.3d at 1204, a rule that requires the person creating the recording to provide notice extinguishes that speech. In other words, creating announced recordings is not an adequate alternative channel of speech for creating unannounced recordings.[19]

Nor does after-the-fact reporting of an undercover interview or encounter provide an adequate alternative method of communication. Audiovisual recording is a

19. In fact, the dissent expressly acknowledges these attributes, which are unique to unannounced recordings. Dissent at 55. But by recognizing that unannounced recordings are unique, the dissent has necessarily conceded that other forms of media are inadequate substitutes.

unique medium of communication. It captures in real time both the sounds and sights of an event, making it more trustworthy and persuasive—and thus having vastly greater impact—than post-hoc written or oral accounts. *See Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) (noting that audiovisual recordings "corroborate[] or lay[] aside subjective impressions for objective facts"); *ACLU v. Alvarez*, 679 F.3d 583, 595-607 (7th Cir. 2012) (stating that the "self-authenticating character" of audiovisual recordings "makes it highly unlikely that other methods could be considered reasonably adequate substitutes"). Indeed, the Supreme Court recognized the importance of audiovisual recording as corroborating or disproving testimony in *Scott v. Harris*. Even on summary judgment when "courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion,'" the court must rely on "the record of a videotape capturing the events in question," when it "clearly contradicts the version of the story told by" the nonmoving party. 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (citation omitted). Audiovisual recordings are also unique because they can readily be disseminated to a wider audience when incorporated into news programming. *See Fields*, 862 F.3d at 359 ("Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media."); *ACLU*, 679 F.3d at 607 (noting that audiovisual recordings are "powerful methods of . . . disseminating news and information"). Accordingly, section 165.540(1)(c) does not leave open alternative channels to real-time, unannounced audiovisual recordings. And we therefore conclude that section 165.540(1)(c) (if read

as a stand-alone provision, without exceptions) is not a valid time, place, or manner restriction. In opposing this analysis, and arguing that section 165.540(1)(c) leaves open ample alternative channels of communication, the dissent reframes the medium of public expression sought by Project Veritas at a high level of generality. According to the dissent, the relevant medium of communication is not the unannounced recordings that capture candid responses, but rather "investigative journalism" generally. Dissent at 61-63. At this high level of generality, the dissent insists section 165.540 does not prevent Project Veritas from engaging in investigative journalism of some sort. And it claims that we previously held that restricting unannounced recording does not foreclose the medium of investigative journalism. *See Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). Dissent at 55-56, 62 & n.11, 65.

We disagree with this analysis. First, the dissent again fails to recognize the implications of *Wasden*. Under *Wasden*, the creation of an unannounced recording of a subject's unguarded conduct (which would include any statements made in the course of such conduct) is itself a form of protected speech and constitutes "a significant medium" of public expression. 878 F.3d at 1203 (citation and quotation marks omitted). As explained above, section 165.540(1)(c) does not leave ample alternative channels for Project Veritas's mode of speech. Thus, the dissent's argument that section 165.540(1)(c) does not foreclose investigative journalism as a journalistic approach misses the mark. At some level of generality, "art" can be made without a paint brush—but neither sculpture nor architecture is a substitute for painting.

Moreover, the dissent's reliance on *Dietemann* is misplaced. Dissent at 55-56, 62 & n.11, 65. In *Dietemann*, two journalists used a ruse to gain entry to the plaintiff's home and then surreptitiously photographed and recorded him without consent. 449 F.2d at 245-46. We held that the plaintiff could state a claim for invasion of privacy under California law because the conduct occurred inside the plaintiff's home, *id.* at 248, and because the First Amendment did not "accord newsmen immunity from torts or crimes committed during the course of newsgathering," *id.* at 249. But *Dietemann* has no bearing on the question whether a rule prohibiting unannounced recordings in public places fails to leave open ample alternative channels of communication.

For this reason, the dissent's argument that a parade of horribles will result from our analysis—such as the invalidation of "eavesdropping statutes"—is not well-taken. Dissent at 73. As explained, *see supra* Section III.A., the threshold question is whether the challenged law restricts First Amendment protected speech. Under *Wasden*, the creation of an unannounced recording is speech protected by the First Amendment. But we are not aware of any cases holding that eavesdropping (without more) is protected speech. Therefore, the First Amendment would not constitute grounds to invalidate a statute prohibiting that conduct. Moreover, we analyzed section 165.540(1)(c) as a prohibition of First Amendment protected speech in *public places. See supra* Section III.C. Our analysis of the state's asserted governmental interest and whether its restriction on speech is narrowly tailored would necessarily be different in the context of eavesdropping, where an individual's heightened privacy

interests in his own home are at stake. Nothing we have said today impugns the well-established rule that the First Amendment does not "accord [a speaker] immunity from torts or crimes committed" in service of his speech. *Dietemann*, 449 F.2d at 249.[20]

2

Because we conclude that section 165.540(1)(c) is not a valid time, place, or manner restriction, it cannot be "saved" by striking the two exceptions at issue here. Therefore, "severability is not germane." *Bernstein Bros.*, 661 P.2d at 539. Further, under *Outdoor Media Dimensions*, we also conclude that the Oregon legislature would not intend the exceptions to be severed, because when Oregon courts analyze severability, they "assum[e] that the legislature prefers to avoid enacting a bill that raises serious questions of constitutionality." *State v. Borowski*, 231 Ore. App. 511, 220 P.3d 100, 109 (Or. Ct. App. 2009).

If the exceptions were removed, section 165.540(1)(c) would raise serious constitutional issues. This section would prohibit the unannounced recording of police officers performing their official duties or a felony endangering human life. But we have consistently and repeatedly held that "[t]he First Amendment protects

---

20. The dissent argues that our conclusion that section 165.540(1)(c) is not a valid time, place, or manner restriction, means that the Oregon legislature is "in a catch-22." Dissent at 69. But a judicial determination that a statute is unconstitutional does not put the legislature in a catch-22 situation; rather, it merely tells the legislature that its enactment has impermissibly infringed on the First Amendment rights of its citizens.

the right to photograph and [to] record matters of public interest," *Askins*, 899 F.3d at 1044, which includes the right to "observ[e] government[al] operation[s]," *Reed v. Lieurance*, 863 F.3d 1196, 1211 (9th Cir. 2017), and the commission of a crime, *see Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291-92 (9th Cir. 2014). Requiring a citizen to inform all parties involved to capture governmental officials' performance of official duties in public places, for example, would substantially impede this speech right by foreclosing a major avenue for citizens to "[g]ather[] information about government officials in a[n unaltered] form that can readily be disseminated to others," despite the fact that this type of speech "serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (citing *Mills v. Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966)). Further, an announced recording of a felony in progress would not only tend to reduce the opportunity to capture such evidence, but also tend to imperil the person recording. Given the impetus for this exception was to enable police officers to make unannounced recordings of felony drug transactions and felonies endangering human life without first obtaining a court order, *see supra* pp. 8-9, the legislature would not choose to endanger police by eliminating this exception to the general rule.

The dissent suggests that removing the exceptions from the general prohibition in section 165.540(1)(c) would not raise constitutional issues because a court would likely deem section 165.540(1)(c) unconstitutional as applied to an individual who filmed police or other matters of

public interest in public places. Dissent at 68-69. But such a conclusion merely acknowledges that the general prohibition itself raises serious constitutional issues. Therefore, severing the exceptions that make the general prohibition content based, and extending the general prohibition to these protected First Amendment activities, would create significant constitutional issues rather than cure them. Under *Outdoor Media*, we must presume that the Oregon legislature would not retain such a law.[21]

* * *

21. The dissent argues that the legislature would want to retain section 165.540(1)(c) as a stand-alone provision, even if the exception in section 165.540(5)(b) for recording police officers were severed, because the general prohibition in section 165.540(1)(c) "was freestanding for fifty-six years before the legislature adopted the exception that allows the recording of law enforcement officers performing official duties in public." Dissent at 51; *see also* Dissent at 67-68. This evinces a misunderstanding of the relevant legislative history. The legislature adopted section 165.540(1)(c) long before *Fordyce* made clear that such a general prohibition on filming matters of public concern raises serious constitutional questions. *See* 55 F.3d at 439. Following *Fordyce* and subsequent opinions reiterating this rule, the legislature added the exception in section 165.540(5)(b)—likely to eliminate this constitutional concern. (Unfortunately, the addition of this exception rendered section 165.540 a content-based speech restriction, which created a different First Amendment issue.) Given that the Oregon legislature already evinced its intent to avoid the constitutional questions raised when section 165.540(1)(c) was a standalone provision, we must conclude that the legislature would not sever the exception in section 165.540(5)(b), which would merely bring back to life the same constitutional issue that the Oregon legislature faced prior to enacting this exception.

Reading section 165.540(1)(c) as a whole, we conclude that it is a content-based speech restriction that cannot survive strict scrutiny because Oregon has not asserted a compelling government interest and because the statute is not narrowly tailored. The statute is also not a valid time, place, or manner restriction because it does not leave open ample alternative channels for communication. Applying Oregon law, we may not sever the exceptions because severing them would not render section 165.540(1)(c) constitutional. Accordingly, we conclude that the statute is facially unconstitutional.

REVERSED and REMANDED.

Appendix B

CHRISTEN, Circuit Judge, dissenting:

"The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965).

When it adopted Oregon Revised Statutes section 165.540(1)(c), the Oregon legislature required that notice must be given before in-person oral conversations may be recorded. With this statute, the legislature ensured that Oregonians would be free to engage in the "uninhibited exchange of ideas and information,"[1] without fear that their words could be broadcast beyond their intended audience, appear on the evening news, or worse, be manipulated and shared across the internet devoid of relevant context.

Project Veritas engages in undercover investigative journalism, and it finds Oregon's protection against the secret recording of oral conversations a hindrance to its operations. Project Veritas seeks a ruling declaring section 165.540(1)(c) unconstitutional, arguing there is no distinction between hearing a conversation and secretly recording it. Because the majority does not dispute that the State has a significant interest in protecting the privacy of Oregonians who engage in conversations without notice that their comments are being recorded, our court's analysis should be straightforward. First, principles of federalism require that we begin from a

1. *Bartnicki v. Vopper*, 532 U.S. 514, 532, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) (citation omitted).

premise of reluctance to strike down a state statute. Next, following Supreme Court precedent, we should sever the two statutory exceptions that Project Veritas challenges, apply intermediate scrutiny to the content-neutral remainder, recognize that the statute is well-tailored to meet Oregon's significant interest, and uphold section 165.540(1)(c) as a reasonable time, place, or manner restriction.

The majority takes a very different path. It begins by straining to avoid the conclusion that the two exceptions to section 540(1)(c)'s notice requirement that Project Veritas challenges are severable. From there, the majority concludes that severance is inappropriate by implausibly speculating that the Oregon legislature—which the majority faults for overzealously protecting privacy—would have preferred to jettison all of section 540(1)(c) rather than striking the two exceptions.

My colleagues do not contest that Oregon has a significant interest in protecting people from unannounced recordings of in-person conversations, but they rewrite the State's articulated purpose. The purpose Oregon advances is its significant interest in protecting participants from having their oral conversations recorded without their knowledge. The majority recasts the State's interest as one in "protecting people's conversational privacy *from the speech of other individuals*." Slip Op. at 25. (emphasis added). That reframing of the legislature's purpose serves as the springboard for the majority's reliance on an inapplicable line of Supreme Court authority that pertains to state action aimed at protecting people from

unwanted commercial or political speech; not protection from speech-gathering activities like Project Veritas's, which are qualitatively different because they appropriate the speech of others.

The majority glosses over this important distinction, and in the end, it declares that all of section 165.540(1)(c) is unconstitutional by concluding that the State's ban on unannounced recordings leaves no adequate alternative channel of communication. This final rationale is contrary to the reasoning of our own court, which has explained that "hidden mechanical contrivances are [not] 'indispensable tools' of newsgathering. Investigative reporting is an ancient art; its successful practice long antecedes the invention of miniature cameras and electronic devices." *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971). Because modern technology now allows voice recordings to be manipulated and disseminated worldwide with a few keystrokes and clicks, the protection afforded by section 165.540(1)(c) is more important than ever.

For all these reasons, I respectfully dissent.

I.

In 1955, the Oregon legislature enacted what is now section 165.540 of the Oregon Revised Statutes, a wiretapping law that requires the consent of one party before a telecommunication or a radio communication may be recorded in Oregon. *See State v. Lissy*, 304 Ore. 455, 747 P.2d 345, 350 (1987); Or. Rev. Stat. § 165.540

(1)(a) (1955).[2] The legislature amended section 165.540 in 1959 to require that anyone wishing to record an in-person conversation must first specifically inform all participants.[3] *Lissy*, 747 P.2d at 350 & n.4. "[T]he primary concern underlying [§] 165.540(1)(c) was the protection of participants in conversations from being recorded without their knowledge." *State v. Neff*, 246 Ore. App. 186, 265 P.3d 62, 66 (Or. Ct. App. 2011). The 1959 amendment was codified as section 165.540(1)(c) of the Oregon Revised Statutes, and it is the focus of Project Veritas's appeal.[4]

Two exceptions to Oregon's ban on recording in-person oral conversations are at issue. The first, adopted by the

---

2. The original wiretapping statute provided, in relevant part, that a person may not "[o]btain or attempt to obtain the whole or any part of a telecommunication or a radio communication to which such person is not a participant, by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, unless consent is given by at least one participant." Or. Rev. Stat. § 165.540(1)(a) (1955).

3. The section was later amended to include face-to-face conversations conducted via video conference. *Compare* Or. Rev. Stat. § 165.540(6)(a) (2022), *with* Or. Rev. Stat. § 165.540(6)(a) (2019). My use of the term "in-person conversation" encompasses the audio portion of conversations conducted by video conference.

4. Section 165.540(1)(c) provides that no person may "[o]btain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if all participants in the conversation are not specifically informed that their conversation is being obtained." Or. Rev. Stat. § 165.540(1)(c) (1961). The term "conversation," is defined to include only "oral communications." Or. Rev. Stat. § 165.535(1).

legislature in 1989, allows the unannounced recording of "a conversation during a felony that endangers human life." Or. Rev. Stat. § 165.540(5)(a) (1989). The second exception, adopted in 2015, permits the unannounced recording of "a conversation in which a law enforcement officer is a participant," provided that certain conditions are met. Or. Rev. Stat. § 165.540(5)(b) (2015).[5] As to this exception, the majority recognizes that our own court has squarely held that the right to record law enforcement officers performing official duties in public is protected by the First Amendment. *See Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018). The majority takes the position that federal law also protects recording during a felony that endangers human life. Assuming the exceptions to section 540(1)(c) are indeed co-extensive with conduct protected by the federal constitution, the exceptions do not change the speech that is permitted in Oregon.

II.

Project Veritas challenges section 165.540(1)(c)'s requirement that a participant must give notice before recording an in-person conversation in Oregon. This provision applies to unannounced recordings of "conversations," which, as explained, are defined to include

5. Specifically, the officer must be "performing official duties," the recording must be made "openly and in plain view," the conversation must be "audible to the person by normal unaided hearing," and the person recording must be "in a place where the person lawfully may be." Or. Rev. Stat. § 165.540(5)(b).

only "*oral* communications."[6] Or. Rev. Stat. §§ 165.535(1), 165.540(1)(c) (emphasis added). Project Veritas proposes to investigate the Oregon Public Records Advocate and Public Records Advisory Council by conducting surreptitious or unannounced recordings of conversations in areas open to the public, including cafes, parks, and sidewalks. Project Veritas also proposes to investigate violent protests in Portland by: (1) secretly recording conversations between police and protestors; (2) secretly recording conversations between its journalists and police; (3) secretly recording conversations between its journalists and protestors; and (4) openly recording conversations with protestors without providing notice of the recording. The majority repeatedly suggests that Project Veritas seeks to record only in public places, but Project Veritas avers only that *most* of its recording will occur in public places. It does not identify the other venues that it has in mind.

---

6. The majority asserts that section 165.540(1)(c) applies to both audio and video recordings. It supports this statement with the observation that the statute "bars individuals from obtaining a conversation 'by means of any device,'" Slip Op. at 6 & n.3 (quoting *State v. Copeland*, 323 Ore. App. 1, 522 P.3d 909, 911-12 (Or. Ct. App. 2022)), and the observation that the term "conversation" is defined to include both in-person oral communications and those conducted via video conference. Neither observation changes that the statute expressly requires notification only before recording an oral communication. A video recording that does not include an accompanying audio recording of an oral communication is not subject to the statute. The majority resists the result of the clear statutory language by arguing *Copeland* did not differentiate between a video of a "heated discussion" and a video of a shooting. Slip Op. at 6 n.3. But that case concerned a video that captured both a conversation and a shooting, and nothing in that opinion implies that section 165.540(1)(c) would apply to a video that did not capture an oral communication. *See Copeland*, 522 P.3d at 912-13.

Appendix B

Project Veritas acknowledges the validity of Oregon's prohibition on "eavesdropping," and explicitly disavows any intention of eavesdropping. As Oregon defines that term, this means Project Veritas will not intercept wire or oral communications to which Project Veritas is not a party, without the consent of the participants. Or. Rev. Stat. § 165.543(1). Instead, Project Veritas plans to record conversations in which its reporters participate by using concealed recording devices and not giving notice that the conversations are being recorded. Project Veritas argues that such recording is protected speech under the First Amendment and that the other participants in these conversations have only a "limited," "tenuous," and "minimal" privacy interest in not having their speech recorded.

A.

In defining the scope of First Amendment protection, our precedent draws no distinction between the process of creating speech and speech itself. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010). We have explained that "[b]ecause the recording process is itself expressive and is 'inextricably intertwined' with the resulting recording, the creation of audiovisual recordings is speech entitled to First Amendment protection as purely expressive activity." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018) (quoting *Anderson*, 621 F.3d at 1062) (reasoning that the act of creating a recording is itself expressive, much like writing a book or painting a picture). But unlike writing a book or painting a picture, recording a conversation involves the

appropriation of others' speech. To be clear, I agree that Project Veritas's act of creating a recording is protected speech, but it is important to recognize that the type of speech Project Veritas plans to engage in—unannounced in-person recordings of oral conversations—infringes upon other speakers' competing interest in conversational privacy. That competing interest plays a critical role when we assess whether the State's time, place, or manner restriction is reasonable and sufficiently tailored to the State's significant interest.

Project Veritas argues that the dangerous-felony exception and the law-enforcement exception are both content based, rendering all of section 165.540(1)(c) content based. For purposes of this analysis, I assume this is correct. Content-based restrictions on speech are subject to strict scrutiny, *Wasden*, 878 F.3d at 1204, and Oregon does not argue that section 165.540(1)(c) can satisfy that heightened standard. But even assuming that section 165.540(1)(c) fails strict scrutiny if the two challenged exceptions are considered, the question we should ask next is whether the two statutory exceptions are severable.

B.

The Supreme Court recently reiterated in *Barr v. American Ass'n of Political Consultants, Inc.* [*AAPC*], 140 S. Ct. 2335, 207 L. Ed. 2d 784 (2020), that when confronted with an exception that renders a restriction on speech impermissibly content based, we apply ordinary severability principles, starting with a "strong presumption of severability" that dates back to the Marshall Court. *Id.*

at 2350; *see Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010). "The Court's presumption of severability . . . allows courts to avoid judicial policymaking or *de facto* judicial legislation in determining just how much of the remainder of a statute should be invalidated." *AAPC*, 140 S. Ct. at 2351. The presumption of severability applies with particular force where, as here, the legislature "added an unconstitutional amendment to a prior law. In those cases, the Court has treated the original, pre-amendment statute as the 'valid expression of the legislative intent.'" *Id.* at 2353 (quoting *Frost v. Corp. Comm'n of Okla.*, 278 U.S. 515, 526-27, 49 S. Ct. 235, 73 L. Ed. 483 (1929)). We need not guess at whether the Oregon legislature intended its previously enacted protection for in-person conversations to exist independently, because section 165.540(1)(c) was a freestanding provision for thirty years before the legislature adopted the dangerous-felony exception, and it was freestanding for fifty-six years before the legislature adopted the exception that allows the recording of law enforcement officers performing official duties in public. As the majority points out, the Oregon legislature's statutory scheme is among the nation's strongest protections for conversational privacy. Slip Op. at 6 n.1. What the majority overlooks is that this makes it particularly implausible that the legislature intended Oregon's entire conversational privacy statute to be struck down rather than have the two challenged exceptions severed. The majority suggests that it addresses severability only because I rely on it, Slip Op. at 31, but the Supreme Court has made clear that striking down a statute before considering severability is not an option.

We have an obligation to consider severability regardless of whether litigants raise it.[7] Principles of federalism make it particularly important that we apply a surgical approach in this case and sever any constitutionally suspect provisions, because we are a federal court treading on a state statute. The majority acknowledges that the "[s]everability [of a state statutory provision] is of course a matter of state law," *Leavitt v. Jane L.*, 518 U.S. 137, 139, 116 S. Ct. 2068, 135 L. Ed. 2d 443 (1996) (per curiam), and both Oregon statutory law and Oregon Supreme Court precedent require us to apply a presumption in favor of severability, *see* Or. Rev. Stat. § 174.040; *Outdoor Media Dimensions, Inc. v. Dep't of Transp.*, 340 Ore. 275, 132 P.3d 5, 18 (Or. 2006). Specifically, Oregon Revised Statutes section 174.040 provides:

> It shall be considered that it is the legislative intent, in the enactment of any statute, that if

7. *New York v. United States*, 505 U.S. 144, 186, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) ("Having determined that the take title provision exceeds the powers of Congress, we *must consider* whether it is severable from the rest of the Act." (emphasis added)); *accord Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 507, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985) (rejecting appellees' argument that appellants had forfeited the severability issue before our circuit and concluding that our circuit should have considered severability before striking down a state statute); *see* Brief for All Appellees at 44, *Brockett*, 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394, 1984 WL 565782, at *44; *see also Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1122 (9th Cir. 2019) (addressing severability sua sponte even though neither litigant addressed it on appeal or in the district court).

> any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:
>
> (1) The statute provides otherwise;
>
> (2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or
>
> (3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.

In *Outdoor Media Dimensions*, the Oregon Supreme Court explained that "[o]rdinarily, when one part of a statute is found unconstitutional, this court's practice (and the legislature's stated preference) is to sever the offending part and save the remainder of the statute, unless the legislature has directed otherwise, unless the parts of the statute are so interconnected that it appears likely that the remaining parts would not have been enacted without the unconstitutional part, or unless the remaining parts are incomplete and cannot be executed in accordance with legislative intent." 132 P.3d at 18. None of Oregon's exceptions to the presumption of severability

apply here, so we should sever the two exceptions Project Veritas challenges and evaluate the constitutionality of the remaining notice requirement.

C.

No one disputes that section 165.540(1)(c) is content neutral if the two challenged exceptions are severed, so intermediate scrutiny applies. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). To survive intermediate scrutiny, a time, place, or manner restriction on speech must be "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)). The narrow-tailoring requirement does not mean that the government's restriction on speech must be the "least restrictive or least intrusive means" of serving the state's interest, but the government cannot "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 798-99.

1.

Oregon's attorney general argues that section 165.540(1)(c)'s restriction on recording in-person conversations is justified by Oregon's significant interest in ensuring that Oregonians know whether their

conversations are being recorded. This is unquestionably a significant state interest. The Supreme Court has recognized that "[p]rivacy of communication is an important interest" and that restrictions protecting this interest can "encourag[e] the uninhibited exchange of ideas and information among private parties." *Bartnicki v. Vopper*, 532 U.S. 514, 532, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) (citation omitted). The Court has also recognized that "the fear of public disclosure of private conversations might well have a chilling effect on private speech." *Id.* at 533; *accord ACLU v. Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012) ("[Conversational privacy] is easily an important governmental interest.").

Project Veritas does not dispute this point. Indeed, it acknowledges that "[p]rivacy is an important governmental interest that eavesdropping and wiretapping prohibitions are narrowly tailored to protect." Nevertheless, Project Veritas argues that if one of its undercover reporters consents to having an in-person conversation recorded, the other party to the conversation has only a "limited," "tenuous," and "minimal" privacy interest in not being recorded. To reach this implausible conclusion, Project Veritas begins from the assertion that "[a]n audio recording by a party is little more than a more accurate record of what one party is already, in the overwhelming majority of circumstances, entitled to share in a free society." In other words, in Project Veritas's view, having one's oral communication secretly recorded imposes no greater burden on privacy than merely having the same comments heard—never mind that recorded comments can be forwarded to vast audiences, posted on the internet

in perpetuity, selectively edited, presented devoid of context, or manipulated using modern technology.

Project Veritas's premise is emphatically wrong. In *Dietemann*, we reasoned:

> One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. A different rule could have a most pernicious effect upon the dignity of man and it would surely lead to guarded conversations and conduct where candor is most valued . . . .

449 F.2d at 249. This rationale is not limited to conversations within private residences, nor does Project Veritas represent that it intends to limit its unannounced recordings to public places, despite the majority's suggestions to the contrary. Ironically, Project Veritas argues that "audiovisual recordings are uniquely reliable and powerful methods of preserving and disseminating news and information," (internal quotation marks and citation omitted), but sees no contradiction in its assertion that turning these "uniquely reliable and powerful methods" on private conversations poses no threat to privacy.

Appendix B

The secret recording of speech is far more destructive to one's privacy than merely having oral communications heard and repeated. Recorded speech can be stored indefinitely, disseminated widely, and viewed repeatedly. In the age of the internet and generative artificial intelligence (AI), surreptitious recording of in-person conversations risks massive and ongoing invasions of privacy. Today, anyone can access and learn how to use AI-powered generative adversarial networks to create convincing audio or video "deepfakes" that make people appear to say or do things they never actually did.[8] With these tools, "the only practical constraint on one's ability to produce a deepfake [is] access to training materials—that is, audio and video of the person to be modeled."[9] *Id.* The importance of the right to have notice before one's oral communications are recorded cannot be overstated because technology now allows recordings to be selectively edited, manipulated, and shared across the internet in a matter of seconds.

Project Veritas acknowledges the privacy interest at stake in Oregon's ban on eavesdropping, yet it denies that the same privacy interests are at stake in Oregon's ban on

8. Robert Chesney & Danielle Citron, *Deepfakes and the New Disinformation War*, Foreign Affairs (Dec. 11, 2018), https://www.foreignaffairs.com/articles/world/2018-12-11/deepfakes-and-new-disinformation-war [https://perma.cc/TW6Z-Q97D].

9. The majority argues this concern about deepfakes is overblown because a person's voice can also be captured through announced recording. This misses the critical point: once a person has notice that her conversation will be recorded, she can choose not only what to say, but also whether to speak at all.

secret recording of in-person conversations. This position is unsupportable. The privacy interest implicated by secret recordings of in-person conversations is grounded in the same concerns as the privacy interest implicated by eavesdropping; in both circumstances, a person's oral communications are shared with an unintended audience and the speaker loses the ability to knowingly choose to speak, or not speak, based upon that audience.

There is no question that journalists perform a vital role in our society and their ability to engage in speech is entitled to constitutional protection, but Project Veritas's speech is not the only speech implicated by the issues in this appeal. By striking down Oregon's carefully crafted statute, the court denies Project Veritas's interviewees the opportunity to knowingly choose not to participate in the recordings Project Veritas plans to create. Respectfully, the majority overlooks that secret recordings can incorporate and disseminate oral comments in ways the original speaker did not intend, and that this implicates the "principle of autonomy to control one's own speech." *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). As the Supreme Court has explained, "The First Amendment securely protects the freedom to make—*or decline to make*—one's own speech; *it bears less heavily when speakers assert the right to make other people's speeches*." *Eldred v. Ashcroft*, 537 U.S. 186, 221, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003) (emphasis added) (rejecting a First Amendment challenge to a copyright extension); *see also Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985)

(recognizing, along with the freedom to express one's views publicly, the "concomitant freedom *not* to speak publicly" (quoting *Est. of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 244 N.E.2d 250, 255, 296 N.Y.S.2d 771 (N.Y. 1968))).

Project Veritas stresses that its clandestinely recorded conversations will be held mostly in public places like cafes or parks. But the State has a significant interest in preventing the secret recording of private conversations even when those conversations occur in public or semi-public locations. Everyday experiences tell us that "private talk in public places is common." *Alvarez*, 679 F.3d at 606 (citation omitted). In many circumstances, even if a conversation may be heard or overheard by multiple people, the State maintains a significant interest in preventing its recording. For example, the State of Oregon points out that this interest is most obvious in multiparty gatherings that welcome members of the public yet expect that attendees will not make secret recordings of each other, such as twelve-step groups, bible study, and religious services. Our society respects those boundaries. Oregon has a significant interest in preventing unannounced recordings of oral in-person conversations.

2.

The next question is whether section 165.540(1)(c) is narrowly tailored to that interest. I conclude it is. By requiring that participants in a conversation be informed before it is recorded—but *not* requiring that they consent

to the recording—the statute infringes as little as possible on the process Project Veritas intends to use to create its speech, while still protecting the interviewees' right to knowingly participate in Project Veritas's speech—or not. Once a person is on notice that she will be recorded, recording does not violate any privacy interest. Keeping the Oregon legislature's actual purpose in mind, the statute is exceptionally well tailored to ensuring that Oregonians' conversations will not be recorded without their knowledge. Consistent with that interest, the statute does not sweep in photography or video recordings—but rather applies only to recordings of oral communications.[10]

There are some settings in which people cannot reasonably expect *not* to have their oral statements recorded, and the Oregon legislature crafted its statute to account for those situations:

> The prohibitions in subsection (1)(c) of this section do not apply to persons who intercept or attempt to intercept oral communications that are part of any of the following proceedings, if the person uses an unconcealed recording device . . . :
>
> (A) Public or semipublic meetings such as hearings before governmental

10. Although "private talk in public places is common," *Alvarez*, 679 F.3d at 606 (citation omitted), and people may reasonably expect, even in public places, that their private conversations will not be recorded, a person cannot reasonably expect that his visual image will not be captured in public.

> or quasi-governmental bodies, trials, press conferences, public speeches, rallies and sporting or other events;
>
> (B) Regularly scheduled classes or similar educational activities in public or private institutions; or
>
> (C) Private meetings or conferences if all others involved knew or reasonably should have known that the recording was being made.

Or. Rev. Stat. §165.540(6)(a). The exceptions in section 165.540(6)(a) permit Project Veritas to openly record at public protests as it proposes to do. Project Veritas points out that this exception does not render section 540(1)(c) *perfectly* tailored to Oregon's stated purpose. For example, the law prohibits recording "a loud argument on the street, a political provocateur on a crowded subway, [or] a drunk, hate-filled conversation in a parking lot," even though the participants in such conversations lack any expectation that their words will not be recorded. Section 165.540(1)(c)'s notice requirement may be overbroad as applied to these fringe cases, but far from demonstrating that a "substantial portion of the burden on speech does not serve to advance [Oregon's] goals," *Ward*, 491 U.S. at 799, Project Veritas's resort to these niche examples illustrates that the bulk of Oregon's protection against secret audio recording is targeted at achieving the State's

significant interest. Nothing more is required to meet intermediate scrutiny's tailoring requirement.

3.

Section 165.540(1)(c) also leaves open ample alternative channels of communication for Project Veritas to engage in investigative journalism and to communicate its message. It is well-settled that an alternative channel need not be ideal, but merely adequate. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981); *Reynolds v. Middleton*, 779 F.3d 222, 232 n.5 (4th Cir. 2015) ("The available alternatives need not be the speaker's first or best choice or provide the same audience or impact for the speech." (citation and internal quotation marks omitted)); *Weinberg v. City of Chicago*, 310 F.3d 1029, 1041 (7th Cir. 2002) ("An adequate alternative does not have to be the speaker's first choice."). A restriction runs afoul of the "alternative channels" requirement if it eliminates the only method of communication by which speakers can convey their message to a particular audience. *See, e.g., Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229-30 (9th Cir. 1990). But a regulation does not fail intermediate scrutiny merely because the other available channels of communication would convey the same message somewhat less conveniently or effectively. *See, e.g., Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1298-99 (9th Cir. 2015); *One World One Fam. Now v. City & County of Honolulu*, 76 F.3d 1009, 1014 (9th Cir. 1996).

"We have observed that the Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." *Menotti v. City of Seattle*, 409 F.3d 1113, 1138 (9th Cir. 2005) (alteration accepted) (internal quotation marks and citation omitted). Project Veritas has no colorable argument that it would be unable to gather information to engage in investigative journalism, to communicate its message "across the landscape of a particular community or setting," or to reach a particular audience if it cannot secretly record in-person oral interviews. Indeed, we made clear in *Dietemann* that restricting surreptitious recording does not foreclose an entire medium.[11] 449 F.2d at 249.

Project Veritas retains ample alternative means of engaging in investigative journalism and expressing its message. It can employ all the tools of traditional investigative reporting, including but not limited to talking with whistleblowers and other inside sources, crowd-sourcing information, researching public records, taking photographs and recording videos that do not capture oral conversations, and using Oregon's freedom-of-information laws. *See, e.g.*, Or. Rev. Stat. §§ 192.311-.431, 192.610-.695. It can also openly record during public and semi-public meetings and events, Or. Rev. Stat.

11. The majority protests that *Dietemann* addressed whether the First Amendment barred state tort liability for invasion of privacy, but my colleagues do not try to explain why *Dietemann*'s observations about the nature and history of investigative reporting are not applicable here.

§ 165.540(6)(a)(A), and, in other settings, provide notice that it is recording without announcing that it is engaging in investigative journalism. These many approaches to traditional investigative reporting satisfy the alternative-channels requirement.

III.

Rather than taking the straightforward path that this case calls for, the majority strikes down all of section 165.540(1)(c) by making several unjustified leaps. First, the majority decides that the two content-based exceptions Project Veritas challenges cannot be severed because, it reasons, the exceptions themselves are not unconstitutional and severing them would raise *other* constitutional questions. Despite strong indications to the contrary, the majority next decides that the Oregon legislature would rather strike down the state's entire statutory protection for conversational privacy rather than sever the two exceptions. The majority also errs by invoking case law that addresses statutes and ordinances adopted to protect others from unwanted commercial or political speech. Finally, my colleagues conclude that even if the two exceptions were severed, section 165.540(1)(c) would still be unconstitutional because it fails to leave open ample alternative channels of communication. The majority makes several missteps in its analysis.

A.

I agree that section 165.540(1)(c) would not survive strict scrutiny viewed as a whole—indeed, Oregon never argues otherwise. But the State of Oregon

specifically describes Oregon's interest in in this statute as "protecting Oregonians from having their private conversations unwittingly made the subject of audio recordings without their knowledge." *See Neff*, 265 P.3d at 66 ("[T]he primary concern underlying [section] 165.540(1)(c) was the protection of participants in conversations from being recorded without their knowledge."). The majority redefines Oregon's interest, reasoning, because the act of recording a conversation is protected speech, Oregon's interest is more accurately stated "as protecting individuals' conversational privacy from the speech of other individuals, even in places open to the public." Slip Op. at 25.

The analogy the majority draws, to case law addressing statutes protecting individuals from the unwanted speech of others, is flawed. *See Cohen v. California*, 403 U.S. 15, 21, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971); *Hill v. Colorado*, 530 U.S. 703, 717, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000); *Berger v. City of Seattle*, 569 F.3d 1029, 1054 (9th Cir. 2009) (en banc); *Kuba v. 1-A Agric. Association*, 387 F.3d 850, 861 n.10 (9th Cir. 2004)). The cases the majority cites involve restrictions on speech intended to further different interests, such as preventing the display of profane slogans in a courtroom (*Cohen*); limiting abortion protestors' unwanted approaches toward clinic patients (*Hill*); shielding park-goers from obnoxious behavior by street performers (*Berger*); and protecting commercial patrons from the speech of protesters (*Kuba*). None of the cases cited by the majority address one speaker's appropriation of another person's speech, as Project Veritas proposes to do. Our court gravely missteps by

ignoring that this appeal implicates not only the First Amendment rights of the person creating a recording, but also the First Amendment rights of those who do not wish to have their speech recorded.

The majority incorrectly asserts that *Wasden* forecloses my analysis. Slip Op. at 28. *Wasden* concerned a video of cows being abused at an agricultural facility, not a secretly recorded audio conversation between people. *See* 878 F.3d at 1189-90. *Wasden* cannot bear the weight the majority places on it because the video in that case did not require the court to confront a secret audio recording that invaded conversational privacy and captured the oral communications of other people. The majority is also incorrect to suggest that *Wasden* foreclosed any argument that unannounced recordings that appropriate others' speech place a greater burden on privacy than other types of unwanted expressive conduct. *Wasden* held that the creation of a recording is speech protected by the First Amendment, *see id.* at 1203; it did not purport to address whether the invasion of privacy caused by secret recording of private conversations is equivalent to the invasion of privacy caused by being bombarded with unwanted speech in public places.

B.

The majority agrees that Oregon law governs severability, but it concludes that the dangerous-felony and law-enforcement exceptions cannot be severed from section 165.540(1)(c) for three wobbly reasons. First, the majority decides that even without these exceptions,

the statute would be unconstitutional because it fails to leave open ample alternative channels. I disagree with this conclusion for reasons previously explained, and because my colleagues' rationale contravenes our own court's recognition that investigative journalism does not require secret recording devices or hidden cameras. *See Dietemann*, 449 F.2d at 249.

The majority also argues that Oregon law does not permit the two challenged exceptions to be severed because the exceptions themselves are not unconstitutional. The majority misreads Oregon law. In particular, its reliance on *State v. Dilts*, 337 Ore. 645, 103 P.3d 95 (Or. 2004) is sorely misplaced. There, a defendant's Sixth Amendment rights were violated when a judge imposed a sentence above the state-law guidelines without providing the defendant an opportunity to argue the facts justifying an increased sentence to the jury. *Id.* at 99. On appeal, the prosecution asked the court to sever the state-law requirement that the defendant's sentence be within the guidelines even though neither party had challenged the constitutionality of the mandatory guidelines. *Id.* In other words, the prosecution asked the court to sever the requirement not because it rendered the statute unconstitutional, but because it rendered the defendant's sentence unconstitutional. It was only in response to the prosecution's unusual argument that the Oregon Supreme Court explained it would not sever a statute that neither party claimed was unconstitutional. *Id.*

The Oregon Supreme Court makes no bright-line distinction between exceptions that are themselves

unconstitutional and exceptions that render the remainder of a statute unconstitutional. For instance, in *Outdoor Media Dimensions*, the Oregon Supreme Court evaluated a multifaceted state statute that regulated highway signs. 132 P.3d at 7. The plaintiffs challenged several of the statute's provisions, including one that required permits for highway signs unrelated to the premises but exempted on-premises signs. *Id.* at 9. The permit requirement and exemption were adopted at the same time. *See* Or. Rev. Stat. §§ 377.725, 377.735 (1971). The court concluded that the on-premises exemption was content based and that it rendered the permitting requirement unconstitutional, but it upheld the rest of the statute. *Outdoor Media Dimensions*, 132 P.3d at 19. Notably, the court did not consider the constitutionality of the exemption—which allowed on-premises signs without a permit—in isolation. Rather, the court concluded that the "on-premises/off-premises distinction" was unconstitutional and that severance of that provision was appropriate. *Id.*; *see also City Univ. v. State, Off. of Educ. Pol'y & Plan.*, 320 Ore. 422, 885 P.2d 701, 703, 706-07 (Or. 1994) (severing an exception that caused an Oregon statute to discriminate against out-of-state schools in violation of the Commerce Clause).

Turning to the remedy, the *Outdoor Media Dimensions* court considered "the same two unpalatable choices that the legislature would face," namely, whether to strike only the exemption from the permitting requirement, and require permits for "thousands of individuals and businesses"; or to instead strike the permitting requirement entirely. 132 P.3d at 19. The court decided

the outcome should turn on legislative intent alone, and ultimately invalidated the entire permitting requirement because it concluded that the legislature would not have enacted it without the simultaneously enacted exemption. *Id.* Here, by contrast, I see no viable argument that the Oregon legislature did not intend the dangerous-felony exception and law-enforcement exception to be severable, because section 165.540(1)(c) was operative for decades before these exceptions were added. *See AAPC*, 140 S. Ct. at 2353. The legislature did not direct that the exceptions may not be severed, they are not interconnected, nor is the remaining part of the statute incomplete or inoperable without them. Or. Rev. Stat. § 165.540.

Finally, the majority argues that Oregon courts would invalidate all of section 165.540(1)(c), not just the content-based exceptions, because severing those exceptions would raise other constitutional concerns.[12] To support this contention, the majority cites *State v. Borowski*, 231 Ore. App. 511, 220 P.3d 100, 109 (Or. Ct. App. 2009), which considered, among other factors, the legislature's preference to avoid enacting bills that raise serious questions of constitutionality. But *Borowski*, much like *Outdoor Media Dimensions*, concerned an exception enacted simultaneously with the challenged provision. *See id.* at 109; Or. Rev. Stat. § 164.887 (1999). Because the Oregon legislature enacted section 165.540(1)(c) as a stand-alone provision that operated for decades before it

12. The majority also relies on the legislative history of the challenged exceptions, taking the unusual step of calling out statements made by the Oregon State Sheriffs' Association and the ACLU to divine legislative intent. Slip Op. at 9-10.

adopted either of the challenged exceptions, we are not left to wonder whether the legislature would enact section 165.540 on its own—it did exactly that in 1959. *See State ex rel. Musa v. Minear*, 240 Ore. 315, 401 P.2d 36, 39 (Or. 1965) (declaring an amended state statute invalid and reverting to the pre-amendment statute).

Failing to sever the two exceptions makes even less sense when one considers that the majority concedes the First Amendment protects the right to record law-enforcement officers in public and the right to make unannounced recordings during felonies that endanger human life. *See Askins*, 899 F.3d at 1044; *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291-92 (9th Cir. 2014); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).[13] Because the exceptions to section 540(1)(c) permit conduct protected by the federal constitution, both

13. Other circuits agree. On recording law-enforcement officers, see, for example, *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011); *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *Alvarez*, 679 F.3d 583; *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). Indeed, the First Circuit has held that the First Amendment right to record law enforcement is "clearly established" even for the purposes of qualified immunity. *See Glik*, 655 F.3d at 85 ("[A] citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment."). On recording crimes, see, for instance, *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1298 (11th Cir. 2008) (observing that speech that "alleged violations of federal gun laws" involved a matter of public concern); *Boule v. Hutton*, 328 F.3d 84, 91 (2d Cir. 2003) (holding that an article addressing art-market fraud "is certainly protected" under the First Amendment).

exceptions could be struck without changing the speech that is permitted in Oregon. *Cf. Alvarez*, 679 F.3d at 608 (enjoining Illinois from enforcing its recording prohibition as applied to open audio recording of law-enforcement officers engaged in their official duties in public places). Nevertheless, the majority concludes that because the Oregon legislature included these carveouts, Oregon's entire notice requirement must receive strict scrutiny. The majority's reasoning places the legislature in a catch-22: the First Amendment requires it to carve out the two challenged exceptions, but because the legislature included the carveouts, the majority decides the entire statute becomes subject to strict scrutiny. We need not adopt this topsy-turvy approach; we should simply sever the two challenged exceptions.

C.

Perhaps the weakest link in the majority's opinion is its conclusion that section 165.540(1)(c) does not leave open ample alternative channels of communication because it constitutes an "absolute prohibition on a particular type of expression," namely "unannounced audiovisual recordings." Setting aside that the statute does not address video recording,[14] I disagree that Oregon's ban on unannounced audio recording eliminates an entire medium of public expression. The majority cites *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977); *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57, 114 S. Ct. 2038, 129 L. Ed.

14. *See* Or. Rev. Stat. § 165.535(1).

2d 36 (1994); *McCullen v. Coakley*, 573 U.S. 464, 487-90, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014); *United Bhd. of Carpenters & Joiners of Am. Loc. 586 v. NLRB*, 540 F.3d 957, 969 (9th Cir. 2008); and *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) in support of its alternative-channels holding, but these cases all miss the mark.

In *Linmark*, the Supreme Court invalidated as content based a township's ban on "For Sale" signs, which it had enacted "to stem what it perceive[d] as the flight of white homeowners from a racially integrated community." 431 U.S. at 86. The Court stressed that the township council was concerned "with the substance of the information communicated" by the signs and that the ban was not "unrelated to the suppression of free expression." *Id.* at 93, 96 (quoting *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)). *Linmark*'s language cannot be stretched to imply that any alternative that is "less effective" than a speaker's chosen medium is "far from satisfactory." Slip Op. at 35 (quoting *Linmark*, 431 U.S. at 93). Rather, *Linmark* explained that the Court doubted whether the ordinance left open "ample alternative channels for communication" because the alternatives were "less effective," and also because those alternatives "involve[d] more cost and less autonomy than 'For Sale' signs [and] [we]re less likely to reach persons not deliberately seeking sales information." *Linmark*, 431 U.S. at 93 (internal citations omitted). After *Linmark*, the Supreme Court clarified that an alternative need not be a speaker's first or best choice, but is adequate if it "permits the more general dissemination of a message." *Frisby v. Schultz*, 487 U.S. 474, 483, 108 S. Ct. 2495, 101 L. Ed.

2d 420 (1988); *see Heffron*, 452 U.S. at 647 ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."). Project Veritas does not argue that alternatives to surreptitious recording involve more cost, or less autonomy, or otherwise make their message less likely to reach its intended audience. Project Veritas's complaint is that Oregon's statute will impede its ability to gather information.

City of Ladue also fails to support Project Veritas's cause. There, the Supreme Court held that a restriction on residential signs did not leave open adequate alternative channels of communication because "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means." 512 U.S. at 56. *City of Ladue* emphasized the long-held tradition of respect for individual liberty in the home and for a person's ability to speak there. *Id.* at 58. Here, by contrast, Project Veritas does not argue that reporting on in-person oral conversations without surreptitiously obtained audio recordings would convey a different message, only that its information gathering would be somewhat less effective, and there is no comparable tradition of respect for surreptitious recording. Indeed, surreptitious recording is generally considered a breach of journalistic ethics except when certain narrow criteria are met.[15]

15. *See, e.g.*, Radio Television Digital News Ass'n (RTDNA), *Guidelines for Hidden Cameras*, https://www.rtdna.org/hidden-cameras [https://perma.cc/8MQ3-P8A9].

McCullen is even less applicable. There, the Court struck down a statute establishing buffer zones around abortion clinics because the statute was insufficiently tailored. The Court did not even reach "whether the Act leaves open ample alternative channels of communication." *McCullen*, 573 U.S. at 496 n.9.

The majority correctly observes that the First Amendment's protections "extend to the 'right to choose a particular means or avenue of speech . . . in lieu of other avenues,'" *United Bhd.*, 540 F.3d at 969 (quoting *Foti*, 146 F.3d at 641), but section 165.540(1)(c) governs how, not whether, Project Veritas can use recording devices. The statute thus permissibly "regulate[s] the *manner* of speech in a content-neutral way," without "infring[ing] on an individual's right to select the *means* of speech." *Foti*, 146 F.3d at 641-42.

The majority and Project Veritas both argue that recordings are unique in their trustworthiness, "self-authenticating character," and ease of distribution, ignoring that surreptitious audio recording is a uniquely effective means for reporters to gather information *precisely* because it is uniquely effective at invading privacy. The very aspects of surreptitious audio recording that render it distinct from other modes of communication, such as its discreetness and its ability to widely disseminate the contents of a conversation, are the same aspects that render it particularly damaging to privacy.[16]

16. It is also worth noting that the self-authenticating character of audio recordings is rapidly eroding as modern technology renders "deepfakes" ever more accessible and difficult to distinguish from

The majority's alternative-channels analysis is particularly concerning because it has no obvious limits. My colleagues suggest that their opinion will be cabined because they view section 165.540(1)(c) as an outlier among other states' limitations on recording conversations. But if it is enough to show that newsworthy information could be obtained by a particular method, the majority's rationale might well apply to Oregon's eavesdropping statute, or to narrower conversational privacy statutes adopted in other states. After all, eavesdropping and unannounced recording in non-public locations are also effective methods to gather information of public concern that cannot be otherwise obtained. Though the majority disavows the suggestion that its reasoning could be applied to strike down eavesdropping statutes, it is hard to see why the forty other states that have adopted more limited conversational privacy statutes are not vulnerable in light of today's opinion.

IV.

"[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991). In this case, we should simply sever the constitutionally suspect exceptions that Project Veritas challenges, and uphold the remainder of section 165.540(1)(c).

---

actual recordings. *See generally* Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 Cal. L. Rev. 1753, 1755-68 (2019).

Appendix B

Appendix A

States allowing recording without providing notice to or obtaining consent from the recording's subjects when created in a place where the subjects lack a reasonable expectation of privacy:

Alabama: Ala. Code §§ 13A-11-30, 13A-11-31; *Chandler v. Alabama*, 680 So. 2d 1018, 1026 (Ala. Crim. App. 1996)

Arizona: Ariz. Rev. Stat. Ann. §§ 13-3001(8), 13-3005(A)(2), 13-3012(9); *Arizona v. Hauss*, 142 Ariz. 159, 688 P.2d 1051, 1056 (Ariz. Ct. App. 1984)

Arkansas: Ark. Code Ann. §§ 5-16-101(a), (b), 5-60-120(a)

California: Cal. Penal Code § 632; *Flanagan v. Flanagan*, 27 Cal. 4th 766, 768, 117 Cal. Rptr. 2d 574, 41 P.3d 575 (2002); *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 117-18, 45 Cal. Rptr. 3d 730, 137 P.3d 914 (2006)

Colorado: Colo Rev. Stat. Ann. §§ 18-9-301(8), 18-9-304(1)(a)

Connecticut: Conn. Gen. Stat. Ann. § 53a-189a(a)(1); *Connecticut v. Panek*, 328 Conn. 219, 177 A.3d 1113, 1126 (Conn. 2018)

Delaware: Del Code Ann. tit. 11, §§ 2401(13), 2402(a)(1), (c)(4)

District of Columbia: D.C. Code §§ 23-541(2), 23-542(a)(1), (b)(3)

Appendix B

Florida: Fla. Stat. §§ 934.02(2), 934.03(1)(a), (2)(d); *McDonough v. Fernandez-Rundle*, 862 F.3d 1314, 1319 (11th Cir. 2017); *Florida v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985); *Dept. of Ag. & Con. Servs. v. Edwards*, 654 So. 2d 628, 632-33 (Fla. Dist. Ct. App. 1995)

Georgia: Ga. Code Ann. §§ 16-11-60(3), 16-11-62(1), 16-11-66(a); *Suggs v. Georgia*, 310 Ga. 762, 854 S.E.2d 674, 680 (Ga. 2021)

Hawaii: Haw. Rev. Stat. §§ 803-41, 803-42(a)(1), (b)(3)(A); *Hawaii v. Graham*, 70 Haw. 627, 780 P.2d 1103, 1110 (Haw. 1989)

Idaho: Idaho Code Ann. §§ 18-6701(2), 18-6702(1)(a), (2)(d)

Illinois: 720 Ill. Comp. Stat. Ann. §§ 5/14-2(a)(1), (2), 5/14-1(a), (d), (g)

Iowa: Iowa Code Ann. §§ 727.8(2), (3)(a), 808B.1(8), 808B.2(1)(a), (2)(c)

Kansas: Kan. Stat. Ann. § 21-6101(a)(4), (f)

Louisiana: La. Stat. Ann. §§ 15:1302(15), 15:1303(A)(1), (C)(4); *Marceaux v. Lafayette City-Par. Consol. Gov't*, 731 F.3d 488, 495 & n.5 (5th Cir. 2013)

Maine: 15 Me. Rev. Stat. §§ 709(4), (5), 710(1)

Maryland: Md. Code Ann., Cts. & Jud. Proc. §§ 10-401(13), 10-402(a)(1), (c)(3); *Agnew v. Maryland*, 461 Md. 672, 197 A.3d 27, 34-35 (Md. 2018)

Michigan: Mich. Comp. Laws §§ 750.539a, 750.539c, 750.539d(1), *Bowens v. Ary, Inc.*, 489 Mich. 851, 794 N.W.2d 842, 843-44 (Mich. 2011); *Kasper v. Rupprecht*, No. 312919, 2014 Mich. App. LEXIS 126, 2014 WL 265542, at *2 (Mich. Ct. App. Jan. 23, 2014) (per curiam); *Lewis v. LeGrow*, 258 Mich. App. 175, 670 N.W.2d 675, 684 (Mich. Ct. App. 2003); *Sullivan v. Gray*, 117 Mich. App. 476, 324 N.W.2d 58, 60-61 (Mich. Ct. App. 1982) (per curiam)

Minnesota: Minn. Stat. §§ 626A.01, 626A.02; *Minnesota v. Vaughn*, 361 N.W. 2d 54, 57-58 (Minn. 1985)

Mississippi: Miss. Code Ann. §§ 41-29-501(j), 41-29-531(e), 41-29-533(1); *Jackson v. Mississippi*, 263 So. 3d 1003, 1011 (Miss. Ct. App. 2018); *Ott v. Mississippi*, 722 So. 2d 576, 582 (Miss. 1998)

Nebraska: Neb. Rev. Stat. Ann. §§ 86-283, 86-290(1)(a), (2)(c); *Nebraska v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732, 735 (Neb. 1991)

Nevada: Nev. Rev. Stat. Ann. § 200.650; *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 969 P.2d 938, 940 (Nev. 1998)

New Hampshire: N.H. Rev. Stat. Ann. §§ 570-A:1(II), 570-A:2(I)(a); *Fischer v. Hooper*, 143 N.H. 585, 732 A.2d 396, 401 (N.H. 1999); *New Hampshire v. Lamontagne*, 136 N.H. 575, 618 A.2d 849, 851 (N.H. 1992)

New Jersey: N.J. Stat. Ann. §§ 2A:156A-2(b), 2A:156A-3(a), 2A:156A-4(d)

Appendix B

North Carolina: N.C. Gen. Stat. Ann. §§ 15A-286(17), 15A-287(a)(1)

North Dakota: N.D. Cent. Code Ann. §§ 12.1-15-02(1)(a), (3)(c), 12.1-15-04(5)

Ohio: Ohio Rev. Code Ann. §§ 2933.51(B), 2933.52(A)(1), (B)(4); *Ohio v. Childs*, 88 Ohio St. 3d 558, 2000- Ohio 425, 728 N.E.2d 379, 388 (Ohio 2000)

Oklahoma: Okla. Stat. Ann. tit. 13, §§ 176.2(12), 176.3(1), (2), 176.4(5); *K.F. v. Oklahoma*, 1990 OK CR 58, 797 P.2d 1006, 1007 (Okla. Crim. App. 1990)

Pennsylvania: 18 Pa. Cons. Stat. Ann. §§ 5702, 5703(1), 5704(4); *Commonwealth v. Mason*, 247 A.3d 1070, 1081 (Pa. 2021)

Rhode Island: R.I. Gen. Laws Ann. §§ 11-35-21(a)(1), (c)(3), 12-5.1-1(10)

South Carolina: S.C. Code Ann. §§ 17-30-10, 17-30-15(2), 17-30-20(1), 17-30-30(C)

South Dakota: S.D. Codified Laws §§ 23A-35A-1(6), (10), 23A-35A-20(1), (2); *South Dakota v. Owens*, 2002 SD 42, 643 N.W.2d 735, 753 (S.D. 2002); *South Dakota v. Braddock*, 452 N.W.2d 785, 788 (S.D. 1990)

Tennessee: Tenn. Code Ann. §§ 39-13-601(a)(1)(A), (b)(5), 40-6-303(14)

Texas: Tex. Penal Code Ann. § 16.02(b)(1), (c)(4); Tex. Code Crim. Proc. Ann. art. 18A.001(19)

Utah: Utah Code Ann. §§ 77-23a-3(13), 77-23a-4(1)(b)(i), (7)(b)

Virginia: Va. Code Ann. §§ 19.2-61, 19.2-62(A)(1), (B)(2)

Washington: Wash. Rev. Code Ann. § 9.73.030(1)(b); *Washington v. Roden*, 179 Wn.2d 893, 321 P.3d 1183, 1188 (Wash. 2014) (en banc); *Washington v. Kipp*, 179 Wn.2d 718, 317 P.3d 1029, 1034 (Wash. 2014) (en banc)

West Virginia: W. Va. Code §§ 62-1D-2(i), 62-1D-3(a)(1), (e); *West Virginia v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169, 187 (W. Va. 2007)

Wisconsin: Wis. Stat. Ann. §§ 968.27(12), 968.31(1)(a), (2)(c)

Wyoming: Wyo. Stat. Ann. §§ 7-3-701(a)(xi), 7-3-702(a)(i), (b)(iv)

States prohibiting recording without providing notice to or obtaining consent from the recording's subjects when created in a place where the subjects lack a reasonable expectation of privacy:

Alaska: Alaska Stat. Ann. §§ 42.20.390(9), 42.20.310(a)(1)

Kentucky: Ky. Rev. Stat. Ann. §§ 526.010, 526.020

Massachusetts: Mass. Gen. Laws Ann. ch. 272, § 99(B)(2), (4), (C)(1); *Curtatone v. Barstool Sports, Inc.*, 487 Mass. 655, 169 N.E.3d 480, 483 (Mass. 2021)

Montana: Mont. Code Ann. § 45-8-213(1)(c); *Montana v. DuBray*, 2003 MT 255, 317 Mont. 377, 77 P.3d 247, 263 (Mont. 2003); *Montana v. Lynch*, 1998 MT 308, 292 Mont. 144, 969 P.2d 920, 922 (Mont. 1998)

Oregon: Or. Rev. Stat. § 165.540(1)(c)

States without laws regarding the recording of in-person conversations:

Indiana, Missouri, New Mexico, New York, Vermont

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, PORTLAND DIVISION, FILED AUGUST 10, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

No. 3:20-cv-01435-MO

PROJECT VERITAS *et al.*,

Plaintiffs,

v.

MICHAEL SCHMIDT, IN HIS OFFICIAL CAPACITY AS MULTNOMAH COUNTY DISTRICT ATTORNEY, ***et al.***,

Defendants.

OPINION AND ORDER

MOSMAN, J.,

Project Veritas and Project Veritas Action Fund (collectively, "Project Veritas") are non-profit national media organizations engaging "almost exclusively in undercover investigative journalism." Compl. [ECF 1] ¶¶ 1, 11. They "rely primarily on secret audiovisual recording to obtain stories of public interest about corruption, fraud, waste, and abuse." *Id.* ¶ 20. Project Veritas's stories

"have garnered national attention, with many garnering hundreds of thousands of views and some receiving over ten million views." *Id.* ¶ 3. They challenge the constitutionality of various provisions of Oregon's recording statute, Or. Rev. Stat. § 165.540. Multnomah County District Attorney Michael Schmidt and Oregon Attorney General Ellen Rosenblum (collectively, "Defendants") move to dismiss all three of Project Veritas's claims. At oral argument, I denied Defendants' motion as to Project Veritas's Third Claim challenging the distribution prohibition. I now GRANT their motion as to the other two claims.

BACKGROUND

I. Oregon's Recording Statute

This dispute centers around Oregon's recording statute, Or. Rev. Stat. Ann. ("Or. Rev. Stat.") § 165.540 (West 2020). It was enacted in 1955 as an anti-wiretapping law, and amended in 1959, 1961, 1983, 2001, and 2015 to add the provisions central to the case before me.[1] Specifically at issue in this case is the law's general prohibition on secret recording in section 165.540(1)(c). Section 165.540(1)(c) generally prohibits recording of conversations "if not all participants in the conversation are specifically informed that their conversation is being obtained." This general

1. Or. Rev. Stat. § 165.540 was also amended in 2021. *See* 2021 Or. Laws Ch. 357, §§ 1-2. However, the parties cite and rely on the 2020 version and did not inform the court in any way of the recent amendments. So, I too cite to the 2020 version for purposes of this opinion. The 2021 amendments do not alter the language of the 2020 version of the statute in a way that changes its meaning or my analysis.

prohibition is subject to several exceptions, which fall into two categories: exceptions that allow surreptitious recording of a conversation, and exceptions that allow open recording of a conversation without specifically informing the participants.

There are two exceptions to the general prohibition on surreptitious recording. First, one may secretly record in one's home. *Id.* § 165.540(3). Second, one may secretly record "a conversation during a felony that endangers human life." *Id.* § 165.540(5)(a).

For purposes of this challenge, there are two exceptions that permit open recording. First, the law-enforcement exception allows a person to record

> a conversation in which a law enforcement officer is a participant, if: (A) The recording is made while the officer is performing official duties; (B) The recording is made openly and in plain view of the participants in the conversation; (C) The conversation being recorded is audible to the person by normal unaided hearing; and (D) The person is in a place where the person lawfully may be.

Id. § 165.540(5)(b). Second is what is most simply referred to as the public-meetings exception, which exempts from the general prohibition

> persons who intercept or attempt to intercept with an unconcealed recording device the oral communications that are part of any of the

> following proceedings: (a) Public or semipublic meetings such as hearings before governmental or quasi-governmental bodies, trials, press conferences, public speeches, rallies and sporting or other events; (b) Regularly scheduled classes or similar educational activities in public or private institutions; or (c) Private meetings or conferences if all others involved knew or reasonably should have known that the recording was being made.

Id. § 165.540(6).

Finally, relevant to this case is the prohibition of the distribution of illegally obtained recordings. The distribution prohibition provides that a person may not "[o]btain the whole or any part of a conversation . . . from any person, while knowing or having good reason to believe that the conversation . . . was initially obtained in a manner prohibited by [the general prohibition]," *id.* § 165.540(1)(d), or [u]se or attempt to use, or divulge to others, any conversation, telecommunication or radio communication obtained by any means prohibited by [the general prohibition]," *id.* 165.540(1)(e). A violation of the statute is a Class A misdemeanor. *Id.* § 165.540(8).

II. Project Veritas's First Amendment Challenge

Project Veritas wants to engage in undercover journalism that could result in criminal charges under the recording statute. Project Veritas asserts that, based on experience, "announcing their recording efforts has caused individuals to refuse to talk or to even distort

their story," hindering their ability to "exercise their First Amendment rights to engage in undercover newsgathering and journalism in Oregon." Compl. [ECF 1] ¶¶ 5, 21. In Project Veritas's view, "[o]nly one method allows them to exercise their First Amendment rights safely and effectively: secret recording." *Id.* ¶ 7. Accordingly, Project Veritas brings this case to challenge the constitutionality of the recording statute.

If not for the recording statute, Project Veritas "would engage in several journalism projects in the state immediately and in the years to come." *Id.* ¶ 27. Specifically, Project Veritas wishes to investigate "the dramatic rise in violent protests in Portland between the police and members of Antifa and other fringe groups." *Id.* ¶ 29. They also seek to "investigate allegations of corruption at the offices of the Oregon Public Records Advocate and the Public Records Advisory Council" in light of the 2019 resignation of the Oregon Public Records Advocate. *Id.* ¶ 28. They seek to conduct such investigations using methods prohibited by the statute. *Id.* ¶¶ 27-29.

STANDARD OF REVIEW

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

Appendix C

Review on a motion to dismiss is normally limited to the complaint itself. If the court relies on materials outside the pleadings to make its ruling, it must treat the motion as one for summary judgment. Fed. R. Civ. P. 12(d); *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). But the court may "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *Ritchie*, 342 F.3d at 908. Here, Project Veritas attaches to their complaint a video exemplar and a narrative document illustrating their journalism activities. Although neither one ends up affecting my analysis, I may consider both at the motion to dismiss stage.

DISCUSSION

Project Veritas brings facial and as applied challenges to the recording statute. They contend that the recording statute violates their First Amendment rights in three ways: (1) the general prohibition against secret recording is unconstitutional as a general rule; (2) the general prohibition against secret recording, in light of the felony exception and the law-enforcement exception, unconstitutionally favors some recording of police but disfavors all other recording; and (3) the distribution prohibition impermissibly punishes publishers of information. Compl. [ECF 1] ¶¶ 39-51.[2] I have already

2. After paragraph 48, the Complaint restarts its numbering at one. For clarity, I cite to the paragraph numbers as if continuous.

decided Project Veritas's challenge to the distribution prohibition can go forward. I now must answer whether the challenges to the general prohibition, considering its exceptions, present tenable constitutional claims.

I. Protected Speech

Project Veritas's claims center around their asserted First Amendment right to surreptitiously record. I must first consider whether this activity is protected by the First Amendment. The Ninth Circuit has recognized that the First Amendment protects audiovisual recordings "as recognized organs of public opinion and as a significant medium for the communication of ideas." *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018) (alteration accepted) (internal quotation marks and citation omitted). Similarly, the creation of audiovisual recordings is protected as "purely expressive activity" because "the recording process is itself expressive and is inextricably intertwined with the resulting recording." *Id.* at 1204 (internal quotation marks and citation omitted). Because the recording statute either directly or indirectly restricts these rights, it must withstand constitutional scrutiny.

II. Levels of Scrutiny

In First Amendment cases, the level of scrutiny under which a law is analyzed hinges on whether the law is content based or content neutral. In this case, two doctrines may apply: strict scrutiny or intermediate scrutiny.

If a law is content based, strict scrutiny applies. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Strict scrutiny is the most heightened form of review; to survive, a law must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Wasden*, 878 F.3d at 1204 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)). "Strict Scrutiny is 'an exacting test' requiring 'some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve the goal.'" *Id.* at 1204 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 680, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. If the law is not facially content based, it may nevertheless be content based if it is justified with reference to content. *Bartnicki v. Vopper*, 532 U.S. 514, 526, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001). A law that differentiates based on speakers is also content based if speakers are a proxy for content. *Turner*, 512 U.S. at 658.

On the other hand, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Id.* at 642 (internal citation omitted). There are several variations of intermediate scrutiny that come up in First Amendment cases. For laws regulating conduct that have an incidental burden

on speech, the *O'Brien* test applies. *See, e.g., id.* at 662 (citing *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)). Under the *O'Brien* test, a content-neutral regulation is valid "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. For speech taking place in certain forums, courts apply a speech-forum analysis.[3] Under this test, a "time, place, or manner" restriction is constitutional if it is "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (internal quotation marks and citation omitted). Narrow tailoring here requires that the law not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 799. But "it need not be the

3. Although this analysis seems to have been initially limited to regulations of speech occurring in public forums, *e.g., Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680-81, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992), it has also been applied, without explanation, to speech in private forums, *see, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 56, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) (applying the time, place, and manner test and striking down a municipal sign ban that restricted sign postings on private properties); *see also* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783, 790 (2007).

least restrictive or least intrusive means of doing so." *Id.* at 798; *see also Hill v. Colorado*, 530 U.S. 703, 726, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) ("[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal."). In other contexts, the Supreme Court has cited the *Ward* time, place, and manner test, but then proceeded to engage in more of a balancing test. *See Bartnicki*, 532 U.S. at 521, 526-35; *see also* Bhagwat, *supra*, at 790 (noting that the Court in *Bartnicki* engaged "in a form of weighted balancing that seemed to strongly elevate free speech interests"). At least one commentator believes the Supreme Court and Courts of Appeals are trending towards a single intermediate scrutiny test in First Amendment cases. Bhagwat, *supra*, at 800-04. Regardless of the precise test being applied, it is clear that for a law to be upheld under an intermediate level of scrutiny it must be content neutral law, serve a significant/important/legitimate interest, and be sufficiently (narrowly, but not perfectly) tailored to that interest.

III. Whether the Recording Statute is Content Based

A. The General Prohibition

Project Veritas makes two arguments as to why the general prohibition in Or. Rev. Stat. § 165.540(1)(c) is content based. First, they contend the statute is facially content based because on its face, it restricts a particular medium of speech--surreptitious recording of

conversations. Pls.' Resp. [ECF 35] at 12-13. I reject this first argument. While it is correct that a medium of speech is generally restricted, that restriction applies across all topics, speakers, and interests. It does not single out any particular viewpoint or subject matter. While it is possible to imagine a statute that regulates a medium of speech as a proxy for a message--say banning mimeographed or photocopied articles as a way of getting at the samizdat in the former Soviet Union--this is not such a case.

Project Veritas's second but related argument looks to the purported justification or purpose of the statute. They argue that section 165.540(1)(c) is justified by reference to content, *see Bartnicki*, 532 U.S. at 526, because the purpose of the law is to change the content of the recorded conversations. Pls.' Resp. [ECF 35] at 14. By notifying someone you are recording, they contend, you are necessarily changing the content of the conversation because the speaker will be less candid. *Id.* Defendants, on the other hand, assert the purpose of the recording statute is not to change the content of conversations, but rather to "protect[] Oregonians' right not to be recorded without their knowledge." Defs.' Mot. Dismiss [ECF 34] at 7. Neither side cites any legislative history that discusses the purpose of the statute, nor does there appear to be any. *See State v. Neff*, 246 Ore. App. 186, 265 P.3d 62, 66 (Or. Ct. App. 2011) (en banc).

One way to resolve this argument is to look at who has the burden of proof. If Project Veritas wants to make a claim based on this argument, the burden is on them to show that the law's purpose is what they say it is. They

have not done so. In cases like this, the law does not allow a plaintiff to make up a purpose out of whole cloth. Grounded in that, Defendants win. Another way to think about this is, without legislative history, a court is left to determine who has the more plausible explanation of the legislature's purpose. I find it completely implausible that in 1961 the recording statute was amended to include the general prohibition before me as some subtle attempt to influence people's speech while being recorded. So, Project Veritas's argument loses on this ground, too.

The general prohibition is content neutral. Still, I must ask whether the law's exceptions transmogrify it into one that is content based.

B. Exceptions to the General Ban

Project Veritas argues that three of the exceptions to the general prohibition are content based: the felony exception, the public-meetings exception, and the law-enforcement exception.[4] These exceptions make distinctions based on speaker identity or the nature of the event being recorded or both. Project Veritas argues that these are impermissible distinctions based on the content of the audio recordings.

In *Reed*, the Supreme Court found a sign code that imposed more stringent restrictions on some categories of signs was a facially content-based regulation. 576 U.S.

4. Project Veritas concedes that the other exception to the general prohibition on surreptitious recording--recording in one's home--is content neutral. *See* Pls.' Resp. [ECF 35] at 12 n.1.

at 159. The sign code at issue prohibited the display of outdoor signs without a permit. *Id.* Presumably, this general prohibition did not violate the First Amendment, but several categories of signs were exempted from this requirement, including ideological signs, political signs, and "Temporary Directional Signs Relating to a Qualifying Event." *Id.* at 159-60. Among these categories, ideological signs were treated most favorably, political signs were treated less favorably, and temporary directional signs were treated the least favorably. *Id.* A local church wishing to advertise the time and location of its Sunday services challenged the sign code. *Id.* at 161. The Court rejected the Court of Appeals' analysis that these were only speaker-based and event-based restrictions and therefore content neutral. *Id.* at 169. It found that the sign code's category-based distinctions were not speaker based, although it also reiterated that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Id.* at 169-70 (quoting *Turner*, 512 U.S. at 658)). Instead, it found the sign code was content based because the different categories of restrictions were based on the particular message being conveyed: the time and location of a specific event. *Id.* at 170-71.

More recently, in *Wasden*, the Ninth Circuit found an "ag-gag statute" that prohibited "making audio or video recordings of the 'conduct of an agricultural production facility's operations'" without consent was content based because it effectively "prohibit[ed] the recording of a defined topic." 878 F.3d at 1203-04 (quoting Idaho Code § 18-7042(1)(d)).

With these principles in mind, I examine each of the challenged exceptions to the recording statute's general prohibition in turn.

1. Felony Exception

The felony exception permits surreptitious recording during a felony that endangers human life. Project Veritas argues that this exception is content based because it is precisely dependent on the content obtained: a felony that endangers human life. Pls.' Resp. [ECF 35] at 13. Moreover, Project Veritas argues that the justification of the law is content based given the Defendants' statement that the felony exception furthers the important state interest of "gathering evidence to allow the prosecution of a serious crime." *Id.* (quoting Defs.' Mot. Dismiss [ECF 34] at 11). I disagree.

There is no discernable content at issue with this exception. The content obtained via a recording during a felony that endangers human life could include innumerable potential topics, viewpoints, and speakers. While it is true that this exception is triggered by a particular kind of event, that event seems disconnected from any particular type of content. There is also no identifiable category of speakers targeted by this exception that is at all related to any specific message or idea. This is distinguishable from *Wasden*, where every banned recording would have involved a distinct topic. Accordingly, the felony exception is content neutral and does not alter the otherwise content-neutral general prohibition.

2. Public-Meetings Exception

The public-meetings exception allows recording with an unconcealed device in, essentially, various situations where there is a reasonable expectation that the conversations would be recorded. Put another way, it allows recording when there is no, or at least a very diminished, expectation of privacy. It is the broadest exception in the recording statute, capturing settings like sporting events, public speeches, regular educational activities, and even some private meetings.

In their brief, Project Veritas argues that this exception is content based because it allows open recording at "government-favored events" while disallowing open recording in "similarly situated circumstances." Pls.' Resp. [ECF 35] at 22. According to Project Veritas, one example of the law's disparate treatment is that it allows one to "record a celebrity offering makeup tips at a press conference . . . but one may not ask her questions about her recent drug arrest on the crowded streets of Portland without specifically informing her." *Id.* The effect of this exception, so the argument goes, is to inhibit "[s]pontaneous, effective undercover journalism." *Id.* At oral argument, Project Veritas walked away from this argument and conceded that this exception was content neutral.

To the extent Project Veritas is still relying on the arguments in their brief, I disagree. This is a classic time, place, manner exception that allows more speech in forums that are typically used for expressive activities. In no way

does the exception mention the *type* of meeting, event, speech, class, or sporting game that must occur for it to apply, precisely because it does not matter. The exception also goes hand-in-hand with the tailoring of the law—where the government's interest in protecting individual privacy is weaker, the law allows open recording. In fact, Project Veritas's own hypothetical highlights this. The proffered celebrity would have a much more heightened sense of personal privacy when interrogated alone on the street than she would at a press conference. And while Project Veritas attempts to inject subject matter into their hypothetical, it is clear the law would not care if the press conference involved the celebrity's recent drug arrest and the sidewalk interrogation was a fan seeking makeup tips. The exception is content neutral.

3. Law-Enforcement Exception

Finally, the law-enforcement exception allows open recordings of any conversation involving a law enforcement officer performing their official duties. Project Veritas argues this exception impermissibly discriminates based on speaker, "allowing the public to more easily record the police while disfavoring similar recordings of other government agents." Pls.' Resp. [ECF 35] at 21.

At first blush this exception does appear to impermissibly distinguish based on speaker. It is expressly limited to conversations where a law enforcement officer is a speaker in the context of his or her official duties. However, as Defendants argue, government speech is analyzed differently in the First Amendment context.

Although neither side cites any precedent for the precise issue in this case—whether a law can allow private citizens to *acquire* government speech more easily than other speech within a statutory scheme that otherwise places restrictions on private speech--there are several contexts in which courts take a different approach in First Amendment cases where the government, as opposed to a private citizen, is the speaker.

First, government speech is generally not subject to First Amendment challenges because when the government speaks, it is free "to select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009). Second, for First Amendment claims brought pursuant to 42 U.S.C. § 1983, courts "have set a high bar when analyzing whether speech by government officials is sufficiently adverse to give rise to a First Amendment retaliation claim" given the competing First Amendment rights of government officials and the importance of allowing them to engage in speech without "interfering with their ability to effectively perform their duties." *Mulligan v. Nichols*, 835 F.3d 983, 989 (9th Cir. 2016). And third, courts treat government speech differently in compelled speech cases because "[c]ompelled support of government—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005) (internal quotation marks). Furthermore, treating government speech differently does not run afoul of the first principles of the First Amendment. The government

subjecting *itself* to greater public scrutiny than private actors seems almost the opposite of the harm the First Amendment is designed to protect against. *See, e.g., Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011) ("[T]here is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs . . . ." (internal quotation marks and citation omitted)). Moreover, the government, unlike private citizens, is accountable to the political process. *See, e.g., Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208, 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015) (reasoning that the government's freedom to speak without being barred by the First Amendment "in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech").

Given the distinct nature of government speech, I find it is appropriate to treat the acquisition of government speech under the recording statute differently.[5] That

5. *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335, 207 L. Ed. 2d 784 (2020), is not to the contrary. In *Barr*, the Supreme Court was faced with a statute that barred all robocalls to cell phones, except for robocalls to collect government debt. *Id.* at 2346. The Supreme Court rejected the Government's argument that this was a content-neutral, speaker-based distinction and instead found it was content based because it "favor[ed] speech made for collecting government debt over political and other speech." *Id.* at 2346-47. Further, the exception "undermine[d] the credibility of the Government's interest in consumer privacy." *Id.* at 2348 (internal quotation marks and citation omitted). The Court did not mention government speech at all, likely because robocalls regarding

the recording statute facilitates some of its own speech through the law-enforcement exception does not render content based the otherwise content-neutral general prohibition.

C. Conclusion

I find both the recording statute's general prohibition and its exceptions are content neutral. The law does not require nor prohibit recording of particular ideas or points of view. Those wishing to record conversations are free to record any type of conversation, within the parameters of the various content-neutral exceptions. Therefore, to be constitutional the law must only withstand intermediate scrutiny.

IV. Application of Intermediate Scrutiny

A. Which Test Applies

As I previously discussed, there are various versions of intermediate scrutiny that apply depending on how the challenged law impacts protected speech. The recording statute directly restricts expressive activity: surreptitious recording. *See Wasden*, 878 F.3d at 1204. It is not a law that regulates conduct with only incidental impacts on speech. Thus, the *O'Brien* test is inapplicable. While most cases applying the time, place, manner test involve regulation

---

government debt would come from private, debt-collecting entities. The law-enforcement exception here is distinct from the government-debt robocall exception. It is specifically aimed at government speech and first principles of the First Amendment are not offended.

of speech on public forums, as I previously noted, this test has also been applied to regulations of speech on private property. *See, e.g., Gilleo*, 512 U.S. at 56. So, as the parties seem to indicate in their briefing, the time, place, manner test is likely applicable, at least in part, to this case. In any event, the intermediate scrutiny analysis is very similar irrespective of the precise test applied: I must examine whether the government has asserted a significant interest to regulate, and then whether the law is sufficiently tailored to that interest. The latter question requires me to look at whether the law is underinclusive or overinclusive. For intermediate scrutiny, some amount of under or overinclusiveness does not automatically render the law invalid. *See, e.g., Ward*, 491 U.S. at 799 (narrow tailoring for the time, place, and manner test requires that the law does not "burden substantially more speech than is necessary to further the government's legitimate interests").

B. Application of Intermediate Scrutiny

1. Governmental Interest

The asserted government interest is safeguarding individual privacy. Defs.' Mot. Dismiss [ECF 34] at 7. Project Veritas agrees that "privacy is an important governmental interest." Pls.' Resp. [ECF 35] at 19. And the Supreme Court has held "[p]rivacy of communication is an important interest." *Bartnicki*, 532 U.S. at 532. In fact, "the fear of public disclosure of private conversations might well have a chilling effect on private speech." *Id.* at 533.

2. Tailoring

The question of tailoring requires me to look at whether the law is underinclusive or overinclusive to achieve the government's stated interest. Project Veritas argues that the recording statute "is not narrowly tailored due to underinclusiveness" in two ways. Pls.' Resp. [ECF 35] at 18. First, it "restricts one from obtaining or using most of one's own conversations via audio device without notice while permitting the acquisition of the same, exact conversation in most other media without notice." *Id.* Second, it "regulat[es] how one obtains his own conversation far more strenuously than how one obtains the conversation of others." *Id.* I address each argument in turn.

I am unpersuaded by their first argument. It is unclear what "other media" could be used to obtain conversations under this statute, and Project Veritas gives no examples. Further, it makes sense to treat the real-time quality of audio recording differently in terms of the government's interest in protecting individual privacy. I thus find the statute is not impermissibly underinclusive in this regard.

Project Veritas's second argument as to tailoring requires me to interpret and compare another Oregon law, the eavesdropping statute, which states:

> any person who willfully intercepts, attempts to intercept or procures any other person to intercept or attempt to intercept any wire or oral communication where such person is not

> a party to the communication and where none of the parties to the communication has given prior consent to the interception, is guilty of a Class A misdemeanor.

Or. Rev. Stat. § 165.543(1) (2019). "Intercept" is defined as "the acquisition, by listening or recording, of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other device." Or. Rev. Stat. § 133.721(5). "Oral communication" is defined in part as any "oral communication, other than a wire or electronic communication, uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." *Id.* § 133.721(7)(a).

Because the eavesdropping statute is essentially limited to scenarios where the communicator has an expectation of privacy, Project Veritas argues that it is easier to record a third party's conversation than it is to record one's own conversation. Pls.' Resp. [ECF 35] at 18-19. This dichotomy, according to Project Veritas, makes the recording statute underinclusive because it is more restrictive of speech in situations where there is a lower expectation of privacy. *Id.* at 16-17, 19. Project Veritas's argument rests on interpreting the recording statute as governing only the recording of conversations where the recorder is a party. I begin my analysis with this underlying premise.

Looking at the plain language of the general prohibition, as well as its context, I reject Project Veritas's

reading of the recording statute. The general prohibition in section 165.540(1)(c) prohibits a person from "obtain[ing] or attempt[ing] to obtain the whole or any part of *a conversation . . . if not all participants in the conversation* are specifically informed that *their conversation* is being obtained." (emphasis added). There is no requirement that the person who seeks to obtain the conversation be a party to the conversation. In fact, the plain language belies any such requirement. The prohibition does not say "*my* conversation" or "*your* conversation"; it says, "*the* conversation." The exceptions to the general prohibition also support this reading. For example, the felony exception allows surreptitious recording "during a felony that endangers human life." Or. Rev. Stat. § 165.540(5)(a). There is no mandate that the recorder be a victim of, party to, or otherwise involved with such an event. Similarly, the public-meetings exception specifically includes things like "public speeches, rallies and sporting . . . events." *Id.* § 165.540(6)(a). Those are not the types of settings where it is likely the recorder would be in a direct conversation with the speaker--it is much more likely that they would be an observer to a conversation between the speaker and a large group or the speaker and another individual.

Still, if this reading of the recording statute renders the eavesdropping statute meaningless, then Project Veritas's argument may have some merit. I find it does not. The eavesdropping statute prohibits one to "intercept" a third party's oral communication. *Id.* § 165.543. "Intercept" is defined as "the acquisition, by *listening or recording* . . . ." *Id.* § 133.721(5) (emphasis added). The recording statute, on the other hand, does not cover listening, only

recording. Under the recording statute, one may lawfully listen to the secrets told by a celebrity to her friend while whispering on a sidewalk, but that same conduct might be unlawful under the eavesdropping statute. Thus, while the recording statute may have the effect of limiting the scope of the eavesdropping statute, it does not render the eavesdropping statute entirely superfluous. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144, 122 S. Ct. 593, 151 L. Ed. 2d 508 (2001) ("[T]his Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases."); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) ("Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." (internal citation omitted)); *State v. Cloutier*, 351 Ore. 68, 261 P.3d 1234, 1250 (Or. 2011) ("We wish to be clear that the fact that a proposed interpretation of a statute creates some measure of redundancy is not, by itself, necessarily fatal" and "may be what the legislature intended."). Accordingly, I find the statute is not impermissibly underinclusive in this regard either.

In their brief, Project Veritas also argues the recording statute is not narrowly tailored because it is overinclusive. Pls.' Resp. [ECF 35] at 24. As to the public-meeting and law-enforcement exceptions, they argue that, despite there being diminished privacy interests in the settings captured by these exceptions, any recording must be done openly or with an unconcealed recording device. *Id.* They also argue the law is overinclusive in that it prohibits surreptitious recording "in places where

one voluntarily exposes communications to others" and therefore "lacks a reasonable expectation of privacy." *Id.* However, at oral argument Project Veritas walked away from this theory, instead arguing that--given the interplay with the eavesdropping statute--the recording statute protected the *least* the conversations where the privacy value is higher and protects the *most* the conversations where the privacy value is lower.

Project Veritas is correct that there are some possible applications of the recording statute that would be overinclusive. That is, there are some potential conversations that despite a very diminished privacy interest in the content of that conversation, a person would be prohibited from recording without first specifically informing the participants. But the likelihood of the statute applying in such scenarios appears to be scant. For instance, at oral argument Defendants indicated that an argument between two people on the sidewalk may constitute a meeting and thus open recording without specifically informing would be permitted under the public-meetings exception. In fact, Defendants indicated that the public-meetings exception would cover many scenarios beyond just the briefest of encounters. While I find this argument to be a somewhat surprising reading of the text, I am satisfied that any potential overinclusiveness of the statute would be very limited. And of course, because I am applying intermediate scrutiny and not strict scrutiny, the law need not be perfectly tailored.

To the extent the time, place, manner test applies to some applications of the recording statute, it is also necessary to ask whether the law "leave[s] open

ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (internal quotations marks and citation omitted). This presents a framing question: must there be ample alternative channels for Project Veritas to surreptitiously record, to record generally, or to simply communicate the message they wish to communicate? I find the appropriate inquiry is whether there are alternative channels for Project Veritas to communicate the message they wish to communicate. *Menotti v. City of Seattle*, 409 F.3d 1113, 1138-39 (9th Cir. 2005) ("The Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." (quoting *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1170 (9th Cir. 2003)); *see also Hill*, 530 U.S. at 729 (explaining that an 8-foot restriction left "ample room to communicate a message," since "[s]igns, pictures, and voice itself can cross an 8-foot gap with ease"). For example, Project Veritas says they wish to "investigate allegations of corruption at the offices of the Oregon Public Records Advocate and the Public Records Advisory Council." Compl. [ECF 1] ¶ 28. So, the question is whether there are ample alternative ways they can do so--aside from undercover, investigative journalism in situations not covered by the statute's exceptions. I find that there are. Project Veritas may record any subject matter at any time if they inform the persons in the conversation. They may always openly record official law enforcement conduct. And they may always openly record public meetings and similar situations--an exception that

covers a broad array of settings. They may also engage in undercover investigations without audio recording. There are many alternatives to surreptitious recording, and, especially in light of the contravening First Amendment and privacy interests at play, those alternatives are adequate for Project Veritas to communicate their desired message. I therefore find this factor is satisfied.

C. Conclusion

I find the recording statute satisfies intermediate scrutiny because the statute does not burden substantially more speech than necessary to serve the government's interest in safeguarding individual privacy.[6]

V. Compelled Speech Argument

Finally, Project Veritas argues that the recording statute compels speech by, in most cases, requiring one wishing to record to specifically inform those they would be recording. Pls.' Resp. [ECF 35] at 15. This requirement, so Project Veritas asserts, "compels individuals to convey a particular message" that "hobbles newsgathering protected by the First Amendment." *Id.* I disagree.

This is a clear case of compelled speech incidental to valid regulation. *See Rumsfeld v. F. for Acad. &*

6. My opinion does not cover the 2021 amendments to the recording statute. Although on their face they seem squarely within my decision that the law is content neutral and sufficiently tailored to the government's important interest, I do not go so far as to so hold today.

Institutional Rts., Inc., 547 U.S. 47, 62, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (requiring a law school to send scheduling e-mails for military recruiters was incidental to the Solomon Amendment's valid regulation of conduct and therefore not impermissible compelled speech). Furthermore, the requirement to specifically inform is not a requirement to convey a particular message. It is merely a notice requirement.

CONCLUSION

For the reasons stated herein, I GRANT the Defendants' Motion to Dismiss [ECF 34] as to Project Veritas's Claims One and Two.

IT IS SO ORDERED.

DATED this 10 day of August, 2021.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 19, 2024

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-35271

D.C. No. 3:20-cv-01435-MO
District of Oregon,
Portland

PROJECT VERITAS; PROJECT VERITAS ACTION FUND,

Plaintiffs-Appellants,

v.

MICHAEL SCHMIDT, IN HIS OFFICIAL CAPACITY AS MULTNOMAH COUNTY DISTRICT ATTORNEY; ELLEN ROSENBLUM, IN HER OFFICIAL CAPACITY AS OREGON ATTORNEY GENERAL,

Defendants-Appellees.

Filed March 19, 2024

Appendix D

ORDER

MURGUIA, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion is vacated.

Judges Forrest and H.A. Thomas did not participate in the deliberations or vote in this case.

APPENDIX E — CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S.C.A. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix E

U.S.C.A. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix E

O.R.S. § 165.535 Definitions

As used in ORS 41.910, 133.723, 133.724, 165.540 and 165.545:

(1) "Conversation" means the transmission between two or more persons of an oral communication which is not a telecommunication or a radio communication, and includes a communication occurring through a video conferencing program.

(2) "Person" has the meaning given that term in ORS 174.100 and includes:

(a) Public officials and law enforcement officers of:

(A) The state and of a county, municipal corporation or any other political subdivision of the state; and

(B) A police department established by a university under ORS 352.121 or 353.125; and

(b) Authorized tribal police officers as defined in ORS 181A.940.

(3)(a) "Radio communication" means the transmission by radio or other wireless methods of writing, signs, signals, pictures and sounds of all kinds, including all instrumentalities, facilities, equipment and services (including, among other things, the receipt, forwarding

and delivering of communications) incidental to such transmission.

(b) "Radio communication" does not include a communication occurring through a video conferencing program.

(4)(a) "Telecommunication" means the transmission of writing, signs, signals, pictures and sounds of all kinds by aid of wire, cable or other similar connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, equipment and services (including, among other things, the receipt, forwarding and delivering of communications) incidental to such transmission.

(b) "Telecommunication" does not include a communication occurring through a video conferencing program.

(5) "Video conferencing program" means software or an application for a computer or cellular telephone that allows two or more persons to communicate via simultaneous video transmission.

Appendix E

O.R.S. § 165.540.
Obtaining whole or part of communication

(1) Except as otherwise provided in ORS 133.724 or 133.726 or subsections (2) to (8) of this section, a person may not:

(a) Obtain or attempt to obtain the whole or any part of a telecommunication or a radio communication to which the person is not a participant, by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, unless consent is given by at least one participant.

(b) Tamper with the wires, connections, boxes, fuses, circuits, lines or any other equipment or facilities of a telecommunication or radio communication company over which messages are transmitted, with the intent to obtain unlawfully the contents of a telecommunication or radio communication to which the person is not a participant.

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

(d) Obtain the whole or any part of a conversation, telecommunication or radio communication from any person, while knowing or having good reason to believe that the conversation, telecommunication

or radio communication was initially obtained in a manner prohibited by this section.

(e) Use or attempt to use, or divulge to others, any conversation, telecommunication or radio communication obtained by any means prohibited by this section.

(2)(a) The prohibitions in subsection (1)(a), (b) and (c) of this section do not apply to:

(A) Officers, employees or agents of a telecommunication or radio communication company who perform the acts prohibited by subsection (1)(a), (b) and (c) of this section for the purpose of construction, maintenance or conducting of their telecommunication or radio communication service, facilities or equipment.

(B) Public officials in charge of and at jails, police premises, sheriffs' offices, Department of Corrections institutions and other penal or correctional institutions, except as to communications or conversations between an attorney and the client of the attorney.

(b) Officers, employees or agents of a telecommunication or radio communication company who obtain information under paragraph (a) of this subsection may not use or attempt to use, or divulge to others, the information except for the purpose of construction, maintenance, or conducting of their

telecommunication or radio communication service, facilities or equipment.

(3) The prohibitions in subsection (1)(a), (b) or (c) of this section do not apply to subscribers or members of their family who perform the acts prohibited in subsection (1) of this section in their homes.

(4) The prohibitions in subsection (1)(a) of this section do not apply to the receiving or obtaining of the contents of any radio or television broadcast transmitted for the use of the general public.

(5) The prohibitions in subsection (1)(c) of this section do not apply to:

(a) A person who records a conversation during a felony that endangers human life;

(b) A person who records a conversation in which a law enforcement officer is a participant, if:

(A) The recording is made while the officer is performing official duties;

(B) The recording is made openly and in plain view of the participants in the conversation;

(C) The conversation being recorded is audible to the person by normal unaided hearing; and

(D) The person is in a place where the person lawfully may be;

(c)(A) A person who, pursuant to ORS 133.400, records an interview conducted by a peace officer in a law enforcement facility; or

(B) A person who, pursuant to ORS 133.402, records a custodial interview, as defined ORS 133.402;

(d) A law enforcement officer who is in uniform and displaying a badge and who is operating:

(A) A vehicle-mounted video camera that records the scene in front of, within or surrounding a police vehicle, unless the officer has reasonable opportunity to inform participants in the conversation that the conversation is being obtained; or

(B) A video camera worn upon the officer's person that records the officer's interactions with members of the public while the officer is on duty, unless:

(i) The officer has an opportunity to announce at the beginning of the interaction that the conversation is being obtained; and

(ii) The announcement can be accomplished without causing jeopardy to the officer or

any other person and without unreasonably impairing a criminal investigation; or

(e) A law enforcement officer who, acting in the officer's official capacity, deploys an Electro-Muscular Disruption Technology device that contains a built-in monitoring system capable of recording audio or video, for the duration of that deployment.

(6)(a) The prohibitions in subsection (1)(c) of this section do not apply to persons who intercept or attempt to intercept oral communications that are part of any of the following proceedings, if the person uses an unconcealed recording device or if the communications occur through a video conferencing program:

(A) Public or semipublic meetings such as hearings before governmental or quasi-governmental bodies, trials, press conferences, public speeches, rallies and sporting or other events;

(B) Regularly scheduled classes or similar educational activities in public or private institutions; or

(C) Private meetings or conferences if all others involved knew or reasonably should have known that the recording was being made.

(b) The prohibitions in subsection (1)(c) of this section do not apply to a person who, with the intent to

capture alleged unlawful activity, obtains or attempts to obtain a conversation occurring through a video conferencing program if the person is a participant in the conversation, or at least one participant in the conversation consents to the recording, and:

(A) The person is a law enforcement officer or is acting in coordination with a law enforcement officer;

(B) The person is acting in coordination with an attorney or an enforcement or regulatory entity; or

(C) The person reasonably believes that the recording may be used as evidence in a judicial or administrative proceeding.

(7) The prohibitions in subsection (1)(a), (c), (d) and (e) of this section do not apply to any:

(a) Radio communication that is transmitted by a station operating on an authorized frequency within the amateur or citizens bands; or

(b) Person who intercepts a radio communication that is transmitted by any governmental, law enforcement, civil defense or public safety communications system, including police and fire, readily accessible to the general public provided that the interception is not for purposes of illegal activity.

(8) The prohibitions in subsection (1)(d) and (e) of this section do not apply to a person who did not participate in initially obtaining the conversation, telecommunication or radio communication if the conversation, telecommunication or radio communication is regarding a matter of public concern.

(9) Violation of subsection (1) or (2)(b) of this section is a Class A misdemeanor.

(10) The exception described in subsection (5)(b) of this section does not authorize the person recording the law enforcement officer to engage in criminal trespass as described in ORS 164.243, 164.245, 164.255, 164.265 or 164.278 or to interfere with a peace officer as described in ORS 162.247.

(11) As used in this section:

> (a) "Electro-Muscular Disruption Technology device" means a device that uses a high-voltage, low power charge of electricity to induce involuntary muscle contractions intended to cause temporary incapacitation. "Electro-Muscular Disruption Technology device" includes devices commonly known as tasers.
>
> (b) "Law enforcement officer" has the meaning given that term in ORS 133.726.

Appendix E

O.R.S. § 133.721. Definitions

* * *

(5) "Intercept" means the acquisition, by listening or recording, of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device.

* * *

(7) "Oral communication" means:

(a) Any oral communication, other than a wire or electronic communication, uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation; or

(b) An utterance by a person who is participating in a wire or electronic communication, if the utterance is audible to another person who, at the time the wire or electronic communication occurs, is in the immediate presence of the person participating in the communication.

* * *

Appendix E

O.R.S. § 165.543. Interception of communications

(1) Except as provided in ORS 133.724 or as provided in ORS 165.540(2)(a), any person who willfully intercepts, attempts to intercept or procures any other person to intercept or attempt to intercept any wire or oral communication where such person is not a party to the communication and where none of the parties to the communication has given prior consent to the interception, is guilty of a Class A misdemeanor.

(2) As used in this section, the terms "intercept" and "wire or oral communication" have the meanings provided under ORS 133.721.