

No. 24-1061

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**

**BRIEF FOR THE RUTHERFORD INSTITUTE
AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

SUMMARY OF ARGUMENT

Project Veritas and Project Veritas Action Fund are nonprofit media organizations that engage in undercover investigative journalism. Project Veritas investigates matters of national public interest, including protests, labor union activities, and political campaigns. They sometimes use unannounced recordings in those investigations. Those recordings then allow Project Veritas investigators to capture their investigative target's unguarded conversations. This often results in revealing and newsworthy soundbites that Project Veritas publishes.

¹ No counsel for a party authored this brief in whole or in part, and no entity or person, other than Amicus Curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of Amicus Curiae's intent to file this brief at least 10 days prior to its due date.

Yet Project Veritas will not investigate undercover in Oregon. Why? Because under Oregon's recording laws, Project Veritas cannot "[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 not all participants in the conversation are specifically informed that their conversation is being obtained." Or. Rev. Stat. § 165.540(1)(c). The tool that allows Project Veritas to break important news stories could thus get its reporters prosecuted in Oregon.

Project Veritas challenged that statutory roadblock to its core mission as violating the First Amendment. In its en banc opinion, the Ninth Circuit upheld Oregon's law, holding it was both content neutral and somehow "narrowly tailored to serve a significant governmental interest" while "leav[ing] open ample alternative channels for communication of the information." *Project Veritas v. Schmidt*, 125 F.4th 929, 952 (9th Cir. 2025). But the Ninth Circuit ignored key First Amendment interests inherent in protecting speech mechanisms. Simultaneously, the Ninth Circuit deepened a circuit split on protecting recorded speech. The Ninth Circuit's threatens not just journalistic freedoms but also threatens justice for victims of a wide array of crimes and abuses by upholding laws that prohibit them from recording their abuse to use as evidence to prove their claims.

The Court should take this opportunity to clarify that the First Amendment protects an individual's right to record his or her own conversations without providing notice to other parties.

ARGUMENT

I. THE NINTH CIRCUIT FAILED TO RECOGNIZE FIRST AMENDMENT INTERESTS AT STAKE IN ONE-PARTY RECORDING

The First Amendment guarantees that “Congress shall make no law * * * abridging the freedom of speech.” “Laws enacted to control or suppress speech may operate at different points in the speech process.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 336 (2010). This Court has “voiced particular concern with laws that foreclose an entire medium of expression.” *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (collecting cases).

A. The First Amendment protects recordings.

As the court below recognized, the First Amendment protects recordings because they are speech. First Amendment protection inheres not only in speech itself but in tools that make speech possible. This includes rights to observe, preserve, and memorialize speech. That includes protecting methods of tattooing, because “the tattoo itself, the process of tattooing, and the business of tattooing are forms of pure expression fully protected by the First Amendment.” *Anderson v. Hermosa Beach*, 621 F.3d 1051, 1068 (9th Cir. 2010). And protecting methods of graffiti art because restricting those methods hindered “young adults’ access to the materials they need for their lawful artistic expression.” *Vincenty v. Bloomberg*, 476 F.3d 74, 89 (2d Cir. 2007).

Recordings, like tools of tattooing and graffiti, receive First Amendment protection. “The act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of

the right to disseminate the resulting recording.” *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). This Court recognized that surreptitiously recorded conversations receive First Amendment protection. *See Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001). This is particularly true in public-interest matters. Indeed, “[t]he right of privacy does not prohibit any publication of matter which is of public or general interest.” *Ibid.*

Courts of Appeals, including the Ninth Circuit, have repeatedly upheld individuals’ right to record public interactions. Though many such cases arose in public recordings of police officers, courts have emphasized a general right to record matters of public concern. *See Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a “First Amendment right to film matters of public interest”). Beyond recordings of police officers, the Ninth Circuit recognizes that laws limiting investigators’ ability to conduct secret recordings “regulates speech protected by the First Amendment.” *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018).

B. Strict scrutiny applies.

Because the First Amendment protects recordings, Oregon’s statute must pass constitutional muster. And as Oregon’s statute is content based, strict scrutiny applies. Oregon regulates one-party recording using pre-determined categories encompassing the type of conversation being recorded, including whether it took place during “a

felony that endangers human life,” or whether it was a “conversation in which a law enforcement officer is a participant” provided it was made “while the officer is performing official duties.” Or. Rev. Stat. § 165.540(5).

This regulation is content based, because it “cannot be justified without reference to the content of the regulated speech.” *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015) (internal quotations omitted). So an Oregon regulator faced with an allegedly impermissible recording cannot determine whether the regulation applies without considering the recording’s “communicative content.” *Ibid.*

In a similar case, *Animal Legal Defense Fund*, the Ninth Circuit held an Idaho law prohibiting secret recordings in agricultural facilities was content based, noting that the law at issue would “permit filming a vineyard’s art collection but not the winemaking operation. 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.” 878 F.3d at 1204.

So too here. A court must first listen to the recording and determine whether the Oregon statute permits its content. Let’s take Anna, who wants to prove that her partner Mike abuses her. Anna secretly records a conversation during which Mike assaults her. To determine whether Oregon law permits that recording, the court must listen to Anna’s recording and determine (1) whether Mike’s conduct is a felony or misdemeanor assault; and (2) whether that abuse rose to the level of endangering human life. Or. Rev. Stat. § 165.540(5). Under Oregon

law, assault in the fourth degree is a Class A misdemeanor. Or. Rev. Stat. § 163.160(2). But it becomes a felony if “the person commits the assault knowing that the victim is pregnant.” Or. Rev. Stat. § 163.160(3)(d). If the recording includes evidence that Mike knew Anna was pregnant, this may be crucial to whether the recording is permissible. That requires a court to consider the content, making the regulation content based. Strict scrutiny should apply. And under that level of scrutiny, no one can dispute that Oregon’s statute fails.

C. Oregon’s statute fails intermediate scrutiny.

Even assuming Oregon’s law is content neutral, it fails because it burdens more speech than necessary. A content-neutral regulation affecting speech survives only 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.” *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

First Amendment restrictions can burden speech more than necessary in many ways. For instance, buffer zones that prevent protesters from accessing public spaces outside abortion clinics burden more speech than necessary. *McCullen v. Coakley*, 573 U.S. 464, 497 (2014). Differential taxes on publications or even publication inputs, also impose impermissible First Amendment burdens. *Minneapolis Star and Trib. Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 592–593 (1983) (“A tax that singles out the press,

or that targets individual publications within the press, places a heavy burden on the State to justify its action.”); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (“selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State.”).

Here, Oregon’s regulation goes further than regulations this Court has struck down. It forbids an entire category of First Amendment-protected activity—recordings—if a single party makes them unannounced. This severely limits a recorder’s ability to capture unguarded admissions, threats, and other misconduct. Returning to Anna, if Mike’s assault does not amount to a felony that endangers her life, and Anna uses a recording to establish his criminal conduct, she risks being prosecuted for recording evidence of her abuse. Given the power of recordings in proving Anna’s allegations, a restriction based on the criminal classification of Mike’s abusive behavior burdens Anna’s speech far more than necessary.

D. The Ninth Circuit’s reasoning is overbroad and underinclusive.

In applying intermediate scrutiny, the court below concluded the law advanced a significant government interest in conversational privacy. *Project Veritas*, 125 F.4th at 952-953 The court worried about actors digitally manipulating records. *Id.* at 955. But at a broader level, the court concluded that Oregon had an interest in “ensuring that its residents retain control of their own speech,” and that undisclosed recordings violated that right by “enabl[ing] a party to disseminate another’s oral comments in a way the speaker did not intend.” *Ibid.*

The Ninth Circuit’s reasoning threatens to swallow the same First Amendment protections that it claims to recognize. Journalists use recording devices in their work to preserve information as accurately as possible. But in finding that Oregon has a compelling interest in regulating such recordings, the court relies in part on fear of a recorder manipulating information. The court was particularly concerned that “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.” *Id.* at 955.

That argument proves too much. Risk-free recording methods do not exist. All recording risks manipulation and information loss, including talking with sources and taking notes. Notes taken after conversations may be misremembered, illegible, lacking important context, or even lies. And lacking a full recording, there may be no means to check the handwritten notes’ accuracy. Such a rule directly conflicts with the recognized “First Amendment right to film matters of public interest.” *Fordyce*, 55 F.3d at 439. It limits the public to seeing only versions of events that speakers curate and approve. And this limits public access to potentially important information.

This does not deny the risks associated with secret recordings. Deepfakes or misleading edits may be published, causing reputation damage to speakers. But that can be done just as easily with consensual recordings or by obtaining audio of someone from other recordings. And victims of such dishonest publication have remedies. They may, for instance, sue for defamation. This reflects the “theory deeply

etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”).

To be sure, the Ninth Circuit’s reasoning might hold more weight if the recordings at issue came from eavesdropping—*i.e.*, *interceptions* where the person recording “is not a party to the communication and where none of the parties to the communication has given prior consent to the interception.” Or. Rev. Stat. § 165.543(1). In such a case, publishing a private conversation arguably interferes with the parties’ “freedom not to speak publicly.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985). But Project Veritas only releases conversations in which its own investigators participated. *Project Veritas*, 125 F.4th at 937–938. All-party consent laws, like Oregon’s, deprive the recording party of its right to publish its own conversations in favor of the preference of non-recording parties not to have their recorded statements shared. That is so even though a party to a conversation could still repeat anything another party said.

Recordings “may be subject to constraints imposed to vindicate weighty privacy interests, but only within the boundaries of First Amendment principle and practice. Those boundaries substantially narrow the legitimate scope of prohibitions” the State can impose on such recordings. Seth F. Kreimer, *Pervasive Image Capture*

and the First Amendment: Memory, Discourse, and the Right to Record, 159 U. Pa. L. Rev. 335, 393 (2011). The Ninth Circuit has gone too far in favoring the rights of non-speakers at the expense of speakers. This Court should correct that error.

II. ALL-PARTY CONSENT LAWS PUT VICTIMS AND POTENTIAL VICTIMS AT RISK

Although Project Veritas records conversations for journalistic purposes, many feel the fallout from laws like Oregon's. Recording restrictions prevent the public from gathering information that may protect individuals, inform policy, or reveal abuses. "The press does not have a monopoly on either the First Amendment or the ability to enlighten." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 782 (1978). All-party consent laws make it harder for private parties, and especially abuse victims, to document, reveal, and stop misconduct. By forcing victims to choose between recording proof of their victimization and avoiding prosecution, Oregon privileges the victimizer's right to privacy over the victim's right to justice.

Too many attempts to report crimes, harassment, and abuse fail from reliance on "he said, she said" evidence. That's true for domestic violence, sexual abuse, or other harassment victims. Would-be whistle-blowers may struggle to produce evidence of the misconduct which they seek to report. In Oregon, they also fear criminal prosecution for recording it. And vulnerable populations, including very young children, elderly, and disabled individuals, may lack the ability to report abuse at all.

Secret recordings like those Oregon prevents can prevent abuse or help ensure punishment when it occurs. Consider again Anna, who wishes to obtain a temporary restraining order against her partner,

Mike, and keep him from gaining custody of their children. A recording of Mike threatening or hitting her would likely be very powerful evidence in her favor. In a one-party consent state, Anna would simply press record. But in Oregon, before she does so, Anna must determine whether Mike is likely to commit a felony during his abuse, and if not, whether she is willing to take the risk that *she* will be prosecuted for recording her tormenter. All-party consent thus forces abuse victims, rather than perpetrators, to bear prosecution risk in proving their case. See John E.B. Myers, *California's Eavesdropping Law Endangers Victims of Domestic Violence*, 31 J. Marshall J. Info. Tech. & Privacy L. 57, 65-66 (2014).

This concern does not apply only in domestic violence cases—sexual harassment and workplace abuse victims face similar dilemmas. Sarah Morgado, *From “He Said, She Said” to “He Said, She-and-Her-Iphone-Said”*: *Florida’s All-Party Consent Requirement Needs an Update*, 14 FIU L. Rev. 677, 678-679 (2021). Whistleblowers who secure evidence of misconduct through unannounced recording risk prosecution. *Id.* at 698-699. This is particularly damaging in cases that “rely almost exclusively on undercover investigations to expose the widespread exploitation and abuse taking place behind closed doors.” Sarah Hanneken, *Principles Limiting Recovery Against Undercover Investigators in Ag-Gag States: Law, Policy, and Logic*, 50 J. Marshall L. Rev. 649, 711 (2017).

One-party recording also may help to prevent abuse. Many parents leave cameras in their homes to monitor those who care for their children. In many one-party consent states, nursing homes and other

long-term care facilities have passed legislation allowing recording devices in patients' rooms to monitor for abuse. Lysie Zona, *Retiring the One-Party Consent Statute for Long-Term Care Residents' Rooms*, 50 Ariz. St. L.J. 1347, 1364-1365 (2018). These laws allow recordings based on only the consent of the patient and any roommates they might have. *Ibid.* In an all-party consent state like Oregon, these recordings could not take place without every caregiver, family member, or friend's consent who might enter the room. But that requirement would defeat the recording's purpose—to deter abuse and to identify perpetrators when deterrence fails.

In each case, a recorder will not necessarily be a journalist. But the information provided may serve important public purposes. Whistleblower revelations may protect the public from abuses by companies or individuals. Harassment recordings may help to identify predators. Nanny cams and nursing home recordings may help care facilities identify dangerous employees and protect vulnerable populations.

Knowledge gleaned from such recordings may secure a legal outcome, promote policy changes, or deter abuse. But in all-party consent states like Oregon, abuse victims cannot use this powerful speech tool. In these states, abuser privacy wins. The First Amendment should not silence victims or shield information from the public. The Court should take this opportunity to clarify that individuals have a right to secretly record conversations to which they are a party.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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