

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 OF NORTH CAROLINA FARM BUREAU FEDERATION,
INC., MARYLAND FARM BUREAU, INC., NORTH CAROLINA
CHAMBER LEGAL INSTITUTE, NORTH CAROLINA DAIRY
PRODUCERS ASSOCIATION, NORTH CAROLINA PORK
COUNCIL, NORTH CAROLINA POULTRY FEDERATION, INC.,
AND SOUTH CAROLINA FARM BUREAU AS AMICI CURIAE IN
SUPPORT OF PETITIONER**

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QUESTION PRESENTED

The questions presented by petitioners are as follows:

Did the Ninth Circuit err by holding that Oregon's prohibition of unannounced recordings—which expressly exempts recordings of police activity and discussion 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?

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INTEREST OF THE *AMICI CURIAE*¹

North Carolina Farm Bureau Federation Inc. (NCFB) is North Carolina's largest general farm organization, representing approximately 35,000 farm families in every county of the State. The organization's volunteer-farmer members raise livestock and poultry and produce a diverse array of crops, such as tobacco, sweet potatoes, melons, cotton, soybeans, corn, and wheat. Farm Bureau's members are the backbone of the State's \$111.1 billion agricultural sector.

Maryland Farm Bureau, Inc. is the State's largest general farm organization with more than 7,000 individual and family members operating over 12,500 diverse farms ranging from livestock and flowers to dairies and grain. Originating in 1915, it is committed to protecting and growing agriculture and preserving rural life. The Maryland Farm Bureau speaks for its members on local and state regulatory matters and provides educational and training opportunities for farmers, farm suppliers and agricultural workers. Farm Bureau's members represent the State's number one commercial industry contributing over \$8 billion to the economy annually.

North Carolina Chamber Legal Institute is the leading business advocacy organization in North Carolina. It works in the legislative, regulatory, and political arenas to proactively drive positive change,

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief.

ensuring that North Carolina is one of the best places in the world to do business. Its members are the businesses—large and small, across every industry and region—that fuel North Carolina’s success.

North Carolina Dairy Producers Association (NCDPA) is the unified voice for the State’s dairy industry concerning issues that affect dairy farms and businesses. NCDPA strives to ensure the future presence of profitable and viable dairy farms in North Carolina by promoting, supporting, and advocating for the development, maintenance, and enhancement of dairy farms and the dairy industry.

North Carolina Pork Council is a nonprofit 501(c)(5) trade association established in 1962. It strives for a socially responsible and profitable North Carolina pork industry through advocacy, research, education, promotion, and consumer information programs and services.

Founded in 1968, the North Carolina Poultry Federation, Inc. (NCPF) is an organization dedicated to providing information, education, resources, and advocacy for the poultry industry and its members with the intent of creating a favorable climate for all companies involved in the production of poultry. NCPF serves producers and processors of chicken, turkey, and egg products, and acts as a voice of the industry, adopting best practices, and working with its 600 member companies, growers, and affiliates to promote safe standards and guidelines within the industry.

South Carolina Farm Bureau is a grassroots, nonprofit organization that celebrates and supports family farmers, locally grown food and rural lands through legislative advocacy, education and

community outreach. The organization, founded in 1944, serves nearly 90,000 member families in 47 chapters.

Thousands of *amici*'s members are farmers and other business people who have fundamental privacy and private property rights guaranteed by the Constitution that are violated by the investigative activities of animal rights, environmental, and other activists. Those activists frequently engage in clandestine operations in private areas of *amici*'s members' farms and businesses to obtain videos, photos, and other information in support of the agendas those parties seek to advance. The Ninth Circuit's decision deepens the split between the Circuits about how private property rights and other privacy interests are to be balanced against these undercover activities.

Indeed, the Ninth Circuit's decision is in several ways directly at odds with a recent Fourth Circuit decision—which itself created an intra-Circuit split—regarding the First Amendment protection, if any, to be afforded to clandestine investigative activities and the weight to be given long-enshrined constitutional privacy and property rights. *People for the Ethical Treatment of Animals v. North Carolina Farm Bureau*, 60 F.4th 815 (4th Cir.), cert. denied, 144 S. Ct. 325 (2023). NCFB intervened in the Fourth Circuit to defend the North Carolina law challenged in that case, and petitioned this Court for certiorari.

Amici each proactively participate as party litigants or *amici* where litigation involves issues that impact their members' interests. To that end, *amici* offer insights to aid this Court's consideration of Project Veritas' petition for certiorari. Although *amici* disagree with petitioners on the merits, they file this brief because the petition squarely presents a

question of great importance to *amici*'s members on which the courts are in disarray, which deserves this Court's attention.

INTRODUCTION AND SUMMARY OF ARGUMENT

Project Veritas' petition squarely presents an important question at the intersection of core American constitutional values: the right of individuals to safeguard their privacy and the extent to which the First Amendment protects unauthorized undercover activities carried out in the name of "newsgathering."

The Ninth Circuit's decision highlights the confusion and inconsistent results among the Circuit Courts that have grappled with how to balance those rights and to apply this Court's decisions such as *Branzburg*, *Zemel*, and *Cowles*, which establish First Amendment parameters on clandestine activities.

The Ninth Circuit here balanced these competing rights to privacy and freedom of speech and press. It granted a degree of First Amendment protection to those who, in the name of newsgathering, make surreptitious recordings. But it nonetheless upheld Oregon's law under intermediate scrutiny by giving significant weight to the privacy interests Oregon sought to protect.

By contrast, in striking down a North Carolina law of general applicability meant to protect individuals' privacy and property rights, the Fourth Circuit in *People for the Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau*, 60 F.4th 815 (4th Cir. 2023), declined to follow its own longstanding precedent—*Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), which held that double-agent television reporters had *no* First Amendment

protection against the application of generally applicable laws to their actions. A divided panel of the Fourth Circuit instead held that a North Carolina law prohibiting, among other things, unauthorized recordings in the private areas of a person’s property, was subject to strict scrutiny. And in *National Press Photographers Ass’n v. McCraw*, 90 F.4th 770, 790 (5th Cir. 2024), the Fifth Circuit relied on Judge Rushing’s dissent in *PETA* and, out of “an abundance of caution,” applied intermediate scrutiny in upholding a Texas law prohibiting use of drones to film private individuals without their consent.

Together, the decisions of the Circuits are inconsistent and uneven in their application of this Court’s precedent. The consequences of this confusion are severe and far-reaching. Private property owners and other individuals in some States, such as those in the Fourth Circuit, are now potentially left without any civil remedy against privacy invasions and trespasses by individuals so long as the invaders claim they were attempting to gather news. Would-be newsgatherers are emboldened in those States to conduct clandestine surveillance and record private conversations and images to advance their agendas.² In other States, however, similarly situated private individuals and

² For example, in 2021, while the law at issue in *PETA* was enjoined by the district court, an animal rights organization investigator worked as a double agent in a chicken processor’s hatchery in North Carolina. The investigator’s work provided another organization with private information about the processor’s business operations that was used by that organization in litigation against the processor. *Legal Impact for Chickens v. Case Farms, LLC*, N.C. Ct. App. No. COA24-672, Record on Appeal at 118-119.

property owners are protected by state law against such infringements of their privacy and property rights.

States themselves are left uncertain whether and how they can enact legislation to address their citizens' specific privacy concerns. Indeed, in recent years several other States have passed laws addressing invasions of privacy and property interests as a matter of general application,³ but the evident and deepening confusion of the Circuits over the balance between privacy and property rights, on the one hand, and the general interest in free speech and newsgathering efforts, on the other, casts all such existing laws and future lawmaking in doubt.

This Court's guidance is all the more important now, as undercover investigators have ever more advanced surveillance tools at their disposal; there is an urgent need to clarify the permissible limits of their methods. And perhaps most importantly, the respective rights of businesses and individuals in their privacy and purported newsgatherers to free speech should not vary Circuit-to-Circuit and State-to-State.

Project Veritas' petition offers the perfect vehicle to resolve the tension between privacy rights and First Amendment interests and clarify the relationship between those core values.

³ See, *e.g.*, Ark. Code Ann. § 16-118-113 (Arkansas law prohibiting accessing private property to record images or sounds that damage property owner); Cal. Civil Code § 1708.8(a) (California law providing for enhanced penalties for individuals who invade privacy of others); 720 Ill. Comp. Stat. Ann. 5/21-7(a) (Illinois law prohibiting trespass in sensitive, crowded spaces).

ARGUMENT

The Circuits Are In Disarray Over How To Apply This Court’s Precedent Balancing Privacy Rights Against Newsgatherers’ Interests In Secret Recordings.

The Ninth Circuit’s decision amplifies the deepening split over the application of First Amendment scrutiny to undercover efforts and secret recordings of private individuals and businesses. As the Fifth Circuit recently explained, “[t]he extent of constitutional protections” accorded to the right to secretly record “is subject to ongoing and vigorous debate—particularly when” privacy rights are involved. *Nat’l Press Photographers Ass’n v. McCraw*, 90 F.4th 770, 788 (5th Cir. 2024). Debates among the Circuits on how to analyze the intersection of the right to secretly record and the privacy interests of their targets “are not new.” *Id.* at 789. This oft-recurring issue is now well-percolated among the Circuits and differences of judicial opinion well-entrenched. Because the Circuits cannot reach a consensus approach to how to balance those important interests, this Court’s intervention is urgently needed. Without guidance from this Court, this conflict will continue and likely deepen, leaving State lawmakers, undercover investigators, and the subjects of surreptitious recordings uncertain of their legal obligations and remedies.

In its decision, the Ninth Circuit determined that Oregon’s ban on secretly recording conversations, including recording by undercover operatives, is a content-neutral regulation that is “agnostic” to the speaker’s message. Pet. App. 30a. The Fourth Circuit, however, held that a North Carolina statute that similarly prohibited individuals, including undercover employees, from secretly recording information in the

employers’ premises and publishing that information to cause harm to the employer—irrespective of the content or type of message involved—was a content-based law subject to strict scrutiny. *PETA*, 60 F.4th at 830.

Prior to that, however, the Fourth Circuit had held that application of generally applicable tort laws to undercover television reporters did not raise any First Amendment issue at all, and thus *no* scrutiny was required. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999) (refusing to subject reporters’ claims to First Amendment scrutiny). As Judge Rushing’s dissent in *PETA* explained, the majority did not reconcile its decision with *Food Lion*. *PETA*, 60 F.4th at 845 (Rushing, J., dissenting). The Fifth Circuit cited Judge Rushing’s dissent in *PETA* in support of its conclusion that application of Texas’s ban on using drones to record private images was entitled to “[a]t most . . . intermediate scrutiny.” *Nat’l Press Photographers Ass’n*, 90 F.4th at 793 (emphasis added). Just these four decisions show four different views on the appropriate level of scrutiny when generally applicable laws are applied to newsgathering efforts.

The Ninth Circuit gave particular weight to Oregon’s “interest in conversational privacy” and had “no hesitation in concluding that secretly recording a conversation” gives rise to serious privacy concerns that are even more at risk with the “rise of accessible artificial intelligence technologies that” enable the recorder to manipulate what was recorded. Pet. App. 39a-41a. The Fourth Circuit in *PETA*, by contrast, gave particular weight to the “right to gather information” and the “distinctly acute” role it plays in journalism. 60 F.4th at 829. These two decisions show the

diametrically opposed approaches the Circuits take to balancing the competing interests.

The Ninth Circuit relied on its previous decision in *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971), which held that the First Amendment does not protect newsgatherers from an invasion-of-privacy claim because “[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering.” Pet. App. 39a. At issue in *Dietemann* was the plaintiff’s action for invasion of privacy against Time, which sent undercover reporters into plaintiff’s house to secretly record him. The Ninth Circuit had “little difficulty in concluding that clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without his consent” was an actionable invasion of plaintiff’s privacy. *Id.* at 248. In rejecting Time’s argument that “the First Amendment immunizes it from liability for invading plaintiff’s den with a hidden camera and its concealed electronic instruments because its employees were gathering news,” the court held that 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” and the First Amendment “does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.” *Id.* at 249. The court continued that “[n]o interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired.” *Id.* at 250.

The Ninth Circuit more recently reaffirmed *Dietemann* in *Planned Parenthood Federation of*

America, Inc. v. Newman, 51 F.4th 1125 (9th Cir. 2022). There, the defendants infiltrated conferences hosted by Planned Parenthood and its affiliate organizations that were not open to the public using false credentials, obtained access to Planned Parenthood clinics using false credentials, made recordings at the conferences and clinics without the consent of the plaintiff's staff, and released the recordings on the internet as part of a "smear campaign." *Id.* at 1130-1132. In rejecting the defendants' argument that the First Amendment immunized them from the award of damages for, among other things, trespass, unlawful business practices, and violating wiretapping laws, the court "repeat[s] today that journalists must obey laws of general applicability. Invoking journalism and the First Amendment does not shield individuals from liability for violations of laws applicable to all members of society." *Id.* at 1134.

Thus, in *Project Veritas, Planned Parenthood*, and *Dietemann*, the Ninth Circuit held that the First Amendment did not apply to protect undercover journalists from laws that apply to all people. In *PETA*, however, the Fourth Circuit applied strict scrutiny to invalidate a North Carolina law that applies to all individuals entering the nonpublic areas of a premises, not just undercover activists. *See* N.C. Gen. Stat. §§ 99A-2(a), (b)(3) (applying equally to everyone in North Carolina). The organizations challenging North Carolina's law stated that they intended "to conduct undercover operations by sending [their] employees to gain secondary employment at places like animal laboratories" and farms, "where they will secretly record, including by placing unattended cameras, and then publicize their findings to the detriment of the duped employers and for the benefit of their primary employer," organizations such as PETA. 60 F.4th at 843

(Rushing, J., dissenting). Over a vigorous dissent, the Fourth Circuit concluded that these furtive actions were protected by the First Amendment and North Carolina’s attempt to protect privacy and property interests from the undercover efforts was invalid. *Id.* at 841.

The court did so despite the fact that previously in *Food Lion* it applied no scrutiny to the application of generally applicable tort rules to newsgathering activity. And the Fifth Circuit in *National Press Photographers Ass’n* applied intermediate scrutiny—and did so only out of an “abundance of caution”—to application of the Texas drone law to newsgathering efforts, suggesting that even that level scrutiny may well be more than is required.

The ongoing discord among the Circuits on the proper balance to strike between privacy rights and undercover investigators’ interests takes place against the backdrop of several decisions by this Court. The Court has held that the press “is not immune from regulation” and “has no special immunity from the application of general laws.” *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937). Members of the press thus have “no special privilege to invade the rights and liberties of others.” *Id.* at 132-133. “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 (1965). Therefore, individuals “may not with impunity break and enter an office or dwelling to gather news.” *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

Reporters are “free to seek news from any source by means within the law.” *Branzburg v. Hayes*, 408 U.S. 665, 681-682 (1972); see also *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979) (information

sought to be published must be lawfully acquired). But “the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.” *Branzburg*, 408 U.S. at 684. Thus, “[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.” *Id.* at 684-685; see also *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (individuals seeking to gather information “have no constitutional right of access” to locations “beyond that afforded the general public”). For these reasons, members of the press, or others engaged in “newsgathering,” are subject to laws of general applicability barring trespass and other tortious conduct. *Cowles*, 501 U.S. at 669 (“generally applicable laws do not offend the First Amendment simply because their enforcement” may have “incidental effects on [the] ability to gather and report the news”).

As the foregoing discussion establishes, the Circuits do not interpret and apply those principles in a uniform manner. Indeed, the Fourth, Fifth, and Ninth Circuits have all applied those same cases and principles to come to different conclusions regarding the level of First Amendment protection to be afforded and the relative importance of individual privacy interests, reaching different conclusions as to the constitutionality of State laws as a result.

* * *

This Court’s review is needed now to resolve the clash between First Amendment rights and privacy rights. These decisions leave States and business owners uncertain over what steps, either through common law actions or legislative enactments to reinforce privacy rights, are viable. These decisions also place investigative journalists and other undercover

operatives in an impossible quandary regarding what actions they may undertake and not run afoul of the law. In short, although *amici* disagree with petitioners here on the merits, it is in all sides' interests for the Court to grant Project Veritas' petition to resolve the important constitutional issues squarely presented by the petition.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted.

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