No. 22-35271

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Brief of the Liberty Justice Center as *Amicus Curiae* in Support of Plaintiffs-Appellants

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INTEREST OF THE *AMICUS CURIAE*

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation firm that pursues strategic, precedent-setting litigation to revitalize protections for individual rights and constitutional restraints on government power.

This case particularly interests Liberty Justice Center because the freedom of speech is a core value vital to a free society. To that end, the Liberty Justice Center has long advocated for strict scrutiny of content-based restrictions on speech. *See, e.g., Vugo, Inc. v. City of New York*, 931 F.3d 42 (2d Cir. 2019), *petition for cert. denied* No. 19-792 (Apr. 27, 2020); Brief of Liberty Justice Center as *Amicus Curiae* in Support of Respondents *City of Austin v. Reagan National Advertising of Austin, LLC,* No. 20-1029; Brief of Liberty Justice Center as *Amicus Curiae* in Support of Petitioners in *Living Essentials, LLC v. Washington,* No. 19-988; Brief of Liberty Justice Center and Manhattan Institute as *Amici Curiae* Supporting Petitioners in *Mazo v. New Jersey Secretary of State,* No. 22-1033; Brief of Liberty Justice Center as *Amicus Curae* Supporting Petitioners in *Vitagliano v. Westchester,* No. 23-74.

SUMMARY OF ARGUMENT

Oregon Revised Statutes Section 165.540(1)(c) regulates the act of making a recording—and imposes different rules for the recording of different activities. Thus, the statute regulates recording—a form of speech—based on its content or subject matter. As content-based distinctions, the statute's restrictions on recording are subject to strict scrutiny.

ARGUMENT

This case concerns the constitutionality of Or. Rev. Stat. § 165.540(1)(c), which prohibits a person from obtaining "a conversation by means of any device . . . if not all participants in the conversation are specifically informed that their conversation is being obtained." As this Court has already observed, "the statute clearly draws content-based distinctions"—for example, by permitting recording of "law enforcement officials engaged in their official duties" but not of "other government officials performing official duties unless they are informed that their conversation is being recorded," and by distinguishing "between recording felonies endangering human lives," and "recording similar conduct during the commission of a misdemeanor." *Project Veritas v.*

Schmidt, 72 4th 1043, 1057 (9th Cir. 2023), citing Or. Rev. Stat. §§ 165.540(5)(a), (5)(b).

This Court's analysis should be guided by two Supreme Court decisions, *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) and *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022).

In *Reed*, the Supreme Court addressed a sign ordinance that treated ideological signs more favorably than political signs, which were treated more favorably than temporary directional signs. 576 U.S. 155, 159–61 (2015). The Supreme Court held that the sign ordinance was a content-based regulation of speech and could not survive strict scrutiny. *Id*. at 159.

Reed held that government regulation of speech is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. Under *Reed,* content-based laws receive strict scrutiny regardless of the government's "benign motive, content-neutral justification, or lack of animus toward the ideas." *Id*. at 165 (cleaned up).

City of Austin concerned that city's sign code, which distinguished between on-premise and off-premise signs ("off-premise sign" meaning "a

sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site"). *City of Austin,* 142 S. Ct. at 1469. The sign code prohibited the construction of new off-premise signs, and prohibited the owner of an existing off-premise sign from, for example, changing the sign from a painted sign to a digitized sign, or increasing the illumination of the sign. *Id.* at 1469-70. Plaintiffs in that case sought and were denied permission to digitize their off-premise billboards. *Id.* at 1470.

The Supreme Court observed that "regulations that discriminate based on 'the topic discussed or the idea or message expressed' . . . are content based." *City of Austin,* 142 S. Ct. at 1474 (quoting *Reed,* 576 U.S. at 171). The *City of Austin* Court described *Reed*'s principle as holding that "subtler forms of discrimination that achieve identical results" as "overt subject-matter discrimination" are also "facially content based." *City of Austin,* 142 S. Ct. at 1474. "In other words, a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *Id.* Nevertheless, the Court did not agree

that the sign code violated the First Amendment, holding that the ordinance was facially content neutral. *Id.* at 1475. Specifically, the Court held that a law is "agnostic as to content" if it "requires an examination of speech only in service of drawing neutral lines," such as ordinary time, place, or manner restrictions. *Id.* at 1471. Another example of a content-neutral line-drawing would be "distinguish[ing] between speech based on its function or purpose *without indirectly regulating its subject matter.*" *Mazo v. New Jersey Sec'y of State,* 54 F.4th 124, 149 (3d Cir. 2022).

After *Reed* and *City of Austin*, a law restricting speech may be content based in two ways. First, a restriction on speech is facially content based if its text discriminates on the basis of particular content—namely, "topic or subject matter." *City of Austin*, 142 S. Ct. at 1472. But if the regulation considers content simply to make neutral determinations—such as permissible time, place, and manner restrictions—then the law may be content-neutral on its face. *Id.* at 1475

Second, if the government has an "impermissible purpose or justification" for a restriction on speech, then it is content based. *Id.* at 1475. Essentially, "regulation of speech cannot escape classification as

facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *Id.* at 1474. Both facially content-based restrictions and restrictions with a content-based purpose require strict scrutiny.

Here, the Oregon statute is plainly content-based, because the statute, through its exceptions, allows recordings of some conversations, but not others, to be obtained and disseminated, based on their content, unless the participants in those conversations are aware that they are being recorded. If the conversation is recorded "during a felony that endangers human life," the statute does not apply. Or. Rev. Stat. § 165.540(5)(a). Which means that if the content of speech is related to a life-threatening felony, it is treated differently. The statute does not apply to a conversation in which a law enforcement officer is a participant, but only so long as, among other things, the officer is engaging in his official duties and the conversation is audible to the recorder by normal unaided hearing. *Id.* § 165.540(5)(b). Which means that if the content of speech is related to a law-enforcement officer's official duties, it is treated differently. The statute does not apply to a person who records a custodial interview. *Id.* § 165.540(5)(c)(B). Which means that if the content of

speech is a custodial interview, it is treated differently. The statute does not apply to conversations recorded by a uniformed law enforcement officer via either a bodycam or a vehicle-mounted camera. *Id.* § 165.540(5)(d). Which means that if the content of speech relates to a traffic stop, it is treated differently. The statute does not apply to a recording of a public or semipublic meeting, including government hearings, trials, press conferences, or sports events. *Id.* §165.540(6)(a)(A). Which means that if the content of speech is a hearing, trial, press conference, or sports event, it is treated differently. The statute does not apply to conversations recorded if the recorder "inten[ds] to capture alleged unlawful activity" and "reasonably believes that the recording may be used as evidence in a judicial or administrative proceeding." *Id.* § 165.540(6)(b). Which means that if the content of speech pertains to alleged illegal activity, it may be treated differently.

This is not a time, place, or manner restriction of the sort at issue in *City of Austin*. Here the speech is the recording, and whether the recording may be disseminated depends on what the recording is of—that is, what its content is. It may not be "overt subject-matter discrimination," but it is most certainly a "subtler form[] of

discrimination that achieve[s] identical results." *City of Austin,* 142 S. Ct. at 1474.

This "regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *City of Austin,* 142 S. Ct. at 1474. The ordinance violates the First Amendment and must be struck down.

CONCLUSION

For the foregoing reasons, Or. Rev. Stat. § 165.540(1)(c) should be struck down.

DATED: April 23, 2024

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CERTIFICATE OF COMPLIANCE

No. 22-35271

This brief contains 1,444 words, excluding the items exempted by FRAP 32(f). The brief's size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief is an amicus brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

/s/ Jacob H. Huebert
April 23, 2024

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2024, I caused the foregoing brief to be served on all counsel of record by filing it via the Court's electronic filing system.

/s/ Jacob H. Huebert