

Case No. 22-35271

In the United States Court of Appeals
for the Ninth Circuit

Project Veritas; Project Veritas Action Fund,
Plaintiffs-Appellees,

v.

**Michael Schmidt, in his official capacity as Multnomah County
District Attorney; Ellen Rosenblum, in her official capacity as
Oregon Attorney General,**
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon
Case No. 3:20-cv-01435-MO
The Honorable Michael W. Mosman

**BRIEF OF AMICI CURIAE FREE EXPRESSION SCHOLARS,
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS,
ANIMAL OUTLOOK, AND FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION IN SUPPORT OF APPELLEES**

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CORPORATE DISCLOSURE STATEMENTS

Amici Curiae People for the Ethical Treatment of Animals (PETA), Animal Outlook (AO), and Foundation for Individual Rights and Expression (FIRE) submit their corporate disclosure statements under Federal Rule of Appellate Procedure 26.1(a).

PETA is a non-profit 501(c)(3) organization and has no corporate parent and is not owned in whole or in part by any publicly held corporation.

AO is a non-profit 501(c)(3) organization and has no corporate parent and is not owned in whole or in part by any publicly held corporation.

FIRE is a non-profit 501(c)(3) organization and has no corporate parent and is not owned in whole or in part by any publicly held corporation.

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INTERESTS OF AMICI CURIAE¹

People for the Ethical Treatment of Animals, Inc. (PETA) is an animal protection charity founded in 1980. PETA works to establish and protect the rights of all animals. PETA is the largest animal rights organization in the world, and PETA entities have more than 9 million members and supporters worldwide.

PETA defends the rights of animals through public education, undercover investigations, newsgathering and reporting, research, animal rescue, direct advocacy to government agencies and legislators, and protest campaigns. PETA has a long history of conducting undercover investigations to expose cruelty to animals. PETA's first undercover investigation—the 1981 investigation of Dr. Edward Taub's monkey testing laboratory in Silver Spring, Maryland—resulted in the nation's first arrest and criminal prosecution of an animal experimenter for cruelty to animals. Ever since that investigation, PETA's most effective form of advocacy has been confronting the public with evidence of animal abuse. By capturing and disseminating this evidence, PETA builds support for enforcing existing animal welfare laws, advancing additional legal protections, and encouraging private and public actors to adopt more humane practices.

¹ All parties have consented to this filing. No party's counsel authored this brief in whole or in part, and no person or entity other than Amici, their counsel, or their members made a monetary contribution intended to fund the brief's preparation or submission.

Animal Outlook (AO) is a national nonprofit animal advocacy organization with the mission of challenging animal agribusiness through undercover investigations, legal advocacy, corporate and food system reform, and disseminating information about the harms of animal agriculture, empowering people to choose vegan.

The evidence AO collects in its undercover investigations, including audiovisual recordings, is crucial to its work. AO provides the recordings to law enforcement officials so they have proof of crimes against animals; offers them in court to seek justice for animals under civil laws; and publishes them widely to raise public awareness and support on behalf of veganism and against corporate cruelty.

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended individual rights through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment.

FIRE has a direct interest in this case because FIRE represents and advocates for student journalists, citizen journalists, and documentarians who capture audiovisual recordings of information on matters of public concern—in a word, speech. FIRE joins this brief in

support of Plaintiffs-Appellees because the Oregon statute threatens the creation and dissemination of speech.

Alan K. Chen is the Thompson G. Marsh Law Alumni Professor at the University of Denver Sturm College of Law and a co-author of a monograph studying the historical role of undercover investigations in promoting democracy.²

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SUMMARY OF ARGUMENT

The gathering and dissemination of information about matters of public concern is no longer exclusively or even primarily the province of a small number of newspapers, journalists, or authors. The ubiquity of personal recording devices has turned the public into newsgatherers capable of recording audio and video efficiently and inexpensively. These individuals, in turn, can share their recordings to an expansive audience through low-cost social media and online platforms. This notion of the citizen-journalist has a prized history in constitutional doctrine; the “liberty of the press is the right of the lonely pamphleteer

² See Alan Chen & Justin Marceau, *Truth and Transparency: Undercover Investigations in the Twenty-First Century* (Cambridge 2023).

who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.” *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

The role of recording matters of public concern in generating the sort of discourse and debate protected by the First Amendment has been recognized by federal courts across the country. As the First Circuit explained more than a decade ago, “The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.” *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011).

Oregon’s eavesdropping statute is one of the broadest in the nation. It negatively impacts individuals’ ability to engage in expressive, speech-related recording activity, and it implicates the First Amendment. *See Project Veritas v. Schmidt*, 72 F.4th 1043, 1083 & App. A (9th Cir. 2023) (surveying eavesdropping statutes across the country). With limited exceptions, the law prohibits non-consensual audio and video recordings of conversations. *See generally* Or. Rev. Stat. § 165.540. In other words, Oregon law broadly prevents journalists and ordinary observers from recording statements that they are legally permitted to observe, document, and discuss. Because audiovisual recording is

speech, this law is in direct conflict with the First Amendment.

See Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) (“This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment.”).

The First Amendment seeks “to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government,” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982), and to render public debate well-informed—capable of advancing knowledge, discovering truth, and allowing rational decisions, *see, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 147 (1967); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *Bridges v. California*, 314 U.S. 252, 277–78 (1941). Our modern history is replete with examples in which audiovisual recordings have greatly contributed to public debate.

Audio and visual recordings are expressive conduct “inextricably intertwined” with the resulting speech itself and are thus entitled to First Amendment protections. *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018) (citing *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010); *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3rd Cir. 2017)). To that end, this Court has held there is a First Amendment right to film matters of public interest and concern. *Id.* at 1203 (citing *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir.

1995)); *cf. Bartnicki v. Vopper*, 532 U.S. 514, 534–35 (2001) (establishing a First Amendment right for publication of unlawfully gathered material on a matter of public concern).

Oregon’s sweeping prohibition on non-consensual audio and video recordings of conversations conflicts with these basic First Amendment principles by presumptively outlawing an important medium of newsgathering and speech creation. A recording is not the same when it does not include sound. While police recordings are exempted from the Oregon statute’s prohibition, the well-known examples of audio from such cases illustrates the impact of audio on the public.³ Imagine the diminished impact of George Floyd’s death without hearing his haunting cries of “I can’t breathe.”⁴ Indeed, the powerful video that revealed the story of George Floyd’s death to the nation’s watchful eyes was recorded not by a professional journalist, but by a bystander, Darnella Frazier. The Pulitzer Prize board awarded Ms. Frazier a special citation for “courageously reporting the murder of George Floyd, a video that spurred protests against police brutality around the world, highlighting the crucial role of citizens in journalists’ quest for truth

³ Or. Rev. Stat. § 165.540(5)(a), (5)(d)(B).

⁴ *‘We Can’t Breathe’: Eric Garner’s Last Words Become Protestors’ Rallying Cry*, The Guardian (Dec. 4, 2014), <https://bit.ly/4b9xlRa>.

and justice.”⁵ Under Oregon’s eavesdropping statute, individuals are chilled from and penalized for documenting crucial and newsworthy events that include audio recordings.

Guided by these principles, a panel of this Court held Oregon’s eavesdropping statute unconstitutional as (1) a content-based restriction because of its exceptions for recording law enforcement engaging in their official duties and for recording life-threatening felonies; and (2) an unconstitutional time, place, and manner restriction regardless of the exceptions. *Schmidt*, 72 F.4th at 1050. Given the role that surreptitious recordings of conversations have played in fostering public discourse, accountability, and safety, this Court should reaffirm the panel’s holding that the broad sweep of Oregon’s prohibition on surreptitious audio and video conversational recordings runs afoul of the First Amendment.

ARGUMENT

I. Undercover Recordings Have Greatly Contributed to Public Discourse, Accountability, and Safety.

Undercover investigations have been a time-honored tradition of American journalism.⁶ Undercover newsgathering of firsthand facts and

⁵ Elahe Izadi, *Darnella Frazier, the Teen Who Filmed George Floyd’s Murder, Awarded a Pulitzer Citation*, Wash. Post (June 11, 2021), <https://wapo.st/3JRVGiV>.

⁶ Chen & Marceau, *supra* note 2.

observations has resulted in important and sometimes history-making reporting.

At the turn of the 20th century, written eyewitness accounts of the meatpacking industry, including Upton Sinclair's novel *The Jungle* (1906), triggered a nationwide debate that led to a regulatory regime to protect public health and ensure worker safety.⁷ Sinclair spent weeks undercover in Chicago's meatpacking plants to research the novel, which, by exposing the industry's harsh, inhumane, and unsanitary working conditions, produced an unprecedented response.⁸ Indeed, Congress enacted the Meat Inspection Act, Pub. L. No. 59-242, 34 Stat. 1260 (1907) (codified as amended at 21 U.S.C. §§ 601–695), and the Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) (codified as amended at 21 U.S.C. §§ 301–399f), following Sinclair's work. Both laws recognized the strong public interest in the safety of the Nation's food supply.

Due to advances in technology, the modern-day Upton Sinclair would not conduct his investigation relying solely on written notes based on memory and transcribing them into a book. His preferred publication medium might be the internet. And a recording device

⁷ See, e.g., David Greenberg, *How Teddy Roosevelt Invented Spin*, *The Atlantic* (Jan. 24, 2016), <https://bit.ly/3pHlzW7/>; Karen Olsson, *Welcome to The Jungle*, *Slate* (July 10, 2006), <https://bit.ly/3um0Mur>.

⁸ See Brooke Kroeger, *Undercover Reporting: The Truth About Deception* 83–91 (2012).

would supplant the pen, just as the word-processor replaced the typewriter, which replaced pen and paper. Oregon’s statute prohibits this practice and many other modern examples in which audiovisual recordings have greatly contributed to issues of public concern.

In 2022, Los Angeles City Council President Nury Martinez was secretly recorded making “openly racist remarks, derid[ing] some of her council colleagues and [speaking] in unusually crass terms about how the city should be carved up politically.”⁹ Three days later, amidst public outcry, Martinez resigned.¹⁰

Reporters and investigators working with activist organizations have similarly used surreptitious recordings to prompt public debate, accountability, and policy changes. For example, an undercover investigator for AO recorded video footage in a facility that supplied both the National School Lunch Program and a popular restaurant chain showing inhumane handling of cows, including some that could no longer walk after being shot in the head over and over, then having their mouths and nostrils stood upon until they suffocated to death. The video led the federal government to shut down the facility temporarily

⁹ David Zahniser, et al., *Racist Remarks in Leaked Audio of L.A. Council Members Spark Outrage, Disgust*, LA Times (Oct. 9, 2022), <https://lat.ms/3xXGjSZ>.

¹⁰ David Zahniser, et al., *Nury Martinez Resigns From L.A. City Council in Wake of Audio Leak Scandal*, LA Times (Oct. 13, 2022), <https://lat.ms/49RWKhh>.

and the chain to sever ties with it.¹¹ Likewise, two investigators for PETA obtained employment at a Hormel Foods supplier in Iowa where they documented and exposed misconduct and abuse.¹² The supplier's employees were recorded beating pigs with metal rods, sticking clothespins into pigs' eyes, and kicking a young pig in the face, abdomen, and genitals to make her move while telling one investigator, "You gotta beat on the b[**]ch. Make her cry."¹³ The investigation resulted in 22 charges of livestock neglect and abuse against six of the facility's former employees, all of whom admitted guilt.¹⁴ The audio portion of the recording was an integral part of the criminal case and the public campaign around the issues.

A 2018 and 2019 PETA investigation into two Iditarod champions' kennels exposed cruel conditions and intentional neglect of the dogs' injuries and also highlights the role of audio in addition to video

¹¹ Tiffany Hsu, *In-N-Out Dumps California Slaughterhouse Accused of Abusing Cows*, LA Times (Aug. 21, 2012), <https://lat.ms/3Jvlpxp>.

¹² *Undercover Video Shows Workers Abusing Pigs*, NBC News (Sept. 17, 2008), <https://nbcnews.to/380H2TU>.

¹³ *Mother Pigs and Piglets Abused by Hormel Supplier*, People for the Ethical Treatment of Animals, <https://bit.ly/3uJPEry>.

¹⁴ *22 Charges Filed Based on PETA Investigation at Hormel Supplier*, People for the Ethical Treatment of Animals (Oct. 14, 2013), <https://bit.ly/2PmkczA>.

recording.¹⁵ Their investigation included audio recordings of candid statements by the former champions and their employees acknowledging the unnecessary pain and cruelty suffered by the dogs. As a result, many sponsors withdrew their support of the Iditarod.¹⁶ Not uncommon for undercover investigations, kennel owners and Iditarod participants alleged the photos and videos were deceptively manipulated and are “fake news,” rather than take accountability for their conduct.¹⁷ Audiovisual recordings are crucial to confirm eyewitness accounts, to dispel these allegations, and to allow viewers to assess those claims on their own.

Additional examples are plentiful and will proliferate exponentially as technology and the way we share information advances. The widely accepted rationales for robust free speech protections—competition of ideas, self-determination, and self-governance—all support recognizing that recording activity falls within

¹⁵ *Groundbreaking Expose Reveals Pain, Desolation, Abuse, and Systemic Neglect At Former Iditarod Champions’ Kennels*, People for the Ethical Treatment of Animals, <https://bit.ly/3Wcnq9e>.

¹⁶ *See, e.g., Alaska Airlines Drops Sponsorship of Iditarod Sled Dog Race*, The Associated Press (Mar. 4, 2020), <https://bit.ly/4aQvVLI>.

¹⁷ Mitch Seavey, *PETA Spies, PETA Lies*, Must Read Alaska (Oct. 27, 2019) <https://bit.ly/4aN9bfv>; Craig Medred, *Fake News*, CraigMedred.news (Apr. 6, 2019), <https://bit.ly/3JxKEyR>.

the ambit of the First Amendment.¹⁸ Oregon's eavesdropping statute criminalizes core speech activity.

II. Audiovisual Recordings Are an Important and Accurate Means of Documenting Information.

Oregon's eavesdropping statute permits an individual to secretly observe conversations and republish those statements without written permission. It also permits surreptitious, non-consensual filming of an individual. Where the law runs afoul of free speech principles is when it prohibits the recording of conversations, whether through audio, video, or both. There is no basis in free speech doctrine for affording *less* protection to recordings of the spoken word, and *more* protection to recordings of actions or conduct.

Further, Amici emphasize that this distinction between recordings of speech and recordings of conduct undermines the significant role of undercover investigations in facilitating debate on matters of public concern. *First*, hearing first-hand what is said by an individual being investigated is qualitatively different than reading a paraphrased summary of what was said. If a picture is worth a thousand words, then an audio recording is a thousand times more reliable than a journalist's

¹⁸ Chen & Marceau, *supra* note 2. See also Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991 (2016); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335 (2011).

memory or post-hoc notes. *See Fields*, 862 F.3d at 359 (noting that audiovisual recordings “corroborate[] or lay[] aside subjective impressions for objective facts”). In the context of PETA’s investigations, one can certainly conceptualize the pain of an animal from a written description or just a video; but when one *hears* an animal’s cries, the listener better understands the animal’s circumstances and *feels* that pain in a completely different, and much more impactful, manner.

Second, audiovisual recordings are more reliable than other methods of describing the sounds and nature of what was said at a particular moment. *See Alvarez*, 679 F.3d at 6078 (“[A]udio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public. Their self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes.”). Given the recent public skepticism of the media, a recording dispels doubt as to what was said.¹⁹ Prohibiting recordings *most likely* to accurately convey truthful information is antithetical to the First Amendment’s protections.

¹⁹ *See, e.g., Dueling Narratives in Michael Brown Shooting*, CNN (Sept. 16, 2014), <https://cnn.it/3WduoKZ> (discussing disputed witness accounts of an incident that was not caught on camera); *supra* note 17 (alleging amicus PETA’s undercover investigation was “fake news”).

CONCLUSION

Oregon is an outlier in the United States in broadly prohibiting (and criminalizing) audiovisual recordings without consent. *See Schmidt*, 72 F.4th at 1083 & App. A. Because watching and editing audiovisual recordings—from cat videos, to cops, to politicians—is expressive activity, so too is the act of creating such recordings. This Court should reaffirm the panel’s decision that Oregon’s uniquely broad law violates the First Amendment.

Dated: April 23, 2024

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This document complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5), and Ninth Cir. Rule 29-2(c)(3), because it contains **2,841** words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point font.

Dated: April 23, 2024.

s/ Julian R. Ellis, Jr.

Julian R. Ellis, Jr.

CERTIFICATE OF SERVICE

I certify that on April 23, 2024, I electronically filed Brief of Amici Curiae Free Expression Scholars, People for the Ethical Treatment of Animals, Animal Outlook, and Foundation for Individual Rights and Expression in Support of Appellees with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: April 23, 2024.

s/ Julian R. Ellis, Jr.

Julian R. Ellis, Jr.