

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 Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

**Brief of The Liberty Justice Center as
Amicus Curiae Supporting Petitioner**

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QUESTION PRESENTED

Whether Oregon Revised Statutes Section 165.540(1)(c), which regulates the act of making a recording, and imposes different rules for the recording of different activities, constitutes a content-based restriction on speech.

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INTEREST OF THE *AMICUS CURIAE*¹

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation firm that pursues cutting edge strategic, precedent-setting cases nationwide, focusing on free speech, educational freedom, workers' rights, and government overreach.

The Liberty Justice Center is interested in this case 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 Curiae* Supporting Petitioners in *Vitagliano v. Westchester*, No. 23-74.

¹ Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission. All parties received notice of *amicus*' intent to file this brief and consented to *amicus*' filing

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. Nonetheless, the Ninth Circuit held otherwise. The Ninth Circuit’s decision contradicts decisions by this Court holding that content-based restrictions on speech are per se unconstitutional.

ARGUMENT

I. A restriction on speech is content based when it discriminates on the basis of particular content.

Oregon law 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.” Or. Rev. Stat. § 165.540(1)(c). The Ninth Circuit explained in a related case that “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).

Review of the Oregon law at issue in this case must be guided by this Court's decisions in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) and *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022).

In *Reed*, this 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”). 596 U.S. at 66. 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. Plaintiffs in that case sought and were denied permission to digitize their off-premise billboards. *Id.* at 66–67.

This Court observed that “regulations that discriminate based on ‘the topic discussed or the idea or message expressed’ . . . are content based.” *City of Austin*, 596 U.S. at 73–74 (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.” *Id.* at 74. “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 71. 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 69. 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*, 596 U.S. at 71. 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 74

Second, if the government has an “impermissible purpose or justification” for a restriction on speech, then it is content based. *Id.* at 76. 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 74. Both facially content-based restrictions and restrictions with a content-based purpose require strict scrutiny.

II. The Ninth Circuit’s holding that the ordinance is content neutral contradicts *Reed* and *City of Austin*.

Although the Ninth Circuit started following this Court’s analysis sketched out in *Reed* and *City of Austin* set forth in the preceding paragraphs. But it veered off-course by trying to cabin *City of Austin* too narrowly. *City of Austin* “reject[ed] . . . the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern.” 596 U.S. at 73 (emphasis in original). However, it did also reaffirm *Reed*’s holding that “regulations that discriminate based on ‘the topic discussed or the idea or message expressed’ . . . are content based.” *Id.* at 73-74, quoting *Reed*, 576 U.S. at 171. The Ninth Circuit erred in paraphrasing this holding as “not every regulation that turns on the content of speech in the loosest sense is content based in the constitutional sense.” Pet. 29a.

Once it did that, all the Ninth Circuit had to do to reach its erroneous conclusion that the ordinance is content neutral was find that it merely “turns on the content of speech in the loosest sense.” But it plainly does.

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 Ninth Circuit’s attempt to get around this plain fact stretches the bounds of credulity. “This exception does not address the content of the audio recording,” the opinion says, because the exception “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.” Pet. 32a (emphasis in original). *Nonsense*. According to the Ninth Circuit’s logic, the exception would apply to a conversation recorded two blocks away from and irrelevant to, but concurrently with, a bank robbery; but it would *not* apply to a recording of the robbers casing the bank a week before the robbery. Of course, this is illogical.

The statute also 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. Or. Rev. Stat. § 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.

But the Ninth Circuit compared this exception to *City of Austin's* sign code ordinance because it does not “concern a particular viewpoint or *prohibit discussion* of an entire topic.” Pet. 33a (quote and citation omitted) (emphasis added). Of course, an exception to a prohibition *obviously* does not “prohibit” anything. But that's not the only problem with the Ninth Circuit's reasoning; as that court acknowledged in a footnote, the exception pertains only to recordings “made while the officer is performing official duties.” Pet. 32a. The ordinance, through its exception, “prohibit[s] . . . public discussion of an entire topic,” that is to say, topics that are not the performance of official duties. *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980). The court in another footnote tried to argue that “the requirement . . . 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.” Pet. 33a. But this just can't be squared with the requirement that the conversation take place during the performance of official duties.

The Ninth Circuit did not address the following provisions, which are further proof that the ordinance is not content-neutral: (1) The statute does not apply to a person who records a custodial interview. Or. Rev.

Stat. § 165.540(5)(c)(B). Which means that if the content of speech is a custodial interview, it is treated differently. (2) 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. (3) 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. (4) 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 74.

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 74. The Oregon law does just that and is therefore unconstitutional.

CONCLUSION

This Court should grant the petition in this case because if the Ninth Circuit's decision is allowed to stand, the First Amendment protects set forth in *Reed* and *City of Austin* will erode significantly. Under the Ninth Circuit's logic, a content-based restriction on speech can become a content-neutral time, place, or manner restriction based on a game of semantics. That is not what this Court intended.

Respectfully submitted,

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