
DONALD SEGRETTI, Appellants,

v.

STATE OF COLUMBIA, Appellee.

No. 14–20–00333.

Supreme Court of the State of Columbia.

Argued February 22, 2021.

Decided June 28, 2021.

Cole Charleson, River City, Columbia for Appellants.

Sally Aiken, River City, Columbia for Appellee.

Before Chief Justice Ben Bradlee, Jus Carol Bernstein and Bob Woodward.

Judge Bernstein delivered the opinion of the court.

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press." U.S. Const. amend. I. The protection of this fundamental liberty "reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). In that way, the First Amendment seeks "to ensure that the individual citizens 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 informing rational decisions. *See Bridges v. California*, 314 U.S. 252, 277-78 (1941).

This appeal implicates two significant aspects of First Amendment protections: first, the Free Speech Clause's need for "breathing space" such that even false statement of fact receive constitutional protection; and second, the need to surreptitiously record others in the course of gathering information for dissemination.

Every First Amendment case involves a balance between competing interests. Because the district court struck the wrong balance on both issues, we reverse.

Background

This case arises from Appellant Donald Segretti's conviction of two offenses under Columbia law: disseminating fake news in violation of Section 31.002 of the Columbia Revised Statutes and violating privacy in communications in violation of Section 39.601 of the Columbia Revised Statutes.

Segretti is a 20-year-old college student, attending Magruder University in New Watergate, Columbia. He is politically active and earns a significant income as a social media influencer. In the past two years, his "business" has taken off. He went from being a follower with a meager social media presence in 2018 to being an influencer with the power to affect the buying habits of others by the end of 2020. At that point, he had over 220,000 followers on social media platforms like Instagram, YouTube, and TikTok. His regular posts of original content on these platforms established his credibility, earning him $45,000 a year for his efforts.

In early 2020, Segretti started working on his aunt's campaign for Mayor of New Watergate. New Watergate is a city of 675,000, and its elections are always contentious. The mayoral election in November of 2020 was no exception.

Segretti's aunt, Joan Dean, was one of twelve candidates seeking the office. All expected the election to end in a runoff between Dean and Gordon Liddy. Both were well funded and enjoyed broad community support. Dean was a realtor who had served on the city planning commission. Liddy was a prominent attorney who had formerly served as Chair of the city's Election Commission.

Dean and Liddy were longtime political rivals. Each ran attack advertisements against the other. Each accused the other of engaging in "dirty

politics."

Throughout the campaign, concerns plaguing the national election spilled into the New Watergate mayoral race. Allegations of voter fraud and misconduct by poll officials were prevalent. Many had serious concerns about the integrity of the election.

The general election went as expected. Liddy finished with 28 percent of the vote. Dean had 23 percent of the vote. The nearest competitor finished with 16 percent of the vote. A runoff election was scheduled between Liddy and Dean for the first Saturday in December.

Immediately after the general election results were certified, reports surfaced that the current chair of the Election Commission, Joanne Erlichman, used her influence to help Dean win the runoff. The story originally appeared on a social media post by Alexander Butterfield. The posts supported Liddy throughout the campaign and amassed a social media following of 25,000 for Butterfield. In the days leading up to the runoff, Butterfield posted daily rants about Erlichman and how she was trying to make Dean the next mayor.

On November 20, 2020, Butterfield broke a story that Erlichman falsely certified 394 absentee ballots to help Dean get into the runoff. The social post ended with a large caption over a photo of Dean and Erlichman that read, "Why bother? Erlichman will rig it anyway."

Two days later, Butterfield posted a video of Dean and Erlichman at a Halloween Party in the city park. The video showed a hushed conversation between the two and ended with Erlichman saying, "I'll take care of it." From that point on, the caption for the daily social media posts included the video and a caption that read, "Why bother? Erlichman will take care of it."

The current mayor, Virgilio Gonzalez, investigated the allegations. No evidence suggested that Erlichman had done anything wrong. Although media outlets reported the investigation's outcome, they continued to report on the widespread rumors stemming from Butterfield's social media posts. As a result, Erlichman and Dean were widely criticized on social media.

Dean defeated Liddy in the runoff by 5 percentage points. Many attributed Dean's victory to the low voter turnout. Only 14 percent of registered voters participated in the runoff. The runoff results were certified on December 11, 2020.

Two days later, New Watergate police discovered that Butterfield was not a real person. It was a pseudonym Segretti had created to influence the outcome of the election. Police also learned Segretti recorded the conversation between Erlichman and Dean at the Halloween Party by wearing a hidden body camera and positioning himself during the party so he could record the conversation. A review of the entire recording of the conversation revealed that Erlichman and Dean were discussing a church project and not anything about the election. Erlichman's comment that she would "take care of it" related to arranging for someone to teach a weekly bible study. Erlichman, Dean, and Liddy were unaware of Segretti's actions.

The State charged Segretti for violating the ban on disseminating fake news and for violating the ban on surreptitiously recording others. After a jury found Segretti guilty of both counts, Judge Archibald Cox of the 112th District Court of Mitchell County sentenced him to 5 months in jail and a $750 fine for the fake news conviction and to 4 months in jail and a $375 fine for the surreptitious recording conviction.

Although Segretti challenged below the State's assertion that he violated the elements of the two offenses at issue, he has not done so on appeal. His notice of appeal limited our review to the constitutional questions of whether his convictions violate the First Amendment.

The Fake News Ban

Segretti first challenges his conviction for violating Section 31.002 of the Columbia Revised Civil Statutes, which bans the knowing dissemination of fake news. [1] The statute defines fake

[1]The statute provides as follows:

Section 1. The Ban. An information source shall not intentionally disseminate purported facts if:

a. The information source knows the purported facts are false or recklessly disregards the truth or falsity of those purported facts;

b. The purpose, in whole or in part, of disseminating such false facts is (i) to enhance the financial interests of the information source, (ii) to influence the outcome of a contested public election, or (iii) to promote the interest of a foreign government; and

c. The intentionally false facts cause material harm to public health, safety, national security, or the operation of an essential government function.

Section 2. Exceptions. It shall not be a violation of this statute if:

a. The information source (i) identifies the purported facts that are false, (ii) discloses the purpose for disseminating those false facts, and (iii) identifies any employer, company, or other third-party providing compensation or other inducement for the information source to disseminate the false facts.

b. The false facts disseminated are:

i. A republication of information originally disseminated by a bona fide news organization ("BFNO"), and the information source can identify the BFNO;

ii. Communicated by a natural person as a comment in a forum sponsored, created, or maintained by a BFNO;

iii. Substantially true;

iv. An accurate report on, or a fair summary of, an official action, public proceeding, or meeting open to the public;

v. Made in the course of a judicial or legislative proceeding.

Section 3. Definitions.

a. An information source is any one of the following:

i. Any entity, organization, or individual with more than 5,000 followers on social media; or

ii. Any entity, organization, or individual whose individual communications through any medium have been received 12 or more times in the preceding calendar year by more than 5,000 individuals.

b. Intentionally disseminate means to publish information in a manner which is reasonably calculated to reach an audience of 5,000 people or more, or which does not, in fact, reach an audience of 5,000 people or more.

c. Facts are statements that can be proven based on objective criteria to be either true or false. They are distinguished from expressions of opinions and value

news narrowly as (1) intentionally false statements (2) of fact, (3) broadly disseminated, (4) for a self-serving purpose, (5) that causes public harm. Segretti does not contest the district court's finding he violated the statute; he challenges its constitutionality.

In 2012, the United States Supreme Court—in a plurality opinion—decided *United States v. Alvarez*, 567 U.S. 709 (2012). The respondent in *Alvarez* was charged with violating section 704(b) of the Stolen Valor Act, which criminalized "[f]raudulent [r]epresentations [a]bout [r]eceipt of [m]ilitary [d]ecorations or [m]edals." 18 U.S.C. § 704(b). Rejecting government arguments that likened the law to existing, permissible regulations on such acts as perjury, lying to a government official, and impersonating a government official or representative, a plurality of the Court held this particular section of the Stolen Valor Act was

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statements.

d. A statement of fact is false if its substance or gist is contrary to objectively verifiable facts, even if parts of the statement are accurate.

e. A statement is substantially true if, when taken in context, the overall substance or gist of the message conveyed is true.

f. Reckless disregard for the truth of a statement means a high degree of awareness that the statement is probably false or serious doubts exist as to the truth of the statement.

g. Essential government functions are operations undertaken by a government entity for the benefit of the general public that are necessary to perform the services for which the government entity was established. Such functions include, without limitation, the operations of schools, fire departments, police departments, public utilities, and elections.

h. BFNO means a Bona Fide News Organization. An organization or entity qualifies as a BFNO if it meets the following criteria:

   i. One of its reasons for existing as an organization is to report information to the public;

   ii. It generates revenue, either directly or indirectly, by reporting information to the public;

   iii. It employs one or more professional journalist;

   iv. It maintains liability insurance against claims for defamation; and

   v. It has and enforces a recognized code of journalistic ethics.

Section 4. Enforcement.

a. Any party that commits a violation of this statute shall be subject to either or both of the following:

   i. A criminal penalty of up to $1,000 per violation and up to 12 months in jail, or both.

   ii. A civil penalty consisting of the greater of the actual damages established or $25,000 payable to the plaintiff in a suit to enforce this statute.

b. The following shall have standing to enforce this statute:

   i. The Attorney General of the State;

   ii. Any state agency harmed by the disseminated false facts;

   iii. The District Attorney in any District in which the false facts were disseminated; or

   iv. Any non-profit organization registered under and recognized by §501(c)(3) of the Internal Revenue Code, whose stated charitable purpose includes public health, safety, or the administration of government.

c. In any civil litigation to enforce this statute, a prevailing plaintiff shall be awarded reasonable costs and attorneys' fees.

invalid.

In reaching its decision, the plurality clarified that "falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood." *Id.* at 719. More significantly, the lie must be made to gain some material benefit, such as "to effect a fraud or secure moneys or other valuable considerations." *Id.* In those instances, "it is well established that the government may restrict speech without affronting the First Amendment." *Id.* But the proposition that speech may be punished merely because it is untrue and where the speaker incurs no benefit other than a boost to his own self-esteem, is not supported by case law. *Id.* Such regulation, the plurality warned, would substantially subdue the First Amendment.

Alvarez is inundated with references to case law in which the Court held that, while false speech may not necessarily be protected to the same extent as truthful speech, it has never been held that false speech is completely unprotected. After all, "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression [that] the First Amendment seeks to guarantee." *Id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). Moreover, "it is sometimes necessary to extend a measure of strategic protection to these statements in order to ensure sufficient 'breathing space' for protected speech." *Id.* at 750 (Alito, J., dissenting) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)). An example of such "breathing space" is the requirement of malice or reckless disregard for the falsity of one's statement in cases of libel and defamation; this stringent mental state requirement allows for the uninhibited exchange of ideas about public figures and other issues of public significance without excessive fear of legal repercussion for unwittingly made false statements. *Id.* at 732 (Breyer, J., concurring). In other words, to ensure that protected speech is not improperly suppressed, it may be crucial to permit lies in certain circumstances.

Although persistent lies about our government may affect public trust, this type of reputational harm to our institutions is qualitatively different than harms to individual's reputations and specific government operations. Our institutions are resilient. Permitting speech that results in distrust is a necessary and acceptable consequence of protecting our right to freely criticize the government.

The First Amendment protects even false speech. This statute prohibits certain kinds of political speech. It would be subject to strict scrutiny to determine whether it is narrowly tailored to serve compelling government interests. No law concerning speech has ever withstood such scrutiny. The statute is overbroad in that it could prohibit—and have a chilling effect on—many forms of protected speech. It is also underinclusive in stopping misinformation because it only prohibits knowingly false statements, although most misinformation is spread by people believing the statements to be true.

Fake news is part of the price we pay for a free society. It is part of the marketplace of ideas, a phrase that,

although coined almost in passing in Justice Oliver Wendell Holmes's dissent in *Abrams v. United States*, has arguably become one of the most powerful governing analogies in First Amendment law. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); It holds that the only way for a democratic society to determine the best idea among many is to let the ideas fight it out in the field: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," Holmes wrote. *Id.* Good ideas, like the best products, will win out and bad ideas, like inferior, faulty, or poorly made products, will be tossed aside. Getting the state involved in any capacity in the fight against fake news runs afoul of this most basic free speech concept of nonintervention and tolerance.

Columbia's ban on fake news is a content-based restriction on core political speech. It cannot overcome the constitutional hurdle it must to stand.

In the marketplace of ideas, all speech—even false speech—has value, if for no other reason but to stir debate and flush out the truth. The best antidote to false speech is more speech. Moreover, no single arbiter can determine what is true, especially not the government. Indeed, drawing lines between truth and falsity, between facts and opinion is so problematic; the cure is worse than the disease.

The Surreptitious Recording Ban

Segretti next challenges his conviction for violating Section 39.061 of the Columbia Revised Civil Statutes, which bans surreptitious recordings.[2]

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[2]The statute provides as follows:

Section 1. A person commits the offense of violating privacy in communications if the person knowingly or purposely records or causes to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation.

Section 2. Exceptions. Section 1 does not apply to:

a. Elected or appointed public officials or to public employees when the transcription or recording is done in the performance of official duty;

b. Persons speaking at public meetings;

c. Persons given warning of the transcription or recording. If one person provides the warning, either party may record.

d. A health care facility or a government agency that deals with health care if the recording is of a health care emergency telephone communication made to the facility or agency.

Section 3.

a. A person convicted of the offense of violating privacy in communications shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

b. On a second conviction of violating privacy in communications, a person shall be imprisoned in the county jail for a term not to exceed 1 year or be fined an amount not to exceed $1,000, or both.

c. On a third or subsequent conviction of violating privacy in communications, a person shall be imprisoned in the state prison for a term not to exceed 5 years or be fined an amount not to exceed $10,000, or both.

Section 4. Definitions. As used in this section, the following definitions apply:

a. "Electronic communication" means any transfer between persons of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or

The challenge raises the issue of whether the First Amendment protects a person's right to surreptitiously make recordings in a place where he has the right to be.

This is an issue of tremendous national importance that will continue to grow more urgent given the ubiquitousness of social media. Most individuals have smartphones with audio and video recording capabilities. The Internet allows audio and video clips to be transmitted instantaneously around the world. The right to record interactions, conversations, and events—whether overtly or surreptitiously—in a place where a person has the right to be has evolved into a crucial aspect of the ability to engage in both political and public dialogue.

Some courts have recognized a First Amendment right to surreptitiously record. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018) ; *Kelly v. Borough of Carlisle*, 622 F.3d 248, 259 n.7 (3d Cir. 2010). Others have expressed concerns. The Seventh Circuit held that important differences exist for First Amendment purposes between overt and surreptitious recordings. *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (drawing "distinctions between open and concealed recording," explaining "surreptitious recording brings stronger privacy interests into play."). And the Fifth Circuit held that the First Amendment did not protect the right to make "secret video recordings" of a public high school teacher in Texas making students recite the Mexican Pledge of Allegiance "with their right arms raised at a 90-degree angle" to celebrate Mexican Independence Day. *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 343-44, 352-53 (5th Cir. 2017).

The First Amendment protects a wide range of expression. *See* U.S. Const. amend. I (literal "speech"); *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (cable television shows); *United States v. Stevens*, 559 U.S. 460, 481-82 (2010) (videos); *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501-02 (1952) (movies). It also protects a person's decision to reproduce and re-convey "speech generated by other persons," *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995), including third parties' paid advertisements, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964). Under these precedents, the First Amendment guarantees the right to disseminate video and audio recordings involving the speech of other people. *See Barnicki v. Vopper*, 532 U.S. 514, 518-19, 534-35 (2001) (holding that the First Amendment protected the right of a radio commentator to play an illegally obtained recording of teachers' union leaders discussing contentious contract

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photo-optical system.

b. "Interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and this type of service or system as operated or offered by a library or educational institution.

negotiations).

A person has a First Amendment right to discuss government officials and matters of public concern. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). That right includes the fundamental right to transcribe verbatim accounts of encounters with government officials or interactions they observe involving government officials. *See Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("Pictures, films, paintings, drawings, and engravings... have First Amendment protection.").

The First Amendment's purpose is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). Prohibiting speakers from being able to generate the types of communications—surreptitious videos—is antithetical to First Amendment values. Audio and video recordings can convey the full texture of a situation in a way that mere words cannot capture and can appeal to a viewer in a more immediate manner than unadorned text.

The right to display audio and video recordings implies a generally concomitant right to create them. Without surreptitiously recording actions and statements, it is impossible for a person to indisputably convey what occurred. Revealing the recording device may often lead the abusive to temporarily alter their speech and behavior to avoid generating evidence of wrongdoing and evade accountability. Failing to record the speech or interactions at all will lead to he-said, she-said situations.

Surreptitious recordings are entitled to full First Amendment protection as conduct that is a necessary precursor to, and integrally intertwined with, speech. A person cannot show a video unless they are permitted to record it in the first place. The First Amendment must protect the creation of the video to the same extent as the right to view it. The First Amendment is triggered by direct restrictions not only on expression, but also conduct that has "a close enough nexus to expression" or is "commonly associated with expression." *Lakewood*, 486 U.S. at 759; *see also Minn. Star Trib. Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 582 (1983) (recognizing tax on ink and paper "burdens rights protected by the First Amendment").

Surreptitious recordings are likewise inextricably intertwined with important political speech. Prohibitions on such recordings inherently prevent such recordings from being displayed to others.

Audios and videos produced through surreptitious recordings are generally a form of speech subject to full First Amendment protection, *United States v. Stevens*, 559 U.S. 460, 481-82 (2010), including when comprised solely of recordings of third parties. *Hurley*, 515 U.S. at 570. The act of recording the videos is likewise entitled to full First Amendment protection on a variety of grounds. Recording a video is itself an act of expression that falls directly within the First Amendment. *Animal Legal Def. Fund*, 878 F.3d at 1205. It is inextricably intertwined with the dissemination of the constitutionally protected videos themselves, *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988), and, alternatively, it is a necessary precursor for the eventual display of the videos.

Buckley v. Valeo, 424 U.S. 1, 16-19 (1976) (per curiam). Under each theory, surreptitious recording of government officials should be subject to strict scrutiny.

Section 39.601 fails strict scrutiny because it serves no compelling government interest, is not narrowly tailored to achieve such an interest, and does not provide the least restrictive means to achieve that interest.

More than a century ago, Justice Brandeis observed: "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis D. Brandeis, *Other People's Money and How Bankers Use It* 92 (1914). Surreptitious recording is often the means of shedding that light; Columbia's prohibition on it must be invalidated.

Conclusion

The judgment of the 112th District Court of Mitchell County is reversed. The case is remanded with instructions to dismiss.

Judge Woodward, dissenting.

Today, the court makes two colossal errors of national importance. I write separately to express my disagreement and to encourage the United States Supreme Court to correct our errors.

Section 31.002

The ban on fake news is a constitutional exercise of state power. It does not violate the First Amendment.

In recent years, fake news has overtaken the internet. Fake news publishers can disseminate false stories widely and cheaply on social media websites, amassing millions of likes, comments, and shares, with some fake news even "trending" on certain platforms. The ease with which a publisher can create and spread falsehoods has led to a marketplace of misinformation unprecedented in size and power. People's vulnerability to fake news means that they are far less likely to receive accurate political information and are therefore unable to make informed decisions when voting. Because a democratic system relies on an informed populace to determine how it should act, fake news presents a unique threat to our democracy.

The First Amendment does not protect intentionally false speech that causes specific and material harm. Laws on defamation, consumer fraud, perjury, foreign influence, election administration, and false reporting of crimes are examples of lawfully prohibiting speech to protect victims of misinformation. This statute illustrates that misinformation harms the public interest in many specific, tangible, and material ways.

The marketplace of ideas was always meant to be a marketplace of ideas, not facts. There is no marketplace in facts. Indeed, no area of law permits a market in facts. In fact, the goal of fake news is to create one, to erode the stability of foundational elements of society—namely, truth. And the reflexive application of a First Amendment metaphor that never contemplated a debate over truth and falsehood to demonstrable lies is complicit in the

corrosion of the body politic brought on by fake news. In this way, tolerating the proliferation of fake news erodes the free and open debate that the First Amendment was intended to protect: If we cannot agree on the veracity of basic facts, debate stops, partisanship hardens, and social solidarity breaks down.

Certain categories of speech are excluded from First Amendment protection. Those categories include "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); speech inciting imminent lawless activity, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); "true threat[s]," *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam); obscenity, *Roth v. United States*, 354 U.S. 476, 485 (1957); child pornography, *New York v. Ferber*, 458 U.S. 747, 754-764 (1982); and offers or solicitations to engage in illegal activity, *United States v. Williams*, 553 U.S. 285, 297 (2008).

The speech in these categories does not serve the central purpose of the First Amendment, while causing significant societal harms. The First Amendment was principally designed "to create[] an open marketplace where ideas, most especially political ideas, may compete without government interference." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008). But certain speech, the Court has explained, has no or minimal expressive value: These limited categories of speech have "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. Accordingly, they may be regulated "because of their constitutionally proscribable" content. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

Fake news should be added to the list of categorically unprotected speech. The value of fake news is clearly outweighed by its societal costs. Our society relies on the public being able to accurately discern what media stories are true and which are false. If Segretti and those like him can disseminate an intentionally false narrative as a truthful news story to advance personal interests with no risk of any civil or criminal liability, then the ability of the public to rely on the information they receive in the media and the decisions they make about that information will be threatened, with no corresponding social gain.

Even if the First Amendment applies to fake news, Columbia still has the constitutional power to prohibit the conduct. Columbia has a compelling interest in preventing the public harm caused by intentionally false statements of fact. Fake news hurts the marketplace of ideas by drowning out the truth, distorting perceptions of the truth, and damaging the credibility of all sources of future truth.

The narrow and discrete nature of intentionally false statements prohibited by the statute provides a unique assurance that the provision chills no protected speech. The requirement of knowledge or reckless disregard ensures that the statute cannot be used to impose orthodoxy or punish criticism, and it creates no risk that people will refrain from truthful speech about any topic for fear of prosecution.

Because the statute furthers a strong government interest and deters no

protected speech, it provides adequate breathing space and should be upheld. Even if the statute did chill some speech, however, the provision is constitutional because any chill would be minimal and no greater than necessary to further the government's interest.

Section 31.002 is constitutional. I would affirm Segretti's conviction for disseminating fake news.

Section 39.601

The ban on surreptitious recordings is not a matter of constitutional law; it is a matter for state legislatures.

That is why we have divergent views to addressing wiretap and eavesdropping statutes. Twelve states, including Columbia, have all-party consent schemes that require individuals recording a communication to have the consent of every party involved. Thirty eight states have one-party consent schemes. Vermont does not have one.

Sometimes, surreptitious recordings implicate Fourth Amendment concerns, but individuals do not have an independent First Amendment right to surreptitiously record. But the First Amendment does not create an independent right to surreptitiously record.

The majority held that because the Columbia statute restricts a medium of expression, which is an integral step in the speech process, it burdens speech rights and is subject to heightened First Amendment scrutiny. But to conclude this, my colleagues give greater First Amendment protection to those who would record a private conversation than it gave to those engaged in that conversation. In doing so, the decision recognized a new constitutional right to surreptitiously record and, thus, has ramifications to all persons in Columbia.

The issue of whether an eavesdropping statute violates the First Amendment is separate from whether eavesdropping statutes are good public policy. When reviewing legislation challenged on constitutional grounds, a court may only decide whether the legislation passes constitutional muster and may not pass upon its wisdom. The perceived fairness of such a result does not justify creating a First Amendment right to surreptitiously record others without their consent where no such right previously existed.

Indeed, the First Amendment does not prohibit Columbia from enacting single party or multi-party consent eavesdropping statutes to ensure conversational privacy. In holding that a State cannot protect such privacy and public safety interests, the decision below diminished the conversational privacy of speakers in favor of a heretofore unrecognized First Amendment right to surreptitiously record the discussions of such speakers.

Legislative history offers concrete reasons for the all-party consent law. The legislature determined that "as a matter of state public policy, we recognize that the right of any person to the privacy of his conversation is of greater societal value than the interest served by eavesdropping or wiretapping." The preamble of the law framed the statute's goal as protecting individuals from "grave dangers to privacy implicated by unrestricted use of modern technology."

The First Amendment guarantees significant protection to a speaker's right to record his or her own speech to disseminate a message. The Act does not implicate this right. What is troubling about the majority's reasoning is that it fastened this right into a multi-step analysis that eventually bootstraps unrelated speech protections and press protections to announce a new First Amendment right to appropriate another person's speech regardless of whether the recorder is a participant to such conversation or receives any party's consent.

This is a matter for the Columbia legislature, not this Court. I would affirm Segretti's conviction for surreptitiously recording.

I respectfully dissent.