No. 14–20–003333

In the

Supreme Court of the United States

October Term 2021

STATE OF COLUMBIA, PETITIONER,

v.

DONALD SEGRETTI, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR PETITIONER

Team 201

QUESTIONS PRESENTED

I . Whether a conviction under Section 31.002 of the Columbia Revised Civil Statutes, which bans the spread of fake news, violates the First Amendment.

II. Whether a conviction under Section 39.061 of the Columbia Revised Civil Statutes, which bans surreptitious recording, violates the First Amendment.

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The Opinion of the Supreme Court of the State of Columbia is cited as *Segretti v. State of Columbia*, 131 Col. Rptr. 44 (Col. 2021), and is available on pages 44–56 of the Record.

RELEVANT PROVISIONS

This case involves the First Amendment of the United States Constitution. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press…." U.S. CONST. amend. I.

The case also involves the following provisions of the Columbia Revised Civil Statutes:

> Section 31.002:
>
> 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 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.
>
> 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 39.061:

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.

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.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Respondent, Donald Segretti, is a college student in New Watergate, Columbia who derives income from posting original content on major social media platforms. Record at 45. Segretti also worked for his aunt, Joan Dean, on her 2020 campaign for Mayor of New Watergate. *Id.* Throughout the campaign, however, Segretti managed pseudonymous social media accounts as "Alexander Butterfield," who consistently purported to support Dean's rival, Gordon Liddy. *Id.* at 46. The campaign generated widespread corruption concerns pertaining to both Dean and Liddy. *Id.* at 45–46. At a Halloween party in a city park, Segretti used a hidden body camera to record a conversation between Dean and Joan Erlichman, the chair of the Election Commission. *Id.* at 46. The video ended with Erlichman quietly telling Dean, "I'll take care of it." *Id.* Liddy and Dean finished first and second, respectively, in the mayoral general election, and were slated to compete in a runoff. *Id.*

As "Butterfield," Segretti then broke a story claiming that Erlichman had falsely certified absentee ballots to aid Dean the general election. *Id.* The post included a photo of Dean and Erlichman, captioned: "Why bother? Erlichman will rig it anyway." *Id.* Two days later, "Butterfield" posted the video from the Halloween party, captioned: "Why bother? Erlichman will take care of it."

An investigation by the sitting mayor found no evidence of actual wrongdoing by Erlichman. *Id.* Despite this, media outlets continued to report on the widespread

rumors stemming from the posts. *Id.* Dean reversed the general election outcome by defeating Liddy in the runoff—a result many attributed to low voter turnout. *Id.* After the certification of the runoff, city police discovered Segretti's use of the pseudonym, and found that Dean's and Erlichman's Halloween party conversation had in fact been innocuous. *Id.*

II. PROCEDURAL HISTORY

The State charged Segretti for violating Section 31.002 of the Columbia Revised Civil Statute, which bans the knowing dissemination of fake news, and Section 39.061 of the same, which bans surreptitious recordings. Record at 47. At trial, Segretti challenged the State's assertion that he had violated the elements of the two statutory offenses. *Id.* A jury found Segretti guilty on both counts. *Id.* The 112th District Court of Mitchell County sentenced Segretti to both jail time and fines for each violation. *Id.*

On appeal to the Supreme Court of the State of Columbia, Segretti challenged his convictions as violations of the First Amendment. *Id.* A two-member majority of that court, Chief Justice Bradlee and Justice Bernstein, reversed the conviction on both counts, holding that each violated the First Amendment. *Id.* at 44–45. Justice Woodward dissented as to both issues and wrote in favor of affirming the convictions. *Id.* at 53.

The State of Columbia, Petitioner, now appeals to the United States Supreme Court.

SUMMARY OF ARGUMENT

This Court should reverse the decision by the Supreme Court of the State of Columbia, because neither Section 31.002 nor Section 39.061 of the Columbia Revised Civil Statutes violates the First Amendment.

Section 31.002, which bans the spread of fake news, does not violate the first amendment. First, fake news, as defined by the statute, is not protected speech under the First Amendment. The statute pertains to knowingly false statements of fact, which case law shows are not given absolute protection. The type of speech regulated—i.e., speech causing public harm, is beyond the protections of the First Amendment. Second, even were fake news protected by the First Amendment, Columbia's regulation thereof would survive strict scrutiny. That is, there is a compelling government interest in preventing the public harm resulting from wide dissemination of fake news, and the statute at issue is narrowly tailored to meet that interest.

Section 39.061, which bans surreptitious recordings under certain circumstances, likewise does not violate the First Amendment. First, the First Amendment does not protect the right to surreptitiously record others without their consent; as such, regulations of the recording of others is a matter for the state legislature. This Court has not recognized an absolute right to such nonconsensual recording. Nor is there a consensus among circuits or states as to the right to surreptitiously record. Absent recognized protection, regulations on surreptitious recording are a matter of public policy not for the courts but for legislatures. Second,

even if First Amendment protections were to be recognized for surreptitious recording, such protection would subject relevant regulations to strict scrutiny. Again, there is a compelling government interest in protecting citizens from the erosion of the right to privacy, particularly in the face of modern technology. The statute is narrowly tailored to meet that interest.

Accordingly, the Columbia statutes should be upheld, and the convictions reached by the trial court should be restored.

STANDARD OF REVIEW

At issue are two questions of constitutional law. The Court reviews questions of law *de novo*. *Highmark Inc. v. Allcare Health Management System, Inc.*, 572 559 (2014). The standard is to review the constitutional question anew and independently, without regard to the conclusions reached by the trial court. "When *de novo* review is compelled, no form of appellate deference is acceptable." *Salve Regina College v. Russell*, 499 U.S. 225, 226 (1991).

ARGUMENT

I. SECTION 31.002 OF THE COLUMBIA REVISED CIVIL STATUTES BANNING THE SPREAD OF FAKE NEWS DOES NOT VIOLATE THE FIRST AMENDMENT.

The First Amendment protects five individual freedoms, including the freedom of speech. U.S. CONST. amend. I. However, as this Court has pointed out on numerous occasions, not all speech is afforded absolute protection. *See Schenck v. United States*,

249 U.S. 47, 52 (1919) (reasoning that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic"). As Justice Holmes wrote in his opinion for a unanimous bench, "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* Ultimately, the *Schenck* court concluded that "[i]t is a question of proximity and degree." *Id.* Section 31.002 of the Columbia Revised Civil Statutes (hereinafter "Section 31.002"), which bans the knowing dissemination of false statements of fact for personal gain, does not violate the protections of free speech ensured by the First Amendment. First, fake news as defined by the Columbia statute is not protected speech under the First Amendment. Second, even if First Amendment protections were to extend to fake news, Columbia appropriately tailored this regulation to meet the state's compelling interest in preventing the public harm caused by dissemination of deliberately false statements of fact.

A. Fake news as defined by the Columbia statute is not protected speech under the First Amendment.

This Court has made clear time and again that not all speech has First Amendment protection. Its First Amendment jurisprudence identifies specific forms and styles of speech which the Court has deemed to be outside the Amendment's protections. In particular, knowingly false statements of fact and speech causing public harm are two types of speech without absolute protection. Section 31.002 bans

fake news, and defines such news as (1) intentionally false statements (2) of fact, (3) broadly disseminated, (4) for a self-serving purpose, (5) that causes a public harm. Based on that definition, Section 31.002 bans speech that has no protection under the First Amendment, and is therefore constitutional.

1. *Knowingly false statements of fact are not given absolute protection under the First Amendment.*

Section 31.002 bans intentionally false statements of fact, a category of speech which this Court tended to exclude from constitutional protection. Admittedly, a law prohibiting any false statement, regardless of knowledge of its falsity, would severely damage the marketplace of ideas the First Amendment is intended to foster. Under such a law, individuals would hesitate to contribute to the discourse for fear that an unwitting error of fact may bear legal repercussions. *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring). For this very reason, this Court has made clear that falsity alone is not enough to bring speech outside the protections of the Constitution—the statement must be a knowing and reckless falsehood. *Id.* at 719.

Section 31.002 provides, in relevant part, "An information source shall not intentionally disseminate purported facts if… the information source knows the purported facts are false or recklessly disregards the truth or falsity of those purported facts." Columbia Revised Civil Statutes § 31.002(1)(a). The statute clearly and unambiguously states that only speech that is a knowing or reckless falsehood is restricted. This Court has permitted restrictions on the freedom of speech in a

multitude of cases because, as Justice Brennan noted, "the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); *see also*, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1946) (laws on defamation); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (consumer fraud); *United States v. Dunnigan*, 507 U.S. 87, 97 (1993) (perjury). Precedent therefore supports denying protection to the exact speech the Columbia statute prohibits: speech intended to mislead and deceive.

This Court has never endorsed the categorical rule that false statements receive no First Amendment protection. *See Alvarez*, 567 U.S. at 718 (explaining that arguments in support of laws that prohibit general falsity like the Stolen Valor Act, stretch positions held by this Court far past their original contexts). Unlike the Stolen Valor Act at issue in *Alvarez*, the Columbia statute does not seek to expand restrictions beyond speech this Court has already excised from First Amendment protection. Rather, by banning only intentionally false statements of fact, the statute is designed to fall within the parameters of constitutionally permitted restrictions on false speech. *See Sullivan*, 376 U.S. at 280 (prohibiting recovery of damages for a defamatory statement made about a public official unless the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not); *see also Garrison*, 379 U.S. at 73, (precluding adverse consequences to any false utterances except those which are knowing and reckless falsehoods). The

intentionally false statements of fact prohibited by Section 31.002 do not enjoy protection under the First Amendment.

2. *Speech causing public harm is beyond the purview of the first amendment.*

Though content-based restrictions on speech are typically maligned and rejected by this Court, such restrictions are upheld when enforcement reduces a public harm. Section 31.002 bans only speech that results in a public harm.

While the protections of the First Amendment encourage a marketplace of ideas that enriches public consciousness, this Court has concluded that categories of speech bringing about a public harm contribute minimal expressive value, if any, and thus enjoy no such constitutional protection. *Dennis v. United States*, 341 U.S. 494, 508 (1951) (accepting certain kinds of speech to be so undesirable as to warrant criminal sanction.) Despite the substantial threat posed to the freedom of speech by content-based restrictions, limiting these limited harmful categories of speech has long been accepted by this Court.

Forms of speech that cause more harm to society than good fall outside the parameters of First Amendment protection. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 754–764 (1982) (upholding legislation prohibiting child pornography in the interest of protecting the psychological, emotional, and physical health of this country's children); *see also Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) (acknowledging no constitutional protection for lewd and obscene speech because the societal interest in maintaining order and morality greatly outweighed

any benefit from it); *Dennis*, 341 U.S. at 509 (finding a government is justified in restricting speech inciting its forceful and violent overthrow and threatening its ability to protect public health, safety and security); *Watts v. United States*, 394 U.S. 705, 707 (1969) (permitting criminalization of true threats to take the life of or inflict bodily harm upon the President of the United States, as the nation has a valid and overwhelming interest in protecting the Chief Executive and in allowing them to perform their duties without threat of physical violence or death).

This court has plainly stated that "the societal value of speech must, on occasion, be subordinated to other values and considerations." *Dennis*, 341 U.S. at 503. The restrictions enacted by Columbia's state legislature exist to protect the State and its citizens from material harm to public health, safety, security, and the operation of essential government functions. As demonstrated by the above cases, this Court has rejected claims of First Amendment violations in cases where the banned speech threatens public welfare. This statute's regulation of speech goes no further than this Court has already gone in its jurisprudence by prohibiting styles of speech whose social value is so negligible that they degrade the very principles the First Amendment is intended to protect and promote.

Section 31.002 of the Columbia Revised Civil Statutes is not unconstitutional, as First Amendment protections do not extend to the specifically defined speech proscribed by the section.

B. Even if First Amendment protections extend to fake news, Columbia appropriately tailored this regulation to meet the state's compelling

interest in preventing the public harm caused by wide dissemination of deliberately false statements of fact.

Fake news contaminates the revered marketplace of ideas by distorting perceptions of truth and damaging the credibility of information sources. Reliable, truthful information sources are necessary to keep the public informed—an informed public being vital to any democracy. When assessing content-based restrictions on the speech and information accessible to the public, the Court applies the "most exacting scrutiny." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). To survive this strict scrutiny analysis, content-based restrictions must be narrowly tailored to serve an existing compelling government interest. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). The state of Columbia has a compelling government interest in enforcing Section 31.002 and the statute is narrowly tailored to meet that interest.

1. *There is a compelling government interest in preventing the public harm resulting from wide dissemination of fake news.*

It is the duty of a democratic government to protect and preserve public health, safety, national security, and the operation of essential government functions. Fake news contaminates the marketplace of ideas that the First Amendment protections on free speech are supposed to preserve and threatens public health, safety, national security, and the operation of essential government functions, all of which the government of Columbia has a compelling interest in protecting.

Protecting freedom of speech allows for open discourse and discussion. It allows a democratic society to sift through and separate the best ideas from the many. A

democracy relies on the decisions made by the informed public; it needs an untainted marketplace to survive. This Court has agreed that false statements damage this marketplace. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (concluding false statements of fact interfere with the truth-seeking function of the marketplace of ideas and cause harm that cannot be repaired with counterspeech). The ease with which an individual can create and spread false information in recent years has led to the creation of a paradoxical new marketplace, one of facts. When the public can no longer discern lies from the truth they cannot make informed decisions. Tolerating the spread of falsity as fact, or going so far as to give protection to such speech, can have dangerous consequences. A government is unable to adequately protect public health when false facts regarding severity and transmissibility of a novel virus are believed as true. The government of the state of Columbia therefore has a compelling interest in preventing fake news from corrupting the marketplace of ideas and the harm to the public that follows.

2. *The statute is narrowly tailored to meet Columbia's compelling government interest in restricting the spread of fake news.*

Speech must meet several specific requirements to qualify as fake news banned by Section 31.002. These requirements prevent the feared chilling effect on forms of protected speech and restrict speech no more than necessary to further Columbia's interest. A law is narrowly tailored when it enforces the least restrictive method needed to meet the compelling government interest. *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 755 (1996). Section 31.002 is so tailored to

meet Columbia's compelling interest of preserving the reliability of factual information necessary to facilitate essential government duties.

First, statements must be intentionally false statements of fact. Narrowing the statute restriction to only intentionally false statements of fact preserves the protection of false speech made mistakenly or with legitimate belief in its veracity. Further, the requirement for a false statement of fact to be made knowingly or with reckless disregard for the truth ensures the statute cannot be used to punish criticism or to chill free expression of ideas. Rather, it targets only speech intended to mislead and deceive—speech maliciously disseminated to erode the distinction between truths and falsehoods that is vital to any democracy.

Second, the statute requires the speech to be broadly disseminated, defined as published "in a manner which is reasonably calculated to reach an audience of 5,000 people or more." Columbia Revised Civil Statutes § 31.002(3)(b). Unlike in *Alvarez*, where this Court took issue with the law's overbroad application to both private and public statements, Section 31.002 does not make similar overreaching restrictions. *See Alvarez*, 567 U.S. at 722 (explaining that the statute, by its plain terms, would apply with equal force to personal conversations and public statements.) By limiting the prohibition to speech disseminated to an audience of 5,000 or more people, the legislature has gone only so far as to prevent harmful speech reasonably expected to influence a large group of people. When false facts purported as truths reach large audiences, they have the potential to negatively affect public trust of the government and its institutions. Without trust in government institutions such as public

elections, a government cannot adequately protect its citizens or its democracy. The statute unambiguously protects the interests of the government without enforcing an overbearing restriction on personal conversation.

Third, speech banned by Section 31.002 is limited to that which is spread for a self-serving purpose. In reversing the judgment of the 112th District Court of Mitchell County, the Supreme Court of the State of Columbia attempted to liken Section 31.002 to The Stolen Valor Act at issue in *Alvarez*, arguing a law like the Columbia statute that "punished speech merely because it is untrue and where the speaker incurs no benefit" had no support in case law. *Segretti v. State Of Columbia*, 131 Col. Rptr. 49 (2021). The court specified that the lie must be made to gain a material benefit to bring the speech outside of the protections of the First Amendment. *Id.* (citing *Alvarez*, 567 U.S. at 723). However, Section 31.002 makes this exact material gain a requirement, banning speech only when "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." Columbia Revised Civil Statutes § 31.002(1)(b). These purposes for disseminating information threaten national security and the operation of essential government functions, which Columbia has a compelling interest in protecting. By limiting the banned speech to only those instances where it does serve a personal or material benefit, the Columbia state legislature does not risk including false information for legitimate purposes, but rather focuses solely on those willing to harm the public for their own benefit.

Finally, in addition to the previous requirements, Section 31.002 prohibits only speech that causes material harm to public health, safety, national security, or the operation of an essential government function. Columbia Revised Civil Statutes § 31.002(1)(c). The Columbia state legislature has restricted speech only as necessary to protect the public, an interest for which this Court has previously upheld restriction. See Dennis, 341 U.S.at 505 (agreeing speech that will or is intended to bring about the threat of certain evils the United States may seek to prevent can constitutionally be restricted and punished.) With each requirement the reach of Section 31.002 is narrowed so that it may enforce the least restrictive method of meeting Columbia's interest in preventing the public harm caused by wide dissemination of fake news.

For the foregoing reasons, this Court should reverse the decision of the Columbia State Supreme Court, because Section 31.002 of the Columbia Revised Civil Statutes, banning the spread of fake news, does not violate the First Amendment.

II. SECTION 39.061 OF THE COLUMBIA REVISED CIVIL STATUTES DOES NOT VIOLATE THE FIRST AMENDMENT BY BANNING SURREPTITIOUS RECORDING.

This court should reverse the decision of the Thirteenth Circuit Court of Appeals because Section 39.061 of the Columbia Revised Civil Statutes does not violate the First Amendment. First, the First Amendment does not protect a person's right to surreptitiously record others without their consent. Because there is no First Amendment protection to begin with, this is a matter of public policy and should be

left to the Columbia State Legislature rather than this Court. Further, even if the First Amendment extended its protections to the surreptitious recording of others, this law would survive strict scrutiny, as it is narrowly tailored to meet the compelling government interest of protecting conversational privacy.

A. The First Amendment does not protect the right to surreptitiously record others without their consent; thus, regulations on the recording of others is a matter for the legislature.

The right to record others has not been specifically illustrated under the First Amendment. Though the Supreme Court has considered the right to record others as it pertains to the Fourth Amendment right against unreasonable search and seizure, there is no case law that specifically identifies a right to record others, especially without their consent, under the First Amendment. Further, there is no consensus among states or circuits that would indicate a First Amendment right to surreptitiously record others without their consent. There is no First Amendment right to surreptitiously record others, and without such protection, the decision to prohibit surreptitiously recording others is a matter of public policy that should be determined by the Columbia state legislature.

1. *In its First Amendment jurisprudence, the Supreme Court has not recognized an absolute right to surreptitiously record others without their consent.*

The Supreme Court has yet to address whether the right to record is protected under the First Amendment, but has considered recording for purposes of reconveyance or reproduction in very limited circumstances. *See, e.g.*, *United States*

v. Stevens, 559 U.S. 460, 481–82 (2010) (holding that a ban on the reproduction of animal cruelty was overly broad because it included "wounded" and "killed" as animal cruelty, which went far beyond the state interest); *see also Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995) (considering a government mandate on private citizens to include reproduced statements in a parade as a violation of the First Amendment); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964) (finding that otherwise protected speech under the First Amendment is still protected even if it is reproduced in the form of a paid advertisement). However, none of these create absolute protection for reproduced materials, but rather address specific circumstances under which reproduced material might enjoy First Amendment protections.

This Court has also identified a right to disseminate video and audio recordings involving the speech of other people if the public concerns outweigh the private concerns and the party releasing the information did not obtain it illegally. *Bartnicki v. Vopper*, 532 U.S. 514, 518–19, 534–35 (2001). However, in *Bartnicki*, this Court made clear the holding would not apply if the person who obtained the communication unlawfully was the same person that released it. *Id.* Section 39.061 does not ban, punish, or otherwise infringe on a person's ability to release information, but rather focuses only on the person that actually records the conversation without the consent of all parties. Thus, Section 39.061 falls outside the *Bartnicki* holding and is not banning speech protected by the same First Amendment principles.

Further, Section 39.061 does not attempt to limit or prohibit surreptitious recording of officials when performing official duties or when persons are speaking at public meetings. In fact, those have been carved out in Section 2 of the statute specifically so that it cannot be used to limit recording under those circumstances. Columbia Revised Civil Statutes § 39.061 (2). While this Court has recognized that there is a "universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs" and that this protection includes protecting the right to transcribe accounts of discussions about governmental affairs, that does not apply to Section 39.061. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The exceptions explicitly outlined in the statute do not prohibit the surreptitious recording of public officials when they are *acting in their official capacity*, which means that this statute still serves the purpose of protecting free discussion of government affairs. Government officials are not discussing governmental concerns or public policy at all hours of the day and to assume so in order to remove the right to conversational privacy indefinitely is a blatant subversion of the very principles upon which the First Amendment relies.

2. *There is no consensus among the circuits or states that the right to surreptitiously record others without their consent has absolute protection under the First Amendment.*

Nearly every state in the country regulates, in some way, the surreptitious recording of others without the consent of at least one party. Under the Electronic Communication Privacy Act, a person is allowed to intercept electronic communication if the person is party to the communication or "one of the parties to

the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(d). In addition, eleven states have required the consent of all parties involved in the conversation in order for the conversation to be recorded. *See, e.g.*, Cal. Pen. Code § 632(a)–(d); *see also* Del. Code Ann. tit. 11 §§ 2402(c)(4) and 1335(a)(4); Fla. Stat. Ann. § 934.03(3)(d); 720 I.L.C.S. § 5/14-2(a); Md. Code Ann. Cts. & Jud. Proc. § 10-402(c)(3); Mass. Gen. Ann. Laws ch. 272 §§ 99(B)(4) and (C)(1); Mont. Code Ann. § 45-8-213; *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1180–81 (1998) (interpreting Nevada surreptitious recording law to require consent of all parties); N.H. Rev. Stat. Ann. § 570-A-2(I-a); 18 Pa. Const. Stat. §§ 5702–5704; Wash. Rev. Code Ann. § 9.72.030. An overwhelming majority of state legislatures, not to mention the federal legislature, have regulated the surreptitious recording of private conversations without any Court declaring the law a violation of the First Amendment.

Furthermore, the circuits have not reached a consensus on the First Amendment implications of laws against the surreptitious recording of private conversations. Some circuits have recognized a right to surreptitiously record a topic of public interest or a conversation regarding governmental affairs. *See, e.g.*, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018) (declaring a right to film matters of public interest when the prohibition of the recording is both under and over-inclusive of the defined state purpose); *see also ACLU v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012) (holding that a statute prohibiting "nonconsensual audio recording of public officials performing their official duties in public" violated the

First Amendment). However, Section 39.061 does not violate either of these rights, but rather specifically creates an exception for "elected or appointed public officials or [for] public employees when the transcription of recording is done in the performance of official duty" and "persons speaking at public meetings." Columbia Revised Civil Statutes § 39.061. On the other hand, some circuits have recognized that there has not been a clearly established First Amendment right to record others. *See Kelly v. Borough of Carlisle*, 622 F.3d 248, 259 n.7 (3d Cir. 2010).

3. *Without First Amendment protection, regulations on surreptitious recording are a matter of public policy, which should be left to the legislature, not the courts.*

The right to surreptitiously record others without their consent is a matter of public policy and should be determined by the legislature, not by this Court. Section 39.061 is the legislature's determination on how to balance the privacy interests of two private persons' conversation and the interest of the recording party in reproducing the conversation. The role of the judiciary is not to make such a decision, but rather to recognize that this is a purely policy-based decision, which should be left to a legislative body that represents the people of the state. As the dissent pointed out in the Columbia Supreme Court decision, states have different views on surreptitious recording. See *Segretti v. State of Columbia*, 131 Col. Rptr. 44, 55 (Col. 2021) (Woodward J., dissenting opinion) ("Twelve states, including Columbia, have all-party consent schemes . . . Thirty eight states have one-party consent schemes [and] Vermont does not have one.").

The right to surreptitiously record others has no First Amendment protection and the Columbia state legislature recognized that the law was actually a balance on conversational privacy against eavesdropping and wiretapping. *Id.* In fact, the legislature explicitly said 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." *Id.* The law was intended to protect the privacy rights implicated by modern technology designed to make it easier for others to record each other and infringe on those privacy rights. Today, phones can be recording devices for audio or video and immediately disseminate that information to an audience of the user's choosing.

B. Even if the First Amendment extended its protections to the right to surreptitiously record others without their consent, Section 39.061 would survive strict scrutiny.

Section 39.061 is not a complete ban on surreptitious recording, as it provides exceptions based on content as listed in section 2; thus, this is a content-based restriction, which must survive a strict scrutiny analysis. Under a strict scrutiny analysis, the means must be narrowly tailored to achieve a compelling government interest. The government action is presumed unconstitutional, and thus the government has the burden to overcome such a presumption. For a law to be "narrowly tailored," it must be the "least restrictive" method to meet the compelling government interest. *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 755 (1996).

1. *There is a compelling government interest in protecting its citizens from the erosion of the right to privacy in the face of modern technology.*

What constitutes a compelling government interest has not been defined by this Court, but it has been made apparent that the government always has an interest in fulfilling its constitutional obligations and protecting its citizens' constitutional rights. In First Amendment freedom of religion jurisprudence, the Court has defined a compelling government interest as an "interest of the highest order" in an attempt to convey the crucial and important nature of the type of interest needed to satisfy strict scrutiny. *Wisconsin v. Yoder*, 402 U.S. 205, 215 (1972). While that definition has not yet extended to any of the other freedoms in the First Amendment, it is one of the only definitions this Court has provided. Thus, citizens' constitutional rights should be among the first interests the state pursues in its legislation.

Among such constitutional rights is the right to privacy, which has been recognized as a right under the Constitution even if it is not explicitly stated. *See Katz v. United States*, 389 U.S. 347, 350–351 (1967) (reasoning that the Fourth Amendment offers a right to privacy against certain kinds of government intrusion); *see also Roe v. Wade*, 410 U.S. 113, 152–153 (1973) (declaring a definite right to privacy even if it can be subject to *some* government regulation). In this case, the legislature's express motivation is to protect individuals from the "grave dangers to privacy implicated by unrestricted use of modern technology." *See Segretti*, 131 Col. Rptr. at 55. There is a recognized right to privacy in the Constitution and Columbia

has a compelling interest in protecting that, which the legislature made abundantly clear in its justification.

2. *Section 39.061 is narrowly tailored to meet that compelling government interest.*

Section 39.061 prohibits a person from "knowingly or purposely record[ing] or caus[ing] to be recorded a conversation" in a surreptitious manner, which can be reproduced without the knowledge of all parties to the conversation. Columbia Revised Civil Statutes § 39.061 (1). The term "narrowly tailored" has not been clearly defined by this Court either, though taken plainly, it means the regulation or restriction must be very specifically fitted to the compelling government interest. For instance, this Court has held that including "wounded" and "killed" under the definition of animal cruelty in a ban on creation, sale, or possession of depictions of animal cruelty is overbroad. *See United States v. Stevens*, 559 U.S. at 481–82. The court found that the ban in Stevens was too broad because it was not solely limited to the governmental purpose of limiting animal cruelty as it would include far more than that. *Id.*

In this case, this statute would not punish those who accidentally catch others' conversations in videos or recordings they are lawfully allowed to make nor does it prohibit recordings of those who give consent to be recorded. The statute only bans intentionally recording a private conversation between two parties who have no knowledge that they are being recorded and thus could not have given consent. By creating these specific limits, the Columbia state legislature prevents this law from

being overly broad and tailors it to meet its compelling interest of protecting conversational privacy in the face of modern technology. Further, Columbia's state legislature carved out specific exceptions for public officials when in their official capacity and healthcare agencies in emergency situations preventing this statute from being overly broad. Section 39.061 is narrowly tailored as it outlines specific exceptions for circumstances where it would serve the public's interest to hear private conversations.

Therefore, the regulations on surreptitious recording in Section 39.061 achieve, without unnecessary restrictions, the compelling government interest of protecting the right to conversational privacy and address the threat that modern technology may pose to that right. However, this analysis only applies if this Court dismisses its own jurisprudence, circuits and state legislatures and finds the First Amendment protects the right to surreptitious recording without the consent of others. The balance of conversational privacy interests and the right to record others for reproduction should be a matter of public policy and determined by the state legislature as has been done in nearly every state and done by the federal legislature, not by this Court. Thus, this Court should reverse the Columbia State Supreme Court decision and find that Section 39.061 does not violate the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Supreme Court of the State of Columbia, because neither Section 31.002 nor Section

39.061 of the Columbia Revised Civil Statutes violates the First Amendment. Because Section 31.002 bans only speech not protected by the First Amendment and because it is appropriately tailored to meet the state's compelling interest in protecting the public from harm, the Columbia statute does not violate the First Amendment. Likewise, because Section 39.061 applies to unprotected speech, and moreover because it is narrowly tailored to meet the state's compelling interest in protecting its citizens from erosions to their privacy, it does not violate the First Amendment. As such, the decision of the Columbia Supreme Court should be reversed and the convictions under these statutes should be upheld.