No. 14-20-00333

In the

Supreme Court of the United States

January 2022

STATE OF COLUMBIA,

PETITIONER,

v.

DONALD SAGRETTI,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of the State of Columbia

BRIEF FOR RESPONDENT

Team 202

NOMCC 2022

QUESTIONS PRESENTED

I. Does a content-based ban on fake news pass strict scrutiny when it prohibits intentionally false statements of fact, broadly disseminated, for a self-serving purpose, that causes material public harm?

II. Does the First Amendment protect a person's right to surreptitiously make recordings in a place where they have the right to be?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Internet Resources

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Respondent Donald Segretti was convicted of disseminating fake news and violating privacy in communications in violation Columbia state law. 131 Col. Rptr. 44, 45 (Col. 2021). At the time of the underlying events, Segretti was a 20-year-old student at Magruder University in New Watergate, Columbia. *Id.* He was politically active and earned over $45,000 a year as a social media influencer with over 220,000 followers on social media platforms. *Id.* Segretti began working on his aunt's campaign for Mayor of New Watergate, where elections are always contentious. *Id.*

Segretti's aunt, Joan Dean, was one of twelve candidates seeking the office. As expected, the election ended in a runoff between longtime rivals Dean and Gordon Liddy. *Id.* Both Liddy and Dean were well funded with broad community support and ran attack advertisements against the other accusing them of engaging in "dirty politics." *Id.* at 45–46. Voter fraud and poll official misconduct concerns that had been plaguing the national election spilled into the New Watergate mayoral race. *Id.* at 46.

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. *Id.* The story originally appeared on a social media post by Alexander Butterfield, who supported Liddy throughout the campaign with 25,000 followers. *Id.* 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. *Id.* On November 20, 2020, Butterfield broke a story that Erlichman falsely certified 394 absentee ballots to help Dean get into the runoff. *Id.* The

post ended with a large caption over a photo of Dean and Erlichman that read, "Why bother? Erlichman will rig it anyway." *Id.*

Two days later, Butterfield posted a video of Dean and Erlichman at a Halloween Party in the city park showing a hushed conversation between the two and ended with Erlichman saying, "I'll take care of it." *Id.* 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." *Id.* The current mayor, Virgilio Gonzalez, investigated the allegations. *Id.* No evidence suggested that Erlichman had done anything wrong. *Id.* Although media outlets reported the investigation's outcome, they continued to report on the widespread rumors stemming from Butterfield's social media posts. *Id.* As a result, Erlichman and Dean were widely criticized on social media. *Id.*

Dean defeated Liddy in the runoff by 5 percentage points. *Id.* Many attributed Dean's victory to the fact that 14 percent of registered voters participated in the runoff. *Id.*

Two days after the certification of the runoff results, New Watergate police discovered that Segretti had created Butterfield. *Id.* 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. *Id.* A review of the entire recording of the conversation revealed that Erlichman and Dean were discussing a church project and Erlichman's comment that she would "take care of it" related to arranging for someone to teach a weekly bible study. *Id.* Erlichman, Dean, and Liddy were unaware of Segretti's actions. *Id.* 46–47.

II. **PROCEDURAL HISTORY**

The State charged Segretti for violating Columbia's Section 31.002 ban on disseminating fake news and for violating Section 39.60's ban on surreptitiously recording others. *Id.* at 45, 47. A jury found Segretti guilty of both counts. *Id.* at 47. Judge Archibald Cox of the 112th District Court of Mitchell County sentenced Segretti 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. *Id.* Segretti appealed on constitutional grounds, claiming that his convictions under Section 31.002 and 39.601 violate the First Amendment. *Id.* at 47, 50. Justice Bernstein of the Columbia State Supreme Court reversed the convictions, finding that the district court struck the wrong balance on both issues. *Id.* at 45.

SUMMARY OF ARGUMENT

Respondents come before this court seeking to affirm the determination of the Columbia Supreme Court and find that (1) Columbia's ban on fake news is a content-based restriction on core political speech that cannot overcome the burden of strict scrutiny and (2) that surreptitious recording of government officials is a protected form of speech that should be subject to strict scrutiny which Columbia's Section 39.601 ban of such recordings fails to overcome. The Free Speech clause protects against government restrictions on speech. US. Const. Amend. I. Courts apply different standards of review under the First Amendment to the government regulation of speech. Regulations on speech that target substantive content, or the message conveyed are subject to strict scrutiny review. Such restrictions are presumed unconstitutional unless "it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 799 (2011).

I. Section 31.002

Under section 31.002 Columbia prohibits the intentional dissemination of purported facts if the source knows they are false or recklessly regards its truth or falsity, the purpose is for pecuniary gain, to influence a contested public election, or promote a foreign government and it causes material harm to public health, safety, national security, or the operation of an essential government function. As such, it is subject to strict scrutiny because it is a facially content-based law that requires consideration of the speaker's message. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Section 31.002 is not actually necessary to protect a compelling government interest. Compelling government interests have been "confined to the few historic and traditional categories of expression," including "advocacy intended, and likely, to incite imminent lawless action," "child pornography," "speech integral to criminal conduct," "so-called 'fighting words'," and "speech presenting some grave and imminent threat the government has the power to prevent." *U.S. v. Alvarez*, 567 U.S. 709, 717 (2012). Section 31.002 is neither narrowly tailored nor the least restrict way of achieving its purpose because it threatens protected speech and counter speech is a sufficient alternative. Moreover, the statute is underinclusive because it only restricts fake news through social media. A law is underinclusive, and therefore, "violates the First Amendment by abridging too little speech." *Williams-Yulee v. Fla. B.*, 575 U.S. 433, 448 (2015).

II. Section 39.601

Section 39.601 prohibits recording a conversation "by use of hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation." This prohibition does not apply to elected or appointed officials or public

employees in the performance of official duties, public meetings, persons given warning of recording, or a recording of health care emergency communication to a health care facility or government agency. This statute effectively limits a person's right to record where they have a right to be. The right to produce speech in the form of recordings is inextricably intertwined with – and generate – communications protected by the First Amendment. Generally, only when recorded parties have a reasonable expectation of privacy in the interaction are recording individuals required to obtain the consent of at least one party involved. 18 U.S.C. § 2511(2)(d) (2018). And a majority of circuits faced with the issue have protected surreptitious recording. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1190, 1205 (9th Cir. 2018) (protecting "secret film[s]" in places where the person creating the recording has permission to be); *see also Kelly v. Borough of Carlisle*, 622 F.3d 248, 259 n.7 (3d Cir. 2010) (finding that the covert nature of a recording does not affect its First Amendment value).

As a necessary precursor to protected speech, section 39.601 should be subject to strict scrutiny. Moreover, though the statute appears content neutral on its face, this Court can deem the regulation content based because it cannot be justified without reference to the content of the regulated speech. The exceptions to rule effectively allows some content (whether actually in performance of public duties or to communicating health care emergencies) while regulating others. Such a statute cannot survive strict scrutiny because it is not narrowly tailored to serve a compelling government interest because it runs afoul of the interest to protect political speech and the dissemination of truth.

STANDARD OF REVIEW

The standard of review in this case is de novo. Questions of law are reviewable de novo. *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc*., 134 S. Ct. 1744, 1748 (2014) (citing *Pierce v. Underwood,* 487 U.S. 552, 558 (1988)). A "question of law" is defined as an issue "concerning the application or interpretation of the law." QUESTION OF LAW, Black's Dictionary (11th ed. 2019). Both questions presented in this case are reviewable de novo because it concerns whether the State of Columbia violated the First Amendment by enacting Sections 31.002 and 39.601. Thus, the constitutionality of a statute is a pure question of law subject to de novo review.

ARGUMENT

I. THE FIRST AMENDMENT LIMITS GOVERNMENT REGULATION OF FAKE NEWS.

The First Amendment plainly states that "Congress shall make no law…abridging the freedom of speech." U.S. Const. amend. I. The freedom of speech–the ability to openly share and debate upon information, evolve ideas, and promote the expanse of a man's free will–is the bedrock of America's free and democratic society. While the privilege of the First Amendment has been hotly contested and challenged throughout history, the plain language of the Constitution- is intentional and explicit, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Alvarez,* 67 U.S. 709 at 716 (2012). As the fabric of American society, the First Amendment must be protected with "vigorous advocacy," in order to "to ensure that the individual citizens can effectively participate in and contribute to our republican system of self-government." *N. A. A. C. P.* v. *Button*, 371 U.S. 415, 429; *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 604 (1982).

This vigorous advocacy is demonstrated in cases such as *New York Times v. Sullivan,* where the Supreme Court has reinforced the "profound national commitment" to protecting the freedom of

speech, as speech "should be uninhibited, robust, and wide-open," even if the expression tends to include "half-truths" and "misinformation." *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). There is a "common understanding that some false statements are inevitable if there is to be an open and vigorous expression," *See Id.* at 271. As the appellate court in this case correctly stated, while the statute was intended to prevent the spread of misinformation the outright ban on fake news "cannot overcome the constitutional hurdle it must to stand." *Segretti*, 131 Col. Rptr. At 50. The survival of a free society hinges on the profound commitment to protecting the First Amendment against threats such as the Columbia Revised Civil Statutes §31.002.

Section §31.002 violates the plain language of the First Amendment by placing an overly broad restriction on speech and prevent the kind of free-flowing discourse that the First Amendment was created to protect. The Constitution "demands that content-based restrictions on speech be presumed invalid…and that the Government bear the burden of showing their constitutionality." *Alvarez,* 567 U.S. 709 at 716-17, (quoting *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004)). Section §31.002 falls within the definition of a content-based restriction-- and is therefore presumed to be unconstitutional. The U.S. Supreme Court recently explained in *Reed v. Town of Gilbert* that a law is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed" or "target[s] speech based on its communicative content." *Reed*, 576 U.S. at 155. In this case, the statute restrains a particular type of speech, the so-called fake news, and places a restraint on specific topic discussed or the message expressed, narrowing including "(1) intentionally false statements (2) of fact, (3) broadly disseminated, (4) for a self-serving purpose, (5) that causes public harm." *Segretti*, 131 Col. Rptr. at 48. To evaluate whether a content-based statute violates the First Amendment, the first step is to articulate the level of scrutiny to apply in this court's analysis—i.e., the standard on which this court examines the fit between the statutory ends and means. *Ashcroft*, 542 U.S. at 2551 (Breyer, J., concurring).

A. Columbia's Section 31.002 Ban on Fake News Fails the Strict Scrutiny Standard.

The Columbia Ban does not survive the strict scrutiny standard. The Columbia ban on fake news is subject to a strict scrutiny standard because it is a content-based restriction. Moreover, "strict scrutiny is applied to any regulation that would curtail" political speech. *Republican Party of Minn. v. White*, 416 F.3d 738, 749 (8th Cir.2005) (en banc) (White II); *see also McIntyre v. Ohio Elections Commn.*, 514 U.S. 334 (1995). A statute survives strict scrutiny only if "it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entertainment Merchants Association* 564 U.S. 786, 799 (2011). This test involves two prongs: (1) proving a compelling interest, and (2) demonstrating that the means serving it are sufficiently narrowly tailored.

To satisfy the first part, the government "must specifically identify an 'actual problem' in need of solving" and prove there is, in fact, "a direct causal link between" the regulated speech and the harm it allegedly causes. *Id.*; *Alvarez,* 567 U.S. at 725. The Government must present more than anecdote and supposition." *United States v. Playboy Entertainment Group*, 529 U.S. 803, 822 (2000). Even when a causal effect is proven, it does not justify regulation if the impact is "small and indistinguishable from effects produced by other media." *Id.* at 822. To justify censorship of a publication, a court must be convinced "the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures." *CBS, Inc. v. Davis,* 510 U.S. 1315, 1317 (1994). The Columbia ban on fake news fails both prongs of the test to prove its constitutionality, and in the interest of a free society, it cannot stand.

i. Columbia Has Not Proven a Compelling Government Interest.

Based on case precedent, Columbia has not proven a compelling government interest to prove the constitutionality of the fake news ban. "Precisely what constitutes a 'compelling interest' is not easily defined. Attempts at definition generally use alternative, equally superlative language: 'interest[ ] of

the highest order,' 'overriding state interest,' 'unusually important interest.'" *White II*, 416 F.3d at 749. Any exceptions to free speech protection are narrowly construed and are sparsely given in situations with an imminent danger government interest. Compelling government interests have been "confined to the few historic and traditional categories of expression," including "advocacy intended, and likely, to incite imminent lawless action," "child pornography," "speech integral to criminal conduct," "so-called fighting words," and "speech presenting some grave and imminent threat the government has the power to prevent." *Alvarez*, 567 U.S. at 717. The Columbia Revised Civil Statute § 31.002 does not fall within one of those specific categories, as it does not present an imminent danger to the government or incite lawless action.

One example of a compelling government interest is explicated in *Abrams v. United States*. 250 U.S. 616, 623 (1919). While the United States was at war with the Imperial Government of Germany, the defendants in that case conspired published written flyers with "the plain purpose of their propaganda was to excite…disaffection, sedition, riots, and…revolution, in this country for the purpose of embarrassing and…defeating the military plans of the government." *Id.* at 623. The court found the restriction on speech to be constitutional because the defendant's conspiracy to incite riots against the government, during the crisis of war, constituted a compelling government interest. *Id*. In the dissenting opinion, the Court further explained that the compelling interest was only sufficient because it created "present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion." *Id*. at 628. This is distinguishable from the case at hand because Segretti's statements (under the pseudonym Alexander Butterfield) did not incite an immediate danger or conspire against the national security. The danger of national unrest during war is an extremely compelling government interest, that such a mayoral race in our case pales in comparison. Moreover, Segretti's social media posts hardly used provocative language as in *Abrams*.

Rather, words such as "why bother?" pose more of a question or opinion. *Segretti*, 131 Col. Rptr. at 46. In comparison to *Abrams*, the fake news ban hardly presents a compelling government interest.

Furthermore, falsity alone is not a compelling reason enough to demonstrate that the speech should be prohibited. In this case, Columbia disputes that falsity–by proxy also including fake news–is not afforded protection by the Constitution. This Court has never outrightly rejected First Amendment protections for falsity. *See Sullivan*, 376 U.S. at 270. Rather, this Court has found that falsity is an inevitable cost that is inseparable to a free society and has protected falsity as "sometimes necessary…to ensure sufficient 'breathing space' for protected speech." *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 342 (1974). As James Madison pointed out in the Report on the Virginia Resolutions of 1798, "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." 4 J. Elliot, Debates on the Federal Constitution of 1787, 571 (1876). Moreover, falsity may actually "serve useful human objectives," to "stir debate and flush out the truth." *Alvarez* 376 U.S. at 733 (Breyer, J., concurring; *Segretti*, 131 Col. Rptr. at 50. The privilege of free speech and debate is "an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369. Danger of falsity alone is not sufficient to prove the constitutionality of the fake news ban. Inhibiting speech simply because it is not true, would be too great a cost to the fundamental right of free speech.

1. There is No Direct Causal Link Between Columbia's Restriction and the Injury to Be Prevented as it is Virtually Impossible to Show the Effect of Fake News on the Mayoral Election.

Columbia's fake news ban attempts to curtail the intentional spread of misinformation in order to prevent "material harm to public health, safety, national security, or the operation of essential government function." *Segretti*, 131 Col. Rptr. at 47. The First Amendment requires that the

Government's chosen restriction on the speech at issue be "actually necessary" to achieve its interest. *Alvarez*, 567 U.S. at 725 (quoting *Entertainment Merchants Assn.*, 564 U.S. at 799). However, it would be virtually impossible to draw a direct causal link between fake news and a material harm to one or multiple of those broad categories. Several other factors in an election apart from news or fake news, including the county demographic, candidate platforms, candidate fundraising and capital, type of campaigning, and voting statistics, play into the outcome of an election and voter activity. Similarly, voters may be influenced on who to vote for by many other likely biased sources other than fake news, including family and friend relationships, news, advertisements, and candidate interviews. There must be a direct causal link between the restriction imposed and the injury to be prevented, and this cannot be definitively proven in this case. *See id*. This is further proven by the fact that despite Segretti's spread of fake news disparaging Dean, in the end, Dean won the overall mayoral election. *Segretti*, 131 Col. Rptr. at 46. On this factor alone, the fake news ban would fail the Courts' test, ruling the statute unconstitutional.

ii. Columbia Ban on Fake News is not Narrowly Tailored to Serve the Specific Interest in Preventing the Intentional Spread Misinformation and Places an Overly Intrusive Infringement on the Freedom of Speech.

In addition to proving that the chosen restriction on the speech at issue be "actually necessary" to achieve its interest, the State must also demonstrate that the statute is narrowly tailored. *Alvarez*, 567 U.S. at 725 (2012) (quoting *Entertainment Merchants Assn.* at 799). A narrowly tailored regulation is one that is necessary to, actually advances the state's interest, does not leave significant influences bearing on the interest unregulated (is not underinclusive), does not sweep too broadly (is not overinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative). *White II*, 416 F.3d at 751. The following analysis posits that the Columbia Revised Civil Statutes §31.002 fails on all three factors.

1. The Columbia Fake News Ban is Underinclusive Because it Only Restricts One Form of Fake News Through Social Media.

Section 31.002 is underinclusive because it only restricts one form of fake news through social media and permits the spread of a similar kind of misinformation by other bona fide news organizations ("BFNO"). A law is underinclusive, and therefore, "violates the First Amendment by abridging *too little* speech." *Williams-Yulee*, 575 U.S. at 433. Underinclusivity that threatens the First Amendment occurs when the State "regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*." *Id*. at 451 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989)). In this case, the Columbia fake news ban wrongfully attaches the fake news issue to social media and similar organizations. However, it carves out a questionable exception for BFNO and those sponsored by a BFNO, which subliminally permits BFNO to disseminate misinformation and otherwise fake news. This discriminatory and impermissible distinction between social media platforms and BFNO, "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989)). The Columbia statute would effectively have to include a wider scope of media platforms in order to truly be tailor to the spread of fake news.

2. The Columbia Fake News Ban is Overinclusive Because it Threatens Protected Speech.

As the Appellate court justly stated, the Columbia ban on fake news is overly broad and presents a "chilling effect" on "many forms of protected speech." *Segretti*, 131 Col. Rptr. at 49. The statute defines a statement of fact to be false if the "substance or gist is contrary to verifiable facts." *Id.* at 48. This definition is overexpansive in that it allows the government to decide what is true and false.

Lending the government the power of discretion contradicts the plain language of the First Amendment. Consequently, such "power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Alvarez* 567 U.S. at 723. Moreover, the risk of chilling otherwise protected speech is not eliminated or lessened by the mens rea requirement, as there is no promise to safeguard statements involving exaggeration, rhetoric, figurative language, and unfavorable, misleading, or illogical statements or opinions. *Segretti*, 131 Col. Rptr. at 47. While in this case, Segretti does not dispute that the information was false. Nevertheless, ruling the Columbia statute constitutional, will bring an unprecedented threat to free speech because it would allow the government itself to decide without limitation, rather than the Constitution, what shall or shall not be protected.

iii. There are Less Restrictive Means of Achieving the Desired Outcome of the Columbia Fake News Ban.

The Columbia fake news ban is not the least restrictive means of preventing the spread of fake news. In order to comply with the Constitution, a government impose restriction "must be the least restrictive means among available, effective alternatives." *Alvarez*, 567 U.S. at 729 (quoting *Ashcroft*, 542 U.S. at 666). In *Alvarez*, the defendant lied about receiving the Congressional Medal of Honor and was indicted under the Stolen Valor Act. *Id*. at 713. Similar to the Columbia fake news ban, the Supreme Court noted that the Stolen Valor Act was written "to control and suppress all false statements on this one subject in almost limitless times and settings." *Id*. at 723. As aforementioned, the Columbia fake news ban places an unwieldy amount of discretion on defining what is fake news and what falls under the rule. Similar to the Stolen Valor Act, it wrongfully "expands liability" to a "far greater realm of discourse and expression" than merely fake news. *Id*. at 719. The Stolen Valor Act is one of the most prestigious and revered awards to the U.S. men of service, and yet, was not upheld due to the

over expansive reach on even a liar's First Amendment right. To uphold the Columbia fake news ban, a statute of similarly expansive width would be unconstitutional.

1. There is No Reason to Presume Counter Speech Would Not Suffice as a Less Restrictive Mean to Advance the State's Interest.

Moreover, there is no reason to presume that counter speech would not suffice to achieve the interests advanced and is a less restrictive means, certainly, to achieve the same end goal. A statute that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another…is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 874 (1997); *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656, 665 (2004). In *Alvarez*, the defendant received widespread rebuke and criticism for his lies, as natural response "to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *See Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). In reviewing the natural response to the defendant's lie, in that case, the Supreme Court posited that there was "no evidence to support its claim that the public's general perception of military awards is diluted by false claims." *Id*. at 726. Justice Kennedy found that "private individuals have already created databases" listing the names of actual Congressional Medal of Honor recipients and that "at least one database of past winners is online and fully searchable," thus countering fabulists such as Alvarez. *Alvarez*, 567 U.S. at 729. Just as nothing could stain the honor of the Congressional medal, in this case, there was no evidence that the legitimacy of the mayoral election in this case was damaged, as the New Watergate elections are typically "contentious" and both candidates engaged in "'dirty politics.'" *Segretti*, 131 Col. Rptr. at 45. There is no evidence to show that Segretti's biased fake news could be remedied or rivaled by more speech and speaking the truth. This is directly exemplified in

this case, as the incumbent Mayor Viriglio Gonzalez publicly commented that Segretti's fake news was unsubstantiated, and in the end, Dean still won the mayoral election. This type of contentious discourse is exactly what the First Amendment was created to protect.

In several cases, the Supreme Court has stated the first remedy for falsity is "self-help" and "speech that is true." *Gertz v. Robert Welch* at 344 (1974); *see also Whitney*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); Alvarez, 567 U.S. at 729 ("Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication."). The truly least restrictive mean would include "using available opportunities to contradict the lie" and "minimizes its adverse impact on reputation." *Gertz v. Robert Welch* at 344 (1974). Moreover, public officials and public figures, such as Dean, "enjoy significantly greater access to the channels of effective communication" and "more realistic opportunity to counteract false statements than private individuals." *Id*. As aforementioned, Dean had the opportunity and resources to dispute the fake news claims against him. The theory of our Constitution is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market," which was effectively communicate in this case without the oppression of the Columbia fake news ban. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). It would effectively impair that privilege of debate in upholding the Columbia fake news ban, and unconstitutionally oppress the right to the freedom of speech.

In conclusion, the Columbia Revised Civil Statutes §31.002 is unconstitutional as it violates the fundamental American right to free speech. The State in this case fails to demonstrate the constitutionality of the fake news ban because there is no compelling government interest and the statute itself is not narrowly tailored to the least restrictive burden on speech. To reverse the appellate court decision would set an unprecedented and potentially irrevocable threat to the First Amendment right, and therefore, the decision must be affirmed.

II. THE FIRST AMENDMENT SHOULD PROTECT A PERSON'S RIGHT TO SURREPTITIOUSLY MAKE RECORDINGS IN A PLACE WHERE THEY HAVE THE RIGHT TO BE.

This Court should hold that the right to record in a place where a person otherwise has the right to be present is a form of free speech, and restrictions are subject to strict scrutiny. The First Amendment limits the government regulation of information collection. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."). The First Amendment also protects surreptitiously recorded videos of public officials in public places. This Court has already verified an extensive list of expressions protected by the First Amendment, including video and audio recordings. Although jurisdictions are divided on whether there needs to be dual or single consent when there is a reasonable expectation of privacy, the majority agree that there only needs to be one party aware of the recording. If the actual video is protected by the First Amendment, the taking of the video should also be protected. Moreover, given the social utility of recording in public places in the modern era of social media and cell phones, it would benefit society and the dissemination of truth to protect surreptitious recordings where a person has a right to be.

A. At a Minimum, Surreptitious Recordings Should be Entitled to Full First Amendment Protection as a Necessary Precursor to, and Integrally Intertwined with, Speech.

It is a fundamental right that each person has access to a broad range of free speech. The First Amendment protects a wide range of expression, including literal "speech," recorded communication such as cable television shows, videos, films, and movies. U.S. CONST. amend. I; *Playboy Entm't Group*, 529 U.S. 813; *United States v. Stevens*, 559 U.S. 460, 481-82 (2010); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973); *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501-02 (1952). Moreover,

making recordings is a creative, expressive activity protected by the First Amendment, and such recordings are inextricably intertwined with - and generate - communications protected by the First Amendment. *See Burks v. Am. Cast Iron Pipe Co.*, 212 F.3d 1333, 1335 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). The First Amendment also protects a person's decision to reproduce and re-convey "speech generated by other persons," including third parties' paid advertisements. *N.Y. Times Co,*, 376 U.S. at 254, 265; *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995). In addition, free speech protects the rights of individuals in the United States to record and report matters of interest to the public. *N.Y. Times Co.*, 376 U.S. at 281. Under these precedents, the First Amendment guarantees the right to disseminate video and audio recordings involving other people's speech, and suggest that the right should be extended to secret bystander recordings. *See Barnicki v. Vopper*, 532 U.S. 514, 518-19, 534-35 (2001) (protecting an illegally obtained recording of teacher's union leaders discussing contentious contract negotiations).

B. The Supreme Court Precedent Protects Recordings of Public Officials Under the First Amendment.

Supreme Court precedent recognizes the existence of a First Amendment interest in criticizing public officials. *See N.Y. Times Co.*, 376 U.S. at 275 ("The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). In addition, the Supreme Court held that individuals who discuss any "matters relating to political processes" or public concern are protected under the First Amendment. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

To be protected while discussing political concern, such expression may be information gathered about these public officials "from any source by means within the law," which has been construed broadly enough to include audio and video recordings. *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978)); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (emphasizing that First Amendment protections go "beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw"). Such action helps to facilitate "the free discussion of governmental affairs," uncover governmental abuse and generally improve the government's functioning. *Glik*, 655 F.3d at 82-83 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986).

C. The Protection of a Surreptitious Recording Under the First Amendment May be Dependent on the Location of the Recording.

Circuits already recognize that the First Amendment protects recording law enforcement in public. *See Fields v. City of Philadelphia*, 862 F.3d 353, 356, 360 (3d Cir. 2017) ("photographing, filming, or otherwise recording police officers conducting their official duties in public.... subject to reasonable time, place, and manner restrictions."; *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017) ("First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions."). Some jurisdictions, however, have gone further, recognizing a broader right to "record matters of public interest," including those involving "public officials... on public property." *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("subject to reasonable time, manner, and place restrictions"); *see also Fordyce*, 55 F.3d at 436. The Ninth Circuit has expressly recognized that the First Amendment protects the right to make "secret film[s]" in places where the person creating the recording has permission to be. *Animal Legal Def. Fund*, 878 F.3d at 1184.

i. The Statute Places an Unreasonable Limitation on Information Gathering Where there is No Reasonable Expectation of Privacy.

The United States Code states that when parties have a reasonable expectation of privacy during an interaction, individuals cannot legally record the conversation without consent from at least one of the parties involved in the exchange. 18 U.S.C. § 2511(2)(d) (2018).

The majority of circuits hold that only single-consent of one of the parties in the interaction is required, especially for interactions involving political figures. *See Animal Legal Def. Fund*, 878 F.3d at 1205 (9th Cir. 2018) (holding the First Amendment protects the right to make "secret film[s]" in places where the person creating the recording has permission to be); *see also Kelly*, 622 F.3d at 259 (holding that the Court "fail[ed] to see how the covert nature of a recording would affect its First Amendment value" compared to an open and obvious recording).

The minority jurisdictions are constantly scrutinized for dual-consent of public figures in public places and should not be considered the standard for this court. *See ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (held that there is a "distinction between open and concealed recording" with "surreptitious recordings bring[ing] stronger privacy interests into play); *Brinsdon v. McAllen Independent School District*, 863 F.3d 338, 343-44, 352-53 (5th Cir. 2017) (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).

However, even in the jurisdictions that require dual-consent for video and audio recordings, the courts still acknowledge that the act of "making a recording is necessarily included in the right to speech and the press." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). The act of making a recording is embedded in the right to speech and press rights, and "[m]ore

generally, photography or videography that has a communicative or expressive purpose enjoys some First Amendment protection." *Id.; see also Fields*, 862 F.3d at 358-59 (affirming that the First Amendment protects the act of "capturing inputs that may yield expression"); *Kelly*, 622 F.3d at 248.

D. Extending First Amendment Protections to Surreptitious Recordings is Beneficial to Public Policy.

Restricting surreptitious recordings of political figures to recordings made during the "performance of official duty" limits the "uninhibited marketplace" and fails to provide a government interest. *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969). Politics and social relationships are highly criticized and prioritized in the United States today. "Cancel culture" is rooted in taking personal or otherwise concealed information and making it public to better the greater good of society. Section 39.601 denies the publication of concealed information and thus defeats the purpose of the "uninhibited marketplace" created by the First Amendment. The informal and non-public actions by politicians often speak the loudest. *See N.Y. Times Co*., 376 U.S. at 254 ("The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."). The voters must see the true intentions of those elected officials and the way to do this often through covert video and audio recordings.

Society relies heavily on the statements made by political figures when it comes to voting and elections. By protecting concealed recordings, the government allows for a more accurate dialogue between the members of society and these political figures fighting for power. Surreptitious recordings reveal undisclosed information, and the tapes allow for the "truth [to] ultimately prevail." *Red Lion Broad. Co.*, 395 U.S. at 367. Information changes so rapidly and often without warning or notice.

Allowing for recordings to reflect those changes is in the best interest of society. As society leans further into the digital world of social media, laws must trend in the same direction.

E. This Court Should Analyze Section 39.601 Under Strict Scrutiny Because it is Content-Based Law As-Applied.

This Court should review Columbia's surreptitious recording ban under strict scrutiny. Speech restrictions are subject either to strict or intermediate scrutiny, depending on whether the limitation is "content-based" or not. *Ward v. Rock Against Racism*, 491 U.S. 781, 791–92 (1989). Strict scrutiny is the highest level of judicial review offered by the Supreme Court, and must be used for content-based restrictions.

Because content-based discrimination related to speech is generally unconstitutional, the restriction must be "necessary to serve a compelling state interest" and "is narrowly drawn to achieve that end" to survive strict scrutiny. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Animal Leg. Def. Fund* 878 F.3d at 1204 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). "Strict scrutiny is 'an exacting test' requiring 'some pressing public necessity, some essential value that has to be preserved; and even then, the law must restrict as little speech as possible to serve the goal.'" *Animal Leg. Def. Fund*, 878 F.3d 1184, quoting *Turner*, 512 U.S. at 680, 114 S.Ct. 2445.

Section 39.601 is a content-based First Amendment restriction as applied. Under Section 39.601, a person may "knowingly or purposely recor[d] or caus[e] to be recorded a conversation by use of a hidden electronic or mechanical device" only if the recording is of a public employee while acting in the scope of their employment duties, "[p]ersons speaking at public meetings," "[p]ersons given warning of the transcription or recording," or "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." Although it is not facially content-based, is it content-based as-applied because assessing the content of the recordings is a precursor to exemption. Whether an official is acting in the scope of employment or whether an emergency is being communicated requires examining its communicative content. By allowing only certain kinds of surreptitiously recorded communication, Section 39.601 effectively operates as a content-based restriction that is subject to the strict scrutiny standard.

F. Section 39.601 Fails Under a Strict Scrutiny Analysis.

When a law conflicts with a constitutional right, there is a presumption that the law fails to meet strict scrutiny and is therefore unconstitutional. As previously discussed, to overcome the presumption, the proponent must prove that the law (1) satisfies a compelling government interest, (2) is narrowly tailored to achieve an interest, and (3) provides the least restrictive means to meet that interest. Section 39.601 fails the strict scrutiny analysis because the law does not satisfy a compelling government interest, it is exceedingly broad, and overly restricts the First Amendment.

i. Section 39.601 does not Meet a Compelling Government Interest and It Fails to Be a Narrowly Tailored Regulation.

Government interest and public concern overlap when it comes to free speech and the First Amendment. Under Section 39.601, there is no overpowering or valuable government interest in restricting the types of recordings of public officials because it goes against the public concern. "Speech involves matters of public concern 'when it can be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Lane v. Franks*, 573 U.S. 228, 241 (2014) (quoting *Snyder v. Phelps*, 562 U.S. 131 (2011)). Section 39.601's highly restrictive language allows individuals to record public officials only "when the transcription or

recording is done in the performance of official duty" but prohibits all other concealed recordings, even in public places where no reasonable expectation of privacy may exist. However, statements by a public official that were made outside of the scope of the official's employment often reflect a more realistic intent of those officials. If those statements involve "political, social, or other community concerns" or "is a subject of legitimate news interest" then the statements are considered to be of public concern. *Id*. Consequently, it is in the government's best interest to protect the recording and distribution of those statements, even if they were taken outside of the scope of the public officials' employment. *Id.*

In addition, Section 39.601 is unconstitutional because it is overbroad, and it does not "leave open ample alternative channels for communication of the information." *Ward,* 491 U.S. at 781; *Kelly,* 622 F.3d at 262; *Ashcroft,* 535 U.S. at 256 (concluding that a statute "abridge[d] the freedom to engage in a substantial amount of lawful speech," and was therefore overbroad). Here, presumably all surreptitious recordings in public places where someone is allowed to be is prohibited by Section 39.601. Therefore, even if Section 39.601 served a government interest, the regulation is not narrowly tailored enough to achieve that interest.

ii. Section 39.601 does not Provide the Least Restrictive Means to Meet an Interest.

If the State of Columbia wants to manage the surreptitious recordings of public officials and survive strict scrutiny, it needs to broaden Section 39.601. If, for example, the rule exempted all recordings in public places where no reasonable expectation of privacy existed, that would satisfy a government interest of the need for the public to know the truth about political officials, and it would not be overly restrictive of free speech.

CONCLUSION

The First Amendment limits government regulation on free speech which naturally extends to fake news. Section 31.002's ban on fake news is a content-based restriction which allows the government to decide truth and falsity. Columbia's interest in protecting elections, national security, and safety is neither compelling nor can a direct causal link be proven to sustain such restrictions on speech. Moreover, the statute is both underinclusive, because it only restricts disseminations through social media, and overinclusive, because it threatens protected speech – it is not narrowly tailored to serve a government interest. Furthermore, the less restrictive alternative would be counter speech. As a result, the fake news ban cannot overcome strict scrutiny.

The First Amendment should also protect a person's right to surreptitiously record where that person has a right to be. At a minimum, surreptitious recordings should be afforded the same protections as a necessary precursor to speech. Columbia's Section 39.601 places unreasonable restrictions on the ability to record truthful communications. Such a policy operates to the detriment of society in a technological era.

For the foregoing reasons, the judgment of Columbia Supreme Court should be affirmed.