In The Supreme Court of the United States

No. 14–20–00333

STATE OF COLUMBIA,
Petitioner

DONALD SEGRETTI,
Respondent

ON APPEAL FROM JUDGMENT OF
THE SUPREME COURT OF
THE STATE OF COLUMBIA

BRIEF FOR THE RESPONDENT

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II. WHETHER SECTION 39.061 (1) IS A CONTENT-BASED FIRST AMENDMENT RESTRICTION, AND IF SO, (2) SURVIVES A STRICT SCRUTINY ANALYSIS

STATEMENT OF THE CASE

Donald Segretti was convicted in the State of Columbia for (1) disseminating "fake news" in violation of Section 31.002 of the Columbia Revised Statutes and (2) violating privacy in communications under Section 39.601 of the Columbia Revised Statutes. *Segretti v. State of Columbia*, 131 Col. Rptr. 44, 47 (Col. 2021).

Section 31.002 of the Columbia Revised Civil Statutes bans the intentional dissemination of purported facts under Section 1 if:

> a. "The information source knows the purported facts are false or recklessly disregards the truth or falsity of those purported facts;"
>
> b. *"The purpose, in whole or in part, of disseminating such false facts is* (i) to enhance the financial interests of the information source, *(ii) to influence the outcome of a contested public election*…; and"
>
> c. "The intentionally false facts cause *material harm* to public health, safety, national security, or the operation of an essential government function."

Id. The Statute provides exceptions where the false facts disseminated are "…Substantially true; [or] an accurate report on, or a fair summary of, an official action, public proceeding, or meeting open to the public;" among other exceptions. *Id*. Section 31.002, Section 4 authorizes each of the following sources to enforce the statute:

> i. "The Attorney General of the State;"
>
> ii. "Any state agency harmed by the disseminated false facts;"
>
> iii. "The District Attorney in any District in which the false facts were disseminated; or"

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

Segretti, 131 Col. Rptr.. at 48.

Segretti is a 20-year-old college student with a substantial social media presence, which by the end of 2020 had amassed him more than 220,000 followers across a number of platforms. *Id*. at 45. A politically active individual, Segretti elected to join the campaign of his aunt, Joan Dean, in her bid to become the next mayor of New Watergate, Columbia. *Id*.

The general election was a contentious one and resulted in a runoff between Dean and her longtime political rival, Gordon Liddy. *Id*. at 45-46. Each had a history of public service in New Watergate with Dean having previously served on the city planning commission and Liddy who served as the former Chair of the City's Election Commission. *Id*. at 45. Leading up to the runoff, beginning in early November, there were concerns within the community about voter fraud, ballot tampering and other activity that would threaten the integrity of the upcoming election. *Id*. at 46. Amidst these concerns in the community, reports began to appear that Joanne Ehrlichman, the current Chair of the Election Commission, had used her position to help Dean win the Runoff. *Id*.

The first of these reports originated online from a social media post by Segretti, posing as "Alexander Butterfield." *Id*. Following the original post levying false accusations against Ehrlichman, the fictitious Butterfield amassed a

substantial social media following of 25,000. *Segretti*, 131 Col. Rptr.. at 46. Segretti continued to post, using his pseudonym, in support of Liddy throughout the weeks leading up to the election. *Id*.

On November 20, 2020, Segretti posted a story online that reported Joanne Erlichman falsely certified 394 absentee ballots for Dean, helping Dean secure a spot in the runoff. *Id*. The post concluded with a Photo of Dean and Erlichman together with a large caption reading "Why bother? Erlichman will rig it anyway." *Id*. Two days later Segretti, as the fictitious Butterfield, posted a video online of Dean and Erlichman together at a Halloween Party in a city park. *Id*. The video showed Dean and Erlichman having a conversation in hushed tones. At the end of the video Erlichman can be heard saying to Dean, "Don't worry, I'll take care of it." *Id*. Accompanying that post was a caption that read "Why bother? Erlichman will take care of it." *Id*. Investigations into the purported fraud were completed internally by the then current mayor Virgilio Gonzalez, who found no evidence wrongdoing on the part of Erlichman. *Id*.

Dean went on to win the runoff and the vote was certified on December 11, 2020. *Id*. Two days after the election, New Watergate Police discovered that it was Segretti who had authored stories accusing Ehrlichman of election tampering and that he was the source of the video showing Dean and Erlichman. *Id*. Segretti had captured the video using a hidden recording device and positioning himself near Dean and Erlichman at the Halloween party in the city park. *Id*.

Following a review of the entire recording, police discovered that Dean and Erlichman were not discussing the election, but instead a local church project. *Segretti*, 131 Col. Rptr.. at 46. Neither Erlichman nor Dean were aware that Segretti was recording when the video was captured. *Id*.

Following his convictions under Sections 31.002 and 39.601, Sergetti appealed, and ultimately both convictions were overturned by the Supreme Court of the State of Columbia. *Id*. at 53. That decision is now appealed by the State of Columbia, Petitioner.

SUMMARY OF THE ARGUMENT

The State of Columbia fails their burden under strict scrutiny for both Section 31.002 and Section 39.061. Section 31.002 fails both on the face of the statute, which is not narrowly tailored, and by failing to require a "legally cognizable interest," evident in Sergetti's prosecution and conviction.

On Section 31.002, the government cannot present "persuasive evidence that a novel restriction on content [here] is part of a long… tradition of proscription." On the contrary, there is a long history and tradition of affording political speech the utmost protection given that it is "at the core of what the First Amendment is designed to protect." *281 Care Comm. v. Arneson*, 766 F.3d 774, 784 (8th Cir. 2014).

Under strict scrutiny, Section 31.002 is invalid for lack of narrow tailoring because it leaves "appreciable damage to the supposedly vital interest unprohibited" and it is "not the least restrictive means of achieving any stated goal."

Section 31.002 fails to meet the narrowly tailored requirement by:

(1) authorizing non-government entities to enforce the regulation, which is antithetical to narrow tailoring and may encourage, rather than curb, fraud;

(2) failing to adequately account for otherwise lawful behavior, by failing to define "material harm" and by leaving determination of information source "purpose" to government officials or non-profit organizations, providing a "chilling effect" on truthful and false political speech alike;

(3) including a provision outlawing false speech by those who would "influence the outcome of a contested public election" despite a long tradition of within our justice system of overturning such regulations, even where there is a "compelling government interest" in the balance,

given the heavy burden which the government must meet under strict scrutiny's "narrowly tailored" requirement;

(4) failing to provide any empirical evidence to show a direct link between the purported interest served and the regulation's scope, instead relying on "common sense" arguments that the Court has warned are insufficient to show the direct causal link required under narrow tailoring.

Section 31.002 fails to actually advance the state's interest by potentially promoting, rather than curtailing fraud. Further, it sweeps too broadly, prohibiting otherwise lawful behavior, despite less restrictive alternatives to advance the same interest. Section 31.002 cannot meet the narrowly tailored requirement under strict scrutiny, and therefore the judgment of the Court of Appeals must be affirmed.

Second, Section 31.002 was overturned consistent with the Courts holding in *Alvarez*, because the statute lacks a requirement that there be a "legally cognizable interest" harmed by the information source. *United States v. Alvarez*, 567 U.S. 709 (2012). The "actual malice" requirement in Section 31.002 does not, by itself, eliminate the potential harm against political speech at the core of First Amendment protections. In addition to the requirement of "actual malice," there must be a "legally cognizable interest" requirement to constitutionally regulate speech based on content, particularly political speech, in order to avoid a serious "chilling effect" upon the public discussion of politics. Section 31.002 does not require injury to a "legally cognizable interest," and no such interest was harmed by Donald Sergetti.

Though the State of Columbia may proffer that the statute protects a quasi-collective political interest previously unrecognized by the court, there are more narrow regulations to address that interest, and such interest in a free and democratic society is best countered by speech that is true. The State is not in a position to determine what is true and false when it comes to political statements, and a statute which seeks to so position the State, without a requirement that a "legally cognizable interest" be harmed, cannot survive strict scrutiny.

The State of Columbia may choose to punish fraud directly. However, it should not be permitted to punish fraud indirectly by broadly and indiscriminately outlawing subjective categories of political speech, based on content, with no necessary relationship to the danger sought to be prevented.

Regarding Section 39.061, audiovisual recordings are a protected form of self-expression protected by the first amendment and any attempt to restrict such a form of expression must be viewed as suspect. *United States v. Stevens*, 529 U.S. 460, 481-82 (2010); *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501-502 (1952). Furthermore, Section 39.061, while appearing content neutral on its face, is a content-based restriction on free expression subject to a strict scrutiny standard of review. The Supreme Court has established that a regulation on speech is content-based under the First Amendment when it draws a distinction on its face regarding the message the speaker conveys or when the purpose and justification for the law are content based. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015). However, the Court has since expanded the category of content-based restrictions to

those that, though facially content neutral, cannot be justified without reference to or review of the content of the regulated speech. *Reed*, 576 U.S. at 164. Section 39.061 falls into the latter category of content-based restrictions and is thus subject to strict scrutiny.

Strict scrutiny demands that the government restriction on personal expression promote a compelling government interest and that said restriction is narrowly tailored and is the least restrictive means of doing so. *United States v. Playboy Ent. Grp., Inc*., 529 U.S. 803, 804 (2000). The compelling interest that Section 39.061 purports to promote is one of privacy. However, within the public, one is entitled only to a reasonable expectation of privacy which is determined by whether someone has demonstrated that they intend to preserve something as private and whether that expectation is a reasonable one. *Kee v. City of Rowlett, Tex.*, 247 F.3d 206 (5th Cir. 2001). It is not reasonable for a person to expect privacy in open and accessible areas. *Id*. This is especially true for those in the public eye. *Bartnicki v. Vopper,* 532 U.S. 514, 516 (2001). Furthermore, a constitutionally reasonable expectation of privacy protects citizens only from government intrusion, not necessarily other private citizens with an intent to record in a purely public space. As such, a law that would limit the public's ability to free expression in public places cannot be a sufficiently compelling interest.

Section 39.061 is also not narrowly tailored nor the least restrictive means of promoting privacy because it impermissibly limits the rights of the public to stay informed about public officials. Section 39.061 permits the recording of public

officials without their consent only when they operate within their official capacity. *Segretti*, 131 Col. Rptr. 44 (Col. 2021). Statements made by public officials that are germane to their capacity for office are matters of public interest. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *Garrison v. State of La.*, 379 U.S. 64, 77 (1964). In its current form, Section 39.061 proscribes surreptitiously recording government officials in public places if they are not acting within the scope of their position, even though they may utter things that speak to their fitness for office or other public matters to which the public is entitled to be informed.

For these reasons, the Court should affirm the Supreme Court of the State of Columbia's opinion.

ARGUMENT

I. SECTION 31.002 VIOLATES CORE FIRST AMENDMENT PROTECTIONS AND THUS THE DECISION TO OVERTURN THE STATUTE MUST BE UPHELD

A. First Amendment Protections Are Broad and Restrictions Upon the Content of Speech, Particularly Political Speech, Have Rarely Been Permitted

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press." U.S. Const. amend. I. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010); citing *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

"The First Amendment is a value-free provision whose protection is not dependent on 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *NAACP* v. *Button*, 371 U.S. 415, 445 (1963).

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

Meyer v. Grant, 486 U.S. 414, 419-20 (1988).

"The First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' … [t]hese 'historic and traditional categories long familiar to the bar,'" *Stevens*, 559 U.S. at 468-69.

"Before exempting a category of speech from the normal prohibition on content-based restrictions … the Court must be presented with 'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription,'" *Stevens*, 559 U.S. at 722; *Citing Brown* v. *Entertainment Merchants Assn.,* 564 U.S. 786, 792 (2011). Categories of speech previously recognized as exemptions from the normal prohibition on content-based restrictions include: "obscenity, … defamation, … fraud, … incitement, … and speech integral to criminal conduct." *Stevens*, 559 U.S. at 468-69. Notably, "falsity alone may not suffice to bring the speech outside the First Amendment." *United States v. Alvarez*, 567 U.S. 709, 719 (2012).

On the other hand,

> The regulation of political speech or expression is, and always has been, at the core of the protection afforded by the First Amendment.'… and is, 'of course, . . . at the core of what the First Amendment is designed to protect.' … 'Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail it.

281 Care Comm. v. Arneson, 766 F.3d 774, 784 (8th Cir. 2014). Though this strict scrutiny is at times referred to by courts as "exacting scrutiny," whenever political speech is burdened the underlying test remains the same. (*See McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 347 (1995), "When a law burdens core political speech, we apply "exacting scrutiny," and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *See Also Stevens*, 559 U.S. at 467, where the Court affirmed that an overly broad content-based regulation of

protected speech was facially invalid under the First Amendment applying an exacting scrutiny standard).

Under strict scrutiny, the burden is on the government to demonstrate that "the interest advanced in support of the [regulation] is narrowly tailored to meet a compelling government interest." *281 Care Comm.*, 766 F.3d at 785; *See Also Burson v. Freeman*, 504 U.S. 191, 198 (1992) ("The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'").

"The inquiry of whether the interest … is 'important enough'—that is, sufficiently compelling to abridge core constitutional rights—is informed by an examination of the regulation (the means) purportedly addressing that end." *281 Care Comm.*, 766 F.3d at 785. "A clear indicator of the degree to which an interest is 'compelling' is the tightness of the fit between the regulation and the purported interest." *Id.*

"A narrowly tailored regulation … actually advances the state's interest (is necessary), 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). *Id.* at 787; (internal citation omitted). "To be actually necessary, there must be a direct causal link between the restriction imposed and the injury to be prevented. *List v. Ohio Elections Comm'n*, 45 F. Supp. 3d 765, 776 (S.D. Ohio 2014). Further, "a statute may also be overbroad if it 'chills' a speaker from engaging in otherwise protected

speech." *List*, 45 F. Supp. 3d at 777. "For example, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart. *Id*.

B. Whether Facially Challenged or Challenged in Application, Section 31.002 Fails Under Strict Scrutiny Due to its Lack of Narrow Tailoring and Lack of "Legally Cognizable Harm" Requirement

1. The Broad Sweeping Authority to Curtail and Regulate Political Speech Authorized Under Section 31.002 Renders It Unconstitutional

This Court recognizes a "'type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's [potentially] plainly legitimate sweep.'" *Stevens*, 559 U.S. at 472-73. In such cases, though there may [or may not] be a compelling state interest, the regulation will nevertheless be overturned where "the narrow tailoring that must juxtapose that interest is absent." *281 Care Comm.*, 766 F.3d at 787. "[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon speech, when it leaves appreciable damage to that supposedly vital interest unprohibited" and when it is "not the least restrictive means of achieving any stated goal." *Id.*

a. Historically Relevant Facial Challenges to the Narrowly Tailored Aspect of False-Statement Regulations

In *United States v. Stevens,* this Court reviewed a federal statute which established a criminal penalty for dissemination of depictions of animal cruelty – "defined as one 'in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,'" if done for commercial gain. *Stevens*, 559 U.S. at 465. Key to the Court's rejection of the statute's constitutionality was the statute's failure to adequately account for otherwise lawful behavior which appeared to be included in the statute's prohibitions, such as educational videos on hunting or humane slaughter of livestock, where those depictions "later find[] [their] way into another State where the same conduct is unlawful." *Id*. at 474-476.

In *281 Care Comm. V. Arneson*, the Eighth Circuit Court of Appeals reviewed the Minnesota Fair Campaign Practices Act (FCPA) which included the following provision:

> A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material . . . that is designed or tends to . . . promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

281 Care Comm., 766 F.3d at 778. As stated by the Eighth Circuit, "[T]he major purpose of [FCPA] … was to preserve fair and honest elections and prevent a fraud on the electorate;" *Id*. at 786. Citing *McIntyre*, 514 U.S. at 348-49, the majority of the Eighth Circuit conceded that "regulating falsity in the political realm definitely exemplifies a stronger state interest than, say, regulating the

dissemination and content of information generally, given the importance of the electoral process in the United States." *281 Care Comm.*, 766 F.3d at 787. Nevertheless, the Eighth Circuit held the "asserted compelling interest falls short," of justifying a statute which lacked the requisite narrow tailoring. *Id.* at 789. There, the state's "reliance upon 'common sense'" without empirical evidence to "establish that the use of false statements impacts voters' understanding, influences votes and ultimately changes elections," fell short of establishing that the regulation was actually necessary, given the "heavy burden when protected speech is regulated." *Id*. at 790.

Further, the Eighth Circuit noted that the statute at issue in *281 Care Comm.* actually worked against the interest it purported to serve – reduction in fraud. Because the statute did not restrict potential complainants to state officials "who are constrained by explicit guidelines or ethical obligations, there [was] a real risk of [fraudulent] complaints from, for example, political opponents" *Id*.

Shortly after *281 Care Comm*. was decided, the Ohio Southern District Court heard a challenge to the Ohio anti-political false statement laws, which made it a crime to:

> [p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate. Ohio Rev. Code § 3517.21(B)(10).

List, 45 F. Supp. 3d at 771. The District Court noted how "exceedingly similar" the political false-statement laws at issue in *List* was to the Minnesota FCPA. *List*, 45

F. Supp. 3d at 769. In *List*, plaintiffs, "[were not]_arguing for a right to lie. [They were] arguing that [they] have a right not to have the truth of [their] political statements be judged by the Government." *Id*. The District Court ultimately accepted the plaintiffs' arguments, wherein Ohio's false-statement laws were rejected as unconstitutional, finding "no reason to believe that the [Ohio Elections Commission] is positioned to determine what is true and what is false when it comes to political statements." *List*, 45 F. Supp. 3d at 769. Further the District Court recognized that Ohio's false statement laws were not the least restrictive means of ensuring fair elections and instead of silence, the proper safeguard against false political statements would be to "encourage truthful speech in response, and to let the voters, not the Government, decide what the political truth is." *Id*. at 769-70.

Both *281 Care Comm*. and *List* harken back to principles recognized by the Supreme Court in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). In *McIntyre*, the Court reviewed the Constitutionality of "[A]n Ohio statute that prohibit[ed] the distribution of anonymous campaign literature," and included detailed and specific prohibitions against making or disseminating false statements during political campaigns. *McIntyre*, 514 U.S. at 336. The statute at issue in *McIntyre* applied "not only to elections of public officers, but also to ballot issues that present[ed] neither a substantial risk of libel nor any potential appearance of corrupt advantage," and the statute applied to leaflets "distributed months in advance" of elections, when the opportunity for reply is less limited compared to the eve of an election. *Id*. at 351-52. The Court recognized that the state's interest in

preventing fraud and libel "carries special weight during election campaigns;" nevertheless, the Court found that Ohio's "extremely broad prohibition" which outlawed all anonymous campaign literature, regardless of type of campaign and regardless of timeframe, was not justified by its ancillary benefits against fraud. *McIntyre*, 514 U.S. at 349-51.

b. Section 31.002 of The Columbia Revised Civil Statutes Is Insufficiently Narrowly Tailored to Survive Strict Scrutiny

Section 31.002 of the Columbia Revised Civil Statutes bans the intentional dissemination of purported facts under Section 1 if:

> a. The information source knows the purported facts are false or recklessly disregards the truth or falsity of those purported facts;
>
> b. *The purpose, in whole or in part, of disseminating such false facts is* (i) to enhance the financial interests of the information source, *(ii) to influence the outcome of a contested public election…*; and
>
> c. The intentionally false facts cause *material harm* to public health, safety, national security, or the operation of an essential government function.

Segretti, 131 Col. Rptr. at 47 (*emphasis added*). The Statute provides exceptions where the false facts disseminated are "…Substantially true; [or] an accurate report on, or a fair summary of, an official action, public proceeding, or meeting open to the public;" among other exceptions. Further, Section 31.002, Section 4 authorizes each of the following sources to enforce the statute:

> i. "The Attorney General of the State;"
>
> ii. "Any state agency harmed by the disseminated false facts;"

> iii. "The District Attorney in any District in which the false facts were disseminated; or"
>
> iv. "Any non-profit organization registered under and recognized by §501(c)(3) of the Internal Revenue Code, whose stated charitable purpose includes public health, safety, or the administration of government."

Segretti, 131 Col. Rptr. at 48.

Substantially similar to the statutes at issue in *281 Care Comm*. and *List*, Section 31.002 should be overturned under strict scrutiny as unconstitutional on its face for four reasons.

First, because Section 31.002 permits enforcement by not only state officials, but also non-profit organizations, including Political Action Committees (PACs), there is a real risk of fraudulent complaints brought about by the statute itself, diverting the energies and funds from a campaign into defending the false claim, just like the potential complainants in *281 Care Comm*.. This non-governmental enforcement undermines the very interest the state claims is served by the statute. Third-party enforcement by entities unconstrained by explicit government guidelines or ethical obligations cannot be permitted against political speech at the core of First Amendment protections consistent with the narrowly tailored requirement of strict scrutiny.

Second, the statute, like the regulation at issue in *Stevens*, fails to adequately account for otherwise lawful behavior included within the statute's prohibitions. When a set of facts are disseminated, Section 1(b) leaves the determination of those facts' "purpose" to government officials (or political opponents in the case of non-

profit organizations), opening the door for abuse of discretion. For example, should a political satirist disseminate information about a politician which includes objectively false facts, as much satire does, Section 31.002 would allow prosecution of that satirist and/or civil suit to be brought by PACs supporting the politician should either group portray the satirist's "purpose" as undermining election integrity. Either prosecution or civil suit would have chilling effect on the political discourse, even if not convicted or found liable.

Further, despite a lengthy definitions portion, Section 31.002 fails to define "material harm," referenced in Section 1(c), similarly allowing broad enforcement of otherwise protected speech. Were the government to interpret "material harm" broadly, it would appear to allow prosecution of mostly innocuous activities. For example, if a high school student with a YouTube Channel posts a falsehood about school administration, the government may be tempted to view such action as materially harming an "essential government function," the administration of public schools. However, this type of speech has never been historically proscribed, and is better dealt with using narrowly tailored policies driven by school administration (meeting with principal, detention, etc.), rather than criminal prosecution. To allow potential criminal prosecution under this law in such scenario would have a tremendous "chilling" effect on both false and true statements about school administration, or other government officials going forward. Because this statute allows for such broad prosecution, and the danger that poses to speech against government officials, the statute must be invalidated as unconstitutional.

Third, though Section 31.002 Section 1(b)(i) closely resembles permissible language outlined by the Court in *U.S. v. Alvarez* (See discussion on pages 23-25 where the Court rejected the Stolen Valor statute, in part, because it criminalized false speech "without regard to whether the lie was made for the purpose of material gain." *Alvarez*, 567 U.S. at 723.), Section 31.002 Section 1(b)(ii) introduces a new category of speech which the Court has been reticent to restrict, the political speech at the core of First Amendment protections. Section 1(b)(ii) allows prosecution where the information source's purpose is "to influence the outcome of a contested public election." Before exempting a new category of speech from the normal-prohibition on content-based restrictions, "the Court must be presented with 'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription,'" *Alvarez*, 567 U.S. at 722. The exact opposite situation exists with regard to the protection of core political speech.

There is a long tradition within this Court and at the Circuit Court level of overturning regulations which seek to broadly curtail political speech without the requisite narrow tailoring, even where there is a legitimate government interest in the balance. The decisions in *McIntyre, Stevens*, *List* and *281 Care Comm.* all follow this same logic. As the District Court noted in *List*, drawing on principles from *Alvarez*, "every public statement about a candidate during an election campaign is made with [intent 'to affect the outcome of the campaign'], or could easily be characterized as such…." *List*, 45 F. Supp. 3d at 778. The District Court described such provision in *List* as providing the Ohio false-statement laws with a very broad

range, inconsistent with the narrowly tailored requirement under strict scrutiny. *Id*. Section 31.002 Section 1(b)(ii), closely resembles a long history of statutes which have attempted to overbroadly curtail political speech. There is a recognized tradition that provides such statutes are invalid and that false political speech regarding an election does not constitute a new category exempted from the normal prohibition on content-based restrictions.

Fourth, the State of Columbia asks that this Court set aside Donald Sergetti's First Amendment rights without offering a shred of empirical evidence that Section 31.002 is directly linked with the government interest purportedly served, and thus cannot claim it is "actually necessary." Here, like the defendants in *List*, the Government is unable to quantify what effect, if any, deceptive false statements have upon elections. Lacking in empirical evidence, the government must rely upon "common sense" arguments that the regulation is actually necessary. Such arguments fall short of the standard of review laid out in *Alvarez*, and explained in *281 Care Comm*. "[R]elying upon common sensibilities to prove" a direct causal link "falls short," of establishing that the regulation is actually necessary. *281 Care Comm.*, 766 F.3d at 790. Thus, the Government has failed its burden to show that Section 31.002 is actually necessary as required under narrow tailoring.

Because the State of Columbia cannot establish a direct causal link to show the regulation is necessary, and because the regulation is not narrowly tailored to

fit the interest purportedly served by Section 31.002, the statute was justly overturned as unconstitutional.

2. Sergetti's Conviction Was Unconstitutional Because No "Legally Cognizable Interest" Was Harmed

a. Guidance from *Alvarez* on When False Speech May Be Constitutionally Regulated

The seminal case regarding regulation of false-speech is *United States v. Alvarez*, 567 U.S. 709 (2012). In that decision, the Court held that it "has never endorsed the categorical rule . . . that false statements receive no First Amendment protection." *Alvarez*, 567 U.S. at 719. Comporting with "[T]he common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Id*. at 718. To give free expression adequate breathing room, "falsity alone may not suffice to bring the speech outside the First Amendment…. The statement must be a knowing or reckless falsehood," *Id*. at 719; citing *New York Times v. Sullivan* 376 U.S. 254, 280 (1964). This "actual malice" requirement is supported by historical limitations upon civil recovery in cases of fraud and defamation. *Alvarez*, 567 U.S. at 719. See also *New York Times v. Sullivan*, 376 U.S. 254 (1964)*; Garrison v. Louisiana*, 379 U.S. 64 (1964); and *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003). This requirement was described by the Court as limiting "liability even in defamation cases where the law permits recovery for tortious wrongs," and as existing "to allow more speech, not less." *Alvarez*, 567 U.S. at 719-720.

In addition to the "actual malice" requirement found in those cases of defamation or fraud, the Court points out that "some other legally cognizable harm associated with the false statement," was also present, indicating that both are required to constitutionally restrict false speech. *Alvarez*, 567 U.S. at 719.

Indeed, the "actual malice" requirement does not, by itself, eliminate the potential harm against political speech at the core of First Amendment protections; as the Southern District Court of Ohio explained:

> [T]here remains a risk of chilling that is not completely eliminated by mens rea requirements; a speaker might still be worried about being prosecuted for a careless false statement, even if he does not have the intent required to render him liable. And so[,] the prohibition may be applied where it should not be applied, for example, to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like.

List, 45 F. Supp. 3d at 777.

As to what constitutes a "legally cognizable harm," the Court in *Alvarez* provides a few examples, including speech which implicates a fraud "to secure moneys or other valuable considerations, say, offers of employment." and speech integral to criminal conduct, such as impersonating a Government official. *Alvarez*, 567 U.S. at 721-723. Ultimately, the Court overturned the Stolen Valor statute in *Alvarez* because it sought "to control and suppress all false statements on this one subject in almost limitless times and settings… *without regard to whether the lie was made for the purpose of material gain*." *Id.* at 723. (*emphasis added*).

Before overturning the Stolen Valor statute, the *Alvarez* Court considered three historic "regulations on false speech that courts generally have found

permissible" – laws against perjury, lying to a government official, and impersonating a government official. *Alvarez*, 567 U.S. at 720. The Court distinguished perjury from the statute at issue in *Alvarez* noting the formal context: "Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action… Sworn testimony is quite distinct from lies not spoken under oath and simply intended to puff up oneself." *Id*. at 721. On the other hand, the Court distinguished laws against impersonating a Government official and lying to a Government official by stating those prohibitions "implicate[d] fraud or speech integral to criminal conduct." *Id*.

In *McIntyre*, the Court noted that, of course, a given State "may, and does, punish fraud directly." *McIntyre*, 514 U.S. at 357. However, a State "cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." *Id*. Instead, "the remedy for speech that is false is speech that is true.…The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Alvarez*, 567 U.S. at 727. "This is the ordinary course in a free society." *Id*. (See Also *List* at 773 and *Whitney v. California*, 274 U.S. 357, 377 (1927) "[T]he remedy to be applied is more speech, not enforced silence").

b. Sergetti's Conviction Under Section 31.002 Is Inconsistent with the Court's Requirements of a "Legally Cognizable Interest."

Here, though Section 31.002 requires actual malice ("The information source knows the purported facts are false or recklessly disregards the truth or falsity of those purported facts…"), the statute prohibits false speech where there is no "legally cognizable interest," an unconstitutional infringement upon First Amendment protected content-based political speech. Therefore, Segretti's conviction under Section 31.002 was rightfully overturned as unconstitutional.

The State of Columbia may argue that an invasion of privacy is the "legally cognizable interest" protected by Section 31.002; however, for reasons explained in depth below, those that have entered the public sphere abandon a reasonable expectation of privacy, and thus, no invasion occurred.

Second, the State of Columbia may argue that fraud or defamation is implicated because false statements were made about Erlichman. However, there is no indication in the record that anyone, including Erlichman or Dean, has brought any civil suits against Sergetti. As the Court indicated in *McIntrye*, a State "may, and does, punish fraud directly." *McIntyre*, 514 U.S. at 357. Where the individuals purportedly harmed do not seek any sort of remedy readily available to them, the State should not be able to rely upon those individuals' separate interest to promote indirect, indiscriminate punishment of fraud and other speech by "outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." *Id*.

Finally, the State of Columbia may argue for a new category of "legally cognizable interest," based on the public's interest in maintaining election integrity, similar to the arguments advanced by the States of Ohio and Minnesota in *List* and *281 Care Comm.*, respectively. In so doing, the State of Columbia may liken such interest to the three permissible prohibitions outlined in Alvarez: regulations against perjury, lying to a Government official, and impersonating a Government official. Unlike regulations against perjury, 31.002 prohibits speech to the public at large, rather than speech in the limited context of evidence gathering inside a single case inside a single courthouse. Certainly, formal evidentiary evidence gathering in the context of perjury does not implicate the same political speech concerns, nor the same First Amendment protections, given the limited audience and purpose. The latter two prohibitions, which the Court recognized "protect the integrity of Government processes" similarly do not impose any restrictions upon political speech to the public at large. *Alvarez*, 567 U.S. at 721. Lying to a government official involves a dialogue between two individuals, wherein the speech carries little, if any political weight. Similarly, impersonating a government official, while conceivably political in nature, nevertheless touches on a firmly established historic government interest – recognition of sovereignty. (*See,* for example, *Tenneco Oil Co. v. Sac & Fox Tribe of Indians,* 725 F.2d 572, 576 (10th Cir. 1984) "[T]he sovereign can only act through its agents."). Such interest is served by a law narrowly tailored to curtail specific, malicious attacks on that "legally cognizable interest," but such

prohibitions cannot justify a law which attacks political speech regardless of whether a "legally cognizable interest" has been harmed.

Section 31.002 does not merely prohibit actual malicious fallacies aimed at the electoral process itself. Regulations which might more narrowly affect such interest would perhaps include regulations aimed specifically at those who would "hack" the election process itself and change votes. The statute at issue here is instead written so broadly that the State must try to claim a broader, hitherto unestablished collective public interest in having the government determine political truth from falsehood for the sake of election integrity. Such an interest, though couched in the familiar and important realm of our elections, cannot be recognized consistent with core First Amendment principles, applying a strict scrutiny standard to content-based regulation of speech, particularly political speech.

Even when courts, such as the Eighth Circuit, have found a state's main interest to be "in preserving fair and honest elections and preventing a fraud on the electorate," such regulations nevertheless were invalidated which were not "the least restrictive means among available, effective alternatives.". *281 Care Comm.*, 766 F.3d at 793; *Citing Alvarez*, 567 U.S. at 729. Further, in *281 Care Comm.,* the county attorneys failed to "offer[] persuasive evidence to dispel the generally accepted proposition that counterspeech may be a logical solution to the [purported] interest advanced in [that] case." *281 Care Comm.*, 766 F.3d at 793. The court noted that "[t]here is no reason to presume that counterspeech would not suffice to

achieve the interests advanced and is a less restrictive means, certainly, to achieve the same end goal." *Id.*

Here, similarly, the State of Columbia has offered no direct link to show that Section 31.002 is narrowly tailored to prevent harm to a legally cognizable interest. Instead, the statute allows for unconstitutionally broad prohibitions on speech, including political speech. The State of Columbia cannot show a direct causal link between the restriction imposed and the injury sought to be prevented.

Whether judged by the narrow tailoring requirements under strict scrutiny or by the "legally cognizable interest" framework from *Alvarez*, Section 31.002 is unconstitutional and was rightfully overturned.

II. SECTION 39.061 VIOLATES CORE FIRST AMENDMENT PROTECTIONS AND THUS THE DECISION TO OVERTURN THE STATUTE MUST BE UPHELD

A. Columbia's Surreptitious Recording Ban is a Restriction on Content Based Speech Subject to Strict Scrutiny

There is no contention that the First Amendment offers protection of expression beyond that of just literal speech. Throughout its history The Supreme Court has ruled that personal expression can take a variety of forms ranging from the written word to audiovisual recordings. *United States v. Stevens*, 529 U.S. 460, 481-82 (2010); *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501-502 (1952). It is of course the latter category that is in question with Section 39.061, and more specifically, how far the first amendment protection over the creation of audio and visual recordings extends. The State of Columbia's statute aims to curb this right of personal expression through its law banning surreptitious recordings in the interest

of personal privacy. However, Columbia's Statute, in its current form, is unconstitutional because its ultimate effect is the regulation of content-based speech that has neither a compelling state interest nor is narrowly tailored in the least restrictive manner possible. As a general rule regarding content-based speech the Supreme Court has found that "governmental bodies may not prescribe the form or content of individual expression." *Cohen v. California*, 403 U.S. 15, 24 (1971). Furthermore, the court has repeatedly ruled that content-based regulations are to be presumed unconstitutional unless the government can illustrate a compelling state interest for doing so and that the statute is narrowly tailored in the least restrictive manner to satisfy that interest. *Reed*, 576 U.S. at 164. Before examining Columbia's Section 39.061 under this strict scrutiny standard, balancing the purported state interest and the narrowness of the statute's tailoring, first we examine why the statute, in its current form, is unconstitutionally restrictive of content-based speech.

The Supreme Court has established that a regulation on speech is content-based under the First Amendment when it draws a distinction on its face regarding the message the speaker conveys or when the purpose and justification for the law are content-based. *Reed*, 576 U.S. at 166. Because Section 39.061 seeks to regulate, with exceptions, the surreptitious recording of the communication of individuals without the consent of all parties involved regardless of the topic or idea being expressed, it may appear content neutral, on its face. This interpretation is certainly congruent with the commonsense concept of appearing facially content

neutral. However, to end one's analysis there would ignore an entire subcategory of laws that the Court has found to be content-based regulation of speech. The Court expanded its definition of content-based regulation to include laws that, though facially content neutral, cannot be justified without reference to or review of the content of the regulated speech. *Reed*, 576 U.S. at 164. This is not to say that any recording, at any time, is automatically content-based and must survive the rigorous standards of strict scrutiny, but rather, because of the overly broad language of Columbia's statute, a detailed review of any recording that is challenged under the law, including, the circumstances in which it was created, who and what it depicts, must be conducted and is subsequently subject to a strict scrutiny standard.

One example of the kind of facially content neutral conduct that is subject to strict scrutiny comes from the Ninth Circuit. In *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018), an Idaho statute sought to prohibit individuals from entering and recording facilities involved in the production of agricultural products without express consent from the facility's owner. The Ninth Circuit struck down this law on the basis that it was a content-based restriction that could not survive strict scrutiny. *Id.* In its ruling the court wrote that the law was a classic example of a content-based restriction and dispensed with the State's argument that the act of creating audiovisual recordings is not speech protected by the First Amendment. *Id.* at 1204. In doing so, the court stated that the State's argument was "akin to saying that even though a book is protected by the First Amendment,

the process of writing the book is not." *Animal Legal Def. Fund*, 878 F.3d at 1203. The court goes on to state that audiovisual recordings are protected by the First amendment because they have been recognized as "significant medium for the communication and expression of ideas" especially in our modern world where capturing moments of one's life using widely available devices such as cellphones is part of day-to-day life. *Id*. at 1205. Furthermore, there is a fundamental right to film matters of public interest. *Id*. "It defies common sense to disaggregate the creation of the video from the video or audio recording itself. The act of recording is itself an inherently expressive activity." *Id*. Reinforcing this assertion, the Ninth Circuit Court wrote,

> Neither the Supreme Court nor [the Ninth Circuit] has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or artwork) in terms of the First Amendment protection afforded.... The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds. In other words, we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.

Animal Legal Def. Fund, 878 F.3d 1184, at 1203.

In the case before the bar, it is also the act of recording without consent that the state seeks to regulate, not necessarily its content. However, whether the act of recording is being done with or without consent cannot be divorced from the principle that even if a statute on its face appears content neutral, the act of

recording is inherently protected by the first amendment. A point strengthened by the fact that Columbia's statute in its current form would curtail the right of individuals to film matters of public interest. For example, it requires the consent of all parties in any recording and does make an exception for public officials when they are acting in the performance of an official duty. But this exception precludes situations where public officials may be acting in a private capacity but making comments that speak to their fitness for office that the public is entitled to be aware of. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

Yet another case analogous to the one before the bar is *F.C.C. v. League of Women Voters of California*, 468 U.S. 364 (1984). The Court in that case was faced with the question of the Constitutionality of a statute that would prevent non-commercial radio or television stations from engaging in any editorializing. *Id* at 384. The state statute was ultimately overturned, in part, because it required "enforcement authorities" to "examine the content of the message that is conveyed to determine whether" a violation has occurred. *Id* at 384. That is exactly what is required in order to enforce Columbia's recording ban statute. As it stands, were an individual to make a recording that is potentially in violation, a detailed examination and review of what was captured will be necessary to determine that it is, in fact, violative. Such inquiry could require a detailed and lengthy analysis that could include steps such as ascertaining its provenance, who and what it is that has been recorded, and whether consent was given. Determining whether a recording breaches the law without such a detailed reference to it is almost certainly an

impossibility. Given the need for such steps, the statute in its current form, must be considered content based and subject to strict scrutiny.

With the understanding that Columbia's Statute is content-based necessitating a strict scrutiny review, its constitutionality turns on the purported compelling governmental interest that the statute seeks to achieve and whether the current scheme for doing so is narrowly tailored and is the least restrictive means of doing so. *United States v. Playboy Ent. Grp., Inc*., 529 U.S. 803, 804 (2000).

B. Section 39.061 Constitutes a First Amendment Restriction and Fails Strict Scrutiny

Where a statute seeks to abridge the core Constitutional right to free expression found in the First Amendment, the government must provide an interest sufficiently compelling. *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014). As was stated above regarding political speech, The inquiry of whether the interest … is 'important enough'—that is, sufficiently compelling to abridge core constitutional rights—is informed by an examination of the regulation (the means) purportedly addressing that end." *Id* at 785. "A clear indicator of the degree to which an interest is 'compelling' is the tightness of the fit between the regulation and the purported interest." *Id* at 784.

In addition to having a compelling state interest a law that seeks to survive strict scrutiny, must also be narrowly tailored. It must be one that "does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), 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)." *Id* at 774 (8th Cir. 2014). As it is written today, Columbia's Section 39.061 is neither a compelling government interest nor is sufficiently narrowly tailored.

1. Section 39.061 Does Not Further a Compelling Government Interest

To answer the question of what compelling government interest Section 39.061 seeks to promote, one need look no further than the statute itself. Section 1. of Section 39.061 states: "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." *Segretti*, 131 Col. Rptr. at 50. This suggest that the interest the government is concerned with is one of personal privacy. The right to privacy is not one that is explicitly enumerated in the Constitution but is instead a judicial construction that is born out of "several fundamental Constitutional guarantees." *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). The Supreme Court established that within the "penumbra" of the First, Third, Fourth, Fifth and Ninth Amendments exists a "zone of privacy." *Id*. The zone of privacy created in *Griswold* was at first narrow, but since the establishment of this right to privacy, the extent of its protection has ebbed and flowed to both include and exclude various other facets of life, but specifically at issue in the present case is the reasonable expectation of privacy.

A reasonable expectation of privacy is normally predicated on two questions. "Whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he [sought] to preserve [something] as private.... Second, we inquire whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." *Kee v. City of Rowlett, Tex.*, 247 F.3d 206, 212 (5th Cir. 2001). When such standards are met, that which an individual wishes to preserve as private, is within a "private sphere." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). Consequently, the natural questions that follow in this case is whether the conversation between Dean and Ehrlichman exhibited a desire to be private that society would recognize as reasonable to the extent that it is within a "private sphere?"

While the right to privacy protects people, not places, places are still an important part of the reasonable expectation of privacy calculus. For example, the "expectation of privacy reaches its zenith in the home." *United States v. McKenzie*, 13 F.4th 223, 235 (2d Cir. 2021). This sphere of privacy is not absolute, but it is perhaps the best illustration of a space where one can claim a reasonable expectation of privacy. But even beyond the home there are places in which a person is "'entitled to assume that he will have privacy.'" *United States v. Taborda*, 635 F.2d 131, 138 (2d Cir. 1980). However, the degree of privacy one can expect to retain once they have left the home and entered a public sphere depends on a reasonable expectation of privacy. "Different degrees of privacy interests attach to different settings …." *McKenzie*, 13 F.4th at 235. One's home is established as a

space in which a person's right to privacy is at its peak but other examples include semi-public spaces. For instance, a person in a closed telephone booth is "entitled to assume that words he utters into mouthpiece will not be broadcast to the world." *Katz v. United States*, 389 U.S. 347, 352 (1967). However, while there are spaces outside one's home or a closed off space like a telephone booth, or a restroom where a sphere of privacy exists, both the Supreme Court and Circuit courts have recognized that in certain spaces people have no legitimate expectation of privacy. *United States v. Lace*, 669 F.2d 46, 50 (2d Cir. 1982). For example, "people generally do not have a legitimate expectation of privacy in open and accessible areas that the public is prepared to recognize as reasonable". *Id*. This is particularly true of those in, or running for, public office like Dean and Ehrlichman, since "one of the costs associated with participation in public affairs is an attendant loss of privacy." *Bartnicki v. Vopper,* 532 U.S. 514, 516 (2001). Therefore, by exiting a traditional zone of privacy like one's home and entering into a public forum with no legitimate expectation of privacy, combined with their heightened public profile, Dean and Ehrlichman intentionally chose to shed any reasonable expectation of privacy at the Halloween party at which their conversation was recorded by Segretti.

However, what is most important about the privacy interest that the Columbia's statute seeks to protect is that nearly all cases that stem from the reasonable expectation of privacy test, first established in *Katz*, protect citizens from intrusion by the government or law enforcement into their spheres of privacy, not "intrusion" by other private citizens with an intent to record in a purely public

space. As has already been established, the right to create audiovisual recordings along with other forms of digital media is an important form of expression protected by the First Amendment and attempts by the government to curb that right should be limited sparingly. *Stevens*, 529 U.S. at 468. This fact is especially true when one exercises that expression in a public place where one is no longer within a private sphere, but instead a public one. In such spaces private citizens may have certain privacy rights when it comes to government intrusion but not necessarily from other private citizens. To allow this statute to survive would be to advance what is, at best, a fictitious right to privacy from other citizens while in public spaces, but it would do so at the expense of the well-established First Amendment right to free expression. If there are those that feel they have been violated in some way by another person exercising that right they can seek a remedy in a number of tort actions such as a libel or slander action available to the private citizenry. However, those are matters for civil court and to criminalize this core kind of free expression poses too great of a chilling effect upon First Amendment protections. It is for these reasons that the governmental interest that Columbia's Recording ban purports to advance is not substantial enough to survive strict scrutiny.

2. Columbia's Surreptitious Recording Ban is Not Narrowly Tailored Nor is it the Least Restrictive Means of Protecting Personal Privacy

While a first amendment restriction cannot survive if it does not advance any compelling government interest, the law in its current form would also fail strict scrutiny because it is not narrowly tailored. The law establishes only four

exceptions to its ban on non-consensual surreptitious recordings. *Segretti*, 131 Col. Rptr. at 50.

Perhaps the most egregiously overbroad prohibition is found in the first exception which allows for the nonconsensual recording of public officials or employees, but only when the recording is captured while the public official or employee is acting within the scope of their official duties. *Id*. This exception severely limits the ability of private citizens to gather information about public officials that is of public interest. For example, under this statute, any and all people would be prohibited from covertly recording public officials for any reason without their consent. This includes recording in public spaces like parks, municipal buildings, street corners, etc. where such public officials, while technically not "performing an official duty" might make statements that are of public interest or concern that those they serve or represent are entitled to know. Statements, for example, that are germane to one's fitness for office such as dishonesty or malfeasance. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Such statements that have the potential to inform the public regarding one's fitness for office are matters of public interest. *Garrison v. State of La.*, 379 U.S. 64, 77 (1964). It is not uncommon in today's world for statements made by public officials to come to light after they have been recorded without their knowledge or consent, and for those statements to have an impact on the public's perception.

The strict scrutiny standard is in place in order to guard core Constitutional rights within the First Amendment against the threats such as the "public

authority from assuming a guardianship of the public mind." *Meyer v. Grant*, 486 U.S. 414, 419-20 (1988). The First Amendment is one of our most sacrosanct and one without which our current democratic system could not survive. As such, it demands a robust defense when any law or regulation seeks to narrow the protections and freedoms it offers. Section 39.061 of Columbia's Code does just that. Freedom of expression comes in many forms including film and other audiovisual mediums. While there certainly are recognized limitations on that type of expression, the right to record surreptitiously or not, those that have entered the public sphere thereby abandoning a reasonable expectation of privacy, should not be counted among those limitations. A statute like Section 39.061, that abridges the ability of citizens to record in the public sphere is violative of the First Amendment. For these reasons, the Court should affirm the Supreme Court of the State of Columbia's opinion.

CONCLUSION

Both Section 31.002 and Section 39.061 seek to abridge speech core to the First Amendment's protections without adhering to the requirements under strict scrutiny, including narrow tailoring. Where the narrow tailoring that must juxtapose a compelling interest is absent, the regulation must be overturned.

Section 31.002 fails to meet the narrowly tailored requirement by:

(1) authorizing non-government entities to enforce the regulation, which is antithetical to narrow tailoring and may encourage, rather than curb, fraud;

(2) failing to adequately account for otherwise lawful behavior, by failing to define "material harm" and by leaving determination of information source "purpose" to government officials or non-profit organizations, providing a "chilling effect" on truthful and false political speech alike;

(3) including a provision outlawing false speech by those who would "influence the outcome of a contested public election" despite a long tradition of within our justice system of overturning such regulations, even where there is a "compelling government interest" in the balance, given the heavy burden which the government must meet under strict scrutiny's "narrowly tailored" requirement;

(4) failing to provide any empirical evidence to show a direct link between the purported interest served and the regulation's scope, instead relying on "common sense" arguments that the Court has warned are insufficient to show the direct causal link required under narrow tailoring.

In addition, Section 31.002 Section 1(b)(ii) authorizes restrictions upon political speech contrary to a long history and tradition of affording political speech the utmost protection given that it is "at the core of what the First Amendment is designed to protect."

Similarly, Section 39.061 of the State of Columbia's Revised Civil Statutes seeks to narrow the protections and freedoms offered by the First Amendment. The high bar imposed by the strict scrutiny standard, while difficult to overcome, is not there by chance, it is in place in order to guard core constitutional rights within the First Amendment against the threats such as the "public authority … assuming a guardianship of the public mind." *Meyer v. Grant*, 486 U.S. 414, 419-20 (1988). The First Amendment is one of our most sacrosanct and one without which our current democratic system could not survive. Freedom of expression comes in many forms including film and other audiovisual mediums. While there certainly recognized

limitations on that type of expression, the right to record surreptitiously or not, those that have entered the public sphere have abandoned a reasonable expectation of privacy, and should not be counted among those limitations. A statute like Section 39.061, that abridges the ability of citizens to record in the public sphere is violative of the First Amendment.

For these reasons, the Court should affirm the Supreme Court of the State of Columbia's opinion.