Team No. 204

2021-22

SUPREME COURT OF THE UNITED STATES

October Term 2021

STATE OF COLUMBIA,

Petitioner,

v.

Donald SEGRETTI,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLUMBIA

No. 14–20–00333.

BRIEF FOR THE RESPONDENT

Counsel for the Respondent

QUESTIONS PRESENTED

1. Under the United States Constitution, does the First Amendment right to freedom of speech apply when a state law bans the knowing dissemination of fake news by an information source?
2. Under the United States Constitution, does the First Amendment right to freedom of speech apply when a state law bans the knowing or purposeful surreptitious recording of a human conversation without the knowledge of all parties to the conversation?

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The opinion for the Supreme Court of the State of Columbia, No. 14–20–00333, reversing the District Court of Mitchell County's decision to convict the Respondent appears on pages 44–53 of the Record. The opinion dissenting in judgement appears on pages 53–56 of the Record.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

The pertinent part of the Columbia Revised Civil Statutes, Section 31.002(1) provides:

> An information source shall not intentionally disseminate purported facts if:
>
> a. The information source knows the purported facts are false or recklessly disregards the truth or falsity of those purported facts;
>
> b. The purpose, in whole or in part, of disseminating such false facts is (i) to enhance the financial interests of the information source, (ii) to influence the outcome of a contested public election, or (iii) to promote the interest of a foreign government; and
>
> c. The intentionally false facts cause material harm to public health, safety, national security, or the operation of an essential government function.

Columbia Rev. Civ. Statutes §31.002(1).

The Columbia Revised Civil Statutes, Section 31.002(2) provides:

> It shall not be a violation of this statute if:
>
> a. The information source (i) identifies the purported facts that are false, (ii) discloses the purpose for disseminating those false facts, and (iii) identifies any employer, company, or other third-party providing compensation or other inducement for the information source to disseminate the false facts.
>
> b. The false facts disseminated are: i. A republication of information originally disseminated by a bona fide news organization ("BFNO"), and the information source can identify the BFNO; ii. Communicated by a natural person as a comment in a forum sponsored, created, or maintained by a BFNO; iii. Substantially true; iv. An accurate report on, or a fair summary of, an official action, public proceeding, or meeting open to the public; v. Made in the course of a judicial or legislative proceeding.

Columbia Rev. Civ. Statutes §31.002(2).

The Columbia Revised Civil Statutes, Section 31.002(3) defines an "information source" as:

> i. Any entity, organization, or individual with more than 5,000 followers on social media; or
> ii. Any entity, organization, or individual whose individual communications through any medium have been received 12 or more times in the preceding calendar year by more than 5,000 individuals

Columbia Rev. Civ. Statutes §31.002(3)

The pertinent part of the Columbia Revised Civil Statutes, Section 39.061 provides:

> 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.

Columbia Rev. Civ. Statutes §39.061(1).

STANDARD OF REVIEW

Both First Amendment claims at issue involve questions of law. Questions of law are subject to a de novo standard of review. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

STATEMENT OF THE CASE

I. Statement of Facts

Donald Segretti is a politically active 20-year-old college student who attends Magruder University in Columbia. R. at 45. Between 2018 and 2020, Segretti grew his social media accounts to have over 220,000 followers and began earning most of his income from these platforms. *Id.* As a social media influencer, Segretti earns about $45,000 a year and is seen as credible by his followers after years of consistent content creation. *Id.*

In 2020, Segretti's aunt, Joan Dean, began a campaign to become the Mayor of New Watergate, Columbia. *Id.* Segretti began working on his aunt's campaign in a contentious race which was expected to end in a runoff between Ms. Dean and Gordon Liddy. *Id.* These candidates were political rivals, and had each previously accused the other of participating in "dirty politics." *Id.*

The general mayoral election results prompted an expected runoff election between Dean and Liddy. R. at 46. Following the results of this general election,

rumors began to spread via a social media post by Alexander Butterfield that the chair of the Election Commission, Joanne Erlichman, used her influence to help Dean win the runoff election. *Id.* Alexander Butterfield supported Liddy during the campaign and developed a following of 25,000 people on social media. *Id.* On November 20, 2020, Butterfield posted that the Election Commission chair falsified 394 absentee ballots in order to help Dean get into the runoff. *Id.* Two days later, Butterfield posted a video of Dean and Erlichman at a party in a city park having a conversation that ended with Erlichman saying "I'll take care of it." *Id.* This was followed by daily posts including the caption "Why bother? Erlichman will take care of it." *Id.*

An investigation of the social media posts followed, and no evidence suggested any foul play on Erlichman's part in the election. *Id.* Despite controversy surrounding Dean and Erlichman, Dean won the runoff election by five percentage points. *Id.*

Following the election, it was revealed that Butterfield was not a real person and was just a social media account created by Segretti. *Id.* It was also discovered that the video posted by Segretti of Erlichman and Dean at a party was recorded without their knowledge and through the use of a hidden camera. *Id.*

The state, in turn, charged Segretti with violations of the ban on disseminating fake news and of the ban on surreptitiously recording others, which later led to his conviction on both accounts. R. at 47. The Supreme Court of the

State of Columbia reversed the District Court's judgment in favor of Segretti. R. at 53. Mr. Segretti respectfully requests that the Supreme Court's ruling be upheld.

II. Procedural History

Following the 2020 mayoral election in New Watergate, Columbia, the state of Columbia charged Donald Segretti with violations of a ban on disseminating fake news (Columbia Rev. Civil Statutes §31.002) and a ban on surreptitiously recording others (Columbia Rev. Civil Statutes §39.061). R. at 47. A jury in the District Court of Mitchell County then found Donald guilty on both counts, and Donald was sentenced by Judge Archibald Cox to five months in jail and a $750 fine for the conviction under CRCS §31.002 and four months in jail and a $375 fine for the conviction under CRCS §39.061. *Id.*

On appeal to the Supreme Court of the State of Columbia, Donald asserted that both statutes under which he was convicted violated his First Amendment rights. *Id.* The Supreme Court ruled in Segretti's favor and reversed the judgment of the 112th District Court of Mitchell County and remanded the case. R. at 53.

SUMMARY OF THE ARGUMENT

This Court should affirm the Supreme Court of the State of Columbia's decision finding that Columbia Rev. Civil Statutes §31.002 and Columbia Rev. Civil Statutes §39.061 as applied to Segretti's case constitute violations of the First Amendment.

Columbia's ban on the dissemination of fake news is a content-based restriction on speech that does not pass strict scrutiny and should therefore be

deemed unconstitutional. Fake news, while not favored in society, remains protected under the First Amendment. Fake news does not belong to any category of speech that has been exempted from First Amendment protections by courts in the past.

The statute banning the dissemination of fake news in Columbia is a content-based ban, as it prohibits certain types of speech based solely on their content. Given this, Columbia's statute should be subjected to a strict scrutiny standard of review. Columbia's statute banning fake news fails strict scrutiny analysis as it is not narrowly tailored to a compelling government interest. The statute is overbroad in that it limits the dissemination of fake news by anyone with over 5,000 followers on social media. Additionally, the statute is under-inclusive as it does not prevent fake news from being spread by legislators and internet bots. Because of this, §31.002 of the Columbia Revised Civil Statutes should be deemed an unconstitutional violation of the First Amendment.

The Court should affirm the Supreme Court of the State of Columbia's holding that the Columbia statute banning surreptitious recordings is a violation of the First Amendment.

Section 39.061 of the Columbia Revised Civil Statutes bans any person from knowingly recording a conversation with a hidden device when the parties to the conversation have not all consented to the recording. This statute applies to the creation of a recording, which is protected under the First Amendment due to its connection to the actual videos themselves, which have been historically protected.

A ban on surreptitious recordings is content-neutral and should therefore be subject to an intermediate scrutiny analysis. The statute at issue fails intermediate scrutiny as it is not reasonably related to an important government interest. The government's interest in protecting privacy is not significant enough to justify this statute, as the statute applies to public and private conversations. The ban is also not reasonably related to a government interest in privacy as it is overbroad in its application to an entire category of speech and its application to public conversations.

We ask this Court to affirm the holdings of the Supreme Court of the State of Columbia.

ARGUMENT

I. The Fake News Ban unconstitutionally restricts speech based on content alone.

The State of Columbia's Fake News Ban is an unconstitutional abridgment of First Amendment rights because it regulates protected speech based on content alone, and it does so in an impermissibly broad and underinclusive manner. False statements are an "inevitable" reality of our country's system of open debate. *United States v. Alvarez*, 567 U.S. 709, 718 (2012). However undesirable they may be, false statements are traditionally policed by the "competition" of truthful speech, not government regulation. *Id.* at 727-28.

Columbia's Fake News Ban rejects this approach, instead opting to screen and prohibit statements based on content alone. But content-based restrictions are themselves anathema to the First Amendment, and they are presumptively invalid as a result. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Absent a showing that it is narrowly tailored to be the least restrictive means of advancing a compelling state interest, a content-based restriction cannot stand. *Id.* Columbia cannot meet this high standard because the Fake News Ban is both over and underinclusive. Because it impermissibly discriminates against protected speech based on content-alone, and does so in an overly broad and underinclusive manner, this Court should affirm the Supreme Court of the State of Columbia in finding the Fake News Ban is unconstitutional.

A. False statements are protected by the First Amendment.

False statements, even false news reports, are protected as part of the "marketplace of ideas" fostered by the First Amendment. *Alvarez*, 567 U.S. at 718. The First Amendment operates on the assumption that truth is best derived from a "multitude of tongues," and that it is suppressed by "authoritative selection." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Nevertheless, this Court has recognized a limited subset of speech does not enjoy First Amendment protection. *Alvarez*, 567 U.S. at 717. The speech that makes up this subset is historically unprotected because it does not contribute to the marketplace and adds little of societal value. *See, e.g.*, *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) ("fighting words" make up "no essential part of any exposition of ideas."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (defamatory or libelous statement lack "constitutional value."); *New York v. Ferber*, 458 U.S. 747, 762 (1982) (the value of pornographic depictions of minors is "*de minimis*.").

However, this Court's recognition that child pornography or libel lack social value is not meant to imply that a balancing test determines whether speech is protected by the First Amendment. In fact, the Court has been emphatic in cautioning that no "ad hoc balancing" or "free-floating test" can be used to grant or deny First Amendment protection. *United States v. Stevens*, 559 U.S. 460, 470 (2010). Rather, the Court assumes all speech is protected by the First Amendment. *Alvarez*, 567 U.S. at 717-18. Only categories of speech that have a tradition and history of restriction "long familiar to the bar" may be permissibly restricted. *Id.* On the other hand, speech

restrictions that lack "historical foundation" or that are adopted from a legislative determination that certain speech is "too harmful to be tolerated" are subject to scrutiny under the First Amendment. *Id.* Uncovering a "new" category of unprotected speech requires "persuasive evidence" that the restriction is not borne of mere legislative judgment, but is instead "part of a long (if heretofore unrecognized) tradition of proscription." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 792 (2011).

This Court in *Alvarez* confronted the question of false speech's First Amendment protection directly. In that case, the Court considered whether a California statute that criminalized making false statements about one's military record was constitutional under the First Amendment. *Alvarez*, 567 U.S. at 715-16. Case law permitting restrictions on defamation and libel, the State argued, demonstrates that false statements are part of a tradition of unprotected speech. *Id.* at 718-19. The Court in *Alvarez* rejected that logic, explaining that "falsity alone" was insufficient to exempt speech from First Amendment protection. *Id.* Instead, the Court continued, defamation and libel are distinguished by their tortious character. *Id.* These laws protect not some generalized fear about the effect of false statements on the marketplace of ideas, but rather the particular and individualized damage to one's reputation and privacy. *Id.*

The Court similarly rejected a comparison between the California law and laws criminalizing false statements made to impersonate a government official, false statements made directly to government officials, and perjury. *Id.* at 720. All three laws, the Court noted, generally implicate fraud or constitute speech "integral to

criminal conduct." *Id.* at 721. To the extent these laws do not implicate fraud or criminal conduct, the Court also explained that each was justified by the unique characteristics of the regulated speech. *Id.* at 720-21. Perjury, for example, has a requisite "formality and gravity" to remind the witness of the importance of telling the truth. *Id.* at 721. Restrictions on statements impersonating a government official protected the reputation of the government itself in much the same way a libel statute protects members of the public. *Id.* Importantly, however, the traditional justification for these restrictions was rooted not in the falsity of the speech alone, but in the unique character of both the speech and the interests protected by its restriction. *Id.* Absent a showing that false speech fit into a historically recognized category of permissible restrictions, the Court held that the California law was an unconstitutional, "freewheeling" restriction of the First Amendment right to freedom of speech. *Id.* at 722.

The Court in *Brown* took this analysis one step further. Here, California sought to defend a law restricting violent video game sales to minors not on the grounds that it fit into an existing category of unprotected speech, but instead by asserting the power to create a new category of First Amendment-exempt speech. *Brown*, 564 U.S. at 794. The Court dismissed this argument at the outset, reiterating its holding in *Stevens* that new categories of unprotected speech may be uncovered by recognizing an ignored or undiscovered history of restriction, but they may not be invented in the absence of traditional restrictions. *Id.* at 792

The Court then engaged in a historical survey to determine whether California's new unprotected category—speech to minors—had a historical foundation. *Id.* at 795-99. Looking first to Grimm's fairy tales, the Court recounted several episodes regularly read to children: would-be princesses eyes gouged out by doves, a witch baked alive in an oven, or made to dance in red hot slippers. *Id.* at 796. The Court then considered similar moral panics in American history, like the worry that comic books were "fostering a 'preoccupation with violence and horror'" among American children. *Id.* at 797-98 (citation omitted). From so-called penny dreadful novels, through movies, and onto modern comics, all forms of media directed to children drew parental concerns, but none justified a restriction like that offered by California. *Id.* Unable to illuminate a hidden history of restriction, the Court rejected this law on First Amendment grounds. *Id.*

The State of Columbia's Fake News Ban neither fits into an existing category of unprotected speech, nor is it part of an unrecognized history of restriction. Like the law at issue in *Alvarez*, the Fake News Ban restricts falsity alone. It does not restrict speech that interferes with a personal right or does tortious harm. Instead, the requisite "material harms" identified under Section 1(c) include "public health, safety, national security, or the operation of an essential government function." Each of these harms are societal and generalized, they are not the kind of personal and discrete harms that underlay permissible libel and defamation claims. And, though the statute includes a civil remedy, it is difficult to imagine how the potential plaintiff

adequately identifies a particularized, individual harm when the interest affected is "national security."

Nor is the Fake New Ban analogous to law restricting perjury or statements to government officials. Unlike perjury, for example, the Fake News Ban restricts statements regardless of the gravity of the situation. Furthermore, unlike laws restricting impersonation of a government official, the Fake News Ban does not directly threaten the operation of government. It does not interfere in the workings of the Courts—for which laws already exist protecting against false speech. Columbia Rev. Civ. Statutes § 31.002(2)(b)(v). Nor does it protect against false speech on the floor of the Senate. *Id.* The government, then, is essentially exempted from the Fake News Ban. It operates only on private, personal interests but, as shown above, it does not recompense the types of injuries one typically associated with the tort system. In this sense, the Fake News Ban is less an expansion of existing categories of unprotected speech, and more a whole cloth addition.

The history of fake news in this country does not support such an addition. Even predating the founding, fake news ran rampant in the American colonies. Eric Burns, *Infamous Scribblers: The Founding Fathers and the Rowdy Beginnings of American Journalism* 3-5 (2006). For example, Sam Adams' *Boston Gazette* was a frequent publisher of everything from embellishment to misinformation to outright lies. *Id.* at 147-49. According to Adams' publications in 1768 and 1769, "scarcely a day passed without a British soldier's assaulting a woman." *Id.* at 148. These stories were fictions. To the extent that any of the incidents reported in the *Boston Gazette* during

this period were true, they were largely embellished, and certainly made to seem more frequent than they ever were in reality. *Id.* Nevertheless, the stories were published widely—even internationally. *Id.* This inflammatory misinformation gained Adams a following, and it spurred on some of the most dramatic and violent incidents on the path to the Revolutionary War, including the Boston Massacre and the Boston Tea Party. *Id.* at 149-62.

And fake news continued well into and beyond the founding. Writing to himself in 1798, President John Adams mused that there had been "more new error propagated by the press" in the preceding ten years than there had been in the entire 17th century. Colleen A. Sheehan, *James Madison and the Spirit of Republican Self-Government* 40 (2009). More recently still, American journalism suffered a crisis of credibility during the period of so-called "yellow journalism." Beginning around the turn of the 20th century, yellow journalism embraced a sensationalist and confrontational style. *See* W. Joseph Campell, *Yellow Journalism: Puncturing the Myths, Defining the Legacies* 1-8 (2003). Headlines were leading and provocative, sources were often anonymous, interviews were widely faked. *Id.* When the USS Maine sank off the coast of Cuba under suspicious circumstances, the yellow press quickly published rumors—unconfirmed to this date—that Spain was behind the attack. *U.S. Diplomacy and Yellow Journalism, 1895-1898*, Office of The Historian https://history.state.gov/milestones/1866-1898/yellow-journalism. These rumors, in combination with an anti-Spanish public sentiment that the yellow press fanned over the course of several years, are widely thought of as critical catalysts for the Spanish-

American War. *Id.* Contemporary critics lambasted the yellow press, calling its influence on the public "pernicious" and its societal value "the same…as brothels." Still, no ban was ever passed on the yellow publications. Campbell, *supra*, at 34-36.

American history is replete with examples of new journalistic mediums and their potential abuses. But tradition does not support restrictions based purely on falsity. Rather, American history demonstrates repeated, sometimes bitter, tolerance of falsehood. This tolerance is rooted in the fundamental understanding of our First Amendment: more speech, not less speech, is what moves the marketplace of ideas towards truth. In centuries past, false or misleading publications have not just materially harmed public safety; they have contributed to outright war. An observer who finds that kind of tolerance distasteful would not be alone—they would, in fact, have the company of John Adams. But Adams, like this Court, recognized that the First Amendment requires a certain tolerance for otherwise distasteful speech. The State cannot be permitted to adopt a freeform test to decide what speech enjoys protection under the First Amendment. Because the State of Columbia cannot justify its law under existing categories of unprotected speech, and because our history does not support such a ban, the Fake News Ban must be understood to restrict constitutionally protected speech.

B. The Fake News Ban is an unconstitutional content-based restriction on speech because it is not narrowly tailored to advance compelling governmental interests.

Columbia's Fake News Ban unconstitutionally discriminates against speech based solely on content, and it does so in an overly broad manner relative to the interests it claims to protect. A law is content-based when it singles out a particular type of speech for favorable or unfavorable treatment based on its content, or whenever it cannot be justified without reference to the content of the regulated speech. *Reed*, 576 U.S. at 163-64. This type of restriction stands in contrast to content-neutral laws, which typically regulate only the time, place, and manner of speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Content-based laws are presumed unconstitutional, and are subject to strict scrutiny. *Reed*, 576 U.S. at 166. Under strict scrutiny, a content-based law is permissible only if it is narrowly tailored to be the least restrictive means of advancing a compelling government interest. *Id.* at 171. The Fake News Ban facially discriminates against false speech, and it cannot be justified without reference to the content of that speech. Because it is not narrowly tailored, the Fake News Ban does not survive strict scrutiny. This court should affirm the Supreme Court of the State of Columbia in finding the Fake News Ban is an unconstitutional content-based restriction on speech.

1. The Fake News Ban is content-based because it singles out fake news for unfavorable treatment.

The Fake News Ban is content-based because it impermissibly restricts an entire category of speech due to the message expressed, and because it is justified only by reference to the false content of reported news. The intent of the legislature is the controlling consideration in determining whether a law is content-based. *Ward*,

491 U.S. at 791. But this does not mean that a facially discriminatory law is absolved simply because the legislature may have seemingly just or constitutional motives. Instead, laws restricting speech are subject to a two part analysis: first the Court should determine whether the law singles out certain types of speech for favorable or unfavorable treatment on its face. *Reed*, 567 U.S. at 163-64. If it does, the analysis ends: the law is content-based. *Id.* However, absent facial discrimination, the Court must still consider whether the law was adopted for an illegitimate legislative purpose. *Id.* Under this second phase of analysis, even a law that does not draw facial distinctions between speech might still be content-based if the Court finds that the law "cannot be justified without reference to the content" of the restricted speech. *Id.*

For example, the statute at issue in *Reed* prohibited placing a temporary sign anywhere within the town without first obtaining a permit. *Id.* at 161. Had it stopped there, the law would have been content-neutral. However, the statute continued to provide exemptions for thirty-two different types of signs. *Id.* Among the types of signs receiving exemptions were: "Ideological Signs," "Political Signs," and "Temporary Directional Signs." *Id.* "Political Signs" were defined as those "designed to influence" an election; "Temporary Directional Signs" were those "directing the public" to a qualifying event; "Ideological Signs" was a catchall category for any sign that expressed a viewpoint not otherwise covered by an exemption. *Id.* at 164. Each of these categories were subject to different restrictions on size, placement, and duration. *Id.* at 160-61. Noting that the signs were defined purely according to their content, the Court explained that these different restrictions effectively

discriminated against entire categories of speech. *Id.* at 164-65. A political sign might be afforded more space and preferential placement to one directing worshippers to a Sunday service, for example. The Court thus held that the statute was a content-based restriction on its face, because the language of the statute itself required discrimination against entire categories of speech. *Id.*

However, not all content-based laws are as blatant as that in *Reed*. For example, a D.C. statute restricting signs critical of foreign governments within 500 feet of an embassy was also held to be content-based even though it did not define impermissible speech by subject. *Boos v. Barry*, 485 U.S. 312, 321 (1988). In *Boos*, the Government argued that the statute did not actually restrict any subject matter or viewpoint. *Id.* at 319. One could, for example, protest against deforestation of the Amazon, but one could not protest against *Brazilian* deforestation of the Amazon if that protest brought offense to Brazil. Thus, the government argued, any restriction on speech was essentially a floating restriction: if Brazil stopped deforesting the Amazon, then protests about deforestation could continue uninhibited. The Court saw through this circuitous reasoning, noting that the government had not offered up a content-neutral reason for enforcing the statute. *Id.* Instead, the statute was justified by the "need to protect the dignity of foreign diplomatic personnel." *Id.* at 321.

The problem with a justification like the need to protect diplomats' dignity, the Court continued, was that it focused entirely on the listener's reaction to the *content* of the speech. *Id.* Laws may permissibly target the "secondary effects" of speech. *Id.* For example, a law might permissibly ban protests outside a building that interfere

with ingress or egress. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 769-70 (1994). This type of law may even burden one type of speech more than another. *See id.* For example, a law prohibiting picketing directly outside abortion clinic necessarily chills some abortion-related speech. But it applies equally to all potential speakers and, critically, is not justified because clinical staff are offended by the speech, but by separate public safety concerns.

These content-based restrictions stand in contrast to generally permissible content-neutral regulations on the time, place, and manner of speech. For example, a statute restricting all picketing outside a private residence is constitutional. *Frisby v. Schultz*, 487 U.S. 474, 488 (1988). In *Frisby*, the Court focused on the stationary nature of picketing as a form of protest to determine that the statute only restricted picketing when it occurred directly outside a private residence. *Id.* at 486. Thus, the Wisconsin statute regulated a specific manner of speech—picketing—when it occurred in a defined place—a private residence. *Id.* It did not, as prior iterations of the statute would have, require the government or law enforcement to consider *what* the picket sign said. *Id.* at 476-77. It only required that a particular manner of speech occurred in a specific place. *Id.*

The Fake News Ban is both facially content-based, and justified only by reference to the content of speech. Like the law at issue in *Reed*, the Fake News Ban defines restricted speech entirely by its content. Law enforcement could not determine if a speaker was in violation of the statute by considering external factors like the time of day, but would be required to proceed to the *content* of an allegedly

fake news report. In this sense, the Fake News Ban is nothing like the law in *Frisby*. Guilt hinges entirely on *what* is said, not when or how it is said. An entire category of speech—false news reports—is effectively denied access to the public forum. The fact that the exact speech restricted might change depending on the speaker's purpose or whether it causes a "material harm" on a given occasion is immaterial. On its face, the language of the statute carves out a subset of disfavored speech, and the dispositive factor in deciding whether speech is disfavored is what is said.

Even if the Court were to find the statute does not discriminate against speech on its face, it is nevertheless content-based because it is justified only by reference to content. Like the statute in *Boos*, the Fake News Ban is justified by the direct effects of speech on the listener. A prima facie case under the Ban requires "material harm." Four types of harm are cognizable under the Ban: harm to public health, safety, national security, or the operation of essential government functions. Columbia Rev. Civ. Statutes 31.002 § 1(c). Each of these harms expresses a concern for the effect of fake news on the listener. Thus, the Ban reflects an impermissible legislative concern that fake news might cause listeners to ignore public health orders, for example, or to take up arms against imaginary tyrants. These concerns may be valid but, like the statute in *Boos*, they are inevitably focused on how the content of speech affects a listener.

The Fake News Ban is content-based even under the most charitable of readings. It concerns itself not with contextual controls like where or when speech occurs. Nor is it justified by neutral concerns such as dangerous congestion on public

sidewalks or concerns for residential privacy. The Fake News Ban carves out a category of disfavored speech based solely on content. It does so by the plain language of the statute, it does so because it requires enforcing bodies to consider the content of speech, and it does so because it is only justified by legislative concerns about the direct effect of fake news on its audience. As a content-based statute, the Fake News Ban is only permissible if it survives strict scrutiny.

2. The Fake News Ban is not narrowly tailored to advance compelling government interests.

The Fake News Ban advances compelling interests in public safety and national security, among others, but it is simultaneously too broad and too underinclusive to survive strict scrutiny. Strict scrutiny is only satisfied when the challenged statue is narrowly tailored to advance compelling government interests. *Reed*, 567 U.S. at 171. A compelling interest is one "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). There is no dispute that the Fake News Ban advances compelling interests.

On the other hand, a statute is narrowly tailored to advance a compelling interest when it is targeted at precisely the evil it is intended to address. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-9 (1984). A statute that restricts conduct without advancing a compelling interest is overbroad. *Id.* A statute that fails to restrict conduct that infringes on the compelling interest it seeks to address is underinclusive. *Republican Party of*

Minnesota v. White, 536 U.S. 765, 780 (2002). Both overbroad and underinclusive statutes fail narrow tailoring. *Taxpayers for Vincent*, 466 U.S. at 808-11.

The statute at issue in *White*, for example, prohibited judicial candidates from announcing positions on disputed legal and political issues. *Id.* at 768. The Court deferentially granted the State's purported compelling interest in maintaining the appearance of judicial impartiality, but it took issue with the statute's means. *Id.* at 775-77. As the Court colorfully illustrated, a judicial candidate could announce she does not believe in the right to same-sex marriage one day before announcing her candidacy. *Id.* at 779-80. She could not, however, make the same statement from the moment her candidacy was announced. *Id.* The law was thus woefully underinclusive. *Id.* It prohibited some speech for a hypothetically compelling interest, but it left uninhibited a vast amount of substantially similar speech that undermined the same interest. *Id.* Given its underinclusive nature, the statute was both suspect in its justification and inefficient in application. *See id.*

On the other hand, a law that restricts a vast amount of innocuous content in the name of capturing a more targeted category of speech is overbroad. The Communications Decency Act ("CDA") of 1996 was one such law. While the CDA sought to restrict children's access to internet pornography and other forms of obscenity, the actual effect of the law would capture a much larger array of speech. *Reno v. ACLU*, 521 U.S. 844, 876-79 (1997). In essence, the language of the statute prohibited making obscene or "indecent" internet materials available to minors. *Id.* at 859-60. However, as the Court recognized, this type of vague language left open

the possibility that a great deal of innocuous or even beneficial speech would be prohibited by the statute without advancing the government's interests at all. *Id.* at 876-77. For example, the district court noted that the statute would likely restrict the ability of non-profit organization like Stop Prison Rape from fully utilizing the internet, while for-profit entities with resources to set-up paywalls or age verification would go unaffected. *Id.* The Court rejected the CDA as overbroad and insufficiently tailored to its interest in protecting minors. *Id.*

The Fake News Ban is both underinclusive and overbroad. It is overbroad primarily because it restricts all false statements made by any person with over 5000 followers on social media, when other requisite conditions are met. Columbia Rev. Civ. Statutes § 31.002(3)(a)(i). It takes less than a little internet literacy to realize why this restriction is overbroad. Ken Bone was a fleeting celebrity during the 2016 presidential campaign. Abby Ohlheiser, *Ken Bone was a 'hero.' Now Ken Bone is 'bad.' It was his destiny as a human meme*, The Washington Post (Oct. 14, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/10/14/ken-bone-was-a-hero-now-ken-bone-is-bad-it-was-his-destiny-as-a-human-meme/. Mr. Bone was among the undecided voters selected to ask questions at the second presidential debate between Donald Trump and Hillary Clinton. *Id.* His question about energy policy was quickly lost among an online fervor fueled by his red cardigan and decidedly meek mannerisms. *Id.* Mr. Bone's short flirtation with celebrity leaves behind a Twitter account with 155000 followers. Kenneth Bone, (@kenbone18), Twitter, https://twitter.com/kenbone18.

In a world of overlapping "connections" and viral celebrity, it is not hard to amass 5000 followers. Indeed, it often happens by accident, and is rarely restricted to the most influential voices in our society. Nevertheless, by its plain language, Ken Bone would run the risk of violating the Fake News Ban whenever he acted recklessly with regards to the truth of his posts. The reader of this brief almost certainly knows someone with 5000 followers. Any of these people and would thus run the risk of violating the Fake News Ban with every post. This kind of breadth cannot be sustained. While the Fake News Ban ostensibly tries to restrict its scope to sources with the potential to cause serious harm to national interests, its language allows the statute to reach ordinary citizens expressing their incorrect beliefs about the day's news.

But the problems with the Fake News Ban do not end there. The Ban is also underinclusive in two ways. First, the Ban fails to target some of the most pernicious weapons of disinformation in today's media: bots. While a 5000-follower requirement will often capture a great deal of innocuous speech by ordinary users with many followers, it will also often fail to capture bots. *See* Rob Pegoraro, *From Russia With Lure: Why We're Still Beset By Bots And Trolls Pushing Disinformation*, Forbes (Aug. 7, 2020, 8:18 AM), https://www.forbes.com/sites/robpegoraro/2020/08/07/from-russia-with-lure-why-were-still-beset-by-bots-and-trolls-pushing-disinformation/?sh=567eb0495542. To this point, one recent Twitter purge of suspected bots found the deleted accounts averaged ten total followers. *Id.* Nonetheless, Russian bots were widely blamed for a great deal of misinformation

surrounding the 2016 presidential election, and their influence continues to be felt in American politics. *Id.* Despite the Fake News Ban's facial concern for national security and issues affecting government operations, these bots would rarely be captured by the statute.

The Fake News Ban is also underinclusive because it exempts false statements made during legislative and judicial proceedings. Columbia Rev. Civ. Statutes § 31.002(2)(b)(v). As the law is currently written, an information source could not accuse a prominent cabinet official of being a communist without a great deal of supporting evidence. *See id.* However, a Senator, without any supporting evidence at all, could accuse the same cabinet official of being a communist. *Id.* Any information source could then run the accusation as a headline. *Id.* The resulting report, despite being patently false, would gain a degree of credibility in the eyes of the public for having passed the "Fake News Ban." Cynical news sources could quickly take advantage of this loophole, using politicians to launder false statements while reaping the benefit of increased credibility in the eyes of the public. In this way, the individuals whose false statements have the potential to do the greatest harm are left uninhibited.

The Fake News Ban subjects the beliefs of ordinary Americans to an intimidating censorship regime. Its provisions capture the speech of a relatively insignificant minority of voices, while exempting some of the speakers with the most potential to do harm. Restrictions based on followers are insufficiently targeted to the State's purported interests in public health, safety, national security, and

government functions. Under this statute, fake news will continue to proliferate, only with an added veneer of credibility and increased restrictions on the speech of ordinary Americans. This Court should find the Fake News Ban fails to satisfy strict scrutiny because it is not narrowly tailored to advance the State's interests.

II. The Surreptitious Recording Ban unconstitutionally restricts a protected form of expression under the First Amendment.

The State of Columbia's Surreptitious Recording Ban is an unconstitutional abridgment of First Amendment rights because it prohibits the recording of utterances that occur in a public place in an overly broad and under-inclusive manner. *ACLU v. Alvarez* (*Alvarez II*), 679 F.3d 583, 606 (7th Cir. 2012). A main purpose of the First Amendment is to protect the free discussion of governmental affairs. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Audiovisual recordings are protected under the First Amendment as they allow individuals to capture oral communication that may be later disseminated for the purpose of critiquing public officials. *Alvarez II*, 679 F.3d at 595.

Laws which infringe on the Second Amendment right to free speech through audiovisual recordings are subjected to an intermediate scrutiny analysis *Alvarez II*, 679 F.3d at 603. Absent a showing that the statute is reasonably tailored to an important government interest, the law at issue is unconstitutional under this standard. *Id.* at 605. Columbia's ban on surreptitious recordings forecloses an entire medium of expression for many individuals and is thus overly broad in scope. Additionally, this law is under-inclusive because it does not prohibit other similar

means of expression, such as photography, under the same circumstances. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018). Because of this, §39.061 will not pass intermediate scrutiny and this Court should affirm the Supreme Court of the State of Columbia in finding the Surreptitious Recording Ban unconstitutional.

A. The right to record surreptitiously is protected by the First Amendment.

As the creation of surreptitious audio and video recordings is inextricably tied to the protected dissemination of such videos and the First Amendment aims to preserve a wide range of types of speech, the creation of surreptitious recordings is protected under the First Amendment. The First Amendment of the United States Constitution provides for the protection of free speech and aims to protect a marketplace of ideas which serves the public's right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences". *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). This protection extends to the act of displaying audio and visual recordings. *Price v. Barr*, 514 F. Supp. 3d. 171, 184 (D.C. Cir. 2021). The protection of displays of audio and visual recordings applies to their creation as well, as the First Amendment applies not only to expressions, but also to conduct that has a "close enough nexus to expression." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759 (U.S. 1988).

The United States District Court for the District of Oregon considered the issue of whether a ban on surreptitious recordings violated the first amendment in the case

Veritas v. Schmidt. No. 3:20-cv-01435-MO, 2021 WL 350786, at *3 (D. Or. Aug. 10, 2021). In this case, a non-profit national media organization which engaged in mostly undercover investigative journalism brought a First Amendment challenge to Oregon's statute banning secretly recording conversations if not all participants to the conversation had been informed of the recording of their conversation. *Id.* at *1. The plaintiffs in this case challenged the statute in order to be able to engage in undercover journalism which would allow for unfiltered stories to be shared and investigated. *Id.* at *2. In its analysis of the plaintiff's claim, the District Court found that the act of surreptitiously recording conversations was entitled to protection under the First Amendment. *Id.* at *3. The court based this finding on holdings from other circuit courts which established that the dissemination of audiovisual recordings generally was protected under the first amendment as a "significant medium for the communication of ideas." *Id.* Because the recordings themselves are protected, the creation of the recordings received the same treatment, it is "inextricably intertwined with the resulting recording." *Id.*

The right to create audio and video recordings under the First Amendment was similarly recognized by the United States Court of Appeals for the Ninth Circuit. *Wasden*, 878 F.3d at 1204. The plaintiff in this case recorded videos undercover at an Idaho dairy farm, in violation of an Idaho statute which prohibited the making of audio or visual recordings in a private agricultural facility without the consent of the facility's owner. *Id.* at 1190-1191. A First Amendment challenge was brought against the Idaho statute by the plaintiff arguing that the statute "stifled political debate

about modern agriculture" by outlawing investigative journalism involving video and sound. *Id.* at 1192. The Ninth Circuit Court of Appeals acknowledged that Idaho's ban on recordings without consent restricted a type of speech protected by the First Amendment. *Id.* The court recognized recordings and captured images as being significant tools for communication and "part of ongoing discourse, both public and private." *Id.* at 1203. Logically, it then follows that the creation of these types of media is also protected under the First Amendment, as the process of creating an expression through a creative medium has never been considered so far removed from the expression itself that one could be afforded protection and not the other. *Id.*

Columbia's ban on surreptitious recordings defines a violation of the statute as the knowing or purposeful recording of a conversation by use of a hidden electronic device without the knowledge of all parties to the conversation. Columbia Rev. Civ. Statutes §39.061(1). As this statute bans the act of creating a protected form of expression under the First Amendment, the statute is restricting a protected form of speech and may be subjected to a constitutional scrutiny analysis. Like the statute in *Veritas*, Columbia's statute prohibits recording conversations when not all parties to the conversation are aware of the recording. The act of recording which is banned by the Columbia statue is very closely related to the recordings themselves, which have historically been deemed protected under the First Amendment, as recognized by the court in *Veritas.*

The Columbia statue also parallels the statute in *Wasden*, which outlawed the making of audio or visual recordings in agricultural facilities without the owner's

express permission. Both statutes aim to prohibit the act of surreptitiously recording, rather than restricting the produced videos and recordings themselves. As the court in *Wasden* did not deny the act of surreptitiously recording the protections of the First Amendment despite its undercover nature because recording is inextricably tied to videos generally, which are indisputably protected under the First Amendment, the Court in this case should extend the same protection to the secret recordings obtained by Segretti.

Finally, there exists an interest in preserving the underlying principles of the First Amendment which further supports the argument that constitutional protections extend to the act of recording surreptitiously. The purpose of the First Amendment is to "preserve a marketplace of ideas in which truth will ultimately prevail." *Red Lion Broad. Co.*, 395 U.S. at 390. The interest in promoting the dissemination of ideas and truth is served by acknowledging a right to surreptitiously record. The act of recording without the knowledge of everyone involved guarantees that the recorded conversation will be candid, which promotes the dissemination of the truest version of the recorded occurrences. This is particularly important when it comes to recording government officials and matters of public concern. The right to discuss both government officials and matters of public concern is protected under the First Amendment and the right to record both surreptitiously allows for information to be spread to the public in its most accurate and raw form. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

As the interest of the public in receiving accurate information on matters of public concern is furthered by protecting the act of surreptitiously recording and previous case law acknowledges the ability to subject restrictions on the right to record surreptitiously to First Amendment analysis, the Columbia ban on recording surreptitiously should be subject to constitutional scrutiny.

B. The Surreptitious Recording Ban should be subject to heightened scrutiny.

Because of the content-neutral nature of Columbia's ban on surreptitious recordings, the statute at issue should be subjected to an analysis under heightened scrutiny. The First Amendment has been interpreted to mean that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Alvarez II*, 679 F.3d at 603. Laws that are claimed to violate the First Amendment in their restriction of speech are subject to analysis under strict scrutiny if they restrict speech based on its content and an analysis under a lower level of scrutiny if the law is facially neutral. Regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because, in most cases, they pose a less substantial risk of excluding certain ideas or viewpoints from the public dialogue.

The United States Court of Appeals for the Seventh Circuit applied a standard of intermediate scrutiny in *Alvarez II* to an Illinois statute which made it a felony to audio record "all or any part of any conversation" unless everyone involved in the conversation consented to the recording. *Id.* at 586. In this case, the American Civil Liberties Union challenged the Illinois statute under the First

Amendment as applied to their police accountability program, which included a plan to record police officers while they performed their duties in public places. *Id.* The court in this case applied intermediate scrutiny to the Illinois statute at issue after determining that the statute was content-neutral on its face. *Id.* at 602. In this case the statute was deemed content-neutral because it did not "target any particular message, idea, or subject matter." *Id.* The court also gave the guidance that a statute is considered to be content-based when it regulates speech because of an agreement or disagreement with the message conveyed by the speech, which the Illinois statute did not. *Id.*

The intermediate scrutiny standard of review was similarly utilized in *Veritas v. Schmidt*. No. 3:20-cv-01435-MO, 2021 WL 350786, at *4 (D. Or. Aug. 10, 2021). The statute at issue in this case prohibited all secret recording of conversations when the parties to the conversation were unaware of the recording. *Id.* at *1. Included in the statute were exceptions to the law, exempting the following types of recordings from its reach: 1) recordings of law enforcement officials made in the open when the official is performing the duties of their job and the conversation is audible to a normal person; and 2) recordings of public or semi-public meetings, speeches, rallies, sporting events, and classes. *Id.* at *1, *2. The court found that the statute was content-neutral and subject to intermediate scrutiny even despite these exceptions. *Id* at *7. The court found the public meetings exception to be content-neutral as it was "a classic time, place, manner exception that allows more speech in forums that are typically used for expressive

activities" and did not differentiate based on specific *types* of meetings. *Id.* at *6. The first exception was content-neutral due to the special nature of government speech, different treatment of which does not "run afoul of the principles of the First Amendment" because a purpose of the First Amendment is to protect the free discussion of governmental affairs. *Id.* at *7.

Similar to the Illinois statute in *Alvarez II*, the Columbia ban on recording surreptitiously is content-neutral on its face. Section 39.061 of the Columbia Revised Civil Statutes bans all recording of conversations that is done by the use of a hidden device when the parties to the conversation are unaware of the recording. Columbia Rev. Civ. Statutes §39.061(1). This law applies to all conversations and does not apply differently based on the subject matter of the conversation, just like the statute in *Alvarez II*. Accordingly, the Columbia statue is facially content-neutral.

While it can be argued in some cases that exceptions to a facially content-neutral statute will render the statute content-based, that is not the case with Columbia's ban on surreptitiously recording. The Columbia statute does not apply to: 1) elected officials or public employees recording as a part of an official duty, 2) persons speaking at public meetings, 3) persons given warning of the recording, and 4) healthcare facilities or government agencies recording healthcare emergency telephone communications to the facility or agency. Columbia Rev. Civ. Statutes §39.061(2). These exceptions parallel those in the statute at issue in *Veritas.* Just as the exception for public officials and the exception for public meetings in *Veritas*

were content-neutral because they did not differentiate based on types of meetings and advanced the First Amendment purpose of allowing free discussion of governmental affairs, the exceptions in the Columbia statute are classic exceptions allowing for more speech in certain public places, like meetings and apply to certain officials in order to promote discussion of matters of public interest. Despite the exceptions included in Columbia's statute, the statute is content-neutral and should therefore be subject to intermediate scrutiny.

C. The Surreptitious Recording Ban does not survive an intermediate scrutiny analysis because the law is overly broad, has reasonable alternatives, and is under-inclusive.

The well-established test for intermediate scrutiny in regard to the First Amendment is a conjunctive three step test in which the law must satisfy each requirement to be valid. *Alvarez II*, 679 F.3d at 605. The Surreptitious Recording Ban requires: (1) content neutrality; (2) an important public interest justification; and (3) a reasonably close fit between the law's means and its ends to be considered constitutional under the First Amendment. *Id.* This law probably satisfies the requirement of content neutrality; however, it likely fails the remainder of the test, and will thus be found unconstitutional. *Id.* If the test does not satisfy the second and third requirements, the law will be found unconstitutional. *Id.* If a law is found unconstitutional under an intermediate scrutiny analysis, it will also fail under a strict scrutiny analysis. *Id.* at 604.

1. The Surreptitious Recording Ban is content neutral and is not presumptively invalid.

The First Amendment has been interpreted to mean that the government has no power to restrict expression based on its message, ideas, subject matter, or content. *Id.* at 603. Laws that restrict speech based on its content are presumptively invalid and subject to strict scrutiny. *Id.* As discussed above, the Surreptitious Recording Ban is content neutral because it does not restrict expression based on specific subject matter; it prohibits all surreptitious recordings. Therefore, the Surreptitious Recording Ban is considered content neutral and satisfies the first requirement of the intermediate scrutiny analysis.

2. The important public interest justification for the challenged regulation provided by the State is not relevant to conversations that are not private in nature.

When a law is subject to intermediate scrutiny, the law must be justified by an important public interest justification. *Id.* at 605. The important governmental interest claimed here is to protect conversational privacy. R. at 51. Protecting conversational privacy is an established important interest. *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001). Actionable invasion of privacy takes several forms and surreptitiously accessing the private communications of another by way of audiovisual recording clearly implicates recognized privacy expectations. *Alvarez II*, 679 F.3d at 603. A major purpose of the First Amendment is to protect the free discussion of governmental affairs. *Id.* at 597. In *Alvarez II*, privacy was not at issue because the request was to openly audio record public officials performing their duties in public places and speaking at a volume audible to bystanders. *Id.* at 606. The definition of public official includes city councilman. Ohio Rev. Code § 102.01(B).

Conversations in the open, such as in a public park, would not be protected against being overheard, as this expectation of privacy under the circumstances would be unreasonable. *Id.* Similar to *Alvarez II*, the public officials in the present case were having a conversation while performing their duties in a public area at a volume audible to bystanders. Thus, these privacy interests are not at issue here with this level of public conversation. *Id.*

The Petitioners would counter that private talk in a public place, such as a city park, is common. *Id.* at 606. However, the right of privacy does not prohibit the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). A citizen's right to film government officials, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment. *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011). One of the costs of being a public official is an attendant loss of privacy. *Bartnicki*, 532 U.S. at 534. The Court must recognize that public officials are performing their duties when attending public events at a city park while campaigning during an election period. R. at 47. Thus, even if these conversations were thought to be private, the public has a right to know the views of public officials to make informed decisions during elections.

3. The Surreptitious Recording Ban is not reasonably tailored to advance the significant government interest.

The Surreptitious Recording Ban is not reasonably tailored to advance the interest of privacy in conversation. Under an intermediate scrutiny analysis, the law's means must be reasonably related to its ends for it to be considered constitutional. *Alvarez II*, 679 F.3d at 606. Thus, a law that is overly broad in scope, has reasonable alternatives to achieve the important public interest that do not implicate First Amendment speech, and is under-inclusive of the forms banned will not be considered to satisfy the ends/means analysis. *Id.* The Surreptitious Recording Ban is overly broad, has other alternatives to satisfy the privacy interests, and is under-inclusive of the forms of communication banned. Thus, the law's means are not reasonably tailored to its ends and the law should be considered unconstitutional by the Court.

When applying the intermediate scrutiny standard, laws will be considered invalid if they deter significantly more speech than necessary to protect the privacy interests at stake. *Bartnicki*, 532 U.S. at 522. The burden on First Amendment rights must not be greater than necessary to further the important governmental interest. *Alvarez II*, 679 F.3d at 605. In *Alvarez II*, the Illinois eavesdropping statute made it a felony to audio record "all or any part of any conversation" unless all parties to the conversation gave their consent. *Id.* at 586. This ban made it illegal to openly make audiovisual recordings of police officers performing their duties in public places and speaking at a volume audible to bystanders. *Id.* The court explained the State banned nearly all audio recording without consent of the parties, including audio recording that implicates no privacy interests at all, rather than attempting to tailor the

statutory prohibition to the important goal of protecting personal privacy. *Id.* at 606. Thus, the court found the statute restricts far more speech than necessary to protect legitimate privacy interests, making its reach overly broad and severing the link between the State's means and its ends. *Id.* Similarly, the Surreptitious Recording Ban is overly broad and suppresses more speech than necessary to further the stated goals of protecting privacy. *Id.* This law bans nearly all audio recording without consent of the parties, including audio recording that implicates no privacy interests at all, such as the conversation between public officials in a public park. R. at 50-51. Thus, the Surreptitious Recording ban is overly broad in scope and the State has severed the link between the Surreptitious Recording Ban's means and its end.

When applying the intermediate scrutiny standard, laws will be considered invalid when there are various other laws at a states' disposal that would allow it to achieve its stated interests, while burdening little or no speech. *Wasden*, 878 F.3d at 1205. In *Wasden*, the court found many alternatives to protect the privacy interests in already existing tort law. These alternatives burdened little to no speech and supported the conclusion the law could not survive First Amendment scrutiny and was therefore unconstitutional. *Id.* Similarly here, the State can use invasion of privacy torts as an alternative to the Surreptitious Recording Ban to protect the privacy interests of citizens. *Id.* Additionally, there are presumably more laws the State of Columbia could use to protect the interest in conversational privacy that do not burden speech. Thus, these alternatives indicate that the Surreptitious Recording Ban cannot survive intermediate scrutiny.

When applying the intermediate scrutiny standard, laws will be considered invalid if they are under-inclusive and do not include other forms of speech. *Id.* at 1204. In *Wasden*, prohibiting only audio or video recordings, without including photography, was found by the court to be suspiciously under-inclusive. *Id.* The court questioned why the making of audio and video recordings of conversations would implicate privacy harms, but photographs of the same content would not. *Id.* at 1205. As in *Wasden*, recordings are the only form not allowed under the Surreptitious Recording Ban. However, recounting the conversation through written notes or transcribing the conversation would implicate the same privacy harms. The under-inclusive nature of the Surreptitious Recording Ban supports the contention that it is not reasonably tailored.

CONCLUSION

For these reasons, we respectfully request that this Court affirm the decision of the Supreme Court of the State of Columbia and find both the Fake News Ban and the Surreptitious Recording Ban unconstitutional.

Respectfully Submitted,

/s/ Team 204

Team 204
Counsel for Respondent