No. 20-00333

In the

Supreme Court of the United States

October Term 2021

STATE OF COLUMBIA, Petitioner,

v.

DONALD SEGRETTI, Respondent.

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

BRIEF FOR RESPONDENT

Team Number: 205

QUESTIONS PRESENTED

1. Whether the First Amendment protects the right to disseminate a fake news story about certifying ballots in a local election; if so, whether Columbia Rev. Civ. Stat. § 31.002's ban on false statements of fact as applied to Respondent violates this right.

2. Whether the First Amendment protects the right to record the conversation of public figures in a public park; if so, whether Columbia Rev. Civ. Stat. § 39.061's ban on surreptitious recording as applied to Respondent violates this right.

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The Opinion of the Supreme Court of the State of Columbia is located at *Segretti v. State of Columbia*, 131 Col. Rptr. 44 (Col. 2021).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

Col. Rev. Civ. Stat. § 31.002 provides in relevant part:

> Section 1. The Ban. An information source shall not intentionally disseminate purported facts if:
>
> a. The information source knows the purported facts are false or recklessly disregards the truth or falsity of those purported facts;
>
> b. The purpose, in whole or in part, of disseminating such false facts is (i) to enhance the financial interests of the information source, (ii) to influence the outcome of a contested public election, or (iii) to promote the interest of a foreign government; and
>
> c. The intentionally false facts cause material harm to public health, safety, national security, or the operation of an essential government function.
>
> Section 2. Exceptions. It shall not be a violation of this statute if:
>
> a. The information source (i) identifies the purported facts that are false, (ii) discloses the purpose for disseminating those false facts, and (iii) identifies any employer, company, or other third-party providing compensation or other inducement for the information source to disseminate the false facts.
>
> b. The false facts disseminated are:
>
> i. A republication of information originally disseminated by a bona fide news organization ("BFNO"), and the information source can identify the BFNO;
>
> ii. Communicated by a natural person as a comment in a forum sponsored, created, or maintained by a BFNO[.]

Section 3. Definitions.

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

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

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

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

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

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

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

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

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

Section 4. Enforcement.

1. Any party that commits a violation of this statute shall be subject to [a criminal or civil penalty.]

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

i. The Attorney General of the State;

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

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

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

Col. Rev. Civ. Stat. § 39.061 provides in relevant part:

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

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

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

2. Persons speaking at public meetings;

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

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

STATEMENT OF THE CASE

I. Statement of Facts

Respondent, Donald Segretti, is a college student and social media influencer. *Segretti v. State of Columbia*, 131 Col. Rptr. 44, 45 (Col. 2021). Since 2018, Mr. Segretti has amassed over 220,000 followers on various social media platforms. *Id.* In early 2020, Mr. Segretti's aunt, Joan Dean, hired him to work on her campaign for Mayor of New Watergate. *Id.*

The campaign was contentious, rife with political attack advertisements and concerns about voter fraud and misconduct at the polls. *Id.* at 45–46. Many citizens, troubled by news of the national election, expressed concerns about the integrity of the New Watergate election. *Id.* at 46. The general election results showed Ms. Dean and her longtime political rival, Gordon Liddy, with the highest percentage of the vote, and a December runoff election was scheduled. *Id.* Shortly after the general election, rumors circulated that the current chair of the Election Commission, Joanne Erlichman, would leverage her position to help Dean win the runoff. *Id.* The rumors stemmed from a story originally published by Alexander Butterfield, a social media user with over 25,000 followers who had throughout the campaign period supported Mr. Liddy. *Id.*

On November 20, 2020, Mr. Butterfield posted allegations that Ms. Erlichman falsely certified 394 absentee ballots so that Dean would qualify in a runoff election against Liddy. *Id.* The post included a photo of Dean and Erlichman with a large caption that read, "Why Bother? Erlichman will rig it anyway." *Id.* On November 22,

2020, Mr. Butterfield posted a video of Dean and Erlichman in a city park. *Id.* In the video, the two engaged in a hushed conversation that ended with Ms. Erlichman saying, "I'll take care of it." *Id.* Butterfield's subsequent posts of the video included a large caption that read, "Why bother? Erlichman will take care of it." *Id.*

The current mayor of New Watergate investigated these allegations and found that Ms. Erlichman had not engaged in any wrongdoing. *Id.* Many media outlets reported this finding, but in the process continued to spread the rumors that Mr. Butterfield had propagated. *Id.* Ms. Dean defeated Gordon Liddy in the December runoff election, a result that many attributed to low voter turnout. *Id.*

On December 13, 2020, police discovered that "Alexander Butterfield" was not a real person but instead Mr. Segretti posting under a pseudonym. *Id.* Mr. Segretti recorded the video of Dean and Erlichman by wearing a hidden body camera to the public park and positioning himself so that he captured the conversation. *Id.* A review of the video confirmed that Dean and Erlichman were discussing a church project. *Id.* Erlichman, Dean, and Liddy did not know that Mr. Segretti took any of these actions under this pseudonym. *Id.*

II. Procedural History

This case presents a constitutional question of whether Mr. Segretti violated the First Amendment by posting on social media both (i) a false story about New Watergate's general election and (ii) a secretly recorded video of public officials conversing in a park. *Id.* at 46–47. Specifically, the State of Columbia contends that Mr. Segretti's actions violated two laws codified in Columbia's Revised Civil Statutes:

Section 31.002, the state's ban on disseminating fake news, and Section 39.061, the state's ban on surreptitious recordings. *Id.* at 47, 50.

The State of Columbia initially charged Mr. Segretti with violating Col. Rev. Civ. Stat. § 31.002 (the "Fake News Ban") and § 39.061 (the "Surreptitious Recording Ban") in the 112th District Court of Mitchell County. Mr. Segretti challenged the State's assertion that he violated the elements of the two bans. *Id.* at 47. After a jury found Mr. Segretti guilty on both counts, District Judge Archibald Cox sentenced him (i) to five months in jail and a $750 fine for disseminating fake news in violation of Section 31.002, and (ii) to four months in jail and a $375 fine for surreptitiously recording others in violation of Section 39.061. *Id.* Mr. Segretti appealed his conviction. *Id.*

On appeal to the Supreme Court of the State of Columbia, Mr. Segretti limited his challenge to the constitutional question of whether his convictions violated the First Amendment. *Id.* Justice Bernstein, writing for a two-justice majority, ruled that both the Fake News Ban and the Surreptitious Recording Ban were unconstitutional. First, citing *United States v. Alvarez*, 567 U.S. 709 (2012), the court expounded on the principle that this Court "has never held that false speech is completely unprotected," and indeed, "it may be crucial to permit lies in certain circumstances." *Id.* at 49. The court noted that "[f]ake news is part of the price we pay for a free society" where a robust, democratic marketplace of ideas encourages the best ideas to win, and where no one actor, "especially [] the government," can determine the truth. *Id.* at 49–50. As Section 31.002 is a "content-based restriction on core political speech," the court

found that it failed a test of strict scrutiny as it was both overbroad and underinclusive, and therefore not narrowly tailored to serve compelling state interests. *Id.*

Second, the court found that the Surreptitious Recording Ban violated the First Amendment. *Id.* at 53. The court first acknowledged this Court's recognition of films as a medium of expression protected by the First Amendment. *Id.* at 51. In addition, the court noted other courts' recognition of recording a video as an act of expression itself entitled to First Amendment protection. *Id.* at 52. In either event, the court concluded that the act of recording was "inextricably intertwined with the dissemination of constitutionally protected videos themselves," and therefore protected speech. *Id.* at 52. Because the Surreptitious Recording Ban restricted a constitutionally protected right to record, it was subject to strict scrutiny, and the court found it not narrowly tailored to serve any compelling government interest. *Id.* at 53.

Finding that both laws were unconstitutional, the State Supreme Court reversed the judgment of the lower court and remanded the case for further consideration. *Id.* This appeal ensued.

SUMMARY OF ARGUMENT

This Court should affirm the judgment of the Supreme Court of the State of Columbia and remand this case for further proceedings because (i) Columbia's Fake News Ban (Col. Rev. Civ. Stat. § 31.002) violates Mr. Segretti's First Amendment right to engage in false speech and political speech and; (ii) as applied to Mr. Segretti's recording of a mayoral candidate and election official speaking in a public park, Columbia's Surreptitious Recording Ban (Col. Rev. Civ. Stat. § 39.061) unconstitutionally infringes Mr. Segretti's First Amendment right to record matters of public concern.

I. The First Amendment protects the right to engage in certain kinds of false speech and political speech. This Court has protected speech, including statements that are exaggerated or untrue, to encourage a lively public discourse. Because the Fake News Ban targets constitutionally protected speech and attempts to appoint an objective decider of truth, it infringes on Mr. Segretti's First Amendment rights. As the statute regulates the content of speech, it is subject to strict scrutiny, which demands a narrow tailoring between the law's prohibitions and the purported state interests. While the Fake News ban asserts multiple interests, none are compelling. The Ban does not demonstrate that its restrictions are causally linked to serve any interest, its language is impermissibly overbroad and underinclusive, and it does not demonstrate that criminalizing speech is the least restrictive way to meet Columbia's purported goals. Therefore, the Ban cannot survive strict scrutiny, and the decision of the Supreme Court of Columbia should be affirmed.

II. The First Amendment protects an individual's right to record public officials and matters of public concern in public forums as a necessary incident to the exercise of free speech rights. Because the State of Columbia's Surreptitious Recording Ban burdens Mr. Segretti's First Amendment right to record, it is subject to constitutional scrutiny. Because the statute exempts certain permissible secret recordings from application of the Surreptitious Recording Ban based on their content, the appropriate level of scrutiny to be applied is strict scrutiny, which requires that the law be narrowly tailored to serve a compelling governmental interest. The ban, however, prohibits too much speech in relation to its asserted interest in conversational privacy. It also prohibits the act of recording even those individuals with no compelling interest in conversational privacy, like mayoral candidates speaking in public parks. Therefore, the ban fails strict scrutiny, and the decision of the Supreme Court of Columbia should be affirmed.

STANDARD OF REVIEW

This Court reviews questions of First Amendment issues *de novo*. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510–11 (1984). The requirement of independent review "reflects a deeply held conviction that judges [and particularly Supreme Court Justices] must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Id.*

ARGUMENT

I. THE FAKE NEWS BAN VIOLATES RESPONDENT'S FIRST AMENDMENT RIGHT TO ENGAGE IN FALSE SPEECH AND POLITICAL SPEECH, IMPERMISSIBLY CONSTRUCTS A TEST OF TRUTH, AND IS NOT NARROWLY TAILORED TO SERVE THE STATE'S ASSERTED INTERESTS.

This Court should affirm the decision of the Supreme Court of Columbia because the Fake News Ban restricts constitutionally protected speech, improperly encourages an objective test of truth, and fails the strict scrutiny test required to uphold such a restriction. First, this Court has "never endorsed the categorical rule . . . that false statements receive no First Amendment protection." *United States v. Alvarez*, 567 U.S. 709, 719 (2012). And, as applied to Mr. Segretti, the Ban restricts political speech—a category considered "integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Second, this Court has acknowledged that the First Amendment must afford the public discourse "breathing space," and the government cannot interfere to decide an objective truth. *Brown v. Hartlage*, 456, U.S. 45, 60 (1982); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

Because the Fake News Ban is a content-based restriction on constitutionally protected speech, it is subject to strict scrutiny, which it cannot survive. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). Content-based bans "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 163. Columbia does not assert a compelling interest, nor is the Fake News Ban narrowly tailored to serve any

state goal. Therefore, this Court should affirm the Supreme Court of Columbia's finding that the Fake News Ban is unconstitutional.

A. Respondent's Right to Engage in Both False Speech and Political Speech is Protected by the First Amendment.

This Court has acknowledged that generalized false speech and political speech are afforded First Amendment safeguards. A fundamental principle of the First Amendment is to protect "uninhibited, robust, and wide open" discussion. *N.Y. Times Co.*, 376 U.S. at 270. Nonetheless, this Court has recognized certain categories of speech, generally those associated with a legally cognizable harm, that do not deserve First Amendment protection. *See Alvarez*, 567 U.S. at 717–18. The Court has no "free-floating" authority to declare new categories of First Amendment exceptions, but rather, considers whether speech falls into a "long-established category" where "the evil to be restricted so overwhelmingly outweighs the expressive interests." *United States v. Stevens*, 559 U.S. 460, 470–72 (2010) (internal citations omitted).

Contrary to Justice Woodward's dissent below, the Fake News Ban is not like other exempted categories of speech because it attempts to target generalized, widespread harm. The Ban targets "intentionally false facts [that] cause material harm to public health, safety, national security, or the operation of an essential government function, [defined as] operations undertaken by a government entity for the benefit of the general public that are necessary to perform the services for which the government entity was established." Col. Rev. Civ. Stat. § 31.002(1)(c)–(3)(g). Despite the statute's inclusion of the word "material," it still extends the Ban to a far-

reaching, seemingly unrelated list of interests, and does not clearly articulate a "legally cognizable harm" to be redressed by restricting speech. *See Alvarez*, 567 U.S. at 718–19. Cabining a false speech ban to a specific type of harm is crucial, as it "comports with the 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.

As applied here, the statute restricts false political speech "intended to influence the outcome of a contested public election." Col. Rev. Civ. Stat. § 31.002(1)(b). Political speech lies at the core of First Amendment freedoms, and it enjoys broad protection to ensure the "unfettered interchange of ideas for bringing about of political and social changes desired by people." *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971)). Indeed, political speech is "the lifeblood of a self-governing people," and to effectively self-govern, the public needs access to a full range of political opinions and ideas. *McCutcheon v. FEC*, 572 U.S. 185, 228 (2014) (Thomas, J., concurring); *see also N.Y. Times Co.*, 376 U.S. at 274–75 (1964); *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence."). Here, Mr. Segretti published a news story about a highly publicized local election—igniting exactly the kind of vigorous political debate that the First

Amendment is designed to protect. As the Fake News Ban restricts constitutionally protected false speech and political speech, the Supreme Court of Columbia rightly held that the law cannot be upheld.

B. The Ban Unconstitutionally Restricts Necessary First Amendment "Breathing Space" and Improperly Contemplates an Objective Arbiter of Truth.

The Fake News Ban endeavors to appoint an evaluator of objective truth, a concept plainly antithetical to First Amendment values. This Court has interpreted the First Amendment as intended to "create[] an open marketplace where ideas . . . may compete without government interference." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008). To that end, it has long held that no one party, especially the government, can be an objective judge of truth. *See N.Y. Times Co.*, 376 U.S. at 271 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth"); *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("[I]t cannot be the duty, because it is not the right, of the state to protect the public against false doctrine.")

Tasking the government with deciding the veracity of political statements is unwieldy and impracticable. In the political context, the lines between facts and opinions are blurred, and speech is often exaggerated. *See Watts v. United States*, 394 U.S. 705, 708 (1969) ("The language of the political arena . . . is often vituperative, abusive, and inexact.") In the instant case, a statement of fact is considered false (and thus, prohibited) when "its substance or gist is contrary to objectively verifiable facts." Col. Rev. Civ. Stat. § 31.002(3)(d). When determining the veracity of speech that is

by its very nature ambiguous, there must be some "breathing space" to avoid chilling speech that could otherwise be innocuous. *Brown*, 456 U.S. at 60. This principle is well-illustrated in *Alvarez*, where a false claim about having received a military medal was at issue. *Alvarez*, 567 U.S. at 713–14. This fact can be confirmed through simple recordkeeping, and yet, the plurality found that the false speech was within First Amendment protection. *Id.* at 728–29. As this Court has provided First Amendment protection to false statements that can be easily verified, it must afford the same protection to political speech, where the objective truth of purported facts is less discernible and often clouded by embellishment and emotion.

Aside from the practical difficulty of relying on the government to parse out truth, such a concept is an affront to basic First Amendment values. The Court reaffirmed the dangers of a government truth repository in *Alvarez*, noting that "government authority to compile a list of subjects about which false statements are punishable . . . has no clear limiting principle." *Alvarez*, 567 U.S. at 723. Indeed, allowing the government to decide what is true can be abused for partisan ends. *See id.* at 736 (Breyer, J., concurring) ("[I]n political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high."); *State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 698–99 (Wash. 1998) (striking down a false-statement law that was improperly fashioned for political gain). Naturally, parties sympathetic to the speaker's viewpoint are more likely to find a misstatement was an innocent mistake, while those ideologically opposed are more likely to declare the statement a falsehood. *See,*

e.g., *Brown v. Entm't Merchs. Assn.*, 564 U.S. 786, 802 (2008). Moreover, allowing the government to decide veracity violates the fundamental notion that the public discourse must be able to right itself without state intervention. *N.Y. Times Co.*, 376 U.S. at 274–75. Here, Col. Rev. Stat. § 31.002 does just that—it criminalizes protected speech that is not "objectively verifiable," while improperly relying on the government to intervene in the public discourse and define the truth.

C. The Fake News Ban is Not Narrowly Tailored to Serve a Compelling Government Interest and Fails Strict Scrutiny.

The Fake News Ban is content-based and thus subject to strict scrutiny. To determine the level of scrutiny to apply to a law in a First Amendment challenge, this Court weighs whether that law is content-based. *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). A law is content-based if it seeks to regulate speech "because of the topic discussed or the message expressed," and is subject to strict scrutiny, meaning its impact on free speech is "justified only if the government proves that [the restriction is] narrowly tailored to serve compelling state interests." *Id.* at 163. Indeed, "it is the 'rare case[] in which a speech restriction withstands strict scrutiny.'" *Id.* at 180 (citing *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015)).

Here, Col. Rev. Stat. § 31.002 is content-based because it seeks to regulate speech based on its subject matter— fake news, which is defined "narrowly as (1) intentionally false statements (2) of fact, (3) broadly disseminated, (4) for a self-serving purpose, (5) that cause[] public harm." *Segretti*, 131 Col. Rptr. at 47–48. As the law seeks to regulate the content of the statements themselves, it must undergo

a test of exacting scrutiny. As the court below correctly indicated, the Fake News Ban cannot survive strict scrutiny and is thus unconstitutional.

1. Columbia does not assert a compelling state interest that the law intends to serve.

Columbia lists multiple state interests that the Fake News Ban intends to protect, but none are compelling. For Columbia's law to survive strict scrutiny, it must be narrowly tailored to serve a "compelling interest," a term "not easily defined." *Republican Party v. White*, 416 F.3d 738, 749 (8th Cir. 2005). This Court has accepted a myriad of different interests for purposes of a strict scrutiny analysis, including, as is relevant in the instant matter, protecting the integrity of elections. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349 (1995); *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

Columbia's statute seeks to ban the dissemination of "intentionally false facts" designed to "influence the outcome of a contested public election" which, in doing so, "cause[s] material harm to public health, safety, national security, or the operation of an essential government function," defined broadly as "the operations of schools, fire departments, police departments, public utilities, and elections." Columbia Rev. Civ. Stat. § 31.002(1)–3(g). Many of these asserted interests have been recognized individually as "compelling" in a strict scrutiny analysis. *See Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (student body diversity in schools); *In re Nat'l Sec. Letter v. Sessions*, 863 F.3d 1110, 1126-27 (9th Cir. 2017) (national security). However, "a State must do more than assert a compelling state interest—it must demonstrate

that its law is *necessary* to serve the asserted interest." *Burson*, 504 U.S. at 199 (emphasis added). To survive judicial scrutiny, a statute must contain "limitations of context, requirements of proof of injury, and the like, [which] narrow the statute to a subset of lies where specific harm is more likely to occur." *Alvarez*, 567 U.S. at 736 (Breyer, J., concurring). While the court below did not address whether Columbia's asserted range of interests was compelling, it correctly recognized that the law "cannot overcome the constitutional hurdle it must to stand." *Segretti*, 131 Col. Rptr. at 50. Accordingly, the law is not narrowly tailored to any state interest and cannot survive strict scrutiny.

2. Columbia has not shown how restricting speech "actually advances" a specific state interest.

To demonstrate that a law is narrowly tailored to meet a compelling state interest, "there must be a direct causal link between the restriction imposed and the injury to be prevented." *Id.* at 725. Simply reciting the government's interest in the law's text will not suffice; the state must show that the speech restriction is "actually necessary" to achieve its goal. *Id.* (citing *Brown*, 564 U.S. at 799).

Federal courts of appeals have been hesitant to uphold false speech bans surrounding political elections. The Eighth Circuit analyzed a political "false speech" ban much like the one in the instant matter. *281 Care Comm. v. Arneson*, 766 F.3d 774, 778 (8th Cir. 2014). Two advocacy organizations challenged a provision of the Minnesota Fair Campaign Practices Act, under which it was a gross misdemeanor to "intentionally participate[] in" creating or spreading information about a ballot question "that the person knows is false or communicates to others with reckless

disregard whether it is false." *Id.* The state asserted an interest in "preserving fair and honest elections and preventing fraud on the electorate," but the court found the law was not narrowly tailored to justify restricting political speech. *Id.* at 787.

The state asserted concerns about widespread election fraud; however, the Court found that they did not provide any empirical evidence of an "actual, serious threat of individuals disseminating knowingly false statements concerning ballot initiatives." *Id.* Nevertheless, the state urged the court to accept the "common sense" notion that people misrepresent ballot initiatives. *Id.* at 787–88. In *Alvarez*, however, this Court rejected the government's "common sense" assertion that false representations diluted the value of military awards to uphold the Stolen Valor Act. *Alvarez*, 567 U.S. at 725–26. Just as this Court reasoned that relying on common sense was not enough to meet the "heavy burden" required to regulate protected speech, *id.*, the Eighth Circuit found that Minnesota did not show a sufficient causal link between the law and the interest served. *281 Care Comm.*, 766 F.3d at 790.

In addition to the lack of a causal link, the provision at issue in *281 Care Comm.* allowed for frivolous complaint filing, a facet so flawed that the Court reasoned the law indeed "perpetuate[d] the very fraud it [was] allegedly designed to prohibit." *Id.* at 789. Under this provision, complaints could be filed at any time, very possibly by someone seeking to strategically "divert the attention of an entire campaign from the meritorious task at hand . . . [and] thus inflicting political damage." *Id.* at 790. *See also Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474 (6th Cir. 2016) (an analogous Ohio statute was "not narrowly tailored to promote fair

elections" where citizens could strategically lodge false-statement complaints before an election).

In the instant matter, Columbia's statute contains neither a "direct causal link" to the asserted state interests nor timing restrictions on filing at all. As Hennepin County was faulted in *281 Care Comm*. for failing to provide empirical evidence of election fraud, here, the State of Columbia has not demonstrated how restricting fake news upholds "essential government functions." The Supreme Court of Columbia only noted that "[t]hroughout the campaign, concerns plaguing the national election spilled into the New Watergate mayoral race. Allegations of voter fraud and misconduct by poll officials were prevalent. Many had serious concerns about the integrity of the election." *Segretti*, 131 Col. Rptr. at 46. While such sentiments are expected after a fraught national election, these generalized "common sense" assertions are not nearly enough to meet the "heavy burden" required for a law regulating protected speech.

Additionally, while the Sixth and Eighth Circuits respectively grappled with whether the timing restrictions of Ohio's and Minnesota's laws were narrow enough to preserve the integrity of elections, the Court here faces no such challenge—because Columbia's law contains no timing apparatus whatsoever. While Columbia's law limits who may bring a complaint in § 4(b), it is not enough to save the law from the possibility that, for instance, a "state agency harmed by the disseminated false facts" files a fake news complaint right before election day, causing a candidate to divert resources to address the allegations amidst political chaos. Indeed, one of the cited

purposes of the law is to ban citizens from intentionally attempting "to influence the outcome of a contested public election," and by failing to include any timing restrictions, Columbia's law "perpetuate[s] the very fraud it is allegedly designed to prohibit." *281 Care Comm.*, 766 F.3d at 789. This Court should affirm the Supreme Court of Columbia's finding that Col. Rev. Stat. § 31.002 does not advance Columbia's purported interests and therefore, fails strict scrutiny.

3. The Fake News Ban chills too much protected speech while also failing to criminalize speech that would still harm the state's asserted interests.

This Court should also find that the law fails strict scrutiny because it is both overinclusive and underinclusive. *See Republican Party of Minn. v. White*, 536 U. S. 765, 780 (2002) ("A law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.") Here, the Fake News Ban is overinclusive as its broad prohibitions sweep in protected speech. Concurrently, it is underinclusive because it targets "knowing" false statements without acknowledging the harm that negligent false statements can inflict.

By prohibiting the intentional dissemination of any statements of facts that are objectively false, the Fake News Ban sweeps too broadly and chills protected speech, demonstrating that it is not narrowly tailored to justify the speech restriction. "[A]n overinclusive statute [is] one that encompasses more protected conduct than necessary to achieve its goal." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 578 (1993). Here, the Fake News Ban manages to prohibit an extensive

range of protected speech. The Fake News Ban applies to any information source reaching 5,000 or more people, any kinds of purported facts, causing any types of material harm to a wide range of interests, disseminated at any time. Col. Rev. Stat. § 31.002(1)(c), (3)(a). *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 351–52 (1995) (anonymous leafleting ban was overbroad where its prohibition encompassed any person, with any level of interest in anonymity, distributing leaflets at any time). The Fake News Ban could target, for example, a social media user intending to provoke a dialogue about a candidate's platform or a performer instigating jokes about the President's campaign promises. Indeed, "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms," and the Fake News Ban directly violates these freedoms. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

Additionally, although the statute limits the prohibition to situations where "the information source knows . . . or recklessly disregards the truth or falsity" of the disseminated facts, the dangers of chilling speech remain. Col. Rev. Stat. Col. Rev. Civ. Stat. § 31.002(1)(a). The analysis in *281 Care Comm.* is instructive, recognizing there that a "mens rea requirement" did not eliminate the risk of chilling speech, as "many might legitimately fear that no matter what they say, an opponent will . . . simply tie them up in litigation and smear their name or position on a particular matter, even if the speaker never had the intent required to render him liable." 766 F.3d at 794. (citing *Alvarez*, 576 U.S. at 736–37) (Breyer, J., concurring). Here, the

statute's application is not only impermissibly overbroad, but it also deters people from exercising their First Amendment rights.

The Fake News Ban is also underinclusive because it prohibits knowingly false statements without restricting negligent false statements that could still allegedly harm the state's interests. A law may be underinclusive when it fails to encompass uses that could still defeat its purpose. *See Reed*, 576 U.S. at 172 (finding a law underinclusive where it limited temporary directional signs for "traffic safety" and exempted others, yet the state "offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs.") "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802 (finding California's law restricting the sale of violent video games to minors underinclusive where only video game sellers were penalized and where one parent could simply authorize the sale to a child).

In *281 Care. Comm.*, the Eighth Circuit found the contested statute underinclusive as it exempted from liability false speech in "editorial comments by the news media," but applied with full force to "paid political advertising." 766 F.3d at 794. The court illustrated this paradox with the example of a newspaper "which, on the same day, prints the very same 'false' information regarding the effects of a ballot question twice—once as an editorial and again in a paid advertisement," resulting in one statement being "exempt from prosecution [while] the other is not." *Id.* at 795. The court reasoned such a counterintuitive result "does not advance a

stated interest in preventing a fraud on the electorate." *Id.* In the instant matter, Columbia's statute does not account for negligently disseminated fake news, which could still unintentionally chill protected speech. And the Fake News Ban exempts false facts "[c]ommunicated by a natural person as a comment in a forum sponsored, created, or maintained by a BFNO [bona fide news organization]." Col. Rev. Civ. Stat. § 31.002(2)(b). Columbia does not demonstrate how facts disseminated in a similar, non-BFNO-sponsored forum, such as a town hall or a well-attended social event, would have less of an impact on the law's stated interests. *See also Smith v. Daily Mail Publishing Co.*, 443 U. S. 97, 104–05 (1979) (prohibiting newspapers, but not electronic media, from sharing the names of juvenile defendants did not advance the law's stated purpose of protecting youth privacy). As the Fake News Ban could chill protected speech while simultaneously fail to capture uses that would defeat the government's stated interests, it is fatally overinclusive and underinclusive.

4. Columbia fails to demonstrate whether lesser restrictive means, like counterspeech, could accomplish Columbia's stated goals.

In addition to the narrowing features of a statute, the government must demonstrate that it is not possible to achieve its objectives in a less burdensome way, or rather, that the law is necessary to achieve the desired end. *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989). As this Court in *Alvarez* confirmed, the classic "remedy for speech that is false is speech that is true." *Alvarez*, 567 U.S. at 727. Here, the government has not demonstrated why simple counterspeech would not be more

effective than a blanket ban in combating fake news, and instead, imposes a stricter-than-necessary prohibition.

In the First Amendment context, courts generally consider whether counterspeech would be effective before accepting a more restrictive narrowing statute. *See Whitney v. Cal.*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[T]he remedy to be applied is more speech, not enforced silence."); *281 Care Comm.,* 766 F.3d at 793 ("Possibly there is no greater arena wherein counterspeech is at its most effective. It is the most immediate remedy to an allegation of falsity."). The Court in *Alvarez* reasoned that the Stolen Valor Act was unconstitutional as applied, in part because the government did not explain why lesser restrictive means, such as refutation of the false statement or an online database of Medal of Honor winners, could not have accomplished the same ends. *Alvarez*, 567 U.S. at 728–29. Here, the State of Columbia did not demonstrate that a blanket fake news ban is the least restrictive way to meet their objectives. For instance, a BFNO or another citizen could simply publicly refute false statements and reach a wide audience. This option is not only less intrusive on First Amendment freedoms, but saves the government from parsing through complex, entangled political speech to declare objectivity.

The Fake News Ban restricts constitutionally protected false speech and political speech and improperly tasks the government with determining the veracity of speech. The content-based ban is subject to strict scrutiny, which it cannot withstand as it is not narrowly tailored to serve any compelling government interest.

For these reasons, this Court should affirm the decision of the Supreme Court of Columbia.

II. THE SURREPTITIOUS RECORDING BAN IS A CONTENT-BASED REGULATION OF RESPONDENT'S FIRST AMENDMENT RIGHT TO RECORD PUBLIC OFFICIALS IN A PUBLIC PARK, WHICH IS NOT NARROWLY TAILORED TO SERVE THE STATE'S INTEREST IN CONVERSATIONAL PRIVACY.

As the Supreme Court of Columbia rightly held, recording a mayoral candidate and the chair of the Election Commission conversing at a public event in a city park is "a form of speech subject to full First Amendment protection." *Segretti v. State of Columbia*, 131 Col. Rptr. 44, 52 (Col. 2021). First, "there is practically universal agreement that a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs. . . . includ[ing] discussions of candidates." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Moreover, "the rights of the State to limit" First Amendment activity in traditional public forums, like parks, are "sharply circumscribed." *Perry Educ. Ass'n v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). Both the subject and location of Mr. Segretti's recording fit, axiomatically, within these categories.

Second, courts have long acknowledged that the First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). Critical to this protection is the "undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*,

408 U.S. 665, 681–82 (1972)). Mr. Segretti's audiovisual recording—an act of information gathering—is therefore subject to First Amendment protection.

Third, as Justice Bernstein correctly pointed out below, "recording . . . is a necessary precursor to, and integrally intertwined with, speech." *Segretti*, 131 Col. Rptr. at 52. Such necessary incidents of protected speech also trigger First Amendment scrutiny. *See Buckley v. Valeo*, 424 U.S. 1, 19 (1976). Under this principle, Mr. Segretti's right to record the conversation of candidate Dean and Commissioner Erlichman is protected "not because [it] *is* speech; but because it *enables* speech." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

Finally, the State of Columbia's Surreptitious Recording Ban is a content-based restriction of the First Amendment right to record, which bans a unique and important medium of expression while burdening Mr. Segretti's political speech. This Court subjects such laws to strict scrutiny, which requires that they be narrowly tailored to serve a compelling governmental interest. *Reed v. Town of Gilbert*, 163–64 (2015). Because the Surreptitious Recording Ban prohibits too much speech in relation to any interest in conversational privacy the law might serve, it fails strict scrutiny. Therefore, this Court should affirm the holding of the Supreme Court of Columbia.

A. Respondent's Recording of a Mayoral Candidate and Election Official Having a Hushed Conversation in a Public Park Amidst a Contentious Election is Protected by the First Amendment, Which Provides Special Protection to Speech About Public Figures, Matters of Public Concern, and Speech in Public Forums.

The Supreme Court of Columbia correctly held that "[a] person has a First Amendment right to discuss government officials and matters of public concern." *Segretti*, 131 Col. Rptr. at 52 (citing *Mills*, 384 U.S. at 218). This Court has likewise firmly established that the First Amendment protects speech regarding matters of public concern. In *Snyder v. Phelps*, this Court limited intentional infliction of emotional distress claims against speech on public issues. 562 U.S. 443 (2011). The Court recognized that speech on matters of public concern "occupies the highest rung of the hierarchy of First Amendment values." *Id.* at 452 (internal quotation marks omitted). In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, this Court likewise limited defamation claims against speech on matters of public concern, reasoning that "speech concerning public affairs . . . is the essence of self-government." 472 U.S. 749, 759 (1985). *See also Bartnicki*, 532 U.S. at 535 (protecting publication of an unlawfully intercepted phone call because it concerned "a matter of public concern"); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (striking down a ban on public disclosure of grand jury witness testimony because "information relating to alleged governmental misconduct . . . has traditionally been recognized as lying at the core of the First Amendment"); *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (striking down law banning paid circulation of a ballot initiative petition because the First Amendment is "at its zenith" where political speech is involved); *Pickering v. Bd. of Educ.*, 391

U.S. 563, 573 (1968) (protecting speech by public employees regarding issues of public concern because "free and unhindered debate on matters of public importance" is "the core value" of the First Amendment). The New Watergate mayoral election and its integrity, the subject of Segretti's recording, are core matters of public concern.

This Court has also held that the First Amendment provides special protection to speech regarding public officials. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). In *Garrison v. Louisiana* and *N.Y. Times Co. v. Sullivan*, this Court limited defamation actions brought by public officials to only those individuals who demonstrated actual malice in defaming said officials. *Id.; N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). In *Garrison*, the Court found that a higher bar for defamation suits brought by public officials was necessary because of "the paramount public interest in a free flow of information to the people concerning public officials." 379 U.S. at 77. In *N.Y. Times Co.,* the Court noted such a standard was necessary to promote the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." 376 U.S. at 269 (quoting *Roth*, 354 U.S. at 484); *see also Bartnicki*, 532 U.S. at 539 (Breyer, J., concurring) (protecting publication of an unlawfully intercepted phone call, in part because the subjects were public figures with "a lesser interest in privacy than an individual engaged in purely private affairs"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (limiting intentional infliction of emotional distress claims brought by public figures to promote "the free flow of ideas and opinions on matters of public interest"). Importantly, this Court includes candidates for public office within the scope of special First Amendment

protection. *See e.g., Mills*, 384 U.S. at 218 (noting the First Amendment protects "discussions of candidates"); *Garrison*, 379 U.S. at 77 ("anything which might touch on an official's fitness for office is relevant"). Joan Dean, a candidate for mayor, and Joanne Erlichman, the chair of the New Watergate Election Commission, are public figures within the meaning ascribed to that term by this Court.

Moreover, "the rights of the State to limit" First Amendment-protected activity in traditional public forums like parks are "sharply circumscribed." *Perry Educ. Ass'n*, 460 U.S. at 45; *see also Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)) (public forums, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"); *United States v. Grace*, 461 U.S. 171, 180 (1983) ("[t]raditional public forum property occupies a special position in terms of First Amendment protection"). The city park in which Segretti recorded is a quintessential example of a traditional public forum.

Given this Court's special solicitude for speech regarding public figures and matters of public concern, and for First Amendment activity in traditional public forums, Segretti's conviction for recording a conversation between candidate Dean and Commissioner Erlichman implicates core First Amendment principles. National concerns about voter fraud and misconduct by poll officials spilled over to the New Watergate mayoral election. *Segretti*, 131 Col. Rptr. at 46. Accordingly, the public was rightly concerned about the integrity of the election. Here, one of the mayoral candidates—Joan Dean—was recorded in hushed conversation with the individual

charged with running New Watergate's mayoral election—Joanne Erlichman. What is more, candidate Dean and Commissioner Erlichman chose to have this conversation in a public park, where their privacy interests are hardly at their zenith. *Cf. Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975). This conversation is a core matter of public concern involving two public figures in a traditional public forum, which the Supreme Court of Columbia correctly concluded deserves First Amendment protection.

B. Respondent's Audiovisual Recording is an Act of Information Gathering Necessary and Preparatory to Speech Also Protected by the First Amendment.

The First Amendment extends protection not only to speech, but also to Mr. Segretti's right to gather information for later dissemination, *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972), and his ability to engage in activity that is necessary to facilitate later speech. *See Buckley*, 424 U.S. at 19. Because Mr. Segretti was engaged in constitutionally protected information gathering regarding a matter of public concern that was necessary to enable his later speech on the election, his recording is wholly protected by the First Amendment.

1. Audiovisual recording, a form of information gathering, is expression the First Amendment protects.

The right of a person to gather information is of paramount First Amendment importance because, in the words of James Madison:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (quoting 9 Writings of James Madison 103 (G. Hunt ed. 1910)). Accordingly, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. at 783; *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is . . . well established that the Constitution protects the right to receive information and ideas."). Critical to protecting this stock of public information is the "undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972)). Here, Mr. Segretti's recording was an act of information gathering protected by the First Amendment.

As several federal courts of appeals have acknowledged, such recording of public officials in public places "fits comfortably within [First Amendment] principles." *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *see also Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020) (recognizing right to *secretly* record police activity in public spaces); *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017) (determining First Amendment protects right to photograph, film, and record police activity in public places); *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017) (recognizing First Amendment right to record public police activity); *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (applying right to record police to protect plaintiff who recorded police traffic stop); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing "a First Amendment right . . . to photograph or videotape

police conduct"); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest").

In *Project Veritas Action Fund v. Rollins*, for example, the Court of Appeals for the First Circuit held that the First Amendment shielded two plaintiffs from application of a criminal statute strikingly similar to the Columbia statute at issue here. 982 F.3d at 840. The statute in that case made it a crime for "any person" to "willfully commit[] an interception, attempt[] to commit an interception, or procure[] any other person to commit an interception or to attempt to commit an interception of any wire or oral communication." *Id.* at 818 (alterations in original). The statute defined "interception" as follows: "to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication." *Id.* Relying on the First Amendment's protection for information gathering as its justification, the court found the First Amendment protected "recording [of police] even when it is conducted 'secretly.'" *Id.* at 833. Columbia's Surreptitious Recording statute likewise infringes on Mr. Segretti's right to record public officials.

2. *Audiovisual recording is a form of conduct both necessary and preparatory to expression.*

Mr. Segretti's audiovisual recording is also protected by the First Amendment because it is conduct preparatory to purely expressive acts. This Court has routinely analyzed laws that prohibit preparatory conduct necessary to speech under the First Amendment. In *Buckley*, this Court first struck down limits on political campaign

donations as violative of the First Amendment, noting such restrictions "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19 (1976) (per curiam). In *Citizens United v. FEC*, this Court invalidated a federal ban on corporate and union spending for political speech because the government may not "repress speech by silencing certain voices at any of the various points in the speech process." 558 U.S. 310, 339 (2010). Both decisions stand for the proposition that even conduct can be considered speech, especially when it is a necessary step to engaging in political speech. *See id.; Buckley*, 424 U.S. at 19; *see also McConnell v. FEC*, 540 U.S. 93, 252 (2003) (Scalia, J., concurring in part and dissenting in part) ("The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise."); *Nixon*, 528 U.S. at 400 (Breyer, J., concurring) ("[A] decision to contribute money to a campaign is a matter of First Amendment concern—not because money *is* speech (it is not); but because it *enables* speech."). Because the use of audiovisual recording is conduct necessary to facilitate Mr. Segretti's subsequent political speech, this Court should affirm the Supreme Court of Columbia's ruling that the First Amendment applies.

Numerous circuit courts have affirmed the basic principle underlying this Court's reasoning in its campaign finance cases, which recognize that "[l]aws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United*, 558 U.S. at 336; *see Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017) ("The First Amendment protects actual photos, videos, and recordings

. . . and for this protection to have meaning the Amendment must also protect the act of *creating* that material.") (emphasis added); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203–04 (2018) ("Because the recording process is itself expressive and is inextricably intertwined with the resulting recording, the creation of audiovisual recordings is speech entitled to First Amendment protection as purely expressive activity.") (internal quotation marks omitted) (citing *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010)).

In this same way, audiovisual recording has become an invaluable tool for reporters and citizens alike to capture events they observe. It is therefore difficult to disaggregate the act of such recording from the clearly expressive activity it facilitates. As the Ninth Circuit observed in *Animal Legal Def. Fund v. Wasden*, "claim[ing] that the act of creating an audiovisual recording is not speech protected by the First Amendment . . . is akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not." 878 F.3d at 1203. To suggest here that Mr. Segretti's recording is not speech protected by the First Amendment would be similarly nonsensical. Accordingly, this Court should affirm the Supreme Court of Columbia's judgment that "[s]urreptitious recordings are subject to full First Amendment protection as conduct that is a necessary precursor to, and integrally intertwined with, speech." *Segretti*, 131 Col. Rptr. at 52.

C. The Surreptitious Recording Ban is a Content-Based Regulation of Speech Subject to Strict Scrutiny, Which It Cannot Survive.

Typically, to determine the appropriate level of scrutiny to apply to a given law in the context of a First Amendment challenge, this Court considers whether that law

is content-based. *See, e.g. Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). Such content-based laws are subject to strict scrutiny. *Id.* at 163. Because the Surreptitious Recording Ban also impermissibly favors certain surreptitious recordings over others based on their content, it too is subject to strict scrutiny. The Supreme Court of Columbia correctly held that the Surreptitious Recording Ban fails strict scrutiny. *Segretti*, 131 Col. Rptr. at 53.

This Court has also applied heightened constitutional scrutiny in the absence of express content-based discrimination, such as when the law at issue bans an entire medium of expression or burdens political speech. *See City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994); *Citizens United*, 558 U.S. at 340–41. In the case of total medium bans, this Court strikes down laws that ban too much speech in relation to the asserted government interest. *See Watchtower Bible & Tract Soc'y v. Stratton*, 536 U.S. 150, 165 (2002); *City of Ladue*, 512 U.S. at 55. Columbia's ban on surreptitious recording is precisely this kind of total medium ban. Moreover, as applied to Mr. Segretti, Columbia's Surreptitious Recording Ban burdens political speech, and as this Court held in *Citizens United v.* FEC, such laws are subject to strict scrutiny. 558 U.S. at 340. Thus, under either theory, the Surreptitious Recording Ban is subject to heightened constitutional scrutiny, which it cannot overcome.

1. *The Surreptitious Recording Ban draws distinctions between nonconsensual recordings based on their content, and is therefore subject to strict scrutiny.*

Because the Surreptitious Recording Ban is a content-based regulation of speech, the Supreme Court of Columbia correctly held it to be subject to strict scrutiny. A law is content-based if, "on its face [the law] draws distinctions based on

the message a speaker conveys . . . [or] defin[es] regulated speech by its function or purpose." *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015) (internal quotation omitted). Even a law that is facially content-neutral can be content-based if it cannot be "justified without reference to the content of speech." *Ward*, 491 U.S. at 791. If a law is content-based, it is subject to strict scrutiny, meaning its impact on free speech is "justified only if the government proves that [the restriction is] narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. Here, the State of Columbia cannot demonstrate such narrow tailoring.

The Surreptitious Recording Ban differentiates between various surreptitious recordings, exempting some from criminal sanction while penalizing others, based solely on their content. Section 2 of the Surreptitious Recording Ban outlines several exemptions to the ban, including recordings made by "[e]lected or appointed officials" or "public employees . . . in the performance of official duty," recordings of "public meetings," and recordings of "a health care emergency." Col. Rev. Civ. Stat. § 39.061. In each case, the content of the recording is a central factor in determining whether the law applies in a given situation. Nonconsensual recording of 9-1-1 calls is permissible while nonconsensual recording of an elected official accepting a bribe is not. Because one recording concerns specific, permissible content, and the other does not, only one is penalized. This is precisely the kind of content-based distinction deserving of strict scrutiny.

2. Total medium bans and laws burdening political speech are also subject to heightened scrutiny.

Even assuming Columbia's ban on surreptitious recording is content-neutral, it functions as a total medium ban, which this Court has routinely found constitutionally problematic and subject to heightened scrutiny. *See City of Ladue*, 512 U.S. at 55. This Court has also held that "laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 558 U.S. at 340 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)). Under either theory, Columbia's Surreptitious Recording Ban is subject to heightened scrutiny, which it cannot survive.

In *City of Ladue v. Gilleo*, this Court considered a town ordinance "prohibit[ing] homeowners from displaying any signs on their property except residence identification signs, for sale signs, and signs warning of safety hazards." 512 U.S. at 45 (internal quotation marks omitted). The ordinance carved out exemptions for commercial establishments, churches, and nonprofit organizations to "erect certain signs that are not allowed at residences." *Id.* Interestingly, the *Ladue* Court did not find it necessary to consider whether the particular ordinance at issue was content-based in order to subject the ordinance to heightened scrutiny:

> In examining the propriety of Ladue's near-total prohibition of residential signs, we will assume, arguendo, the validity of the City's submission that the various exemptions are free of impermissible content or viewpoint discrimination. . . . [Nevertheless,] Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. . . . Often placed on lawns or in windows, residential signs play an important part in political campaigns. . . . by

> eliminating a common means of speaking, such measures can suppress too much speech.

Id. at 53–55. The Court went on to hold that because the ordinance banned a common means of speaking and, as applied to the petitioner, infringed her ability to engage in important political speech, the law abridged the First Amendment rights of homeowners and could not stand. *Id.* at 58–59. *See also Martin v. City of Struthers*, 319 U.S. 141, 145–49 (1943) (ban on door-to-door distribution of literature held unconstitutional); *Schneider v. New Jersey*, 308 U.S. 147, 164–65 (1939) (same); *Lovell v. City of Griffin*, 303 U.S. 444, 451–52 (1938) (ordinance that banned the distribution of pamphlets within municipality held unconstitutional). Here, Columbia's ban on surreptitious recording likewise suppresses too much speech by eliminating a unique and important means of capturing and disseminating information regarding political campaigns.

In *Citizens United*, this Court likewise invalidated a law that burdened political speech. At issue were provisions of the Bipartisan Campaign Reform Act of 2002 that restricted unions, corporations, and profitable organizations from engaging in certain independent political expenditures. 558 U.S. at 472. What the Court found problematic was how the law's restrictions "operate[d] to the disadvantage of certain persons" in the absence of "an interest in allowing governmental entities to perform their functions." *Id.* at 341. Where such an interest is absent, the Court found, "voters must be free to obtain information from diverse sources in order to determine how to cast their votes." *Id.* Therefore, the Court deemed such "an outright ban, backed by criminal sanctions" burdening political speech subject to strict scrutiny, which it

could not survive. *Id.* at 337. Here, too, Columbia has enacted an outright ban, backed by criminal sanctions, that operates to the detriment of Mr. Segretti's ability to engage in protected political speech.

Columbia's prohibition of surreptitious recording is a total ban on a unique and important medium of expression—secret recording. By prohibiting such recording, Columbia has foreclosed not just Mr. Segretti's ability to record a conversation between a candidate for public office and a government official charged with maintaining the integrity of municipal elections, but also the ability of almost all citizens to uncover the kinds of corruption that might necessarily be otherwise unprovable without such recording. Investigative journalists and others rely on secret recording to disseminate information on issues of public concern that might not otherwise come to light. An individual who knows they are being recorded is unlikely to say the same things they would if they were not being recorded, especially if what they are saying might implicate them in illegal activity. This necessarily restricts "the stock of information from which members of the public may draw." *First Nat'l Bank*, 435 U.S. at 783. Without such important means to gather information, the ability of Columbia's citizens to engage in "free discussion of governmental affairs" will be sharply circumscribed. *Mills*, 384 U.S. at 218.

Nor is the Ban saved by its exemptions. Like the exemptions in *City of Ladue*, the exemptions here fail to address the near total ban of nonconsensual recording. By eliminating a common means of information gathering, they suppress too much speech. Moreover, the Ban's exemptions seemingly make it permissible for certain

speakers—like elected officials—to engage in surreptitious recording, but not for the citizens they serve to do the same. This creates a perverse dynamic wherein elected officials can secretly record and disseminate conversations that cast them in a positive light, while simultaneously allowing them to avoid conversations casting them in a negative light from ever being disclosed. Such distinction between speakers necessarily alters the balance of power between the government and its citizens, and should not avoid the close scrutiny of this Court.

Finally, Columbia's Surreptitious Recording Ban involves the kind of conduct necessary to the exercise of Mr. Segretti's free speech rights. Like in *Citizens United*, the statute here forbids a necessary incident of political speech. In this case, that conduct is recording as opposed to spending money, but in either event, the effect is to burden Mr. Segretti's political speech. Moreover, the Columbia statute draws problematic distinctions between speakers in the absence of any showing that those engaged in surreptitious recording would in any way interfere with governmental functions. The statute specifically exempts individuals engaged in certain of those governmental functions from its reach, meaning any such interest is speculative at best. Because Columbia's ban on surreptitious recording bans a unique and important medium of expression and burdens political speech, this Court should subject the statute to strict scrutiny, which it cannot survive.

3. Columbia's Surreptitious Recording Ban is not narrowly tailored to the asserted state interest in privacy and therefore fails any form of constitutional scrutiny.

"Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). "A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). As the very name of the offense indicates, "privacy in communications" is the interest Columbia's Surreptitious Recording Ban seeks to advance. Because the interest in conversational privacy is hardly at its zenith when public officials are conversing in a public park, the asserted interest is not adequately served by Columbia's total ban on surreptitious recording, and is therefore unconstitutional.

In *Project Veritas Action Fund v. Rollins*, the Ninth Circuit assessed Massachusetts's ban on surreptitious recording under intermediate scrutiny. 982 F.3d at 836. While conceding the importance of the state's asserted interests—"preventing interference with police activities and protecting individual privacy"—the court held the statute failed even intermediate scrutiny because it was "not narrowly tailored to further either of the identified governmental interests." *Id.* In particular, the court failed to see how "the proposed secret recording results in 'substantial privacy interests . . . being invaded in an essentially intolerable manner.'" *Id.* at 839 (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)). The court faulted Massachusetts for failing to include a privacy-based exception to its statute, like

those contained in similar statutes enacted by most other states, which proscribe recording only when the subjects of the recording can be said to have a reasonable expectation of privacy. *See id.* at 840. Focusing on the subject of the challenged recording at issue—police officers—the court highlighted that such public officials are "expected to endure significant burdens caused by citizens' exercise of their First Amendment rights. . . . includ[ing] the loss of some measure of their privacy when doing their work in public spaces." *Id.* at 838 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S 323, 344 (1974)).

The fact that the recording took place in a traditional public forum also weighed in favor of finding the ban over-inclusive in *Project Veritas*. *Id.* at 839. ("[A]s a general matter an individual's privacy interests are hardly at their zenith in speaking audibly in a public space within earshot of a police officer.") (citing *Cox Broad. Corp.*, 420 U.S. at 494-95). The court declined to address whether the statute left open "viable alternative channels for First Amendment activity," but noted open recording would not necessarily provide an adequate alternative means of information gathering. *Id.* at 840; *see also ACLU v. Alvarez*, 679 F.3d 583, 607 (2012) (noting the "self-authenticating character" of audiovisual recording "makes it highly unlikely that other methods could be considered reasonably adequate substitutes").

Like the recording at issue in *Project Veritas*, Mr. Segretti's recording involved a conversation between public figures in a public place. In *Project Veritas*, the Ninth Circuit found Massachusetts's ban on secret recording problematic because it did not limit its reach to those scenarios in which the parties to a recorded conversation had

a reasonable expectation of privacy. Likewise, here, Columbia's statute fails to limit the reach of its surreptitious recording ban to only those scenarios implicating legitimate privacy interests. As this Court has noted before, "[a]n individual who decides to seek governmental office . . . runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties." *Gertz*, 418 U.S. at 344 (1974). Candidate Dean and Commissioner Erlichman have likewise opened themselves up to public scrutiny and the diminished privacy their positions bring with them. Those privacy interests are at an even lower ebb here because Ms. Dean and Ms. Erlichman chose to expose their conversation to the public at a Halloween party held in a city park. To the degree Ms. Dean and Ms. Erlichman have any interest in preventing false representations of their recorded conversation, the appropriate remedy is a suit for defamation, not criminal penalty imposed by the State of Columbia. Quite simply, the Columbia statute sweeps too broadly, and is therefore not narrowly tailored.

At the same time, the Columbia statute is also underinclusive. Prohibiting only those media capable of reproducing human conversations, but saying nothing about photographs, is suspiciously under-inclusive. *City of Ladue*, 512 U.S. at 51 ("[T]hat a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles."). Why Mr. Segretti's recording of Ms. Dean and Ms. Erlichman conversing would implicate privacy interests, but photographs of the same conversation would not, is illogical.

The Surreptitious Recording Ban is a content-based regulation that bans a unique medium of expression and political speech. As such, it is subject to strict scrutiny review. The statute cannot survive the scrutiny it must to stand because it is not narrowly tailored to serve Columbia's asserted interest in privacy. This Court should affirm the decision of the Supreme Court of the State of Columbia.

CONCLUSION

The Fake News Ban restricts constitutionally protected speech and is not narrowly tailored to serve a compelling government interest, and therefore, it cannot survive strict scrutiny. The Surreptitious Recording Ban infringes on Mr. Segretti's First Amendment right to record matters of public concern in a public park, and therefore bans too much speech in relation to any interest in privacy it may protect. It, too, fails strict scrutiny. Accordingly, this Court should affirm the decision of the Supreme Court of the State of Columbia.

Respectfully submitted,

s/ Team 205
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