No. 20-6206

In the
Supreme Court of the United States

STATE OF COLUMBIA,

Petitioner,

v.

DONALD SEGRETTI,

Respondent.

On Writ of Certiorari to the State of Columbia

BRIEF FOR PETITIONER

Team 206

Counsel for Petitioner

December 20, 2021

QUESTIONS PRESENTED

1. Whether the state's regulation of the intentional dissemination of false information that threatens public harm violates the First Amendment.
2. Whether the state's ban on surreptitious recordings offends the First Amendment.

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OPINIONS BELOW

The opinion of the 112th District Court of Mitchell County finding the State of Columbia's regulations constitutional is unpublished. R. at 53. The Supreme Court of the State of Columbia issued its opinion in favor of the Respondent's claims on June 28, 2021. R. at 44.

PROVISIONS INVOLVED

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

Section 31.022 of the Columbia Revised Civil Statutes bans the knowing dissemination of fake news if:

a. The information source knows the purported facts are false or recklessly disregards the truth or falsity of those purported facts; and
b. The purpose, in whole or in part, of disseminating such false facts is (1) to enhance the financial interest 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 39.061 of the Columbia Revised Civil Statutes imposes liability for "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."

STANDARD OF REVIEW

This court reviews questions of federal constitutional law *de novo*. *United States v. Kacynski,* 551 F.3d 1120, 1123 (9th Cir. 2009). Statutory interpretations are

questions of law and are therefore reviewed *de novo* on appeal. *See Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 589 (2012).

STATEMENT OF THE CASE

A. The State of Columbia has banned the knowing dissemination of fake news and surreptitious recordings.

The State of Columbia has enacted Section 31.002 of the Columbia Revised Civil Statutes, which bans the knowing dissemination of fake news. R. at 47. The statute narrowly defines fake news as (1) intentionally false statements (2) of fact (3) broadly disseminated, (4) for a self-serving purpose, (5) that causes public harm. R. at 47-48. The State of Columbia has also enacted Section 39.016 of the Columbia Revised Civil Statutes which bans surreptitious recordings. R. at 50-51.

B. Respondent influenced New Watergate's mayoral election with fake news, including a surreptitious recording of the candidate.

Donald Segretti ("Segretti") is a 20-year-old college student and an experienced social media influencer. R. at 45. Segretti began working for Joan Dean ("Dean"), his aunt, on Dean's campaign for Mayor of New Watergate in November of 2020. R. at 45. In the middle of New Watergate's contentious mayoral runoff election, Segretti used a pseudonym to circulate false information about Dean to undermine the integrity of the election. R. at 46. Segretti published accounts of Dean's relationship with the Election Commission Chair, Joanne Erlichman ("Erlichman"), accusing Erlichman of using her influence to help Dean win the runoff election. R. at 46. Included among these reports, was the circulation of part of a recorded conversation between Dean and Erlichman that concludes with Erlichman saying, "I'll take care of it." R. at 46. Segretti posted this recording under the caption suggesting that the public's votes don't matter because Erlichman would influence the election outcome in Dean's favor. R. at 46. These posts were shared on social media with an audience

of approximately 25,000 people. R. at 46. Dean ultimately won the runoff election, and this victory has largely been attributed to low voter turnout following these false reports. R. at 46. However, a review of the full recording revealed that Dean and Erlichman were discussing a church project and bible study with no relation to the election or governmental affairs. R. at 46.

C. Respondent brought action against the State of Columbia averring the unconstitutional nature of the bans.

The State charged Segretti with violation of the fake news and surreptitious recordings ban. R. at 47. A jury found Segretti guilty on both counts and he was sentenced to five (5) months in jail and a $750 fine for the fake news conviction and four (4) months in jail and a $375 fine for the surreptitious recording conviction. R. at 47. On appeal, Segretti challenged the constitutionality of both statutes. R. at 47. The Supreme Court of the State of Columbia concluded both statutes were unconstitutional and this Court granted certiorari on both issues. R. at 50, 53.

SUMMARY OF THE ARGUMENTS

I.

States have the authority to regulate speech that is intentionally false and likely to cause harm. Intentionally false speech has evolved to pose serious harm to the public due to its untamed widespread nature coupled with its long-term harmful effects. Allowing this danger to persist unchecked would offend the true spirit of the First Amendment: the promotion of an informed electorate. Section 31.002 of the Columbia Revised Civil Statutes (the "Fake News Statute") represents an appropriate proscription of speech within the State of Columbia's authority.

II.

The First Amendment does not confer any individual right protecting surreptitious recording; therefore, regulation of such recording is a matter within the authority of state legislatures. Furthermore, the First Amendment does not preclude states from enacting consent statutes for recording in the interest of protecting conversational privacy. The Supreme Court of Columbia incorrectly applied strict scrutiny when analyzing the constitutionality of Section 39.601 of the Columbia Revised Civil Statutes (the "Recording Statute") because the statute does not implicate nor unduly burden any constitutionally protected classes of speech. Therefore, the Recording Statute is not subject to heightened judicial scrutiny and the State need only a rational basis for prohibiting surreptitious recording. The Recording Statute prohibits intentional recording without the knowledge and consent of all parties involved and makes exceptions for recordings made of public officials in the performance of their official duties. Individuals may reasonably expect some degree of privacy in personal conversations; therefore, the State has a constitutional rational basis for enacting eavesdropping prohibitions to protect individuals from surreptitious recording. This provision does not proscribe any constitutionally protected speech and survives a rational basis analysis in the interest of individual privacy.

ARGUMENTS

I. The State of Columbia's ban on fake news is in line with the First Amendment and is an appropriate exercise of the state's power.

The First Amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. Const. amend. I. The unconditional phrasing of the First Amendment was not intended to protect every utterance, however. *Roth v. U.S.*, 354 U.S. 476, 483 (1957). This protection was designed to assure the "unfettered exchange of ideas" to bring about political and social changes desired by the people. *Id.* at 484.

The Fake News Statute bans the knowing dissemination of fake news. R. at 47-48. The Fake News Statute narrowly defines fake news as (1) intentionally false statements (2) of fact, (3) broadly disseminated, (4) for a self-serving purpose, (5) that causes public harm. *Id.* The Fake News Statute aims to address the pervasive nature of digital information in online social media. Michela Del Vicario et al., *The Spreading of Misinformation Online*, 113 Proc. Nat'l Acad. Sci. U.S. 554, 558 (2016) ("Digital misinformation has become so pervasive in online social media that it has been listed by the [World Economic Forum] as one of the main threats to human society.") Intentionally false information "causes people to believe in falsehoods, creates a crisis of credibility in society, and widens the nation's partisan divide." Steven Siedenberg, *Lies and Libel: Fake News Lacks Straightforward Cure,* A.B.A.J., July 2017. This court reviews questions of federal constitutional law de novo. *United States v. Kacynski,* 551 F.3d 1120,1123 (9th Cir. 2009).

A. The fake news ban is constitutional because the First Amendment does not protect speech that is intentionally false and likely to cause harm.

This Court has set clear precedent that the right of free speech is not absolute at all times and under all circumstances. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571 (1942). There are well-defined and narrowly limited classes of speech the prevention and punishment of which does not raise any constitutional problem. *Id.* Utterances that are lewd and obscene, profane, libelous, and insulting or 'fighting' words, for example, are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Id.* Regulations aimed at political speech, however "vituperative, abusive, and inexact" this area of speech may be, will be considered constitutional if its objective falls in line with the First Amendment. *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (such regulations must be contrasted "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.") (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

i. Precedent supports the government's authority to forbid factually false statements where they are likely to cause extreme harm.

There is a long-standing consensus that where the false speech in question is especially likely to cause severe harm, the government may forbid statements on the grounds that they are factually false. For example, categories of speech including defamation, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (holding that a

public officials may recover against a publisher who causes intentional infliction of emotional distress if he can prove that the publication contained a false statement of fact published with knowledge that the statement was false or with reckless disregard as to whether it was true or not), commercial speech that is misleading or deceptive or that proposes an illegal transaction, *In re R.M.J.,* 455 U.S. 191, 203 (1982) (observing that speech with the potential to mislead may be regulated, but if information may be presented in a misleading or non-misleading way, the state must attempt to use the least-restrictive alternative), and perjury, *United States v. Dunnigan,* 507 U.S. 87, 97 (1993) (perjured testimony does not enjoy First Amendment protection because it undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system), are recognized as regulable as a matter of law because these regulations protect the public from specific, tangible, and material harms. These categories of speech have "no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 567, 572 (1942). For this reason, these categories of speech may be regulated "because of their constitutionally proscribable" content. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 383 (1992).

This Court opened the door to justifiable regulation of falsities in its decision of *United States v. Alvarez*, 567 U.S. 709 (2012). Alvarez was charged with violating section 704(b) of the Stolen Valor Act, which criminalized falsely stating being

"awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." *Id.* at 715. A plurality of the Court concluded that the Act was invalid because it punished speech merely for falsity, rather than for a compelling end. *Id.* at 724. The plurality further agreed that the government had a strong interest in ensuring that the public's perception of military awards not be diluted, but the Act could not survive because it was not the only measure that could achieve this interest. *Id.*

The Court clarified that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood." *Id.* at 719. Further, the falsity must be made for the purpose of gaining some kind of material benefit, such as "to effect a fraud or secure moneys or other valuable considerations," such as offers of employment. *Id.* at 723. This Court's *Alvarez* decision concluded that this section of the Stolen Valor Act was unconstitutional because it prohibited falsities without a compelling end, such as obstruction to the legal process or connection to fraudulent activity. *Id.* at 724.

ii. The Fake News Statute takes direct aim at factually false statements that threaten two dangerous public harms: the prevalence and nature of misinformation, and the decline in legitimate media.

In the present action, the challenged statute prohibits falsities that could bring about specific, tangible, and material harms associated with intentional misinformation in our modern era of technology. R. at 47. First, the Fake News Statute addresses the prevalence and nature of intentionally fake news by acting as an accountability measure for platforms with elevated visibility with audiences of

5,000 people or more. *Id.* While the intentional dissemination of falsities is not a new practice, the ever-growing use of social media elevates this practice to an entirely new level. Social media offers a platform unprecedented in size to create and circulate falsities. Misinformation has been analogized to a "blanket of fog" that conflates realities with falsities, resulting in a misinformed electorate. Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. Democracy 63, 69 (2017) (explaining that the misinformation marketplace interferes with the electorate's ability to make informed decisions about the candidates that they cast ballots for.)

This blanket of fog is even denser because of how easily intentionally false news can be shared. Social networks, such as Facebook and Twitter, allow individuals to share content with their personal networks and across platforms. This is dangerous because misinformation disguised as legitimate news has the capability of spreading rapidly to audiences in excess of millions of viewers. Jonathan D. Varat, *Truth, Courage, and Other Human Dispositions: Reflections on Falsehoods and the First Amendment*, 71 Okla. L. Rev. 35, 48-49 (2018). This is illustrated by a recent study conducted by the Massachusetts Institute of Technology that found false stories diffused farther, faster, deeper, and more broadly than the truth in all categories of information and that the truth, in other words, could not keep pace because the field was crowded with lies. *See* Soroush Vosoughi et al., *The Spread of True and False News Online,* 359 Science 1146, 1147 (2018).

What is equally, or perhaps even more, dangerous about the ease of spreading misinformation is the "echo chambers" social media sites tend to promote. Social

network platforms offer users control over the content that they see while utilizing these platforms. *E.g.*, *Controlling What You See in News Feed*, Facebook, https://www.facebook.com/help/335291769884272 (last visited December 9, 2021) (explaining to users how they can personalize what they see on their Facebook news feed). *See* Walter Quattrociocchi et al., *Echo Chambers on Facebook,* Harv. L. Sch., Working Paper (2016) (explaining that echo chambers are created from peoples' confirmation bias and result in a group that will accept and share intentionally false claims that support their pre-existing beliefs, while ignoring debunking information). This practice perpetuates the prevalence of this problem by narrowing users' engagement with different viewpoints that may reinforce or challenge their views, posing an increasing challenge for users to discern facts from falsities.

Second, the Fake News Statute addresses another public harm that intentional false information presents: the decline in legitimate media. Journalism adds value to society by making factual information accessible to people who then can make informed decisions and form reasoned opinions. Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 Fordham L. Rev. 2623, 2630 (2019). As professor of public policy Philip Napoli has observed, journalism produces value for society that is difficult to quantify as it is not accurately represented in the economic transactions between news organizations and news consumers, ultimately resulting in market inefficiency in the form of underproduction of journalism. Philip M. Napoli, *What if More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter*

Bubble, 70 Fed. Comm. L.J. 55, 89-90 (2018). This problem is further exacerbated by "parasitic journalism," the practice of reporting news produced by another source without additional investigation. *Id.* at 69. This draws viewership and revenue away from legitimate sources that incur significant costs while producing quality news. *Id.* at 69-70.

Fake news also promotes a culture of media distrust. Fake news dissemination tactics, such as "flooding," where false stories are distributed through various sources misleading readers into believing their credibility, can cause people to stop trusting media sources because it is impossible to cut through the fake news noise. *Id.* at 48-49. According to a recent study conducted by the Pew Research Center, 64% of United States citizens believe that "fabricated news stories cause a great deal of confusion about the basic facts of current issues and events." Michael Barthel, Amy Mitchell, & Jesse Holcomb, *Many Americans Believe Fake News Is Sowing Confusion*, Pew Research Ctr. (Dec. 15, 2016), https://www.pewresearch.org/journalism/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/. In the same study, 23% of Americans said they had shared fabricated political stories themselves – sometimes by mistake and sometimes intentionally. *Id.* These sentiments vary only marginally across gender, race, age, education level, income, and partisan lines. *Id.*

The promulgation of fake news erodes at public confidence in journalism. Regulation of intentional misinformation as proscribed by the Statute is necessary to promote an informed electorate as was intended by the drafters of the First

Amendment. Fake news is created by individuals, governments, and politically motivated groups for ideological and economic purposes. Steven Seidenberg, *Lies and Libel: Fake News Lacks Straightforward Cure,* A.B.A. J., July 2017, at 51. The dangers of intentional misinformation have reached proportions that no longer permit inaction. The Fake News Statute does not offend the First Amendment because here, the dangers of inaction with regard to intentional misinformation strip this category of any First Amendment protection. To promote an informed electorate through quality journalism, states such as Columbia must be able to protect their body politic from intentional misinformation through statutory measures.

B. Failure to find the Fake News Statute an appropriate regulation of speech would contravene the spirit of the First Amendment.

The First Amendment aims to promote debate and self-expression in the interest of self-identity and fulfillment. The long-recognized purpose of the First Amendment is to protect the free exchange of ideas in public debate, which shapes public opinion and inform democratic self-governance. *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.") The "marketplace of ideas" is a metaphor originally coined by Justice Oliver Wendell Holmes's dissent in *Abrams v. United States,* and continues to dominate discussions of free expression by illustrating that the government should have no place in distorting or controlling the content of ideas shared in the United States. 250 U.S. 616, 630 (1919).

As Judge Woodward cautioned in the dissenting opinion below, reflexive application of this metaphor to all First Amendment challenges related to speech is misguided because it fails to capture the nuanced landscape of expression with respect to intentionally false news. R. at 53-54 ("The marketplace of ideas was always meant to be a marketplace of ideas, not facts.") There is no marketplace of facts. This metaphor, though persuasive, misses the mark because in application it fails to keep pace with the modern resurgence of fake news.

This marketplace of ideas concept encourages the free trade of ideas in order to promote a democratic system of governance by allowing people to discover the ultimate truth of what policies best serve society. Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 Fordham L. Rev. 2623, 2626 (2019). The marketplace of ideas was intended to promote a marketplace of *ideas* not *facts*. No area of law permits a market in facts. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991) (stating that "facts are not copyrightable," rather, some modicum of originality is required to put facts in the marketplace.) The court below took a similar, albeit misguided, approach as this Court did in *United States v. Alvarez*, 567 U.S. at 732.

In its decision of *Alvarez,* this court evaluated the constitutionality of section 704(b) of the Stolen Valor Act, which criminalized falsely claiming, even orally, receipt of "any decoration or medal authorized by Congress for the Armed Forces of the United States." *Id.* at 713. In a public meeting, Alvarez falsely claimed that he had been awarded the Congressional Medal of Honor 20 years before. *Id.* A six-

justice plurality agreed with Alvarez that the Act violated the First Amendment. *Id.* at 728-730. Justice Breyer opined that "false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas." *Id*. at 732 (Breyer, J., concurring in the judgment). Later, Justice Breyer drew upon the writings of John Stuart Mill's defense of false speech protections because of his belief that false opinions enable people to ascertain the truth in free and open debate. John Stuart Mill, *On Liberty, reprinted in On Liberty, Utilitarianism And Other Essays* 5, 15, 18-54 (Mark Philip & Frederick Rosen eds., 2015). Justice Breyer employed Mill in support of his assertion that examination of a false statement of fact can "promote a form of thought that ultimately helps realize the truth." *Alvarez*, 567 U.S. at 732 (Breyer, J., concurring in the judgment). Similarly, the majority opinion of the court below in the present matter relied on Justice Breyer's analysis to conclude that "to ensure protected speech is not improperly suppressed, it may be crucial to permit lies in certain circumstances." R. at 49.

i. The marketplace of ideas metaphor does not apply to the speech restricted by the Fake News Statute because this doctrine applies to ideas, not facts.

The *Alvarez* approach is flawed for two reasons. First, the marketplace of ideas metaphor never contemplated a debate over truth and falsehood to demonstrable lies. Ideas are defined as "an opinion or belief" or "a thought, plan, or suggestion about what to do." *Ideas*, Merriam-Webster (11th ed. 2021). Facts are defined as "a piece of information presented as having objective reality" or "something that has actual existence." *Facts*, Merriam-Webster (11th ed. 2021). The marketplace of ideas

metaphor in the history of American Jurisprudence has focused its application of this metaphor to ideas and advocacy, not facts. Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. Pa. J. Const. L. 845, 868 (2018) (distinguishing facts from ideas to support the premise that the intellectual tradition underpinning the marketplace of ideas was never concerned about truth or falsehood of basic facts).

Professor Ari Ezra Waldman expands on the assertion that the intellectual tradition underpinning the marketplace of ideas was never concerned about truth or falsehood of basic facts in *The Marketplace of Fake News*. *Id.* at 868. Waldman points to specific examples where leaders in First Amendment jurisprudence have supported the applicability of the marketplace metaphor to ideas, not facts. *Id.* Among these examples is John Milton's *Areopagitica*, a pamphlet advocating against the censorship of books prior to their publication, where Milton wrote, "who ever knew Truth put to the wors, in a free and open encounter." *Id.* This statement came in reaction to the British government's refusal to let Milton publish *The Doctrine and Discipline of Divorce*, a pamphlet Milton authored advocating for liberalization of divorce law. *Id.* When Milton used the word "truth," he was not referring to truth about facts, but rather about ideas (about divorce), that he considered were "truer," or otherwise superior. *Id.* This statement promotes the notion that ideas, not facts are protected under this metaphor. *Id.* The pamphlet was not about facts regarding divorce law because the law governing falsehoods, such as fraud and defamation, was still emerging and nearly nonexistent at the time.

We see another example of this in this Court's decision of *Abrams, Whitney, and Gitlow v. New York,* where Justices Holmes and Brandeis joined a dissent supporting the assertion that the marketplace of ideas metaphor should apply because the case centered on the defendant's advocacy to overthrow the government. 268 U.S. 652 (1925). Similarly, this metaphor was applied in *Scheneck v. United States* where circulars were distributed that promoted debate about the World War I draft. 249 U.S. 47, 48-49 (1919). In neither of these cases, nor any other examples of First Amendment jurisprudence, include application of this metaphor to facts.

ii. Application of the marketplace of ideas metaphor to intentionally false facts is flawed because it supports the inherent assumption that people advance falsities in search of the truth.

The *Alvarez* approach is also flawed because it misunderstands the free trade of ideas as a truth-seeking mechanism. A functional ideas marketplace presumes that true ideas can be discovered and that participants in the marketplace are trying to uncover the ultimate truth in good faith. Annie C. Hundley, *Fake News and the First Amendment: How False Political Speech Kills the Marketplace of Ideas*, 92 Tul. L. Rev. 497, 502-03 (2017) (arguing that the marketplace of ideas metaphor is a flawed way of understanding free speech because participants do not always employ the marketplace to find truth in good faith). However, as previously addressed, there are a multitude of reasons fake news is created. Proponents of this information may be foreign governments that have political motivations to undermine their adversaries, Evan Perez & Simon Prokupecz, *CNN Exclusive: US Suspects Russian Hackers Planted Fake News Behind Qatar Crisis*, CNN (June 7, 2017, 7:34 AM),

http://www.cnn.com/2017/06/06/politics/russian-hackers-planted-fake-news-qatar-crisis/index.html (reporting that U.S. investigators believe Russian hackers planted a fake news report in the Qatar state-run news agency to create a rift between the country and its Gulf allies). Alternatively, fake news may be created and circulated for economic gain. Intentionally inaccurate information is sensationalized in such a way to draw consumers' eyes and generate advertising dollars for every "click" they receive on these websites. Abby Ohleiser, *This is How Facebook's Fake-News Writers Make Money*, Wash. Post (Nov. 18, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/ (explaining how one fake news website owner makes money via Google and Facebooks' self-service ad technology).

Author Daniela C. Manzi examines the intersection between truth-seeking and the marketplace of ideas metaphor in *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*. 87 Fordham L. Rev. 2626, 2626-2627 (2019). Manzi highlights two authors' approaches to truth's place in the realm of the First Amendment. *Id.* Manzi first points to John Stuart Mill, an English philosopher, who defended false speech protections because he believed that ideological truth must be unearthed through debate. *Id.* Mill asserted that because false opinions provoke investigation, their value lies in their role to unearth the truth. *Id.* Manzi then highlights the writings of Immanuel Kant, who argued that all lies are harmful because they undermine the dignity of the listener by preventing them from acting freely and rationally. *Id.* It was Kant's position that when speakers lie,

they manipulate and distort the listeners' ability to make informed decisions based on fact. *Id.* Taken together, Mill and Kant's philosophies embrace the right to communicate ideas and a right to receive information in open discourse.

Mill and Kant's philosophies align with the core objective Justice Holmes' marketplace of ideas metaphor. The marketplace of ideas promotes a democratic system of governance by allowing people to discover the ultimate truth of what policies best serve society. *Id.* However, the resurgence of fake news threatens the existence of a shared truth that is integral to our democratic system. Absent a belief in some manner of shared facts, democracy loses its power, and the loudest and most sensational voices hold the power to determine the truth. Fake news creates a "crisis of credibility" by undermining the public's confidence in information sources, thus threatening the very discourse the First Amendment seeks to protect.

C. If this Court declines to exclude misinformation from the ambit of the First Amendment, the Fake News Statute remains within the State of Columbia's authority.

The First Amendment does not generally prevent governments from forbidding defamatory (and thus factually false) speech. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that a public figure or official may recover against a publisher who causes intentional infliction of emotional distress if he can prove that the publication contained a false statement of fact published wither with knowledge that the statement was false or with reckless disregard as to whether it was true or not.) Content-based regulations of speech are generally subjected to strict scrutiny and presumed to be unconstitutional. *See Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (holding that the Constitution demands content-based restrictions on speech be

presumed invalid). Furthermore, the First Amendment's most urgent and protected application is to political speech; therefore, laws that burden political speech are accordingly subject to strict scrutiny. *See Arizona Free Enter. Club's Freedom Club PAC v. Bennett,* 564 U.S. 721, 755 (2011). To survive strict scrutiny, the government must justify the regulation by demonstrating: (1) the regulation is necessary to serve a compelling government interest; and (2) the regulation is narrowly tailored to achieve that interest. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (holding that the State must show that a content-based law concerning the taxation of magazines serves a compelling state interest and is narrowly tailored to achieve that end). Strict scrutiny protects the public from the government employing suspect classifications when crafting regulations. Suspect classifications are reserved for rare situations where the high cost of sanctioning official invidious discrimination is outweighed by the costlier price of not doing so.

i. The Fake News Statute represents an appropriate restriction of speech because it serves a compelling government interest.

This first prong of strict scrutiny acts as a filter to safeguard against upholding regulations with discriminatory purposes. For example, even if the means to achieve the regulation's end is a good fit, if the end that is promoted has insubstantial justification for government regulation, the regulation's end is merely pretext and more likely motivated by externalities such as prejudice or bias.

The Fake News Statute satisfies the first prong of strict scrutiny because the government has a compelling government interest in preventing public harm caused by intentionally false statements of fact. Intentionally false information poses

unprecedented harms to the public, including public mistrust of media resulting in a decline in legitimate media and the prevalence and widespread nature of intentionally false information due to the ease with which it is disseminated over social media platforms. In fact, a majority of Americans believe that fake news should not be protected under the First Amendment. *The State of the First Amendment*, Newseum Inst. 1, 5-18 (May 2017), https://www.freedomforuminstitute.org/first-amendment-center/state-of-the-first-amendment/2017-report/.

Respondent may argue that private corporations, such as social media platforms like Facebook, are better suited to undertake speech-controlling measures without offending the First Amendment than if the government were to take similar measures. However, Facebook has already undergone regulatory measures, showing that counter speech—a First Amendment principle positing that truth rather than censorship is the answer to false speech—also fails to address the depth of the problem fake news poses. *See Whitney v. California*, 274 U.S. 357, 377 (1927), (Brandeis, J., concurring) (introducing the concept of counterspeech), overruled on other grounds by *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Similarly, citizens are not able to combat the spread of fake news. Critical thinking skills and careful evaluation of the trustworthiness of these news sources cannot be trusted alone because of the pervasiveness of the problem and how saturated news feeds have become with false narratives. A problem of this size requires government intervention in order to preserve the First Amendment's objective of an informed body politic. In an age where (1) public mistrust of mainstream media appears to be

increasing, (2) social media has become a primary source from which to find and share news, and (3) there is growing concern that fake news negatively and materially impacts our democratic political processes, now is the time to embrace appropriate regulations to curb the harms of intentionally false information. The government's interest in precluding false news and reporting is the same as the public's interest in ensuring receipt of accurate and reliable facts to shape informed decisions, thus making the interest in the Fake News Statute compelling and significant.

ii. The Fake News Statute is an appropriate regulation of speech because it is narrowly tailored to achieve its interest.

As Judge Woodward observed in the lower court's dissent, the Fake News Statute is narrowly tailored to achieve its interest. R. at 54-55. This second prong of strict scrutiny ensures that the government will always employ the less discriminatory alternative if one is available to attain the regulation's objective. This prong sometimes calls for less discriminatory alternatives to be required even if they will not achieve the regulation's compelling goal quite as well as the discriminatory means. Some degree of sacrifice of the legislative objective may be required in the name of freedom of expression. This Court's decision of *United States v. Alvarez* is an appropriate illustration of requiring a less discriminatory alternative that does not promote the regulation's objective as well in order to preserve freedom of expression. 567 U.S. 709 (2012). In *Alvarez*, this Court's plurality conceded that the government's interest in guarding against the dilution of the public's general perception of military awards by false claims was a compelling government interest. *Id.* at 726-28. However, this Court declined to find that the section of the Stolen Valor Act at issue

satisfied the second prong of strict scrutiny because the government failed to address how a less restrictive means could not achieve the government's interest. *Id.* The Court highlighted a less-restrictive mode to achieve this interest, pointing out that the government could likely protect the integrity of the military awards system by creating a database of medal recipients accessible and searchable on the internet. *Id.* at 2551.

The facts of *Alvarez* are sufficiently distinguished from the present matter. Here, the challenged statute is the least restrictive means to achieve its objective because the "narrow and discrete nature of the speech regulated ensures that no protected speech will be impacted by the statute." R. at 54. The Fake News Statute is tailored to regulate only speech that poses specific harms to the public such as the decline of legitimate media and the widespread nature of intentionally false information. The Fake News Statute bans intentional dissemination of facts if:

a. The information source knows the purported facts are false or recklessly disregards the truth or falsity of those purported facts; and
b. The purpose, in whole or in part, of disseminating such false facts is (1) to enhance the financial interest 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.

R. at 47. These provisions are drafted to minimize their "chilling effect" on speech. The first two provisions set forth mental state and purpose requirements that limit the scope of liability to only intentionally false speech that is proffered for specified gains. The statute further limits the type of harms that must result in order to bring action under this statute. In other words, not all falsities will result in liability, only

those that cause significant material harm will result in liability. This ensures that this statute cannot be used to punish criticism of the government and eliminates the risk that individuals will refrain from truthful speech out of fear of persecution because they are tailored to only impact intentionally false speech that threatens public harm. The State is allowed to regulate dangerous or harmful speech, and here, as Justice Woodward concluded, the statute's risk of a potential chilling effect is substantially outweighed by the need to preserve our democratic values. The Fake News Statute is the most narrowly tailored restriction on political speech to serve the State's compelling interest in condemning false journalism. The Fake News Statute survives strict scrutiny and is therefore an appropriate and constitutional regulation of speech.

II. The regulation of surreptitious recording is a matter for state legislatures because the First Amendment does not confer such a right.

Individuals do not have a substantive First Amendment right to surreptitiously record. There are certain limited classes of speech (such as speech that inflicts injury) which present no essential part to any exposition of ideas and are of such slight social value that any benefit which may be derived is clearly outweighed by the social interest in order and morality. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942). Respondent's published recordings were out of context and clearly intended to inflict injury upon the candidates' prospects through social media. R. at 46. Never does the Constitution state that the First Amendment protects a "right to audio record." *ACLU v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012); U.S. Const. amend. I. Therefore, the State of Columbia's ban on surreptitious

recordings is not a matter of constitutional law but one that should be left to state legislatures.

The Recording Statute bans a narrow category of recordings: those considered "surreptitious." R. at 50. As defined in *Black's Law Dictionary*, the term "surreptitious" refers to activity that is unauthorized and clandestine; done by stealth and without legitimate authority. *Surreptitious*, Black's Law Dictionary (11th ed. 2019). The Recording Statute provides that: "A person commits the offense of violating privacy in communications if the person knowingly or purposely records . . . by use of a hidden electronic or mechanical device . . . without the knowledge of all parties to the conversation." R. at 50. In addition, the Recording Statute provides two important exceptions: neither (1) recordings made of elected or appointed public officials *when the transcription or recording is done in the performance of official duty*; nor (2) recordings taken when the person being recorded is *given warning of the recording* will give rise to liability under this statute. R. at 50 (emphasis added). If one person provides the warning, either party may record. *Id.* When Respondent recorded the communications between Dean and Erlichman, the two were engaged in quiet conversation at a Halloween party and discussing a private matter unrelated to any official duties. R. at 46. Therefore, while Respondent's recordings captured a conversation between two "public and/or elected officials," these communications were not recorded while the officials were performing duties within the scope of their employment and would therefore not qualify as an exception to the Recording Statute. Further, given these circumstances, it is reasonable to expect some degree

of privacy in a quiet conversation, so an enforceable eavesdropping prohibition to protect individuals from surreptitious recordings is constitutional. Since the First Amendment does not protect a right to surreptitiously record, the State of Columbia is well within its authority to enact a statute such as the Recording Statute and any challenge of the law should be left to the state's legislature. Statutory interpretations are questions of law and therefore reviewed *de novo* on appeal. *See Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 589 (2012).

A. The Recording Statute does not burden a protected right under the First Amendment; therefore, the statute should not be subject to heightened judicial scrutiny.

Strict scrutiny does not apply to an equal protection analysis when "an ordinance is not content-based, does not infringe upon a fundamental right, and does not concern a suspect or semi-suspect class." *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1141 (9th Cir. 2011). Intermediate scrutiny is the appropriate scrutiny standard to apply to laws drawing less-suspect classifications that do not impact individuals' fundamental rights. *See United States v. Laurent,* 861 F. Supp. 2d 71, 98 (E.D.N.Y. 2011) ("Intermediate scrutiny applies to content-neutral restrictions that place an incidental burden on speech, to disabilities premised on illegitimacy, and to discrimination on the basis of sex."); *Adkins v. Rumsfeld,* 464 F.3d 456, 468 (4th Cir. 2006) ("[C]ourts apply "intermediate scrutiny" to statutes that classify on the basis of gender.") This includes regulations aimed at safeguarding individuals' privacy and content-neutral regulations of speech. In order to survive intermediate scrutiny, the statutory scheme at issue must be (1) supported by an

important state interest, and (2) be substantially related to that interest. *Bartnicki v. Vopper*, 532 U.S. 514, 514-15 (2001).

i. The Recording Statute does not unduly burden historically protected classes of speech recognized at the core of the First Amendment.

The lower court's decision confuses the First Amendment protection of a speaker's right to record his or her own speech with a fabricated right to disseminate a message with unrelated speech and press protections. R. at 56. The result is the lower court's creation of a new First Amendment right to appropriate another person's speech, regardless of awareness or consent. *Id*. This approach is misguided because the Recording Statute does not implicate nor unduly burden any important, protected classes of speech.

Through a conflation of causation, the lower court held that surreptitious recordings are inextricably intertwined with important political speech; however, as Judge Woodward's dissent illustrates, this is not the case. R. at 55. It is uncontested that a person has a First Amendment right to discuss government officials and matters of public concern. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Nothing in Columbia's statute prohibits political discussion. In fact, one very specific exception to the ban includes recordings of elected or public officials in the performance of official duties. R. at 50. Respondent's recording does not fall within the scope of this exception. R. at 46. Rather, the recordings Respondent made were of two private citizens, Dean and Erlichman, who were not performing any official duties, rather, they were having a private conversation with the reasonable expectation that their

communication would not be broadcast to advance Segretti's misinformation campaign. R. at 46.

Another incorrect conclusion was drawn by the lower court's understanding that Respondent's actions were necessary in the course of gathering information for dissemination. R. at 45. This understanding implicates the right to freedom of the press and implies that restriction of Respondent's ability to surreptitiously record somehow restrains this freedom. However, when the Founders included constitutional protections to safeguard freedom of the press, they were doing so to ensure that the people remained informed as to the conduct of their elected officials, shape their own judgments on public matters, and be qualified to choose their own representatives. *ACLU*, 679 F.3d at 600 (quoting directly from Leonard W. Levy, *Emergency of a Free Press* (2004)). The Virginia General Assembly objected to the infamous Sedition Act of 1798 in part because it placed limitations on the right to "freely examine public characters" in the exercise of their political office, and thereby restricted free communication amongst the public. *See ACLU*, 679 F.3d at 600 (citing David B. Mattern et al eds., *The Papers of James Madison,* 189-90 (1991)). The Recording Statute is not the type of restriction feared by the Founders; only eavesdropping statutes which interfere with the *gathering and dissemination of information about government officials performing their duties in public* would fall into this category. *ACLU*, 679 F.3d at 600 (emphasis added). The surreptitious recordings Respondent made and disseminated featured public officials outside the

purview of their official duties and is therefore an impermissible violation of their privacy.

As recognized by the Supreme Court in *Branzburg v. Hayes*, the First Amendment provides some degree of protection for gathering news and information, particularly news and information about the affairs of government. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). However, no rights are without any limit whatsoever. *Id*. at 707. Therefore, applying the regulations enacted in the Recording Statute would not be an unconstitutional limitation upon Respondent's actions because, while gathering government news and information is a protected activity, it is not absolute when individual privacy interests are implicated in the process. More importantly, when Respondent's actions are examined in the light of First Amendment protections, the recordings cannot be said to contain any value or purpose in expressing the liberties of free speech and press.

ii. The Recording Statute merits and survives intermediate scrutiny.

In the Supreme Court of Columbia's decision below, the majority held that because the Columbia statute restricts a medium of expression, it burdens the First Amendment's guarantee of freedom of expression and is therefore subject to strict judicial scrutiny. R. at 55. Only regulatory measures which suppress, disadvantage, or impose differential burdens upon speech because of its **content** may be subjected to strict scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (emphasis added). An eavesdropping statute, such as the statute at issue, is content neutral, seeing as it does not target any particular message, idea, or subject matter and will

therefore merit intermediate scrutiny. *ACLU*, 679 F.3d at 603. Although the line between content-neutral and content-based laws is difficult to draw, the basic test for determining content neutrality is "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Id.* at 603 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). In this instance, the State of Columbia's ban on surreptitious recordings is clearly content-neutral because it exists to protect privacy, not to promote or suppress any particular position or viewpoint. The conclusion reached by the court below was misguided because it applied an improper level of judicial scrutiny.

The challenged statute is analogous to the content neutral regulation evaluated by this Court in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). Similar to the challenged statute in *Bartnicki*, the Recording Statute is a content-neutral law of general applicability. *Id.* at 515. In *Bartnicki*, the statute's purpose was to protect the privacy of certain communications by extending protection to illegally obtained or intercepted communications. The statute focused on *the source of the communication* rather than the *subject matter*. *Id.* (emphasis added). Application of this guidance to the issue at bar supports a finding that the State of Columbia's statute is a content-neutral regulation of speech because it takes aim at the interception of the message or communication, not the content of the communication itself. Because the Recording Statute is content-neutral, it does not unduly burden protected First Amendment rights and should not be subject to strict scrutiny.

The Recording Statute survives intermediate scrutiny. First, the Recording Statute serves the important government interest of safeguarding individuals' privacy interests. This Court has previously held that privacy in communications is an important interest deserving of protection. *Bartnicki*, 532 U.S. at 532. *See also ACLU*, 679 F.3d at 586 (concluding that the government's interest in protecting the privacy of citizen speakers and minimizing the harm to persons whose conversations have been illegally intercepted is considerably strong and compelling). This precedent supports the conclusion that the Recording Statute serves an important government interest in protecting citizens' privacy.

Second, the Recording Statute survives intermediate scrutiny because it is substantially related to the government interest it serves. As noted in Judge Woodward's dissent below, the Recording Statute is substantially related to the government's interest at stake here because of the "grave dangers to privacy implicated by the unrestricted use of modern technology." R. at 55.

B. The First Amendment does not prohibit the State of Columbia from enacting single or multi-party consent statutes, such as the Recording Statute, to protect conversational privacy.

The First Amendment does not create an independent right to surreptitiously record. As such, most states—by use of the power delegated to them via Congress—have enacted a multitude of wiretapping and eavesdropping statutes to address concerns over the invasion of privacy brought about by surreptitious recordings. *Id.* As noted by the lower court, twelve states (including Columbia) have all-party consent schemes that require individuals recording a communication to have the consent of every party involved and thirty-eight states have one-party consent

schemes. R. at 55. Requiring some form of consent is a reasonable provision to include when enacting laws involving any audio or video recordings in the interest of individuals' privacy.

The Recording Statute is considered an "all-party" consent law, but in practice is more lenient than the term implies. If either party gives warning of the recording, then the exception to the ban applies and neither party is in violation of the statute. R. at 50. *See* Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DePaul L. Rev. 837 (1998) (explaining examples of state and federal statutory schemes that protect individuals from the recording, wiretapping, bugging or eavesdropping of private communications). The State of Columbia's legislature appears to have relied on the same reasoning as *ACLU v. Alvarez*, where the Seventh Circuit concluded that if a party to the conversation knows of the recording, they have given implied consent to the recording of their conversation. *See ACLU*, 679 F.3d at 587.

In *ACLU*, the civil liberties organization challenged Illinois's eavesdropping statute, which made it a felony to audio record "all or any part of any conversation" unless all parties to the conversation rendered consent. *Id.* at 586. The eavesdropping statute did not prohibit taking silent video of police officers performing their duties in public; turning on a microphone, however, would trigger class 1 felony punishment. *Id.* The ACLU raised a First Amendment challenge to this statute as applied to the organization's "police accountability program," which included a plan to openly make audiovisual recordings of police officers performing their duties in

public places and speaking at a volume audible to bystanders. *Id.* The organization feared that contributing videographers would be prosecuted under the eavesdropping statute and filed pre-enforcement action against the State's attorney seeking declaratory and injunctive relief barring the eavesdropping statute's enforcement. *Id.* The Seventh Circuit concluded that because the eavesdropping statute targeted the expressive element of an expressive activity, the statute exceeded the state's authority and improperly burdens First Amendment rights directly by restricting far more speech than necessary to protect legitimate privacy interests. *Id.* at 602-03.

i. Regulation of conduct in the interest of citizens' privacy is recognized within the traditions of American jurisprudence.

The Recording Statute is necessary to protect conversational privacy. As highlighted by Judge Woodward's dissent, state legislative history offers concrete reasons for the all-party consent law. R. at 55. The State of Columbia's legislature determined that "as a matter of state public policy, we recognize that the right of any person to the privacy of his conversation is of greater societal value than the interest served by eavesdropping or wiretapping." R. at 55. The goal of enacting such a statute was to protect individuals from the "grave dangers to privacy implicated by unrestricted use of modern technology." R. at 55. At common law, actionable invasion of privacy takes several forms: (1) an unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) *unreasonable publicity given to another's private life*; and (4) *publicity that unreasonably places another in a false light before the public*. *ACLU*, 679 F.3d at 605 (7th Cir. 2011) (quoting from

Restatement (Second) of Torts §652A). States may impose regulations on conduct impeding these zones of privacy in the interest of promoting individuals' privacy.

Here, Respondent's surreptitious recording violated the privacy of Dean and Erlichman under both provisions (3) and (4) of this established area of law. Respondent's actions were in violation of well-recognized privacy expectations and is precisely the type of "grave danger" the State of Columbia intended to prevent. *ACLU*, 679 F.3d at 605. ([S]urreptitiously accessing the private communications of another by way of trespass or non-trespassory wiretapping or use of an electronic listening device "clearly implicates recognized privacy expectations.") (quoting *United States v. Jones*, 132 S.Ct. 945, 945-52 (2012)). Laws that prevent recording or similar information gathering are necessary to protect privacy. Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. Rev. 167, 219 (2017) (expounding the way privacy laws intersect with First Amendment jurisprudence). Therefore, the State is permitted to implement reasonable measures to protect the privacy of speakers through consent laws such as the Recording Statute and this is not an abuse of authority.

Respondent would have been well within his rights if the recordings took place during performance of official duties by either Dean or Erlichman; however, he chose to secretly record private matters during a recreational event and then mislead his audience by only posting a portion of the conversation, without any factual context. R. at 46.

ii. The Recording Statute is a positive public policy measure designed to protect individuals' privacy.

As noted in Judge Woodward's dissent, the question before this court of whether an eavesdropping statute violates the First Amendment is not the same as whether such a statute is good public policy. R. at 55. As Carol M. Bast highlights in *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, existing federal statutes and the majority of states restrict eavesdropping and wiretapping to safeguard individual privacy. 47 DePaul L. Rev. 837, 839 (1998) (arguing for preservation of protection against third party monitoring and taping). Opponents may argue that regulations of surreptitious recording should be eliminated in the interest of preserving the marketplace of ideas. *Id.* at 180. However, this approach fails to account for the intersection between the desire to record information and the recorded individual's right to privacy. The State of Columbia has carved out exceptions so that the free marketplace of ideas is not being infringed upon because government and public health employees acting within the scope of their employment are not shielded by this statute. This statute supports government transparency, and instead targets surreptitious recording of private individuals without their consent.

The First Amendment does not create an independent right to surreptitiously record; it does, however, guarantee significant protection to a speaker's right to record his or her own speech to disseminate a message. The Recording Statute does not implicate this right and is therefore a matter for the Columbia legislature and not this Court.

CONCLUSION AND PRAYER

For the forgoing reasons, the State of Columbia respectfully requests this Court overturn the judgment of the Supreme Court of the State of Columbia.

Respectfully submitted this 20th day of December 2021.

/s/ Team 206
Team 206
Counsel for Petitioner