No. 14-20-00333

IN THE

Supreme Court of the United States

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 207

Counsel of Record

ORAL ARGUMENT REQUESTED

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RELEVANT STATUTES

COLUMBIA REV. CIV. STAT. § 31.002:

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;

iii. Substantially true;

iv. An accurate report on, or a fair summary of, an official action, public proceeding, or meeting open to the public;

v. Made in the course of a judicial or legislative proceeding.

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.

h. BFNO means a Bona Fide News Organization. An organization or entity qualifies as a BFNO if it meets the following criteria:

i. One of its reasons for existing as an organization is to report information to the public;

ii. It generates revenue, either directly or indirectly, by reporting information to the public;

iii. It employs one or more professional journalist;

iv. It maintains liability insurance against claims for defamation; and

v. It has and enforces a recognized code of journalistic ethics.

Section 4. Enforcement.

a. Any party that commits a violation of this statute shall be subject to either or both of the following:

i. A criminal penalty of up to $1,000 per violation and up to 12 months in jail, or both.

ii. A civil penalty consisting of the greater of the actual damages established or $25,000 payable to the plaintiff in a suit to enforce this statute.

b. 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.

c. In any civil litigation to enforce this statute, a prevailing plaintiff shall be awarded reasonable costs and attorneys' fees.

COLUMBIA REV. CIV. STAT. § 39.061:

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:

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

b. Persons speaking at public meetings;

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

d. 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.

Section 3.

a. A person convicted of the offense of violating privacy in communications shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

b. On a second conviction of violating privacy in communications, a person shall be imprisoned in the county jail for a term not to exceed 1 year or be fined an amount not to exceed $1,000, or both.

c. On a third or subsequent conviction of violating privacy in communications, a person shall be imprisoned in the state prison for a term not to exceed 5 years or be fined an amount not to exceed $10,000, or both.

Section 4. Definitions. As used in this section, the following definitions apply:

a. “Electronic communication” means any transfer between persons of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system.

b. “Interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and this type of service or system as operated or offered by a library or educational institution.

ISSUES PRESENTED

I. Whether Respondent's conviction pursuant to Section 31.002 of the Columbia Revised Civil Statutes, banning the knowing dissemination of Fake News, violates the First Amendment.

II. Whether Respondent's conviction pursuant to the Section 39.061 of the Columbia Revised Civil Statutes, banning surreptitious recordings, violates the First Amendment.

STANDARD OF REVIEW

This Court reviews issues of law under a *de novo* standard. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The meaning and interpretation of a statute is a legal question, which should be reviewed *de novo. See Udall v. Tallman,* 380 U.S. 1, 16 (1965). *De novo* review is required when First Amendment issues are raised on appeal. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. (1984). The questions certified before this Court require a First Amendment review to determine the constitutionality of the State of Columbia's Fake News and Surreptitious Recordings statutes. Thus, the appropriate standard of review is *de novo.*

STATEMENT OF THE FACTS

Respondent is a twenty-year old college student who regularly exercises the core of his First Amendment rights—freedom of political speech. *Segretti v. State of Columbia*, 131 Col. Rptr. 44, 45 (Col. 2021). Mr. Segretti is a model young-adult, balancing university demands, political engagement in local campaigns, and humbly earning his way through college by interacting with his social medial following. *Id.* The immediate case stems from Respondent's involvement in a mayoral campaign for the city of New Watergate. *Id.*

At the outset of 2020, Mr. Segretti became involved in the campaign efforts for Joan Dean, his aunt. *Id.* After the general election, but prior to the runoff election between Joan Dean and Gordon Liddy, Mr. Segretti, under the pseudonym

"Alexander Butterfield," posted a video on social media. *Id*. at 46. That video depicted Joan Dean and the current chair of the Election Committee having a hushed conversations at a public Halloween party in a city park. *Id.* That video ended with the current chair of the Election Committee stating "I'll take care of it"—effectively generating the caption: "Why bother? Elrichman will take care of it." *Id.*

Allegations that the current chair of the election committee falsely certified 394 absentee ballots to help Mr. Segretti's aunt survive the general elevation were investigated. *Id.* That investigation reached the conclusion that the electoral process was not tampered with. *Id.* The investigation results, along with widespread criticism of the two candidates in the run-off election—which is not an extraordinary occurrence in a contemporary and contentious political race—was thereafter widespread in the media. *Id.*

Two days after Joan Dean was confirmed victorious in her mayoral campaign, New Watergate police discovered the connection between Mr. Segretti and the fictitious Alexander Butterfield: that Mr. Segretti was in fact the recorder of the conversation between the Election Committee chair and his aunt, that recording being procured by wearing a hidden recording device on Mr. Segretti's person during the public Halloween party. *Id.* A review of the recording—revealing the speakers to be discussing a church project—and a confirmation that neither speaker was aware of Mr. Segretti's recording of that conversation, led to Mr. Segretti being charged with a violation of Section 31.0002 (the "Fake News Ban") and Section 39.061 (the "Surreptitious Recording Ban") of the Columbia Revised Civil Statutes. *Id.* at 46–47.

Mr. Segretti was tried in the 112th District Court of Mitchell County for allegedly disseminating fake news and for surreptitiously recording others in a public park. *Id.* At 47. A jury found Mr. Segretti guilty on both counts and he was thereafter sentenced to nine months in jail and fined $1,125. *Id.* Mr. Segretti immediately appealed that the State failed to meet its burden on proving his violation on both offenses, to no avail. *Id.* In the State of Columbia Supreme Court, Mr. Segretti limited his appeal to challenging the constitutionality of his convictions—bringing the court's attention to the inconsistency of the statues as applied to him, in light of the First Amendment. *Id.*

The State of Columbia Supreme Court found both statutes to be an impermissible assault on the First Amendment and in direct contradiction to this Court's precedent. *See id.* at 49—50 The State now appeals to this Court in an effort of last resort to maintain the effectiveness of its current statutory regime, which turns a blind eye to one of the most bled for and coveted constitutional protections: those commemorated in the First Amendment of the United States Constitution.

SUMMARY OF THE ARGUMENT

I.

Petitioner's Fake News Ban is content-based regulation of protected speech that impermissibly discriminates speech based upon its falsity. In doing so, Petitioner enforces an unconstitutional content-based regulation outside of the categories of speech historically protected by this Court. As the State Supreme Court below properly recognized, content-based regulations of speech must withstand strict scrutiny to remain effective. Petitioner failed to carry its burden in the court below and once again cannot carry such a burden here today. The ambiguous language of the Fake News Ban translates into an overbroad application—chilling constitutionally protected speech and prohibiting the statute from being narrowly tailored, as is required under strict scrutiny. Thus, the Fake News Ban is unconstitutional and effectively represents a freezing over of the marketplace of ideas.

II.

Petitioner's Surreptitious Recording Ban is an unconstitutional attempt to criminalize underlying conduct, too inextricably intertwined with constitutionally protected conduct to survive intermediate or strict scrutiny. Although prohibiting surreptitious recordings is a power that many other states have exercised, the State of Columbia has done so in an unconstitutional manner—evidenced by the striking down of every analogously drafted statute due to their inconsistency with the First Amendment. As such, this Court should affirm the decision of the State Supreme Court and hold the State's regulations unconstitutional.

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE DETERMINATION OF THE STATE SUPREME COURT THAT COLUMBIA'S STATUTE BANNING THE DISSEMENATION OF FAKE NEWS BLATANTLY VIOLATES THE FIRST AMENDMENT.

Fake news is often understood to be "a fabricated story or article propagated in the same fashion and via the same mediums as real news." *See* Brittany Vojak, *Fake News: The Commoditization of Internet Speech*, 48 CAL. W. INT'L L. J. 123, 128 (2017) (citing Hunt Allcott & Matthew Gentzkow, S*ocial Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211, 213 (2017) https://web.stanford.edu/-gentzkow/research/fakenews.pdf); *see also* Alvin I. Goldman & Daniel Baker, *Free Speech, Fake News, and Democracy*, 18 FIRST AMEND. L. REV. 66, 75, n. 21 (2019) (offering various definitions of fake news, including "'news articles that are intentionally and verifiably false, and could mislead readers'" and "'fabricated information that mimics news media content in form but not in organizational process or intent'"). Fake news dates back to sixth century A.D., outdating the First Amendment and its integral role in laying the foundation of American democracy in which it is so concretely commemorated. *Compare* Brittany Vojak, *Fake News: The Commoditization of Internet Speech*, 48 CAL. W. INT'L L. J. 123, 128 (2017) (presenting the history of fake news, findings its roots in sixth century A.D.) *with* U.S. Const. amend. I (setting forth the shield that is the First Amendment, protecting freedom of speech since 1789). The United States is no stranger to fake news and has protected its marketplace of ideas to circulate both what is considered real and fake news. *See* Brittany Vojak, *Fake News: The Commoditization of Internet Speech*, 48

CAL. W. INT'L L. J. 123, 128 (2017) (asserting "there has been no legal action brought against any purveyor of fake news" after detailing the stories of three profiteers of fake news). However, the State of Columbia seeks to upset that history today by banning an entire category of speech based upon its content. *See Segretti v. State of Columbia*, 131 Col. Rptr. 44, 49 (Col. 2021) (stating that the statute at issue "prohibits certain kinds of political speech").

Petitioner's unconstitutional ban on fake news scrutinized here today defines fake news to be the broad dissemination of intentionally false statements for a self-serving purpose. *Segretti v. State of Columbia*, 131 Col. Rptr. 44, 47–48 (Col. 2021). Although the statute defines what the State of Columbia considers to be a false statement of fact—i.e., "a statement that can be proven based on objective criteria to be either true or false . . . [where] its substance or gist is contrary to objectively verifiable acts, even if parts of the statement are accurate"—the statute's subjective components, such as "broad dissemination" and "self-serving purpose" are ambiguously drafted to petrify those aware of the statute and its consequences, effectively chilling the exercise of free speech in the State of Columbia. *See* COLUMBIA REV. CIV. STAT. § 31.002(3)(C–D). This statute infringes upon constitutionally guarded political-speech in a chilling manner and specifically criminalizes internet conduct outside of its jurisdictional reach. *See* COLUMBIA REV. CIV. STAT. § 31.002(3)(A)(I) (criminalizing information disseminated by an individual or entity with more than five-thousand social media followers). The State of Columbia's statute effectively disregards this Court's precedent and well-established principles of First Amendment protections. *See*

United States v. Alvarez, 567 U.S. 709, 719 (2012) (striking down the Government's convenient botch job of this Court's language in various opinions involving false speech in the context of "defamation, fraud, or some legally cognizable harm associated with a false statement" to further its contention that false statements are not inevitable and the marketplace of ideas and thereby should enjoy no constitutional protections. This Court corrected the government and expressly set the record straight: "the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment."); *see also* Alvin I. Goldman & Daniel Baker, *Free Speech, Fake News, and Democracy*, 18 FIRST AMEND.. L. REV. 66, 73 (2019) (recognizing that "First Amendment jurisprudence has been very resistant to the idea that the mere falsity of a conveyed message is grounds for taking action against a speaker).

A. Section 31.002 of the Columbia Revised Civil Statutes is a content-based restriction on political speech and is therefore subject to strict scrutiny.

The threshold question a court must answer in inquiring into the validity of a regulation of speech is whether the government is regulating the content of the speech. *See* Michael S. Ariens, *American Constitutional Law and History* 657 (Carolina Academic Press, 2d. ed. 2016). Content-based regulations are those that censor speech based on its communicative content, targeting certain speech because of the message, subject matter, idea, or content. *See Reed v. Town of Gilbert, Az.*, 576 U.S. 155, 163 (2015) (setting forth that content-based laws are "presumptively unconstitutional"). Outside of the clearly defined categories of historically permitted

regulations of content, content-based regulations are presumptively unconstitutional and must withstand the strictest Constitutional scrutiny. *See United States v. Alvarez*, 567 U.S. 709, 717 (2012). The widely understood general prohibition against content-based regulation of speech extends to the inability of a state to "determine whether particular assertions are true or false or take action against speakers who make false assertions." *See* Alvin I. Goldman & Daniel Baker, *Free Speech, Fake News, and Democracy*, 18 FIRST AMEND. L. REV. 66, 74 (2019) (explaining that "statutes are not legitimate—and must therefore be declared unconstitutional—when they seek to constrain based on content what speakers may say or may post in a public forum, such as Facebook.")

Here, Section 31.002 of the Columbia Revised Civil Statues (the "Fake News Ban") criminalizes a speaker's discussion of false fact, even if parts of the statement are accurate. *See* COLUMBIA REV. CIV. STAT. § 31.002 (defining "facts" as "false if its substance or gist is contrary to objectively verifiable facts, even if parts of the statement are accurate."). Further, the statute challenged today singles out certain sources of information, only applying to those individuals, entities or organizations with more than five-thousand followers on social media or those communicating with five thousand individuals through any medium at least twelve times a year. *Compare* COLUMBIA REV. CIV. STAT. § 31.002(3)(a) (providing the definition of an "information source"); *with Turner Broadcasting System, Inc. v. Fed. Comm. Comm'n*, 512 U.S. 622, 623 (1994) ("laws that single out the press for special treatment pose a particular danger of abuse by the State and are always subject to some degree of heightened

scrutiny.") *and Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (mandating strict scrutiny because the practical application of the regulation fell upon a small group of individuals). The fake news statute challenged today is not a time, place, or manner regulation of speech. Instead, it is a content-based regulation singling out prominent communicators. Therefore, the fake news statute is presumptively unconstitutional and must withstand strict scrutiny. *See Reed v. Town of Gilbert, Az.*, 576 U.S. 155, 163–64 (2015).

This Court's precedent firmly establishes that a statute that regulates speech based on its content must withstand strict scrutiny to coincide with the United States Constitution, unless the speech has been determined to fall outside of the protections afforded by the First Amendment. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). This Court has taken great care to define narrow classes of speech that fall outside of the First Amendment's scope, including fighting words, obscenity, child pornography, and defamation. *See 281 Care Comm. V. Arneson*, 638 F.3d 621, 634 (8th Cir. 2011). Critically, this list does not include false speech—or more specifically applicable to the statute at hand, false political speech—which the Eighth Circuit has recognized as protected First Amendment speech. *See id.* At 633–34 (reversing a district court's erroneous holding; establishing that knowingly false speech is not "speech categorically outside of the protections of the First Amendment"). Strict scrutiny "requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). It

is Petitioner's burden to satisfy this heightened constitutional standard. *See* Michael S. Ariens, *American Constitutional Law and History* 657 (Carolina Academic Press, 2d. ed. 2016).

B. Petitioner's content-based regulation of political speech does not survive strict scrutiny.

Strict scrutiny of a state statute requires the state to prove two things: firstly, that its goal or end in enforcing the regulation serves a compelling government interest; secondly, that the statute is the state's utilization of the least restrictive means to achieve that compelling interest. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). Arguably, the purpose of the statute challenged today is to preserve elections and other public services defined within the statute. *See* COLUMBIA REV. CIV. STAT. § 31.002(1)(C) (requiring harm be caused to "public health, safety, national security, or the operation of an essential government function"); *see also* COLUMBIA REV. CIV. STAT. § 31.002(3)(G) (including elections within the definition of "essential government function").

Although this Court has recognized a compelling interest in orderly elections, with the same stroke of its pen, this Court took note of its skepticism towards a ban that "restricts the flow of information to the citizenry" for the purpose of protecting voters from confusion and undue influence . . ." *See Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 221–28 (1989); *see also United States v. Alvarez*, 567 U.S. 709, 719–20 (2012) (correcting the contention that the unprotected nature of "a knowing falsehood or reckless disregard for the truth" in defamation cases is not a transferrable doctrine that can be applied to general or political speech; instead it is

a condition that allows unintentionally defamatory speech to stand behind the shield of the First Amendment; whereas this Court expressly refuted a state's attempt to refashion a rule of toleration—designed to "allow more speech, not less"—into a rationale for restriction). That very purpose is a common argument in favor of penalizing "fake news." *See* Brittany Vojak, *Fake News: The Commoditization of Internet Speech*, 48 CAL.. W. INT'L L. J. 123, 130 (2017) (venturing down the slippery slope that fake news will lead to the destruction of "entire political systems."); *see also* Alvin I. Goldman & Daniel Baker, *Free Speech, Fake News, and Democracy*, 18 FIRST AMEND. L. REV. 66, 127 (2019) (warning that voters will likely believe false statements of fact that are offered to them throughout the pendency of a campaign). This Court's precedent demonstrates the fatal flaw of such an argument, as it has held that the state cannot substitute its judgement for that of its people. *See Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 215 (1989).

1. The government cannot be the single arbiter to determine what is true.

The Fake News Ban's purpose of preserving the electoral process by censoring information disseminated leading up to its elections is in clear contradiction to this Court's consistent refusal to recognize an exception for First Amendment protections of speech dependent upon any measure of truth, social utility or popularity; regardless of the arguably narrowly drafted nature of that regulation. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . .");

see also N.A.A.C.P v. Button, 371 U.S. 415, 445 (1963) (clarifying that First Amendment protections are not dependent upon "the truth, popularity, or social utility of the ideas and beliefs which are offered."). Neither half-truths, misinformation, or criticisms of officials' conduct are worthy of a loss of constitutional protection, simply because they diminish the reputation or effectiveness of that official. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964). Nor does a requirement of guilty knowledge or a provision for a defense of truth revive such a statute's constitutionality. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964) (describing the chilling effect a statute will have on speech if the burden of proving the truth of that speech's assertions rests with the speaker for fear of liability or prosecution).

Here, Petitioner has failed to demonstrate a compelling government interest, or any governmental interest that could be logically discerned from the statute's plain language. As such, the Fake News Ban falls short of the constitutional scrutiny it must survive and the State's burden to maintain its Fake News Ban is unsatisfied. Accordingly, this Court should affirm the decision of the Supreme Court of State of Columbia and hold the Fake News Ban unconstitutional.

2. Petitioner's Fake News Ban is overbroad and chills constitutionally protected speech.

Free discussion of the affairs of the government has been determined by this Court to be both a major purpose of the First Amendment and a "universal" truth. *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills v. Alabama*, 384 U.S.

214, 218–19 (1966)). Recognizing the heightened protection of political speech, this Court has established that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu. V. S.F. Ctny. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). Although Petitioner's Fake News Ban is inspired both by a desire to preserve the integrity of contested public elections and to irradicate falsity that may hamper the operation of schools, fire departments, police departments, and public utilities, this Court has recognized that an "erroneous statement is inevitable in free debate, and that [those falsities and unavoidable abuses of any protection] must be protected if the freedoms of expression are to have the 'breathing space' they need to survive." *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964). The State attempts to defend its Fake News Ban as necessary to preserve the integrity of essential government functions, which they contend is harmed by the intentional dissemination of false fact; however, our institutions are resilient and "[a]lthough persistent lies about our government may affect public trust, this type of reputational harm to our institutions is qualitatively different than harms to individual's reputations . . ." *Compare Segretti v. State of Columbia*, 131 Col. Rptr. 44, 49 (Col. 2021); *with* COLOMBIA REV. CIV. STAT. § 31.002(1)(c) (requiring the "intentionally false facts" prohibited by the statute to "cause material harm to public health, safety, national security, or the operation of an essential government function.").

The Supreme Court of the State of Columbia in the case below correctly recognized the Fake News Ban's implication and infringement upon this breathing space, soundly holding the statute to be an impermissible regulation of speech. *See Segretti v. State of Columbia*, 131 Col. Rptr. 44, 45 (Col. 2021). Further, this Court has expressly approved of the express striking of cases like the immediate one, finding those that "impose liability for erroneous reports of the political conduct of officials [to] reflect the *obsolete* doctrine that the governed must not criticize their governors." *See New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678).

When a "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression," this Court has repeatably held such a statute unconstitutional for fear of its chilling effect on protected speech. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent, et al.*, 466 U.S. 789, 799 (1984) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

Here, the potential chilling effect of the statute can be found within the statute's defined terms. *See* COLUMBIA REV. CIV. STAT. § 31.002. The Fake News Ban criminalizes the intentional dissemination of false facts with knowledge of, or reckless disregard for, its truth or falsity. *See id.* The statute's language requires that disseminating entity seek to influence the outcome of a contested election and harm that election. *See id.* The statute defines such intentional

dissemination as the publishing of information "reasonably calculated to reach an audience of 5,000 people or more. . ." *See id*. At (3)(b). False information censored by the Fake News Ban *can* include statements that is compiled of true components . . ." *See id.* At (3)(d) (emphasis added). Reckless disregard for the truthful nature of the statute *can* include serious doubts as to its truth . . .". *See id.* At (3)(f) (emphasis added). Effectively, under the statute, an individual with a reach of more than five thousand people can distribute a narrative comprised of mostly truthful fact in the midst of an election, but if those some of those facts are doubted, that person may be subject to imprisonment, criminal penalties and civil penalties up to $25,000. *See* COLUMBIA REV. CIV. STAT. § 31.002(3). Logically, any individual reporting on an election of public officials with a substantial following would be fearful to post, share, or even discuss any information regarding the election. Through fear of punishment or infraction, the statute scrutinized today discourages free thought and discussion in direct contradiction to deeply rooted history, this Court's precedent, and the spirit of the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The State Supreme Court below correctly noted that "[i]n the marketplace of ideas, all speech—even false speech—has value, if for no other reason but to stir debate and flush out the truth." *See Segretti*, 131 Col. Rptr. 44, 50 (Col. 2021). Allowing such a statute to remain in effect and penalize Respondent today would run afoul the marketplace of ideas—a foundational pillar of American democracy and jurisprudence.

C. By upholding the State Supreme Court decision, this Court preserves the marketplace of ideas, so heavily guarded by the United States Constitution.

The marketplace of ideas is enshrined at the base of American First Amendment jurisprudence. *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1, 3 (1984) (surveying the historical roots in the marketplace of ideas in order to introduce its first and widely cited debut in American case law: Justice Holmes' renowned dissent in *Abrams v. United States*, 250 U.S. 616 (1919)). Valuing a "multitude of tongues," over "silence coerced by law," this political theory—interwoven into American principles and case law—protects a freedom of speech where the people are the censors of their government; not a place where the government censors its people. *See Whitney v. California*, 274 U.S. 357, 376 (1927); *see also United States v. Associated Press*, 52 F. Supp. 362, 372 (D.C.S.C.N.Y 1943).

Here, the State of Columbia attempts to refashion a principle that is designed to be tolerant of more speech into a rationale for restricting protected speech. *See United States v. Alvarez*, 567 U.S. 709, 719–20 (2012) (striking down a previous governmental attempt to perform an analogous transformation). In doing so, Petitioner asks this Court to depart both from the bedrock principle of preserving the marketplace of ideas and adhering to *stare decises*, absent a special justification from its departure. *See Janus v. American Federation of State, Cnty., and Mun. Employees, Council 31*, 138 S.Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (defining a departure from *stare decisis* to be an "'exceptional action[]'"

demanding special justification . . .", such as the legal foundation in which that precedent rests has eroded over time). Petitioner failed to make such a display as to why its statute is deserving of this Court upending decades of precedent and effectively eradicating the marketplace of ideas, where falsities fuel the peoples' fire to search for the truth. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market"). In sum, Petitioner's Fake News Ban a content-based assault on the First Amendment and this Court's precedent, that neither Petitioner nor logic can defend. As such, this Court should affirm the decision of the State Supreme Court and hold Petitioner's Fake News Ban unconstitutional.

II. THIS COURT SHOULD AFFIRM THE STATE SUPREME COURT'S HOLDING THAT "SURREPTITIOUS RECORDINGS ARE ENTITLED TO FULL FIRST AMENDMENT PROTECTION", AS IS THE CONDUCT NECESSARY TO PROCURE THAT RECORDING.

This Court has established the First Amendment right to create audio and audiovisual recordings, and to disseminate that recording. *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952). This Court has further recognized that the regulation of a medium, such as the recording of a conversation, is recognized by the Court to "inevitably affect [the] communication itself." *City of Ladue v. Gileo*, 512 U.S. 43, 48 (1994). Additionally, a government restriction on the "free flow of truthful information" has been deemed unconstitutional by this Court. *Linmark Associates, Inc. v. Willingboro*, 421 U.S. 85, 95 (1977). Ignoring this Court's precedent and the emerging consensus of the Circuit courts, Petitioner seeks to wield the First

Amendment into a sword by prosecuting those exercising their constitutional right to make an audio or visual recording.

Petitioner's statute challenged here plainly prohibits protected First Amendment conduct: the recording of a conversation with a hidden electronic or mechanical device, without the knowledge of all parties to the conversation. COLUMBIA REV. CIV. STAT. § 39.061. This ban (the "Surreptitious Recording Ban") is inapplicable to those that provide a warning to the parties speaking. COLUMBIA REV. CIV. STAT. § 39.061(2)(c). Effectively, the underlying issue Petitioner seeks to protect under the guise of this statute is privacy and consent. However, Petitioner cannot prohibit underlying, protected First Amendment conduct under the guise of privacy. As such, this Court should affirm the State Supreme Court's decision and hold that the Surreptitious Recording Ban is unconstitutional.

A. The Circuit Courts have recognized the First Amendment right to make a surreptitious audio or audiovisual recording and the corollary right to disseminate that recording.

The Seventh Circuit recognized, as did the Columbia Supreme Court in the case below, that the cemented "right to public or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected." *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 598 (7th Cir. 2012). Relying on this Court's principle that a law may not suppress protected speech at any point in the speech process, the Seventh Circuit in *American Civil Liberties Union of Illinois v. Alvarez* deemed an eavesdropping statute unconstitutional because it regulated the use of an entire

medium of expression; operating to restrict speech at the front end of the process. *Id.* at 596. As the right to contribute money to a political campaign stands behind the shield that is the First Amendment because it facilitates speech, the act of making audio and audiovisual recordings too facilities speech. *Id.* at 597. (analogizing campaign-finance protections to the protected act of making a recording). Collaterally, prohibiting the making of a recording logically limits the information made available for sharing in the marketplace of ideas. *Id.* .

The First Circuit recently struck down a Massachusetts statute that prohibited the surreptitious recording of police officers in discharging their official duties. *See Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020) (holding Massachusetts' blanket ban on the secret recording of police officers was not narrowly tailored enough to further the purported state interest of preventing interference with the carrying out of police officers' duties). The Third Circuit took the analysis of the First Amendment protection of private recordings a step further, recognizing the value of press generated by bystanders. S*ee Fields v. City of Philadelphia*, 862 F.3d 353 (3d. Cir. 2017) (considering the role private recordings have had in improving professional reporting and "enrich[ing] the stories journalists tell and improving accountability by amongst law enforcement by both aiding in investigations and documenting police misconduct).

Additionally, the Fifth and Tenth Circuit have both recently recognized a "First Amendment right to record" regardless of consent or knowledge of all parties involved. *See Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *see also*

Frazier v. Evans, 992 F.3d 1003 (10th Cir. 2021). The majority of circuits, and the court below, present resounding persuasive authority to aid this Court in establishing—or at the very least, protecting—a First Amendment right to make a recording.

B. The Surreptitious Recording Ban is a content-neutral restriction on political speech and is therefore subject to intermediate scrutiny.

Regulations that burden speech dependent upon its conduct are subject to strict scrutiny; alternatively, those that regulate speech in no way dependent on the content of the speech are subject to intermediate scrutiny. *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission, et al.*, 512 U.S. 622 (1994). The key determination for a court to make in determining whether a regulation is content-based or content-neutral turns on "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Id.* at 642 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Although the Supreme Court of Columbia applied strict scrutiny to the Surreptitious Recording Ban, Mr. Segretti still prevails even if this Court determines intermediate scrutiny is appropriate. *See Segretti v. State of Columbia*, 131 Col. Rptr. 44, 53 (Col. 2021) (determining that "[u]nder each theory, surreptitious recording of government officials should be subject to strict scrutiny."). Therefore, under either level of scrutiny, this Court should affirm the decision of State Supreme Court and hold the Surreptitious Recording Ban is unconstitutional.

C. The Surreptitious Recording Ban does not survive intermediate scrutiny because it does not serve an important government interest and is not substantially related to achieving that interest.

To satisfy intermediate scrutiny under the First Amendment, the regulation must not place a burden on speech that is substantially more than necessary to further the government's legitimate interest. *Turner Broadcasting System, Inc. et al. v. Fed. Comm. Comm'n, et al.*, 512 U.S. 622, 662 (1994) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). Under intermediate scrutiny, a law will be upheld if the government can carry its burden to demonstrate the "'regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Here, the Surreptitious Recording Ban initially suffers from an inability to determine the exact governmental interest it seeks to further.

Section 39.061 of the Columbia Revised Civil Statute is not a traditional government regulation to advance aesthetic values, as it is the act of surreptitiously recording the conversation that is prohibited under the ban—not the posting, sharing or disseminating of that information in a harmful or unaesthetic manner. *Compare Berman v. Parker*, 348 U.S., 26 (1954) (recognizing the power of the legislature to remove a blighted housing as an "ugly sore" within the community); *with* COLUMBIA REV. CIV. STAT. § 39.061 (prohibiting the recording or causing the recording of a "conversation by use of hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation."). The Surreptitious Recording Ban's

failure to prohibit or regulate the act, nonetheless the nature or method of, disseminating the recorded material eliminates Petitioner's ability to hang its hat on its ability to avoid visual or ethical clutter within its community. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. (1981) (affirming the city's prohibition of certain forms of outdoor billboards, finding the city's content-neutral prohibition to be justified in its valid aesthetic interest of avoiding visual clutter). Neither can the statute be saved nor justified under the premise that it serves as a permissible exercise of government authority to protect citizens from unwanted exposure to a public nuisance, as the text of both the statute and its supplemental definitions fail to address public dissemination or intimate sharing of the banned recording. *Compare Kovcas v. Cooper*, 336 U.S. 77 (1949) (recognizing a city's power to regulate the time, place and manner of speech to serve its legitimate interest of protecting its citizens from unwanted exposure to a public nuisance); *with* COLUMBIA REV. CIV. STAT. § 39.061(1–3) (failing to address the placement of this recording in a public setting or exposing the public—in any way—to the criminalized recording). Additionally, the ban cannot be said to be drafted under government's ability to protect its citizens from unwanted exposure to certain methods of expression or to uphold its aesthetic goals because the statute does not concern itself with the dissemination of the information at all.

Due to the ban's provided exception for the recording of communications consented to by all parties, it could be inferred that the statute seeks to protect

the privacy of its citizens' communications. COLUMBIA REV. CIV. STAT. § 39.061(2)(c) (providing the ban does not apply to "[p]ersons given warning of the transcription or recording."). However, the requirement that such a purpose be inferred, and is not readily discernable from the statute's language or the conduct that statute prohibits, is evident that the regulation is not substantially related to serve that interest. *See United States v, Stevens*, 559 U.S. 460 (2010) (finding a statute whose interest is in prohibiting underlying conduct to invite a number of impermissible applications that "far outnumber any permissible ones" and is therefore places an unconstitutional burden on too vast a pool of protected speech).

The plain language of the Surreptitious Recording Ban indicates Petitioner does not seek to prohibit the actual portrayal of conversations but rather the underlying conduct of invading the privacy of others by recording their communications without their consent. *See* Part II(C) *infra* (inferring the possible purpose behind the statute to determine the possible governmental interest at stake). However, Petitioner cannot rely on a statute's relatedness to conduct it seeks to criminalize or prohibit to narrow its overbreadth nor satisfy constitutional scrutiny. *See United States v. Stevens*, 559 U.S. 460 (2010) (holding a statute banning the depiction of certain criminal conduct too overbroad and not narrowly tailored enough to reinforce restrictions on the underlying conduct). Petitioner cannot rely here on distant and unrelated privacy concerns to validate its overbroad and unconstitutional prohibition on the making of recordings.

Lastly, a statute that is overbroad and burdens more speech than necessary to serve a legitimate interest in protecting constitutional privacy, has been found to crumble under intermediate scrutiny. *See id.* (holding an overbroad statute that may unconstitutionally burden speech in a number of applications to not withstand constitutional scrutiny); *see also People v. Melongo*, 6. N.E.3d 120 (Ill. 2014) (stating a "[r]ecording provision [seeking to protect the privacy of communicators but failing to codify the speakers' expectation of privacy] is unconstitutional on its face because a substantial number of its applications violate the first amendment").

D. Even if this Court finds the statute to survive intermediate scrutiny, the statute is substantially overbroad and thus, unconstitutional under the overbreadth doctrine.

A law that applies to both speech that may be suppressed and protected speech is overbroad and thus, unconstitutional under the overbreadth doctrine. *See* Michael S. Ariens, *American Constitutional Law and History* 661 (Carolina Academic Press, 2d. ed. 2016). The "strong medicine" that is the overbreadth doctrine finds a law invalid if substantial overbreadth is found. *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (finding substantial overbreadth where "the flaw is a substantial concern in the context of the statute as a whole"). Where a statute is to be struck down under the overbreadth doctrine, especially one that turns upon the conduct of the speaker, the overbreadth of the statute must be a substantial and plain sweep. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent, et al.*, 466 U.S. 789, 799–800 (1984). Whereas a realistic

danger that the statute will significantly compromise protected First Amendment conduct, repeatedly chilling or deterring protected expression, must be present. *See id.* at 800–01 (1984).

Under the statute challenged today, an individual's protected right to create audio and video recordings of third-party speech is unconstitutionally criminalized. *Compare Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995) (discussing the multitude of instances where the Court has upheld third-party First Amendment protection in relaying—and even editing—others' speech, such as cable programmers, newspapers, the general press); *with* COLUMBIA REV. CIV. STAT. § 39.061 (subjecting an individual to six months in prison simply for "knowingly or purposely" recording third-party speech by using a hidden recording device). Petitioner's Surreptitious Recording Ban is overbroad and undeniably prohibits protected conduct under the First Amendment, as an individual could purposely record a conversation to which it has no consent from the parties communicating to record, keep that recording to him or herself, and be subject prosecution and imprisonment. COLUMBIA REV. CIV. STAT. § 39.061. This outcome alone demonstrates why this Court should strike down the statute and hold Respondent's conviction pursuant to the statute, unconstitutional.

The Surreptitious Recording statute's language is also overbroad because it effectively prohibits the dissemination of protected speech. Logically, recorded speech cannot be shared if it cannot be recorded in the first place. The Columbia

State Supreme Court artfully recognized this fatal flaw in the statute challenged today, recognizing "[p]rohibitions on [surreptitious] recordings. . . . [i]nherently prevent such recordings from being [created and] displayed to others." *Segretti v. State of Columbia*, 131 Col. Rptr. 44, 52 (Col. 2021) (discussing the unconstitutionality of Petitioner's Surreptitious Recording Ban). As applied to the immediate case, the surreptitiously recorded conversation was posted to a social media profile and thereby shared, and the sharing of that information was the subject of prosecution under § 31.002 of the Columbia Revised Civil Statutes. *See* Part I *infra*. Petitioner's own statutory scheme negates the contention that the Surreptitious Recording Ban in any way concerns itself with the sharing of information. Instead, the statute is merely an impermissible time, place, manner blanket prohibition on conduct that inevitably flows from the speech recorded and is thereby protected under this Court's First Amendment precedent. *See City of Ladue v. Gileo*, 512 U.S. 43 (1994) (finding the regulation of a medium of speech inevitably restricts the speech itself).

E. Petitioner's all-party consent scheme in the Surreptitious Recording statute implements flawed policy.

Twelve states, now including the State of Columbia, have all-party consent laws. *See Segretti v. State of Columbia*, 131 Col. Rptr. 44, 55 (Col. 2021) (J.

Woodward dissenting). Those states include: California,[1] Columbia,[2] Delaware,[3] Florida,[4] Illinois,[5] Maryland,[6] Massachusetts,[7] Montana,[8] Nevada,[9] New Hampshire,[10] Pennsylvania,[11] and Washington.[12] *See* Matthiesen, Wickert, & Lehrer, S.C., *Laws on Recording Conversations in All Fifty States* (January 5, 2021). All party-consent statutes require all parties to a conversation consent to being recorded. *See* Matthiesen, Wickert, & Lehrer, S.C., *Laws on Recording Conversations in All Fifty States* (January 5, 2021). Two-party consent statutes require the oral communication surreptitiously recorded to be private—not including conversations made in group settings where the parties could reasonably expect to be overheard or intercepted—or the more extensive act of

[1] CAL. PENAL CODE § 632 (applying to only certain *private* and confidential communications, excluding "any [] circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.").
[2] COL. REV. CIV. STAT. § 39.061 (prohibiting the recording of all conversations, regardless of the expected level of privacy or confidentiality, without the knowledge of all parties involved).
[3] DEL. CODE ANN. TIT. 11 § 1335 (requiring trespass onto property, the installing of a device, or the interception of *private* communications).
[4] FLA. STAT. § 934.03 (criminalizing wiretapping, recording through an electronic devise that transmits a signal and disclosing information procured by such means).
[5] 720 ILL. COMP. STAT. 5/14-2 (prohibiting the surreptitious recording of any *private* conversation to which the recorder is not a party to unless the recorder procures the consent of all parties to the private conversation).
[6] MD. CODE., CTS. & JUD. PROC. § 10-402 (focusing on interception of wire or electronic communication but including protection of *private* oral communication).
[7] MASS. GEN. LAWS CH. 272 § 99 (criminalizing willful surreptitious recording of any oral communication).
[8] MONT. CODE § 45-8-213 (requiring the preliminary establishment that the communication be *private* in nature).
[9] N.R.S. 200.650 (codifying the intrusion of privacy of other persons engaging in a *private* conversation).
[10] N.H. REV. STAT. § 570-A:2 (applying only to oral communication where the person has a reasonable expectation and under circumstances to justify the expectation that the communication is *private* and not subject to interception).
[11] 18 PA. STAT. AND CONS. STAT. § 5703 (making it a felony to intentionally intercept *private* oral communication only if that oral communication is "uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation).
[12] WA ST 9.73.030 (protecting only *private* communication).

disclosure of that communication in order for the surreptitious recorder to be subject to legal consequences. *See* n. 1–12 *infra*. The statutes set forth in Illinois,' Massachusetts' and the statute before the Court today serve as the exception to this general rule. *See* n. 2, 5, 7 *infra*. Tellingly, each of these statutes have been held unconstitutional in violation of the First Amendment when brought before a court. *Compare* 720 ILL. COMP. STAT. 5/14-2 (held unconstitutionally overbroad, inconsistent with the First Amendment in *People v. Melongo*, 6 N.E.3d 120 (Ill. 2014)); *and* MASS. GEN. LAWS CH. 272 § 99 (held unconstitutional in violation of the First Amendment, as-applied, in *Project Veritas Action Fund v. Rollins*, 982. F.3d 813 (1st Cir. 2020)); *with* COLUMBIA REV. CIV. STAT. § 39.061 (held unconstitutional in *Segretti v. State of Columbia*, 131 Col. Rptr. 44 (Col 2021).

Although the dissent in the immediate case below correctly noted the State of Columbia is in great company in enacting a two-party consent statute, the State of Columbia has ventured down the road less traveled: drafting an ambiguous, broad-sweeping statute too broad to coexist with the First Amendment. This Court should take comfort in the path paved by the circuit and state supreme courts, striking down analogous laws too broad to withstand constitutional muster. Thus, this Court should affirm the decision of the Supreme Court of State of Columbia and hold the Surreptitious Recording statute violates the First Amendment because it is unconstitutionally overbroad and fails both intermediate and strict scrutiny.

CONCLUSION AND PRAYER

For the forgoing reasons, Respondent respectfully request this Court affirm the judgment of the State of Columbia Supreme Court. Respectfully submitted this 15th day of December 2021.

/s/_____

Counsel for Respondent