No. 14—20—00333

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF COLUMBIA,

Petitioner

v.

DONALD SEGRETTI,

Respondent

On Petition for Review from the

Supreme Court of the State of Columbia

Brief for Petitioner

Oral Argument Requested

TEAM - 208

Attorney for Petitioner

QUESTIONS PRESENTED

1. Does Segretti's conviction under Section 31.002 of the Columbia Revised Civil Statutes, which bans the knowing dissemination of false facts under particular circumstances, violate the First Amendment?
2. Does Segretti's conviction under Section 39.061 of the Columbia Revised Civil Statutes, which bans surreptitious recordings, violate the First Amendment?

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The opinion of the Supreme Court of the State of Columbia is reported as Segretti v. State of Columbia, No. 14—20—00333 (Col. 2021).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. CONST. amend. I provides in pertinent part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S. CONST. amend. XIV provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States

3. Columbia Revised Civil Stat. § 31.002 (2021): See record.

4. Columbia Revised Civil Stat. § 39.061 (2021): See record.

STATEMENT OF THE CASE

A. Facts

Appellant Donald Segretti is a successful 20-year-old social media influencer residing in New Watergate, Columbia; within the past two years, he accumulated over 220,000 followers and generated $45,000 a year in income from his content. R. at 45. Segretti is also a political activist, and in early 2020, he began working on his aunt's mayoral campaign for the city of New Watergate. R. at 45. Segretti's aunt, Joan Dean, was a political rival of the election's other frontrunner, Gordon Liddy. R. at 45.

New Watergate's mayoral election was known to be contentious, and this was exacerbated when electoral concerns from the national stage began spilling into the local race. R. at 46. As a result, countless citizens of New Watergate worried about the integrity of the election. R. at 46.

The general election involved twelve candidates for mayor. R. at 45. Liddy received twenty-eight percent of the vote, and Dean received twenty-three percent of the vote. R. at 46. Because neither candidate received a majority of the votes cast, a runoff election between Liddy and Dean was scheduled. R. at 46.

Throughout the campaign, a social media presence by the name of Alexander Butterfield amassed 25,000 followers through posts in support of Liddy. R. at 46. Immediately after the certification of the general election results, Butterfield began posting accusations that the chair of the Election Commission, Joanne Erlichman, used her influence to help Dean win. R. at 46 These accusations quickly became more specific: Butterfield posted an accusation that Erlichman falsely certified 394

absentee ballots to help Dean qualify for the runoff election with a caption that read, "Why bother? Erlichman will rig it anyway." R. at 46. Two days later, Butterfield posted a video of a hushed conversation between Dean and Erlichman that ended with Erlichman saying, "I'll take care of it." R. at 46. This post also included a caption: "Why bother? Erlichman will take care of it." R. at 46.

As a result of the allegations, the current mayor launched an investigation into Erlichman and the city's election practices, but no evidence suggested foul play. R. at 46. This did not matter to the media; though media outlets noted the results of the investigation, they continued to report on Butterfield's social media posts. R. at 46. Because of this, both Erlichman and Dean continued to receive widespread criticism from the public. R. at 46.

Dean won the runoff election by five percent, but only fourteen percent of registered voters participated in the runoff election. R. at 46. Dean's victory was attributed to the low voter turnout. R. at 46.

Shortly after the certification of the runoff election results, New Watergate Police realized that Butterfield was not a real person--rather, he was a pseudonym created by Segretti to influence the outcome of the election. R. at 46. Police also discovered that Segretti recorded the hushed conversation between Dean and Erlichman at a Halloween party in the city park by wearing a hidden body camera and intentionally positioning himself to hear the conversation. R. at 46. A review of the full recording clarified that Dean and Erlichman were discussing a church

project rather than anything related to the election. Id. Dean, Erlichman, and Liddy had no knowledge of Segretti's actions. R. at 46.

B. Procedural History

Segretti was convicted of two offenses under Columbia law: disseminating false facts under the particular circumstances detailed in Section 31.002 of the Columbia Revised Civil Statutes and surreptitiously recording under the circumstances detailed in Section 39.601 of the Columbia Revised Civil Statutes. R. at 47. He was sentenced to five months in jail and a $750 fine for violating Section 31.002 of the statutes; he was also sentenced to four months in jail and a $375 fine for violating Section 39.601 of the statutes. R. at 47.

On appeal before the Supreme Court of Columbia, Segretti did not challenge the government's assertion that he violated the elements of the two statutes; rather, he challenged whether his convictions violate the First Amendment. R. at 47. The Supreme Court of Columbia held both Columbia statutes unconstitutional as violations of the First Amendment. R. at 50 & 53.

SUMMARY OF THE ARGUMENT

Columbia's ban on Fake News is constitutional because intentional falsehoods are not afforded First Amendment protection, and even if they were, the statute remains constitutional because the statute is content neutral, and it survives intermediate scrutiny. Should this Court determine that the speech prohibited by the statute is protected by the First Amendment and that the statute imposes a content based restriction, the statute should still be upheld as constitutional because it survives the relevant strict scrutiny analysis. A content based restriction

on speech will only be upheld as constitutional if (1) there is a compelling government interest in restricting the speech, (2) the restrictions imposed by the statute are necessary to achieve that compelling government interest, and (3) the statute imposes the least restrictive means available. Though this is an undeniably high burden for content based restrictions on speech, the statute at issue satisfies this burden.

Columbia's ban on surreptitious recording is constitutional because surreptitious recording is not protected by the First Amendment. There are two potential sources within the First Amendment for a right to surreptitious recording: 1) the right to receive information or 2) protection of mediums of expression. Surreptitious recording is not found within either potential source; thus, the issue of banning surreptitious recording is for the decision of state legislatures.

Should this Court decide that a right to surreptitious recording does exist, the Columbia ban is a restriction on the manner of surreptitious recording because it restricts surreptitious recording only to specific circumstances. The Columbia ban survives intermediate scrutiny here because it is content neutral, narrowly tailored to serve the significant government interest of protecting privacy, and it leaves open ample alternative channels for communicating the speaker's message, such as overtly recording, taking notes, or taking pictures.

Finally, should this Court decide that the Columbia ban on surreptitious recording is content based, it remains constitutional because it is necessary to serve the compelling state interest of protecting privacy, because without it self-

censorship will occur. The statute is also narrowly drawn to achieve that end, because it only restrict private conversations that do not implicate public interests.

ARGUMENT

I. COLUMBIA'S BAN ON FAKE NEWS IS CONSTITUTIONAL REGARDLESS OF WHETHER SUCH STATEMENTS ARE AFFORDED FIRST AMENDMENT PROTECTION AND REGARDLESS OF WHICH LEVEL OF SCRUTINY IS APPLIED TO THE BAN

A. Intentional falsehoods are not a protected category of speech under the First Amendment; thus, the statute is constitutional.

The protection of the First Amendment is a wide-spreading blanket that ensures the right to speak and spread a message without fear of persecution. Regulations on speech are typically viewed as suspect, and content based restrictions are subject to strict scrutiny. Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 164 (2015). Although there are wide protections of many types of speech, there are several categories of speech that invite regulation and punishment when they occur. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-72 (1942). When these categories of speech are prohibited, there has seldom been a resulting constitutional issue. Id. These categories include, but are not limited to, fighting words, incitement, obscenity, true threats, defamation, and fraud. U.S. v. Alvarez, 567 U.S. 709, 717 (2012).

Intentional falsehoods should be a category of unprotected speech. Our legal precedent has stated on numerous occasions that false statements are of little to no

value. In Gertz v. Robert Welch, Inc., this court stated that "there is no constitutional value in false statements of fact" and that "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open' debate on public issues." 418 U.S. 323, 340 (1974). It further stated in Garrison v. Louisiana that "calculated falsehoods" exist in a group of utterances that "do not enjoy constitutional protection." 379 U.S. 64, 75 (1964). These statements are at odds with the basic fundaments of democracy. Id. The purpose of democracy with the First Amendment was to inspire change and growth through debate in a "marketplace of ideas" where thoughts can be shared without persecution to propel society forward. Intentional lies do not serve that purpose.

It is true that falsehoods are inevitable in discourse in a "free marketplace of ideas." Gertz, 418 U.S. at 340. Therefore, safeguards were put in place to ensure that individuals would still be able to share their ideas without fear of accidentally making a false statement and fearing criminal charges. Id. However, accidental lies and intentional ones differ and cause two distinct types of harm. Accidental harms are unintentional and are a necessary risk when free ideas are meant to be uninhibited. Intentional lies pose great societal harm in different facets. We prohibit intentional lies already in certain areas such as: perjury, knowing defamatory statements, knowing false statements likely to inspire panic, and knowingly representing oneself as a government official. James Weinstein, What Lies Ahead?: The Marketplace of Ideas, Alvarez v. United States, and First

Amendment Protection of Knowing Falsehoods, 51 Seton Hall L. Rev. 135, 149 (2020).

Each of the aforementioned statements pose a specific harm to society when they are uttered. Therefore, it is in our government's best interest to shield and safeguard the public from them. Here, Columbia has established a statute barring intentional false statements that are broadly disseminated and that affect political elections. R. at 47. This qualifies perfectly as a category of speech that should be prohibited and thus fall outside the realm of First Amendment protection. This would still promote the freedom of ideas while eradicating a detrimental social harm.

B. Even if intentional falsehoods are not a protected category of speech under the First Amendment, Columbia's statute remains constitutional because it is content neutral and survives intermediate scrutiny.

The court below incorrectly utilized strict scrutiny when it should have used intermediate scrutiny. The standard for analyzing whether a statute violates the First Amendment differs based on the categorization of the statute. United States v. O' Brien, 391 U.S 367, 376-377 (1968). As noted in Alvarez, O'Brien, and numerous other cases, there are two main categories of speech regulation: content based restrictions and content neutral restrictions. Id. See also United States v. Alvarez, 567 U.S. 709, 730 (2012). Content based restrictions are viewed as more suspect under the First Amendment because the regulation quells certain ideas or viewpoints. Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 168 (2015). In contrast,

content neutral restrictions are simply "time, place and manner" restrictions that treat all speech equally and does not change based on the content of the speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

Determining whether an ordinance or statute is content based or content neutral is sometimes a difficult query. Turner Broad. System, Inc. v. F.C.C., 512 U.S. 622, 642 (1994). The determining factor is "whether the government has adopted a regulation of speech because of the message it conveys." Id. When a regulation judges speech based on its message it is content based and subject to strict scrutiny. Id. When the regulation does not look to the content of the speech it is content neutral and subject to intermediate scrutiny. Id.

1. Columbia's Fake News Ban is content neutral because it does not judge speech based on the speech's message or viewpoint.

Columbia's statute does not place a restriction on speech based on its content; therefore, the statute is content neutral and subject to intermediate scrutiny. This court has regularly differentiated between content based and content neutral laws. In R.A.V v. City of St. Paul, Minnesota, a city ordinance banning the display of certain symbols was found to be content based. 505 U.S. 377, 382 (1992). This court deemed it content based because it prohibited messages of "bias-motived hatred" and "racial supremacy." Id. at 392. In Simon & Schuster, Incorporated v. Members of New York State Crime Victims Board, this court found a law to be content based. 502 U.S. 105, 116 (1991). This conclusion was reached because it placed a financial burden on authors based on the content of their published work. Id. at 117. Both

regulations targeted the content of the respective speech or expressions at issue, and this led to their invalidation.

In United States v. Alvarez, the Stolen Valor Act was found to be a content based restriction on speech. 567 U.S. 709, 715 (2012). The regulation criminalized making false claims that one had been awarded any decoration or medal from Congress. Id. at 716. This Court deemed the restriction content based because it targeted speech specifically about military decorations or medals. Id.

In Ward v. Rock Against Racism, a regulation mandating use of city sound equipment and a city sound technician in a park was deemed content neutral and valid because the purpose of the regulation was to control noise levels at bandshell events in order to protect neighboring residents and protect other peaceful activities in the park. 491 U.S. 781, 792 (1989). This Court stated that the ordinance had nothing to do with content and met the condition that the time, place, or manner regulation be content neutral. Id. Respondent tried to argue that the city's justification of "ensuring the quality of sound at Bandshell events" was content based because it is "based on the quality, and thus the content of the speech being regulated. Id. This Court found that reasoning unsatisfactory based on the facts of the case. Id. at 793. The city was not regulating content based on what it considered to be good sounds. Id. The kind of regulation that respondent suggested was at hand would be one that hindered certain artistic choices of music. Id. This court stated that those concerns would be valid, but that issue was not present.

Columbia's regulation is almost identical to the regulation in Ward and should therefore be found content neutral. Columbia's regulation targets intentionally false statements of fact that are broadly disseminated, for either a self-serving purpose or influencing a public election, that cause a harm to the public or essential government function. R. at 47-48. This regulation does not target speech based on the message it conveys. Turner Broad. System, Inc. v. F.C.C., 512 U.S. 622, 642 (1994). Rather, it targets all intentional false speech equally that is broadly disseminated for self-serving purposes and harms essential government function. R. at 47-48.

Unlike in Alvarez, where the regulation only targeted false speech about congressional medals, Columbia's regulation prohibits false speech of any kind under certain parameters. 567 U.S. 709, 716 (2012). This distinguishes this case from Alvarez, R.A.V, and Simon & Schuster, and under this Court's precedents, this case must be held to a different standard. This case should be held to the same standard set in Ward. Ward's statute prohibited groups from using personal sound equipment to protect the public's right to quiet. Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989). Similarly, Columbia's statute prohibits the broad dissemination of any intentional false facts for foul motives that interfere with government functions. R. 47-48.

The court below argues that because Columbia's statute bans certain kinds of political speech, it should be deemed content based and subject to strict scrutiny. R. at 49. This is a gross mischaracterization of the standard this Court has set and

followed. If Columbia's statute only targeted political speech, then, facially and as-applied, it would be considered content based. Turner Broad. System, Inc. v. F.C.C., 512 U.S. 622, 643 (1994). Columbia's statute does not approve or disapprove of. speech based on the ideas or views conveyed within. R. at 47-48. For example, if an information source (as defined under the statute) broadly disseminated knowingly false facts stating that drinking bleach cures COVID-19 to cause his stock in Clorox to appreciate, that could be criminal under Columbia's statute. That speech has nothing to do politics and would be just as criminal as Segretti's speech. Therefore, because the statute is content neutral, it should not be held to the same standard as Alvarez and should be judged under intermediate scrutiny.

2. Columbia's Fake News Ban survives intermediate scrutiny.

To pass strict scrutiny the government must prove that it has a compelling interest for the regulation and that the regulation used the least speech restrictive means to do so. Turner Broad. System, Inc. v. F.C.C., 512 U.S. 622, 653 (1994). To pass intermediate scrutiny, the regulation must further a substantial government interest and must not burden substantially more speech than is necessary to further that interest. Id. at 662. Under intermediate scrutiny, the government does not have to use the least restrictive means possible to further its substantial interest. Id. Rather, incidental hinderances are allowed if they are essential to the furtherance of the substantial interest. United States v. O' Brien, 391 U.S 367, 376 (1968).

The State's interest in maintaining the integrity of the electoral process has been deemed a substantial and even compelling interest by this court. John Doe No. 1 v. Reed, 561 U.S. 186, 197 (2010). See also Storer v. Brown, 415 U.S. 724, 736 (1974) (noting that the government's interest in maintaining the stability of its political system was "not only permissible, but compelling"). This interest has been noted to be especially significant when it pertains to eradicating fraud. John Doe No. 1 v. Reed, 561 U.S. 186, 197 (2010). Fraud can not only lead to dishonest outcomes but also has the effect of driving "honest citizens out of the democratic process and breeds distrust of our government." Id. (quoting Purcell v. Gonzalez, 549 U.S. 1, 4 (2006)). The dissent below echoes this concern. R. at 53. Our democratic process is incumbent upon a well-informed population. R. at 53. Therefore, fake news threatens democracy as we know it.

Presently, Columbia has issued a statute to further a substantial government interest. Protecting the electoral process and eradicating fraudulent activity and outcomes, as noted in John Doe No. 1, is a substantial government interest. John Doe No. 1 v. Reed, 561 U.S. 186, 197 (2010). Thus, all that is necessary for the statute to be upheld is an inquiry as to whether the regulation burdens substantially more speech than is necessary to further that interest. Turner Broad. System, Inc. v. F.C.C., 512 U.S. 622, 662 (1994). The statute does not burden more speech than necessary because it is narrowly tailored to combat specific harms. R. at 47-48.

In Alvarez, Justice Breyer noted in his concurrence that he would read a mens rea requirement into the reading of the Stolen Valor Act. *United States v. Alvarez*, 567 U.S. 709, 732 (2012). A mens rea requirement in speech restrictions is imperative as to create "breathing room" for valuable speech by mitigating an honest orator's fear that he will accidentally suffer liability for speaking. Id. at 733. This court's worry was that the large breadth of the statute could allow for selective prosecution, where the house party guest and aspiring congressman are both prosecuted equally where the harms are drastically different. Id. The statute in *Alvarez* falls victim to this fear. Id. at 736. It would be used to prosecute social or private events where little harm is done. Id. Because there was a way to further the government's substantial interest in a less burdensome way, the Stolen Valor Act was invalidated. Id. at 737. Justice Breyer suggested a more finely tailored statute that required a showing of a specific harm or only focused on lies that are most likely to cause harm. Id. at 738.

The Fake News Ban addresses all the concerns noted with the Stolen Valor Act and therefore should be upheld. The Fake News Ban criminalizes knowingly false statements or statements made with reckless disregard for the truth addressing the need for a mens rea requirement. R. at 47. This leaves ample breathing room for valuable speech because no one who accidentally disseminates false facts will be prosecuted. R. at 47. This safeguard allows for valuable speech and eradicates the public's fear of saying the wrong thing and incurring liability for it.

The large breadth that is present in Alvarez is not present here. R. at 47-48. In Alvarez, any fraudulent representation about receipt of military decorations or medals could be criminally prosecuted. United States v. Alvarez, 567 U.S. 709, 715 (2012). Here, only intentional false facts that are broadly disseminated to a certain amount of people for specific reasons are criminalized. R. at 47-48. This directly addresses Justice Breyer's concern for any and everybody being caught under a statute. Id. at 736. The political connoisseur spouting facts he heard off Fox News or from an article he found in a dark hole of the internet would not be prosecuted under this statute. R. at 47-48. Even if this person knew the facts were wrong, unless they were disseminating these false facts to a population of 5,000 or more people, there still would not be criminal liability. R. at 47.

The fine tailoring Justice Breyer suggested is also present here. The specific harm showing is weaved into section 1(c) of the Fake News Ban. R. at 47. The intentional false facts that are broadly disseminated will only be prosecuted if they cause "material harm to public health, safety, national security, or the operation of an essential government function." R. at 47. This tailoring to a specific harm is exactly what Justice Breyer stated was missing from the Stolen Valor Act. United States v. Alvarez, 567 U.S. 709, 736 (2012). This required showing is pertinent to catching only violations that cause gross harms. This shields valued speech and protects First Amendment rights. The Fake News Ban does not burden more speech than necessary to further the government's interest. Any burden is incidental and is

outweighed by the government's substantial interest. Therefore, after an intermediate scrutiny review, Columbia's regulation should be upheld.

C. Even if intentional falsehoods are protected under the First Amendment, and even if Columbia's Fake News Ban imposes a content based restriction, the statute remains constitutional because it survives strict scrutiny.

Even if this Court determines that the speech prohibited by the statute is protected by the First Amendment and that the statute imposes a content based restriction, the statute should still be upheld as constitutional because it survives the relevant strict scrutiny analysis. This strict scrutiny analysis does not consist of a mere "ad hoc balancing of relative social costs and benefits." U.S. v. Stevens, 559 U.S. 460, 470 (2010). Rather, this Court has subjected such inquiries to the "most exacting scrutiny." Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

In United States v. Alvarez, 567 U.S. 709 (2012), this Court explained that a content based restriction on speech will only be upheld as constitutional if (1) there is a compelling government interest in restricting the speech, (2) the restrictions imposed by the statute are necessary to achieve that compelling government interest, and (3) the statute imposes the least restrictive means available. Though Alvarez sets forth an undeniably high burden for content based restrictions on speech, the statute at issue satisfies this burden.

1. Columbia's Fake News Ban addresses a compelling government interest.

A statute that imposes a content based restriction on speech will not be upheld unless there is a compelling government interest in restricting that speech. Id. The statute at issue in this case restricts the dissemination of purported facts when all three of the following criteria are met: (1) the information source knows the purported facts are false; (2) the purpose of disseminating the false facts is to influence the outcome of a contested public election; and (3) the intentionally false facts cause material harm to the operation of an essential government function, including elections. R. at 47-48. More simply, the statute at issue prohibits an information source from disseminating facts that they know are false when their intent is to influence the outcome of a contested public election and when the dissemination causes material harm to an election. Id.

Columbia has a compelling government interest in prohibiting material harm to the operation of its elections. This Court has repeatedly recognized the existence of compelling governmental interests when elections are involved. See Jenness v. Fortson, 403 U.S. 431, 442 (1974) (recognizing that the government has an important interest in "avoiding confusion, deception, and even frustration of the democratic process at the general election"); Bullock v. Carter, 405 U.S. 134, 145 (1972) (designating the government's purpose of avoiding elector confusion as understandable and proper); Storer v. Brown, 415 U.S. 724, 736 (1974) (noting that the government's interest in maintaining the stability of its political system was "not only permissible, but compelling"). As the dissent below notes, our nation's

method of democracy relies upon the public's freedom to access accurate political information in order to make informed voting decisions. R. at 53. Deployment of knowingly false statements that are intended to influence the outcome of a public election and that actually cause material harm to an election actively infringe upon this freedom. Thus, the state of Columbia has a compelling government interest in prohibiting such statements.

This is especially true if this Court employs an as-applied analysis to Segretti's conviction under the statute. New Watergate's 2020 mayoral runoff election was expected to be contentious. R. at 45. This was confirmed when the general election ended with a less than five percent difference between candidates Liddy and Dean. R. at 46. The public was aware of allegations of voter fraud, and widespread concerns about the integrity of the election were rampant. R. at 46. As a worker on Dean's campaign and a social media influencer, Segretti possessed the motivation and means to cause significant harm to the integrity of the mayoral election. R. at 45-46. Even under the guise of Alexander Butterfield, Segretti was able to utilize his social media prowess to gain a following of over 25,000 individuals. R. at 46. This was not a case of a private figure telling a fib to their friends at a house party, but rather one of a candidate's relative and employed staff member using a disguise and a significant public platform to intentionally spread lies in order to influence the outcome of an election. This case offers a perfect example of the conduct targeted by the statute at issue.

2. The restrictions imposed by the Columbia Fake News Ban are necessary to achieve a compelling government interest.

The existence of a compelling government interest is easily settled in this case, but "to recite the Government's compelling interests is not to end the matter." Alvarez, 567 U.S. at 725. First Amendment challenges impose a higher burden—"the First Amendment requires that the [g]overnment's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest." Id. (quoting Brown v. Entertainment Merchants Assn., 564 U.S. 786, 799 (2011)).

To demonstrate that a restriction is necessary, "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." Alvarez, 567 U.S. at 725 (citing Entertainment Merchants Assn., 564 U.S. at 799). Such a causal link is present in this case. The government of Columbia has a compelling interest in preventing material harm to its elections. The statute at issue specifically provides that it prohibits knowingly false statements that are intended to influence the outcome of a public election and that actually cause material harm to the election operation. R. at 47-48. Causation is included as a provision of the statute; the statute does not apply, and therefore cannot restrict speech, when this provision is not satisfied. R. at 47-48. Thus, any application of this statute will necessarily include a direct causal link between the restriction imposed and the injury to be prevented.

In Alvarez, this Court evaluated the constitutionality of a law that prohibited individuals from falsely claiming to be recipients of the Congressional Medal of Honor. Alvarez, 567 U.S. at 714. Though this Court recognized that there was a

legitimate government interest in protecting the integrity of the Medal of Honor, it ruled the law to be unconstitutional because its restriction was not necessary to achieve that interest. Id. at 726. Instead, this Court asserted that the government's interest could be achieved through counterspeech, or refutation of the lie. Id. The defendant in Alvarez was a man who was "widely perceived as a phony"; the man received extensive ridicule online as soon as his false statements were made public. Id. at 727. Thus, counterspeech was effectively able to achieve the government's interest in protecting the integrity of the Medal of Honor: widespread disdain for the man's actions were reflected through news broadcasts and public calls for his resignation from his post as a governmental board member. Id.

Counterspeech would be insufficient to achieve the government's interest in this case. The false statements at issue were published under the internet persona of Alexander Butterfield. R. at 46. Butterfield was not widely perceived as a phony; rather, he quickly amassed a social media following of over 25,000 individuals through posts supporting Liddy's campaign. R. at 46. The recipients of Butterfield's false statements were unaware of the truth--that Butterfield's account was actually run by Segretti, a firm supporter of Dean's candidacy. *Id.* Because Butterfield did not exist in the flesh (under his claimed identity, at least), and because the few potentially identifying facts about him were false, it was impossible for the public to effectively hold him accountable through counterspeech. Thus, there exist no alternative means of achieving the state's interest of preventing the deployment of

knowingly false statements that are intended to influence the outcome of a public election and that actually cause material harm to an election.

3. **Columbia's Fake News Ban imposes the least restrictive means available to achieve a compelling government interest.**

Finally, "when the Government seeks to regulate protected speech, the restriction must be the 'least restrictive means among available, effective alternatives.' Alvarez, 567 at 729 (quoting Ashcroft v. Am. C. L. Union, 542 U.S. 656, 666 (2004)). The statute at issue imposes the least restrictive means available to achieve its purpose.

Though this Court has noted that falsity alone is insufficient to bring speech outside of the protection of the First Amendment, some knowing and reckless falsehoods have been deprived of such protection. Alvarez, 567 U.S. 719 (noting that defamation and fraud do not receive First Amendment protection because they require knowing and reckless falsehoods). The statute in this case includes a knowing requirement. Specifically, the statute only restricts speech when the information source "knows the purported facts are false or recklessly disregards the truth or falsity of those purported facts." R. at 47. This is analogous to the knowing requirements present in many defamation and fraud statutes.

The court below noted that even knowingly or recklessly false statements are not brought outside the protection of the First Amendment unless they are made to gain a material benefit. R. at 49. The statute at issue also includes a material benefit requirement. Indeed, speech is only restricted under the statute when "[t]he

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." R. at 47.

The statute also includes a material harm requirement. Speech will not be restricted by the statute unless, in addition to all other requirements, "[t]he intentionally false facts cause material harm to public health, safety, national security, or the operation of an essential government function." R. at 47. The statute later defines "essential government function" to include elections operations. R. at 47. Because of the material harm provision, the statute will only restrict speech when doing so will directly further the legitimate government interest of preventing such material harm.

The inclusion of these provisions "extend[s] a measure of strategic protection . . . to ensure sufficient 'breathing space' for protected speech." Alvarez, 567 U.S. at 750 (Alito, J., dissenting) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974)). As an example of such breathing space, the court below noted the requirements of reckless disregard for falsity in libel and defamation cases. R. at 49. As discussed, such requirements exist in the statute at issue. Further breathing room is created by the statute's numerous exceptions, including exceptions for republication of information originally disseminated by a bona fide news organization; purported facts communicated as a comment in a forum sponsored,

created, or maintained by a bona fide news organization; purported facts that are substantially true, and more. R. at 47.

Though it is possible that the statute could have a chilling effect on some protected speech, the statute's numerous "breathing space" provisions--its knowing requirement, material benefit requirement, material harm requirement, and exceptions--ensure that the effect would be minimal. Because of these provisions, a less restrictive means of preventing this harm does not exist.

II. COLUMBIA'S BAN ON SURREPTITIOUS RECORDING IS CONSTITUTIONAL REGARDLESS OF WHETHER SURREPTITIOUS RECORDING IS AFFORDED FIRST AMENDMENT PROTECTION, AND REGARDLESS OF WHICH LEVEL OF SCRUTINY IS APPLIED TO THE BAN

The First Amendment protects "the freedom of speech, or of the press" from government infringement. U.S. Const., amend I. This right of the people is protected from state government intrusion through the Fourteenth Amendment. U.S. Const., amend XIV.

A. Surreptitious recording is not protected by the First Amendment; thus, the ban is constitutional.

An analysis of the constitutionality of a government restriction that potentially implicates the First Amendment requires a foundational determination of whether the restricted conduct at issue is protected by the First Amendment, and "if it is not, [the court] need go no further." Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 797 (1985). Courts have analyzed a potential right to

surreptitiously record within two contexts of the First Amendment. The first potential source of a right to surreptitiously record is within the First Amendment's protection of the right to receive information and ideas. Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (stating that the First Amendment protects the right to distribute information and to receive it); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (stating that it was well established that the First Amendment protects the right to receive information and ideas); Whiteland Woods, L.P. v. Township of West Whiteland, 193 F.3d 177, 182-183 (3rd Cir. 1999) (holding that a government ban on filming public meetings shouldn't be examined as a potential restriction speech or other expressive activity, but rather as a potential restriction on the right to receive and record information). The second possible source of a right to surreptitiously record is within the First Amendment's protection of mediums of expression. Burstyn v. Wilson, 343 U.S. 495, 502 (1952) (holding that movies were protected by the First Amendment as significant mediums of expression for the communication of ideas); City of Ladue v. Gilleo, 512 U.S. 43 (1994) (holding that signs on a person's lawn are a medium of expression protected by the First Amendment); ACLU v. Alvarez, 679 F.3d 583, 597 (7th Cir. 2012) (stating that an eavesdropping statute must be examined as a restriction on a medium of expression); Animal Defense Fund v. Wasden, 878 F.3d 1184, 1204 (9th Cir. 2018) (stating that the act of recording is an expressive activity).

1. **A right to surreptitiously record does not exist within the First Amendment right to receive information and ideas**

The court in Whiteland provides a foundation for whether a right to surreptitiously record exists within the right to receive information. 193 F.3d 177 (3rd Cir. 1999). In Whiteland, a Township refused to allow overt videotaping of the Township Planning Commission Meeting, so the issue was "whether there is a federal constitutional right to videotape public meetings of a township planning commission when other effective means of recording the proceedings are available." Id. at 180. The court decided that while some courts may classify recording as "speech or other expressive activity," including the lower court in the case, the proper First Amendment lens was to determine whether the right to record a public meeting existed within the "right to receive and record information" within the First Amendment. Whiteland at 183. The court found that while there was a right of access to the information at the meeting, this right of access "did not create a federal constitutional right to videotape the meetings." Similarly, here, Donald Segretti has a right of access to public information, specifically that relating to politics and government, that cannot be burdened by the government without strict scrutiny implications. See, e.g., Citizens United v. Federal Election Com'n, 558 U.S. 310, 340 (2010) (stating that suppression of political speech must be subject to strict scrutiny).

However, like in Whiteland, Segretti's right to access of government information does not create a right to surreptitiously record. Moreover, a finding of a right to surreptitiously record is fundamentally at odds with the right to receive information. A right to surreptitiously record will necessarily lead to self-censorship

in Columbia and disrupt the free flow of ideas that the Court in Stanley (the case in which the right to receive information was first established), was so adamant about protecting. 394 U.S. 557 (1969). Self-censorship will arise out of the fear of being surreptitiously recorded and will in turn inhibit the right to receive information. A right to surreptitiously record is thus logically incompatible with the well-established right to receive information.

2. A right to surreptitiously record does not exist within the First Amendment protection of mediums of expression

The issue of whether a right to surreptitiously record exists within the First Amendment's protection of mediums of expression remains. In ACLU v. Alvarez, the constitutionality of an Illinois eavesdropping statute that criminalized the audio recording of any conversation without all-party consent was at issue. 679 F. 3d 583, 586 (7th Cir. 2012). In ACLU v. Alvarez, the court found that "[a]udio recording is entitled to First Amendment protection," but went on to take special note of how the restriction specifically "interferes with the gathering and dissemination of information about government officials performing their duties in public" and thus is subject to judicial review of its constitutionality. Id. at 597 & 600. In Animal Legal Defense Fund v. Wasden, the court reviewed the constitutionality of an Idaho statute that prohibited creating nonconsensual "audio or video recordings of the 'conduct of an agricultural production facility's operations.'" 878 F.3d 1184, 1203 (9th Cir. 2018) (citing Idaho Code § 18–7042(1)(d)). The court noted that "there is a 'First Amendment right to film matters of public interest.'" Id. at 1203 (quoting Fordyce of City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995). Moreover, the court

noted how the "recording process is itself expressive" thus entitled it to "First Amendment protection as purely expressive activity." Id. at 1204. Neither Alvarez v. ACLU nor Wasden tend to differentiate between the right to record, and the right to surreptitiously record, which is at issue in the present case. 679 F. 3d 583, 586 (7th Cir. 2012); 878 F.3d 1184, 1203 (9th Cir. 2018). The State of Columbia does not dispute that there is caselaw to support a right to record, specifically where recording has the policy interests of protecting against police wrongdoings and the mistreatment of animals like seen in the previous two cases, however the State of Columbia does dispute that this right exists in the form of surreptitious recording. There is a distinct difference in protecting overt and covert recording. For example, the court in Kelly v. Borough of Carlisle found that while there may be sufficient caselaw to establish a right to record matters of public concern, there was insufficient caselaw to establish that the covert recording of a police officer was protected by the First Amendment. 622 F.3d 248, 261 & 262 (3rd Cir. 2010). Because that Columbia ban on surreptitious recording does not implicate overt recording, the caselaw that establishes a right to record matters of public concern does not hold much weight. The difference between overt and covert recording is the fact that the caselaw in this country has placed an emphasis on the protections of privacy afforded to every citizen. See, e.g. Katz. v. United States, 389 U.S. 347 (1967) (holding that because of the Fourth Amendment, search and seizure without a warrant in a place that a person has a reasonable expectation of privacy is unconstitutional). Because of this country's emphasis on the importance of privacy,

and because caselaw only points to a right to overtly record matters of public concern, a right to surreptitiously record does not materialize.

Opposing counsel argues that the right to surreptitiously record logically flows from the right to reproduce illegally obtained video; however, this is not necessarily true. Bartnicki v. Vopper, 532 U.S. 514 (2001). In Bartnicki v. Vopper, the court held that a restriction on the broadcast and publication of an illegally obtained telephone interception was unconstitutional. 532 U.S. 514 (2001). The Court held this because "'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" Id. at 527 (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 102 (1979)). Moreover, the Court goes on to note how governments may take preventative measures to deter the unlawful conduct of obtaining illegal recordings, but how if the damage is already done, it is unconstitutional to thus restrict publication of the recordings. Id. The Court in Bartnicki was clearly more concerned with the right of the press to reproduce information, but at no point does the Court suggest that the act of illegal recording itself should be afforded any protection, or that illegally creating the recording is subsequently constitutional because of this decision. Id. Likewise here, Columbia does not contest the constitutionality of restricting publication of illegally-obtained recordings, but rather emphasizes the sanctioned restriction of producing nonconsensual recordings.

3. A right to surreptitiously record does not exist within the First Amendment; thus, this is an issue for state legislatures.

Because surreptitious recording is not protected by the First Amendment, this is an issue for the state legislature. Columbia urges the Court to consider the dissent in the lower court's decision by Judge Woodward stating, "[t]welve states, including Columbia, have all-party consent schemes that require individuals recording a communication to have the consent of every party involved." R. at 55. Further, Judge Woodward states that "the First Amendment does not prohibit Columbia from enacting single party or multi-party consent eavesdropping statutes to ensure conversational privacy," and that "holding that a State cannot protect such privacy and public safety interests" diminishes individuals conversational privacy. R. at 55.

B. **Even if surreptitious recording is protected by the First Amendment, the ban is a remains constitutional because it is a manner restriction, and it survives intermediate scrutiny because it is content neutral, narrowly tailored to serve a significant governmental interest, and it leaves open ample alternative channels for communicating the speaker's message.**

1. The ban is a manner restriction.

The Court in Clark v. Community for Creative Non-Violence stated that, "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Further, "restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the

information." Clark at 293 (citing City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); United States v. Grace, 461 U.S. 171 (1983); Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45–46 (1983); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647–648 (1981); Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); Consolidated Edison Co. v. Public Service Comm'n of N.Y., 447 U.S. 530, 535 (1980).

Should the Court find that surreptitious recording is protected by the First Amendment, Columbia's ban is a limitation on the manner of the expressive conduct of surreptitious recording. The Court in Clark, while declining to decide whether sleeping overnight in Lafayette Park as an extension of a demonstration on the plight of the homeless constituted symbolic conduct, found that a ban on the overnight sleeping was a limitation on the manner of symbolic conduct. 468 U.S. 288, 294 (1984). Here, the manner of surreptitiously recording, with the exceptions of what are essentially matters of public concern, is restricted. R. at 50-51. Similar to Clark, the ban doesn't limit all surreptitious recording, nor does the Columbia statute limit the times or places in which one can surreptitiously record, thus the restriction must be restriction on which the manner of surreptitiously recording may be conducted.

2. The ban survives intermediate scrutiny.

After determining that the ban is a manner restriction, the next step in the analysis is to assess whether the ban is content neutral. The act of "[d]eciding

whether a particular regulation is content based, or content neutral is not always a simple task…As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642-643 (1994). Additionally, "[r]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny…because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." (Turner at 642) (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

The Court in Clark found that the regulation was clearly content neutral, and that the regulation could not be faulted "on the ground that without overnight sleeping the plight of the homeless could not be communicated in other ways." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984). In Ward v. Rock Against Racism, the Court explained that the "principal inquiry in determining content neutrality…is whether the government has adopted a regulation of speech before of [agreement or] disagreement with the message it conveys." 491 U.S. 781, 791 (1989). Moreover, "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content based." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 643 (1994) (citing Burson v. Freeman, 504 U.S. 191, 197 (1992); Boos v. Barry, 485 U.S. 312, 318-319 (1988)). Whereas "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content

neutral." Id. at 643 (citing Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981)). The Court in Turner held that must-carry provisions were content neutral, because they "extend[ed] to all cable programmers irrespective of the programming they cho[se] to offer viewers," and because they "benefit[ed] all full power broadcasters…be they commercial or non-commercial, independent or network affiliated, English or Spanish language, religious or secular." Id. at 645. While the must-carry provisions were neutral on their face, the Court goes on to mention that "even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys." Id. at 645 (citing United States v. Eichman, 496 U.S. 310, 315 (1990)). The Court found that Congress' intent in "enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable." Id. at 646.

Segretti cites to Animal Legal Defense Fund v. Wasden to show how Columbia's ban must be unconstitutional, but the ninth circuit court in Wasden found that the ban on recording was content based, thus constituting viewpoint discrimination, because it "prohibit[ed] the recording of a defined topic—'the conduct of an agricultural production facility's operations.'" Animal Legal Defense Fund v. Wasden, 878 F. 3d 1184, 1204 (9th Cir. 2018).. Moreover, the court stated that it was clearly content based "because it 'defin[ed] regulated speech by particular

subject matter.'" Id. at 1204 (citing Reed v. Town of Gilbert). Similarly, the Supreme Court in United States v. Stevens found a statute was content based "when it prohibited 'visual [and] auditory depiction[s]…depending on whether they depict conduct in which a living animal is intentionally harmed." Id. at 1204 (citing United States v. Stevens, 559 U.S. 460, 468 (2010). The Supreme Court in Reed v. Town of Gilbert established that a restriction on speech is content based if "it draws a distinction 'on its face' regarding the message the speaker conveys or 'when the purposed and justification for the law are content based.'" Id. at 1204 (citing Reed at 2228). The court in Wasden also notes that the Supreme Court has discussed how a restriction is content based if law enforcement authorities have to view the content of the speech to determine whether it violates the restriction. Id. at 1204 (citing F.C.C. v. League of Women Voters, 468 U.S. 364, 383 (1984)). In Wasden, the court finds that the restriction is content based because it "depends not just on 'where they say' the message but also—critically—"on what they say." Id. at 1204 (citing McCullen v. Coakley, 134 S.Ct. 2518, 2531 (2014)).

Here, the statute is clearly content neutral because it doesn't discriminate against one viewpoint or another. An individual may surreptitiously record any type of public official in their public capacity. Likewise, an individual is restricted from surreptitiously recording any type of private conversation, regardless of what the content entails. Like the restriction in Turner, the Columbia statute does not promote nor tend not to promote one type of surreptitious recording over another, 512 U.S. 622 (1994). Moreover, the Columbia ban is distinguishable from the ban in

Wasden because the Columbia ban does not restrict surreptitious recording in one context or another. Id. The Columbia ban restricts all surreptitious recording, with exceptions in order to protect privacy.

Next, the Court in Clark noted that the restriction was narrowly tailored because it "neither attempt[ed] to ban sleeping generally nor to ban it everywhere in the parks." 468 U.S. 288, 295 (1984). The regulation furthered "the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them in their presence." Id. at 296. Here, Columbia's substantial interest is protecting conversational privacy, The court in ACLU v. Alvarez does not dispute that privacy is an important government interest, stating that "the protection of personal conversational privacy serves First Amendment interests because 'fear of public disclosure of private conversations might well have a chilling effect on private speech.'" 679 F.3d. 583, 605 (2012) (citing Bartnicki v. Vopper, 532 U.S. 514, 532 (2001)). The interest is protected under Columbia's ban on surreptitious recording, and the ban is narrowly tailored to promote that interest because it still allows for an essential aspect of the First Amendment—recording matters of public concern. The primary issue in ACLU v. Alvarez, was that surreptitious recording of police officers engaging in their public duties would be prohibited by the statute at issue, whereas here that concern does not exist because the statute allows for the recording of public officials in their public capacity. Id.

C. Even if the ban if surreptitious recording is protected by the First Amendment, and even if Columbia's ban on surreptitious recording is content based, it remains constitutional when subject to strict scrutiny because it is necessary to serve a compelling state interest, and it is narrowly tailored to achieve that end.

The Court has held that "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 641-642 (1994) (citing R.A.V. v. St. Paul, 505 U.S. 377, 382-383 (1992); Texas v. Johnson, 491 U.S. 397, 414 (1989)). A content based regulation is constitutional if it "is necessary to serve a compelling state interest" and "is narrowly drawn to achieve that end." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The Ninth Circuit has interpreted strict scrutiny in this context as "'an exacting test' requiring 'some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve the goal.'" Wasden at 1204 (citing Turner at 680).

1. The ban is necessary to serve a compelling state interest.

The restriction in Wasden was under-inclusive, because it only protected the privacy interests of agricultural production, and amounted to state-backed censorship of agricultural production facilities. 878 F. 3d 1184, 1205 (9th Cir. 2018). Moreover, the court in Wasden found that the restriction at issue was over-inclusive, in that it restricted more speech than necessary, because there were other laws that were available to agricultural facility owners to protect their privacy, such

as laws against trade secrets, invasion of privacy, and defamation. Id. The ninth circuit stated that "[b]ecause there are 'various other laws at [Idaho's] disposal that would allot it to achieve its stated interests while burdening little or no speech,' the law is not narrowly tailored." Id. at 1205 (quoting Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 949 (9th Cir. 2011).

Here, the ban is necessary to serve the compelling state interest of privacy. While this brief has already discussed how a state interest of privacy is substantial, the interest is also compelling and necessary to protect the First Amendment. As previously stated, a restriction on surreptitious recording prevents self-censorship, and promotes free speaking without fear of that speech being broadcast publicly. An essential aspect of free speech is the ability to monitor and adjust one's speech, should there be a recording present. Libel and defamation laws exist as recourse to help protect this critical aspect of speech, which emphasizes the governmental interest in protecting it.

2. The ban is narrowly drawn to achieve that end.

The court in Wasden noted how the government did not explain "how limiting the filming of operations, but nothing else, effectuates its interests [of privacy and property] better than eliminating all audio and video recordings at agricultural production facilities." Id. at 1205. The court explains how this statute cannot truly protect privacy, because it only protects the privacy of agricultural production (not just something like an unauthorized filming of birthday party or something). Ultimately, "[w]ithout some legitimate explanation, [the ninth circuit court was] left

to conclude that Idaho [was] singling out for suppression one mode of speech—audio and video recordings of agricultural operations—to keep controversy and suspect practices out of the public eye." Id. at 1205.

Using the exacting test of Wasden, and the court's reasoning, it is clear that the Columbia statute is narrowly drawn to achieve the substantial government interest in protecting conversational privacy. Id. Here, Columbia is careful to protect the interest of monitoring matters of public concern, while maintaining the compelling interest of conversational privacy. Unlike Wasden, the Columbia ban does not protect conversational privacy only in some settings, which would make it underinclusive and not truly protective of conversational privacy, but rather it protects conversational privacy in all instances, while still accounting for there promotion of critique and dissemination of matters of public concern. A private conversation, not engaged in by a political figure in that figure's public capacity, is at its core, not a matter of public concern. The Columbia statute carefully and successfully balances the several critical interests at issue here.

CONCLUSION

For the foregoing reasons, the Petitioner, the State of Columbia, respectfully requests that this Court uphold the Appellant's convictions under Sections 31.002 and 39.601 of the Columbia Revised Civil Statutes.