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 209

QUESTIONS PRESENTED

1. Whether Columbia's Fake News Ban is an unconstitutional restriction of speech that fails strict scrutiny because it is not narrowly tailored to achieve a compelling state interest.
2. Whether Columbia's Secretive Recordings Ban is an unconstitutional restriction of political expression that fails strict scrutiny because it is not narrowly tailored to achieve a compelling state interest.

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CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

This case involves the First Amendment to the United States Constitution, which provides:

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

This case also involves Columbia's fake news ban and surreptitious recording ban which state:

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.

STATEMENT OF THE CASE

I. Statement of the Facts

Protection of the fundamental liberty of free speech is detrimental to our republican system of self-government. R. at 2. Therefore, citizens must be able to engage in uninhibited public debate and freely criticize the government. R. at 2, 6. In early 2020, Respondent Donald Segretti, a twenty-year-old college student at Magruder University, began working on his aunt, Joan Dean's, mayoral campaign in New Watergate, Columbia. R. at 2. At that time, Mr. Segretti had over 220,000 total followers on his various social media platforms. R. at 2. He posted original content on his platforms and earned $45,000 annually.

The highly contested mayoral election had twelve candidates, but many voters had serious concerns about the integrity of the election. R. at 3. There were also allegations of voter fraud and misconduct by poll officials. R. at 3. After the general election, a run-off was conducted between two candidates, Mr. Segretti's aunt and Gordon Liddy. Mr. Segretti created a social media profile that criticized the integrity of the election and the chair of the Election Commission, Joanne Erlichman. R. at 3. The profile used a pseudonym, Alexander Butterfield, amassed 25,000 followers, and supported Gordon Liddy's campaign for mayor. R. at 3.

Prior to the run-off, Butterfield accused Erlichman of using her political influence to assist Dean, even breaking a story that she had falsely certified 394 absentee ballots to do so. R. at 3. Butterfield also posted a video of Dean and Erlichman that ended with Erlichman saying, "I'll take care of it." R. at 3. The incumbent mayor investigated the allegations of misconduct and found no evidence

that Erlichman was guilty. R. at 3. Media outlets reported the results of the investigation and also speculated on the rumors from Butterfield's social media posts. R. at 3.

On December 11, 2020, Dean won the run-off election with only 14% of voter participation. R. at 3. New Watergate police then discovered that Mr. Segretti created the Butterfield account and had secretly recorded the conversation between Dean and Erlichman. R. at 3. Dean, Erlichman and Liddy were all unaware of Mr. Segretti's actions, and he was subsequently arrested. R. at 3.

II. Procedural History

After the election, the state of Columbia charged the respondent with violating both the ban on disseminating fake news and the ban on secretly recording others. R. at 4. A jury in the District Court of Mitchell County found the respondent guilty of both counts, and he was sentenced to nine months in jail and fines totaling $1,125. R. at 4. Respondent then filed a petition for review with the Supreme Court of the State of Columbia. R. at 4. Respondent argued that both the Fake News Ban conviction and the Secretive Recording Ban conviction violated his constitutional rights. R. at 4, 7.

On June 28, 2021, the Supreme Court of the State of Columbia reversed the conviction and remanded the case for dismissal. R. at 10. Specifically, the supreme court held that the fake news ban was overly broad, under inclusive, and was a content-based restriction on political speech that could not withstand strict scrutiny. R. at 6-7. The court also held that the secretive recording ban failed strict

scrutiny because it served no compelling government interest, was not narrowly tailored, and did not make use of the least restrictive means to achieve that interest. R. at 10. The Petitioner then appealed the supreme court's reversal to the Supreme Court of the United States.

SUMMARY OF THE ARGUMENT

This Court should affirm the Supreme Court of Columbia because the Fake News Ban statute violates the First Amendment. The First Amendment's protection of speech is extended to both true and false speech, as there is social value in false information, and Columbia's Fake News Ban fails the strict scrutiny analysis because it is content-based but is not narrowly tailored to meet a compelling government interest. Even if public trust in the integrity of elections is a compelling interest, the statute chills speech and is underinclusive of all false political speech. Therefore, the state of Columbia could use less restrictive means to attain its goal without ignoring the value of false information in the idea marketplace.

This Court should affirm the Supreme Court of Columbia because the Secretive Recording Ban is unconstitutional. Audio and video recordings are means of expression protected by the First Amendment and can be intertwined with political speech. Therefore, strict scrutiny should apply. Columbia's ban fails the strict scrutiny analysis in its attempt to abridge this right because the ban is not narrowly tailored to achieve a compelling government interest. But even if the strict scrutiny analysis does not apply, the Secretive Recording Ban is unconstitutional because the Ban does not pass intermediate scrutiny.

ARGUMENT

I. The Lower Court Correctly Held That the Fake News Ban is Unconstitutional Because it Fails to Meet Strict Scrutiny.

The First Amendment's protection of speech demonstrates "a profound national commitment to the principle that public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In the spirit of robust public debate, this Court has not forfeited protection of political false speech, yet Columbia's Fake News Ban seeks to do that exact thing.

A. Because the Fake News Ban is a Content-Based Restriction on Speech, it is Subject to Strict Scrutiny.

The Fake News Ban criminalizes speech made "to enhance the financial interest of the information source, to influence the outcome of a contested public election, or to promote the interest of a foreign government." Col. Rev. Civ. Stat. § 31.002. Since the statute "targets speech based on its communicative content," *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)) it is a content-based restriction and is subject to strict scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994).

Content-based laws are laws that restrict speech based on its subject matter or viewpoint. *Boos v. Barry*, 485 U.S. 312, 318-20 (1988). The Court is weary of content-based restrictions because under the First Amendment, the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

Restrictions on subject matter are subject to strict scrutiny because "[t]o allow a government the choice of permissible subjects for public debate would be to

allow that government control over the search for political truth." *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 538 (1980). In *Boos*, the Court invalidated a city ordinance that prohibited the display of any sign within 500 feet of a foreign embassy that brought that foreign government into "public odium" or "public disrepute." 485 U.S. at 315. The ordinance was a content-based restriction because even though it prohibited all negative signs against foreign governments irrespective of viewpoint, it still prohibited an entire category of speech and therefore, was subject to strict scrutiny.

Here, the Fake News Ban restricts three categories of speech: speech that enhances the speaker's financial interests, influences the outcome of a contested election, or promotes the interests of a foreign government. Col. Rev. Civ. Stat. § 31.002. Because it is a content-based restriction on subject matter, the Fake News Ban is subject to strict scrutiny.

B. The Fake News Ban Does Not Pass Strict Scrutiny.

For a law to pass strict scrutiny, it must further a compelling government interest and be narrowly tailored to meet that interest. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. at 163. The Fake News Ban is not narrowly tailored to meet a compelling government interest. The purpose of the statute is to protect the "public health, safety, and national security" and "operation[s] of essential government function[s]" from false information. Columbia Revised Civil Statutes § 31.002. One of Columbia's essential government functions, as defined in the statute, is overseeing elections. Ensuring that the public trusts the integrity of its elections is

a compelling government interest. While these interests are valid concerns, the statute is not narrowly tailored to meet those interests because there is no evidence of the restricted speech causing a material harm to the election, the statute chills speech, the statute is under inclusive, and there are less restrictive means to achieving the government interests.

The First Amendment requires that there be a "direct causal link between the restriction imposed and the injury to be prevented." *United States v. Alvarez*, 567 U.S. 709, 720 (2012) (citing *Brown v. Ent. Merch. Assn.*, 564 U.S. 786, 799 (2011)). No evidence has been presented to show that the false claims made by the respondent led to a material harm to the election. There is no certainty that the respondent's speech convinced anyone to distrust the integrity of the election such that a person chose not to vote or chose to change their vote. Even if the speech did sway a person's decision regarding the election, the First Amendment still provides protection for the speech. The First Amendment "invites dispute" *Terminiello v. City of Chi.*, 337 U.S. 1, 3 (1949) which includes "unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S 254, 270 (1964). A natural side effect of dispute *Terminiello*, U.S. at 3 and attacks on public officials" *N.Y. Times Co.*, U.S. at 270 is questioning the integrity of elections, which is not a material harm the Court has held to require the regulation of speech.

The statute is also not narrowly tailored because it chills speech that "lies at the First Amendment's heart." *United States v. Alvarez*, 567 U.S. 709, 734 (2012) (Breyer, J., concurring) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41

(1974)). In *Gertz*, the Court defended the importance of false speech, stating, "The First Amendment requires that we protect some falsehood in order to protect speech that matters." 418 U.S. at 341. Here, people would likely refrain from speaking about anything related to their financial interests, public elections, of foreign policy in fear of potentially violating the Fake News Ban. Some speech on these topics would still be protected, yet the chilling effect of the statute would discourage people from speaking. Since the statute heavily focuses on political speech, people with views contrary to the government would likely fear that the government could selectively use the statute as a weapon against them. *United States v. Alvarez*, 567 U.S. 709, 734 (Breyer, J., concurring).

The statute is under inclusive because it does not cover all false political speech. In *Korematsu,* an executive order forcing Japanese Americans to live in internment camps was under inclusive because it failed to reach all disloyal U.S. citizens who might seek to sabotage the efforts of the U.S. in World War II. 323 U.S. 214 (1944).[1] Here, the Fake News Ban also fails to meet the purpose of eliminating false political speech. The statute only prohibits knowingly or recklessly made false statements, yet most misinformation is spread by people believing the false statements to be true. If the goal of the statute is to promote public trust in its elections and to allow voters to be well informed, then the statute fails to achieve this goal.

[1] The Court first upheld the government action in *Korematsu* but later overturned the 1944 holding in *Trump v. Hawaii*, 138 U.S. 2392 (2018).

Also, the statute only applies to specific information sources, one of which is "any entity, organizing, or individual with more than 5,000 followers on social media." Col. Rev. Civ. Stat. § 31.002. The threshold of 5,000 followers is arbitrary. There is no evidence that a social media account with 5,000 followers can materially harm the public health, safety, national security, or essential government function in a way that an account with less followers could not. Additionally, the evidence of an account's impact on an election is nearly impossible to collect. This arbitrary threshold further makes the statute under inclusive.

While preserving the truth about elections is a notable goal, Columbia could achieve this goal through less restrictive means. Counter-speech providing context to the respondent's speech would suffice to achieve the government interest. *United States v. Alvarez*, 567 U.S. at 726. False speech should be fought by more speech, not less speech. As Justice Brandeis famously notes, "If there be time to expose through discussion, the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring). The government should not decide what is factual and what is not. If false information spreads, the First Amendment allows true information to also spread and in turn, counter the false information.

Other courts have reached similar conclusions. In *Susan B. Anthony List v. Dreihaus*, the Sixth Circuit invalidated Ohio's political false statement law because it was a content-based restriction that was not narrowly tailored to meet the

purpose of ensuring public trust in its elections. 814 F.3d 466, 476 (6th Cir. 2016). In *218 Care Committee v. Arneson*, the Eighth Circuit held that "no amount of narrow tailoring succeeds because [Minnesota's political false statements law] is not necessary, is simultaneously overbroad and underinclusive, and is not the least restrictive means of achieving any stated goal." 766 F.3d 744, 785 (8th Cir. 2014). Other states with similar political false statement laws have also reached similar conclusions. *Commonwealth v. Lucas*, 34 N.E.3d 1242 (Mass. 2015); *Rickert v. State, Public Disclosure Com'n*, 168 P.3d 826 (Wash. 2007).

C. There is Social Value in False Information.

The Court has recognized a narrow set of circumstances in which subject matter restrictions on speech are permitted due to the lack of social value in the speech. *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *New York. v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement of illegal activity). To balance freedom of speech with the need for social order, these categories receive less protection than other forms of speech.

Some categories, such as obscenity, receive no protection due to being "utterly without redeeming social purpose." *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413, 418 (1966). Misinformation is not comparable to obscenity because there is value in false speech, especially political false speech. In politics, the line between fact and fiction is blurry, and information sources often have their own political motives for their speech. To

compare false statements to obscenity or child pornography, another category that receives no protection *New York v. Ferber*, 458 U.S. 747 (1982), would be an improper comparison. There is no remedy to obscenity or child pornography in the same way true statements provide a remedy to false statements.

Permitting speech that dampens public trust in the government is an acceptable consequence of protecting the right to freely criticize the government. In an environment of "open and vigorous expression of views," false statements are inevitable. *United States v. Alvarez*, 567 U.S. at 718. False speech stirs debate and helps determine what the truth is. That determination, especially when dealing with political topics, is for the people to reach, not the government. While something may be objectively true to one person, another may view it to be a subjective opinion than a statement of fact. Nonetheless, free public discourse gets to decide whether a statement is fact or fiction without fear of government intervention.

Other categories of speech receive only some protection. Fighting words are prohibited if the speech is directed at another person and is likely to elicit a violent response. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Similarly, speech directed to inciting or producing imminent harm that has a likelihood of producing illegal such action is prohibited. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Both categories of speech have strict requirements to allow the government to prohibit the speech. Both require the speech be directed at a particular person and have a likelihood of effecting a negative outcome. While the Fake News Ban does include an intent element of "knowingly or recklessly" spreading fake news, the statute does

not require the speech be directed at a specific person nor the speech to have influenced that person in a negative way.

The Court has never considered false political speech another category of speech that receives less protection. Since false political speech does have social value, prohibiting it is unconstitutional.

II. The Lower Court Correctly Held That the Secretive Recording Ban is Unconstitutional Because the Ban Fails to Meet Strict Scrutiny.

The First Amendment "preserve[s] an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broad Co. v. FCC*, 395 U.S. 367, 390 (1969). The Secretive Recording Ban prohibits the knowing or purposeful recording of 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." Col. Rev. Civ. Stat. § 39.061. The Secretive Recording Ban's broad language limits important speech that could otherwise contribute to the marketplace of ideas.

Justice Brandeis stated: "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis D. Brandeis, *Other People's Money and How Bankers Use It* 92 (1914). Allowing the secretive recording of government officials would further the goal of open communication about matters of public interest. While the Secretive Recording Ban protects the privacy of other

individuals, the individual doing the recording also has important First Amendment rights that need protection.

A. The First Amendment Protects the Creation and Distribution of Video Recordings.

Audio and visual "recordings are protected by the First Amendment as recognized 'organ[s] of public opinion' and as a 'significant medium for the communication of ideas.'" *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)). This Court's precedent illustrates the many forms of expression protected by the First Amendment. Actual speech is protected by the First Amendment. *See* U.S. Const. amend. I. In *United States v. Playboy Entertainment Group*, the Court held that cable television shows are considered protected expression. 529 U.S. 803, 826-27 (2000). In *United States v. Stevens*, this Court held that videos were also protected speech. 559 U.S. 460, 481-82 (2010). Finally, in *Joseph Burstyn Inc., v. Wilson*, this Court held that movies were considered speech protected by the First Amendment. 343 U.S. 495, 501-02 (1952).

In *Joseph Burstyn Inc.*, this Court held that a State may not ban a film based on a determination that the film is "sacrilegious." 343 U.S. at 506. This Court recognized films as a category of expression protected by the First Amendment. *Id.* at 502-03. The Court reasoned that "[i]t cannot be doubted that motion pictures are a significant medium for the communication of ideas" and that "they may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all

artistic expression." *Id.* at 501. Although *Joseph Burstyn, Inc.* dealt with movies rather than recordings, the reasoning still applies to the distribution of recordings. Given the rise of social media platforms, video recordings play an even more important role in affecting public attitudes.

The creation of audio and video recordings is also protected because the process is "inextricably intertwined" with the result. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010); *see also Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988) (recognizing that First Amendment protections also apply to conduct that has "a close enough nexus to expression" or is "commonly associated with expression"); *Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582, 592-93 (1983) (stating that taxing ink and paper "burdens rights protected by the First Amendment"). Additionally, the creation of audio and video recordings is critical to the eventual dissemination of the videos. *See Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (reasoning that campaign donations are necessary to the ultimate message). For this reason, the Secretive Recording Ban's limitation on the ability to create these recordings also affects speech protected by the First Amendment.

This Court also recognizes other important protected speech including the reproduction of speech and distribution of recordings of third-party individuals. *See Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston*, 515 U.S. 557, 570 (1995) (reasoning that the reproduction of "speech generated by other persons" is protected by the First Amendment); *Bartnicki v. Vopper*, 532 U.S. 514, 534-35

(2001) (holding that use of an illegally obtained recording was protected by the First Amendment because the recording concerned a matter of public importance and since the defendants did not participate in the illegal recording).

B. Because the Secret Recording Ban is An Expression Protected By the First Amendment, and This Expression is Inextricably Tied to Political Speech, Strict Scrutiny Should Apply.

Multiple circuits recognize a First Amendment right to secretly record. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1205 (9th Cir. 2018); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 259 n.7 (3rd Cir. 2010) (stating that "it is unclear why the 'surreptitious' nature of the videotaping would be significant to whether the videotaping implicates the existence of a First Amendment right or its clearly established nature"). The Seventh Circuit however, stressed the difference between known recordings and secretive recordings. *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). The Fifth Circuit also does not protect the right to secretly record. *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338 (5th Cir. 2017) (holding that students' secret recording of high school teacher was not protected by the First Amendment).

In *Wasden*, Idaho enacted a law which prohibited a person from going into a private agricultural facility and making recordings of the operations without consent from the facility owner. 878 F.3d at 1203. The court stated that the First Amendment protects audio and visual recordings because the recording is an expressive activity. *Id.* at 1203. The court applied strict scrutiny because the ban was a content-based discrimination on speech. *Id.* at 1204. In its strict scrutiny

analysis, the court reasoned that the prohibition was "over-inclusive and suppresse[d] more speech than necessary to further Idaho's stated goals of protection property and privacy." *Id.*

As demonstrated by its application in this case, the Ban restricts important speech, including political speech. Although the Ban is not an outright content-based restriction as seen in *Wasden*, the Ban effectively limits this type of important political speech. The First Amendment protects the discussion of public officials and issues of public concern. *See Mills v. Alabama*, 384 U.S. 214, 218 (1966) (holding that the First Amendment protects the discussion of public officials and issues of public concern). In *Mills*, this Court held that a state law prohibiting an editor of a daily newspaper from publishing "an editorial on election day urging people to vote a certain way on issues submitted to [the editors]" was unconstitutional. *Id.* at 215, 220. This Court reasoned that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Id.* at 218. Allowing recordings of public officials contributes to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Audiovisual recordings are means of expression protected by the First Amendment. The Secretive Recording Ban prohibits the recording of public officials outside of their official capacities, essentially shutting down that mode of expression. The prohibition on secretive recording of government officials should therefore be subject to strict scrutiny review.

C. The Secretive Recording Ban Does Not Pass Strict Scrutiny.

Strict scrutiny sets out a high bar 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." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 680 (1994) (O'Connor, J., concurring in part). To pass strict scrutiny, there must be a compelling state interest and the statute must be narrowly tailored to achieve that interest. *Wasden*, 878 F.3d at 1204.

Columbia's interest in enacting this statute is the protection of its citizens' privacy. The government has an interest is prohibiting individuals from intruding on the privacy of its citizens by recording them without their knowledge. Even though Columbia likely has a compelling state interest, the Secretive Recording Ban fails the other prong of the strict scrutiny analysis.

The Secretive Recording Ban is not narrowly tailored because the prohibition is overbroad. Although the prohibition on secretive recordings does protect the privacy of individuals, the statute also bans important means of expression. Secretive recording allows an individual to gain access that might otherwise be altered once the subject of the video knows that a recording is taking place. This expression is even more important in the context of government officials. To not allow the secret recording of government officials when they are not acting in their roles could prohibit individuals from gaining valuable information crucial to the public's interest.

This Secretive Recording Ban prohibits the gathering of this important information and hampers the public's ability to hold government officials accountable. As in *Wasden*, this statute is "over-inclusive and suppresses more speech that necessary" to achieve Columbia's goal of protecting privacy. 878 F.3d at 1205. The Ban is overbroad and therefore, is not narrowly tailored to achieve Columbia's interest in protecting the privacy of individuals.

Additionally, though Columbia does have a compelling state interest in protecting the privacy of individuals, there are less restrictive means to achieve the state's interest. *See United States v. Playboy Entm't Grp.*, 529 U.S. at 816, 827 (holding that the cable television regulation was unconstitutional because there were less restrictive means available to achieve the government's interest). The Ban does not address the issue of an individual making a recording in a place that the individual was invited to or has a right to be. The statute could provide a less restrictive means of protecting privacy by distinguishing between a trespasser and someone who was invited or has a right to be in the place where the recording takes place. This distinction would help further Columbia's privacy interests by limiting the recording to places where the person recording has a right to be so that the individual being recorded might be more on notice. The Secretive Recording Ban does not provide for this distinction and so the Ban could use less restrictive means to achieve the compelling state interest. For the foregoing reasons, the Secretive Recording Ban does not pass strict scrutiny, and should therefore be deemed unconstitutional.

D. Even if Strict Scrutiny Does Not Apply, the Secretive Recoding Ban Does Not Pass Intermediate Scrutiny

"Our cases make clear … that … the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are 'justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

In *Clark*, the regulation prohibited "camping" on the park grounds but allowed "demonstrations for the airing of views or grievances" through permits. 468 U.S. at 290-91. The respondent in *Clark* planned a demonstration to show the "plight of the homeless." *Id.* at 291-92. In this case, the Court stated that "overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment." *Id.* at 293. The Court then used a time, place, manner analysis because any expression, "whether oral or written or symbolized by conduct," is subject to this analysis. *Id.* Although the Court held that the regulation was a proper time, place, manner restriction, *Clark* provides guidance for time, place, manner analysis. *Id.* at 299.

The Secretive Recording Ban is a reasonable time, place, manner restriction. The Ban regulates the time and place of secretive recordings by restricting these recordings to times when government officials are acting in their official capacities. The Ban is also a manner restriction because it prohibits the secretive recording

rather than any recording. Although the Ban is a reasonable time, place, manner restriction, the Ban is still subject to other requirements of intermediate scrutiny.

The Secretive Recording Ban does not pass intermediate scrutiny. The first consideration in this analysis is whether the restriction references the content of the regulated speech. *Ward*, 491 U.S. at 791. Here, the Ban does not reference the content of the prohibited speech. The Ban applies generally to secret recordings with few exceptions.

The second consideration is whether the restriction is "narrowly tailored to serve a significant government interest." *Id.* The Secretive Recording Ban is not narrowly tailored to serve a significant government interest. Columbia likely has a significant interest in protecting the privacy of its citizens, but this Ban is overbroad. The Ban effectively prohibits important political speech. The First Amendment protects interactions with government officials and matters of public interest. *Mills*, 384 U.S. at 218. While the privacy of one's own home is an important consideration, the Secretive Recording Ban does not distinguish between a recording that occurs in a place the individual making the recording has a right to be and a recording that takes place where the individual does not have a right to be.

The third consideration is whether the restriction "leave[s] open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791. The Secretive Recording Ban does not leave other ample channels for communication of the information. While an individual could transcribe the events that take place, the ability to record an event eliminates the legitimacy question

that would otherwise dilute the witness' statement. These other channels are much less effective than the audio or video recording of the event. For the foregoing reasons, the Secretive Recording Ban does not pass intermediate scrutiny and should be deemed unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should AFFIRM the Columbia State Supreme Court's findings that both the Fake News Ban and the Secretive Recording Ban are unconstitutional.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT