No. 211

IN THE
SUPREME COURT OF THE UNITED STATES

Spring Term 2022

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 211
Counsel for Respondent

Oral Argument Requested

QUESTIONS PRESENTED

1) Whether a state statute banning dissemination of fake news on social media platforms violates a person's First Amendment?
2) Whether a state statute banning surreptitious recording of a political candidate in a public place violates First Amendment's rights?

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The decision of the 112th District Court of Mitchell County is published at 131 Col. Rptr. 44 (Col. 2021). The decision of the Supreme Court of the State of Columbia is published at 131 Col. Rptr. 44 (Col. 2021).

STATEMENT OF THE CASE

I. Statement of The Facts

In 2018, Respondent Donald Segretti ("Mr. Segretti") was a 20-year-old college student attending Magruder University in New Watergate, Columbia. *Segretti v. State of Columbia*, 131 Col. Rptr. 44, 45 (Col. 2021). Mr. Segretti earns his living as a social media influencer. *Id*. In the last few years, he has gone from being a follower with a meager social media presence, to being a respected influencer with the power to affect the buying habits of others by the end of 2020. *Id*. Mr. Segretti has over 220,000 followers on social media platforms like Instagram, YouTube, and TikTok. *Id*.

In early 2020, Mr. Segretti started working on his aunt's campaign for Mayor of New Watergate. *Id*. New Watergate is a city if 675,000 and its elections are always contentious. *Id*. Mr. Segretti's aunt, Joan Dean, was one of twelve candidates seeking the office against her longtime political rival, Gordon Liddy. *Id*. The general election went as expected with Liddy finishing with 28 percent of the vote and Dean with 23 percent of the vote. *Id*. at 46. A runoff election was scheduled between Liddy and Dean for the first Saturday in December 11, 2020. *Id*. Mr. Segretti put his expertise to the test and created a pseudonym that he used to operate a social media page to assist his aunt, Dean in the election. *Id*.

After general election results were certified, reports surfaced on a social media post that the current chair of the Election Commission, Joanne Erlichman,

used her influence to help Dean win the runoff. *Id.* On December 11, 2020, the runoff results were certified. *Id.* Dean defeated by 5 percentage points, which many attributed to low voter turnout. *Id.* Only 14 percent of registered voters participated in the runoff. *Id.* However, the 112th District Court of Mitchell County found that Mr. Segretti violated the ban on disseminating fake news and for violating the ban on surreptitiously recording others. *Id.* at 47.

II. Course of Proceedings and Disposition in the Court Below

The State charged Mr. Segretti for violating the ban on disseminating fake news and for violating the ban on surreptitiously recording others. *Id.* at 47. After a jury found Mr. Segretti guilty of both counts, the 112th District Court of Mitchell County sentenced him to 5 months in jail and a $750 fine for the fake news conviction and to 4 months in jail and a $375 fine for the surreptitious recording conviction. *Id.*

This appeal implicates two significant aspects of First Amendment protections: first, the Free Speech Clause's need for "breathing space" such that even false statement of fact receives constitutional protection. *Id.* at 45. Second, the need to surreptitiously record others while gathering information for dissemination. *Id.* Mr. Segretti challenges his convictions violating Section 31.002 and Section 39.601 of the Columbia Revised Civil Statutes. *Id.* at 47, 50.

SUMMARY OF THE ARGUMENT

There are two issues before this Court. Respondent asks this Court to affirm the Supreme Court of Columbia's holding on the fake news ban because the First Amendment protects even false speech. Mr. Segretti does not contest the district court's findings that he violated the statute; rather he challenges its constitutionality. Fake news is a part of the marketplace of ideas and is necessary for a democratic society to determine the best ideas. All speech has value even if its intentions are to stir debate. In *United States v. Alvarez*, the proposition that speech may be punished merely because it is untrue and where the speaker is benefitted other than a self-esteem boost, the court says, is subject to the First Amendment protections. Thus, Mr. Segretti fake news requires special constitutional protections.

As for the second issue, this Court should reverse the decision of the Supreme Court of Columbia and decide that the First Amendment protects Mr. Segretti's right to surreptitiously record in a place where he has a right to be.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DECISION TO REVERSE THE DISTRICT COURT'S HOLDING BECAUSE IT IS FAITHFUL TO THIS COURT'S FIRST AMENDMENT JURISPRUDENCE

The decision of the Supreme Court of Columbia should be affirmed because this Court's First Amendment precedent demonstrates that false statements such as fake news is expression protected under the First Amendment. This Court has stated that "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society." *United States v. Alvarez*, 567 U.S. 709, 727-729 (2012). Additionally, government restrictions on content-based speech have been struck down by this Court because it is apprehensive that if such laws could be promulgated, "the government may effectively drive certain ideas or viewpoints from the marketplace," and "[t]he First Amendment presumptively places this sort of discrimination beyond the power of the government." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). Furthermore, this Court summarized in *United States v. Playboy Entertainment Group*, Inc.: "It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy* Entertainment *Group, Inc.*, 529 U.S. 801, 818 (2000).

In following with this Court's tradition of invalidating statutes that criminalize content-based expression which violate the First Amendment, the Supreme Court of Columbia found the statute unconstitutional for three reasons.

First, it found that Section 31.002 of the Columbia Revised Civil Statutes fails strict scrutiny because the government's compelling interest in prohibiting certain kinds of political speech was not narrowly tailored to serve its interest.

Second, it emphasized that even false speech has value in the marketplace of ideas. In order to not improperly suppress protected speech, the marketplace of ideas sometimes permits lies in certain circumstances. "Fake news is part of the price we pay for a free society." *Segretti v. State of Columbia*, 131 Col. Rptr. 49 (Col. 2021). "The best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Third, it recognized that the ban on disseminating fake news is governmental overreach because the ban is too overbroad and violates the First Amendment since it regulates substantially more expression than necessary and thus chill otherwise protected expression.

A. The Columbia Fake News Ban Statute Is a Content-Based Restriction on Speech and Fails Strict Scrutiny

Fake news is defined under the statute narrowly as (1) intentionally false statements (2) of fact, (3) broadly disseminated, (4) for a self-serving purpose, (5) that causes public harm. *Segretti v. State of Columbia*, at 48. The Columbia statute restricts speech and as a result it requires First Amendment protection. *See Texas v. Johnson*, 491 U.S. 397, 403 (1989).

Legal precedent indicates that disseminating or making online posts is considered speech. The North Carolina Supreme Court held when addressing

Facebook posts that violated North Carolina's cyberbullying statute, "[s]uch communication does not lose protection merely because it involves the 'act' of posting information online, for much speech requires an 'act' of some variety . . . ." *State v. Bishop*, 787 S.E.2d 814, 818 (N.C. 2016); *See* also *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790, (2011) ("And whatever the challenges of applying the Constitution to ever advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). Here, as a medium to express his opinion regarding political figures, Mr. Segretti posted a social media post utilizing captions over a photo, and a video capturing a conversation. *Segretti v. State of Columbia*, at 46. This is akin to symbolic expression. *See Texas v. Johnson*, 491 U.S. at 397.

Additionally, the statute seeks to restrict content-based speech because it targets to penalize the intentional dissemination of fake news on core political speech. *Segretti v. State of Columbia*, at 50. As in *United States v. Alvarez*, the statute's prohibition extends only to a certain type of speech (false speech) that spreads a certain message (the "occurrence or impending occurrence of a crime, catastrophe or emergency"). *United States v. Alvarez*, 567 U.S. 709, 715 (2012). ("The Government contends the criminal prohibition is a proper means to further its purpose in creating and awarding the Medal. When content-based speech regulation is in question, however, exacting scrutiny is required."). Because the Columbia's statute restricts content-based speech, it is therefore subject to strict scrutiny. *Id.*

As a result, the government must show that it has a compelling government interest and is narrowly tailored to promote it. Here, the compelling government interest implicated for proscribing the dissemination of fake news could be to promote public health, safety, national security, or the operation of an essential government function. *Segretti v. State of Columbia*, at 47. However, the statute is not narrowly tailored to promote those interests in the context of speech made on social media platforms. The reason being is that there are other least restrictive ways whereby the government could achieve its interests. The statute states in part regarding the information source as follows:

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.

Col. Rev. Stat. §§ 31.002.

The statute could potentially criminalize speech even when humor or satire, which have been recognized as legitimate and important forms of speech, is involved.

See 20 CARDOZO ARTS & ENT. L.J. 589, 603 (2002) (contending that satire is useful because it uses recognized symbols to "ridicule or criticize political institutions, cultural values, or media presentations"). One of the issues in *Alvarez* was that the Stolen Valor Act was injurious to free speech because it proscribed useful false statements along with more harmful ones. *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring). Here, the statute states that 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*." Col. Rev. Stat. §§ 31.002, Section 2, Exceptions, d. Consequently, someone could say a half-true and will get penalized under the statute.

Although, this Court has previously upheld the "interest of the community in maintaining peace and order on the streets," as a compelling governmental interest, it is still cautious to not chill protected speech. *Feiner v. New York*, 340 U.S. 315, 320–21 (1951) (upholding a speaker's conviction for disorderly conduct and holding that communities may punish "when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot"). The Court after *Feiner,* held in several cases that community unrest was not a sufficient justification for restricting otherwise protected speech. *See*, e.g., *Henry v. City of Rock Hill*, 376 U.S. 776, 778 (1964) (holding that communities cannot punish speakers simply because "their speech stirred people to anger, invited public dispute, or brought about a condition of unrest"); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (invalidating a statute that made "breach of the peace" unlawful, which had been judicially defined as "to agitate, to arouse from a state of repose, to molest, to

interrupt, to hinder, to disquiet"); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (holding that speech must be protected when, and is perhaps most useful when, "it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

While Columbia's statute includes potential objective means to deduce whether a statement of fact is false, there are other least restrictive means to refute falsity without criminalizing and chilling speech on social media platforms. For example, social media platforms allow the public to share information, false and true. Through the same platforms where falsehoods spread, true can be found as well. Without criminalizing speech, there are mechanisms or tools, which have been proven effective, which the government can utilize to achieve its compelling interests.

One significant example where falsehoods and public alarms where quenched was during the tragic Boston Marathon bombing. On that day, there was plenty of false information spreading on various social media platforms. *See* Christina Reinwald, What Twitter Got Wrong During the Week Following Last Year's Boston Marathon, BOSTON.COM (Apr. 18, 2014), https://www.boston.com/ news/local-news/2014/04/18/what-twitter-got-wrong-during-the-week-following-last-yearsboston-marathon (last visited December 20, 2021). However, the Boston Police Department (BPD) turned around and utilized the same social media platforms to inform the public the accurate facts including casualty numbers and correcting whether a Saudi man had been arrested. *See* Edward F. Davis III, et al., HARV.

Kennedy Sch., Social Media And Police Leadership: Lessons From Boston 3–4 (Mar. 2014), https://www.ncjrs.gov/pdffiles1/ nij/244760.pdf [https://perma.cc/7DUS-F5DG?type=image] (noting that Boston police focused on using social media to "push accurate and complete information to the public" as soon as possible during the 2013 Boston Marathon bombings) (last visited December 20, 2021).

Additionally, there are other websites such as snopes.com where people can fact-check and debunk rumors. *See*, e.g., David Emery, Instant Replay: A video allegedly showing anti-Trump protesters beating a man to death in Philadelphia was actually filmed in 2014 and is unrelated to the protests, SNOPES (Nov. 12, 2016), http://www.snopes.com/protesters-beat-homeless-veteran/ [http://perma.cc/9LXB-3DAN]. (last visited December 20, 2021). Because true speech is an available and effective remedy, Columbia's statute is not the least restrictive alternative for limiting speech such as fake news on social media. Therefore, it fails strict scrutiny.

Additionally, as a matter of public policy, the restrictions that the statute seeks to impose have the possibility to discourage the public from engaging in open conversations on social media out of fear that they will be punished for making false statements, even if the speech was well-intentioned. A tool that it is used to inform and help the public remain safe and calm during tragic times such as the Boston Marathon bombing, is gravely limited by statutes such as the Fake News Ban.

Therefore, the Fake News Ban is unconstitutional because it fails strict scrutiny. Additionally, it chills First Amendment protected speech and it does more harm than good to the public by its restrictions.

B. Even False Speech Has Value In The Marketplace of Ideas

The Supreme Court of Columbia emphasized this Court's precedent on the value of false speech in the marketplace of ideas. *Segretti v. State of Columbia*, 131 Col. Rptr. 49 (Col. 2021). It noted that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). It also discussed the need that the Free Speech Clause has for "breathing space" to the extent that even false statements of fact receive constitutional protection. *Segretti v. State of Columbia*, at 45. In *New York Times Co. v. Sullivan*, this Court considered that "falsity alone may not suffice to bring the speech outside the First Amendment; the statement must be a knowing and reckless falsehood in defamation or fraud cases. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). Additionally, the Court has given First Amendment protection to false factual statements. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, (1974). False factual statements serve useful human objectives in many contexts. Moreover, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby "chilling" a kind of speech that lies at the First Amendment's heart. *Id.* at 340-341. The Court in *Sullivan* held that erroneous statements are inevitable in free debate, especially in a society where open and vigorous expression of views are encouraged— not only

in private but in public conversations as well; these are rights guaranteed under the First Amendment. *New York Times Co. v. Sullivan*, at 271.

In the case at hand, both political candidates, Dean and Gordon Liddy ran attack advertisements against one another. *Segretti v. State of Columbia*, at 45. This type of attack advertisement is a form of political debate which is encouraged by the First Amendment, and it stirs conversations among society about those public figures who in turn seek to influence society through governance. *Associated Press v. Walker* decided with *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result).

Furthermore, when Mr. Segretti posted on social media about facts that he overheard in a public setting, Mr. Segretti, as a young American influencer interested in politics was simply exercising his right to express his criticism about Dean, who was his own aunt and a public official, and Erliechman, who was also a public official in the community. There is no proof that he knew those statements were true or not. Nevertheless, he was still punished for making the social media post. Individuals like him, should not be prohibited or criminalized for engaging in the right to criticize a public figure. In *Baumgartner v. United* States, Justice Frankfurter stated that "one of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks. *Baumgartner v. United* States, 322 U.S. 665, 673-674 (1944).

Additionally, this Court held in *Garrison v. Lousiana*, that "even when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment." *Garrison v. Louisiana,* 379 U.S. 64 (1964). Moreover, the First Amendment shields things in the world of debate about "public affairs that are done with motives that are less than admirable." *Id.*

In the interest of public discourse, it is common practice for politicians and the public to use images to stir up conversations, whether the information depicted is accurate. However, the statute at issue seeks to unconstitutionally restrict political speech from the marketplace of ideas by criminalizing and chilling such speech when someone knowingly disseminates fake news for personal gain, to influence the outcome of an election or to promote an interest of a foreign government. *Segretti v. State of Columbia*, at 47. Enforcing this statue would have a negative economic impact on markets such as the entertainment industry. For example, magazine companies and a vast majority of citizens in Columbia will be affected because magazines make a profit by selling salacious information that is not always accurate; on the other hand, a regular citizen could unintentionally make a false statement because he believes is true.

Additionally, this statute has the effect of preventing discourse on different set of ideas out of fear that an expression voiced or circulated turns out to be false, and such mistake carries a criminal and civil liability. This Court has upheld decisions protecting speech that it is more damaging and offensive than the speech being restricted by the Columbia Fake News Ban.

For instance, in *Hustler Magazine v. Falwell,* this Court considered the Respondent's petition to rule against a national magazine for inflicting emotional distress as a result of a parody that the magazine published. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 47 (1988). Respondent was a nationally known minister and commentator on politics and public affairs. *Id.* In the advertisement "parody," the magazine portrayed the minister as having engaged in a drunken incestuous rendezvous with his mother in an outhouse. *Id.* In that case, the Court held in favor of the magazine because "the state's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved." *Id.* at 50. As in Mr. Segretti's case, there was no showing that the false statement of fact was made with "actual malice," *i.e.,* with knowledge that the statement was false or with reckless disregard as to whether or not it was true. *Segretti v. State of Columbia*, at 46. However, in the present case, other media outlets continued to publish the rumors about Dean and Erlichman, yet Mr. Segretti was still punished because of the enforcement of the statute. *Id.* at 47.

In *Hustler Magazine v. Falwell*, this Court held that utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.* at 73. Additionally, the Court opined that the First Amendment prohibits bad motive as a controlling factor in the area of public debate about public figures. *Id.* Furthermore, it stated that "speech on public issues occupies the highest rung of

the hierarchy of First Amendment values and is entitled to special protection" (*Hustler* citing *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

In recent cases, the Court has held that speech that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations lies at the heart of the First Amendment's protection, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021); "Speech by citizens on matters of public concern lies at the heart of the First Amendment") *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (quoting *Lane v. Franks*, 573 U. S. 228, 235 (2014)).

Currently, with the rise of misinformation on social media platforms there has been controversy regarding influencing the outcome of elections, but this Court held in *McIntyre v. Ohio Elections Comm'n*, that advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression. *McIntyre v. Ohio Elections Comm'n* 514 U. S. 334, 347 (1995)). Therefore, even if someone engages in speech or expression that may promote one political party over another, as it happened in the case at hand, as this Court has held repeatedly, there should not be any violations of First Amendment rights by the state.

In *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n***,** the Court held that states cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or

disagreeable." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

Pursuant to precedent, this Court should affirm the Supreme Court of Columbia's rationale holding the Fake News Ban unconstitutional because it goes against the marketplace of ideas and the heart of established First Amendment case law.

C. The Ban on Disseminating Fake News Is Governmental Overreach

The Supreme Court of Columbia recognized that the ban on disseminating fake news is governmental overreach because the ban is too overbroad and violates the First Amendment since it regulates substantially more expression than necessary, and thus chill otherwise protected expression. *Segretti v. State of Columbia*, at 49. In *United States v. Alvarez*, the Court held that permitting the government to criminalize the speech in question would have endorsed government authority to compile a list of subjects about which false statements were punishable. *United States v. Alvarez*, 567 U.S. 709 (2012). "And the pervasiveness of false factual statements provides a weapon to a government broadly empowered to prosecute falsity without more. Those who are unpopular may fear that the government will use that weapon selectively against them." *Id*.

Permitting the state of Columbia to enforce its Fake News Ban will be tyrannical because the government will have a weapon to use against individuals who are said to be engaged in falsity. As previously mentioned, the government's compelling interest is not sufficiently narrowed and it creates an almost unlimited

governmental authority in regulating speech, in particular on social media platforms. Because social media has increasingly grown in popularity, many individuals are likely to have at least 5,000 followers, in particular the younger generations such as Gen Z and Millennials. The statute makes the audience to whom the information source disseminates the fake news of "5,000 people or more, or which does not, in fact, reach an audience of 5,000 people or more." *Segretti v. State of Columbia*, at 47.

Enforcing this ban is problematic because if younger people, who may be more susceptible to break the ban, because they are still learning how to discern factual from false information, will probably be the ones being criminalized the most. A 2019 article by CNBC called influencers who typically have less than 10,000 followers as "nano influencers." Taylor Locke, 86% of Young People Say They Want To Post Social Media Content For Money, https://www.cnbc.com/2019/11/08/study-young-people-want-to-be-paid-influencers.html. (last visited on December 20, 2021). The statute, however, is targeting users with even fewer number of users. Therefore, the government is being tyrannical by imposing high burdens on citizens.

As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). Here, the government is restricting content-based speech (fake news) but it has not met the burden of showing its constitutionality. Therefore, enforcing the ban on

disseminating fake news is governmental overreach. Individuals in a democracy where the free flow of ideas and opinions on matters of public interest and concern are fundamental First Amendment rights should not be criminalized for expressing their autonomous ideas online or on other similar platforms. In *Bose Corp. v. Consumers Union of the United States, Inc.*, described the freedom to speak one's mind as "not only an aspect of individual liberty and thus a good unto itself but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 503-504 (1984).

As a result, the Court should affirm the Supreme Court of Columbia's decision because this Court has been particularly "vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea." *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 339 (1974).

II. THIS COURT SHOULD AFFIRM THE DECISION TO REVERSE THE DISTRICT COURT'S HOLDING BECAUSE IT PROPERLY RECOGNIZED THAT MR. SEGRETTI'S FIRST AMENDMENT RIGHTS WERE VIOLATED

The decision of the Supreme Court of Columbia should be affirmed because it recognized the proper protections the First Amendment of the United States Constitution provides against limits to surreptitiously record others in the course of gathering information for dissemination. The Supreme Court of Columbia properly reversed the judgment of the 112th District Court of Mitchell County, and properly recognized that Mr. Segretti's surreptitious recording was protected under the First

Amendment and Section 39.601 of the Columbia Revised Statutes limits these rights for two reasons.

First, the First Amendment guarantees the freedom of expression by prohibiting Congress from permitting laws to be made that restrict one's freedom of speech or press. Second, Section 39.601 of the Columbia Revised Civil Statutes, which bans surreptitious recordings, violates the First Amendment under the Overbreadth Doctrine. For these reasons, the decision of the Supreme Court of Columbia should be affirmed.

A. The First Amendment Guarantees the Freedom of Expression by Prohibiting Congress From Making Laws Restricting It So a Statute Created and Applied That Restrict That Freedom Violates Mr. Segretti's First Amendment Rights

First, Mr. Segretti appropriately stated a claim that the First Amendment protects his right to surreptitiously record in a place where he has a right to be because it is conduct that is necessarily and integrally intertwined with speech and expression. Thus, the convictions against Mr. Segretti are unconstitutional and infringe on Mr. Segretti's First Amendment rights.

The First Amendment to the Constitution states that "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. The First Amendment guarantees freedom of expression by asserting that Congress shall not restrict the press or rights of individuals to speak freely. *Id*. Fundamental to the freedom of expression is the right to reproduce and

reconvey speech and information through various avenues, such as the dissemination of video and audio recordings. This Court has recognized that pictures and films have First Amendment protection. *Kaplan v. California*, 413 U.S. 115, 119-20 (1973). Most individuals own or have access to smartphones with both audio and video recording capabilities today. With the continuing advancement of technology, the ubiquitousness of social media, and other electronic communications, the right to record both overtly or surreptitiously has become a crucial and imperative aspect of a person's ability to engage in political and public dialogue today. Without it, timely, expressive engagement is limited.

This Court has also found that that engagement includes the discussion of government officials and matters of public concern. *NY Times v. Sullivan*, 376 U.S. 254 (1964). *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Innate to the right to discuss government officials and matters of public concern is the right to transcribe verbatim accounts of encounters with government officials or interactions they observe involving government officials. *Kaplan v. California*, 413 U.S. 115 (1973).

The act of recording a video is a form of information gathering which also falls within protections under the First Amendment. *Animal Legal Def. Fund,* 878 F.3d 1184, 1205 (9th Cir. 2018). "The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is

wholly unprotected." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012). This Court has held that the First Amendment protects a person's decision to reproduce "speech generated by other persons," meaning recordings of third parties are also protected. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995). This Court affirmed this precedent in *Bartnicki*, holding that the First Amendment guarantees the right to disseminate video and audio recordings involving the speech of other people and stating that one of the costs associated with the participation in public affairs is an attendant loss of privacy. *Bartnicki v. Vopper*, 532 U.S. 514, 519, 534-35 (2001).

The Supreme Court has generally recognized that "the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570. However, the states are split about surreptitious recordings' protections under the First Amendment. The majority view of 38 states among the circuit split has adopted one-party consent laws, permitting individuals to record calls and conversations to which they are a party or when one party to the communication consents. While some courts have expressed concerns regarding the First Amendment right to surreptitiously record, this Court has found that audio and video recordings produced through surreptitious recordings are generally a form of speech subject to full First Amendment protection. *United States v. Stevens*, 559 U.S. 460, 481-82 (2010).

Surreptitious recordings are inextricably intertwined with important political speech; therefore, prohibiting the recording and dissemination of the surreptitious

recordings essentially restricts the recordings from being shared with and displayed to others because they are necessary precursors for the eventual display of the videos. *Buckley v. Valeo*, 424 U.S. 1, 16-19 (1976). The recorded audio and video content, the act of recording the content, and the dissemination of the content are constitutionally protected because the information captured, content created, and the distribution of the information are inextricably intertwined.

The surreptitious video footage at issue of a recorded conversation between Joan Dean, Mr. Segretti's aunt and candidate for the Mayor of New Watergate, and Joanne Erlichman, the current chair of the Election Commission, is a surreptitious recording entitled to full First Amendment protection. The Supreme Court of the State of Columbia correctly found that a statute and conviction for violating a statute that bans surreptitious recordings is a violation of an individual's First Amendment freedom of expression. *Segretti v. State of Columbia*, 131 Col. Rptr. 44 (Col. 2021). Because audios and videos produced through surreptitious recordings have been recognized by this Court to be a form of speech subject to full First Amendment protection, Mr. Segretti's video recording of Dean and Erlichman is also a form of speech subject to full First Amendment protection. *United States v. Stevens*, 559 U.S. 460, 481-82 (2010)

Audio and audiovisual recordings have the ability to convey the full texture of a situation and can appeal to a viewer in a more immediate and captivating manner than words alone can. *Segretti*, 131 Col. Rptr. at 52. Without surreptitiously recording actions and statements, it is impossible for a person to indisputably

convey what occurred. Revealing the recording device may often lead the person being recorded to temporarily alter their speech and behavior to avoid generating evidence of wrongdoing and evade accountability. *Id*. On the other hand, individuals would likely not consent to being recorded if the recording device is revealed, while failing to record the speech or interactions at all will then lead to, he-said, she-said situations. *Id*.

The Sixth Circuit has correctly ruled that a wiretap provision that made non-consensual interception of a communication actionable when done with injurious purpose was unconstitutionally vague. *Boddie v. Am. Broad. Cos.*, 881 F.2d 267 (6th Cir. 1989). Similarly, Section 39.601 provides that a person violates privacy in communications of a person purposely records a conversation with a hidden electronic device that reproduces a human conversation without the knowledge of, and thus without the consent of, all parties to the conversation. Col. Rev. Stat. § 39.601. This Court should adopt the ruling of the Sixth Circuit and apply it to the statute at issue, declaring it unconstitutionally vague and improper.

Here, Dean and Erlichman were unaware of Mr. Segretti's actions - referring to the surreptitious recording of their conversation. *Segretti*, 131 Col. Rptr. at 46. Mr. Segretti, a politically active college student who used his social media accounts as a business, thus utilized his regular posts of original content as a platform to express his thoughts regarding allegations of voter fraud and the highly discussed misconduct by poll officials. Regardless of what his viewers believed; he had a right to express his opinions on the integrity of the election. With those concerns in mind,

Mr. Segretti reasonably had a motivation to discover candid, unaltered evidence from which he could gather his thoughts and disseminate to his many concerned followers. When he saw the opportunity, he captured what he believed to be a recording that would only be authentic if surreptitious.

Surreptitious recordings are entitled to full First Amendment protections as conduct that is a necessary precursor to, and integrally intertwined with, speech. *Buckley* 424 U.S. at 1. The First Amendment must protect the creation of the video to the same extent as the right to view it for its purpose of preserving an "uninhibited marketplace of ideas." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). Of course, not all recordings or disseminations of any recordings are subject to First Amendment protections. The public's right of access to information is coextensive with that of the press, so the First Amendment right inures to individual citizens and journalists alike; it may be subject to reasonable time, place, and manner restrictions. *Martin v. Gross*, 340 F. Supp. 3d 87. For example, the First Amendment does not guarantee a right to free expression on private property or a non-public space. *Id*. Accordingly, a conversation between two people in a home or other private place may result in a reasonable expectation of privacy of a higher standard. In some one-party consent states such as Ohio, consent is not required for oral communications or in-person conversations where the parties to the conversations do not have a reasonable expectation of privacy in the communication. Ohio Rev. Code § 2933.51. Under such statutes, one may record a conversation of third parties in a public place if the recording is not made using

sensitive recording equipment that a person would not otherwise hear without. *Id*. Here, the conversation and recording took place at a Halloween party in a city park, which is a public space. As recognized by recording statutes of a state that has adopted the majority view, the same expectation does not apply in a very public city park or at a Halloween party with other people present.

In *Katz*, an individual was justified in assuming that his phone conversation would remain private under the Fourth Amendment when he entered a phone booth and shut the door, making the surreptitious recording of the conversation an unreasonable search and seizure. *Katz v. United States*, 389 U.S. 347 (1967). Justice Harlan's concurrence in *Katz* implemented a two-prong test, first analyzing whether the individual has exhibited an actual expectation of privacy that he seeks to preserve as private and, next, if the individual's expectation is one that society is prepared to recognize. In contrast to the individual who was recorded in *Katz*, a reasonable person in either Dean's or Erlichman's position would expect a very diminished, if any, level of privacy at a Halloween party opens in the city park, whether speaking loudly or in hushed tones. Consequently, though Petitioner may argue that a hushed conversation exhibits an actual expectation of privacy, Petitioner fails the second prong of the test because Dean's and Erlichman's expectation is one that society is not likely to recognize as reasonable.

In addition, it may be argued that the disclosure of sensitive or graphic information would lead to a higher reasonable expectation of privacy. The government has a significant interest in restricting First Amendment activities that

interfere with the performance of law enforcement activities or present legitimate safety concerns; those significant interests may justify certain restrictions on audio and audiovisual recordings. *Martin v. Evans*, 241 F. Supp. 3d 276 (D. Mass. 2017). However, in the case at hand, Dean, who is a political candidate, and Erlichman were discussing a church project and who might teach a weekly Bible study. *Segretti*, 131 Col. Rptr. at 46. Mr. Segretti did not intrude into Dean or Erlichman's home or office, nor did he intercept a private phone call or video conference. A reasonable person in the same or similar circumstances would likely conclude that the topic of who might teach a weekly Bible study for a church project is not a sensitive or graphic topic requiring a heightened expectation of privacy, and that there was a lowered reasonable expectation of privacy while at a public location and event.

This approach is consistent with this Court's long recognized and protected First Amendment rights to create and disseminate information. Therefore, any statute restricting a person's right to surreptitiously record would be violating their First Amendment rights.

B. Section 39.601 Of The Columbia Revised Civil Statutes Violates The First Amendment Under The Overbreadth Doctrine And So The Lower Court's Judgment Was Properly Reversed

Second, it is important to emphasize the unconstitutional nature of Section 39.601 of the Columbia Revised Civil Statutes on further grounds. In the First Amendment context, a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly

legitimate sweep. *United States v. Stevens*, 559 U.S. 460 (2010). The United States Supreme Court has provided this expansive remedy of a second type of facial challenge out of concern that the threat of enforcement of an overbroad law may deter or chill constitutionally protected speech, especially when the statute imposes criminal sanctions. *Virginia v. Hicks*, 539 U.S. 113, 119, 123 (2003). However, for a statute to be invalidated on overbreadth grounds, the overbreadth must be substantial accompanied with a realistic danger that the statute will significantly compromise recognized First Amendment protections of parties not before the Court. *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)). When making an overbreadth analysis under the overbreadth doctrine, the first step is to construe the challenged statute to examine what the statute covers. *United States v. Williams*, 553 U.S. 285, 293 (2008). Section 39.601 of the Columbia Revised Civil Statutes provides in part:

> (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 without the knowledge of all parties to the conversation."
> (4) "'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." Col. Rev. Stat. § 39.601.

Next, the purpose of the statute and governmental interest associated with the statute must be considered. When considering whether the restriction on secret recording is reasonable, the level of scrutiny applied to the restriction is strict

scrutiny because government regulations on speech must generally satisfy the strict scrutiny test. *Loving v. Virginia*, 388 U.S. 1 (1967). Surreptitious recordings of government officials should also be subject to strict scrutiny. To satisfy the strict scrutiny test, the government must prove that the law is necessary to serve a compelling government interest, and that it furthers that interest using the narrowly tailored, least restrictive means available. *Id.*

Section 39.601 fails strict scrutiny because in regulating the speech of the people of Columbia, it serves no compelling government interest, is not narrowly tailored to achieve such an interest, and does not provide the least restrictive means to achieve that interest. Rather, while Mr. Segretti's conduct of surreptitiously recording Dean and Erlichman does fall within the First Amendment protection, the statute acts as a blanket statement with language that is overbroad and impermissibly vague. Alternatively, Petitioner may argue that there is a valid and compelling government interest in the privacy of individuals' communications and a legitimate expectation that their conversations will not be recorded by those not privy to the conversation. This Court may find that the fear of having private conversations exposed to the public and further having a potential chilling effect on private speech. *Bartnicki*, 532 U.S. at 533. To that extent, such an eavesdropping statute may be found to legitimately criminalize audio recordings because the purpose of the statute to protect private conversations may be served and justified. *People v. Clark*, 6 N.E.3d 154 (Ill. 2014). However, that is not the entirety of the statute in this case. Section 39.601 further criminalizes a whole range of conduct

that involves reproducing a human conversation by use of a hidden electronic or mechanical recording device that is non-consensual. *Clark*, 6 N.E.3d at 151. Mr. Segretti's recording does not fall into the exceptions provided in the statute. Petitioner may also argue that surreptitious recordings of truly private conversations may be found to be within the legitimate scope of the statute. Yet the purported private conversation in this encounter was regarding church projects and Bible study plans, which a reasonable person would likely not consider to be truly private in the same sense.

In *People v. Clark*, the Supreme Court of Illinois comparably identified that the statute at issue left a general ban on audio recordings of any oral communication whatsoever, absent consent from all parties, except in limited circumstances that mostly apply to law enforcement authorities. *Id*. The court stated that the statute's blanket ban on audio recordings swept so broadly "that it criminalizes a great deal of wholly innocent conduct, judged in relation to the statute's purpose and its legitimate scope. It matters not whether the recording was made openly or surreptitiously. The statute prohibits the recording in the absence of consent of all parties. And, while the consent need not be express, any implied consent will become a factor only after an individual has been charged with a violation of the eavesdropping statute and raises implied consent in defense." *Id*. at 22.

The court in *Clark* further stated that "if another person overhears what we say, we cannot control to whom that person may repeat what we said. That person

may write down what we say and publish it, and this is not a violation of the eavesdropping statute. Yet if that same person records our words with an audio recording device, even if it is not published in any way, a criminal act has been committed. The person taking notes may misquote us or misrepresent what we said, but an audio recording is the best evidence of our words. Yet, the eavesdropping statute bars it." *Id*. at 23. While the court recognized that it is understandable that many people would not want their voices and conversations on the Internet to be shared around the world, it also recognized the ubiquity of devices like smartphones with their recording capabilities and the fact that that is beyond our control to a certain extent. *Id*. The court in *Clark* found that the privacy statute was overbroad because many of its applications were unconstitutional, and it reached too far in its effort to protect individuals' interest in the privacy of their communications. *Id*.

Similar to the eavesdropping statute in *Clark*, Section 39.601 substantially burdens more speech than is necessary to serve the interests the statute may legitimately serve. The statute, which restricts a significant amount of non-disruptive and safe First Amendment activities such as peaceful recording of third parties in a public space, is not narrowly tailored to promote the governmental interest of protecting the conversational privacy of Columbia's residents. Accordingly, it does not meet the necessary requirements to satisfy the strict scrutiny standard. Section 39.601 is also overbroad in relation to its plainly legitimate sweep.

Section 39.601 does not pass constitutional muster. Rather, it infringes on Mr. Segretti's First Amendment rights, as do the convictions against Mr. Segretti. Considering the First Amendment rights at issue, Petitioner's privacy interests do not rise to a level that would justify banning all surreptitious recording on electronic or mechanical devices. Therefore, Mr. Segretti asks this Court to affirm the decision of the lower court because Mr. Segretti's right to surreptitiously record without the consent of all parties in a place where he has a right to be is fully protected by the First Amendment.

III. THE FIRST AMENDMENT WAS PRINCIPALLY DESIGNED TO CREATE AN OPEN MARKETPLACE WHERE IDEAS, ESPECIALLY POLITICAL IDEAS, MAY COMPETE WITHOUT GOVERNMENT INTERFERENCE

Political speech depends fully on the marketplace of ideas. Article: How and Why the Marketplace of Ideas Fails, 31 Val. U.L. Rev. 951. Suppressing political campaign speech imposes costly entry barriers to the political marketplace of ideas and is essential to the democratic process. Voters must decide what is the political truth, not the government.

The concern with suppressing political speech is the potential for the chilling effect it could have on public discussion of political affairs. "Lawmakers should keep in mind that any effort to use the force of law to inflict punishment for allegedly false political speech will have this same chilling effect." Alex Baiocco, Yes, Politicians, "False" Speech About You Is Protected by the First Amendment Institute for Free Speech (2020), https://www.ifs.org/blog/false-speech-trump-democrats-first-amendment/. Every person must be his own watchman for truth,

because the forefathers did not trust any government to separate the truth from the false for us. *State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691 (1998).

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. *United States v. Alvarez*, 567 U.S. 709 (2012). This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee. *Id.*

In *Alvarez*, the dissenters qualified that "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. *SYMPOSIUM: Falsehoods, Fake News, and The First Amendment: The Right to Receive Foreign Speech, 71 Okla. L. Rev. 269.* The *Alvarez* Court would strike down regulations on false political speech given the intolerable risk of government bias and meddling in this quintessential sector of the marketplace of ideas. *Id.*

Similarly, in *Sullivan*, the Court extended First Amendment protection to false statements of fact in a defamation suit and held that false statements when made about a public official, could not be the basis for awarding damages. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

False statements contribute nothing of value, however, they do need "breathing space" for statements that are true. Mr. Segretti's appeal implicates the

Free Speech Clause's need for "breathing space" such that even false statements of fact receive the same constitutional protections. *Segretti*, 131 Col. Rptr. at 49. An example of such "breathing space" is the requirement of malice or reckless disregard for the falsity of one's statement in cases of libel and defamation; this stringent mental state requirement allows for the uninhibited exchange of ideas about public figures and other issues of public significance without excessive fear of legal repercussion for unwittingly made false statements. *Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).* In other words, to ensure that protected speech is not improperly suppressed, it may be crucial to permit lies in certain circumstances. *Id.* That would be the case when Mr. Segretti was hired to assist his aunt in her political campaign. Although it was found that the conversation between Dean and Erlichman was about their church project, Mr. Segretti's efforts in her campaign should remain protected by the First Amendment.

Mr. Segretti was operating a social media page under the pseudonym, Alexander Butterfield. The first story on this page broke that, "Erlichman falsely certified 394 absentee ballots to help Dean get into the runoff and the second story implied that Erlichman would, "take care of it.'"

However, in *Hustler Magazine v. Falwell*, Hustler magazine stated that a prominent fundamentalist minister had drunken sex with his mother in an outhouse. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 47 (1988). "The Court held that the First Amendment prohibited awarding damages for false statements about public figures that cannot reasonably be believed. Satire and parody often involve

false statements, and so long as persons would not take the statements to be true, they cannot be the basis for a tort action."

Similarly, in *Rickert v. Washington*, the Washington Supreme Court considered whether a political candidate could be punished for telling deliberate lies about her opponent in a political campaign. *Rickert v. Public Disclosure Comm'n*, 161 Wn.2d 843, 168 P.3d 826 (2007). This case reminds the Court that a state cannot impose fines on a candidate for telling deliberate lies about his or her opponent, no matter how outrageous. *Id*.

Selectively proscribing unprotected speech based on its content is unconstitutional. If freedom of speech is to mean anything, it must include the freedom to determine for ourselves the veracity of the most contentious political statements of the day.

CONCLUSION

WHEREFORE, for the reasons set out above, Respondent, Donald Segretti, asks this Court to affirm the decision of the Supreme Court of Columbia.

Respectfully submitted,

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