No. 14-20-00333

In the
Supreme Court of the United States
SPRING TERM 2022

State of Columbia
Petitioner,

v.

Donald Segretti,
Respondent

BRIEF IN SUPPORT OF WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLUMBIA

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QUESTIONS PRESENTED

1. The First Amendment does not apply to statutes which regulate fraudulent speech. § 31.002 of the Columbia Revised Civil Statutes regulates the intentional dissemination of fraudulent speech in four areas related to the State's police power: public health, public safety, national security, and essential government functions. Does § 31.002 violate the First Amendment?
2. The First Amendment may be limited by content-neutral laws that are narrowly tailored to fulfill a legitimate government interest. § 39.601 is a content-neutral statute that bans surreptitious recordings regardless of their content. It promotes the important government interest of protecting the right to privacy. Does § 39.601 violate the First Amendment?

PARTIES TO THE PROCEEDING

Petitioner is the State of Columbia. The State of Columbia seeks to defend the regulations at issue in this case. The State was the appellee in the opinion by the Supreme Court of Columbia.

Respondent is David Segretti. Mr. Segretti is a social media influencer who was convicted under § § 31.002 and 39.601 of the Columbia Revised Civil Statutes. In this appeal, he challenges these provisions as unconstitutional under the First Amendment of the United States Constitution. Mr. Segretti was the appellant in the opinion by the Supreme Court of Columbia.

TABLE OF CONTENTS

QUESTIONS PRESENTED 2

PARTIES TO THE PROCEEDING 2

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 5

OPINIONS BELOW 7

INTRODUCTION 7

STATEMENT OF THE CASE 8

SUMMARY OF ARGUMENT 11

ARGUMENT 14

§ 31.002 REGULATES FRAUDULENT SPEECH AND THUS IS NOT SUBJECT TO THE FIRST AMENDMENT 14

§ 31.002 CONSTITUTES A REGULATION OF FRAUDULENT SPEECH 15

§ 31.002 Requires Intent to Deceive 17

§ 31.002 Requires the Potential for Harm 18

§ 31.002 Requires A Material Harm in One of Four Areas 19

IF UPHELD AS A REGULATION OF FRAUDULENT SPEECH, § 31.002 WILL NEITHER PERMIT NOR ENCOURAGE VIEWPOINT REGULATION 20

COUNTERSPEECH IS NOT A SUFFICIENT REMEDY TO FALSE INFORMATION CONCERNING GOVERNMENT AFFAIRS 22

ALTERNATIVELY, IF THE COURT INTERPRETS § 31.002 AS A CONTENT-BASED REGULATION, THE STATUTE REMAINS CONSTITUTIONAL BECAUSE IT IS NARROWLY TAILORED TO PROMOTE THE POLICE POWERS OF THE STATE 24

§ 31.002 Satisfies the Narrowly-Tailored Requirement in Three Ways 25

§ 39.601 DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT IS A CONTENT NEUTRAL RESTRICTION THAT FURTHERS THE GOVERNMENTAL INTEREST OF PROTECTING

INDIVIDUAL PRIVACY AND IS NARROWLY TAILORED TO APPLY IN THOSE INSTANCES WHEN INDIVIDUAL PRIVACY IS AT RISK 28

RESPONDENT'S RECORDING CONSTITUTES EXPRESSIVE CONDUCT AND IS PROTECTED GENERALLY BY THE FIRST AMENDMENT 29

§ 39.601 DOES NOT LIMIT THE RIGHT TO RECORD MATTERS OF PUBLIC INTEREST 30

THE COURT SHOULD APPLY INTERMEDIATE SCRUTINY TO § 39.601 BECAUSE THE STATUTE IS CONTENT NEUTRAL 32

THE EXCEPTIONS IN § 39.601 ARE CONTENT NEUTRAL BECAUSE THEY WERE ADOPTED TO PROTECT INSTANCES WHEN THERE IS A LESSENED EXPECTATION OF PRIVACY 33

§ 39.601 PASSES INTERMEDIATE SCRUTINY BECAUSE IT SERVES THE LEGITIMATE GOVERNMENT INTEREST OF PROMOTING THE PRIVACY OF THE INDIVIDUAL AND IS NARROWLY TAILORED TO FURTHER THAT INTEREST BY HOLDING RESTRICTIONS ON SURREPTITIOUSLY RECORDING THOSE CONVERSATIONS IN WHICH THE INDIVIDUALS SPEAKING HAVE A REASONABLE EXPECTATION OF PRIVACY. 36

EVEN IF § 39.601 IS SUBJECT TO STRICT SCRUTINY, IT IS NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST 37

§ 39.601 SERVES THE GOVERNMENT INTEREST OF PROTECTING INDIVIDUAL PRIVACY 39

§ 39.601 IS NARROWLY TAILORED BECAUSE IT EXCLUDES INSTANCES IN WHICH THE STATE'S INTEREST IN PROTECTING PRIVACY NO LONGER EXISTS 40

§ 39.601 IS NARROWLY TAILORED BECAUSE ITS EXCEPTIONS ALLOW FOR SURREPTITIOUS RECORDING WHERE AN EXPECTATION OF PRIVACY IS UNREASONABLE 42

§ 39.601 IS NARROWLY TAILORED BECAUSE IT EXPRESSLY ALLOWS THOSE RECORDINGS OF PUBLIC OFFICIALS WHICH ENSURES THE PUBLIC'S RIGHT TO RECORD THEIR PUBLIC OFFICIALS 43

§ 39.601 IS NARROWLY TAILORED BECAUSE IT LEAVES OPEN AN ALTERNATIVE CHANNEL TO CREATE EXPRESSIVE CONDUCT BY RECORDING INDIVIDUALS WITH NOTICE 44

THE LAST ANTECEDENT RULE OF STATUTORY INTERPRETATION DOES NOT IMPLY THAT EXCEPTION 2(A) OF § 39.601 ALLOWS SURREPTITIOUS RECORDING OF PUBLIC OFFICIALS 45

§ 39.601 DOES NOT VIOLATE THE OVERBREADTH DOCTRINE 47

CONCLUSION **49**

TABLE OF AUTHORITIES

CASES

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).....24-25
Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004).....15, 24
Bartnicki v. Vopper, 532 U.S. 514 (2000).....37-39
Broadrick v. Oklahoma, 413 U.S. 601 (1973) 18, 47-48
Brown v. Hartlage, 456 U.S. 45, 52 (1982).....25
Burson v. Freeman, 504 U.S. 191 (1992).....40
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).....18, 49
Chicago, B & Q. Ry. Co. v. People of State of Illinois, 200 U.S. 561 (1906).....25
Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995).....30
Garrison v. Louisiana, 379 U.S. 64 (1964).....18, 26
Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011).....31
Gooding v. Wilson, 405 U.S. 518 (1972).....48-49
Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).....39
Knauer v. United States, 328 U.S. 654 (1946).....17
Lesar v. United States Dep't of Justice, 204 U.S. App. D.C. 200 (D.C. Cir. 1980)41, 43
Lord v. Goddard, 54 U.S. 198 (1851).....17
Mapp v. Ohio, 367 U.S. 643 (1961).....36-37
N.A.A.C.P. v. Button, 371 U.S. 415, 445 (1963).....12
Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005).....44-45
New York Times v. Sullivan, 376 U.S. 254 (1964) 12, 18, 26
New York v. Ferber, 458 U.S. 747 (1982).....47
Niemotko v. Maryland, 340 U.S. 268 (1951).....21
Project Veritas Action Fund v. Rollins, 982 F.3d 813 (1st Cir. 2020).....44
Project Veritas v. Schmidt, 2021 U.S. Dist. LEXIS 150310.....33-35, 45
Reed v. Town of Gilbert, 576 U.S. 155 (2015).....32, 34, 36
Roth v. United States, 354 U.S. 476 (1957) 12

Segretti v. State of Columbia, 131 Col. Rptr. 44 (Col. 2021).....16, 20
Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000).....30-31, 42, 47
Sorrell v. IMS Health, Inc., 564 U.S. 567 (2011).....34
Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008).....17
Texas v. Johnson, 491 U.S. 397 (1989).....29
Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 502 (1969).....21
Turner Broadcasting Systems, Inc. v. F.C.C., 512 U.S. 622 (1994).....12, 33-34
United States v. Alvarez, 567 U.S. 709 (2012).....12, 15-16, 18-19, 22-23, 26, 43
United States v. Dunnigan, 507 U.S. 87 (1993).....17
United States v. O'Brien, 391 U.S. 367 (1968).....38
United States v. Pierce, 224 F.3d 158 (2d Cir. 2000).....17
United States v. Ramos-Arenas, 596 F.3d 783 (10th Cir. 2010).....17
United States v. Wells, 519 U.S. 482 (1997).....16
Ward v. Rock Against Racism, 491 U.S. 781 (1989).....32, 38, 40-41, 44
Washington v. Davis, 426 U.S. 229 (1976).....24
Whitney v. California, 274 U.S. 357 (1927).....22

STATUTES AND CONSTITUTIONAL AMENDMENTS

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…….23
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OPINIONS BELOW

Mr. Segretti was convicted under Columbia Revised Statutes § § 31.002 and 39.601 by the 112th District Court of Mitchell County. R. at 47, 53. He appealed his convictions to the Columbia Court of Appeals and reserved his right to challenge the statutes as unconstitutional. *Id*. at 47. Mr. Segretti then appealed the constitutionality questions to the Supreme Court of Columbia. *Id*. at 45. The Supreme Court of Columbia held that both regulations were unconstitutional and reversed Mr. Segretti's convictions. *Id*. at 53.

INTRODUCTION

In early 2021, David Segretti (Respondent) was convicted for violating Columbia Revised Statutes § § 31.002 and 39.601. § 31.002 regulates the intentional spread of fraudulent information related to several areas of government affairs, including essential government functions such as elections. § 39.601 bans

surreptitious recordings. In this appeal, Respondent challenges both provisions as unconstitutional under the First Amendment.

Contrary to the opinion of the Columbia Supreme Court, neither regulation at issue in this case violates the First Amendment. This Court has established several categories of speech that evade First Amendment protection. One such category is fraudulent speech – the kind of speech that § 31.002 clearly intends to regulate. The Columbia Supreme Court did not analyze whether § 31.002 constitutes this exception and instead assumed that the First Amendment applied. If this Court similarly finds that the First Amendment regulates § 31.002, then it should also hold that it satisfies strict scrutiny because the State has a compelling interest in asserting its police powers and the statute is narrowly tailored to that interest.

Similarly, the Columbia Supreme Court incorrectly found that § 39.601 violates the First Amendment because it erroneously applied strict scrutiny and exceeded precedent by inferring the existence of a right to illegally record from a right to disseminate illegally recorded information. This Court has established that the level of scrutiny that applies to statutes regulating speech turns on whether that statute is content-based or content-neutral. Content-based statutes are subject to strict scrutiny, while content-neutral statutes are subject to intermediate scrutiny. The Columbia Supreme Court applied strict scrutiny without addressing whether § 39.601 is content-based. If this Court finds that § 39.601 is content-neutral, it should assess the statute under intermediate scrutiny. This

Court should then find that the statute survives intermediate scrutiny because it is narrowly tailored to fulfill a legitimate government interest.

STATEMENT OF THE CASE

Respondent is a successful social media influencer. R at 45. At just 20 years old, he has amassed more than 220,000 followers across various social media platforms. *Id.* By 2020, Respondent reported an annual profit of $45,000 from his social media presence alone. *Id.*

In early 2020, Respondent began to work for his aunt's mayoral campaign in the City of New Watergate. *Id.* at 45. During the contentious campaign season, allegations of voter fraud and misconduct by poll officials emerged, causing concern about the validity of the election results. *Id.* at 46. The election resulted in a runoff election between Dean and her opponent, Gordon Liddy. *Id.*

Between the certification of the election results and the runoff, reports emerged that the chair of the Elections Commission, Joanna Erlichman ("Erlichman"), helped Dean succeed in the general election. *Id.* The story originated in a social media post from an individual named Alexander Butterfield. *Id.* Butterfield's daily posts included claims that Erlichman wanted Dean to be the next Mayor and was working to achieve this goal. *Id.* One post asserted that Erlichman falsely certified 394 absentee ballots to push Dean into the runoff. *Id.* Another included a picture of Erlichman and Dean with a large caption that stated "Why bother? Erlichman will rig it anyway." *Id.* Finally, Butterfield posted a short video of

Erlichman and Dean taken at a Halloween Party in a city park. *Id.* The video showed the two talking and ended with Erlichman saying "I'll take care of it." *Id.*

Butterfield continued to post daily, using the caption "Why bother? Erlichman will take care of it." – a slogan devised from previous "proof" he had claimed to prove Erlichman's involvement. *Id.* However, an investigation revealed no evidence to support the claims that Erlichman helped Dean win the election in any way. *Id.* Despite these findings, the rumors regarding Erlichman's misconduct persisted.

Ultimately, Dean won the runoff election. *Id.* Many attributed the win to the relatively low voter turnout, with only fourteen percent of registered voters participating in the runoff. *Id.*

Two days after the run-off election was certified, New Watergate police discovered that "Alexander Butterfield" was in fact Respondent. *Id.* There was no evidence to support any of his claims regarding the local election. *Id*. Respondent had recorded the conversation at the Halloween party using a hidden body camera. *Id.* After reviewing the entire footage, police learned that Erlichman and Dean had been talking about a church project, with Erlichman agreeing to "take care of" arranging for someone to teach a weekly bible study. *Id.* No part of the conversation related to the election. *Id.* Neither Erlichman or Dean were aware that they were being recorded. *Id.*

The State of Columbia charged Respondent for violating § § 31.002 and 39.601 of the Columbia Revised Civil Statutes. *Id.* at 47. The former bans knowingly disseminating fraudulent information, colloquially referred to as "fake news." *Id.*

The latter bans knowingly surreptitiously recording other parties' conversations without their knowledge. *Id.* at 50.

Respondent was convicted on both counts. *Id.* at 47. On appeal, Respondent challenged the constitutionality of both provisions under the First Amendment. *Id.* In overturning § 31.002, the Columbia Supreme Court found that the statute was a "content-based restriction on core political speech" and that the First Amendment protects false speech. *Id.* at 49–50. The Columbia Supreme Court then found § 39.601 unconstitutional, noting that the First Amendment invokes a right to surreptitiously record because it is expressive conduct that is "inextricably intertwined with important political speech." *Id.* at 52.

In his dissent, Justice Woodward opined that the Columbia Supreme Court should have upheld both laws. *Id.* at 53-55. He noted that the First Amendment "does not protect intentionally false speech" in a number of contexts, such as defamation and perjury. *Id.* at 53. Justice Woodward emphasized that such areas of speech have "no or minimal expressive value" because they play "no essential part of any exposition of ideas." *Id* at 54. The dissent also noted that the First Amendment only guarantees an individual to record his own speech, not that of others, and thus the surreptitious recording ban does not implicate the First Amendment. *Id.* at 56. Justice Woodward emphasized the public policy concerns that would outweigh the First Amendment interests, including the interest in protecting individual privacy. *Id.* at 55.

This Court granted the State's petition for a Writ of Certiorari. The State asks the Court to reverse the judgement of the Supreme Court of Columbia and find that § § 31.002 and 39.601 are constitutional.

SUMMARY OF ARGUMENT

"Congress shall make no law…abridging the freedom of speech, or of the press." U.S. Const. amend. I. This revolutionary constitutional guarantee was "fashioned to assure unfettered interchange of ideas for bringing about political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Such speech demands rigorous protection; as such, this Court has held repeatedly that the First Amendment does not "turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered." *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964) (citing *N.A.A.C.P. v. Button*, 371 U.S. 415, 445 (1963)). Indeed, the protection of erroneous statements is central to the core principle that constitutional speech be afforded "the breathing space [it needs] to survive." *Id*.

Regulations of speech can take one of two forms. Those that target the substantive content of the message contained within the speech are known as content-based regulations. These laws must satisfy strict scrutiny in order to pass constitutional muster. *Turner Broadcasting Systems, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Alternatively, a regulation is content-neutral if it applies regardless of the message of the speech. Content-neutral regulations are subject only to

intermediate scrutiny. *United States v. Alvarez*, 567 U.S. 709, 730 (2012) (Breyer, J., concurring).

§ 31.002 of Columbia Revised Statutes narrowly restricts a category of content-based speech that is exempt from First Amendment protection: fraudulent speech. Specifically, the statute aims to prohibit fraudulent speech that seeks to undermine government functions, processes, and affairs. Fraudulent speech requires three elements to be met: it must have an intent to deceive, there must be the potential for harm, and there must be a benefit to the proponent of the speech. § 31.002 satisfies each of these elements. Crucially, the statute also does not engage in viewpoint discrimination. Regardless of the view being expressed or its political leaning, the statute prohibits speech based on its fraudulence. Because § 31.002 specifically restricts a category of speech that is not protected by the First Amendment, and does so without regard to the speaker's viewpoint, it is constitutional.

Alternatively, the Court may find that § 31.002 is a content-based restriction on speech and thus is subject to the First Amendment. Nevertheless, the regulation remains constitutional because it furthers a compelling governmental interest: the state's police power. Furthermore, the statute is narrowly tailored to this interest because it imports the actual malice standard from defamation law, offers a reasonable avenue for the expression of fraudulent facts, and narrowly defines an information source such that average individuals are not implicated by the statute.

For these reasons, this Court should reverse the Supreme Court of Columbia's finding that § 31.002 does not satisfy strict scrutiny.

Second, § 39.601 of Columbia Revised Statutes prohibits surreptitious recordings and delineates several exceptions to this prohibition. Similar to § 31.002, it expresses no preference toward the viewpoint of the speaker and does not discriminate based on the content of the speech. Consequently, the statute is content-neutral and is subject to intermediate scrutiny. Under this standard of review, a law will be upheld if it is narrowly tailored to fulfill a legitimate government interest. Because both privacy and speech issues are implicated in the law, they must be carefully balanced in any legislative decision. § 39.601 passes intermediate scrutiny because it achieves such a constitutionally permissible balance. It is specifically engineered to protect privacy interests but also creates exceptions where those privacy interests are superseded by First Amendment concerns.

Even if the Court finds that § 39.601 is content-based and subject to strict scrutiny, the statute survives that more stringent standard of review. The law is narrowly tailored, as it is under intermediate scrutiny, and its purpose of protecting the right to privacy is so important that it not only qualifies as a legitimate government interest, but also a compelling government interest. As such, § 39.601 is constitutional.

ARGUMENT

I.

§ 31.002 REGULATES FRAUDULENT SPEECH AND THUS IS NOT SUBJECT TO THE FIRST AMENDMENT

Prior to engaging in any analysis under the First Amendment, this Court must determine whether the First Amendment is applicable to the speech regulated by § 31.002. Contrary to the decision below, the First Amendment does not control § 31.002 because it governs fraudulent speech – a category of unprotected speech recognized throughout this Court's precedents. Under such an interpretation, § 31.002 does not pose a risk of viewpoint discrimination because it applies regardless of the substantive content of the speech itself – it regulates fraudulence, not subject matter. Furthermore, government intervention in this area is necessitated by the strong public interest in access to true information regarding government affairs. As such, the counterspeech remedy is an insufficient replacement for the reasonable restrictions imposed by § 31.002.

§ 31.002 CONSTITUTES A REGULATION OF FRAUDULENT SPEECH

Content-based restrictions on speech are presumptively invalid, and the government has the burden of proving their constitutionality. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004). The rejection of content-based regulations has resulted in broad First Amendment protection. However, this rule is not unconditional. The Court has recognized multiple categories of content-based restrictions which are exempt from First Amendment protection, including: fraud,

defamation, speech integral to criminal conduct, true or imminent threats, fighting words, incitement, obscenity, and child pornography. *Alvarez*, 567 U.S. at 717-18. Because they are unprotected by the First Amendment, legislatures can regulate them without concern for strict scrutiny.

Missing from this list is a general exception for false statements. *Id*. at 719. In *United States v. Alvarez*, this Court found that a statute targeting falsity and nothing more is unconstitutional. *Id*. at 722. There, Mr. Alvarez was convicted of violating the Stolen Valor Act, which prohibited falsely claiming receipt of various military awards. *Id*. at 716. The Court held that the government failed to show narrowly-tailored interests that would justify such a broad preclusion on speech. *Id*. at 729. In so holding, *Alvarez* stands for the proposition that "false statements *generally* [do not] constitute a new category of unprotected speech." *Id*. at 722 (emphasis added).

In the decisions below, the Supreme Court of Columbia and the trial court misinterpreted *Alvarez* to stand for a much more broad principle: that false statements can *never* constitute a category of unprotected speech. *Segretti v. State of Columbia*, 131 Col. Rptr. 44 (Col. 2021). This reading of *Alvarez* is plainly incorrect. The *Alvarez* plurality held that the Stolen Valor Act was invalid because it punished speech *solely for its falsity*. *Alvarez*, 567 U.S. at 724. As such, *Alvarez* does not bar categories of unprotected speech which include falsity as an element so long as strict scrutiny is satisfied. As the Court noted, multiple such types of unprotected speech already exist and remain exempted, including defamation, fraudulent

speech, and perjury. *Alvarez*, 567 U.S. at 719-23 ("This opinion does not imply that any of these targeted prohibitions are somehow vulnerable."). In fact, there are over 100 federal criminal statutes that punish false statements in various contexts. See *United States v. Wells*, 519 U.S. 482, 505-507, and nn. 8-10 (1997) (Stevens, J., dissenting) (collecting cases).

In light of this proper interpretation of *Alvarez*, § 31.002 must be read as a regulation on fraudulent speech that seeks to undermine government functions, processes, and affairs. The definition of fraudulent speech is dependent upon the context in which the alleged fraud is committed. This Court generally defines fraudulent speech to include perjury, falsification, concealment, and misrepresentation. *Knauer v. United States*, 328 U.S. 654, 657 (1946). Applications of this rule often include three elements. First, there must be an intent to deceive. *See, e.g.*, *United States v. Dunnigan*, 507 U.S. 87, 94 (1993) (perjury requires "willful intent"); *Lord v. Goddard*, 54 U.S. 198, 211 (1851) ("Fraud means an intention to deceive."). Fraudulent speech must also have the potential to effectuate some type of harm. *See, e.g.*, 18 U.S.C. § 1344 (2006) (requiring the obtaining or intent to obtain "moneys, funds, credits, assets, securities, or other property" for bank fraud); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (requirement that economic loss be shown for securities fraud); *United States v. Pierce*, 224 F.3d 158, 165 (2d Cir. 2000) (intent "to get money or property" to prove wire fraud). Third, some legislatures and courts require that fraudulent speech result in some benefit to the proponent. *See, e.g.*, *United States v. Ramos-Arenas*,

596 F.3d 783, 787 (citing 18 U.S.C. § 912) (false impersonation requires proof that the "pretended character demand[ed] or obtain[ed] any…thing of value."). As described below, intent to deceive, potential for harm, and material benefit to the speaker are all incorporated within § 31.002, thus making it an emblematic regulation of fraudulent speech.

§ 31.002 Requires Intent to Deceive

§ 1(a) requires that "the information source knows the purported facts are false or recklessly disregards the truth or falsity" of those facts. This standard, otherwise known as the "actual malice" standard, was imported directly from this Court's holding in *New York Times v. Sullivan*. There, the Court established that public officials can recover damages for defamatory falsehoods relating to their official conduct if they can prove that the statement was made with actual malice. *NYT v. Sullivan*, 376 U.S. 254, 279-80 (1964). Falsity alone is not sufficient to render criticism of public officials outside of First Amendment protection, but malicious falsehoods do not enjoy constitutional protection. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). While not required in fraudulent speech statutes, this heightened standard in § 31.002 ensures the statute affords proper "breathing space" for protected speech, such as critiques of the government that are true or unintentionally false. *Alvarez*, 567 U.S. at 751 (Alito, J., dissenting) (standards like actual malice "ensure that truthful speech is not chilled.").[1] As such, its inclusion speaks to the Columbia

[1] Even if § 31.002 were applied to a small amount of non-fraudulent speech that was protected by the First Amendment, this Court requires that a statute be substantially overbroad before it can be struck down as facially unconstitutional. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

legislature's dedication to protecting the First Amendment while balancing its legitimate government interests.

§ 31.002 Requires the Potential for Harm

§ § 1(b) and 3(b) of Columbia Revised Civil Statutes § 31.002 outline the harm that must occur (or have the potential to occur) in order to be convicted under the statute. Speakers must intentionally disseminate false information that is reasonably calculated to reach at least 5,000 people. § 3(b). The purpose of this dissemination must be to "enhance the financial interests of the information source," influence a contested election, and/or aid a foreign government. § 1(b). To avoid overly broad applications of this statute, the first potential harm listed under § 1(b) – to enhance the financial interests of the information source – should be read within the context of the rest of the statute. § 31.002 is clearly concerned with the regulation of disinformation as it relates to elections, government, and public health and safety. The statute does not otherwise seek to regulate the freedom of contract or individual finances. Interpreting this provision in context with the remainder of § 1(b), it should be understood as prohibiting individuals from generating disinformation about the government in order to generate revenue or otherwise promote their financial interests. The Court may also choose to sever this part of the statute so as to ensure its constitutionality.

§ 31.002 Requires A Material Harm in One of Four Areas

Finally, § 1(c) mandates that intentionally false and fraudulent speech causes material harm to one or more areas: public health, public safety, national security,

or the operation of an essential government service (e.g. an election). While the *Alvarez* Court cited defamation, fraudulent speech, and perjury as reasons to discredit the Stolen Valor Act, it simultaneously reaffirmed that the regulation of false speech in these areas is militated by important values: protection of the integrity of government processes, maintenance of the dignity of government service, and assurance of the "function and province" of the legal system. *Alvarez*, 567 U.S. at 720-21. As demonstrated by § 1(c), as well as the application of this statute to Mr. Segretti's dissemination of fraudulent election information, these values also underpin § 31.002. Moreover, as the Supreme Court of Columbia aptly stated in the opinion below:

> "The First Amendment seeks 'to ensure that the individual citizens can effectively participate in and contribute to our republican system of government' *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982), and to render public debate well-informed – capable of advancing knowledge, discovering truth, and informing rational decisions. *See Bridges v. California*, 314 U.S. 252, 277-78 (1941)."
>
> *Segretti v. State of Columbia*, 131 Col. Rptr. 44, 45 (Col. 2021).

Failure to regulate fraudulent speech that impacts government functions negatively impacts the public's ability to enjoy these core First Amendment principles. Government participation is not "effective" if one is intentionally misled by an information source. Similarly, the intentional spread of false information regarding public officials and government action seriously impedes the ability of individuals to gain knowledge and make rational, informed decisions.[2]

[2] An examination of the popular conspiracy theory, QAnon, demonstrates this point. For instance, a shocking 15% of Americans agree with QAnon's central (and unsubstantiated) tenant that "the government, media, and financial worlds in the U.S. are controlled by a group of Satan-worshipping

In sum, falsity alone is not sufficient for speech to be removed from constitutional protection; the falsity must be a knowing or reckless falsehood made for the purpose of gaining some material benefit. *Alvarez*, 567 U.S. at 719. 723. Columbia Revised Civil Statute § 31.002 is emblematic of this rule. It seeks to regulate fraudulent speech – a well-recognized exception to content-based restrictions on speech – in order to further its compelling governmental interests. As articulated below, it is also upon this basis that § 31.002 satisfies strict scrutiny and thus is constitutional as a regulation of fraudulent speech.

IF UPHELD AS A REGULATION OF FRAUDULENT SPEECH, § 31.002 WILL NEITHER PERMIT NOR ENCOURAGE VIEWPOINT REGULATION

Viewpoint discrimination is perhaps the most egregious form of content-based restrictions on free speech. It occurs when the government targets the particular views taken by speakers on a subject. *See, e.g.*, *Niemotko v. Maryland*, 340 U.S. 268 (1951) (Jehovah's Witnesses denied access to public park to give religious speeches where other religious organizations had been granted access for similar purposes); *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 502, 511 (1969) ("[T]he prohibition of expression of one particular opinion … is not constitutionally permissible."). In contemporary American society, some political viewpoints – on both sides of the political spectrum – are grounded in disinformation. Professor Alan Chen from the University of Denver Sturm College of Law argues that

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pedophiles who run a global child sex trafficking operation." Public Religion Research Institute, *Understanding QAnon's Connection to American Politics, Religion, and Media Consumption* (2021), available at: https://www.prri.org/research/qanon-conspiracy-american-politics-report/.

political mistruths have value because they can promote cultural connections among like-minded people and advance social cohesion within those networks. Alan K. Chen, *Free Speech, Rational Deliberation, and Some Truths About Lies*, 62 Wm. & Mary L. Rev, 357, 362-64 (Nov. 2020). As such, he argues, the government should not be able to control the ways in which individuals emotionally experience ideas, beliefs, and facts. Nevertheless, Professor Chen recognizes that content-based constitutional protection under the First Amendment "disappears when the lies cause a legally-cognizable harm." *Id*. at 362.

By adopting the proposal set forth herein, this Court should hold that intentionally spreading fraudulent facts regarding government function or affairs is a cognizable harm that does not result in viewpoint discrimination. Requiring that a statement be objectively and verifiably true does not require that a speaker must adopt a certain viewpoint. Under this proposal, there remains ample breathing space for government criticism and robust debate. Moreover, this standard would apply to government actors and everyday citizens alike, thereby preventing government officials from intentionally lying about their roles, duties, and obligations unless there is a compelling, narrowly tailored interest at stake (e.g. national security). The protections outlined above provide more than sufficient safeguard to ensure that this exception to First Amendment protection is not weaponized by the government against individuals with whom it disagrees.

COUNTERSPEECH IS NOT A SUFFICIENT REMEDY TO FALSE INFORMATION CONCERNING GOVERNMENT AFFAIRS

Additionally, fraudulent speech concerning government affairs requires more protection than individuals can (and should) provide on an individual basis. This Court has frequently used the counterspeech doctrine to strike down regulations of speech as overbroad or unnecessary. *See, e.g.*, *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring) (false speech should be counteracted with "more speech, not enforced silence."); *Alvarez*, 567 U.S. at 727 ("The remedy for speech that is false is speech that is true."). However, the maxims of counterspeech constitute naive proclamations given the context of contemporary American society, especially within the areas § 31.002 seeks to regulate.

For example, in *Alvarez*, the government failed to show that counterspeech could not serve as an appropriate remedy to false speech regarding military awards. *Id.* at 727-29. There, the counterspeech at issue included the defendant being ridiculed online and asked to resign prior to any government action. *Id.* In contrast, applying the counterspeech principle to public health and safety, national security, and elections would put the onus on individuals to combat intentional, widespread disinformation campaigns about systemic problems. This approach has already failed. From the 2020 election[3], to QAnon[4], to widespread distrust in the media,[5] the

[3] Monmouth University Polling Institute, *National: Public Supports Both Early Voting and Requiring Photo ID to Vote* (June 21, 2021) (finding that ⅓ of Americans remain convinced that President Joe Biden won the 2020 election because of widespread voter fraud), available at https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_062121/.

[4] See *supra* n. 2.

[5] As of October 2021, only 36% of Americans reported having "a great deal" or "a fair amount" of trust in newspapers, television, and radio news reporting. Gallup, *Americans' Trust in Media Dips to Second Lowest on Record* (Oct. 7, 2021), available at https://news.gallup.com/poll/355526/americans-trust-media-dips-second-lowest-record.aspx.

pervasiveness of fraudulent information is weakening Americans' ability to decide the truth for themselves. Critically, oppressed groups with inequitable access to the free marketplace of ideas are ill-equipped to counter disinformation spread by actors with more wealth, access, and opportunity. See Engy Abdelkader, Elie Mystal, Wajahat Ali, Jim Weinstein, *U.S. Elections 2020: Where and How Do We Draw A Constitutionally Permissible Line to A Candidate's Inflammatory Political Rhetoric?*, 44 Harbinger 140, 144–45 (2020). Whereas *Alvarez* endorsed public shaming as an appropriate solution to an easily disprovable lie, the challenges posed by systemic disinformation cannot be resolved by individuals. As such, the Court should uphold § 31.002 as a constitutional solution to these widespread problems.

ALTERNATIVELY, IF THE COURT INTERPRETS § 31.002 AS A CONTENT-BASED REGULATION, THE STATUTE REMAINS CONSTITUTIONAL BECAUSE IT IS NARROWLY TAILORED TO PROMOTE THE POLICE POWERS OF THE STATE

Alternatively, this Court may find that § 31.002 is a content-based regulation because it restricts false speech that causes harm in four areas: public health, public safety, national security, and/or essential government functions. § 1(c). Content-based restrictions on speech are presumptively invalid, and the government has the burden of proving their constitutionality. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004). The State must do so by satisfying the strict scrutiny standard under the Equal Protection Clause of the 14th Amendment. In the First Amendment context, the Equal Protection Clause ensures

that the government does not favor speech on certain topics over others. Under strict scrutiny, plaintiffs must assert that the regulation at issue created unequal treatment on the basis of a suspect class or fundamental right, and that the government intentionally mandated such disparate treatment. *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). The burden then shifts to the government to prove that a narrowly tailored compelling interest justified the disparate treatment. *Id*.

Each of the areas regulated by § 31.002 – public health, public safety, national security, and/or essential government functions[6] – fall within the broad police power of the state to regulate behavior and enforce order within its territory. *Chicago, B & Q. Ry. Co. v. People of State of Illinois*, 200 U.S. 561, 592 (1906) ("We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."). Through § 31.002, the Columbia legislature asserted its compelling interest in exercising this power. Because § 31.002 is narrowly tailored to this compelling interest, the State has satisfied its burden under strict scrutiny.

§ 31.002 Satisfies the Narrowly-Tailored Requirement in Three Ways

Three elements of § 31.002 demonstrate that it is narrowly tailored to further the State's compelling interest in exercising its police powers: the actual malice

[6] As in the case of Mr. Respondent, one essential government function is the maintenance of free and fair elections. States have a legitimate government interest in upholding the integrity of their elections. *Brown v. Hartlage*, 456 U.S. 45, 52 (1982).

requirement, the exceptions listed in § 2 of the Act, and the definition of information source.

First, a conviction under § 31.002 requires that the information source "knows the purported facts are false or recklessly disregards the truth or falsity of those purported facts." § 1(a). This standard was adopted from the landmark civil defamation case *New York Times v. Sullivan*. See also *Garrison v. Louisiana*, 379 U.S. 64 (1964) (extending *Sullivan* to criminal defamation statutes). In *Sullivan*, this Court established that public officials may not recover monetary damages "for a defamatory falsehood relating to his official conduct" unless he can satisfy this actual malice standard. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). The Court clearly distinguished that "factual error affords no warrant for repressing speech that would *otherwise* be free." *Id*. at 272 (emphasis added). If malice is involved, however, the false speech at issue is not "otherwise free." *Id*.

§ 31.002 is not a defamation statute, and the Columbia legislature was not required to include the actual malice standard. By doing so, the State intended to insulate protected speech from the chilling effect that results from overly broad regulations. Such an effect is well-demonstrated in the Stolen Valor Act, found to be unconstitutional by this Court in *United States v. Alvarez*. 567 U.S. 709 (2012). The Act, which banned false claims of receipt of military decorations or medals, sought to suppress all false statements on this subject without time, place, or manner restrictions. *Id*. at 722-23. The Court found the Act was not narrowly tailored for a myriad of reasons, including that it did not require proof of specific harm, did not

require speech to have been made for material gain, and posed too great of risk to protected speech. *Id*.

These issues are not present in § 31.002. In addition to the actual malice requirement, the statute specifies two important exceptions to liability that offer additional "breathing space" for protected speech. First, liability cannot be imposed where the information source identifies the fraudulent facts, describes the purpose for disseminating them, and identifies any third party interests who have offered compensation or other inducement for their dissemination where applicable. § 2(a). Under this exception, an information source remains able to share fraudulent information but must balance this desire against the interest the public has in reliable information. Similarly, the second exception denotes five ways in which fraudulent facts may still be communicated without violating the statute. § 2(b)(i-v). Information sources remain free to report fraudulent information communicated by other, reliable sources, such as Bona Fide News Organizations, courts, and legislatures. This exception clarifies that individuals need not fear prosecution if they repeat fraudulent information; the onus to ensure the information is true remains on the original source. Thus, unlike the Stolen Valor Act, it is clear that § 31.002 does not ban all fraudulent speech on topics related to the State's police power.

Third, the definition of information source itself offers additional proof that § 31.002 is narrowly tailored to meet the State's compelling interest in furthering its police power. As defined in § 3, an "information source" must be one with significant

size and influence. The State does not seek to target the average person sharing fraudulent information online or otherwise. Rather, the statute only seeks to target those who have the potential to impact public health, public safety, national security, or the operation of an essential government function in a materially significant way. The limiting principle provided by the third exception ensures that the reach of § 31.002 is not overly broad and that small instances of false information are not to be regulated by the State.

Thus, if the Court interprets § 31.002 as a content-based regulation, it should find that it satisfies strict scrutiny. The State has a compelling interest in utilizing its constitutionally protected police power. Through multiple restrictions incorporated in § 31.002, the State achieves this goal through a narrowly-tailored statute that balances competing interests in free speech, reliable information, and general welfare. However, because § 31.002 regulates fraudulent information, this Court should find that it concerns speech that falls outside of First Amendment protection.

II.

§ 39.601 DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT IS A CONTENT NEUTRAL RESTRICTION THAT FURTHERS THE GOVERNMENTAL INTEREST OF PROTECTING INDIVIDUAL PRIVACY AND IS NARROWLY TAILORED TO APPLY IN THOSE INSTANCES WHEN INDIVIDUAL PRIVACY IS AT RISK

Assessing whether a statute that regulates speech is constitutional or not hinges upon the level of scrutiny applied to the statute. Such a statute can be subject to strict or immediate scrutiny, determined by whether the statute is

content-based or content-neutral. Content-based statutes are subject to strict scrutiny, while content-neutral statutes are subject to intermediate scrutiny. § 39.601 is content-neutral because it does not discriminate on the basis of the speaker, their viewpoint, or their political message. The statute passes intermediate scrutiny because it is narrowly tailored to fulfill a legitimate government interest. It is designed to protect the privacy interests of the State's population and does so by limiting only surreptitious recordings and provides several exceptions where First Amendment concerns supersede the right to privacy.

Even if the statute was subject to strict scrutiny, it would survive that higher standard of review. The methods used to narrowly tailor the law to pass intermediate scrutiny still apply in their application to strict scrutiny. Additionally, preserving privacy is so paramount that it also meets the threshold of a compelling government interest. Accordingly, § 39.601 does not violate the First Amendment.

RESPONDENT'S RECORDING CONSTITUTES EXPRESSIVE CONDUCT AND IS PROTECTED GENERALLY BY THE FIRST AMENDMENT

In analyzing Respondent's claim that surreptitious recording is protected under the First Amendment, the Court must first establish that recording itself is expressive conduct. While conduct that is not speech may be protected under the First Amendment, it must be expressive. *Texas v. Johnson*, 491 U.S. 397 (1989) addresses the applicable test for whether conduct is expressive. In evaluating whether conduct "possesses sufficient communicative elements," two elements must be present: "an intent to convey a particularized message," and a "likelihood. . . that

the message would be understood by those who viewed it." *Id* at 404. Applying this test, it is clear that not all audiovisual recordings are expressive conduct. Recordings with no purpose or audience – of which there are plenty in the age of smartphones – would not meet this definition.

In the present case, Respondent's surreptitious recording of Dean and Erlichman constitutes expressive conduct. Applying the first prong of the *Johnson* test, Respondent recorded the conversation to intentionally convey the erroneous message that Erlichman was engaging in election fraud. As to the second prong, local news media reported on the meeting and citizens discussed it on social media. The proliferation of this message demonstrates the public's understanding of the false narrative that Respondent crafted. Respondent's particular surreptitious recording, therefore, constitutes expressive conduct. This does not affect the constitutionality of § 39.601, however, because the First Amendment can be limited under certain circumstances.

§ 39.601 DOES NOT LIMIT THE RIGHT TO RECORD MATTERS OF PUBLIC INTEREST

Several circuits have held that the First Amendment includes a right to film matters of public interest, and some have even invalidated laws prohibiting recording public officials discharging their duties in public. *Fordyce v. City of Seattle* involved a videographer recording police activity during a public protest. 55 F.3d 436 (9th Cir. 1995). The officers arrested Fordyce for being in violation of a Washington privacy statute. *Id.* at 438. Although the court found a genuine issue of

material fact as to whether Fordyce's rights were violated by the officers' conduct, the case held that there is a right to "film matters of public interest." *Id.* at 439.

Citing *Fordyce*, the Eleventh Circuit recognized a similar right to record in *Smith v. City of Cumming*, 212 F.3d 1332, but expanded on the concept of public interest. In *Smith*, the plaintiffs claimed a violation of their First Amendment rights when police officers prevented them from recording police activity. "The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." *Id.* at 1333. The First Circuit also adopted a right to record matters of public interest. In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), a passer-by noticed police officers engaging in an arrest. Worried that the officers were using excessive force, he began to record them. The officers arrested him for violating a Massachusetts wiretapping statute. *Id.* at 79. The court held that there is a First Amendment right to film "government officials engaged in their duties in a public space." *Id.* at 82. The circuits that recognize this right have placed specific limits on it, however.

While the right to record matters of public interest is broad, the circuits that recognize it have ruled almost unanimously that this right only applies to recording public officials in the discharge of their public duties in public. The overwhelming weight of the case law surrounding this issue involves the right to record police officers, which gestures toward this heightened standard. While other public officials may be recorded under this First Amendment protection, they must be

recorded while discharging their duties in public. In Respondent's case, he recorded public officials while they were not discharging their public duties.

Respondent's conduct was not protected by a First Amendment right to record matters of public interest, if that right does exist. He recorded two public officials—Dean served on the city planning commission and Erlichman was chair of the election commission—and he did so in public. He did not, however, record them while they were discharging their public duties. Neither of them were performing public functions at the time of the recording. The unedited video of the event reveals they were discussing a church project. Even if Respondent had recorded them as they conspired to fix the election, which they were not, this would not have been in discharge of their public duties. It would stretch reason to find that a city planning commissioner and an election commissioner were acting within the scope of their respective positions by discussing election fraud. Furthermore, § 39.601 includes an exception for recording public officials and employees "done in the performance of official duty." Therefore, even if the Court adopts the First Amendment right to film matters of public interest, following the Ninth, Eleventh, and First Circuits, the statute challenged here does not violate that right.

THE COURT SHOULD APPLY INTERMEDIATE SCRUTINY TO § 39.601 BECAUSE THE STATUTE IS CONTENT NEUTRAL

To be subject to intermediate scrutiny, a law that implicates the First Amendment must be content neutral. *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). In contrast, "[g]overnment regulation of speech is content-based if a law

applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). The *Reed* Court further noted that a law may be content-based by regulating speech based on a particular subject matter or by regulating speech based on its "function or purpose." *Id*. Overall, the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner*, 512 U.S. at 642.

§ 39.601 is content neutral because the law shows no preference toward who is speaking. Rather, it restricts expressive conduct based on the circumstances of the speech. § 39.601 only bans surreptitious recordings in those instances when the recording is created from hidden cameras. Such a ban holds no preference for who is speaking or what is discussed; it focuses solely on the method of creating the speech and whether that method violates the privacy interests of those individuals being recorded. Indeed, when enacting § 39.601, the legislature stated that "as a matter of state public policy, we recognize that the right of any person to the privacy of his conversation is of greater societal value than the interest served by eavesdropping or wiretapping." R at 55. Similarly, in *Project Veritas v. Schmidt*, the court held that an Oregon statute banning surreptitious recordings was content neutral because the restriction applied "across all topics, speakers, and interests" and thus did not "single out any particular viewpoint or subject matter." *Project Veritas v. Schmidt*, 2021 U.S. Dist. LEXIS 150310. Similarly, § 39.601 applies in the exact same manner as the statute in *Schmidt* because it restricts surreptitious recordings

regardless of the topic being recorded, the essence of the speech being recorded, and the interests held by those recording. As such, Columbia's general ban on surreptitious recordings is content neutral because its purpose is to protect individual privacy, rather than regulating expressive activity based on any particular viewpoint.

THE EXCEPTIONS IN § 39.601 ARE CONTENT NEUTRAL BECAUSE THEY WERE ADOPTED TO PROTECT INSTANCES WHEN THERE IS A LESSENED EXPECTATION OF PRIVACY

To satisfy intermediate scrutiny, the exceptions to a regulation must also be content neutral. *Sorrell v. IMS Health, Inc.*, 564 U.S. 567 (2011). § 39.601 includes four exceptions in which the surreptitious recording ban does not apply. Those exceptions apply in situations where an individual does not have a reasonable expectation of privacy. As such, the State of Columbia implemented these exceptions not because of its agreement with the content of the expressive activity, but rather, because they outline instances in which the state's concern for individual privacy is lessened or nonexistent.

§ 2(a) allows for surreptitious recordings of "[e]lected or appointed public officials or… public employees when the transcription or recording is done in the performance of an official duty." R. at 50. At first glance, this exception appears to distinguish the permissibility of recording based on the speaker. This Court upheld in *Reed* that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed*, 576 U.S. at 157 (quoting *Turner*, 512 U.S. at 658). In this instance, § 39.601 allows for

surreptitious recordings of public officers and employees and at public meetings not because of a content preference, but because of a diminished expectation of privacy.

§ 2(b), the public meetings exception, is content neutral because it is a time, place, and manner exception that allows for more speech in a forum which is "typically used for expressive activities." R at 50. The court in *Schmidt* established this idea, holding that a public meeting exception to a Oregon ban on surreptitious recordings was not content-based. *Schmidt*, 2021 U.S. Dist. LEXIS 150310. In making the ruling, the court rejected the argument that the exception was content-based because it allows open recording at "government-favored events." *Id.* at 18. In so holding, the court noted that the exception does not favor any type of meeting or event, but rather, is focused on those instances "where the government's interest in protecting individual privacy is weaker." *Id.* This reasoning should be applied to the exception in § 39.601. It allows for recordings at public meetings without preference for any specific topic, speaker, or interest. Like in *Schmidt*, the statute is concerned with the diminished expectation of privacy of the individual. As such, the second exception is also content neutral because its purpose is to narrow the scope of the restriction to those cases in which there is a reasonable expectation of privacy.

§ 2(c) to § 39.601 allows for surreptitious recordings of "[p]ersons given warning of the transcription or recording." R. at 50. This exception is content neutral because the content and ideas expressed by the speech in these instances is irrelevant to its protection by the law. Rather, the protection is given to those who

no longer have a reasonable expectation of privacy due to their knowledge of the recording. Therefore, the purpose of this exception is to prevent the statute from restricting expressive conduct in situations when individual privacy is not of concern.

§ 2(d) of § 39.601 allows for surreptitious recordings of "[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." R. at 50. The essential purpose of this exception is to permit the various forms of 911 call receiving agencies to maintain a record of those emergency calls that they receive. As such, the government's purpose of adopting the exception is unrelated to whether the government agrees with the contents of the call, but rather, to ensure that there is a record of 911 calls. As such, § 39.601 is content neutral, making it subjected to intermediate scrutiny.

EVEN IF § 39.601 IS SUBJECT TO STRICT SCRUTINY, IT IS NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST

Even if § 39.601 was found to be content-based, it would survive strict scrutiny. To survive this standard of review, "the Government must prove that the restriction furthers a compelling government interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 157. This standard is significantly more stringent than intermediate scrutiny, but is not insurmountable. Here, § 39.601 seeks to protect the privacy interests of all private citizens of Columbia. *Mapp v. Ohio*, 367 U.S. 643 (1961) found that the Fourth Amendment to the Constitution

created a right to privacy which was "no less important than any other right carefully and particularly reserved to the people." *Id.* at 656. Privacy's status as a right constitutes a compelling government interest that would pass strict scrutiny. Additionally, if the right to privacy is on equal footing with other similar rights, as *Mapp* asserted, then it may be balanced against freedom of speech. Case law supports such an equilibrium.

Bartnicki, 532 U.S. 514 specifically addresses such a balance of interests in the context of surreptitious interception. In that case, negotiations between a Pennsylvania school district and a teachers' union were intercepted and published. *Id.* at 518-519. Petitioners sued, alleging a violation of both federal and state wiretapping statutes. *Id.* at 520. but also acknowledged that "there are important interests on both sides of the constitutional calculus." *Id.* at 533. Ultimately, the court held that in those circumstances, "privacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.* at 534. Here, however, the constitutional calculus between privacy and free speech favors privacy.

The facts of the present case are significantly different from those in *Bartnicki*. First, in that case, the surreptitiously intercepted information was undoubtedly a matter of public interest, involving public spending. *Id.* at 519. In this case, there was no element of public interest at stake. While Respondent's edited video of Dean and Erlichman's interaction at the Halloween party may have suggested an element of public interest, the full recording definitively demonstrates that their conversation regarded private church matters, not a matter of public

interest. Second, in *Bartnicki*, the radio commentator who published the intercepted recording was crucially not the actor who had intercepted the conversation. The court reasoned that Vopper's First Amendment protection could not be stripped by "a stranger's illegal conduct." *Id.* at 535. Similarly, Respondent's publication of his surreptitious recording does not violate § 39.601. His illegal act of recording does violate the statute, though. In the present case, there was no third party, no stranger, to buffer Respondent from liability under the law. As such, any interest in publishing matters of public interest that existed in *Bartnicki* do not apply to Respondent with regards to his violation of § 39.601. Using *Bartnicki* as a guide, the balance of privacy interests against the right to surreptitiously record leans the other way in Respondent's case.

§ 39.601 PASSES INTERMEDIATE SCRUTINY BECAUSE IT IS NARROWLY TAILORED TO SERVE THE GOVERNMENT INTEREST OF INDIVIDUAL PRIVACY.

There are several variations of the intermediate scrutiny test that apply in First Amendment Cases. When a law regulating conduct has an incidental burden on speech, the Court applies the *O'Brien* test. Under the *O'Brien* test, the regulation is constitutional if it "furthers an important or substantial government interest" which is "unrelated to the suppression of free expression" and if the First Amendment burden is "no greater than is essential to the furtherance of the interest." *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). Alternatively, when a law regulates the "time, place, and manner" of speech,

the court evaluates whether the restriction is "justified without reference to the content of the regulated speech," "narrowly tailored to serve a significant government interest" and "leave[s] open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791.

The surreptitious recording ban does not regulate conduct that has incidental impacts on speech. Rather, because recording is a manner of expression in of itself, the impact on speech is not incidental. A more appropriate intermediate scrutiny test is the time, place, and manner test. § 39.601 seeks to regulate the manner in which expressive conduct is created by prohibiting it from being created by surreptitious manners. Meanwhile the exceptions to the ban relate to the places in which the ban does not apply, those being public meetings, places where public officials and employees are present, and places relating to health care emergency phone calls. As such, this court should apply the time, place, and manner intermediate scrutiny test.

§ 39.601 SERVES THE GOVERNMENT INTEREST OF PROTECTING INDIVIDUAL PRIVACY

§ 39.601 serves the government interest of protecting individual privacy. This court has held that privacy of communication is an important interest. *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 559, (1985). As such, the State has an important interest in protecting the privacy of the individual, finding that "[p]rivacy of communication is an important interest." *Bartnicki v. Vopper*, 532 U.S. 514 (2000). In *Bartnicki*, this Court noted the "chilling effect on private speech"

that a lack of privacy may cause. *Id.* at 533. The assurance that one may communicate privately is "essential if citizens are to think and act creatively and constructively" because when one is fearful that they are being listened to, it may have an "inhibiting effect upon the willingness to voice critical and constructive ideas." President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 202 (1967). § 39.601 seeks to protect the privacy of communication of individuals by banning recordings of those persons conversations in instances when they reasonably expect that their conversations will remain private. As such, it relates to the government interest of protecting individual privacy.

§ 39.601 IS NARROWLY TAILORED BECAUSE IT EXCLUDES INSTANCES IN WHICH THE STATE'S INTEREST IN PROTECTING PRIVACY NO LONGER EXISTS

Under the time, place, and manner test, to be narrowly tailored the regulation must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. To pass intermediate scrutiny, the regulation need not be the least restrictive means possible. *Id.* at 798. Rather, intermediate scrutiny allows for some amount of overinclusiveness with the enforcement of the law. *Id.* at 799. Along with this, the tailoring of the regulation must be compared to the strength of the government interest. *Burson v. Freeman*, 504 U.S. 191, 206 (1992). § 39.601 aims to protect individual privacy by ensuring those who have a reasonable expectation of privacy from being recorded. This

interest outweighs the public's interest in recording them from being recorded because of the detrimental effects on individuals' ability to think critically and constructively when they believe they are being recorded. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 202 (1967).

The general ban starts by prohibiting recordings, but specifies that it only applies to recordings of (1) "conversations" by (2) "the use of hidden electronic or mechanical devices." R. at 50. From the start, § 39.601 creates a substantial restriction on the ban, applying only to those instances when an actual conversation is recorded, rather than all recordings. *Id*. It continues on to further restrict the ban, requiring that the recording be created by "hidden" devices. *Id*. As read, § 39.601 allows both for overt recordings of other conversations *and* for the surreptitious recordings of others so long as it does not include an audible recording of any conversation. Such a restriction is therefore narrowly tailored in order to specifically serve the governmental interest of allowing people to converse privately. It reaches only to those instances when those individuals having a private conversation have a reasonable expectation of privacy—when there is no overt recording, and only protects their conversations, not their entire existence in spaces. As such, § 39.601 does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. 781 at 799.

The exceptions outlined in § 39.601 further restrict the regulation to ensure that it is narrowly tailored. It first allows for the surreptitious recording of public

officials and employees. Public officials' privacy interests are reduced as a result of their position. See *Lesar v. United States Dep't of Justice*, 204 U.S. App. D.C. 200, 636 F.2d 472, 487 (D.C. Cir. 1980) ("In their capacity as public officials FBI agents may not have as great a claim to privacy as that afforded ordinarily to public citizens, but the agent by virtue of his official status does not forgo altogether any privacy claim in matters related to official business.") This is because individuals have the right to "gather information about what public officials do on public property." *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). Because persons in these roles have a reduced privacy interest, § 39.601 curtails its restriction appropriately in order to apply in situations when individuals have an interest in privacy.

§ 39.601 § 2(b) permits surreptitious recordings of persons at public meetings. Those speaking at a public meeting have a lessened expectation of privacy because their actions are occurring at a meeting that is open to the public and that they should reasonably know will have discussions of public importance, making it more subject to the public's attention. By including this exception, § 39.601 further ensures that the law is narrowly tailored by carving out this instance in which one's reasonable expectation of privacy is lessened and the public's interest in recording is heightened.

§ 2(c) ensures that the statute does not restrict surreptitious recordings of those with notice. Persons with notice that they will be recorded do not have a reasonable expectation of privacy because by definition they know that their

conversations are no longer private. As such, § 2(c) carves out another instance in which there is no privacy interest of the individual.

§ 39.601 IS NARROWLY TAILORED BECAUSE ITS EXCEPTIONS ALLOW FOR SURREPTITIOUS RECORDING WHERE AN EXPECTATION OF PRIVACY IS UNREASONABLE

The court in *Alvarez* held that a recording ban was not narrowly tailored to serve the governmental interest because it criminalized recording audio of conversations that are not private, extending beyond the state's interest in protecting individual privacy. *Alvarez*, 567 U.S. 709, 736 (2012). The court in *Alvarez* reasoned that the Illinois' statute went beyond the state's interest in protecting privacy by banning those recordings that implicate *no* privacy interest at all. *Id.*

The recording ban in § 39.601 is distinguishable from the Illinois statute in *Alvarez*. In the present case, the law seeks to protect those conversations which may be reasonably deemed as private, thus protecting the privacy of the individual. The general ban prohibits secretly recording others by surreptitious manners when the individuals being recorded have a reasonable interest in privacy because due to the surreptitious nature of the recording they are unaware of it.

The exceptions involve those situations where the reasonableness of an individual's interest in privacy is lessened. Public officials and employees as well as those speaking at public meetings have a lessened interest in privacy because the public has an interest in taking record of how their public officials carry out their

duties. *See Lesar*, 636 F.2d at 487. Those who have been warned of the recording are significantly less likely to have an interest in privacy because they are aware that their conversations are in fact not private.

§ 39.601 IS NARROWLY TAILORED BECAUSE IT EXPRESSLY ALLOWS THOSE RECORDINGS OF PUBLIC OFFICIALS WHICH ENSURES THE PUBLIC'S RIGHT TO RECORD THEIR PUBLIC OFFICIALS

In *Rollins*, the court evaluated the constitutionality of a recording ban which forbade both the recording of public officials and employees as well as private individuals. *Rollins*, 982 F.3d at 844. The court struck down the law as it related to public officials and employees, noting the importance that private parties have in "informing the public about the way public officials, and law enforcement in particular, carry out their official duties." *Id.* The court went on to uphold the ban on recording private individuals, citing the "substantial protection for privacy that it provides" for those non-public parties. *Id.* § 39.601 passes constitutional evaluation first because unlike the statute in *Rollins*, § 39.601 allows individuals to record public officials and employees. As such, § 39.601 has no restrictions on the public's ability to create expressive material regarding their public officials and employees. Meanwhile the statute bans the recording of private individuals, which the court in *Rollins* found to be constitutional because of the substantial interest the state has in protecting the privacy of its citizens. *Id.*

§ 39.601 IS NARROWLY TAILORED BECAUSE IT LEAVES OPEN AN ALTERNATIVE CHANNEL TO CREATE EXPRESSIVE CONDUCT BY RECORDING INDIVIDUALS WITH NOTICE

To be narrowly tailored, courts also consider whether a regulation "leave[s] open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791. This requires the court to determine whether there is an alternative channel to communicate the message the impacted party wishes to. *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005) ("The Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." (quoting *Ctr. for Fair Pub. Policy*, 336 F.3d at 1170 (9th Cir. 2003)).

§ 39.601 leaves open "ample alternative channels" for communication of the information an impacted party seeks to communicate because it allows for the surreptitious recordings of recordings that do not involve conversation, public officials and employees, public meetings, those with notice, and 911 call operators. The court in *Schmidt* upheld a similar surreptitious recording ban under this logic. There, the court found that alternative channels such as recording after providing notice, and allowing all recordings of law enforcement and public meetings provided a "broad array of settings" in which persons may gain recordings of the information they wish to express. As such, the exceptions of § 39.601, as well as the scope of the ban itself, leaves open alternative channels of communication.

THE LAST ANTECEDENT RULE OF STATUTORY INTERPRETATION DOES NOT IMPLY THAT EXCEPTION 2(A) OF § 39.601 ALLOWS SURREPTITIOUS RECORDING OF PUBLIC OFFICIALS

"When the transcription or recording is done in the performance of official duty" in § 2(a) of § 39.601 applies to both "public employees" and "elected or appointed public officials." § 2(a) could be construed to mean that the "in the performance of official duty" clause only applies to public employees, and not to public officials. This interpretation would be unpersuasively supported by the last antecedent rule of statutory interpretation. The last antecedent rule is partly defined as "as a general rule, relative, qualifying, or limiting words or clauses in a statute are to be referred to the next preceding antecedent." Henry Campbell Black, *Handbook on the Construction and Interpretation of Laws*, § 73, 224 (2d ed. 1911). Using this rule, the official duty clause would perhaps only apply to public employees. This rule leads to an unconvincing interpretation of the statute, however.

The last antecedent rule is not always applicable. The Handbook on the Construction and Interpretation of Laws qualifies its definition of the last antecedent rule. It elaborates, "Unless the context, or the evident meaning of the enactment, requires a different construction." Rules of statutory construction have been criticized as highly contextual and sometimes contradictory. In his famous article, Karl Llewellyn noted that many rules of interpretation can be organized into pairs, in which one rule directly opposes the other. Pair 23 includes the last antecedent rule, and finds another rule that contradicts it. Karl Llewellyn, *Remarks*

on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed, 3 Vanderbilt Law Rev. 395 (1950).

Admittedly, Llewellyn's article is not free of controversy, but even critics have recognized fault in treating the last antecedent rule as absolute. *'Only a Sith Thinks Like That': Llewellyn's 'Dueling Canons,' Twenty One to Twenty Four* is an article in a series that questions Llewellyn's formulation of rules of statutory interpretation as contradictory pairs. Schlusselberg, Adam and Sinclair, Michael, *'Only a Sith Thinks Like That': Llewellyn's 'Dueling Canons,' Twenty One to Twenty Four* (February 23, 2010). NYLS Legal Studies Research Paper No. 09/10 #22, Available at SSRN: https://ssrn.com/abstract=1557831. Still, though, *Only a Sith* questions the strength of the last antecedent rule. "The popular approximation that is the basis of Thrust #23 is a weak reed indeed, too unreliable to claim the status of a rule. Thus it is not surprising that the treatise writers should emphasize its frailty." *Id.* at 31. Both proponents and skeptics of rules of statutory interpretation assert the last antecedent rule is not always applicable, which it is not here.

§ 39.601 DOES NOT VIOLATE THE OVERBREADTH DOCTRINE

The overbreadth doctrine is one way in which a statute may fail strict scrutiny and be invalid on First Amendment grounds. Under this doctrine, a person may allege the unconstitutionality of a law not as applied to themself, but as applied to others. *New York v. Ferber*, 458 U.S. 747, 769 (1982). The overbreadth doctrine does not apply to § 39.601, however. A statute cannot be found in violation

of this doctrine, in violation of the First Amendment, unless that overbreadth is "not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Applying this to § 39.601, the statute has a plainly legitimate sweep that focuses on protecting the privacy interests of Columbia citizens. In addition, few to none of its potential applications are unconstitutional. Challenges to similar laws from other circuits have emphasized that it is unconstitutional to ban recording public officials or employees, usually police officers, while they are discharging their public duties. *Smith v. City of Cumming,* 212 F.3d at 1333. § 39.601 avoids this pitfall by including § 2(a), which provides an exception specifically for recording public officials and employees "done in the performance of official duty." Additionally, the statute provides three other exceptions, further limiting any opportunity for overbroad application. Without application to police officers, public meetings, or persons given warning of the recording, § 39.601 has little capacity to infringe on the First Amendment and allows for recording where an overwhelming First Amendment interest exists.

Overbreadth is a problematic doctrine that should only be applied in exceptional circumstances. *Broadrick*, 413 U.S. 601 described the overbreadth doctrine as "strong medicine" that should be "employed by the Court sparingly and only as a last resort." *Id.* at 613. It cannot be used when "a limiting construction has been or could be placed on the challenged statute." *Id*. § 39.601 does not warrant such a drastic response. Not only are there few to no hypothetically unconstitutional

applications, but there are options other than invoking the overbreadth doctrine to invalidate the statute entirely. This is not the last resort. § 39.601 could be effectively constrained by the Court through limiting constructions. In opposition to cases in which the overbreadth doctrine has been effectively utilized, the instant case deals with a statute that specifically targets unprotected conduct for a constitutionally permissible purpose.

There are many cases that address the overbreadth doctrine and that provide good bases for comparison. *Gooding v. Wilson,* 405 U.S. 518 (1972) is a perfect example. In *Gooding*, a protester insulted police officers and was convicted of violating a Georgia statute that banned "opprobrious words or abusive language." *Id.* at 518. The government argued that this statute narrowly banned "fighting words," a class of speech that is not constitutionally protected. *Id.* at 522. Fighting words was defined in an earlier case, *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942) as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. The court in *Gooding* held that "opprobrious" and "abusive" is a standard that, by dictionary definition, is much broader than "fighting words," and that the Georgia statute stretched beyond banning speech that is not constitutionally protected. *Id.* at 527. The words chosen in that statute were semantically vague and open to multifarious interpretations, many of which would violate the First Amendment. No such interpretive element exists in § 39.601. The phrasing and construction of this statute is definitively concrete, narrowly circumscribing both the prohibition on surreptitious recording

and its exceptions. In analyzing a successful overbreadth challenge in *Gooding*, an argument for finding § 39.601 overbroad in the present case is unpersuasive.

CONCLUSION

This case presents two questions regarding the scope of the First Amendment. Both statutes at issue in this case limit a particular category of speech for a narrowly tailored government purpose. Neither, however, violates the First Amendment.

§ 31.002 only restricts fraudulent speech, which is exempt from First Amendment protection. Fraudulent speech may be restricted if the regulation contains three factors: intent to deceive, a potential for harm, and a benefit to the proponent of the speech. § 31.002 is narrowly tailored to only restrict speech that contains these three elements. Additionally, the statute does not distinguish speech based on its viewpoint or political leaning. Because § 31.002 only regulates fraudulent speech and does not do so based on the speaker's viewpoint, it does not violate the First Amendment. Moreover, if this Court interprets § 31.002 as a content-based restriction on free speech, then it should also find that the statute satisfies strict scrutiny. In regulating four different areas of general welfare, § 31.002 fulfils the compelling government interest in states asserting their police powers. § 31.002 is narrowly tailored to this interest because it includes the actual malice standard, offers a reasonable avenue for the expression of fraudulent facts, and narrowly defines an information source. For these additional reasons, this Court should find that § 31.002 does not violate the First Amendment.

Second, § 39.601 prohibits audiovisual recordings that are made without the consent or knowledge of the parties being recorded. The statute also does not discriminate based on viewpoint and provides exceptions to protect recordings that fulfill important First Amendment functions. As such, the statute is content-neutral and is subject to intermediate scrutiny. It survives this standard of review because the law is narrowly tailored to fulfill a legitimate government interest. Two constitutional rights are implicated in a law that regulates surreptitious recording: privacy and speech. § 39.601 balances the interests in both rights while also delineating circumstances in which First Amendment concerns override those of privacy. Therefore, § 39.601 is constitutional.

For the foregoing reasons, the judgement below should be reversed.