No. 14-20-00333

IN THE
SUPREME COURT OF THE UNITED STATES
SPRING TERM 2022

THE STATE OF COLUMBIA,

Petitioner,

v.

DONALD SEGRETTI,

Respondent.

On Writ of Certiorari to the
Supreme Court of the
State of Columbia

BRIEF FOR PETITIONER

Team 213

Counsel for Petitioner

QUESTIONS PRESENTED

Section 31.002 of the Columbia Revised Statutes bans the intentional dissemination of false purported facts. Section 39.601 of the Columbia Revised Statutes bans the surreptitious recording of a conversation without the knowledge of all parties to the conversation. The questions presented are:

I. Does Respondent Donald Segretti's conviction for disseminating fake news under Section 31.002 of the Columbia Revised Statutes violate the First Amendment to the United States Constitution?

II. Does Respondent Donald Segretti's conviction for violating privacy in communications under Section 31.601 of the Columbia Revised Statutes violate the First Amendment to the United States Constitution?

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CONSTITUTIONAL AND STATUATORY PROVISIONS INVOLVED

This case involves interpretation and application of the First Amendment to the United States Constitution which provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

This case also involves interpretation and application of Section 31.002 of the Columbia Revised Statutes, which bans the intentional dissemination of false purported facts. Further, this case involves interpretation and application of Section 31.601 of the Columbia Revised Statutes, which bans the surreptitious recording of a conversation without the knowledge of all parties to the conversation.

STATEMENT OF THE CASE

This case arises from the convictions of Respondent Donald Segretti ("Segretti") for disseminating fake news in violation of Section 31.002 of the Columbia Revised Statutes and violating privacy in communications in violation of Section 39.601 of the Columbia Revised Statutes.

Segretti is a 20-year-old student at Magruder University in New Watergate, Colombia. He is politically active and has amassed a large following on social media. Segretti began working on his Aunt's mayoral campaign in early 2020. His aunt, Joan Dean ("Dean") was one of twelve candidates for office, and it was expected that the election would result in a runoff between her and Gordon Liddy ("Liddy"). Dean and Liddy are longtime political rivals and have both run numerous attack advertisements against the other.

The campaign was plagued with concern about voter fraud and misconduct by poll officials. The general election finished with Dean receiving 28 percent of the vote and Liddy receiving 23 percent of the vote. A runoff election was scheduled for December.

After the general election results were certified, reports began coming in that the current chair of the Election Committee, Joanne Erlichman ("Erlichman"), used her influence to help Dean get into the runoff. The reports originated from Alexander Butterfield, who had supported Liddy throughout the campaign. An investigation yielded no evidence of wrongdoing but Dean and Erlichman continued to receive criticism via social media. Dean defeated Liddy in the runoff election.

Two days after the election, New Watergate police discovered that Butterfield was a pseudonym Segretti had created to influence the election. Police also learned that Segretti had fitted himself with a hidden body camera and positioned himself at the party so he could record a "hushed" conversation between Dean and Erlichman. It was later determined that the two were discussing a church project and not anything about the election.

The State of Columbia charged Segretti with violating the Section 31.002 fake news ban and violating the Section 39.601 surreptitious recordings ban. In the 112nd District Court of Mitchell County, a jury found Segretti guilty on both counts. Segretti appealed his convictions to the Supreme Court of the State of Columbia, arguing that both were in violation of the First Amendment. The State Supreme Court reversed the District Court's decisions, finding both convictions to violate the First Amendment.

SUMMARY OF THE ARGUMENT

Segretti's conviction for violating the Section 31.002 dissemination of fake news ban does not violate the First Amendment because precedent has allowed restrictions on fake news to be narrowly tailored to restrict self-serving statements that cause public harm. The statute passes the strict scrutiny test because it has been narrowly tailored to further a significant government interest that outweighs the expressive interest in the false statement. Furthermore, the current political climate is a prime example of why fake news should be added to the existing categories of unprotected speech. Fake news is dangerous to society and any interest in creating it is outweighed by the negative effects it can cause.

Segretti's conviction for violating the Section 39.601 surreptitious recording ban does not violate the First Amendment because the expressive interests of Segretti burdened by this ban are insufficient to receive First Amendment protection. Merely showing that Section 39.601 implicates expressive interests does not mean that the conduct it burdens is protected by the First Amendment. This Court has found on multiple occasions that certain categories of expression are unprotected when the interest in restricting such expression outweighs any expressive interest. In this case, the expression and social value burdened by the surreptitious recordings ban are minimal. The conversation Segretti recorded was in regard to a private affair that had nothing to do with the mayoral election, therefore making its social value marginal at best. However, the evil associated with recording one's conduct without their consent is substantial and well-established. The evil nature and reprehensibility of such a recording is multiplied

by its accessibility via social media, further justifying the restriction of such expression. The expressive interests of Segretti seeking to disseminate the recording fall outside of First Amendment protection and are outweighed by the State's interest in restricting such expression.

ARGUMENT AND AUTHORITIES

I. SEGRETTI'S CONVICTION FOR VIOLATING THE SECTION 31.002 FAKE NEWS BAN DOES NOT VIOLATE THE FIRST AMENDMENT.

While prohibitions against falsities generally have not been held to be a new category of unprotected speech, Section 31.002 is hardly a general prohibition against false statements. Section 31.002 provides a prohibition against dissemination of fake news, with fake news being narrowly defined as intentionally false statements made for a self-serving purpose that causes public harm. The statute falls in line with Supreme Court precedent regarding the making of false statements for personal gain or public harm. The statute also withstands the test of strict scrutiny as it is narrowly tailored towards only false statements made for self-serving purposes and causing public harm, meeting the compelling state interest of protecting the public from nefarious private interests in elections. Due to the current nature of fake news and false narratives surrounding elections, fake news should be added to the categorical list of unprotected speech for its lack of social value and great societal harm it causes. As such, Section 31.002 does not violate the First Amendment and this conviction against Segretti should remain intact.

A. Section 31.002 of the Columbia Revised Statutes is consistent with Supreme Court precedent.

General prohibitions against false statements are unconstitutional, but where there is a material gain by use of the false statement, the Court is receptive to its censorship. *See United States v. Alvarez*, 132 S. Ct. 2537 (2012). While erroneous statements are inevitable in free debate, false statements knowingly made to the public made with malice are not protected by the First Amendment.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Actual malice "is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

In numerous cases throughout the history of the Court, decisions have been made that do not run inconsistent with the current statute. As in *Alvarez*, while prohibitions against general false statements of fact are not categorically held as a class of unprotected speech, the Court states that if the statute were to be more narrowly tailored in its application for personal gain that the statute would pass constitutional muster. *Alvarez*, 132 S. Ct. at 2548. In *New York Times Co. v. Sullivan*, statements made with malice, while erroneous, are not protected by the constitution. *New York Times Co.*, 376 U.S. at 726. In *Hustler Magazine, Inc.*, a public figure sought to recover damages for intentional infliction of emotional distress due to a parody publication. *Hustler Magazine, Inc.*, 485 U.S. at 48. However, the petitioner was unable to recover because they were unable to demonstrate that the publication, while containing false information, was made with actual malice. *Id.* at 56.

Regarding these instances, the current case follows Court precedent and does not go beyond the bounds set forth by the Court. The instant case uses false information for personal gain and is made with malintent. By purposely fabricating information about an election opponent to sway the odds in favor of his aunt, Segretti knowingly distributed false information for his own personal benefit to the detriment of the public. Compared with the aforementioned cases, Section 31.002 of

the Columbia Revised Statutes does exceed the bounds of the precedent, but falls in line with what has been held by the Court. Section 31.002 of the Columbia Revised Statutes neatly flows with the decisions and intentions of the Court and recognizes where the constitutional limits lie regarding the implementation of a prohibition.

As such, Section 31.002 does not violate precedent set forth in seminal cases concerning speech and truth, but is consistent with it.

B. Section 31.002 of the Columbia Revised Statutes passes strict scrutiny.

Although the current statute's prohibition is content-based in nature, Section 31.002 is written in such a way that it would survive analysis under strict scrutiny as it is narrowly tailored to prohibit fake news that is self-serving and causes public harm. In order for a statute that is content-based to pass constitutional muster, it must pass through the most exacting level of scrutiny, strict scrutiny. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011). A prohibition that is content-based on its face is subject to strict scrutiny regardless of the government's motive. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 165 (2015).

The State of Columbia has a compelling state interest in preventing public harm caused by intentionally false statements of fact. The statute as it is currently written is narrowly tailored as to not inhibit free expression that is erroneously made nor does it provide a blanket prohibition against false statements generally. Segretti may argue that the statute is too overbroad and thus unconstitutional, but it is clear that when combined, both parts of the statute (the first clause and the definition) provide that the statute is narrowly written. In the statute's current,

unaltered form, freedom of expression is not repressed and statements regarding political actors can be made in full confidence that their words will not subject them to criminal or civil liability. Beyond that, the statute even carves out exceptions for bona fide news organizations (BNFOs) that grant even further credence to the argument that the state of Columbia orchestrated the statute in such a way as to have it narrowly tailored for the particular purpose as that of the current case.

The state of Columbia does not wish to subject its citizens to a world in the image of William Blackstone where every word spoken has a consequence. Conversely, Columbia recognizes the inherent value of political speech as it is set for in precedent and as such only prohibits false political narratives made with the inherent purpose of self-gain resulting in public harm.

Additionally, there is a very compelling interest in preventing the dissemination of fake news resulting in political turmoil. The State of Columbia has an obligation to its people that it keeps its election process free of malicious misinformation. If elections cannot be free of misinformation dispersed by bad actors, there is no way of securing the confidence of the public or guaranteeing that elections are free from coercion. Trust in the system will dissolve and turmoil will replace it as a result. There is also likely no other alternative to stop the spread of fake news than to have a prohibition such as the one that has been presented by the State.

Thus, by showing that the statute is narrowly tailored as to only affect fake news whose purpose is for personal gain and causes public harm as well as being

the only available remedy to meet the compelling state interest of ending fraud in elections, the State of Columbia can adequately demonstrate that the statute can pass strict scrutiny.

C. Fake news should be added to the list of categorically unprotected speech.

"Although the First Amendment stands against any 'freewheeling authority to declare new categories of speech outside the scope of the First Amendment' . . . the Court has acknowledged that perhaps there exist 'some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law.'" *Alvarez*, 132 S. Ct. at 2537.

Though false statements have not been held to be categorically unprotected speech in the past, modern developments in the way citizens receive the news and are presented with information that directly affects their lives through political engagement necessitate considerations on whether false narratives for political gain should be added to the list of categorically unprotected speech. As stated by Justice Woodward, "[t]he value of fake news is currently outweighed by its societal costs." *Segretti v. State of Columbia*, 131 Col. Rptr. 44 (Col. 2021) (Woodward, J., dissenting).

The value of fake news is in the eye of the beholder; for the speaker spreading the lie the value is immense and for the public the value is little to none. With the only value for fake news arising out of the private actor's personal gain as a result, the scale is clearly in the favor of protecting public interests. While political parody and erroneous fact-finding have been used in the past to protect statements that are

false or incorrect, it is clear in the instant case that there were nefarious motives used by Segretti to benefit both himself and a member of his family. This is precisely what Section 31.002 of the Columbia Revised Statutes intended to prohibit.

If the Court were to hold that fake news is not a class of unprotected speech, the Court will be holding in direct opposition to protecting the public and will remove all trust of the public regarding political affairs. Additionally, the Court will only be enabling more reprehensible actors from inflicting their individual will upon the political sphere. Fake news provides nothing of value for the public, but rather robs the public of making valid, informed decisions concerning the most sacred of civic duties and the most important decisions they can make. It is clear that the government interest of protecting the public outweighs and outclasses the private interests of Segretti. For the Court to hold in favor of Segretti would ensure the inevitable corrosion of our political system as we currently know it.

II. SEGRETTI'S CONVICTION FOR VIOLATING THE SECTION 39.601 SURREPTITIOUS RECORDINGS BAN DOES NOT VIOLATE THE FIRST AMENDMENT.

Surreptitious recordings, such as that made by Segretti, barred under Section 39.601 do not receive First Amendment protection solely by virtue of implicating expressive conduct. If would-be-protected actions are burdened by banning surreptitious recordings, those recordings nevertheless must be subjected to a categorical balancing of their social value and resulting harms, as well as a weighing of the expressive interests in recording against the State's interests in ensuring communicative privacy. In both analyses, this Court's prior decisions and

the factual record show the ban to not run afoul of the First Amendment. Aside from either of which, the ban passes constitutional muster under even the most exacting test of scrutiny, and because Segretti should have had fair notice that his act of recording was unlawful, facial validation of the ban itself suffices to affirm his conviction.

A. The expressive interests of Segretti burdened by the surreptitious recordings ban are insufficient to receive First Amendment protection.

Expression that threatens other persons' privacy interests may be prohibited. *See Cohen v. California*, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.") Here, the privacy invasions presented by surreptitious recordings, both as a whole category and limited to Segretti's conduct, justify state abridgement of the ability to conduct such recordings.

1. Surreptitious recordings fail the categorical balancing requisite for protection.

Though the Columbia Supreme Court observes that "The First Amendment is triggered by direct restrictions not only on expression, but also conduct that has 'a close enough nexus to expression' or is 'commonly associated with expression'" *Segretti*, 131 Col. Rptr. at 52 (citing *Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 759 (1988)), merely proving that Section 39.601 implicates expressive interests does not mean that the conduct it burdens is protected by the First Amendment.

"[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). This Court has previously found categories of expression to be unprotected when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *New York v. Ferber,* 458 U.S. 747, 763–64 (1982) (finding child pornography to be unprotected by the First Amendment). Moreover, this Court has factored into its analysis "the universal judgment that" some speech "should be restrained, reflected in the…laws of…States." *Roth v. United States*, 354 U.S. 476, 485 (1957) (finding that obscenity being restricted by 48 states' laws, an international agreement between over 50 nations, and over 20 enactments by Congress suggests obscenity to be "without redeeming social importance").

Here, the constitutionally cognizable expression and social value inhibited by the surreptitious recordings ban are marginal. The ban, by virtue of explicitly exempting public officials and public meetings, is tailored to shield conversations on private matters such as that recorded by Segretti. Correspondingly, speech concerning these private matters affords far less First Amendment significance. *See N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'…'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'") (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980); quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75

(1964)). Hence, because the conversation Segretti recorded pertained to a private affair completely unrelated to the New Watergate mayoral election, its social value is de minimis.

Accordingly, the act of private recording without the authorization of present parties has been found by lower courts to fall outside First Amendment protection. *See Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 352 (5th Cir. 2017) ("Making unauthorized and secret video recordings of secondary-school classes does not represent a recognized First Amendment right, nor does the public dissemination of the video.").

The evils of obtaining audio and video of one's conduct without their consent are substantial and well-established. "[S]urreptitiously accessing the private communications of another by way of…use of an electronic listening device clearly implicates recognized privacy expectations." *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012). These evils are even more profound and legally reprehensible in the context of sharing information that one believes is meant to be kept within the bounds of who they entitle to receive that information. *See Id.* ("At common law, actionable invasion of privacy takes several forms … [including] unreasonable publicity given to another's private life…").

Recognizing these evils, surreptitiously recording is widely regarded as unlawful. "Twelve states, including Columbia, have all-party consent schemes that require individuals recording a communication to have the consent of every party

involved. Thirty eight states have one-party consent schemes. Vermont does not have one." *Segretti*, 131 Col. Rptr. at 55 (Woodward, J., dissenting).

Completely aside from the law of states reflecting the societal axiom that recording a conversation without the consent of those involved is harmful, that belief is commonly engrained in contemporary ethical standards, such as those of the workplace and our legal system as a whole. *See* Charles Doyle, *Wiretapping, Tape Recorders, and Legal Ethics: An Overview of Questions Posed by Attorney Involvement in Secretly Recorded Conversation,* 8 Int'l J. Ethics 95, 95 (2012) (noting that "a substantial number" of bar associations consider "oneparty consent recording per se unethical").

Even before the prevalence of modern technological practices, encroaching expectations of privacy in communication was considered a social vice. *See* Richard G. Donnelly, *Comments and Caveats on the Wire Tapping Controversy*, 63 Yale L.J. 799, 799 (1953-1954) (observing that as of that time, wiretapping was a crime both federally and "in almost every state" and that in 1924 Attorney General Stone "banned tapping by the FBI as 'unethical'"); *see also Olmstead v. United States*, 277 U.S. 438, 470 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967), *and Herger v. New York*, 388 U.S. 41 (1967) (Justice Holmes dictating that wiretapping is a "dirty business").

Furthermore, the nature of how surreptitious recordings are often disseminated makes the State's burden for justifying restrictions on them less stringent. The interconnectedness between recordings and social media is manifest,

and social media's prevalence means that content on such platforms is viewed widely and indiscriminately. *See Segretti*, 131 Col. Rptr. at 51 (social media is "ubiquitous[ ]"); *see also Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (social media is the "modern public square"); *see also* Brian P. Kane, *Social Media Is the New Town Square: The Difficulty in Blocking Access to Public Official Accounts*, 60 Advocate 31 (2017) (same).

The accessibility of these recordings expands the dangers associated with them—the further a recording obtained nonconsensually is spread, the greater the scope of the privacy violation of the parties that were recorded without notice. This amplification of the dangers of recording surreptitiously, vis-à-vis the prominence of social media, further justifies restricting such expression. *C.f. F.C.C. v. Pacifica Found.*, 438 U.S. 726, 749 (1978) ("[B]roadcasting is uniquely accessible to children…The ease with which children may obtain access to broadcast material…justify special treatment of indecent broadcasting.").

Just as the commonality of radio airwaves in yesteryears meant more children were exposed to obscene broadcasts, the modern function of social media as a public square means the fruits of privacy invasions are unprecedently accessible to the general public. This accessibility rationale in *Pacifica*, then, justifies awarding surreptitious recording a lower level of protection.

Thus, the expressive interests of those such as Segretti seeking to disseminate the contents of conversations recorded in private without consent falls well outside the First Amendment's core—commentary on public matters—and the

evils of nonconsensually sharing such private matters are documented by the law of every state but one. Operating under the Columbia Supreme Court's finding that recording conversations either shares a close nexus with disseminating those conversations or is itself an act of expression, the totality of the deep societal and judicial concern for the privacy curtailed by recording surreptitiously, combined with the parallel laws of nearly every jurisdiction, overwhelms those supposed expressive interests.

The common disdain for violating communicative privacy and the nexus between those violations and magnified exposure in the modern public square of social media shows that any social value from surreptitious recordings is greatly outweighed by the evil they generate to the point that no case-by-case adjudication could justify such violations. This makes it clear that under *Ferber* balancing, the acts of surreptitious recording barred by Section 39.601, including Segretti's, should be categorically excluded from First Amendment protection.

2. The State's interests in ensuring communicative privacy outweigh Segretti's interest in surreptitiously recording.

If First Amendment-protected conduct yet comes into play—following this assertion of the lower court—interests other than expressive interests must also be considered. The expressive interests of those making and disseminating recordings—i.e., Segretti—are not absolute, and the State of Columbia is justified in protecting relevant privacy interests, even if some expressive interests are undermined as an externality.

This Court's prior decisions have recognized the ability of states to enact laws furthering important interests of their own, even if those laws may subsidiarily restrict some First Amendment-protected conduct. In *Zacchini*, this Court found that the First Amendment did not shield a news station from violation of Ohio's "right to publicity" statute when it nonconsensually broadcasted a performer's entire act without compensation.

> The Constitution does not prevent Ohio from … deciding to protect the entertainer's incentive in order to encourage the production of this type of work … There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news … But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized.

Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 577-578 (1977) (citations omitted).

Just as the *Zacchini* Court held that the First Amendment did not permit the respondent to air the petitioner's entire act absent his consent, minding Ohio's ability to recognize a state "right of publicity" for public policy reasons, Columbia has the ability implement pertinent legislation ensuring the contents of private communications are not recorded and thus disseminated absent all-party consent. Collateral to the prior decision that "although the State of Ohio may as a matter of its own law privilege the press…the First…Amendment[ ] do[es] not require it to do so" *Id.* at 578-579, the First Amendment here does not require Columbia to privilege the expressive rights of surreptitious recorders, like Segretti, over the consent of those unknowingly subject to being recorded, like Dean and Erlichman.

To the same extent that Ohio's "right to publicity" is constitutionally valid under the premise that the media's First Amendment rights do not enable it to appropriate an act without just deserts to the performer, the surreptitious recording ban is valid to facilitate the legislative recognition that one's private words should not be used nonconsensually as another's expressive content. *See Segretti*, 131 Col. Rptr. at 55 (Woodward, J., dissenting) ("The legislature determined 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.'").

B. The surreptitious recordings ban satisfies means-end scrutiny.

1. The ban does not trigger strict scrutiny.

Though the Columbia Supreme Court held that "[a]udios and videos produced through surreptitious recordings are generally a form of speech subject to full First Amendment protection…[and] surreptitious recording of government officials should be subject to strict scrutiny," this finding hinges on the presumption that recordings of governmental officials would be restricted under Section 39.601. *See Id.* at 52-53. In actuality, internal Section 2(a) of the law, read and interpreted textually, should exempt the recording of governmental officials. *Id.* at 50.

Section 39.601(2)(a) can be reasonably construed as to exempt the *recording of* elected or appointed government officials, in addition to exempting recordings *made by* public employees in the performance of official duty. Two linguistic phenomena in the text of the Section (2) exemptions grammatically support this construction.

First, the preface of Section 2 reads "Section 1 does not apply to," while the noun phrase "public employees when the transcription or recording is done in the performance of official duty" in Subsection 2(a) is preceded by inclusion of a separate coordinating conjunction, "or to," which grammatically signifies that two distinct exception clauses are created—with the clause relating to duties of employees creating a different exception from the clause relating to elected or appointed officials, as both clauses are contained within separate "to…" prepositional phrases.

Grammatically construed, it must be presumed that the framers of Section 39.601 intended for Subsection 2(a) to create two distinct exceptions. *See generally Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("Affirmative words are often, in their operation, negative of other objects than those affirmed; and…a negative or exclusive sense must be given to them or they have no operation at all. It cannot be presumed that any clause in the constitution is intended to be without effect.").

Since the phrase "does not apply to…elected or appointed officials" in operation creates a separate exception than "does not apply…to public employees when the transcription or recording is done in the performance of official duty," this Court must accordingly interpret the former phrase to exempt the *recording of* these officials from the ban, rather than *recording by* them. This construction is supported by the text of Subsections (b) and (c). The text of these exceptions exclude persons that presumably would be victims *being recorded*, rather than the perpetrators violating the law *by recording*: "[p]ersons speaking at public meetings" and

"[p]ersons given warning of the transcription or recording…" Therefore, the exception "Section 1 does not apply to…elected or appointed public officials…" must be construed to exempt the recording *of* them, rather than recordings performed *by* them. The ban, then, cannot be viewed as a vehicle to restrict "recording of government officials," so either a lesser level of scrutiny or a balancing inquiry is appropriate instead.

Importantly, this interpretation of the Section 39.061(2) exceptions does not call the validity of Segretti's conviction itself into question merely because he recorded a would-be-excluded public official, Erlichman. Segretti did not raise that issue on appeal. *Segretti*, 131 Col. Rptr. at 47 ("His notice of appeal limited our review to the constitutional questions of whether his convictions violate the First Amendment.").

Even if this Court concludes that the ban would prohibit *recording of* public officials, strict scrutiny is not required by virtue of that prohibition, and the Columbia Supreme Court cites no precedent in asserting otherwise. Still, under that assertion, the restriction on recording such officials is incidental and not an objective of the legislature in codifying the ban. *See Segretti*, 131 Col. Rptr. at 55 (Woodward, J., dissenting) ("Legislative history offers concrete reasons for the all-party consent law.").

This legislative history demonstrates content-neutrality and thus implicates lower levels of scrutiny. Restrictions are content-neutral if they "are justified without reference to the content of the regulated speech." *Virginia*

Pharm. Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976). Here, the ban is facially content-neutral, as it is justified without any mention of the recording of any specific persons or the content of any recordings. The legislature justifies it solely by the dangers to privacy of surreptitiously recording taken as a whole.

Because the ban was crafted with articulable concerns for the dangers of surreptitious recordings on individual privacy interests, and not the contentive implications of the recordings themselves or their dissemination, it is content-neutral. *Cf. City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 41 (1986) ("[T]he…City['s]…concerns were with the secondary effects of adult theaters on the surrounding community, not with the content of adult films themselves. This… establish[ed] that the city's…interest[ ] was unrelated to the suppression of free expression, and thus the ordinance is…'content-neutral'…").

Further, the "principal inquiry in determining content neutrality...is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Here, the State gives no weight to the messages conveyed by the act of recording (regardless of whether that be considered speech itself) and offers no regard for the specific messages conveyed by dissemination of those recordings, as the ban takes no action against dissemination once communications have already been recorded.

The content-neutrality of the ban shown, intermediate scrutiny is the most appropriate level of means-end scrutiny to apply to it. "[R]egulations that are

unrelated to the content of speech are subject to an intermediate level of scrutiny…because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. F.C.C.,* 512 U.S. 622, 642 (1994) (citing *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 (1984)). The State, then, only need show that an "important or substantial…governmental interest is unrelated to the suppression of free expression; and…incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien,* 391 U.S. 367, 377 (1968).

2. The ban would nevertheless survive any level of scrutiny.

Regardless of which level of scrutiny, if any, this Court applies to the Section 39.601 surreptitious recordings ban, the ban would survive, because it furthers a compelling governmental interest and is narrowly tailored to achieve that interest. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("[S]trict scrutiny…requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'") (quoting *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)).

In implementing the ban, the Columbia Legislature sought to further the interest of privacy. *See Segretti*, 131 Col. Rptr. at 55 (Woodward, J., dissenting) ("The preamble of the law framed the statute's goal as protecting individuals from 'grave dangers to privacy implicated by unrestricted use of modern technology.'"). That considered, privacy is certainly a compelling interest. *See Frisby v. Schultz*, 487 U.S. 474, 480 (1988) ("The State's interest in protecting the well-being,

tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.").

Banning surreptitious recordings undoubtedly furthers the interest of privacy. In fact, this Court has previously opined that other legal mechanisms based in the security of communication—such as the Fifth Amendment privilege against self-incrimination—serve privacy interests. *See Fisher v. United States*, 425 U.S. 391, 399 (1976) ("It is true that the Court has often stated that one of the several purposes served by the constitutional privilege against compelled testimonial self-incrimination is that of protecting personal privacy."). Likewise, the ban on surreptitious recordings ensures that what a person conveys to another without the communicator's consent to be recorded is, indeed, not recorded.

Moreover, the ban is narrowly tailored to serve those privacy interests. "The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest." *Ward,* 491 U.S. at 782–83. Here, without the ban, privacy could not be promoted as effectively as it would be with it. By way of a deterrent effect, invasive surreptitious recordings of private matters with miniscule social value—such as that committed by Segretti—are prosecuted.

The State's interests are furthered by the deterrent effect of the ban, as plainly inflicting legal liability upon violators of law is classically and contemporarily useful as a roadblock to prevent actions odious to public policy. *See*

e.g., *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 70 (2001) ("[T]he threat of litigation and liability will adequately deter federal officers [from committing Fourth Amendment violations]").

Next, completely banning such recordings that lack all-party consent, as opposed to other measures, uses the least restrictive means. The ban is tailored to eliminate an exact source of privacy violation—surreptitious recording—at its inception rather than choosing broader means that implicate unrelated conduct. Specifically, banning the recording of these conversations themselves rather than banning their dissemination avoids the implication of direct speech interests.

Even as applied directly to Segretti, no more conduct is burdened than what is necessary. The factual record demonstrates the harm caused by his pertinent recording, not only by giving out-of-context false light to Dean and Erlichman's private matters, but by way of potentially undermining the election. *See Segretti*, 131 Col. Rptr. at 46 (runoff voter turnout was "low"). That considered, it is well-within furtherance of the State's interest to prosecute such an act, especially when the supposed expression in that act amplifies and weaponizes a patently private matter discussed in a private setting.

Additionally, the exceptions in internal Section 2 for elected and appointed public officials, public employees, public meetings, and emergency healthcare communications ensure that overbreadth is avoided. *See Id.* at 50; *c.f. Osborne v. Ohio*, 495 U.S. 103, 107 (1990) (the Court upheld the lower court's determination that Ohio's statute restricting child pornography was narrowly tailored based on its

exceptions). Similarly, because the State adequately identifies dangers specifically associated with surreptitious recordings (i.e., privacy violations) and each exception serves a crucial public policy interest (i.e., governmental functions, public discourse, healthcare), the ban runs no risk of underbreadth.

Minding this, the compelling interest of privacy is furthered through narrow-tailored means. Therefore, strict scrutiny—the most exacting of constitutional scrutiny—in addition to any more deferential scrutiny, would be satisfied applied to the Section 39.601 surreptitious recordings ban, both facially and as applied to Segretti.

C. Even if Segretti's conviction for violating the ban as applied were to burden his First Amendment rights, facial validation alone is sufficient to sustain the conviction.

Because the surreptitious recordings ban is facially constitutional, if Segretti's conviction is otherwise found to violate the First Amendment, this Court's prior decisions signify that his conviction is nevertheless constitutional. If the surreptitious recording of Dean and Erlichman warrants protection, Segretti's conviction for it (which was not challenged on other grounds) remains in accordance to the First Amendment insofar as the ban is facially constitutional, because he had fair notice that his act of recording was illegal.

This Court opined in a previous First Amendment challenge, *Osborne*, upholding a conviction in part on the same grounds:

> Osborne contends that it was impermissible for the Ohio Supreme Court to apply its construction of § 2907.323(A)(3) to him—i.e., to rely on the narrowed construction of the statute when evaluating his overbreadth claim. Our cases, however, have long held that a statute as construed "may be applied to conduct occurring prior to the construction, provided

> such application affords fair warning to the defendan[t]."…In *Hamling* …we reviewed the petitioners' convictions for mailing and conspiring to mail an obscene advertising brochure…That statute makes it a crime to mail an "obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance."…[F]or the first time, we construed the term "obscenity"…"to be limited to the sort of 'patently offensive representations or depictions of that specific "hard core" sexual conduct given as examples in *Miller*…" In light of this construction…we affirmed the petitioners' convictions under the section after finding that the petitioners had fair notice that their conduct was criminal.

Osborne, 495 U.S. at 115-116 (citing *Hamling v. United States,* 418 U.S. 87, 94 (1974)) (citations omitted) (alteration in original).

Here, even in the case that Segretti's conviction were to render the ban impermissibly overbroad applied to him and thus in violation of the First Amendment, the conviction is nonetheless constitutional. Segretti had fair warning that his conduct was against Columbia law. The plain language of Section 39.601(1) on its face makes clear that "knowingly or purposely record[ing]…a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation" is an offense.

That considered, Segretti does not challenge his convictions on appeal on any ground other than the First Amendment. *See Segretti*, 131 Col. Rptr. at 47 ("His notice of appeal limited our review to the constitutional questions of whether his convictions violate the First Amendment."). Because he did not appeal any question of elements or other defense, it can only be presumed that like the defendants in *Osborne and Hamling*, the statute in violation on its face gave Segretti fair notice of the criminality of surreptitiously recording. *C.f. Osborne*, 495 U.S. at 116 ("Like the Hamling petitioners, Osborne had notice that his conduct was proscribed. It is

obvious from the face of § 2907.323(A)(3) that the goal of the statute is to eradicate child pornography.") (citing *Hamling*, 418 U.S. at 94).

Also, as Segretti limited his challenge to just the lone constitutionality issues now before the Court, construing the Section 39.601(2)(a) public officials exception to allow *recording of* governmental officials would also not suffice to negate his conviction.

Because Segretti had fair notice that surreptitiously recording Dean and Erlichman's "hushed" conversation ran afoul to Columbia law, Section 39.601's facial adherence to the First Amendment means his conviction must only be sustained, even in the case that it be found overbroad as applied to him. In sum, there is no reason to suggest that Segretti be able to escape an elementally-conceded conviction of a facially constitutional law solely because it is imprecise applied to him. *See Id.* ("although…[the law] may have been imprecise at its fringes, someone in…[defendant's] position would not be surprised to learn…[his conduct] constituted a crime.").

CONCLUSION

For the reasons above, under de novo review, this Court should reverse the decision of the Columbia Supreme Court and affirm the constitutionality of Segretti's convictions for violating Columbia's Section 31.002 fake news ban and Section 39.061 surreptitious recordings ban.

Respectfully submitted,

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