COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-11830

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT-APPELLEE,

v.

MELISSA LUCAS,
PETITIONER-APPELLANT.

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS IN SUPPORT OF THE PETITIONER

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ISSUE PRESENTED

Whether Mass. G.L. c. 56, § 42, which proscribes any false statement in relation to any candidate for nomination or election to public office which is designed or tends to aid or to injure or defeat such candidate, unconstitutionally abridges the freedom of speech protected by the federal and state constitutions.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Massachusetts ("ACLUM"), an affiliate of the national American Civil Liberties Union, is a statewide nonprofit membership organization dedicated to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. ACLUM has frequently appeared before this and other courts in support of civil and political rights, including free speech rights of individuals and organizations. *See, e.g., Benefit v. City of Cambridge,* 424 Mass. 918 (1997); *Glik v. Cunniffe,* 655 F.3d 78 (1st Cir. 2011); *AIDS Action Committee v. MBTA,* 42 F.3d 1 (1st Cir. 1994). This case implicates the mission and values of the ACLU because it concerns the right to free political

expression under the United States and Massachusetts Constitutions.

SUMMARY OF ARGUMENT

Political speech concerning the character and qualifications of candidates for public office (including incumbents running for re-election) is at the very heart of our constitutional system of representative self-government. In subjecting such political speech to possible criminal proceedings and penalties, Mass. G.L. c. 56, § 42 decidedly abridges freedoms of speech protected and guaranteed by the First Amendment and art. XVI.

A. Because Mass. G.L. c. 56, § 42 is a content-based restriction upon speech, it is presumptively invalid, and the burden is on the government to demonstrate its constitutionality. The government bears an especially heavy burden here, because section 42 operates in the context of campaigns for nomination and election to public office, an area at the heart of American constitutional democracy. The First Amendment has its fullest and most urgent application to speech in this area. Pp. 5-8.

B. The Supreme Court has recognized a limited number of well-defined historical and traditional

categories of exception to the free speech guarantees of the First Amendment, which include defamation and fraud. But section 42 neither requires nor is limited to either defamation or fraud; instead, it concerns *false campaign statements* and does not come within either of those narrowly limited categorical exceptions. Moreover, the Supreme Court recently held, in *United States v. Alvarez,* 132 S. Ct. 2537 (2012), that there is no "false statements" exception to the First Amendment. Pp. 8-18.

C. Laws that regulate political speech on the basis of its content are subject to strict judicial scrutiny, under which the government must show that the statute is both actually necessary to serve a compelling state interest and the least restrictive means for achieving that interest. Recent decisions in First Amendment challenges to similar "false campaign statements" statutes in Washington, Minnesota and Ohio, applying strict scrutiny, have all held that the statutes were not the least restrictive means to achieve an overriding state interest. Pp. 18-27.

D. Nor can Section 42 withstand judicial review under the strict scrutiny standard that governs petitioner's challenge. The government has not proven

that there is an actual problem of misleading campaign speech for which section 42 is the necessary solution. Moreover, far from being unrestrictive, section 42's approach of punishing false statements about political candidates predictably will have a chilling effect upon truthful political speech and expressions of opinion that lie at the core of First Amendment protection. The chilling effect arises both from the threat of criminal prosecution, penalties and associated stigma, and from the need to spend significant time and resources to respond - burdens that are apt to fall as heavily upon truthful speakers, and upon those who express opinions that are neither true nor false, as upon someone who knowingly makes false statements in violation of section 42. In fact, that appears to have happened in this very case.

Moreover, even when a statement is arguably knowingly false, section 42 is not geared to provide the voters with a timely and reliable determination as to where the political truth lies. That is partly because a criminal prosecution is not well suited to making such determinations and informing the voters of the results, but also because campaign speech can be hyperbolic, imprecise, and rife with ambiguous or

mixed statements of opinion and fact, requiring a nuanced or sophisticated analysis. Ultimately, section 42 is ill suited to the task at issue because, in our democracy, the responsibility for judging and evaluating political claims and charges lies with the people. In keeping with that recognition, the most appropriate and effective, as well as least restrictive, alternative is not section 42's suppression of speech, but counterspeech pursuant to and protected by the First Amendment. Pp. 27-37.

E. The reasoning of each of the three opinions in *Alvarez* supports the conclusion that section 42 is an unconstitutional restriction upon freedom of speech. Pp. 38-44.

ARGUMENT

SECTION 42 UNCONSTITUTIONALLY ABRIDGES FREEDOM OF SPEECH.

A. Because section 42 is a content-based restriction of political speech, it is presumptively invalid and the government bears a heavy burden to prove its constitutionality.

In proscribing false statements "in relation to" a candidate for public office that are designed or tend to aid or to injure or defeat said candidate, Mass. G.L. c. 56, § 42 sets forth a content-based

restriction upon speech. The law does not apply to all false statements, or even to all false statements designed or tending to aid or injure someone involved in politics. Rather, it applies only to such false statements "in relation to" a candidate for office.

Thus, for example, section 42 seems to prohibit falsely accusing a political candidate of drunk driving. But section 42 does not prohibit leveling that same false allegation against an *incumbent* politician, provided that the incumbent is not at that moment running for reelection. Nor does it prohibit falsely accusing *the chair of a political party,* or *a cabinet official,* since such accusations would not be "in relation to" a particular candidate.

Generally, however, "the First Amendment means that government has no power to restrict expression because of its . . . content." *United States v. Stevens*, 559 U.S. 460, 468 (2010), quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). "As a result, the Constitution 'demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." *United States v. Alvarez*, 132 S. Ct. 2537, 2543-2544 (2012) (plurality

opinion), quoting *Ashcroft v. American Civil Liberties Union,* 542 U.S. 656, 660 (2004). "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon v. Fed. Election Comm'n,* 134 S. Ct. 1434, 1452 (2014) (plurality opinion), quoting *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 816 (2000).

The government bears an especially heavy burden in this case, because section 42 regulates the content of speech in political campaigns, a subject "at the heart of American constitutional democracy." *Brown v. Hartlage*, 456 U.S. 45, 53 (1982). "[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. State of Ala.*, 384 U.S. 214, 218-19 (1966). "This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 346 (1995),

quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

"'Discussion of public issues and debate on the qualifications of candidates are integral to the operation' of our system of government." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2816-2817 (2011), quoting *Buckley v. Valeo,* 424 U.S. 1, 14 (1976) (per curiam). "As a result, the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office."" *Id.* at 2817, quoting *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 223 (1989), and *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

B. Section 42's proscription of allegedly false, but undeniably political, speech in relation to candidates for public office is not exempt from First Amendment scrutiny.

The Supreme Court has recognized a limited number of well-defined traditional categories of exception to the free speech guarantee of the First Amendment, but false statements, including false statements in political campaigns, are not among them. Those exceptions, rather, "represent 'well-defined and narrowly limited classes of speech, the prevention and

punishment of which have never been thought to raise any Constitutional problem,'" *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011), quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942); they include obscenity, incitement, fighting words, defamation, fraud, and speech integral to criminal conduct. *Id.; Stevens*, 559 U.S. at 468.[1]

False campaign statement laws do not come within any of these "well-defined and narrowly-limited" exceptions. In *Rickert v. State, Public Disclosure Comm'n*, 168 P.3d 826 (Wash. 2007) (en banc), for example, the court rejected a contention that Washington's false campaign statement law came within the defamation exception, holding that because the law "does not require proof of the defamatory nature of the statements it prohibits, its reach is not limited to the very narrow category of unprotected speech identified in *New York Times* and its progeny. Thus, [the law] extends to protected political speech and strict scrutiny must apply." 168 P.3d at 828-29. So too, here, section 42 does not require a showing of

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[1] *See also Commonwealth v. Johnson*, 470 Mass. 300, 311 (2014) (exception for speech integral to criminal conduct).

harm to an individual's reputation, which is an essential element of a libel claim. "Defamation statutes focus upon statements of a kind that harm the reputation of another or deter third parties from association or dealing with the victim." *Alvarez,* 132 S. Ct. at 2554 (concurring opinion), citing RESTATEMENT (SECOND) OF TORTS §§ 558, 559 (1976); *see Phelan v. May Dep't Stores Co.,* 443 Mass. 52, 55-56 (2004). But section 42 includes false statements about a candidate that are designed or tend to ***aid*** that candidate,[2] which by definition would not be defamatory. Even statements designed to *defeat* a candidate, thereby potentially coming within section 42, may lack the defamatory element of holding that candidate up to contempt, hatred, scorn or ridicule in the community.[3]

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[2] For example, a candidate knowingly embellishing his resume. *See, e.g.,* Walter V. Robinson, *Lakian's self-portrait and what record shows,* Boston Globe, Aug. 16, 1982 (where counterspeech proved effective).

[3] For example, the assertion in *Susan B. Anthony List v. Ohio Elections Com'n,* 45 F. Supp. 3d 765 (S.D. Ohio 2014), appeal pending (6th Cir. No. 14-4008), that a candidate for re-election to Congress had voted in favor of taxpayer-funded abortions. A panel of the OEC found probable cause that the charge violated the statute, *see Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2344 (2014), but the Sixth Circuit recently affirmed that it was not defamatory. *Susan B. Anthony List v. Driehaus,* 779 F.3d 628 (6th Cir. 2015). The Sixth Circuit's decision came after the Supreme Court,

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Contrast the express requirement to show defamation in Puerto Rico's criminal libel statute that was struck down (for lack of an "actual malice" requirement) in *Mangual v. Rotger-Sabat*, 317 F.3d 45, 52 (1st Cir. 2003).

Nor does section 42 come within the fraud exception. *See 281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), *cert. den.*, 133 S. Ct. 61 (2012), where the Eighth Circuit observed that the Supreme Court has not applied fraud principles to all knowingly false speech but, instead, "has carefully limited the boundaries of what is considered fraudulent speech" and "has not included all false speech, or even all knowingly false speech." *Id.* at 634, n.2, citing *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003).[4]

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134 S. Ct. 2334, upheld plaintiffs' standing to pursue their constitutional challenge.

[4] *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334 (1995), in *dictum*, noted Ohio's false campaign statements laws, but expressly disclaimed ruling on their constitutionality. 514 U.S. at 350-51 n.12. *McIntyre's holding* was that Ohio's prohibition of anonymous pamphleteering was unconstitutional, since it was "a direct regulation of the content of speech" and "a limitation on political expression subject to exacting scrutiny," *id.* at 345-46, and "the category of speech [i.e., *political* speech] regulated by the

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"Fraud statutes . . . typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury. See Restatement (Second) of Torts § 525 (1976)." *Alvarez*, 132 S. Ct. at 2554 (Breyer, J., concurring); *see also Reisman v. KPMG Peat Marwick LLP*, 57 Mass. App. Ct. 100, 108-09 (2003); *Ward v. Perna*, 69 Mass. App. Ct. 532, 540 (2007).[5] But section 42 does not require actual injury; it suffices for conviction that a false statement about a candidate "is designed or tends" to aid, injure, or defeat the candidate. In fact, section 42 is largely incapable of reaching election fraud that *does* cause injury. It does not apply, for example, if someone is kept from the polls by a false assertion that she is ineligible to vote, or if a campaign stuffs the ballot box by means of false voter registrations or forged absentee ballots. Those falsehoods are not "in relation to" a candidate.

[pamphleteering] statute occupies the core of the protection afforded by the First Amendment." *Id.*

[5] The RESTATEMENT (SECOND) OF TORTS § 525 (1977) provides: "One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation."

Ultimately, "defamation-law principles are justified not only by the falsity of the speech, but also by the important private interests implicated by defamatory speech." *281 Care Comm.*, 638 F.3d at 634, citing Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty,* 59 U. Chi. L. Rev. 225, 238 (1992). And "knowingly false political speech is not automatically akin to fraud or defamation. While knowingly false speech may be an element of fraud or defamation, false political speech by itself does not implicate 'important private interests.' [638 F.3d] at 634. As a result, knowingly false political speech does not fall entirely outside of First Amendment protection, and any attempt to limit such speech is a content-based restriction, subject to close review." *Susan B. Anthony List v. Ohio Elections Comm'n,* 45 F. Supp. 3d 765, 775 (S.D. Ohio 2014), appeal pending (6th Cir. No. 14-4008).[6]

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[6] This decision in *List* struck down Ohio's false campaign statement laws. In an earlier case, *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 577 (6th Cir. 1991), the Sixth Circuit upheld those laws on the erroneous basis that "false speech, even political speech, does not merit constitutional protection" if made with "actual malice," as defined in *Sullivan*, 376 U.S. 254, and *Garrison v. Louisiana,* 379 U.S. 64 (1964). But that decision gave insufficient

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Moreover, the list of such categorical exceptions to the First Amendment is essentially closed. Those exceptions are "historical and traditional categories long familiar to the bar," *Stevens*, 559 U.S. at 468-69, quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991). "These categories have a historical foundation in the Court's free speech tradition." *Alvarez*, 132 S. Ct. at 2544 (plurality). The Supreme Court has never endorsed a "freedom to disregard these traditional limitations." *Stevens*, 559 U.S. at 468, quoting *R.A.V. v. St. Paul,* 505 U.S. 377, 382-83 (1992).

In *Stevens,* the government maintained that depictions of animal cruelty are of such minimal redeeming value as to render them unworthy of First Amendment protection, and urged the Court to adopt a rule under which courts would consider new claims of categorical exclusion from First Amendment protection under a balancing test. 559 U.S. at 469-470. But the

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recognition to the distinction between defamation and false campaign statements. Moreover, as *Alvarez* has now confirmed, "the Supreme Court has never placed knowingly false campaign speech categorically outside the protection of the First Amendment." *281 Care Committee*, 638 F.3d at 633-34.

Court rejected that proposition, describing it as "startling and dangerous," and held instead that the First Amendment's guarantee of free speech does *not* except categories of speech "that survive an ad hoc balancing of relative social costs and benefits." *Id.* at 470. The Court did leave open the possibility that "[m]aybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law." *Id.* at 472. But if so, depictions of animal cruelty were not among them. *Id.*

Two years later, the Supreme Court made it clear that those not-yet-identified areas do not include a categorical exception for "false statements" either. In *Alvarez,* the defendant was prosecuted for falsely claiming that he had been awarded the Congressional Medal of Honor. He challenged the Stolen Valor Act as a content-based restriction of speech protected by the First Amendment, and the Supreme Court agreed. There were three opinions in *Alvarez;* none of them endorsed a categorical exception for false statements.

Justice Kennedy, writing for the four-justice plurality, wrote that "[a]bsent from those few categories where the law allows content-based

regulation of speech is any general exception to the First Amendment for false statements." 132 S. Ct. at 2544. Justice Kennedy explained that this absence "comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Id.*, citing *Sullivan*, 376 U.S. at 271.[7]

Justice Breyer's concurring opinion did not undertake a categorical analysis, but he agreed that the Act violated the First Amendment, 132 S. Ct. at 2551 - a conclusion inconsistent with any assertion that false statements come within a categorical exception to First Amendment protection. While conceding "that this Court has frequently said or implied that false factual statements enjoy little

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[7] The plurality was not swayed by the government's compilation of "isolated statements in earlier decisions" to the effect that false statements have no value and are beyond constitutional protection, saying they were taken out of context. *Id.* at 2544-2545. "Those quotations all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement." *Id.* at 2545. "The Court has never endorsed the categorical rule that the Government advances: that false statements receive no First Amendment protection." *Id.*

First Amendment protection," the concurrence held that "these judicial statements cannot be read to mean 'no protection at all.'" *Id.* at 2553. "False factual statements can serve useful human objectives," and "[e]ven a false statement may be deemed to make a valuable contribution to public debate," *id.*, quoting *Sullivan*, 376 U.S. at 279 n.19, and J. Mill, On Liberty 15 (Blackwell ed. 1947). Moreover, "the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." *Id.*[8]

Even Justice Alito's dissenting opinion, while taking the view that false factual statements lack any *intrinsic* First Amendment value and thus merit no First Amendment protection in their own right, 132 S.

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[8] Indeed, even if the Act were "construed to prohibit only knowing and intentional acts of deception about readily verifiable facts within the personal knowledge of the speaker, thus reducing the risk that valuable speech is chilled," given the breadth of its application, which included family, social, and other private contexts, "a speaker might still be worried about being *prosecuted* for a careless false statement," and "the prohibition may be applied where it should not be applied, for example, . . . in the political arena, subtly but selectively to speakers that the Government does not like." *Id.* at 2555.

Ct. at 2560-61, 2563, also acknowledged that it was sometimes necessary to "extend a measure of strategic protection" to such statements in order to ensure sufficient "breathing space" for protected speech. *Id.* at 2653-54, quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Justice Alito agreed that "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." *Id.* at 2564. In his view, however, the *Stolen Valor Act* presented "no risk at all that valuable speech will be suppressed." *Id.*

Thus, none of the opinions in *Alvarez* support the position that there is a categorical exception to the First Amendment for false statements, including false statements in political campaigns.

C. False campaign statement laws cannot withstand scrutiny under the standards that govern judicial review of content-based restrictions upon political speech.

"Laws that burden political speech are . . . subject to strict scrutiny, which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Ent. Club's*

Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2817 (2011), quoting *Citizens United v. Federal Elections Comm'n*, 558 U.S. 310, 340 (2010) (internal quotation marks omitted); *see also Entm't Merchants Ass'n*, 131 S. Ct. at 2738. Under this standard, "[t]he State must specifically identify an 'actual problem' in need of solving," *Brown*, 131 S. Ct. at 2738, quoting *Playboy Entm't Group*, 529 U.S. at 822-23, and "the curtailment of free speech must be 'actually necessary' to the solution." *Id.*, citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992). The Court itself has characterized this as "a demanding standard," and has warned that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.*, quoting *Playboy Entm't Group*, 529 U.S. at 818.[9]

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[9] The Supreme Court has sometimes referred to these same standards under the rubric of "exacting scrutiny." *See, e.g., McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1444 (2014) (plurality opinion) (referring to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression," under which "the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest"); *McIntyre*, 514 U.S. at 347 ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is

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Recent decisions in Washington, Minnesota and Ohio have applied this standard to challenges to false campaign statement laws. Although the specific statutory provisions at issue in those cases differed in various respects from each other and from section 42, in each case the state law proscribed false campaign statements made with actual malice, and in each case the court, applying strict or exacting scrutiny, held that the statute's restriction of speech was *not* the least restrictive means to

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narrowly tailored to serve an overriding state interest"); *Burson v. Freeman,* 504 U.S. 191, 198-199 (1992) (plurality opinion) (using "strict scrutiny" and "exacting scrutiny" interchangeably to refer to same demanding standard). However, the Court has also sometimes used "exacting scrutiny" to signify a less-than-strict standard, but only in contexts not at issue here. *See, e.g., Citizens United,* 558 U.S. at 340, 366-67 (laws "that burden political speech" are subject to "'strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest," while "disclaimer and disclosure requirements" are subject only to "'exacting scrutiny,' which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest"); *John Doe No. 1 v. Reed,* 561 U.S. 186, 196 (2010) (lesser "exacting scrutiny" standard in disclosure case). No matter how murky its usage elsewhere, the *Alvarez* plurality held that "[t]he Court applies the '*most* exacting scrutiny' in assessing content-based restrictions on protected speech," *Alvarez,* 132 S. Ct. at 2540 (emphasis added), quoting *Turner Broadcasting System Inc. v. FCC,* 512 U.S. 622, 642 (1994).

achieving an overriding state interest and struck down the statute.

In *Rickert v. State, Public Disclosure Comm'n,* 168 P.3d 826 (Wash. 2007) (en banc), a candidate sought review of the Commission's decision that she had violated the state law that proscribed sponsoring, with actual malice, a political advertisement containing a false statement of material fact about a candidate for public office. Noting that "speech uttered during a campaign for political office" is "at the core of our First Amendment freedoms," the court held that the statute was subject to strict scrutiny. 168 P.3d at 828, citing *Republican Party v. White,* 536 U.S. 765, 774 (2002) (under strict scrutiny, respondents had burden to prove that the restriction was narrowly tailored to serve a compelling state interest and did not unnecessarily circumscribe protected expression), and *Burson v. Freeman,* 504 U.S. 191, 196-98 (1992) (plurality opinion).

Applying that standard, the Court held that the Commission's "claim that it must prohibit arguably false, but nondefamatory, statements about political candidates to save our elections conflicts with the fundamental principles of the First Amendment." 168

P.3d at 831. Furthermore, the court held that "even if such an interest were valid, [the statute] would remain unconstitutional because it is not narrowly tailored." *Id.* (citing a statutory exemption for statements made by a candidate about himself or herself and the chilling effects resulting from the statute's administrative enforcement mechanisms). The court pointed out that "[o]ur constitutional election system already contains the solution to the problem that [the statute] is meant to address. 'In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of "'more speech, not enforced silence,' thus has special force." *Id.* at 832, quoting *Brown v. Hartlage,* 456 U.S. 45, 61 (1982) and *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Indeed, the court noted that the target of the false statements in that case had "responded to Ms. Rickert's false statements with the truth," and consequently those false statements "appear to have had little negative impact on his

successful campaign and may even have increased [his] vote." *Id.*[10]

More recently, the Eighth Circuit struck down the Minnesota false campaign statement law. *281 Care Committee v. Arneson*, 766 F.3d 774 (8th Cir. 2014), *cert. den.*, --- S. Ct. ----, 2015 WL 1280248 (No. 14-779, March 23, 2015). In that case, two grassroots advocacy organizations founded to oppose school-funding ballot initiatives claimed that the Minnesota law, despite an actual malice requirement, inhibited their ability to speak freely against those ballot initiatives. Applying strict scrutiny because the law regulated protected *political* speech, 766 F.3d at 782-785, the court held that, even if it were to "assume that the asserted compelling interests . . . pass muster for purposes of this constitutional analysis, no amount of narrow tailoring succeeds because [the statute] is not necessary, is simultaneously overbroad

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[10] *See also State ex rel. Public Disclosure Com'n v. 119 Vote No! Comm.*, 957 P.2d 691 (Wash. 1998) (en banc), which struck down an earlier version of the statute, applying the strong version of "exacting scrutiny" pursuant to, *inter alia*, *Meyer v. Grant*, 486 U.S. 414, 425 (1988), and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

and underinclusive, and is not the least restrictive means of achieving any state goal." *Id.* at 785.

While a state "has a compelling interest in preserving the integrity of its election process," 766 F.3d at 786, quoting *Eu,* 489 U.S. at 231-32, and the state interests in conducting elections with integrity and reliability "obviously are compelling," *id.* "when these preservation goals are achieved at the expense of public discourse, they become problematic." *Id.* "[A] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Id.*, quoting *Eu,* 489 U.S. at 228.

Moreover, the requisite "narrow tailoring" was absent. The law's defenders had not shown that it was "actually necessary" to achieve the claimed state interests, as strict scrutiny requires. 766 F.3d at 787-788, citing *Brown,* 131 S. Ct. at 2738, and *Alvarez,* 132 S. Ct. at 2549 (plurality).[11] And the

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[11] Indeed, the statute was, in some ways, at cross-purposes with its asserted goals. The Eighth Circuit noted the Ohio Attorney General's *amicus* brief in *Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334 (June 16, 2004), which described abuses that had arisen under a similar law in Ohio, including the filing of complaints at a "tactically calculated time"

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court further found that the law's defenders had "not offered persuasive evidence to dispel the generally accepted proposition that counterspeech may be a logical solution to the interest advanced in this case." *Id.* at 793.

"When the government seeks to regulate protected speech, the restriction must be the least restrictive means among available, effective alternatives." *Id.*, quoting *Alvarez*, 132 S. Ct. at 2551 (plurality). "The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. . . . [S]uppression of speech by the government can make exposure of falsity more difficult, not less so." *Id.*, quoting *Alvarez* at 2550 (plurality). "Possibly there is no greater arena [than in political campaigns] wherein counterspeech is at its most effective. It is the most immediate remedy to an allegation of falsity. "The theory of our Constitution is that the best test of truth is the power of thought to get itself accepted in the

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so as to divert an opposing campaign's attention and resources. "[R]eal potential damage is done at the time a complaint is filed," even if the complaint is eventually determined to be without merit. 766 F.3d at 790-792.

competition of the market." *Id.* "[C]ounterspeech, alone, establishes a viable less restrictive means of addressing the preservation of fair and honest elections in Minnesota and preventing fraud on the electorate." *Id.* at 794.

Finally, in *Susan B. Anthony List v. Ohio Elections Com'n,* 45 F. Supp. 3d 765 (S.D. Ohio Sept. 2014), a federal district court struck down Ohio's similar false campaign speech law. Despite an actual malice requirement, the court found that the law chilled truthful political speech; it was overbroad in not being limited to *material* falsehoods and in including commercial intermediaries in the ban. Furthermore, there was "no evidence that [the law] was 'actually necessary'" to its purpose of protecting voters from being influenced by false statements in political campaigns. 45 F. Supp. 3d at 776, quoting *Brown*, 131 S. Ct. at 2738. Ultimately, "[w]hen the Government seeks to regulate protected speech, the restriction must be the 'least restrictive means among available, effective alternatives,'" *Id.* at 777, quoting *Ashcroft v. ACLU,* 542 U.S. 656, 665-66 (2004). "Speaking the truth in response to the lie . . . is a less restrictive yet equally effective means to

prevent voter deception about candidates. 'The remedy for speech that is false is speech that is true. This is the ordinary course in a free society.'" *Id.* at 778, quoting *Alvarez,* 132 S. Ct. at 2550 (plurality). The defendants had "not proffered any facts that support a finding that the public requires the Government's help in determining the veracity of political rhetoric.[12] Indeed, . . . the false-statements laws are inherently coercive, because they are specifically designed to *suppress* speech by punishing speech *determined by the Government* to be false." *Id.*

D. Section 42 has a chilling effect upon core protected political speech, and it is not effective in dealing with misinformation about candidates that could mislead voters.

In this case, as well, the government cannot show that section 42 is the least restrictive means to

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[12] While the district court was "not convinced, especially in the wake of *Citizens United*, that counterspeech will always expose lies, it found that Ohio's political false-statements laws do not provide a framework under which the OEC can remedy that situation because the OEC cannot issue a final determination regarding the truth or falsity of a last-minute attack ad prior to an election. Moreover, the court expressed concern about the potential for the Commission to issue an erroneous probable cause finding too close to the election to be corrected. 45 F. Supp. 3d at 772, 778.

achieve a compelling state interest. The integrity of the election process certainly is a compelling state interest, but the Commonwealth has not shown that there is an "actual problem," *Brown*, 131 S. Ct. at 2738, of knowingly false speech about candidates misleading the voters. Nor has it shown that section 42 is "actually necessary" to solve such a problem. *Id.*; *cf. Burson,* 504 U.S. at 200-207 (identifying actual problems with bribery and intimidation to justify 100-foot buffer zone around polling places).

As to whether there is an "actual problem" of false campaign speech for which section 42 a "necessary" solution, it is particularly striking how seldom section 42 appears to have been used during the almost seven decades since its enactment. The annotations to section 42 report only two occasions (before the present controversy) upon which section 42 has even been mentioned: a passing reference in *Opinion of the Justices*, 363 Mass. 909, 916 (1973), and a statement in *Reeves v. Town of Hingham,* 2013 WL 9925601 (Mass. Super. 2013), *aff'd*, 86 Mass. App. Ct. 1121, n.4 (2014) (unpublished opinion), that a criminal complaint under section 42 had, earlier, been issued against the plaintiff (who has submitted an

amicus brief in this case asserting, *inter alia,* that he is the only person other than the petitioner herein to have ever been charged with violating section 42). If there really had been a problem of candidate-related misinformation misleading voters, to which section 42 was the necessary solution, there likely would have been at least *some* reported cases under the statute (other than the isolated situation involving Mr. Reeves). Put another way, the Commonwealth "cannot show a direct causal link," *Brown*, 131 S. Ct. at 2738, between section 42 and its asserted interest in protecting voters from being misled.

Nor can the Commonwealth demonstrate that section 42, just by being on the books, has deterred knowingly false campaign speech and thus protected voters without the need for any prosecutions. It's not even clear that knowledge of the statute was widespread enough to have had any such deterrent effect. For example, the Cape and Islands District Attorney reportedly conceded that not only had he never seen section 42 invoked but that, "[f]rankly, [he] didn't even know this law existed" before this case brought it to his attention. Brandon Gee, *Lawyer*

fights campaign "lies" with little-known state law, 43 Mass. Law. Wkly. 1009, 1035 (Feb. 9, 2015).

Even assuming section 42 has some deterrence capability, at least if awareness of its existence becomes more widespread, it can surely deter speech that is not false, or at least not clearly and knowingly false, and expressions of opinion – *i.e.*, political speech at the core of First Amendment expression – at least as easily as it can deter the knowingly false statements of fact to which the Commonwealth claims section 42 is limited.[13] Indeed, the criminal penalties alone could chill protected speech.[14] Beyond that, however, the statute's

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[13] Although section 42 does not expressly require a showing of "actual malice," construing the "knowingly" requirement to incorporate that standard would seem consistent with *Commonwealth v. Jones,* 471 Mass. 138, 2014 WL 8508373 at *4 (2015). Such a requirement would reduce, but not eliminate, the statute's chilling effect. *See Alvarez,* 132 S. Ct. at 2555 (Breyer, J., concurring). But the Commonwealth's other efforts to narrow section 42 are untenable: the suggestion to limit its scope to "verifiably" false statements has no basis or substance; "knowingly" does not modify "tends to"; and there is no basis whatsoever to read "to aid or" out of the statute.

[14] *See Alvarez,* 132 S. Ct. at 2555 (Breyer, J., concurring) (noting that for statements made in political contexts, "the risk of censorious selectivity by prosecutors is also high," and that even with a statute that requires actual malice, "a speaker might still be worried about being *prosecuted*

– footnote cont'd –

practical operation will predictably burden, and therefore chill, the exercise of protected truthful speech or expression of opinion.

First, the very filing of the application for the issuance of a criminal complaint, particularly in the heat of a political campaign, can be used (as apparently it was here) to generate publicity adverse to the speaker by suggesting to the voters that those who made or published the allegedly false statement had committed a crime. Especially if the speaker and the complainant are opposing candidates, the speaker will have to divert significant time and resources from the campaign (potentially including court appearances and legal fees) to respond to that development; and the same dynamic will repeat itself if and when, as happened in this case, a Clerk-Magistrate finds probable cause and issues a criminal complaint. Such burdens are apt to fall as heavily upon truthful speakers, and upon those who express opinions that are neither true nor false, as they would upon someone who knowingly made or published false statements.

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for a careless false statement, even if he does not have the intent required to render him liable").

In fact, by the Attorney General's own account, that is what happened in this case. To support the argument that the Court should not decide the constitutionality of section 42 in this case, the Attorney General concedes that Ms. Lucas's statements did not actually violate section 42. Comm. Br. 15-25. Yet, as the Attorney General equally concedes, a Clerk-Magistrate found probable cause to issue a criminal complaint against Ms. Lucas, and the District Attorney has not taken any affirmative step to dismiss the case. *Id.* at 7, 10. Even now, the Attorney General suggests that Ms. Lucas should undertake the effort and expense to file papers seeking to dismiss this concededly-invalid complaint. *See id.* at 12-15. This entire case thus illustrates section 42's potential for chilling or punishing protected speech.[15]

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[15] The Attorney General's concession should not lead this Court to dismiss the petition on narrow grounds instead of addressing the constitutional issue. As a defendant in a criminal complaint under § 42, petitioner has standing not only to challenge the constitutionality of § 42 as applied to the facts of her case but also to "argue that [§ 42] is unconstitutional because it infringes on the speech of others." *O'Brien v. Borowski*, 461 Mass. 415, 421 (2012), citing *Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482-483 (1989). "[I]n the free speech context, such challenges have been permitted in order 'to prevent [a] statute from chilling the First

- footnote cont'd -

Even when a statement about a candidate is arguably knowingly false, section 42 will seldom actually provide the voters with a timely determination as to where the truth lies. As to timing, most controversial or inflammatory statements likely to give rise to an application for a complaint under section 42 typically would be made in the run-up to an election, in which case a section 42 prosecution would almost certainly fail to provide any definitive information to the voters before they must cast their vote. Instead, as happened here, the voters will likely go to the polls while a criminal complaint hangs over the defendant, charging her with deliberately lying about the candidate whose election she was aiding (or, as in this case) opposing. And this will be as true for truthful speakers or expressers of opinions, who may eventually be cleared of the charges, as it would be of someone who

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Amendment rights of other parties not before the court.'" *Id.* quoting *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 957, 958 (1984). Because section 42 unconstitutionally restricts protected speech under the applicable standards for judicial review, it violates the First Amendment in all its applications, and a dismissal of the petition based merely upon the facts of this particular case would improperly leave the unconstitutional chilling effect of § 42 in place.

knowingly misstated facts about a candidate, within the intended scope of the statute.

With respect to the merits, a criminal case is not well suited either to deciding, or to informing the citizenry of, the truth or falsity of political speech. Campaign speech can be hyperbolic, imprecise and rife with ambiguous or mixed statements of opinion and fact. "In a political campaign, the exaggerated character of normal discussion is usually intensified." *Borski v. Kochanowski,* 3 Mass. App. Ct. 269, 272 (1975) (holding that a reference in a political advertisement to "half-truths" and an inferential imputation of dishonesty could not reasonably be construed, in the context of a political campaign, as anything more than an opinion that the plaintiff's opponent would be more devoted to the public interest). And unlike in *Alvarez*, which involved "easily ascertainable" questions about whether someone had been awarded a medal or not, "the factual issues raised [in a false campaign statements case] are far more complicated and require a sophisticated analysis." *Susan B. Anthony List,* 45 F. Supp. 3d at 777. In that case, for example, the challenged statement was a claim that incumbent Rep.

Driehaus had voted for taxpayer-funded abortions. Driehaus heatedly denied it and complained to the Ohio Elections Commission, a panel of which found probable cause (despite an actual malice requirement) that the plaintiff had violated the statute. *Susan B. Anthony List*, 134 S. Ct. at 2339, 2344. Such disputes about the accuracy or falsity of statements in relation to candidates in political campaigns are particularly poorly suited to resolution by means of a criminal prosecution. Proceedings under section 42 are not geared to providing the public with any nuanced analysis of such a statement's accuracies and inaccuracies. Section 42 thus is unlikely to serve the asserted goal of preventing the voters from being deceived by misinformation about candidates.

More fundamentally, it is (at least) "unseemly" for the State to assume the position of being "the arbiter of truth about political speech." *281 Care Comm.*, 638 F.3d at 635-36. Speech on matters of public affairs "occupies the highest rung of the hierarchy of First Amendment values" because it is "the essence of self-government." *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011). "[T]he people in our democracy are entrusted with the responsibility for

judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by the appellants, it is a danger contemplated by the Framers of the First Amendment." *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 791-792 (1978).[16]

"Our constitutional election system already contains the solution to the problem that [the statute] is meant to address." *Rickert,* 168 P.3d at 832. That solution is "counterspeech," *281 Care Comm.*, 766 F.3d at 793, which is normally "[t]he preferred First Amendment remedy" and has "special force" in the election context, *Rickert,* 168 P.3d at 832, quoting *Brown v. Hartlage,* 456 U.S. 45, 61 (1982) and *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). "The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the

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[16] Thus, "a State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *281 Care Comm.*, 766 F.3d at 786, quoting *Eu,* 489 U.S. at 228.

competition of the market.'" *Alvarez*, 132 S. Ct. at 2550 (plurality), quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting). We do not hold elections so that prosecutors can decide, through criminal prosecution, what statements the voters are permitted to hear.

In short, knowing falsehoods during political campaigns are supposed to be addressed through the political process and resolved by the voters on election day; they are not amenable to redress months or years later, by a judge or jury in a criminal trial that risks chilling a multitude of protected speech. This Court should therefore conclude that section 42 is neither narrowly tailored to a compelling state interest nor the least restrictive alternative to achieving that interest. The government has not shown that section 42 is actually necessary to protect the voters from false statements in relation to candidates. To the contrary, section 42 will predictably have a restrictive chilling effect, while not effectively informing the public regarding the truth or falsity of such statements. Corrective counterspeech is the less restrictive, and more

effective, solution. It is also consistent with the fundamental principles of the First Amendment.

E. Section 42 is unconstitutional under the reasoning of each opinion in *Alvarez*

The reasoning in each of the three opinions in *Alvarez*, the Stolen Valor Act case, confirms that section 42 is an unconstitutional restriction upon free speech under the First Amendment.

This may be most readily apparent with respect to the plurality opinion (written by Justice Kennedy, joined by the Chief Justice and Justices Ginsburg and Sotomayor). After rejecting the government's urging to create a new categorical exception to the First Amendment for false statements, 132 S. Ct. at 2543-2548, the plurality applied the "most exacting scrutiny" to the Act, since it was a "content-based restriction upon protected speech." *Id.* at 2548. Justice Kennedy found that "the Government's interest in protecting the integrity of the Medal of Honor is beyond question," *id.* at 2549, but held that "to recite the Government's compelling interests is not to end the matter." *Id.* The First Amendment requires that the government's restriction on the speech at issue be "actually necessary" to achieve its

interest," and that "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." *Id.*, citing *Entm't Merchants Ass'n*, 131 S. Ct. at 2738. The plurality held that the government had not shown such "link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent." *Id.* Furthermore, the plurality held:

> The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve the interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, or refutation, can overcome the lie.

131 S. Ct. at 2549. Accordingly, the plurality held that the Act "infringes upon speech protected by the First Amendment." *Id.* at 2551. As applied here, the plurality would conduct "the most exacting scrutiny," and the Commonwealth's failure to show a direct causal link between its stated interest and section 42's restriction upon protected speech, as well as the failure to show why counterspeech would not suffice to achieve that interest, would result in the plurality

ruling that section 42 "infringes upon speech protected by the First Amendment." The plurality's clear statement that Alvarez's lies (which were "intended" and "undoubted," *id.* at 2542), were "speech protected by the First Amendment" is worth noting.

Justice Breyer, joined by Justice Kagan, concurring in the judgment, applied "intermediate scrutiny" to the Stolen Valor Act, *id.* at 2551-2552, and the Commonwealth submits that this Court should follow suit on the basis that the concurrence was "controlling" as the narrowest ground upon which the Court's judgment was based. Comm. Br. 40, citing *Marks v. United States,* 430 U.S. 188, 193 (1977). That argument, however, overlooks the fact that this case involves a restriction upon *political* speech, which is accorded the greatest protection under the First Amendment, and *Alvarez* did not. Indeed, Justice Breyer agreed with the dissent that "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." *Id.* at 2552. But, the concurrence continued:

> this case does not involve such a law. The dangers of suppressing valuable ideas are lower where, as here, the regulations

> concern false statements about easily verifiable facts that do not concern such subject matter.

Id.[17]

Justice Breyer's reasons for applying "intermediate scrutiny" in *Alvarez* thus were *not* based upon a broad rationale encompassing restrictions upon core political speech. To the contrary, the concurrence clearly recognized a distinction between "broad areas" where laws restricting speech "raise . . . concerns, and in many contexts have called for strict scrutiny," and *Alvarez* itself. *Id.* at 2552. While the concurring justices chose to use intermediate scrutiny to analyze "regulations [that] concern false statements about easily verifiable facts that do not concern such subject matter," *id.*, nothing in their opinion suggests that they would hesitate to apply strict scrutiny to a case, such as this one, where the regulation at issue restricted core political speech. *See also 281 Care Comm.*, 766 F.3d

[17] Justice Breyer also recognized that when it comes to narrow tailoring, "in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve. In the political arena a false statement is more likely to make a behavioral difference . . . but at the same time criminal prosecution is particularly dangerous . . . and consequently can more easily result in censorship of speakers and their ideas." *Id.* at 2556.

at 782-85 (explaining its choice to use strict, rather than intermediate, scrutiny to a false campaign statements law after *Alvarez*). As demonstrated above, such scrutiny results in a finding of unconstitutionality. Indeed, even intermediate scrutiny should reach the same result. The *Alvarez* concurrence, after all, concluded that the Stolen Valor Act violated the First Amendment even if it was "construed to prohibit only knowing and intentional acts of deception about readily verifiable facts within the personal knowledge of the speaker, thus reducing the risk that valuable speech will be chilled." *Id.* at 2555. Section 42 is much broader, and the First Amendment harm that it risks is much greater than any public harm that might result from someone lying about having received a military medal.

Justice Alito, joined by Justices Scalia and Thomas, dissented in *Alvarez*, but the reasoning of that dissent also suggests that section 42 is unconstitutional. The dissent emphasized that the Act was quite limited, applying only to "a narrow category of false representations about objective facts that can almost always be proved or disproved with near certainty" and concerning "facts that are squarely

within the speaker's personal knowledge." *Id.* at 2557. The dissent took the view that as a general matter false factual statements possess no intrinsic First Amendment value. *Id.* at 2560-2563. But it also recognized that "it is sometimes necessary to 'exten[d] a measure of strategic protection' to [false] statements in order to ensure sufficient '"breathing space"' for protected speech." *Id.* at 2563, quoting *Gertz,* 418 U.S. at 342, and *NAACP v. Button,* 371 U.S. 415, 433 (1963). Under such circumstances the dissenters agreed that there are broad areas in which "it is perilous to permit the state to be the arbiter of truth." *Id.* at 2564. "Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends." *Id.* at 2564. By contrast, the Act "present[ed] no risk at all that valuable speech will be suppressed." *Id.* In short, the dissent agreed that the First Amendment protects false speech when necessary to prevent the chilling of truthful speech on matters of public concern, which is precisely what section 42 does. Indeed, unlike the law in *Alvarez,* section 42 applies to speech in the context of political campaigns, where freedom of

speech is most essential, most protected, and most effective. When the differences between the Stolen Valor Act and section 42 are factored in, the reasoning of all three opinions in *Alvarez* supports the conclusion that section 42 infringes upon freedom of speech in violation of the First Amendment.

CONCLUSION

This Court should hold that section 42 unconstitutionally restricts the freedom of speech.

Respectfully submitted,

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ADDENDUM

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ADDENDUM

UNITED STATES CONSTITUTION, AMENDMENT 1:

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.

MASSACHUSETTS DECLARATION OF RIGHTS, ARTICLE XVI:

The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth. The right of free speech shall not be abridged.

MASS. G.L. c. 56, § 42:

No person shall make or publish, or cause to be made or published, any false statement in relation to any candidate for nomination or election to public office, which is designed or tends to aid or to injure or defeat such candidate.

No person shall publish or cause to be published in any letter, circular, advertisement, poster or in any other writing any false statement in relation to any question submitted to the voters, which statement is designed to affect the vote on said question.

Whoever knowingly violates any provision of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than six months.

CERTIFICATE OF COMPLIANCE

I, hereby certify pursuant to Mass. R. App. P. 16(k) that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, those rules set forth in Rule 16(k).

/s/ H. Reed Witherby

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