COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
NO. SJC-11660

ESSEX, SS.

COMMONWEALTH,
Appellee

V.

WILLIAM P. JOHNSON & another,
Appellants

ON APPEAL FROM JUDGMENTS
OF THE LAWRENCE DISTRICT COURT

BRIEF OF *AMICUS CURIAE* PROF. EUGENE VOLOKH IN SUPPORT OF APPELLANTS

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August 15, 2014

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ISSUE PRESENTED, STATEMENT OF THE CASE, AND STATEMENT OF THE FACTS

Amicus adopts the issue presented, statement of the case, and statement of the facts submitted by the Commonwealth.

INTEREST OF *AMICUS CURIAE*

Eugene Volokh is the Gary T. Schwartz Professor of Law at UCLA School of Law, and the author of *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 Nw. U. L. Rev. 731 (2013), the most comprehensive analysis of the First Amendment issues raised by criminal harassment laws. He is also the author of over 35 other articles on First Amendment law, as well as a textbook on the subject.

ARGUMENT

I. Knowingly False Statements That Invite Unwitting Third Parties to Contact a Targeted Individual Are Not Constitutionally Protected, and May Be Restricted by a Sufficiently Clearly Drawn Statute

Under *United States v. Alvarez*, 132 S. Ct. 2537 (2012), knowingly false statements are not generally excluded from First Amendment protection, but they are treated as less protected than other speech. Six Justices in *Alvarez* rejected the view that knowingly false statements form a categorical exception from

First Amendment protection. *Id.* at 2545 (plurality opinion); *id.* at 2553 (Breyer, J., concurring in the judgment). But five Justices rejected the view that such statements are fully protected by the First Amendment. *Id.* at 2553 (Breyer, J., concurring in the judgment); *id.* at 2560-62 (Alito, J., dissenting).

As a result, the governing rule appears to be the one set forth by Justice Breyer's concurrence in the judgment (joined by Justice Kagan): such statements may be restricted if the restriction passes "intermediate scrutiny." *Id.* at 2551-52 (Breyer, J., concurring in the judgment).[1] The intermediate scrutiny test

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[1] Whether such five-Justice concurrence-plus-dissent positions are binding precedent is not entirely clear. On one hand, some Supreme Court precedents take the view that "when no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who *concurred in the judgmen[t]* on the narrowest grounds.'" *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 n.9 (1988) (4-3) (emphasis added) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). Under this view, the dissenters' votes cannot be included, and thus there is no holding that restrictions on lies are constitutional if they pass intermediate scrutiny (since there are only two votes for that proposition among the Justices who concurred in the judgment). The proper test for restrictions on lies would thus remain up in the air, with no binding precedent on this point for other courts.

On the other hand, several other Supreme Court precedents take the view that the holding of a splintered Court is that position taken by a majority of all Justices, whether they concurred in the judgment or dis-

generally asks whether the restriction is "narrow[ly] tailor[ed]" to "a substantial government interest." *Turner Broad.*, 512 U.S. at 662 (cited by *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring in the judgment)). Intermediate scrutiny is deliberately less

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sented. *See Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (deriving the holding of *Guardians Association v. Civil Service Commission of New York City*, 463 U.S. 582 (1983), from the views of three dissenters and some of the Justices who had concurred in the judgment); *Alexander v. Choate*, 469 U.S. 287, 293-94 & nn.8-11 (1985) (same); *United States v. Jacobsen*, 466 U.S. 109, 116-17 & n.12 (1984) (deriving the holding of *Walter v. United States*, 447 U.S. 649 (1980), from the agreement of the four dissenters and a two-Justice lead opinion); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) (deriving the holding of *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), by combining the votes of the four dissenters and one Justice concurring in the judgment, and expressly noting that "the Court of Appeals correctly recognized that the four dissenting Justices and Justice Blackmun formed a majority" on the relevant legal proposition); *see also Waters v. Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (concluding that "lower courts should apply" the views taken by a majority of the Justices in that case, even when the majority is formed from the plurality and the dissent).

The latter view seems to be the more prominently followed, and it is also sound. Given that five U.S. Supreme Court Justices concluded in *Alvarez* that restrictions on lies are generally constitutional if they pass intermediate scrutiny, it makes sense to give this majority sentiment the same respect whether or not some of those Justices were dissenting from the bottom-line result. *See 281 CARE Comm. v. Arneson*, 2013 WL 308901, *6-*7 (D. Minn. Jan. 25, 2013) (concluding that "Justice Breyer's concurrence is the controlling opinion of *Alvarez*" and that intermediate scrutiny therefore applies).

speech-protective than the "strict scrutiny" test applicable to fully protected speech. *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring in the judgment).

In particular, Justice Breyer's concurrence approved of speech restrictions that "limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm." *Id.* at 2554 (Breyer, J., concurring in the judgment). Such restrictions that focus on harm to particular people, it appears, are seen by the concurrence as both supported by an especially important government interest and especially likely to be well-tailored to that interest (rather than being more extensive than necessary).

A narrow ban on knowing falsehoods about a particular person that are intended to -- or are obviously very likely to -- cause third parties to be duped into contacting the target seeking some good or service (whether a golf cart, used motorcycle, sex, *see, e.g.*, *United States v. Sayer*, 748 F.3d 425 (1st Cir. 2014),

or anything else), should thus be constitutional. Such statements produce a potentially dangerous situation. No one likes to feel cheated, especially when he has invested time or effort to go somewhere. If someone is told that a product is available at a particular place, and then drives out to buy the product only to be informed that he has been lied to, he might well be annoyed and even angry. (The same of course is even more true if someone goes to meet a person who was billed as a willing sexual partner, and is told that the person is in fact completely unwilling.)

The cheated person may suspect that the target of the falsehoods is simply unjustifiably trying to back out of an offer, and thus be angry with the target as a result. The target might react brusquely, either because she is surprised by a stranger coming to ask about a good or service that she knows nothing about, or because she is weary of dozens of people approaching her about the ad. This in turn may be off-putting to the cheated person, who expects the target to be happy about the approach; the situation may thus become still more tense and dangerous.

Even if the cheated person quickly realizes he was duped by a third party, and not by the target, he may

still feel humiliated and want to lash out at whoever is present. And even if no violence results, it is likely that the target will feel a sense of danger and fear stemming from a tense situation involving a stranger -- especially if the situation is repeated many times, as many strangers respond to the deceptive advertisement. (The harm might be especially serious when the falsehoods lead someone to the target's home, where the target may be least on guard and may most expect peace and repose. *See Frisby v. Schultz*, 487 U.S. 474, 484 (1988). But even if the falsehood invites people to approach the target at her place of business, the harm may still be substantial enough.)

These possibilities would not suffice to justify restricting fully protected speech. For instance, accurately stating facts about a person is generally constitutionally protected, even if it creates some risk of violence against the person, or creates a sense of fear. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903-04 (1982). The same is true of constitutionally protected opinions, at least as long as they do not fit within the narrow exception for incitement of imminent violence. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*).

But under the views of five Justices in *Alvarez*, knowing falsehoods have less constitutional value and less constitutional protection than true statements of fact or statements of opinion. This view allows the legislature to restrict such knowing falsehoods in order to prevent the risk of harm to the identifiable targets of the falsehoods.

This is especially so when none of the potentially valuable features of falsehoods is present. The *Alvarez* concurrence reasoned:

> False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.

132 S. Ct. at 2553 (Breyer, J., concurring in the judgment). Yet none of these "useful human objectives" is served by knowing falsehoods that invite unwitting third parties to contact a targeted individual. Nor is there reason to think that these particular knowing falsehoods are so "pervasive[]" that criminalizing them would "provide[] a weapon to [the] government"

that it can use "selectively" in a politically biased way. *Id.* (Breyer, J., concurring in judgment) (giving this as another concern justifying striking down a law that banned self-aggrandizing falsehoods).

Thus, a law focused on such knowing falsehoods that invite unwitting third parties to contact a targeted individual should pass the "intermediate scrutiny" required by *Alvarez*. The interest in preventing the risk of unwanted, potentially dangerous, and likely frightening and disturbing approaches to the targets of the speech should be seen as substantial. And the law would be narrowly tailored to that precise interest. *Cf. People v. Golb*, 2014 WL 1883943 (N.Y. May 13, 2014) (applying New York's "criminal impersonation" statute to online impersonation; the statute bars intentionally impersonating someone in order to get a benefit, to injure, or to defraud).

II. Section 43A Does Not Restrict Such Knowingly False Statements That Are Outside the Existing Categories of Constitutionally Unprotected Speech

Though a narrow, clearly drafted law can prohibit such knowing falsehoods, G. L. c. 265, § 43A is not such a law. In *Commonwealth v. Welch*, 444 Mass. 80 (2005), this Court concluded:

> [T]he Legislature, in carefully crafting the statute, intended the statute be applied solely to constitutionally unprotected speech. Any attempt to punish an individual for speech not encompassed within the "fighting words" doctrine (or within any other *constitutionally unprotected category of speech*) would of course offend our Federal and State Constitutions. We decline to narrow the statute by engrafting onto it a savings clause or other limiting construction at this time. Should the Commonwealth attempt to prosecute an individual for speech that is constitutionally protected, we would have no hesitation in reading into the statute such a narrowing construction to ensure its application only to *speech that is accorded no constitutional protection*.

Id. at 99-100 (emphasis added). This Court thus, without expressly "engrafting onto [the statute] a savings clause or other limiting construction," in essence interpreted § 43A to read:

> Whoever willfully and maliciously engages in a knowing pattern of conduct or series of acts [limited, as to speech, to speech encompassed within the "fighting words" doctrine (or within any other constitutionally unprotected category of speech)] over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of criminal harassment.

But, as noted above, under *Alvarez*, knowing falsehoods (outside the established categorical exceptions for perjury, fraud, and certain kinds of defamation) are *not* a "constitutionally unprotected category of

speech."[2] *Alvarez* expressly rejected the view "that false statements receive no First Amendment protection." 132 S. Ct. at 2545 (plurality opinion); *id.* at 2553 (Breyer, J., concurring in the judgment). The "constitutionally unprotected categories" are categories such as "obscenity," "defamation," "fighting words," and "true threats." *Id* at 2544 (plurality opinion). Knowing falsehoods more generally do not constitute such a category. Even when they can be restricted, they can be restricted because the restriction passes intermediate scrutiny (under Justice Breyer's view) or strict scrutiny (under the plurality's view) -- not because the speech falls within an unprotected category.

Indeed, trying to import intermediate scrutiny into this Court's reading of § 43A in *Welch* would leave it impossible for laypeople to understand what speech is protected. Any such interpretation of § 43A would make it, in effect, read something like this:

> Whoever willfully and maliciously engages in a knowing pattern of conduct or series of acts [limited, as to speech, to speech encompassed within the "fighting words" doctrine (or within

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[2] *Amicus* filed a brief in *Alvarez* urging the United States Supreme Court to treat such knowing falsehoods as a constitutionally unprotected category, but that Court rejected this suggestion.

> any other constitutionally unprotected category of speech)] [*or knowingly false statements when restricting the statements is narrowly tailored to a substantial government interest*] over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of criminal harassment.

Yet even if laypeople can be presumed to know the existing "constitutionally unprotected categor[ies] of speech" (such as fighting words, threats, incitement, and the like), it would be unreasonable to presume that laypeople can anticipate which government interests will be seen as "substantial" for purposes of intermediate scrutiny, and which restrictions will be seen as "narrowly tailored" to those interests. Tests such as intermediate scrutiny are plausible tools for judges, when the judges are called on to evaluate criminal laws. But such tests are not plausible elements of criminal laws themselves.

Nor would it be proper for this Court to retroactively impose a limiting construction on the statute that would protect most speech, but expressly exclude knowing falsehoods inviting unwitting third parties to contact a targeted individual. Nothing in the statutory text, or in the earlier decisions of this Court,

suffices to put people on notice of any such distinction.

Cohen v. California, 403 U.S. 15 (1971), offers a helpful analogy here. In *Cohen*, a California statute that banned "offensive conduct" had been applied to ban the display of vulgarities in public places. The Court concluded that such a broad ban was unconstitutional.

Cohen himself, though, wore a jacket with the offensive message into a courthouse, and the opinion noted that such speech might be prohibitable by a rule targeted solely to courthouses. *Id.* at 19; *see also ISKCON v. Lee*, 505 U.S. 672, 679 (1992) (holding that speech in nonpublic fora may be restricted through reasonable viewpoint-neutral rules). Still, the Court overturned Cohen's conviction, because nothing in the statute sufficiently clearly defined where such vulgarities would be allowed:

> Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. No fair reading of the phrase "offensive con-

> duct" can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.

403 U.S. at 19 (citations omitted). The same applies here. The Johnsons were tried under a statute that, on its face, covers a wide range of speech, including constitutionally protected speech. That statute, as interpreted by this Court in *Welch*, would have covered a narrower range of speech, including only speech falling into a "constitutionally unprotected category of speech." Whether the statute is considered as written or as previously interpreted in *Welch*, there is an "absence of any language in the statute that would have put appellant[s] on notice" that certain speech -- knowing falsehoods that invite people to approach the targets of the falsehoods -- was being specially punished.

CONCLUSION

For the reasons stated here, *amicus curiae* respectfully requests that this Court reverse defendants' convictions -- but without precluding the Legislature from crafting a narrower, more precisely defined, ban

on false advertisements that cause unwitting third parties to contact the targeted individual.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under the penalties of perjury that on August 15, 2014, I served two copies of the foregoing brief by first-class mail, postage prepaid, on counsel of record.

Theodore J. Folkman

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the rules of court that pertain to the filing of briefs.

Theodore J. Folkman