23-7577

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

DOUGLASS MACKEY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York
Case No. 21-cr-00080 (AMD)

Brief of Amicus Curiae Professor Eugene Volokh in Support of Defendant-Appellant and Reversal

RUSSELL B. BALIKIAN
CODY M. POPLIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
rbalikian@gibsondunn.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES.......... ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION.......... 1

ARGUMENT.......... 5

I. The First Amendment Permits Narrow and Clearly Defined Prohibitions on Knowing Lies Regarding the Mechanics of Voting.......... 5

A. Although the Supreme Court Has Not Clearly Defined the Constitutional Protection Afforded to False Statements, Courts Have Invalidated Broad Bans on Lies in Elections.......... 6

B. Narrow and Clearly Defined Restrictions Continue to Survive First Amendment Scrutiny.......... 9

II. Section 241 Is Not a Narrow and Clearly Defined Prohibition on Knowing Lies Regarding the Mechanics of Voting. 13

A. The District Court's Interpretation of Section 241 Would Render It Unconstitutionally Overbroad 16

B. Applying Section 241 to Cover Speech Would Render It Unconstitutionally Vague 22

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

281 Care Comm. v. Arneson,
766 F.3d 774 (8th Cir. 2014) 3, 9, 12

Baggett v. Bullitt,
377 U.S. 360 (1964)..29

Bray v. Alexandria Women's Health Clinic,
506 U.S. 263 (1993)..20

Bridges v. California,
314 U.S. 252 (1941)..13

In re Chmura,
608 N.W.2d 31 (Mich. 2000)..8

Cohen v. California,
403 U.S. 15 (1971)..27, 28

Commonwealth v. Lucas,
34 N.E.3d 1242 (Mass. 2015)..3, 9, 12, 21

Crolich v. United States,
196 F.2d 879 (5th Cir. 1952) 25

FCC v. Fox Television Stations, Inc.,
567 U.S. 239 (2012)..23

Garrison v. Louisiana,
379 U.S. 64 (1964)..6

Gentile v. State Bar of Nev.,
501 U.S. 1030 (1991)..15, 28

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974)..6, 7

Grayned v. City of Rockford,
408 U.S. 104 (1972)..24

Grimmett v. Freeman,
59 F.4th 689 (4th Cir. 2023)..3, 9, 17

Hope Clinic v. Ryan,
195 F.3d 857 (7th Cir. 1999) 22

Hustler Mag., Inc. v. Falwell,
485 U.S. 46 (1988)..6

Kolender v. Lawson,
461 U.S. 352 (1983)..24

Konigsberg v. State Bar of Cal.,
366 U.S. 36 (1961)..6

Linert v. MacDonald,
901 N.W.2d 664 (Minn. Ct. App. 2017)......................................10, 11

Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.,
538 U.S. 600 (2003)..6, 7

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995)..12, 17

Minn. Voters Alliance v. Mansky,
138 S. Ct. 1876 (2018)..10, 19

NAACP v. Button,
371 U.S. 415 ....23, 28

NAACP v. Clairborne Hardware Co.,
458 U.S. 886 (1982)..20

New York Times Co. v. Sullivan,
376 U.S. 254 (1964)..7

Ohio Democratic Party v. Ohio Elections Comm'n,
2008 WL 3878364 (Ohio Ct. App. Aug. 21, 2008) 10

Pestrak v. Ohio Elections Comm'n,
926 F.2d 573 (6th Cir. 1991) 8

State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.,
957 P.2d 691 (Wash. 1998) 8

Reno v. ACLU,
521 U.S. 844 (1997) 26

Rickert v. State,
168 P.3d 826 (Wash. 2007) 8

Rosenblatt v. Baer,
383 U.S. 75 (1966) 7

Ryan v. United States,
99 F.2d 864 (8th Cir. 1938) 25

Schmitt v. McLaughlin,
275 N.W.2d 587 (Minn. 1979) 10

State v. Davis,
499 N.E.2d 1255 (Ohio Ct. App. 1985) 8

Susan B. Anthony List v. Driehaus,
814 F.3d 466 (6th Cir. 2016) 3, 9

Time, Inc. v. Hill,
385 U.S. 374 (1967) 6

Tomei v. Finley,
512 F. Supp. 695 (N.D. Ill. 1981) 10

Treasurer of the Comm. to Elect Gerald D. Lostracco v. Fox,
389 N.W.2d 446 (Mich. Ct. App. 1986) 10

United States v. Alvarez,
567 U.S. 709 (2012) 3, 5, 6, 7, 8, 10, 11, 16, 21, 22

United States v. Anderson,
417 U.S. 211 (1974) 25

United States v. Butler,
25 F. Cas. 213 (D.S.C. 1877) 25

United States v. Guest,
383 U.S. 745 (1966)..26

United States v. Hansen,
599 U.S. 762 (2023)..15

United States v. Haynes,
1992 WL 296782 (6th Cir. Oct. 15, 1992) 25

United States v. Kozminski,
487 U.S. 931 (1988)..14, 24

United States v. Lanier,
520 U.S. 259 (1997)..14, 23

United States v. Lee,
6 F.3d 1297 (8th Cir. 1993) 21

United States v. Lee,
935 F.2d 952 (8th Cir. 1991) 22

United States v. Mackey,
652 F. Supp. 3d 309 (E.D.N.Y. 2023).................................3, 15, 17, 22

United States v. Mosely,
238 U.S. 383 (1915)..25

United States v. Price,
383 U.S. 787 (1966)..2, 14

United States v. Robel,
389 U.S. 258 (1967)..25

United States v. Stevens,
559 U.S. 460 (2010)...6, 16, 22

United States v. Stone,
188 F. 836 (D. Md. 1911) 25

United States v. Tobin,
2005 WL 3199672 (D.N.H. Nov. 30, 2005) 18, 25

United States v. Williams,
341 U.S. 70 (1951) 14, 26

United States v. Williams,
553 U.S. 285 (2008) 15, 22

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 23

Virginia v. Hicks,
539 U.S. 113 (2003) 16

Weaver v. Bonner,
309 F.3d 1312 (11th Cir. 2002) 8

Winter v. Wolnitzek,
834 F.3d 681 (6th Cir. 2016) 8

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I .... *passim*

U.S. Const. amend. II 26

STATUTES

18 U.S.C. § 241 .... *passim*

42 U.S.C. § 2000a 20

52 U.S.C. § 10307(c) 13

Act of May 31, 1870, 16 Stat. 140 13

Deceptive Practices and Voter Intimidation Act,
109th Cong. S. 1975 (2005) 13
110th Cong. S. 453 (2007) 13
117th Cong. S. 1840 (2021) 13

Minn. Stat. § 204C.035 12

N.M. Stat. Ann. § 1-20-9 12

Va. Code Ann. § 24.2-1005.1 12

OTHER AUTHORITIES

David S. Ardia & Evan Ringel, *First Amendment Limits on State Laws Targeting Election Misinformation*, 20 First Amend. L. Rev. 291 (2022) 12

Dep't of Just., *Federal Prosecution of Election Offenses* (8th ed. 2017) 24

Elaine Kamarck, *A Short History of Campaign Dirty Tricks Before Twitter and Facebook*, Brookings Inst. (July 11, 2019) 25

Eugene Volokh, *When Are Lies Constitutionally Protected?*, Knight First Amend. Inst., Columbia Univ. (Oct. 19, 2022) 1

Hiroko Tabuchi, *'Worse Than Anyone Expected': Air Travel Emissions Vastly Outpace Predictions*, N.Y. Times (Sept. 19, 2019) 20

Sabrina Tavernise, *Planning to Vote in the November Election? Why Most Americans Probably Won't*, N.Y. Times (Oct. 3, 2018) 17

Sabrina Tavernise & Robert Gebeloff, *They Did Not Vote in 2016. Why They Plan to Skip the Election Again*, N.Y. Times (Oct. 26, 2020) 17

INTEREST OF AMICUS CURIAE[1]

Professor Eugene Volokh is the Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law and Visiting Fellow at the Hoover Institution (Stanford University). He is the author of more than 50 law-review articles on First Amendment law and the textbook, *The First Amendment and Related Statutes* (7th ed. 2020). Professor Volokh has written on and has an interest in the development of a practically workable free-speech doctrine concerning false statements.[2] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief.

INTRODUCTION

The First Amendment likely tolerates narrow and clearly defined bans on disseminating knowing lies regarding election procedures—that is, false statements of fact (not opinion, humor, parody, hyperbole, or the

---

[1] No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief. No person other than amicus curiae or its counsel contributed money that was intended to fund preparing or submitting this brief.

[2] *See, e.g.*, Eugene Volokh, *When Are Lies Constitutionally Protected?*, Knight First Amend. Inst., Columbia Univ. (Oct. 19, 2022), https://knightcolumbia.org/content/when-are-lies-constitutionally-protected.

like) made with actual malice regarding the time or place of an election, or the procedures one must follow to lawfully cast a valid vote. But Congress has not enacted any federal law that clearly criminalizes such conduct. While some states have passed legislation that comes close to the mark, Congress has debated and repeatedly failed to enact similar statutes. *See infra*, at 12-13.

Despite the absence of a federal statute specifically on point, the government prosecuted Douglass Mackey for posting messages on Twitter relating to the 2016 presidential election. To achieve that result, the government repurposed 18 U.S.C. § 241, a statute enacted in 1870 to target violence and intimidation by the Ku Klux Klan during Reconstruction. *United States v. Price*, 383 U.S. 787, 800-05 (1966). Section 241 does not specifically address false factual statements about the mechanics of voting, or even speech about elections. Instead, it broadly prohibits "conspir[ing] to injure, oppress, threaten, or intimidate any person … in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." The district court nonetheless construed the term "injure" to encompass any "conduct that makes exercising the right to vote more difficult, or in some

way prevents voters from exercising their right to vote." *United States v. Mackey*, 652 F. Supp. 3d 309, 337 (E.D.N.Y. 2023). It held that Mackey had "fair warning" that this 1870 statute prohibited posting tweets suggesting that people could "vote by text." *Id.* at 338, 346.

Whatever one thinks of Mackey's tweets, the district court's broad reading of Section 241 brings the statute into conflict with the First Amendment and risks chilling protected political speech. Courts are rightfully loath to let the government regulate the rough and tumble of speech surrounding elections as a general matter, preferring counterspeech as the appropriate remedy. Consistent with that principle, courts in recent years have invalidated broad election-lie statutes in North Carolina, Ohio, Minnesota, and Massachusetts, holding that they are insufficiently clear and narrow to survive First Amendment scrutiny. *See Grimmett v. Freeman*, 59 F.4th 689, 692 (4th Cir. 2023); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 476 (6th Cir. 2016); *281 Care Comm. v. Arneson*, 766 F.3d 774, 796 (8th Cir. 2014); *see also Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 (Mass. 2015). These decisions, read together with the Supreme Court's false-speech jurisprudence in cases such as *United States v. Alvarez*, 567 U.S. 709

(2012), make clear that a statute prohibiting election misinformation will not survive First Amendment scrutiny unless it is narrowly and clearly limited only to knowing (or perhaps reckless) lies made to confuse voters about easily verifiable facts such as the time or place of voting.

Section 241 does not fit that description. Nothing in its text nor in earlier precedents suggests that it forbids lies while protecting other speech; certainly it is not a narrow, clearly defined statute targeting knowing lies about election mechanics. Accepting the district court's view would dramatically expand Section 241's scope and transform it into a boundless, indeterminate criminal prohibition on any speech that the government (later) deems injurious to constitutional rights. Because the district court's interpretation of Section 241 would render it overbroad and impermissibly vague, the best reading of Section 241—and the one compelled by the First Amendment—is that Section 241 does not reach false speech regarding elections. If Congress desires to regulate knowing lies about election mechanics, it must enact a narrow, clear statute targeting such lies.

ARGUMENT

I. The First Amendment Permits Narrow and Clearly Defined Prohibitions on Knowing Lies Regarding the Mechanics of Voting.

False speech raises unique First Amendment concerns—depending on the context, restrictions on knowingly or recklessly false speech may warrant intermediate or even strict scrutiny, or alternatively may not implicate First Amendment protections at all. *Alvarez*, 567 U.S. at 717 (Kennedy, J.) (plurality op.); *id.* at 730-31 (Breyer, J., concurring in the judgment). The Supreme Court has never directly addressed whether and when false speech relating to elections can be prohibited. Nevertheless, the Court's general false-speech decisions and lower courts' false-election-speech-focused decisions suggest that the First Amendment prohibits broad regulations of election lies, but likely permits narrow restrictions on knowing lies concerning certain readily verifiable factual matters, especially the time and place of an election, that deceive voters about the mechanics of elections.

A. Although the Supreme Court Has Not Clearly Defined the Constitutional Protection Afforded to False Statements, Courts Have Invalidated Broad Bans on Lies in Elections

The Supreme Court has repeatedly stated that while "[u]nder the First Amendment there is no such thing as a false *idea*," "there is no constitutional value in false statements of *fact*." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (emphasis added). As a result, knowingly false factual statements are punished without constitutional question in a number of areas that are "long familiar to the bar." *United States v. Stevens*, 559 U.S. 460, 468 (2010). These include defamation, perjury, fraud, false statements to the government, and knowingly false statements that portray a person in a false light or intentionally inflict emotional distress, among others. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (defamation); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961) (perjury); *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (fraud); *Time, Inc. v. Hill*, 385 U.S. 374, 389-91 (1967) (false light); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (intentional infliction of severe emotional distress); *see also Alvarez*, 567 U.S. at 720 (plurality op.) (discussing false statements made to Government officials).

At the same time, the Supreme Court has held that the First Amendment limits liability for certain false statements "in order to protect [other] speech that matters." *Gertz*, 418 U.S. at 341. For example, even knowingly false libelous statements about the government may not be punished. *New York Times Co. v. Sullivan*, 376 U.S. 254, 291 (1964); *accord Rosenblatt v. Baer*, 383 U.S. 75, 83 (1966). Similarly, knowingly "false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern" are protected because permitting "the state to penalize [such] purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." *Alvarez*, 567 U.S. at 751 (Alito, J., dissenting) (writing for three Justices); *id.* at 733 (Breyer, J.) (writing for two Justices). And the First Amendment imposes "[e]xacting proof requirements" on false speech claims in other contexts to ensure truthful speech is not chilled. *Madigan*, 538 U.S. at 620 (fraud complainant must prove that the speaker knew statement was false and intended to mislead); *New York Times Co.*, 376 U.S. at 279-80 (requiring "actual malice" for public official to recover "damages for a defamatory falsehood"). Indeed, truthful noncommercial speech is generally

protected even if it is potentially misleading. *See, e.g.*, *Winter v. Wolnitzek*, 834 F.3d 681, 694 (6th Cir. 2016) (striking down ban on "misleading" statements in election campaigns); *Weaver v. Bonner*, 309 F.3d 1312, 1320 (11th Cir. 2002) (same).

In *Alvarez*, the Supreme Court held 6-3 that the Stolen Valor Act violated the First Amendment in prohibiting lies about receiving military decorations, 567 U.S. at 714, 730 (plurality op.); *id.* at 739 (Breyer, J.), even as five Justices suggested that lies about readily verifiable facts receive less constitutional protection, *id.* at 730-32 (Breyer, J.); *id.*at 750-52 (Alito, J.). Since then, lower courts have consistently found that broadly worded bans on knowing lies in elections violate the First Amendment.[3] In *Grimmett*, for example, the Fourth Circuit held unconstitutional a statute that prohibited "derogatory reports" regarding any candidate, in part because, even if it were read as limited to

[3] Before *Alvarez*, courts took varying approaches to broad statutes prohibiting election lies, with some courts upholding them, *see In re Chmura*, 608 N.W.2d 31, 33 (Mich. 2000); *State v. Davis*, 499 N.E.2d 1255, 1258 (Ohio Ct. App. 1985); *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 575 (6th Cir. 1991), and others holding that they violated the First Amendment, *Rickert v. State*, 168 P.3d 826, 827 (Wash. 2007); *State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 699 (Wash. 1998).

falsehoods, "it draws impermissible content-based distinctions in identifying which speech to criminalize." 59 F.4th at 690-91, 694. The Sixth Circuit similarly invalidated an Ohio law that barred knowingly or recklessly disseminating false information designed to promote or defeat a political candidate, because the law was not tailored to "preserving the integrity of [the state's] elections"—it criminalized even "non-material statements" such as "lying about a political candidate's shoe size." *Driehaus*, 814 F.3d. at 469-70, 473-75. The Eighth Circuit likewise held that a statute unconstitutionally chilled political speech when it broadly criminalized knowingly false "paid political advertising or campaign material." *281 Care Comm.*, 766 F.3d at 778, 792. And the Supreme Judicial Court of Massachusetts struck down a law prohibiting "any false statement in relation to any candidate" that is "designed or tends to aid or injure or defeat such candidate," explaining that, given the breadth of the statute, counterspeech was the preferred remedy for alleged election fraud. *Lucas*, 34 N.E.3d at 1244 n.1, 1252, 1256.

B. Narrow and Clearly Defined Restrictions Continue to Survive First Amendment Scrutiny

Despite the cases cited above, statutes that narrowly and clearly forbid "easily verifiable" false statements about objective facts—even

those made in the political context—raise fewer First Amendment concerns because they are less likely to lead to arbitrary enforcement or curtail valuable speech. *Alvarez*, 567 U.S. at 732 (Breyer, J.).

In *Minnesota Voters Alliance v. Mansky*, for example, the Supreme Court observed that it "d[id] not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures." 138 S. Ct. 1876, 1889 n.4 (2018).[4] And courts have upheld statutes regulating specifically defined knowing lies in elections, even after *Alvarez*. *See Linert v. MacDonald*, 901 N.W.2d 664, 667, 670 (Minn. Ct. App. 2017) ("knowingly mak[ing] … a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party"); *Schmitt v. McLaughlin*, 275 N.W.2d 587, 590-91 (Minn. 1979) (falsely claiming support or endorsement by a political party); *Treasurer of the Comm. to Elect Gerald D. Lostracco v. Fox*, 389 N.W.2d 446, 447, 449 (Mich. Ct. App. 1986) (falsely claiming that one is the incumbent); *see also Tomei v. Finley*, 512 F. Supp. 695, 696, 698 (N.D. Ill. 1981) (misrepresenting party affiliation); *Ohio Democratic Party v.*

[4] This was said in a case involving restrictions on speech in a government-controlled nonpublic forum, but the Court did not expressly include any such limitation in that statement.

Ohio Elections Comm'n, 2008 WL 3878364, at *5 (Ohio Ct. App. Aug. 21, 2008) (falsely claiming to hold a particular office).

These cases suggest that government restrictions on knowing lies concerning certain objectively verifiable matters, such as the time and place of an election, that are made to confuse voters, survive First Amendment scrutiny. Assuming someone is deceived, such falsehoods work a "legally cognizable" or "specific harm," satisfying the Supreme Court's concern that statutes criminalize more than simple false speech. *See Alvarez*, 567 U.S. at 719 (plurality op.); *id.* at 734 (Breyer, J.). Intentional lies about when polls close, where one can vote, whether one can vote online, and who is eligible to vote can generally be narrowly defined by statute and will often be "easily verifiable" for a court, mitigating concerns about vagueness and overbreadth, *id.* at 732 (Breyer, J.), and reducing the potential for "argu[ments] about interpretation or shades of meaning" to lead to selective prosecution, *id.* at 716 (plurality op.). Counterspeech is also less likely to be effective in the days immediately before an election, when election officials, candidates, and the media may not have time to rebut the lie. *See Linert*, 901 N.W.2d at 670. And the government's interest in preventing fraud "carries special

weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349 (1995); *281 Care Comm.*, 766 F.3d at 785-86 (the state "indisputably has a compelling interest in preserving the integrity of its election process"); *Lucas*, 34 N.E.3d at 1252 (similar).

Consistent with these principles, some states have enacted laws that endeavor to target knowing lies about the mechanics of voting (though even some of these statutes likely need to be tightened up to comply with the First Amendment).[5] Minnesota, for example, prohibits "knowingly deceiv[ing] another person regarding the time, place, or manner of conducting an election." Minn. Stat. § 204C.035. Similarly, a Virginia statute bars knowingly false statements "about the date, time, and place of the election." Va. Code Ann. § 24.2-1005.1. And New Mexico proscribes printing, distributing, or displaying "false or misleading instructions pertaining to voting or the conduct of the election." N.M.

---

[5] For an analysis of such state laws, *see* David S. Ardia & Evan Ringel, *First Amendment Limits on State Laws Targeting Election Misinformation*, 20 First Amend. L. Rev. 291 (2022) (collecting and describing statutes).

Stat. Ann. §1-20-9. Congress, however, has not enacted a similarly targeted statute, despite considering several bills, *see, e.g.*, Deceptive Practices and Voter Intimidation Act, 109th Cong. S. 1975 (2005); 110th Cong. S. 453 (2007) (reintroducing); 117th Cong. S. 1840 (2021) (same), and despite regulating certain knowingly false statements made when registering to vote, 52 U.S.C. § 10307(c).

In sum, the First Amendment likely permits narrow and clearly defined bans on knowing lies regarding objectively verifiable facts about election procedures, which tend to cause material harm. But broad bans on false speech in elections risk undermining core political discourse, and that "prized American privilege to speak one's mind, although not always with perfect good taste" or with perfect accuracy. *Bridges v. California*, 314 U.S. 252, 270 (1941). They are thus likely barred by the First Amendment.

II. Section 241 Is Not a Narrow and Clearly Defined Prohibition on Knowing Lies Regarding the Mechanics of Voting.

In this case, the government prosecuted Mackey under 18 U.S.C. § 241. Originally enacted in 1870, *see* Act of May 31, 1870, ch. 114, § 6, 16 Stat. 140, 141, that statute as revised makes it a crime for:

> two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same.

18 U.S.C. § 241. Congress enacted the statute as a broad remedy to the KKK's campaign of terror targeting newly freed slaves in the exercise of their constitutional rights following the Civil War. *See Price*, 383 U.S. at 804-06; *see also* 18 U.S.C. § 241 (companion provision prohibiting "two or more persons [from] go[ing] in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment" of federal rights).

Because Section 241's reference to "any right or privilege" "incorporate[s] by reference a large body of potentially evolving federal law," the Supreme Court has read certain limits into the statute to ameliorate otherwise significant vagueness concerns. *See, e.g.*, *United States v. Kozminski*, 487 U.S. 931, 941 (1988). The right at issue must be both "clearly established," *United States v. Lanier*, 520 U.S. 259, 270-71 (1997), and, if only private individuals are charged, must be one that protects against private interference (rather than having a state-action element), *see United States v. Williams*, 341 U.S. 70, 77 (1951). Before

this case, Section 241 had never been interpreted to prohibit purely deceptive speech—and it certainly had never been applied to deceptive speech by private individuals.

When interpreting criminal statutes, courts must avoid unnecessary "collision[s]" with the First Amendment. *United States v. Hansen*, 599 U.S. 762, 781 (2023). Here, the district court did the opposite, reading the term "injure" broadly to cover purely deceptive political speech so long as it "makes exercising the right to vote more difficult," or in some way "prevents," "hinder[s]," or "inhibit[s]" "voters from exercising their right to vote." *Mackey*, 652 F. Supp. 3d at 337-38.

That interpretation conflicts with First Amendment principles in two constitutionally significant ways. First, it renders the statute overbroad, because it would "prohibit[] a substantial amount of protected speech," *United States v. Williams*, 553 U.S. 285, 292 (2008), sweeping in true speech, false speech deriding government policy, and false speech about history, social science, and the like. And second, it renders Section 241 impermissibly vague because it provides "no principle for determining when" speech will "pass from the safe harbor … to the forbidden." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1049 (1991).

Accordingly, because Section 241 is not a narrow statute that forbids clearly defined knowing lies about the time or place (or other technical mechanics) of voting, the better reading is that the term "injure" does not encompass false—as opposed to coercive—speech that injures people's right to vote.

A. The District Court's Interpretation of Section 241 Would Render It Unconstitutionally Overbroad

Courts have regularly invalidated statutes that are "substantially overbroad," *Stevens*, 559 U.S. at 842, or that are insufficiently tailored to their ends, *Alvarez*, 567 U.S. at 737-38 (Breyer, J.). A statute, like Section 241 as interpreted by the district court, that imposes criminal penalties on speech is "especially" likely to be found overbroad. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Here, the district court's interpretation of Section 241 sweeps in a substantial amount of protected speech regarding the right to vote and other rights, and lacks the necessary limiting features of other criminal statutes prohibiting knowingly false speech.

To begin, the district court's expansive reading of Section 241 encompasses any speech that purportedly "obstructs," "hinders," "prevents," "frustrates," "makes difficult," or "inhibit[s]" other persons'

exercise of voting rights. *Mackey*, 652 F. Supp. 3d at 336-38 (quotation marks and brackets omitted). This standard is not limited to threatening speech at the voting booth: "[Section] 241 could be violated at any stage that represent[s] an integral part of the procedure for the popular choice," and "in any way that injure[s] [the] right to participate in that choice." *Id*. at 334 (quotation marks omitted).

That interpretation sweeps in a host of clearly protected speech. It would, for instance, forbid *true* speech simply because it suppresses voter turnout and thus "prevents" or "inhibits" people from voting. *See McIntyre*, 514 U.S. at 343-44 (striking down regulation that "applie[d] even when there is no hint of falsity or libel"); *Grimmet*, 59 F.4th at 692-93 (First Amendment "forbids" criminalizing true speech). A campaign's decision to trumpet news articles explaining why many eligible voters will decline to vote could thus be criminal if it is intended to reduce voting by the campaign's opponents. *See*, *e.g.*, Sabrina Tavernise & Robert Gebeloff, *They Did Not Vote in 2016. Why They Plan to Skip the Election Again*, N.Y. Times (Oct. 26, 2020); Sabrina Tavernise, *Planning to Vote in the November Election? Why Most Americans Probably Won't*, N.Y. Times (Oct. 3, 2018). Even the publication of lopsided opinion polls could

be a crime, because "when polls reveal more unequal levels of support, turnout is lower with than without this information," *see* Jens Großer & Arthur Schram, *Public Opinion Polls, Voter Turnout, and Welfare: An Experimental Study*, 54 Am. J. Pol. Sci. 700, 700 (2010), which is to say that some voters are "inhibit[ed]" from voting.

Other types of protected speech would similarly be swept into Section 241's scope. Under the district court's reading, peaceful picketing outside a political party's headquarters would be covered by Section 241, since it is designed to "inhibit" people from voting for particular candidates. So too would unsubstantiated claims that the opposing candidate is a crook or a racist, which could be deemed misleading information that "obstruct[s]" or "hinder[s]" people's right to vote by tricking them out of voting for their preferred candidate. Urging a company, school, or other organization to curtail its get-out-the-vote effort and focus on other priorities is also a form of advocacy protected by the First Amendment, but it could be criminalized as speech published "with the specific intent to ... prevent qualified persons from exercising the right to vote," *United States v. Tobin*, 2005 WL 3199672, a *3 (D.N.H.

Nov. 30, 2005), so long as the district court's broad reading of Section 241 is accepted.

The district court's view of Section 241 would even sweep in the "Please I.D. Me." buttons at issue in *Mansky*, which Minnesota argued "were properly banned because [they] were designed to confuse other voters about whether they needed photo identification to vote." 138 S. Ct. at 1884, 1889 n.4. The statute there was much narrower than Section 241, since it was limited solely to speech at polling places (which are nonpublic fora) on election days; but a 7-2 majority of the Supreme Court nevertheless concluded that a law barring "political" apparel in such places still was far too "indeterminate" and primed with "opportunity for abuse" to survive constitutional scrutiny. *Id.* at 1891. Under the district court's view of Section 241, however, the government could regulate any speech that "hinders," "frustrates," or "inhibits" voting—in any location, and at any time.

The district court's interpretation is also likely to chill speech regarding *other* constitutional rights. Section 241's text is not limited to protecting the right to vote; it prohibits "injur[ing]" people "in the free exercise or enjoyment" of "*any* right or privilege secured … by the

Constitution or laws of the United States." 18 U.S.C. § 241 (emphasis added). Thus, speech that inhibits people in the exercise of other rights could be criminalized. For example, a climate-change activist opposed to air travel could be criminally prosecuted if she publishes misleading statistics about environmental harms associated with flying. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993) (the "right to interstate travel" is a right "constitutionally protected against private interference"); *see also* Hiroko Tabuchi, *'Worse Than Anyone Expected': Air Travel Emissions Vastly Outpace Predictions*, N.Y. Times (Sept. 19, 2019). The district court's reading would likewise sweep in the constitutionally protected speech of a civil rights boycott leader who uses the threat of "social ostracism" to discourage black residents from exercising their federally protected right to patronize white-owned stores or restaurants. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 910, 913 (1982); 42 U.S.C. § 2000a. There is practically no limit to the variety of speech that could be chilled by such an expansive reading.

Finally, Section 241 lacks the limiting features necessary to sustain statutes prohibiting certain categories of false speech. Spanning "almost limitless times and settings," Section 241—as the district court construed

it—comes with "no clear limiting principle." *See Alvarez*, 567 U.S. at 723 (plurality op.). Here, the statement at issue was made on a large social media platform, but the statute would apply "with equal force" no matter the context, and would include barstool comments to new acquaintances about voting at 10 p.m. or on a Wednesday. *See id.* at 722. Moreover, Section 241, unlike fraud statutes, does not by its terms require a showing of materiality or reliance—only that a conspiracy was formed to make false statements. Other courts have found the lack of such limiting features to undermine the constitutional validity of election-speech regulations. *See Lucas*, 34 N.E.3d at 1249-50.

Concerns about Section 241's breadth and potential to ban protected speech motivated at least one court of appeals to read Section 241 to reach only speech that threatens or intimidates. *See United States v. Lee*, 6 F.3d 1297, 1298-99, 1304 (8th Cir. 1993) (en banc) (Gibson, C.J., plurality op.) (rejecting jury instruction that applied Section 241 to speech that "inhibit[s]" or "interfere[s]" with the exercise of rights). As one judge noted in dissenting from the later-reversed panel opinion, "a great deal of speech is sufficiently forceful or offensive to *inhibit* the free action of persons against whom it is directed, in the sense that it would

make someone hesitate before acting in a certain way"; in fact, that "is the very purpose of speech: to influence others' conduct." *United States v. Lee*, 935 F.2d 952, 959 (8th Cir. 1991) (Arnold, J., dissenting) (emphasis added)). The district court's interpretation in this case raises the same overbreadth concerns.

Here, Congress could substantially achieve its purported objective of ensuring that "voters have accurate information about how, when, and where to vote," *Mackey*, 652 F. Supp. 3d at 347, through "a more finely tailored statute" that is "less burdensome," *Alvarez*, 567 U.S. at 737-38 (Breyer, J.); *Stevens*, 559 U.S. at 481-82 (an overbroad statute is not finely tailored). And the potential misapplications and abuses of reading Section 241 to cover deceptive speech substantially exceed whatever lawful applications may be found. *Williams*, 553 U.S. at 292. As a result, the district court's interpretation renders Section 241 overbroad.

B. Applying Section 241 to Cover Speech Would Render It Unconstitutionally Vague

Section 241 has been described as "the poster child[] for a vagueness campaign." *See Hope Clinic v. Ryan*, 195 F.3d 857, 866 (7th Cir. 1999), *judgment vacated on other grounds by Christensen v. Doyle*, 530 U.S. 1271 (2000). Applying it to pure speech only magnifies those already

significant vagueness concerns because it is unclear what speech would violate the statute, and whether similar "false speech" would "inhibit" the exercise of other rights.

"When speech is involved," the Constitution demands "rigorous adherence" to the requirements of fair notice, because fear that a vague restriction may apply to one's speech is likely to deter even constitutionally protected speech. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012) (courts must "ensure that ambiguity does not chill protected speech"); *NAACP v. Button*, 371 U.S. 415, 438 ("precision of regulation must be the touchstone" when determining whether a regulation impedes on First Amendment rights). Where "the law interferes with the right of free speech," courts have required exacting statutory precision. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Button*, 371 U.S. at 432 ("[S]tandards of permissible statutory vagueness are strict in the area of free expression.").

Here, neither Section 241 "nor a good many of [its] constitutional referents delineate the range of forbidden conduct with particularity." *Lanier*, 520 U.S. at 265. Section 241 does not define any mental state

with respect to a statement's falsehood and is not limited to any particular subject matter. Instead, it refers generally to the Constitution and federal statutes—and court decisions interpreting them—to determine which conspiracies it prohibits. *Kozminski*, 487 U.S. at 941. Section 241 itself thus offers *no* "guidelines to govern law enforcement," *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), in applying the statute to speech. In this regard, Section 241 starkly differs from the state laws discussed above that target specific types of knowing lies about the mechanics of voting. *See supra*, at 12-13. This lack of "explicit standards" for law enforcement to apply to differentiate between lawful and unlawful speech under Section 241 "invit[es] subjective or discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 111 (1972).

Even the Department of Justice has previously indicated that "there is no federal criminal statute that directly prohibits" the act of "providing false information to the public … regarding the qualifications to vote, the consequences of voting in connection with citizenship status, the dates or qualifications for absentee voting, the date of an election, the hours for voting, or the correct voting precinct." Dep't of Just., *Federal Prosecution of Election Offenses* 56 (8th ed. 2017). Here, the government

has attempted to read such a restriction into Section 241. But because Section 241 does not "directly" regulate the conduct at issue, *see id.*, the statute cannot provide clarity as to the range of forbidden conduct, let alone with the sort of "precision" that the First Amendment demands, *United States v. Robel*, 389 U.S. 258, 265 (1967).

Past prosecutions likewise did not anticipate the government's use of Section 241 in this case. Complaints concerning voter misinformation are almost as old as the Republic itself, *see* Elaine Kamarck, *A Short History of Campaign Dirty Tricks Before Twitter and Facebook*, Brookings Inst. (July 11, 2019), yet the government has never utilized Section 241 to punish conduct like Mackey's that involves deceptive—as opposed to coercive or threatening—speech. Indeed, other prosecutions under Section 241 almost invariably involve *conduct*, not speech.[6] There

---

[6] *See, e.g.*, *United States v. Butler*, 25 F. Cas. 213, 220 (D.S.C. 1877) (conspiracy to murder a freed slave); *United States v. Stone*, 188 F. 836, 839, 840 (D. Md. 1911) (printing ballots that made it "impossible" for illiterate voters to vote for Republicans); *United States v. Mosely*, 238 U.S. 383, 385 (1915) (refusing to count valid ballots); *Ryan v. United States*, 99 F.2d 864, 866 (8th Cir. 1938) (altering ballots); *Crolich v. United States*, 196 F.2d 879, 879 (5th Cir. 1952) (forging ballots); *United States v. Anderson*, 417 U.S. 211, 226 (1974) (casting ballots for fictitious persons); *United States v. Haynes*, 1992 WL 296782, at *1 (6th Cir. Oct. 15, 1992) (destroying voter registrations); *Tobin*, 2005 WL 3199672, a *1 (jamming telephone lines to obstruct ride-to-the-polls service).

are thus no court decisions clarifying when deceptive speech in the election context crosses the line from vigorous advocacy to unlawful "injury."

The fact that Section 241's state-action limitation is a judicial gloss only enhances the vagueness problem. *See United States v. Guest*, 383 U.S. 745, 754-55 (1966); *Williams*, 341 U.S. at 77. If a person can be "injured" in the exercise of their rights through pure speech, the statute's plain text suggests that any "two or more persons" could cause that harm. *See* 18 U.S.C. § 241. The district court's interpretation of the statute thus suggests that purely private speech would violate the statute if it "inhibit[s]," "frustrate[s]," or "obstruct[s]" individuals from exercising rights that otherwise have state-action requirements, such as the First Amendment right to speak, U.S. Const. amend. I, or the Second Amendment right to "keep and bear Arms," U.S. Const. amend. II. For instance, does protesting gun sales in one's town injure people in exercising their rights under the Second Amendment? The statutory text itself does not answer this question, thereby imposing an impermissible and "obvious chilling effect" on speech regarding any number of constitutional rights, *see Reno v. ACLU*, 521 U.S. 844, 871-72 (1997)—

even those rights beyond the power of Congress to protect from private interference.

Nor can this vagueness problem be solved by retroactively limiting Section 241 solely to conspiracies to prevent voting through knowingly false statements about the mechanics of an election. The Court's analysis in *Cohen v. California*, 403 U.S. 15 (1971), is instructive here. In *Cohen*, the Court rejected the argument that a disturbing-the-peace statute could constitutionally be applied to wearing a jacket with an offensive message into a courthouse:

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

Id. at 19 (citations omitted).

Likewise, Mackey was tried under a statute that on its face is equally applicable (or inapplicable) to speech, regardless of whether that speech falsely describes the mechanics of voting. As a result, "[a]ny

attempt to support [Mackey's] conviction on the ground that" Section 241 targets only a narrow class of false statements "must fail" because the statute contains no limiting language "that would have put [Mackey] on notice that certain kinds of otherwise permissible speech or conduct" that injures a person's exercise of constitutional rights "would nevertheless, under [Section 241], not be tolerated" if it concerns false information about how to vote. *See id.* "No fair reading" of the statutory phrase "conspir[ing] to injure … any person … in the free exercise or enjoyment of any right or privilege," 18 U.S.C. § 241, "can be said sufficiently to inform the ordinary person that distinctions between" false statements about the mechanics of voting and false statements about exercising other federal rights "are thereby created." *Cohen*, 403 U.S. at 19.

The "government may regulate in the area" of First Amendment freedoms "only with narrow specificity." *Button*, 371 U.S. at 433. Because Section 241 provides "no principle for determining when" speech has "pass[ed] from the safe harbor … to the forbidden," *Gentile*, 501 U.S. at 1049, interpreting it to encompass any kind of injurious speech would make it "susceptible of sweeping and improper application," *Button*, 371 U.S. at 433. As a result, people may well "steer far wide[] of the unlawful

zone" and avoid speaking at all. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). The First Amendment does not permit a reading that produces such a result.

CONCLUSION

The First Amendment tolerates narrow, clear statutes that target knowingly false speech concerning the time, place, and manner, or other technical mechanics of an election. But Section 241 is not such a statute. This Court should reverse the decision of the district court.

Dated: January 12, 2024

Respectfully submitted,

/s/ Russell B. Balikian
RUSSELL B. BALIKIAN
CODY M. POPLIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
rbalikian@gibsondunn.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Local Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,436 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point New Century Schoolbook font.

Dated: January 12, 2024

By: *<u>/s/ Russell B. Balikian</u>*
Russell B. Balikian