COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Suffolk County

Supreme Judicial Court
No. SJC-11830

COMMONWEALTH

v.

MELISSA LUCAS

Brief of Amicus Curiae Cato Institute in Support of Defendant

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Interest of Amicus Curiae

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case concerns Cato because the law here violates the First Amendment's protection of speech.

Statement of the Facts

This case began on October 21, 2014, when State Representative Brian Mannal filed a criminal complaint against the defendant, Melissa Lucas, claiming that "in a mass mailer that was distributed to voters . . . Ms. Lucas falsely stated that Brian Mannal filed legislation to help convicted sex offenders for the purpose of the 'helping himself' as an attorney and further stated that Brian Mannal put 'his own interest above our families.' The mailer inferred [sic] in no

uncertain terms that Brian Mannal sought to benefit financially from legislation that he had filed."[1]

In the publications at issue, the PAC which employs Ms. Lucas alerted voters to the fact that Rep. Mannal "introduced legislation that weakens penalties against convicted sex offenders and uses taxpayer dollars to help them purge their names from sexual offender databases" and that as a criminal defense attorney, Rep. Mannal "has earned nearly $140,000 of our tax dollars to represent criminals. Now, he wants to use our tax dollars to pay defense lawyers like himself to help convicted sex offenders."[2] These claims were sourced to articles that had appeared in the popular press, including *The Boston Herald*.[3]

It is not disputed that Rep. Mannal is a criminal defense attorney who has received tax dollars to represent indigent clients. It is not disputed that in the prior session of the General Court he introduced Bill H.1490 "An Act Relative to the Use of Global

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[1] J.A. 103.
[2] J.A. 83-86
[3] E.g. "now championing a bill to help convicted sex offenders get taxpayer-funded lawyers [Mannal] has earned more than $139,000 from the state's public defender coffers in the past several years, according to state records." Erin Smith, "Pol Aiding Sex Cons Got Defense Cash" *The Boston Herald*, February 26, 2013. *Available at* http://goo.gl/Y8XrIl.

Position [sic] Devices for Certain Sex Offender Parolees and Probationers"[4] which would eliminate the wearing of GPS tracking devices as a mandatory requirement of parole or probation for convicted sex offenders. It is not disputed that Representative Mannal also introduced Bill H.1491, "An Act Relative to Reclassification and Early Termination of Finally Classified Sex Offenders" which would require the Commonwealth to "inform sex offenders requesting reclassification that they have the right to request a hearing under the provisions of this subsection and the right to have counsel appointed if a sex offender is deemed to be indigent."[5]

The defendant has disputed whether, as Rep. Mannal alleged in his complaint and the accompanying press release,[6] the distribution of those mailers violated M.G.L. Ch.56 § 42's prohibition on the publication of "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." But more importantly, and which is *amicus'* interest, is whether such a

[4] https://malegislature.gov/Bills/188/House/H1490
[5] https://malegislature.gov/Bills/188/House/H1491
[6] J.A. 88

prohibition on *any* speech -- whether true or false -- is permissible given the protections afforded free expression by the constitutions of the United States and the Commonwealth of Massachusetts.

Summary of Argument

"I am not a crook."

"Read my lips: no new taxes!"

"I did not have sexual relations with that woman."

"Mission accomplished."

"If you like your healthcare plan, you can keep it."

While George Washington may have been incapable of telling anything but the truth, the whole truth, and nothing but the truth, his successors have certainly not had the same integrity. The campaign promise (and its subsequent violation), as well as disparaging statements about one's political opponents (whether true, mostly true, mostly not true, or entirely fantastic), are cornerstones of American democracy. More importantly, it can be incredibly difficult to assess the truth of a politician's claims, especially in the chaos of an election campaign. By their very nature, the accuracy of

certain statements can only be determined at some future point. For example, according to Politifact.com, President Obama's claim that "if you like your health-care plan you can keep it" was true five years before it was named the "Lie of the Year."[7] Similarly, the claim that Representative Mannal alleges the mailers *implied* -- that he will benefit financially from H.1491 -- *could* prove to be entirely true if, at some point in the future, he decides to expand his practice to include the representation of indigent clients before the Sex Offender Registry Board.

Other statements cannot be easily classified as "true" or "false" because they're non-falsifiable, concern essentially contested concepts, or because they are the syllogistic product of deeply held but unprovable maxims. Was President Nixon a "crook?" He was never convicted of a crime, but you can't prove he never committed one -- and just how are we going to

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[7] *Compare* Politifact.com, *Obama's Plan Expands Existing System*, Oct. 9, 2008, http://www.politifact.com/truth-o-meter/statements/2008/oct/09/barack-obama/obamas-plan-expands-existing-system, with Politifact.com, *Lie of the Year: 'If you like your health care plan, you can keep it,'* Dec. 12, 2013, http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it.

define "crook" anyway? Would Rep. Mannal's proposals "[hurt] our families?" By what universal, objective, and unassailably valid metric could that be judged? Simply put, certain statements, purportedly of fact, are in truth a matter of opinion.

For example, it is axiomatic "that every man who is his own lawyer, has a fool for a client."[8] In the federal court proceedings related to this case, Rep. Mannal appeared *in propria persona*.[9] Therefore, as surely as Socrates is mortal,[10] Brian Mannal is a fool.

Is that a truthful statement? Without getting into an epistemological or metaphysical debate, we might say that the answer to that question depends on whether you accept the validity of the initial premise -- that only fools represent themselves. While not a matter of opinion, the veracity of the claim that Rep. Mannal is a fool is inherently indeterminate, somewhat subjective, and entirely unsuited to judicial resolution. But, if Rep. Mannal were to run for reelection next year, and during the campaign *amicus* were to distribute leaflets that said "Brian Mannal is

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[8] Henry Kett, *The Flower of Wisdom* 115 (Cooke & Co, 1825)
[9] J.A. 30 line 20
[10] *See, e.g.,* Plato, *Phaedo*, and Xenophon, *Memorabilia*.

a fool -- he was dumb enough to represent himself, don't let him represent *you!*" would that violate M.G.L. Ch.56 § 42? Stipulating that *amicus* would be responsible for the production and distribution of the leaflets, and that they were both designed and actually tend to discourage voters from supporting Rep. Mannal, the legality of these hypothetical leaflets would depend entirely on whether the proposition "Brian Mannal is a fool" is true or false.

Fortunately, neither this Court, nor any court in the country will ever have to answer that question because laws like M.G.L. Ch.56 § 42 are irredeemably unconstitutional. While *amicus* will not presume to advise this Court as to the strictures of the Commonwealth's Constitution -- but see, *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83 (1983)(Art. 16 of Mass. Declaration of Rights offers protections greater than First Amendment and reaches private action) -- § 42 is clearly incompatible with the First Amendment. That is not a statement of opinion, but one of verifiable fact. The Supreme Court has explicitly held that states cannot punish speakers -- even indirectly -- simply for publishing factually

inaccurate statements about a political figure.[11] The Supreme Court has also held that governments cannot criminalize the utterance of "an intended, undoubted lie" without satisfying the requirements of strict scrutiny.[12] Last year, the Supreme Court indicated that a law practically identical to § 42 would not be able to survive strict scrutiny, because these laws "sweep broadly" and their very existence chills speech. [13]

Since the decision in *S.B.A. List*, two federal courts have found laws criminalizing false statements about political candidates to be unconstitutional. On remand, the District Court for the Southern District of Ohio held that the statute considered by the Supreme Court in *S.B.A. List* violated the First Amendment in part because "we do not want the Government . . . deciding what is political truth," and because the burdens of such a law are "equally imposed on truthful speakers."[14] Less than 10 days earlier, the Eighth Circuit held that a substantively identical Minnesota law was unconstitutional because the "speech at issue occupies the core of the

[11] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)
[12] *United States v. Alvarez*, 132 S. Ct. 2537 (2012)
[13] *S.B.A. List v. Driehaus*, 134 S. Ct. 2334 (2014)
[14] *S.B.A. List v. Ohio Election Comm'n et. al.*, 2014 U.S. Dist. LEXIS 127382 (S.D.O, 2014)

protection afforded by the First Amendment," and though a state has a legitimate interest in preventing electoral fraud "the state does not have carte blanche to regulate the dissemination of false statements during political campaigns."[15]

The law at issue here is unconstitutional. This law is unconstitutional because it does not require proof of actual malice. This law is unconstitutional because the government is simply not permitted to be the arbiter of what is true and what is false. This law is unconstitutional because it is a content-based restriction of political speech that is presumptively unconstitutional, there is simply no credible argument to be made that it satisfies the exacting requirements of strict scrutiny.

[15] *281 Care Comm. (II) v. Arneson* 766 F.3d 774, 795 (8th Cir. 2014), cert. denied March 23, 2015.

Argument

I. Section 42 Is Constitutionally Incompatible with *New York Times v. Sullivan*.

This Court need not vex itself by considering whether false political speech is protected by the First Amendment, and if so what level of scrutiny laws restricting it must be subjected to, and ultimately whether or not this particular law could survive judicial review. Whatever the answers to those questions might be, § 42 is unconstitutional because as interpreted by this Court, it is incompatible with a half-century of Supreme Court decisions, beginning with *New York Times Co. v. Sullivan*.

In 1973, the Senate requested this Court's opinion on the constitutionality of a proposed law that would have required newspapers to publish "responsive" political advertisements. One of the several reasons why this Court offered advised that the law would be unconstitutional was that it would likely have "the chilling effect of discouraging newspapers and the other affected publications from accepting any political advertisements. A newspaper or

other publication of general circulation may decide to publish no political advertisements on an election issue rather than expose itself to a commitment to publish all responsive advertisements. [The proposed law] contains no restriction on the number, size or complexity of responsive advertisements. Each newspaper or other publication would have to devote particular attention to its **statutory obligation not to publish 'false statements'** (G. L. c. 56, § 42)."[16]

Almost 10 years before that advisory opinion, the Supreme Court in *Sullivan* held unequivocally that newspapers could not be liable for false and defamatory statements about politicians that were published in paid advertisements. Since "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate."[17] The Supreme Court held that Constitution guarantees to publishers and private individuals alike a qualified or conditional privilege

[16] *Opinion of the Justices to the Senate*, 363 Mass. 909, 916 (1973) (emphasis added).
[17] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

for statements concerning the conduct or character of public officials and politicians.[18]

This privilege is necessary because if the law required "the critic of official conduct to guarantee the truth of all his factual assertions … would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[19]

While the explicit holding of *Sullivan* was only that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct,"[20] the opinion suggested that the privilege also existed in criminal cases.[21] Less than a year later, the Supreme Court held so explicitly. In *Garrison v.*

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[18] *Id.* at 282-83.
[19] *Id.* at 279.
[20] *Id.* at 283.
[21] Sullivan argued unsuccessfully that that the enforcement of a judgment for damages in a civil suit did not constitute state action. The Supreme Court disagreed, holding that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *Id.* at 277. Logically then the inverse is true as well.

Louisiana,[22] the Supreme Court wrote that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the breathing space that they need to survive, **only those false statements made with the high degree of awareness of their probable falsity** demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government."[23] Under *Garrison*, states can only criminalize criticisms of politicians that are both knowingly or recklessly false, and uttered with the "intent to inflict harm through falsehood."[24]

Based on its text, and the construction given to it by this Court's 1973 advisory opinion, § 42 does not require proof of actual malice. If it does, then the argument this Court made in 1973 would have been nonsensical. A newspaper that was statutorily

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[22] *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964).
[23] *Id.* at 75 (internal citations and ellipses omitted) (emphasis added).
[24] *Id* at 74

obligated to carry an advertisement (or chose to do so for purely financial reasons) could not be said to be acting with malicious intent towards the target of the advertisement. Moreover, if actual malice was an element of the crime, *Sullivan* and its early progeny would have rendered moot this Court's concern that in order to avoid prosecution newspapers would be forced to devote "particular attention" and resources to fact-checking political advertisements prior to publication.

In *Sullivan,* the Supreme Court made clear that a newspaper's failure to corroborate an advertisement's claims did not constitute actual malice.[25] When it comes to criticizing public figures, journalists, especially those reporting the claims of a third party, are not held to the standard of a reasonable duty of care or prevailing journalistic best practices. Because the Supreme Court has made clear that "reckless conduct is not measured by whether a reasonably prudent man" would have published or investigated a statement, a finding of actual malice requires proof of "deliberate falsification" on the part of the defendant or "sufficient evidence … that

[25] 376 U.S. at 287.

the defendant, in fact, entertained serious doubts as to the truth of his publication."[26]

Section 42 cannot be distinguished from the laws struck down in *Sullivan* and *Garrison* on the grounds that it is not, strictly speaking a libel law. It is legally irrelevant that § 42 criminalizes false statements beneficial to a politician's electoral chances, as well false statements about ballot issues. In *Brown v. Hartlage* the Supreme Court recognized that though "the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods," because the "principles underlying the First Amendment remain paramount," that difference does not alter the constitutional calculus.[27]

Because the chilling effect of "absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political

[26] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).
[27] 456 U.S. 45,61 (1982).

campaigns,"[28] the *Hartlage* Court held that, in the context of electioneering, states can only punish false statements made in bad faith *and* with actual knowledge of the statement's falseness, or with reckless disregard for the truth.[29]

Taken together, these cases establish a clear limit on the power of a state to police false political speech. In order for the state to impose any sort of penalty, two things (collectively referred to as actual malice) must be true: 1) the speaker must be acting in bad faith and with injurious intent, and, 2) the statement must be a deliberate falsification, known by the speaker to be false, or published with reckless disregard for its veracity.

As written, and as previously interpreted by this Court, § 42 does not require proof of actual malice, and is therefore unconstitutional. There are only two ways this Court can avoid that conclusion: by denying the continuing validity of the rule in *New York Times Co. v. Sullivan*, or by attempting to salvage § 42 by narrowing its scope through a construction that treats

[28] *Id.*
[29] *Id.* at 62.

actual malice as an implied and necessary element of the crime.

While a saving construction is normally favored under the *Ashwander* rules,[30] it is not a viable option in this case. The canon of constitutional avoidance is properly invoked when courts give narrow and definite meaning to ambiguous terms in statutes that would otherwise be void for vagueness or overbreadth. It does not give judges the power to save an unconstitutional law by ignoring or rewriting the text of the statute.[31] The Supreme Court has consistently held that the canon only applies "where the language of an act will bear two interpretations equally obvious," and one of those equally valid constructions is "clearly in accordance with the provisions of the Constitution."[32] The question then, is "whether [§ 42] is fairly open to such a construction?"[33]

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[30] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J. concurring).

[31] Scroggs, C.J. and *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) always excepted.

[32] *Knights Templar Indem. Co. v. Jarman*, 187 U.S. 197, 205 (1902). *See also, United States v. Delaware & Hudson Co.*, 231 U.S. 366, 407 (1909) ("It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save

Nor do this Court's saving construction precedents permit ignoring or rewriting the text of a statute. This Court has consistently used the doctrine of constitutional avoidance, but only to give narrow and definite meaning to ambiguous terms.[34]

Section 42 "is not equally susceptible to two constructions. The court may not, in order to avoid holding a statute unconstitutional, engraft upon it an exception or other provision. Neither may it do so to avoid having to resolve a constitutional doubt."[35] For a law to be open to multiple equally credible constructions, there must be some ambiguity in the statute's text.[36] The only term in § 42 sufficiently ambiguous to allow for a potentially credible saving

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the statute from constitutional infirmity."), *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.").

[33] *Panama R. Co. v. Johnson*, 264 U.S. 375, 390 (1924).

[34] See, e.g., *Commonwealth v. Templeman*, 376 Mass. 533, 538 (1978) (limiting "lewd, wanton and lascivious persons" provision of G. L. c. 272, § 53, to exclude application to "speech or expressive conduct or to activities which involve lawful exercise of a First Amendment right"), *Commonwealth v. Chou*, 433 Mass. 229, 233 (2001); *Commonwealth v. Sefranka*, 382 Mass. 108, 118 (1980); *Commonwealth v. A Juvenile*, 368 Mass. 580, 597 (1975).

[35] *Crowell v. Benson*, 285 U.S. 22, 76 (1932) (Brandeis, J., dissenting) (internal citations omitted).

[36] *Delaware & Hudson Co.*, 213 U.S. at 412.

construction is Paragraph 3's proviso that a defendant can only be punished if she "knowingly violates" the law. While Massachusetts's courts typically interpret the words "knowing" and "knowingly" in criminal statutes as requiring only proof of general criminal intent -- effectively making them synonymous with words like "willingly" and "intentionally."[37] However, this Court has repeatedly held that where criminal liability hinges on the content of expressive material the First and Fourteenth Amendments require proof of a higher level of *scienter*, even when the statute appears to impose strict liability. Under this rule, a statute making it a crime to sell or distribute written matter or any "other thing which is obscene, indecent or impure," had to be applied by courts "as if it contained the words 'knowing it to be obscene, indecent or impure.'"[38] In a later case, this Court explained the rule as being that a law "which imposes criminal liability for the sale of obscene matter to the general public, although containing no express provision for *scienter*, must be construed as requiring *scienter*," which this Court said meant "knowledge of

[37] *Commonwealth v. Luna*, 418 Mass. 749 (1994).
[38] *Demetropolos v. Commonwealth*, 342 Mass. 658, 661 (1961).

the contents or allegedly obscene character of the book."[39] That opinion invoked the Supreme Court's holding in *Mishkin* that "[t]he Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material."[40]

Even if § 42 *didn't* contain the word "knowingly" this Court could still credibly interpret the statute as only applying to defendants who had actual knowledge that the published statements were false. This construction of § 42 would be of at least equal, if not greater credibility than its construction as essentially a crime of strict liability in the 1973 advisory opinion.

While a implying a *scienter* requirement into § 42 may make sense as a matter of statutory interpretation, it doesn't produce a construction of the statute that is "clearly in accordance with the provisions of the Constitution."[41] Even if this Court construed § 42 as requiring knowledge that the published statements were false *and* that they were either designed to influence an election or would tend

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[39] *Commonwealth v. Corey,* 351 Mass. 331, 332-33 (1996).
[40] *Id.* at 333, quoting *Mishkin v. New York*, 383 U.S. 502, 511 (1966).
[41] *Jarman*, 187 U.S. at 205.

to have that effect, that knowledge is not necessarily equivalent with "actual malice" as defined by the Supreme Court. So construed, § 42 would still criminalize many publications and utterances protected under *New York Times Co v. Sullivan*.

We need not invent hypotheticals. Assuming for the sake of argument that the Defendant's mailers included false statements, the record in this case indicates that she was not the only party who caused them to be published. In a press release Representative Mannal republished, *verbatim*,[42] the statements that his complaint claimed were both false and designed "specifically for the purpose of injuring [his] bid for re-election."[43] By his own admission then Representative Mannal violated § 42 because he knowingly and intentionally published false statements that were designed or tended to injure or defeat a candidate. The newspapers that picked up on Representative Mannal's press release and published the contested statements[44] would be similarly liable, as would news outlets that published the statements as

[42] J.A. 88.
[43] J.A. 103.
[44] *E.G.* Connor Powers-Smith, *Mannal Files Criminal Complaint over PAC Ads*. J.A. 90.

part of their coverage of this litigation, including *The Boston Globe*,[45] *The Boston Herald*,[46] and the *Cape Cod Times*.[47]

The Supreme Court has explicitly held that there is no actual malice when all a speaker has done is repeat or publish an "accurate and truthful report" of a third party's allegations about a politician or matter of public concern.[48] True or false "[w]hat is newsworthy about such accusations is that they were made," and a publisher cannot be "required under the First Amendment to suppress newsworthy statements . . . . The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them."[49]

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[45] Stephanie Ebbert, *Statute Against Lying in Campaign Ads Faces Legal Test*, Feb. 2, 2015. *Available at* goo.gl/n9VJrz.

[46] Bob McGovern, *Free Speech not so Free in Elections*, Dec. 9, 2014. *Available at* goo.gl/WlVP44.

[47] C. Ryan Barber, *Brian Mannal and PAC Square Off*, Oct. 28, 2014. *Available at* goo.gl/p3hU8E.

[48] *Greenbelt Cooperative Publ'g Assn. Inc. v. Bresler*, 398 U.S. 6, 12 (1970).

[49] *Edwards v. Nat'l Audubon Soc'y Inc.*, 556 F.2d 113, 120 (2d Cir. 1977), cert. denied 434 U.S. 1002 (1977). *See also*, *Harte-Hanks Communications Inc. v. Connaughton*, 491 U.S. 657, 694-95 (1989)("[the defendant] has eschewed any reliance on the "neutral

Section 42 contains no exception for the accurate reports of allegations concerning public officials, however, and Massachusetts's newspapers would not be protected by the very limited privilege this Court has recognized for speakers who republish a third party's claims while reporting on legal proceedings, because the allegations were not originally made or reported in an official statement by a law enforcement or government agency.[50]

The newspapers aside, given how often the Supreme Court has stressed in one formulation or another that "the remedy for speech that is false is speech that is true,"[51] it would be absurd to punish a politician for defending himself against slander, if in doing so he had to repeat his critics' false statements. Not only would this be absurd, it would be unconstitutional

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reportage" defense … This strategic decision appears to have been unwise in light of the facts of this case. The article accurately reported newsworthy allegations [about] a political candidate … Were this Court to [decide the case under] the neutral reportage theory, the facts of this case arguably might fit within it. That question, however, has also not been squarely presented.") (Blackmun, J., concurring).

[50] *Jones v. Taibbi*, 400 Mass. 787 (1987)(holding that the "fair report" privilege does not apply to the republication of false allegations made by private litigants or complaining witnesses.).

[51] *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012).

given that the "First Amendment itself ensures the right to respond to speech we do not like."[52] What speech could a politician like less than false accusations made during a bid for reelection? But § 42 does exactly that by failing to draw a distinction between Ms. Lucas's initial publication of the putatively false statements in the mailers and Representative Mannal's republication of those same statements.

The only way to distinguish between the conduct of Ms. Lucas, Representative Mannal, and the papers that covered the story, would be to consider each party's respective motive for publishing the statements -- an inquiry not required or contemplated by any fair or reasonable construction of § 42.

In order to construe § 42 in a way that complies with *Garrison*'s formulation of actual malice, its application would have to be limited to statements made with "an intent to inflict harm through falsehood."[53] Producing such a construction would be problematic for two reasons. First, as a matter of statutory interpretation, it would require courts to

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[52] *Id.*
[53] 379 U.S. at 73.

read out of § 42 the word "tends," and an interpretation which violates the canon against surplussage is not equally as fair as one which gives meaning to each word. Second, such a construction would have to produce a very narrow definition of "harm" in order to avoid constitutional doubt.

In this context, "intent to inflict harm through falsehood" cannot be treated as synonymous with an intent to "aid or to injure or defeat" a candidate "through falsehood," because the Supreme Court has held that there are cases where the Constitution protects deliberate falsehoods explicitly intended to influence voters and affect the outcome of an election.[54] Long before *Alvarez*, the Supreme Court ruled that laws limiting campaign speech on the grounds of falsity have to allow for the fact that during campaigns speakers often engage in "political hyperbole" and use language that while "often vituperative, abusive, and inexact," is still constitutionally protected.[55] Since the Constitution protects a candidate who lies about being awarded the Medal of Honor during a stump speech, a

[54] *Alvarez*, 132 S. Ct. 2537.
[55] *Watts v. United States,* 394 U.S. 705, 708(1969).

constitutionally valid construction of § 42 would have to exclude punishment of the sort of garden variety political hyperbole,[56] exaggeration,[57] and misstatement[58] that is a staple of political rhetoric, and "in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[59]

Nor is the First Amendment's protection limited to falsehoods that *hypothetically* could be attributed to enflamed passions in the heat of a vigorous political debate. The Supreme Court has been quite clear that Americans are allowed to make deliberately false statements about politicians for the sake of a punchline.

While political debate may be at the "core" of the First Amendment, it is political *comedy* which receives the strongest protection. Without fear of civil or criminal penalty, comedians and satirists can tell the most outrageous lies about politicians, for the basest of motives. Even though "the law does not

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[56] Al Gore did not invent the internet, but he helped get early funding for some of the scientists who did.
[57] Considerably less than 47% of Americans pay no taxes.
[58] Whatever the definition of "is" is, President Clinton had sexual relations with "that woman."
[59] *Cantwell v. Connecticut,* 310 U.S. 296, 310 (1940).

regard the intent to inflict emotional distress as one which should receive much solicitude," when it comes to political comedy "many things done with motives that are less than admirable are protected by the First Amendment."[60] In *Hustler v. Falwell* the Supreme Court held that jokes do not forfeit the First Amendment's protection, even when motivated by "hatred or ill-will"[61] towards a public figure, noting that, in many cases, political comedy's "appeal" depends on it being "calculated to injure the feelings of the subject."[62]

At the very least, a constitutionally valid construction of § 42 would have to protect the right of a comedian to publish deliberate falsehoods about a candidate calculated to make him an object of scorn and ridicule, for no nobler reason than to entertain an audience. That protection could be provided by interpreting § 42 as only applying to false statements intended to influence an election. It would be clearly inconsistent with the First Amendment, however, to protect the crass comedians who lie about a politician

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[60] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988).
[61] *Id.*
[62] *Id.* at 54.

out of avarice and scorn while punishing the true satirists who use humor in an attempt to influence how their audiences think about political issues.

Such a construction would protect the sort of juvenile humor found in *Hustler* but punish publications like *The Onion* and *MAD*, as well as shows like *Saturday Night Live* and *South Park,* which regularly put words into politicians' mouths and make up outlandish stories about them -- for the great sin of making people think as well as laugh. Despite its "sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day," political satire has played a prominent role in public and political debate," and from the "viewpoint of history, it is clear that our political discourse would have been considerably poorer" if satirists had been chilled by censorious laws like § 42.[63]

The only construction of § 42 that would undeniably be consistent with the rule in *Sullivan* and its progeny would be to limit it to the deliberate publication of a statement known to be false with the specific intention of influencing the outcome of the

[63] *Id.* at 54-55.

election by deceiving voters into believing that the false statement was true. But the law is not "reasonably susceptible" to such a construction -- it does not arise out of a "fair" reading of § 42's text, and can only be produced by a court engaging in the interpretive gymnastics and judicial policy making that Justice Brandeis warned against.

But that still wouldn't be enough, for even so imaginatively construed, "grave doubts" would remain as to § 42's constitutional validity.

II. Even if States Could Punish Political Criticism Absent Actual Malice Section 42 Would Still Be Invalid.

The courts which invalidated § 42's counterparts in Washington, Ohio, and Minnesota did so without relying on *New York Times Co. v. Sullivan*. Despite the fact that each state's false statement law required actual malice, the reviewing courts concluded, for different but overlapping reasons, that the laws were subject to strict scrutiny, and against that measure, each court found the laws to be lacking.

A. False Statement Laws Are Subject to Strict Scrutiny Analysis.

Section 42 is a paradigmatic example of a content-based restriction on speech because the

statute "itself describes impermissible [speech] not in terms of time, place, and manner, but in terms of subject matter."[64] Because the law only applies to statements about political candidates and ballot questions, "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition."[65] As a content-based restriction on speech, § 42 is "presumptively invalid"[66] and can only be upheld if the government can show that "it is narrowly tailored to serve an overriding state interest."[67]

The only reason that has ever been offered for why this sort of law could be subjected to a lower level of scrutiny is the claim that "false" speech is not constitutionally protected. That argument is precluded by the Supreme Court's holding in *Alvarez* 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

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[64] *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 99 (1972)'

[65] *Carey v. Brown*, 447 U.S. 455, 463, (1980)

[66] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

[67] *McIntyre v. Ohio Election Comm'n,* 514 U.S. 334, 347 (1995).

statements."[68] While often treated as such, the Supreme Court's holding in *Alvarez* was not novel. As discussed above, in both *Sullivan* and *Garrison* the Supreme Court held that falsity does not strip political speech of its constitutional protection. More importantly, the Supreme Court has made clear that it alone has the power "to declare new categories of speech outside the scope of the First Amendment."[69] Because the Supreme Court has declined "to carve out from the First Amendment any novel exception for [false speech]"[70] this Court should not presume to do so in its place.

In *281 Care Committee (II)*, the 8th Circuit declined to treat *Alvarez* as controlling precedent when reviewing Minnesota's false statement law, on the somewhat dubious basis that "while *Alvarez* dealt with a content-based restriction on protected speech, the restriction at issue in *Alvarez* did not regulate political speech."[71] However, the 8th Circuit still recognized that "false statements, as a general proposition, are not beyond constitutional

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[68] *Alvarez*, 132 S. Ct. at 2544.
[69] *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).
[70] *Id.*
[71] *281 Care Comm. v. Arneson*, 766 F.3d 774, 782 (8th Cir. 2014)

protection."[72] Therefore Minnesota's statute was subjected to strict scrutiny, not because it impermissibly targeted speech on the basis of content, but because it interfered with political speech and since "regulation of political speech or expression is, and always has been, at the core of the protection afforded by the First Amendment … strict scrutiny is applied to any regulation that would curtail it."[73]

Several years before *Alvarez*, the Washington Supreme Court subjected that state's false statements statute to strict scrutiny on the grounds that the "United States and Washington Constitutions both protect the right of free speech, and political speech is the core of that right. The notion that a censorship scheme like [Washington's equivalent of § 42] may be constitutionally enforced by a government agency erroneously presupposes that the State possesses an independent right to determine truth and falsity in political debate."[74]

The Washington court accepted as axiomatic that false political speech was constitutionally protected,

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[72] *Id.* at 783.
[73] *Id.* at 784 (internal quotations omitted).
[74] *Rickert v. State Pub. Disclosure Comm'n*, 168 P.3d 826, 827 (Wash. 2007).

and viewed *New York Times v. Sullivan* as an anomalous and unique exception to that rule based on what it considered the state's "compelling interest present in defamation cases," namely "compensating private individuals for wrongful injury to reputation."[75] Since punishing false and malicious criticism of politicians doesn't serve that compensatory interest, the *Sullivan* "exception" to that protection was held not to apply.

The Southern District of Ohio approvingly quoted *Alvarez*, *281 Care Committee (II)*, and *Rickert*, summarizing and endorsing those courts' respective reasons for applying strict scrutiny. Ultimately the district court based its decision on its view that "the answer to false statements in politics is not to force silence, but to encourage truthful speech in response, and to let the voters, not the Government, decide what the political truth is. Ohio's false-statements laws do not accomplish this, and the Court is not empowered to re-write the statutes; that is the job of the Legislature."[76]

Though they took different paths, each court agreed in the end that a law making it a crime to

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[75] *Id.* at 830 (internal quotations omitted).
[76] *S.B.A. List v. Ohio Elections Comm'n*, 2014 U.S. Dist. LEXIS 127382 at 5.

publish knowingly false and malicious statements about political candidates needs to be subjected to strict scrutiny.

B. Section 42 Is Not Supported by a Compelling State Interest.

Recognizing that § 42 is subject to strict scrutiny is the logical end of this Court's inquiry. Laws subject to strict scrutiny are presumed to be unconstitutional, and the state has the burden of proving otherwise.[77] Massachusetts's decision to offer less than two pages in defense § 42's validity under strict scrutiny shows that the Commonwealth's burden has not been discharged, and the presumption of unconstitutionality stands.

But if, out of an abundance of judicial caution, this Court chooses to play devil's advocate and reason through this case based on its speculation as to what the Commonwealth's further arguments *might* have been, this is still the logical end of any reasonable inquiry into the law's validity. The nature of strict scrutiny analysis requires that a valid defense of § 42 begin by identifying a non-imaginary compelling

[77] *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004).

or overriding state interest that the law was *actually* promulgated to serve.

While a court exercising rational basis review is supposed to uphold a law if it can conceive of any *possible* legitimate purpose which the law could serve, even if there is no evidence that the legitimate interest identified by the court is what actually motivated the legislation, to survive strict scrutiny the reviewing court must be convinced that "the asserted justification is in fact an accurate description of the purpose and effect of the law."[78]

To return to this Court's 1973 advisory opinion, one of its major concerns with the proposed law requiring papers to publish responsive advertisements was that an examination of the bill's legislative history and text furnished no "legislative findings or other indication of a substantial and overriding governmental interest that all newspapers and all other publications of general circulation in this Commonwealth publish all responsive, paid political advertisements of whatever nature or size."[79]

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[78] *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring).
[79] 363 Mass. at 917.

Any attempt to identify a compelling interest in § 42's legislative history will be similarly fruitless. First introduced in 1922 as an "An Act relative to the making of false statements in relation to candidates for nomination or election to public office,"[80] the statute contained no preamble or statement of purpose, and *amicus* has been unable to unearth any committee reports, debate records, or any contemporary sources commenting on the law's purpose or the perceived dangers that lead to its passage. What little evidence *amicus* has discovered in the historical records, however, suggests that the motivations behind the law may have been less high-minded than concern for the integrity of the electoral process.

The bill that would eventually become § 42 was first introduced by John C. Brimblecom, the representative for Newton, on the same day he introduced another bill titled "An Act Relative to the Political Expenses of Candidates for Public Office," which increased the legal limit on the amount of money that candidates could spend on, amongst other campaign

[80] *Available at* goo.gl/f8G2D0

expenses, advertising in newspapers.[81] That is of some significance since, in addition to being a member of the House, Brimblecom was a newspaperman. He was the Editor of *The Newton Graphic*, and in 1922 was elected President of the National Editorial Association[82] (later renamed the National Newspaper Association), the largest newspaper trade association and lobby in the United States. Just as one might reasonably question the motives of a legislator/lawyer who promotes legislation that funnels money towards attorneys, one should be wary of attributing noble motives to a legislator/editor who passed laws that funneled money towards newspapers.

Though history counsels otherwise, the Attorney General's office has suggested, as other governments have argued, unsuccessfully, that § 42 serves a compelling state interest, because these laws are needed to "preserve fair and honest elections and prevent a fraud on the electorate" by providing

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[81] *Journal of the House of Representatives of the Commonwealth of Massachusetts*, 44 (1992), *available at* goo.gl/5vuNDm.

[82] "Brimblecom Now Heads N.E.A. in Own Right." *The Fourth Estate*, p. 4, July 29, 1922. *Available at* goo.gl/7Qpjgu.

"safeguards against campaigns of misinformation."[83] Whether this interest is "compelling" is questionable.

The Supreme Court has recognized that a state "indisputably has a compelling interest in preserving the integrity of its election process,"[84] as well as compelling interests in "ensuring that an individual's right to vote is not undermined by fraud"[85] or "voter intimidation,"[86] but that was in the context of cases involving outright bribery of politicians and candidates, vote-buying, ballot tampering, and the coercion of voters through threats of physical violence. Conversely, in *Hartlage*, which actually concerned a law targeting "campaigns of misinformation," the Supreme Court characterized the state's interest in restricting false statements in order to promote democratic integrity as being merely "legitimate," and reiterated that laws like § 42 which "restrict directly the offer of ideas by a [speaker] to the voters" must be supported "by not only a legitimate state interest, but a compelling one."[87]

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[83] *281 Care Comm.*, 766 F.3d at 786.
[84] *Eu v. San Francisco County DCC,* 489 U.S. 214, 231 (1989).
[85] *Burson v. Freeman*, 504 U.S. at 199.
[86] *Id.* at 206.
[87] 456 U.S. at 53-54.

C. If There Is a Compelling Interest, Section 42 Isn't Narrowly Tailored to Serve It.

"A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative)."[88]

Even if this Court concludes that there is "a compelling state interest in preserving 'fair and honest' elections and preventing a 'fraud upon the electorate,' [§ 42] fails under strict scrutiny"[89] because it is an unnecessary measure which is simultaneously overbroad and under inclusive, and there are less restrictive alternatives that the Commonwealth could adopt.

1. Section 42 Is Unnecessary

Section 42 and similar laws are based on the faulty assumption that the "danger" posed by false political speech is so great that criminalization is

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[88] *Republican Party v. White*, 416 F.3d 738, 752 (8th Cir. 2005).
[89] *281 Care Comm.*, 766 F.3d at 787.

the only sufficient remedy. But the Supreme Court has said that this is not the case: "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[90]

Claiming that § 42 is necessary presupposes that voters will be unable or unwilling to separate fact from fiction without the State's help. That assumption is both patronizing and inaccurate.

No one should be concerned that false political statements won't be subjected to careful examination by the public. As the Supreme Court said in *Hartlage*, "a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent."[91] Indeed, it was Representative Mannal, not a government watch-dog, that identified the supposed falsehoods in this case. He responded by initiating criminal proceedings because the option was available to him. But it would be foolish to assume that if § 42 didn't exist

[90] *Alvarez*, 132 S. Ct. at 2550.
[91] 456 U.S. at 61.

Representative Mannal, or any other aggrieved candidate, would be incapable of rebutting false accusations.

Nor does the discovery of falsehood depend solely on the egoism and self-interest of politicians. The technological advancements of the last 35 years, especially the rise of social media and the democratization of knowledge, mean that politicians are exposed to constant public scrutiny and have every incentive to tell the truth. A lying politician will not only attract the attention of his or her opponents, but that of professional investigative journalists and fact checkers like those employed by newspapers of record, specialist websites like Snopes and Politifact.com, as well as individual bloggers, tweeters, and citizen journalists.

Voters are getting by just fine without the government telling them what to believe. A state "Ministry of Truth" is not only unnecessary, but improper, for "it is not the right of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and

religion. **In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.**"[92]

2. Section 42 Is Overbroad

A content-based regulation of speech is impermissibly overbroad if it "creates a 'danger zone' within which protected expression may be inhibited."[93] The law need not actually proscribe or punish protected speech, so long as a credible fear of its application "chills" speech by forcing individuals to engage in self-censorship. In considering Ohio's false statements law, the Supreme Court held that defendants engaging in presumptively truthful and protected speech faced a "credible threat" of injury under the law, because the statute allowed "any party" to file a complaint. "Because the universe of potential complainants [was] not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there was a real risk of complaints from, for example, political opponents. And [speakers] who

[92] *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (emphasis added).
[93] *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

intend to criticize candidates for political office, are easy targets."[94]

No matter how narrowly it is interpreted, § 42's very existence will chill constitutionally protected speech so long as any bitter politician or citizen is free to follow Representative Mannal's example and swear out a complaint against his critics, thus enlisting the full criminal power of the state against the speech of his political opponent. The chilling effect of § 42 is especially grave because this Court has left victims of baseless complaints brought by political opponents without a legal remedy. Under the rule in *Higgins v. Pratt*, Ms. Lucas will not be able to sue Representative Mannal for false prosecution unless she can show that he made the complaint in bad faith and knew for a fact that her conduct did not violate § 42.[95] If politicians like Representative Mannal are free to invoke § 42 without fear of reprisal, then their critics will never be truly free to speak out against them.

3. Section 42 is Underinclusive

[94] *S.B.A. List* 134 S. Ct. at 23345 (citations omitted).
[95] 316 Mass. 700 (1944).

"[T]he facial underinclusiveness of [§ 42] raises serious doubts about whether [Massachusetts] is, in fact, serving, with this statute, the significant interests" which may be invoked to justify its existence.[96] If the criminal prohibition of false political speech is necessary to preserve the integrity of Massachusetts's electoral system, then § 42 is far too limited in scope. The first paragraph applies to an impermissibly narrow content-based subset of false speech. Statements made "in relation" to a candidate are forbidden, but false statements concerning any other subject are exempted, even if they are designed to influence how the public votes. On its own terms, § 42 does not apply to false statements about a candidate's friends or family members, or to false claims about incumbent politicians, or about individuals who are likely to run for office, but have yet to formally declare their candidacy, or to false statements about issues that may be at the center of a contested election. And as this case has shown, § 42 does not prevent a politician from falsely accusing a non-candidate critic of criminal behavior, even though by

[96] *Florida Star v. BJF*, 491 U.S. 524, 540 (1989).

discrediting that critic in the eyes of the public, the politician tends to improve his chances of winning reelection.

Paragraph two is impermissibly underinclusive because it arbitrarily applies only to speech in a single medium.[97] It is a crime to publish false statements in relation to ballot questions "in any letter, circular, advertisement, poster or in any other writing," but identical false statements may be communicated through word of mouth or via radio and television advertisements without consequence. "Without more careful and inclusive precautions against alternative forms of dissemination, [this Court] cannot conclude that [§ 42's] selective ban on publication" serves a compelling state interest.[98]

4. There Are Less Restrictive Alternatives

In *S.B.A. List*, the Supreme Court identified two aspects of Ohio's false statement law that caused it to have a particularly egregious chilling effect on core political speech, flaws shared by § 42: 1)

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[97] *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (holding that a content based restriction was underinclusive when it applied only to information communicated through newspapers, as opposed to radio or electronic media).

[98] *Florida Star,* 491 U.S. at 541.

anyone, including the defendant's political opponents, can file a complaint, and, 2) as a result complaints are typically filed near the climax of a political campaign, as a tactic to force "the target of a false statement complaint … to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days leading up to an election."[99]

A version of § 42 that could only be invoked by the Attorney General or some other state officer, and explicitly required all complaints about misconduct during a campaign to be filed *after* the election was over, would make it harder for the law to be used as a political weapon and would significantly reduce § 42's chilling effect without making it any less effective a protector of the electoral system's integrity. That law would still be unconstitutional, in the opinion of *amicus*, but it would certainly be less restrictive. Because a law cannot survive strict scrutiny if the state could achieve the same ends with a regulation that would restrict less protected speech, the existence of this less burdensome and chilling alternative is the final nail in Section 42's coffin.

[99] *S.B.A. List,* 134 S. Ct. at 2346.

Conclusion

Whether or not hard cases produce bad laws, bad laws produce easy cases. Section 42 is unconstitutional. It was probably unconstitutional when it was passed in 1922, it has certainly been unconstitutional since the Supreme Court's 1964 decisions in *New York Times Co. v. Sullivan* and *Garrison v. Louisiana*, and the more recent decisions in *Alvarez* and *S.B.A. List* leave no possible doubt that § 42 is incompatible with the First Amendment and with the speech and press protections of the Massachusetts Declaration of Rights. All that remains is for this Court to acknowledge that fact, putting an end to the abusive use of an unconstitutional law as a political weapon.

It is an inconvenient aspect of the American legal system that while the Supreme Court's decision that a law is unconstitutional automatically applies to all similar laws throughout the country, it does not have the effect of automatically removing those invalidated laws from each state's statute books. Unconstitutional laws linger, like something foul in a Tupperware container at the back of the office fridge that no one claims to own and no one wants to touch.

Fifty years after *Griswold*, M.G.L. Ch. 272 § 21 makes it a crime to sell or distribute condoms and any other "instrument or article whatever for the prevention of conception." Fornication[100] and adultery[101] are still nominally crimes in Massachusetts, as is that "abominable and detestable crime against nature,"[102] even though the Supreme Court has said that what two consenting adults do in the privacy of the bedroom is no business of the state. And this is in Massachusetts, one of the most liberal and progressive states in the Union.

These laws may be left to molder harmlessly in the law books, but there can be doubt that they are unconstitutional. The Commonwealth's prosecutors won't enforce them, and this Court wouldn't stand for it if they tried. If instead of being a self-serving politician, Brian Mannal was a religious zealot who had filed a criminal complaint accusing a critic of violating M.G.L. Ch. 272 § 36 -- which makes blasphemy a crime -- this Court would declare that law unconstitutional without a second's thought, no matter what defense was offered for it by the Commonwealth.

[100] M.G.L. Ch.272 s.18.
[101] M.G.L. Ch.272 s.14.
[102] M.G.L. Ch.272 s.34.

M.G.L. Ch. 56 § 42 should receive the same treatment for the simple reason that *Sullivan*, *Garrison*, *Hartlage*, and *Alvarez* are as valid and binding on this Court as the decision in *Burstyn v. Wilson*.[103] Section 42 is a bad and rotten law, and that makes this an easy case.

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[103] 343 U.S. 495 (1952).

Certification Under rule 16(k)

I hereby certify that the foregoing brief complies with all rules pertaining to the filing of briefs in this Court.