No. 23-7577

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

DOUGLASS MACKEY,

Appellant.

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

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT DOUGLASS MACKEY

Reilly Stephens
Counsel of Record
LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, IL 60654
(312) 637-2280
rstephens@ljc.org

January 12, 2023

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(a), Liberty Justice Center states that it is a nonprofit corporation registered in the State of Illinois, and has no parent company and no stockholders.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to protect core First Amendment rights.

As part of its mission to defend fundamental rights, LJC litigates cases around the country pushing back on government attempts to censor "misinformation," "disinformation," and other disfavored speech. *See, e.g.*, *McDonald v. Lawson*, 9th Cir. No. 22-56220 (challenging statute punishing doctors for giving patients "misinformation"); *Minnesota Voters Alliance v. Ellison*, D. Minn. No. 23-cv-02774 (challenging statute punishing "false" election-related statements with criminal and civil penalties).

This case interests *amicus* because the right to speak on matters of public concern is fundamental, and if the government is concerned about

---

[1] Fed. R. App. P. 29(a)(4)(E) statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for all parties consented to the filing of this amicus brief.

the content of speech the "remedy for speech that is false is speech that is true." *United States v. Alvarez*, 567 U.S. 709, 727 (2012).

INTRODUCTION

Doug Mackey stands convicted of posting factually inaccurate information on Twitter. This isn't about calling potential voters, paying for robo-calls, knocking on doors, or sending out mailings with the wrong election date. This is about sending a tweet that included a meme that was factually inaccurate. Factually inaccurate tweets should not be a federal crime. And to be clear, that's all the government has here: the conspiracy as charged is that Mackey was exchanging direct messages with other Trump supporters, and they jokingly exchanged ideas for memes that might befuddle one group of voters or another. One of these gags was that Mackey posted a meme suggesting one could vote by text message. This is not a vast right-wing conspiracy—this is a couple of JPEGs. And indeed, the particular snark Mackey was engaged in is a common one. For instance, on November 8, 2016, comedian Kristina

Wong posted her own video on Twitter[2], wearing the signature red hat of Trump supporters and imploring them to vote on November 9—the day after election day. As far as *amicus* is aware, Ms. Wong has never been indicted for attempting to mislead voters in 2016.

Nor should she be—these sorts of political stunts should be understood as stunts, rather than crimes. Some are in better or worse taste than others, but memes—even memes in truly bad taste—are not crimes, and this court should not be an institution that decides which memes are funny and which require prison sentences.

ARGUMENT

Political lies are ubiquitous, and all of them are intended to gain a material advantage. Politicians political propagandists lie to change voters' minds (or avoid such minds changing), to cover up embarrassing facts, to invent embarrassment for one's opponents, to convince voters with made-up evidence that a proposed policy is proven to work (or fail),

[2] Available at https://x.com/mskristinawong/status/795999059987173377?s=20

and to encourage one's friends to show up to the polls while dissuading one's enemies.

The district court believed that "the appropriate analysis is one of how the First Amendment interacts with verifiably factually false utterances made to 'gain a material advantage' in the context of election procedures," 652 F. Supp. 3d at 340, and insisted that "unlike Mr. Alvarez's claims"—in *United States v. Alvarez*, 567 U.S. 709 (2012)—"Mr. Mackey's tweets do not even arguably constitute 'pure speech'" because the goal was "to secure an outcome of value to Mr. Mackey—an advantage in a Presidential election for his preferred candidate." 652 F. Supp. 3d at 344-45. But Alvarez's lies about winning the Congressional Medal of Honor—which the Supreme Court deemed to be protected by the First Amendment—were not just "Big Fish" stories told to family and friends. They were embellishments to his resume as an elected official—attempts, one might reasonably suspect, to gain an advantage in future elections where he was a candidate.

The "material advantage" language the district court quoted refers to situations where "false claims are made to effect a fraud or secure moneys or other valuable considerations, say, offers of employment." *Alvarez*, 567 U.S. at 723. Indeed, the citations in that portion of the opinion are to cases discussing commercial fraud. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (striking down restriction on adverting prescription drug prices); *S.F. Arts & Ath., Inc. v. United States Olympic Comm.*, 483 U.S. 522, 539 (1987) (prohibiting the "Gay Olympics" from exploiting the "commercial magnetism" of the word "Olympic," which belonged by statute to the USOC).

These traditional First Amendment exceptions for fraud, defamation, and the like cannot support a criminal conviction here. Fraud generally requires that the defrauded rely on the false statement. Defamation generally requires that the false statement actually harm someone's reputation. In each case, the speech is not unprotected simply because it is *false*, but because it was part of a scheme to defraud or defame—to steal money or reputation.

Mackey stole no money, nor did the particular memes relevant here defame anyone. He was convicted—literally—of posting factually false memes on Twitter. That's it. There is no claim that he violated a campaign finance law, or a disclosure law. He wasn't putting ads on TV, or standing outside precincts harassing voters. He posted inaccurate information on the internet. If everyone who posts inaccurate information on the internet is to be brought before this Court, this Court will be very, very busy. Just last month, a sitting Congresswoman posted a video on Twitter advertising the wrong election date.[3] That post—from an elected official, making a specific claim about the election day—seems far more likely to mislead voters in practice than any meme Mackey photoshopped in his spare time. But she should also be forgiven—because it is not the role of this court to police such trifles.

It is not enough to say that Mackey's memes might cause harm. *See Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam) (holding

[3] Adam Zuvanich, "Mayoral campaign ad for Sheila Jackson Lee provides wrong date for runoff election", Huston Public Media, December 4, 2023, https://www.houstonpublicmedia.org/articles/news/politics/2023/12/04/471435/mayoral-campaign-ad-for-sheila-jackson-lee-provides-wrong-date-for-runoff-election/

advocacy of violent resistance not sufficient to justify punishment of speech). "The First Amendment recognizes no such thing as a 'false' idea." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 51 (1988). Rather, the "general rule that the speaker has the right to tailor the speech[] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.,* 515 U.S. 557, 573 (1995). When speech that the government considers harmful is at issue, the "least restrictive alternative" is unlikely to involve censorship. "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." *Alvarez*, 576 U.S. at 727. "[M]ore speech, not enforced silence" is the best response to perceived falsehoods or misguided ideas. *Whitney v. California*, 274 U.S. 357, 377 (1927).

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573

(2002). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

The district court in part rested its argument on the perplexing claim that Mackey's political memes were somehow not political speech. But decades of Supreme Court case law hold "speech on matters of public concern is at the heart of the First Amendment's protection." *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (cleaned up) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759 (1985) (opinion of Powell, J.); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). And the definition of what are political matters of public concern is not so narrow as the district court believed. Rather, "[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Id.* at 453

(quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983); *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004)). And since "speech concerning public affairs is more than self-expression; it is the essence of self-government," the Supreme Court holds that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* at 452 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Connick*, 461 U.S. at 145).

This is the point at which the district court simply lost track of the argument. According to the Eastern District of New York, Mackey's political speech doesn't count as political speech because "political speech cases have uniformly involved speech and expressive conduct relating to the substance of what is (or may be) on the ballot—policy issues, party preference, candidate credentials, candidate positions, putative facts about issues covered by ballot questions, and the like." 652 F. Supp. at 345. This is, simply, not the law, nor should it be.

Political speech—and speech on matters of public concern, more broadly—is not limited to issues before the voters. Take the facts of

Snyder: the Westboro Baptist Church "believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military." 562 U.S. at 448. They therefore chose to picket Matthew Snyder's funeral carrying "signs [that] reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment." What was the issue before the voters there? There was no ballot question related to homosexuality in Maryland in 2006, nor any formal referendum on foreign military interventions. Westboro Baptist's signs mentioned no candidate for office, nor any government official (other than the Pope). *Id*. Yet the Supreme Court found that "Westboro's signs plainly relate[d] to broad issues of interest to society at large, rather than matters of 'purely private concern.'" *Id*. at 454.

Laws regulating the who, what, where, and when of an election count as political speech. Indeed, such regulations often implicate First Amendment rights of speech and association, which is why they're often struck down. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 1370 (1997) (ballot access requirements implicate

First Amendment rights); *Storer v. Brown*, 415 U.S. 724 (1974) (same); *see also Tashjian v. Republican Party*, 479 U.S. 208, 210, 107 S. Ct. 544, 546 (1986) (closed primary requirement violated first amendment rights).

The district court also misapplied *Marks v. United States*, 430 U.S. 188 (1977). *Marks* holds that, where "no single rationale explaining the result enjoys the assent of five Justices, '[the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)). The district court assumes this means one defaults to the *least restrictive* rule. "least restrictive" is not the same as "narrowest." But the concurrence in *Alverez* is not really narrower than the plurality opinion. Choosing intermediate instead of strict scrutiny is not a *narrower* or more *limited* rule—it's just a choosing a rule that provides the government more discretion to restrict speech.

Indeed, there is nothing narrower about the decision below—rather it is sweeping in its implications. This Court is, for the first time, asked to imprison a man for tweeting dumb memes—again, that is the entire

crime. The conspiracy charges here allege a conspiracy of direct messages on Twitter discussing which dumbs memes to post on Twitter. This is not some small part of some broader plan, nor any elaborate scam that defrauded anyone. That memes might be in poor taste should not make them a federal crime—the church's protest signs in *Snyder* were in extremely poor taste, as was the satirical Campari ad about Jerry Falwell. *See Hustler Mag., Inc.,* 485 U.S. at 48. Mackey posted two or three particular tweets that were in particularly poor taste, for which Mackey might rightly be shamed and mocked. But this was not a meme for which he should be jailed: as a generally matter, this Court should reject the idea that the First Amendment allows anyone to be jailed for memes at all.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

Reilly Stephens
Counsel of Record
Reilly Stephens

LIBERTY JUSTICE CENTER
440 N. Wells Street,
Suite 200
Chicago, IL 60654
(312) 637-2280
rstephens@ljc.org

January 12, 2023

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and Circuit Rule 29.1(c) because, excluding the parts exempted by Fed. R. App. P. 32(f), the brief contains 2,125 words.

2. This brief 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)(b) because the brief has been prepared in Microsoft Word 2019, using 14-point Century Schoolbook font, a proportionally spaced typeface.

/s/Reilly Stephens
Reilly Stephens
Counsel of Record