No. 13-744

IN THE

Supreme Court of the United States

JOHN NATALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., AND MEDICAL SOCIETY OF THE STATE OF NEW YORK, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does 18 U.S.C. § 1035 criminalize false statements that are made without any intent to deceive?

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae ("*Amici*") are associations of physicians whose combined membership spans the nation. *Amici* file this brief in support of Petitioner.

Amicus Association of American Physicians and Surgeons, Inc. ("AAPS"), is a national association of physicians. Founded in 1943, AAPS has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has been a

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. *Amici* file this brief with consent by all parties, with the required 10 days prior written notice, and those consents are filed concurrently with this brief.

litigant in this Court and in other appellate courts. *See, e.g., Association of American Physicians & Surgeons v. Mathews*, 423 U.S. 975 (1975); *Association of American Physicians & Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

This Court has expressly made use of amicus briefs submitted by AAPS in high profile cases. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The Third Circuit also cited an amicus brief by AAPS in the first paragraph of one of its decisions. *See Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006).

AAPS has long opposed an over-criminalization of medicine, dating back at least to 1996 when its Executive Director, Jane Orient, M.D., wrote a much-publicized editorial in connection with the debate over passage of 18 U.S.C. § 1035. *See* Jane M. Orient, M.D., "Health Bill Would Shackle Doctors – Literally," THE WALL STREET JOURNAL A14 (May 30, 1996) (observing how physicians are being denied "the same due process rights as people accused of rape or aggravated assault"). The criminalization of medical misstatements results in shortages of physicians and denial of care to patients. AAPS filed an amicus brief with the Seventh Circuit in this case below, and the Court ruled that the concern of AAPS "is not completely misguided." *United States v. Natale*, 719 F.3d 719, 739 (7th Cir. 2013) (Pet. 37a).

Amicus Medical Society of the State of New York ("MSSNY") is an association of approximately 30,000 licensed physicians, medical residents, and medical students. A nonprofit organization located in the State

of New York, MSSNY is devoted to representing the medical profession in advocating health-related rights and responsibilities. MSSNY strives to promote and maintain high standards in the practice of medicine and in medical education, in order to ensure that high quality medical care is available to the public.

Amici AAPS and MSSNY have a strong interest in opposing the over-criminalization of medicine. Specifically, *Amici* oppose elimination of the longstanding requirement of proof of criminal intent in connection with the federal prosecution of physicians. *Amici* thereby have a strong interest in the petition for a writ of *certiorari*.

SUMMARY OF ARGUMENT

The criminalization of misstatements in a physician's own dictation is a bridge too far for expanding federal police power. The incarceration below of Petitioner John Natale, for merely making mistakes as he tried to recall details of his complex surgeries, is both untenable and unprecedented. Unless reversed, the decision expands federal prosecutorial interference with medical practice to a suffocating degree. It constitutes a step towards an Orwellian society of government control over what professionals say, in this case in a professional's own dictation.

The jury found that Petitioner Natale did not defraud anyone in connection with errors in his dictation of operative notes. Demanding perfect dictation, under threat of prosecution for anything less, would cause far more harm than good. With crushing documentation demands by insurers and

hospitals, physicians already have very little time to spend with patients; "doctors spent on average 1.3 minutes conveying crucial information about the patient's condition and treatment" to the patient, according to one study.[2] The tradeoff between spending time on paperwork and spending time with patients is best made without the harmful distortion of terrifying federal prosecutions.

The Seventh Circuit opinion, replete with drawings of medical anatomy, plays doctor more than any court should. Federal incarceration should not hinge on an academic inquiry into whether terminology used by a physician in his own dictation is the same wording that most other physicians might use. Courts are not a proper forum for establishing how a physician should be describing his own operation; juries should not be handed the task of divining the state of mind of a physician who was not proven to have defrauded anyone. The net effect of the decision below is to disrupt the efficient delivery of medical care, by chilling physicians' speech.

In response to a brief filed by *Amicus* AAPS, the Seventh Circuit acknowledged the chilling effect that could result from its decision, but declared that to be a consequence which only Congress can rectify. *Natale*, 719 F.3d at 739 (Pet. 37a) ("it is for Congress and not this court to amend the criminal statute") (inner

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[2] Shannon Brownlee, "The Doctor Will See You – If You're Quick," NEWSWEEK 46 (April 30, 2012); *see also* Pauline W. Chen, M.D., "For New Doctors, 8 Minutes Per Patient," THE NEW YORK TIMES (ONLINE COLUMN) (May 20, 2013) http://well.blogs.nytimes.com/2013/05/30/for-new-doctors-8-minutes-per-patient/?smid=pl-share&_r=0 (viewed 1/12/14).

quotations omitted). To the contrary, constitutional norms of due process and free speech militate against allowing the federal criminalization of a professional's speech in the absence of a proven intent to deceive for financial gain.

Specifically, the decision below violates due process by dropping the need to prove real *mens rea* in this type of criminal prosecution. In addition, the decision is contrary to teachings by this Court against criminalizing speech in the absence of proof of an intent to defraud. The result, if not reversed here, is an unjustified chilling effect on professional speech.

The Seventh Circuit ruling has astounding and obviously unjustified consequences, as it would allow federal prosecution (and imprisonment up to 5 years) for the following:

- a false statement made by a physician for the benefit of safeguarding patient privacy;
- with respect to psychiatric records, an intentional misstatement for the future protection of the patient; and
- the reuse of any medical record that contains a known, uncorrected error.

The Constitution prohibits this over-criminalization of medical speech by the federal government, and precludes the Orwellian nightmare made possible by the decision below. The petition for a writ of *certiorari* should be granted to review and reverse the Seventh Circuit ruling.

ARGUMENT

Proof of criminal intent is an essential requirement in Anglo-American jurisprudence for a conviction, and the elimination by the decision below of the need for meaningful *mens rea* proof warrants a writ of *certiorari*. Congress did not dispense with the *mens rea* requirement for 18 U.S.C. § 1035, nor could it do so within the boundaries of the Constitution. Yet the Seventh Circuit decision virtually wrote *mens rea* out of the statute and declared it to be for Congress to restore if desired. *Mens rea* is a presumptive and essential part of criminal statutes, and it was a profound error for the court below to hold otherwise.

The magnitude of the error is compounded by how it criminalizes speech – the spoken words of Petitioner Natale – despite his lack of any intent to deceive or gain any benefit from inaccuracies. Spoken falsehoods are not, and should not be, federal felonies unless criminal intent is proven with far more serious consequences than exist in this case. The ruling below conflicts with this Court's holding against criminalizing speech, in *United States v. Alvarez*, 132 S. Ct. 2537 (2012). The recent grant of the petition for a writ of *certiorari* in *Susan B. Anthony List v. Driehaus*, No. 13-193, 2014 U.S. LEXIS 19, 1 (U.S. Jan. 10, 2014), to review a state statute criminalizing speech, suggests the need to grant *certiorari* here also with respect to a federal statute broadly interpreted to criminalize speech.

I. THE ELIMINATION OF A MEANINGFUL *MENS REA* REQUIREMENT FROM 18 U.S.C. § 1035 WARRANTS A WRIT OF *CERTIORARI*.

The Seventh Circuit lowered the standard for proving guilt under 18 U.S.C. § 1035 by holding that it "does not require proof of specific intent to deceive." *Natale*, 719 F.3d at 742 (Pet. 43a-44a). This conflicts with the longstanding, essential requirement for proof of criminal intent.

Centuries of Anglo-American jurisprudence confirm the need to prove real *mens rea* before taking liberty away from an individual by incarcerating him. More than a half-century ago, this Court held that the requirement of *mens rea* in criminal prosecutions is "universal and persistent in mature systems of law":

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. United States, 342 U.S. 246, 250 (1952).

Enacted in 1996 as part of the Health Insurance Portability and Accountability Act, 18 U.S.C. § 1035 criminalizes false statements relating to health care matters, imposing fines and imprisonment for up to five years. *See* P.L. 104-191, Title II, Subtitle E, § 244(a), 110 Stat. 2017. But this statute expressly includes the requirements that false statements are criminal only if "knowingly and willfully … materially false, fictitious, or fraudulent":

> (a) Whoever, in any matter involving a health care benefit program, ***knowingly and willfully***—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or
>
> (2) makes any ***materially false, fictitious, or fraudulent*** statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry,
>
> in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 1035 (emphasis added). The plain meaning of this statute does not weaken or eliminate the traditional requirement of *mens rea*. Nothing in the statutory language suggests an attempt to bypass the need to prove full criminal intent. Indeed, a stronger statutory expression of a requirement to prove full criminal intent is difficult to imagine.

Petitioner ably explains the significance of "willfully" in 18 U.S.C. § 1035, and how it requires proof of full *mens rea*. (Pet. 14-20) *Amici* fully support Petitioner's argument, and supplement it by observing that "willfully" applies not only to the falsity, but also to the requirement of materiality in the "delivery of or payment for health care benefits." 18 U.S.C. § 1035(a)(2). Proof that a statement was willfully false is not enough; the statute also requires proof that a statement was willfully material to the payment of benefits. The jury acquitted Petitioner Natale of the

latter by rejecting the fraud charges, which means no conviction can stand under 18 U.S.C. § 1035.

This Court should grant the petition for a writ of *certiorari* to clarify the *mens rea* required under 18 U.S.C. § 1035, just as it previously granted *certiorari* "to resolve a conflict in the Courts of Appeals concerning the *mens rea* required under" another federal statute. *Staples v. United States*, 511 U.S. 600, 604 (1994). There this Court rejected a lower standard for criminal intent that was urged by the government. There, as here, the issue was the level of proof of criminal intent that was required under the federal statute. This Court granted *certiorari* and held that proof of intent to do something is not enough; there must be proof of intent to do something criminal. Proof of *mens rea* "require[s] that the defendant know the facts that make his conduct illegal." *Id.* at 605. That was never proven against Petitioner Natale.

The conduct at issue here is not a public welfare offense involving "dangerous or deleterious devices or products or obnoxious waste materials" which, in limited circumstances, has allowed a weakened *mens rea* requirement. *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971). The rationale in those situations is that defendant knows that he is handling something that is dangerous to others. But a doctor's dictation of notes hardly qualifies for that limited exception to the traditional requirement of *mens rea*. As this Court explained in *International Minerals & Chemical Corp.*:

> In *Balint* the Court was dealing with drugs, in *Freed* with hand grenades, in this case with sulfuric and other dangerous acids. Pencils, dental floss, paper clips may also be regulated. But they

> may be the type of products which might raise substantial due process questions if Congress did not require, as in *Murdock*, "*mens rea*" as to each ingredient of the offense.

Id. at 564-65.

Even if 18 U.S.C. § 1035 does not expressly require proof of an intent to deceive, as the court below held, such a requirement should be inferred in order to avoid constitutional infirmities. *See, e.g., United States* v. *United States Gypsum Co.*, 438 U.S. 422, 446 (1978) (rejecting an interpretation of a statute that "would effectively eliminate intent as an ingredient of the offense") (inner quotations omitted).

"[W]here a statute is silent as to scienter, we traditionally presume a *mens rea* requirement if the statute imposes a 'severe penalty.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2654-55 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (quoting *Staples*, 511 U.S. at 618). The ten-month prison sentence imposed on Petitioner Natale, ending his medical career, is certainly a "severe penalty." Section 1035 should have been interpreted to include a meaningful *mens rea*. It was not, and a writ of *certiorari* is necessary to rectify this.

II. A WRIT OF *CERTIORARI* IS NECESSARY TO ADHERE TO *UNITED STATES V. ALVAREZ*, AND AVERT THE ORWELLIAN CONSEQUENCES OF CRIMINALIZING ROUTINE DICTATION.

Petitioner Natale was incarcerated for errors in his own speech during his own dictation, without any intent to defraud. *Certiorari* is warranted to avert the Orwellian consequences that would flow from this conflict with *United States v. Alvarez*, which expressly rejected allowing government to declare a category of false statements to be a criminal offense: "Permitting the government to decree this speech to be a criminal offense … would endorse government authority to compile a list of subjects about which false statements are punishable. … Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." 132 S. Ct. 2537, 2547 (2012) (citing George Orwell, NINETEEN EIGHTY-FOUR (1949) (Centennial ed. 2003)).

For example, the precedent below criminalizes a false statement that may be deliberately made in a medical record to protect patient privacy, without any intention to receive a financial benefit from it. Similarly, with respect to psychiatric records, the decision below makes it a federal felony to intentionally misstate something for the future protection of the patient, despite no benefit to the physician. In both cases the "lie" would be for the good of the patient, and not for any nefarious reason. Yet the decision below makes those good deeds a federal felony, because they would be intentionally false statements.

The harmful effects of the ruling below extend even further. The statute applies to "uses" of false statements as well as initiating them. 18 U.S.C. § 1035 ("makes ***or uses*** any materially false writing") (emphasis added). If in the exigency of time a medical professional reuses an uncorrected medical record, then that becomes a federal felony under the lower court ruling. Interpreting the statute to require a criminal intent to defraud would avert these manifestly unjust results, but the court below ruled against including such a requirement.

The ruling below directly conflicts with *Alvarez*, which properly limited the criminalization of speech to when "false claims are made to effect a fraud or secure moneys or other valuable considerations." *Alvarez*, 132 S. Ct. at 2547. More speech is often beneficial, and numerous rulings of this Court have prohibited the prosecution of speech, in order to avoid the deleterious chilling effect. *See Dombrowski* v. *Pfister*, 380 U.S. 479, 494 (1965) ("So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression"); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002); *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963); *Wieman* v. *Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). Yet the decision below encourages physicians to say less, and spend more time reviewing what they do say in documentation rather than spend that time with patients.

On January 10, 2014, this Court granted *certiorari* in *Susan B. Anthony List v. Driehaus*, *supra*, to review a state statute criminalizing speech in the context of political campaigns. No one was prosecuted or imprisoned in that case for the speech, but this Court properly considers the issue to be weighty enough to warrant review. Here, Petitioner Natale was imprisoned for things he said, despite no intent by him to do anything wrong. Indeed, the jury even rejected the allegations that he sought to defraud anyone.

Criminalizing speech, without requiring proof of intent to defraud, creates a new risk of imprisonment for anyone who is less than perfect in what he says – which is, of course, everyone. Perfect paperwork does not represent an optimal level of medical care, and reducing further the amount of time that a physician is able to spend with a patient, so that he can spend even more time improving documentation, is not a tradeoff that benefits anyone. Moreover, the chilling effect that results from imprisoning someone for something he said, without an intent to defraud, results in the immense harm of discouraging people from saying more.

George Orwell famously warned us against a world where government would intimidate people in what they say, and in *Alvarez* this Court acted on Orwell's warning by declaring that an interest in reducing false statements is not "sufficient to sustain a ban on speech, ***absent any evidence that the speech was used to gain a material advantage***." *Alvarez*, 132 S. Ct. 2537, 2547-48 (emphasis added). No such evidence exists against Petitioner Natale.

Yet the decision below marches blithely into the bleak Orwellian future, criminalizing what someone

says in his own dictation without any intent to defraud. The implications of criminalizing such speech are profoundly adverse, and justify a writ of *certiorari* here.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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