IN THE
SUPREME COURT OF THE UNITED STATES

JUAN CARLOS OCASIO

Petitioners

V

MERIT SYSTEMS PROTECTION BOARD

Respondent

# MOTION TO FILE BRIEF OUT OF TIME AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE
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MOTION FOR LEAVE TO FILE
BRIEF OUT OF TIME

Juan Carlos Ocasio hereinafter ("Ocasio") respectfully moves for leave to file this brief out of time. There exist extenuating circumstances related to this petition and its companion case Juan Carlos Ocasio v Department of Justice 17 5005 which merit the review of this Court.

The first reason why review should be permitted is the question with regards to this courts prior decision in United States v Alvarez. Is again being questioned with regards to the DOJ case. Is lying about having been awarded the Purple Heart Medal for the expressed purpose for obtaining an economic benefit. Lying Speech protected by the First Amendment or is it lying speech with consequences?

The second reason for permitting the review, asks this Court to further clarify its prior decision in Perry v MSPB No 16-399.

The third reason why appellant is requesting leave to file the brief out of time was the simple fact that Appellant who was on State Active Duty as part of the Hurricane Maria Relief Efforts. Appellant had filed a motion for leave to file the brief out of time, which was returned by the clerk of the Court.

In this specific appeal the District of Columbia Circuit Court issued its decision March 17, 2018 the mandate was issued May 8, 2018.

The decision of the District of Columbia District Court is an unpublished decision Juan Carlos Ocasio v U.S. Department of Justice 13-cv-00921 TSC. dated December 1, 2016. The case was timely appealed to the United States Court of Appeals for the District of Columbia December 29, 2016, the appeal was docketed December 30, 2016. The United State Court of Appeals for the District of Columbia Circuit assigned case docket no 17-5005.

On January 11, 2017 the Clerk of the District of Columbia Circuit informed appellant that he had failed to pay the $505 appeal fee. Appellant filed a complaint with the clerk of the District of Columbia District Court. Appellant then filed a USPS money order trace. Upon receipt of the copy of the cashed money order, Appellant filed an IFP and submitted the documentary evidence in support thereof. The IFP was denied as moot because the appeal fee had in fact been paid. The District Court Clerk located the misapplied the $505 appeal fee, and processed the appeal file. On March 27, 2017 the DOJ filed for summary affirmance. June 9, 2017 Petitioner filed his opposition. On June 23, 2017 the Supreme Court issued its decision in Anthony Perry v MSPB No 16-399. Justice Ginsberg writing for the majority answered the following question.

Is a Merit Systems Protection Board decision disposing of an employment discrimination case on a jurisdictional ground subject to judicial review in district court or in the U.S. Court of Appeals for the Federal Circuit? The conclusion if the majority, a Merit Systems Protection Board decision to dismiss a case with mixed claims on jurisdictional grounds is subject to review in district court.

## THE DISTRICT OF COLUMBIA CIRCUIT COURT WAS AWARE OF THE REVERSAL AND REMAND IN PERRY

The Supreme Court reversed the District of Columbia Circuit and remanded the case back to the Chutkan District Court. This Appeal and its related case Ocasio v Department of Justice 17-5005. Is on point with the issue in Perry.

On August 23, 2017 the Circuit Panel Henderson, Brown and Srinivasan issued three interrelated orders. The Circuit Panel dismissed the related case Ocasio v MSPB 17-5085 for lack of prosecution. It also denied the motion to consolidate the related cases and withheld the mandate. On September 5, 2017 Appellant petitioner filed a petition for rehearing en banc. The Circuit Court Garland, Henderson, Rogers, Tatel, Grifith, Kavanaugh, Srivinasan, Millet, Pillard, denied the petition for rehearing dated September 27, 2017, the mandate was issued October 5, 2017. Appellant had been ordered to State Active Duty (SAD) 29 September 2017 for the activation for Hurricane Maria Response. The activation ran 29 September 2017 through 15 December 2017.

Appellant responded to the District of Columbia Circuit dismissal of the MSPB appeal. Appellant provided documentary evidence that the $505 Appeal fee had in fact been paid with the appeal. The District of Columbia Circuit reinstated the MSPB appeal dated 30 November 2017. Upon appellants being released from military duty (SAD), Appellant finalized the DOJ petition for certiorari. Because appellant was

concerned about the time frame to file the petition, he included a motion to file his brief out of time. The petition was returned out of time. The briefing schedule from the District of Columbia Circuit, was completed. The affirmance decision was dated March 17, 2018, however the mandate was not issued until May 8, 2018. The petition for certiorari was filed July 24, 2018 which was returned for clerical corrections. The clerical corrections were made and the brief filed was retuned as out of time, this motion followed.

REASONS FOR GRANTING THE MOTION

This petition and its companion case Ocasio v Department of Justice Docket No 17-5005 addresses several points which were left unaddressed by two previous decided opinions. The first opinion was United States v Alvarez 132 S.Ct.2537 (2012) and the second opinion is Anthony Perry v Merit Systems Protection Board Docket No 16-399. The issue in United States v Alvarez 132 S.Ct.2537 (2012) was a finding with regards to free speech. The question as to whether lying about having been awarded a military honors and or medals. Was lying speech which is protected by the First Amendment or is it lying speech with consequences? Although Alvarez lied about having been awarded the Congressional Medal of Honor. Gaston on the other hand used a forged, falsified or altered Military or Naval Discharge Certificate in violation of 18 U.S.C. 498. He forged, falsified and or altered the certificate for the specific purposes of obtaining employment with the United States Government.

THE NINTH CIRCUIT OVERRULES PERLMAN TO AFIRM ALVAREZ

The Ninth Circuit En Banc Panel in United States v. Swisher, 811 F.3d 299 (9th. Cir. 2016), overruled United States v. Perelman, 695 F.3d 866 (9th Cir. 2012), Mr. Swisher conducts was similar to Xavier Alvarez was a form of speech entitled to the same protection as Alvarez actual speech. Judge Bybee in a strongly worded dissent held as follows: Alvarez held that false statements are not categorically unprotected by the First Amendment. Alvarez, 132 S. Ct. at 2545–47 (Kennedy, J.) (plurality opinion); id. at 2552–53 (Breyer, J., concurring in the judgment). As Justice Breyer explained, the government can have little interest in policing the "white lies" we tell to "provide the sick with comfort, or preserve a child's innocence," or false statements made "in technical, philosophical, and scientific contexts, where . . . examination of a false statement . . . can promote a form of thought that ultimately helps realize the truth." Id. at 2553 (Breyer,J., concurring in the judgment). But the Court stopped well short of protecting lying generally. As Justice Kennedy reminded us, "there are instances in which the falsity of speech bears upon whether it is protected." Id. at 2546 (plurality opinion).

The statute at issue here, however, does not police "white lies," nor does it prohibit lying generally. Instead, it targets a very specific lie that implicates a v very specific government interest, an interest which the full court here and the Supreme Court in Alvarez agrees is significant. And importantly, the lie the government wishes to punish cannot be uttered with words; it can only be accomplished by falsely wearing the nation's medals. Although the Court in Alvarez found that the harm caused by the form of the lie regulated by § 704(b) did not outweigh the First Amendment harm, the interests implicated by § 704(a) must be weighed differently from those at issue in Alvarez under § 704(b). The harm to the government's interest in upholding the military honors system caused by the false wearing of its medals is greater than the harm caused by "bar stool braggadocio." Alvarez, 132 S. Ct. at 2555 (Breyer, J., concurring in the judgment).

Concomitantly, because § 704(a) requires proof of deceptive conduct, any harm to First Amendment interests is less than in Alvarez, and the less restrictive alternatives discussed in Alvarez, less effective. The majority today ignores these distinctions, and discusses the outcome of this case as though Alvarez renders it a foregone conclusion. But it is not. Alvarez does not clearly compel the result here—indeed, that was the conclusion reached by a panel of our court in United States v. Perelman, 695 F.3d 866, 872–73 (9th Cir. 2012), in which we upheld § 704(a) under the lesser scrutiny applied to conduct regulations laid out in O'Brien. 1 It was also the conclusion reached by the Fourth Circuit, which found that § 704(a) would survive strict scrutiny. United States v. Hamilton, 699 F.3d 356, 371–74 (4th Cir. 2012).

While I do not entirely agree with the reasoning in these cases, they demonstrate that the reach—and indeed the holding—of Alvarez is unclear. Alvarez gives uncertain guidance as to how false statements should be analyzed, especially if Justice Breyer's opinion controls under Marks v. United States, 430 U.S. 188, 193 (1977).2 Justice Breyer, writing for himself and Justice Kagan, applies what he describes as "intermediate scrutiny," Alvarez, 132 S. Ct. at 2556, although without really explaining why that is the proper test. Part of the analytical challenge of Alvarez is trying to understand why intermediate scrutiny applies. In Perelman, the panel used the O'Brien test. 695 F.3d at 872. I can't agree with the Perelman panel on that point because § 704(a) seems to violate at least one prong of O'Brien: The Government's interest in § 704(a) is not "unrelated to the suppression of free

expression." O'Brien, 391 U.S. at 377; see also Texas v. Johnson, 491 U.S. 397, 410 (1989). For that reason, the Fourth Circuit did not apply O'Brien, but ultimately concluded the statute would survive strict scrutiny. Hamilton, 699 F.3d at 371. The anomaly is, as Judge Davis pointed out, that § 704(a) survives strict scrutiny, but would fail O'Brien's version of intermediate scrutiny. Id. at 377 (Davis, J., concurring)

Despite this ambiguity, the majority goes out of its way to extend Alvarez where it does not clearly apply. Moreover, the majority fails to consider the consequences of our decision. In addition to creating an unnecessary split with the Fourth Circuit over a statute that is no longer in effect today's decision calls into question the validity of numerous other statutes that prohibit, for example: the unauthorized wearing of a military uniform, 18 U.S.C. § 702—which the Supreme Court has noted is "a valid statute on its face," Schacht v. United States, 398 U.S. 58, 61 (1970); the unauthorized use of the name of federal agencies, 18 U.S.C. § 709; or the impersonation of a federal officer, 18 U.S.C. § 912—a statute we upheld in United States v. Tomsha Miguel, 766 F.3d 1041, 1048–49 (9th Cir. 2014), a case in which we relied on Perelman (which we now overturn).5 In light of this, I see no reason to extend Alvarez to § 704(a), in order to protect deceptive conduct that has no First Amendment value, and which poses greater harm to the government's significant interest in upholding the military honors system than did the speech covered by § 704(b).

Although in Alvarez, Justice Breyer ultimately concluded that the confusion caused by false statements was not sufficient to outweigh the constitutional harm caused by the statute, here, the calculus is different, because § 704(a) creates less risk of constitutional harm, and because the wearing of an unearned medal offers more convincing proof of the lie than a mere false statement. The false and deceptive wearing of military medals "dilutes the value" of military honors generally, by conveying the impression that "everyone" earns them. Moreover, such conduct also dilutes the symbolic value of the medal itself, hampering the government's ability to reward those it has concluded are worthy of recognition. The purpose of a military medal is not only that it conveys the government's appreciation for an individual's service to the individual, but that it conveys the government's commendation of that individual to others, identifying the medal winner "as an example worthy of emulation." United States v. Alvarez, 617 F.3d 1198, 1234 (9th Cir. 2010) (Bybee, J., dissenting).

## GASTON MISCONDUCT EXCEEDED THAT OF ALVAREZ AND SWISHER

Mr. Gaston's reprehensible action pre-dates both Alvarez and Swisher and puts both of them to shame. Alvarez lied about having received the Nation's highest honor which is the Congressional Medal of Honor. Elven Joe Swisher enlisted in the United States Marine Corps on August 4, 1954, a little over a year after the Korean War ended. In August 1957, he was honorably discharged from the Marine Corps into the reserves. Upon discharge, Swisher was given a DD-214 discharge document, a typewritten form that provided his name, education, type of discharge, last duty assignment, last date of service, and similar information regarding his military service. The form required a listing of Swisher's "decorations, medals, badges, commendations, citations and campaign ribbons awarded or authorized." In the authenticated copy of Swisher's original DD-214, the term "N/A" (not applicable) is written in the field.

In 2001, more than forty years after his discharge, Swisher filed a claim for service-related Post-Traumatic Stress Disorder (PTSD). In his application, Swisher claimed he suffered from PTSD as a result of his participation in a secret combat mission in North Korea in August or September 1955. Along with his application, Swisher provided a self-published narrative that described the North Korea operation. According to the narrative, Swisher was wounded in battle, and subsequently presented with a Purple Heart by an unnamed captain who visited him in the hospital. The same captain told him he was "entitled to and should wear the National Defense Medal, Korean War Service Medal and the Korean War U.N. Service Medal and Ribbons." Swisher claims he also received a Silver Star and a Navy Commendation Medal and Ribbon with a Bronze "V." After reviewing Swisher's application for PTSD benefits and the accompanying narrative, the VA denied the claim because Swisher failed to provide corroborating evidence beyond his own statement that his PTSD was service connected. Swisher appealed the denial and submitted a photocopy of a second DD-214, which included the typewritten comment that "[t]his document replaces the previously issued transfer document" and "[c]hanges and additions have been verified by Command." The new form stated that Swisher had received the Silver Star, Navy and Marine Corps Medal with Gold Star, Purple Heart, and Navy and Marine Corps Commendation Medal with Bronze "V." Based on this information, the VA reversed its previous decision in July 2004, ruled that Swisher's PTSD was a compensable disability, and granted Swisher a total of $2,366 a month in benefits.

About a year later, the VA received information from the military personnel division that the replacement DD-214 was fraudulent. In July 2006, after further investigation confirmed that the DD-214 was forged, the VA reversed its determination that the PTSD was service connected and required Swisher to pay back the PTSD benefits that he had received. In July 2007, a grand jury indicted Swisher for four violations of federal law: (1) wearing unauthorized military medals in violation of 18 U.S.C. § 704(a); (2) making false statements to the VA regarding his military service, disabilities, and honors, in an effort to obtain benefits in violation of 18 U.S.C. § 1001(a)(2); (3) forging or altering his certificate of discharge, also in an effort to obtain benefits, in violation of 18 U.S.C. § 1001(a)(3); and (4) theft of government funds, in violation of 18 U.S.C. § 641.

During the one-week trial, Lieutenant Colonel Elaine Hensen, the assistant head for the Military Awards Branch at Headquarters Marine Corps, discussed her review of the Marine Corps files and her determination that the files contained no record of Swisher receiving or being awarded the Purple Heart or any other medal or award. The government also introduced Exhibit 67, a photograph showing Swisher and another man in Marine Corps League uniforms.5 In the photograph, Swisher is wearing several military medals and awards, and shaking hands with a person in civilian garb. The parties stipulated that the photograph was authentic. Lt. Col. Henson testified that the photograph showed Swisher wearing the Silver Star, Navy and Marine Corps Ribbon, Purple Heart, Navy and Marine Corps Commendation Medal with a Bronze "V," and UMC Expeditionary Medal. She reiterated that there was nothing "in the United States Marine Corps' files . . . to substantiate Mr. Swisher's entitlement to wear any of those awards." In addition, Jeffrey Shattuck, the head of the Records Correspondence Section for the Personnel Management

Support Branch of the Marine Corps, outlined in detail the numerous indicia of fraud on Swisher's replacement DD-214 that Swisher had used to verify his awards. At the conclusion of the trial, the jury found Swisher guilty on all counts. The court imposed a below-guidelines sentence of 12 months and one day, with a three-year term of supervised release. We affirmed Swisher's conviction and sentence on appeal. United States v. Swisher, 360 F. App'x 784 (9th Cir. 2009). Swisher subsequently challenged his conviction through a motion under 18 U.S.C. § 2255 and claimed that his conviction for wearing the medals violated the First

Amendment under the reasoning of the Ninth Circuit's intervening decision in United States v. Alvarez, 617 F.3d 1198 (9th Cir. 2010). The district court denied the motion and an appeal followed. See United States v. Swisher, 790 F. Supp. 2d 1215, 1245–46 (D. Idaho 2011); United States v. Swisher, 771 F.3d 514 (9th Cir. 2014).

While Swisher's appeal was pending, the Supreme Court affirmed our decision in Alvarez, and held that § 704(b) unconstitutionally infringes upon speech protected by the First Amendment. See United States v. Alvarez, 132 S. Ct. 2537 (2012). Nevertheless, we subsequently distinguished Alvarez, and held that § 704(a) survived First Amendment scrutiny. United States v. Perelman, 695 F.3d 866, 871–72 (9th Cir. 2012) (as amended). Bound by Perelman, a three judge panel rejected Swisher's constitutional challenge to § 704(a). Swisher, 771 F.3d at 524. In his petition for rehearing, Swisher argued that § 704(a) was unconstitutional under the reasoning set forth in Alvarez and asked us to overrule our contrary decision in Perelman. We took the case en banc to reconsider this issue.

The Ninth Circuit overruled Perlman and held that Swishers conduct reprehensible as it was, was still protected under the First Amendment. Mr. Swisher sought a retrial on the three related counts arguing that the jury was prejudiced by the evidence on the overturned count and that he in entitled to a new trial free from prejudice. The Idaho District Court disagreed and Mr. Swisher filed an appeal. The Appeal is pending before the Ninth Circuit Elven Joe Swisher v United States 17-35451 (9th Cir 2017). Mr. Swisher defrauded the US Government for $90,000 in disability benefits, Gaston on the other hand. In total compensation from the United States 11 years with the Immigration and Naturalization Service (INS) and 5 years with the Department of Defense in total 16 years of employment. In direct economic benefits, salary, annual leave and medical benefits earned in excess of $1,500,000

In a recent decision from the Northern District of Illinois Eastern Division United States v Harrison 2016 U.S. Dist LEXIS 29798. Defendant James Harrison filed a Motion to Dismiss Count II of the superseding indictment against him , claiming that the charging statute, *18 U.S.C. § 912*, is an unconstitutional content-based regulation, facially overboard, and/or unconstitutionally vague. Defendant also argues that Count II is legally deficient because it fails to provide adequate notice as to the crime with which Defendant has been charged. For the following reasons, Defendant's Motion is denied. Defendant was initially charged with one

count of impersonating an officer of the United States Marshal Service, and in such pretended character, demanding a thing of value — in this case, employment. Defendant was charged by superseding indictment with two counts of impersonating a United States Marshal in violation of *18 U.S.C. § 912*. Count II of the superseding indictment alleges that, from January 24, 2014, until February 11, 2014, Defendant falsely assumed and pretended to be an officer and employee acting under the authority of the United States Marshal's Service (USMS) and acted as such.

Federal Rule of Criminal Procedure 7(c)(1) requires that an indictment provide: "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). When determining whether an indictment is sufficient, the court must assume that all alleged facts are true and "view all facts in the light most favorable to the government." United States v. Yashar, 166 F.3d 873, 880 (7th Cir.1999). This standard is "stringent," and "a court should dismiss only if the Government's inability to produce sufficient evidence so convincingly appears on the face of the indictment...." United States v. Sorich, 427 F.Supp.2d 820, 830 (N.D.Ill. 2006). In an indictment based on a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words fully, directly, and expressly, without any ambiguity, set forth all the elements necessary for the offense. Russell v. United States, 369 U.S. 749, 765, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962) (citing U.S. v. Carll, 105 U.S. 611, 612, 26 L. Ed. 1135 (1881)).

Defendant is charged with violating *18 U.S.C. § 912*, which states:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.

Defendant moves to dismiss Count II of the superseding indictment, which charges him with falsely assuming or pretending to be "an officer or employee acting under the authority of the United States or any department, agency or officer thereof" and "acting as such". Defendant makes three arguments in support of his Motion. Defendant argues: (1) that 18 U.S.C. § 912's prohibition on acting as a federal agent is unconstitutional because it is a content-based restriction on false speech without accompanying harm; (2) that 18 U.S.C. § 912 is facially overbroad in violation of

the First Amendment; and (3) that 18 U.S.C. § 912 is unconstitutionally vague under the First and Fifth Amendments. Defendant cites to United States v. Alvarez, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012), to support his argument that a statute that criminalizes false speech violates the First Amendment and that the government can criminalize false speech only if it is accompanied by some other legally cognizable harm.

In *Alvarez*, the Supreme Court noted that statutes that prohibit false speech in order to "protect the integrity of Government processes" and "maintain the general good repute and dignity of government service itself" are permissible restrictions on free speech. *Alvarez, 132 S. Ct. at 2546* (internal quotation marks and ellipses omitted). While *Alvarez* addressed the constitutionality of the Stolen Valor Act under the *First Amendment* and not *18 U.S.C. § 912*, the plurality opinion specifically named *18 U.S.C. § 912* as an example of a statute that constitutes a permissible restriction on free speech. *Id.*

Although the Seventh Circuit has not yet analyzed whether *18 U.S.C. § 912* is an impermissible restriction under the *First Amendment*, courts of appeals that have addressed this issue have declined to extend the holding in *Alvarez*, upholding the constitutionality of *Section 912*. *United States v. Tomsha-Miguel, 766 F.3d 1041 (9th Cir. 2014)*; *United States v. Chappell, 691 F.3d 388, 392 (4th Cir. 2012)*. The statute states, "[w]hoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, *and acts as such*." *18 U.S.C. § 912* (emphasis added). The Ninth Circuit held in *Tomsha-Miguel* that "*§ 912* criminalizes conduct with 'an expressive element,' as distinct from pure speech." *Tomsha-Miguel, 766 F.3d at 1048*.[1] By its terms, the statute regulates expressive conduct, and not speech alone.

When reviewing a regulation of expressive conduct, the Supreme Court and the Seventh Circuit apply intermediate scrutiny to determine the constitutionality of the statute. *See Texas v. Johnson, 491 U.S. 397, 406, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)*; *see also Ben's Bar, Inc. v. Vill. of Somerset, 316 F.3d 702, 723 (7th Cir. 2003)*. Under intermediate scrutiny, a government regulation "is sufficiently justified" if it "is within the constitutional power of the Government; if it furthers an

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[1] Defendant notes that a recent Ninth Circuit case, *United States v. Swisher, 811 F.3d 299 (9th. Cir. 2016)*, overruled *United States v. Perelman, 695 F.3d 866 (9th Cir. 2012)*, a case on which *Tomsha-Miguel* relies. However, to the extent that the Ninth Circuit's decision in *Tomsha-Miguel* does not rely on *Perelman*, the reasoning is persuasive. As noted above, the Supreme Court and the Seventh Circuit apply intermediate scrutiny when reviewing expressive conduct.

important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged *First Amendment* freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)*.

As held in *Alvarez*, it is within the constitutional power of the government to prohibit the impersonation of federal officials and employees in order to protect the integrity of government processes and maintain the reputation of government services. Further, the protection of the integrity of government processes does not suppress free expression because the statute does not limit one particular viewpoint. As discussed below, the statute is neither overbroad or vague, thus its restriction on free speech is limited only to the extent necessary to further the government's interest. Therefore, *18 U.S.C. § 912* is sufficient under intermediate scrutiny and is constitutional.

To succeed in a typical facial attack, the movant has to establish that no set of circumstances exists under which the statute would be valid. "In the *First Amendment* context, however, this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens, 559 U.S. 460, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)*. Defendant argues that the "acts as such" offense is unconstitutionally overbroad because it does not provide necessary limitation required by the *First Amendment* and because it does not include a heightened *mens rea* requirement.

Defendant reasons that because the statute does not restrict "acts as such" to "acting as such as part of fraud or speech integral to crime," it does not provide a meaningful limitation on the false speech. Therefore, the statute opens up any act taken while impersonating an officer to a possible "acts as such" prosecution. The Seventh Circuit has held that the "acts as such" language in *18 U.S.C. § 912* "has been construed to mean acting in the pretended character, and not necessarily doing an act which defendant would have been authorized to do under authority of the assumed capacity." *United States v. Hamilton, 276 F.2d 96, 98 (7th Cir. 1960)*. In *Hamilton*, the defendant wore firearms in a person's home while pretending to be an F.B.I. agent, an act that was "in keeping with his pretended character."

This interpretation specifically limits the reach of the statute to actions that are consistent with the pretended role or "conduct with an expressive element," not simply speech. *18 U.S.C. § 912* criminalizes overt acts that are in service of creating the illusion or impersonation, not just any act taken by Defendant. *United States v. Rippee, 961 F.2d 677, 678 (7th Cir. 1992)* (holding that *§ 912* criminalizes "false impersonation of a federal official coupled with an overt act in conformity with the pretense"). Defendant relies on *Alvarez* to support its argument that the statute is unconstitutionally overbroad because there is no intent to defraud element in the statute, and thus, a heightened *mens rea* requirement is required to limit the statute's reach. However, nothing in the Supreme Court's holding in *Alvarez* requires an "intent to defraud" *mens rea* requirement to find that a statute involving fraud is a permissible restriction on speech. Nor does *Alvarez* hold that a *mens rea* requirement is necessary to "save a fraud statute criminalizing false speech from a *First Amendment* challenge." (Dkt. 37 at 11.) Thus, *18 U.S.C. § 912* is not unconstitutionally overbroad.

A statute is void for vagueness under the *Fifth Amendment* "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Johnson v. United States, 135 S. Ct. 2551, 2566, 192 L. Ed. 2d 569 (2015)*. Defendant reiterates his argument that *18 U.S.C. § 912* is unconstitutionally vague because it "criminalizes far more than the *First Amendment* permits" and "the narrowing constructions are not evident in the statute itself." (Dkt. 44.) This argument is unpersuasive. "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado, 530 U.S. 703, 733, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000)* (quoting *United States v. Raines, 362 U.S. 17, 23, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960)*. Defendant cites to "multiple circuit splits" over what this statute prohibits and whether it requires an intent to defraud. However, as noted by the Ninth Circuit in *Tomsha-Miguel*, the "majority of our sister circuits have also held that the government need not establish an intent to defraud as a separate element of a *§ 912* offense." *Tomsha-Miguel, 766 F.3d at 1050*. A review of courts interpreting this statute does not reveal the type of confusion Defendant claims is evidence of the statute's vagueness. Defendant cites to no specific legal authority that supports his position that the "acts as such" element of the statute is unconstitutionally vague.

An indictment is sufficient if it: "(1) states the elements of the offense charged; (2) fairly informs the defendant of the nature of the charge so that he may prepare a defense; and (3) enables him to plead an acquittal or conviction as a bar against future prosecutions for the same offense." *United States v. Ramsey, 406 F.3d 426, 429-30 (7th Cir. 2005)*. "[I]t is generally acceptable for the indictment to 'track' the words of the statute itself, so long as those words expressly set forth all the elements necessary to constitute the offense intended to be punished." *United States v. Smith, 230 F.3d 300, 305 (7th Cir. 2000)*. Defendant argues that the indictment omits any facts relating to the "acts as such" element in Count II of the superseding indictment and does not sufficiently inform him of the "precise charge he must meet." Again, the "acts as such" element of the statute is sufficient to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. The superseding indictment includes the crime, the dates and place the crime occurred, the name of the agency with whom Defendant claimed to be employed, and the "thing of value" he demanded while in pretended character. These particulars are sufficient to inform Defendant of the nature of the charge. Thus, the indictment is legally sufficient. Gaston sits on the shoulder of both arguments as indicated above, however the same question applies to Gaston false expressions of military awards and gallantry.

THE BOARD ACTION WAS COMMENCED AFTER THE CIVIL ACTION WAS FILED IN DISTRICT COURT LUGO V SHAM ET AL

The Navy Officials particularly Capt. Gaston were fully aware of Lugo v Sham et al. Each and every action taken by the Capt. Gaston and the other Navy officials. (Security Director Lewis, Lt Commander Smith). In furtherance of its adverse employment action was a clear violation of the anti-retaliation provisions of Title VII. See Burlington Northern Santa Fe Railroad v White 126 S.Ct.2405, 165 L.Ed 2d 345 (2006). Lugo was engaged in prior protected activity, the agency was aware of the activity, the agency took adverse action against the complainant (Lugo) and that a causal connection exist between the prior protected activity and the adverse action i.e. that a retaliatory motive played a part in the adverse action. Cifra v General Electric Co., 252 F.3d 205, 216 (2nd Cir 2005), Terry v Ashcroft 336 F.3d at 141, Quinn v Green Tree Credit 159 F.3d 759 (2nd Cir 1998). All of the agencies actions violated Lugo's prior protected activity Evangelista Lugo v Richard Danzig Secretary of the Navy DON No 00-68711-00 EEOC Case No 370-A1-X2153. Gaston was personally motivated to retaliate against Lugo. Gaston, who in addition to providing false information to the EFA West Base Command. Also provided the Redwood City Police with false information regarding Officer Lugo's ability to carry a concealed firearm

off duty. Capt. Gaston and Director Lewis, conspired with the Redwood City Police Department and the San Mateo County District Attorney's office to criminally victimize this officer. All related parties here were aware of the existence of the nightclubs CCTV video tape. All related parties herein conspired to conceal its existence throughout all of the related federal proceedings (The EEOC, District Court, the MSPB Board Proceeding and the criminal prosecution of officer Lugo.

It was captain Gaston who had issued the federal authorization to carry firearm (OPNAV Form 5512) to Officer Lugo for use of his personal off duty firearm. The false declarations of Gaston and Director Lewis was the basis of the State criminal proceeding. People of the State of California v Evangelista Lugo San Mateo County Criminal Court Case No SMS 306880A. The criminal prosecution including and any and all written statements or affidavits from Naval Officials (Gaston, Lewis) were subject to the jurisdiction of the Merit Systems Protection Board. Evangelista Lugo v Department of the Navy. MSPB Case No SF-0750-00-0499-I-1. During the initial discovery phases of the Board action, (Lugo v Navy supra, he was informed of the secret indictment, which was unsealed but was not served. Lugo was warned by a police supervisor that Director Lewis had planned a trap for Lugo. Lugo was being requested to appear at his EEO interview. Lewis had planned to have Lugo give his EEO statement and as the ultimate act of humiliation. Have Officer Farley arrested him at the EFA West police command.

## OFFICER LUGO AS A FEDERAL OFFICER WAS DENIED DUE PROCESS RIGHTS UNDER 28 U.S.C. 1442(a)

In reliance of Pennsylvania v Newcomer 618 F.2d at 967 and Willingham v Morgan 395 U.S. 402 (1969) Officer Lugo filed a notice of removal with the San Mateo County Superior Court to remove the state prosecution under Cal Penal Code Section and removed the misdemeanor criminal complaint to the Northern District of California District Court. People of the State of California v Evangelista Lugo C-00-3887 CW (N.D. Ca 2000) (Honorable Claudia Wilken) (01-16619 9th Cir 2001) The filed petition for certiorari was returned for some clerical reason and was made part of the related matter. Ocasio v Department of Justice 13-cv-00921 Document No 10 exhibit 14. The related criminal matter Evangelista Lugo v Donald Horseley Sheriff of San Mateo County 2002 US LEXIS 2453, cert denied at 535 US 992, 122 S.Ct. 1551, 152 L.Ed. 2d 475, (April 15, 2002),) The Board record clearly establishes several facts at issue in this matter. The record is clear that the agency failed to abide by the Board's acknowledgement order. The agency withheld material favorable to Officer Lugo's board appeal. The agency failed to disclose the fact that the CCTV video tape was in the possession of the Redwood City Police. The agency failed to disclose that Gaston was terminated for cause. As a practical matter if the agencies only investigator has been discredited, how would the Navy be able to rely upon the

"suspect investigation" The Agency did not provide a single solitary document in support of its adverse action. The agency did not oppose any of Appellants discovery request. The agency did not produce a single agency witness for deposition. The agency did not produce a single non-government witness and the police report prepared by the Redwood City Police. Was prepared almost 6 weeks after the incident, in concert between the Dept of the Navy.

The record which purported to support the agency decision to remove Lugo was never presented. Lugo was not able to rebut the agencies extremely thin case. All of the rebuttal witnessed to the agencies core witnesses were denied by Judge Ellison. Lastly but most importantly as it relates to this appeal. Neither the reasoning or the deciding official who terminated Captain Gaston was ever disclosed. Finally the identity of the party which obstructed the Navy referral to the California Department of Motor Vehicles Investigations and Audits Division Referral Case No 00N50367

Appellant filed a FOIA request from the Merit Systems Protection Board seeking copies of the MSPB proceeding Evangelista Lugo v Department of the Navy. MSPB Case No SF-0750-00-0499-I-1. The clerk of the Board requested Appellant to provide evidence of permission to access or in the alternative authorization from Mr. Lugo in order to process the FOIA request. Appellant provided a notarized letter from Evangelista Lugo, which granted his authorization and permission to release the board file. The board even went as far as to call Mr. Lugo to speak to him personally to insure that the notarized letter was in fact sent by him. The Board was notified by way of notice of related case of ongoing litigation in the same court Ocasio v U.S Dept. of Justice Case No. 13-cv-000921-TSC, MSPB FOIA Specialist, Tamesha Larbi reviewed the request and its attachments and determined that plaintiff sought documents related to Lugo v Dept. of Navy MSPB Docket No SF-0752-00-499-I-1. Appellant informed the board that Appellant had represented Mr. Lugo before the Board and was completely familiar with the contents of the Board file. The MSPB requested Mr. Evangelista Lugo to authorize Appellant to receive copies of documents from Mr. Lugo's case file. The MSPB received the notarized authorization on June 19, 2015.

Upon receipt of the board records, Appellant reviewed the 4 volumes of records sent and discovered. (a) the administrative Judges hand written notes were not part of the record and (b) the hearing tapes were likewise not included. On that basis on June 30, 2015 Appellant filed a FOIA complaint in the U.S. District Court of the District of Columbia in an action entitled Ocasio v Merit Systems Protection Board supra. The case file documents provided by the MSPB did not include copies of the MSPB administrative judges hearing notes. The MSPB supplemented its document production after conceding that it had not provided all of the documents under its control and or possession. The MSPB also supplemented its audio tape production as

it also conceded that it had not produced all of the hearing tapes. The official record of an MSPB hearing is the audio recording. The agency further goes on "the official record of the MSPB's decisions are the written decision themselves, which are appealable to the federal court pursuant to 5 U.S.C. 7703... Mr. Lugo's case, the final decision was not even the administrative judge's decision, which was only an initial decision. Mr Lugo filed a petition for review of that decision with the full board, which issued a final decision on May 2004.

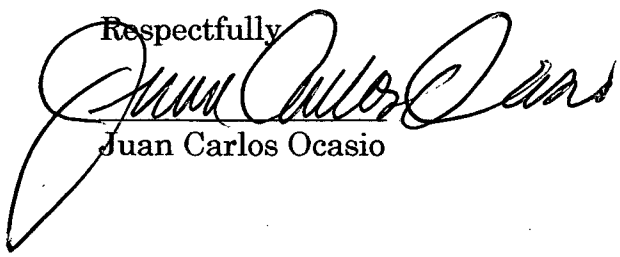
Appellant asserts the board record explicitly demonstrated that (a) Officer Lugo was placed under "citizens arrest" by an illegally armed civilian bouncer employed by the Flamingos Night Club, (b) the business owner Rodolfo Carranza's declaration, indicated that he called the Redwood City police to the scene, (3) responding Redwood City Police Officers Greg Farley and Evan Paraskevopolous refused to accept custody of the "person subjected to the citizen's arrest". The significance of Officer Farley's testimony is that it clearly and unambiguously demonstrated the commission of a felony at California law. Under California Penal Code Section 142. which imposed the felony upon any California Police Officer or Peace Officer who refuses custody of any individual placed under Citizens Arrest, when requested by the person who effected the arrest. In this case the individual who called the Redwood City Police to the scene was Rodolfo Carranza and the individual who effected the "citizens arrest" Mr. Sham. The final criminal violation which related to both obstruction of justice 18 U.S.C. 1503 and evidence tampering 18 U.S.C. 1519 which applies equally upon the State Actors. Sham, Carranza, Redwood City Officer Farley Also applies equally to the Department of the Navy regarding the EEOC matter Lugo v Danzig supra and the MSPB proceeding Lugo v Dept of Navy.

However with regards to the related FOIA matter Ocasio v U.S. Dept of Justice supra the 18 U.S.C. 1503 and the 18 U.S.C. 1519 apply specifically to Northern District of California Assistant United States Attorney Abraham A. Simmons as it does to Northern District of California United States Attorney Robert Mueller. The concealment of the CCTV Video tape which captured the entire event March 14, 2000. The video tape was crucial evidence towards the first District Court Case Evangelista Lugo v Keawe Charles Sham et al 00-cv-1104 MMC (N.D. Cal 2000) 2001 U.S. Dist. LEXIS 4116, 2001 WL 348984, cert denied at 536 U.S. 929; 122 S. Ct. 2602; 153 L. Ed. 2d 789; 2002 U.S. LEXIS 4572; 70 U.S.L.W. 3774. Was evidence favorable towards to Officer Lugo, which would have materially contradicted the Navy version of the alleged off duty misconduct accusation. The video tape likewise would have undermined the indictment and conviction of Officer Lugo People of the State of California v Evangelista Lugo C-00-3887 (N.D. Ca 2000) (01-16619 9th Cir 2001 and finally Evangelista Lugo v Donald Horseley Sheriff of San Mateo County 2002 US LEXIS 2453 535 US 992, 122 S.Ct. 1551, 152 L.Ed. 2d 475, cert denied (April 15, 2002),)

When the record is taken in a totality of circumstances, what started out as a EEO complaint which lead to a board action. Is still at its core a EEO with a board action and the District Court was always the proper forum for such mixed motive case. The instant case on petition cannot be read alone, it must be reviewed in light of the related Ocasio v DOJ case.

Appellant respectfully request that the motion to file the brief out of time be granted, That fee waiver be granted and that the petition for writ of certiorari be permitted to be filed.

Respectfully



Juan Carlos Ocasio

Additional material from this filing is available in the Clerk's Office.