No. 19-_____

In The

Supreme Court of the United States

MICHAEL BONIN,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant violates 18 U.S.C. § 912's prohibition on "falsely assum[ing] or pretend[ing] to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and act[ing] as such," if he does not purport to be "acting under the authority of the United States." And, if so, whether the statute violates the First Amendment.

RELATED CASES

- *United States v. Bonin*, No. 15-cr-22, U.S. District Court for the Northern District of Illinois. Judgment entered February 15, 2018.
- *United States v. Bonin*, No. 18-1479, U.S. Court of Appeals for the Seventh Circuit. Judgment entered July 26, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Bonin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at *United States v. Bonin*, 932 F.3d 523 (7th Cir. 2019), and is reproduced in the Appendix at App. 1–34. The district court's relevant rulings are unreported but reproduced in the Appendix at App. 35–41, 52–53.

JURISDICTION

The court of appeals issued its decision on July 26, 2019. On October 8, 2019, Justice Kavanaugh extended the time for filing this petition to December 23, 2019. *See* 19A384. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 912: 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.

U.S. Constitution, First Amendment: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

INTRODUCTION AND STATEMENT OF THE CASE

Michael Bonin was convicted after trial of impersonating a U.S. Marshal "acting under the authority of the United States" and acting "as such," in violation of 18 U.S.C. § 912. App. 2, 10. Section 912 does not define what it means to act "as such," 18 U.S.C. § 912, and the circuits are deeply riven. The majority—five circuits—require the government to show that an offender "perform[ed] an overt act that asserts, implicitly or explicitly, authority that the impersonator claims to have by virtue of the office he pretends to hold." *United States v. Rosser*, 528 F.2d 652, 656 (D.C. Cir. 1976). The minority—three circuits, including the opinion below—require only that an offender act "consistent with" the impersonation, reading the "authority" requirement out of the statute. App. 20–23.

The issue is important. Conduct that violates the law in three circuits does not violate the law in at least five others. This lack of uniformity in the scope of a federal criminal statute—especially a statute that itself deals with federal officers and federal authority—calls for this Court's review. Indeed, the Court regularly

grants certiorari to resolve these sorts of conflicts. *See*, *e.g.*, *Marinello v. United States*, 138 S. Ct. 1101, 1105 (2018); *McDonnell v. United States*, 136 S. Ct. 2355 (2016); *Elonis v. United States*, 135 S. Ct. 2001 (2015); *Black v. United States*, 561 U.S. 465, 471 (2010); *Skilling v. United States*, 561 U.S. 358, 410–11 (2010).

And the majority position is correct. It is required by the plain language of the statute, which expressly demands that an offender "act[ ] as" someone "acting under the authority of the United States." 18 U.S.C. § 912. It also better supports the purpose of the statute, namely to protect the integrity of federal authority. *See United States v. Alvarez*, 567 U.S. 709, 721 (2012) ("the integrity of government processes") (plurality opinion); *United States v. Barnow*, 239 U.S. 74, 78 (1915) ("It is the false pretense of Federal *authority* that is the mischief to be cured[.]" (emphasis added)).

The issue is also important because it implicates core First Amendment protections. In *United States v. Alvarez*, Justices of this Court recognized that the federal impersonation statute would implicate the First Amendment but for its "focus on *acts* of impersonation, not mere speech. . . ." 567 U.S. at 735 (Breyer, J., concurring). The majority interpretation of Section 912 avoids this First Amendment problem by enforcing the statute's "acts as such" requirement, but the minority interpretation squarely raises the issue by all but reading the "acts" requirement out of the statute. The minority interpretation of the statute would apply broadly not only to "family, social, or other private

contexts" but also to "political contexts," unlimited by any showing of harm or materiality. *Id.* at 736, 738. These constitutional concerns provide another reason to grant the petition.

The majority circuits would have been unable to affirm Bonin's conviction. The Seventh Circuit concluded that Bonin violated the statute by trading on falsely claimed professional courtesy to excuse his rude behavior and to be re-admitted to the movie theater. App. 16, 22. But trading on ostensible professional courtesy does not involve asserting the authority of the U.S. Marshal Service. The Seventh Circuit thus sustained Bonin's conviction under a theory that the majority circuits would have rejected.

This Court should grant Bonin's petition to resolve this circuit split over the elements of a long-standing and important criminal prohibition.

I. Proceedings before the District Court.

On December 4, 2014, Michael Bonin went on a date with his then-girlfriend to watch a movie at the AMC River East Theater in downtown Chicago. App. 49–50. Bonin kept his cell phone on and answered a call during the movie. App. 2. Movie patrons then loudly confronted him for talking on the phone in the movie room. *Id.*

Bonin was lawfully carrying a concealed firearm, which inadvertently became visible during the argument. App. 50–51. Theater security guards (themselves off-duty police officers) then removed him from the

movie room, and eventually the police arrived. App. 2–3. The officers and guards held him outside the movie room, during which time Bonin's license check revealed that he had a valid concealed carry license. App. 3–4. At that point, they promptly released him back into the movie room. App. 32.

Bonin was then prosecuted for impersonating a U.S. Marshal "acting under the authority of the United States" and "act[ing] as such," in violation of 18 U.S.C. § 912.[1] At trial, the law enforcement witnesses testified that they allowed Bonin to return to the theater because they believed him to be a law enforcement officer. App. 4. They testified that he claimed to be one, and that they observed him wearing a firearm, ammunition, and a badge on his belt.[2] App. 3. The officer even said she offered Bonin a ride home "as a courtesy" because she believed that Bonin was a U.S. Marshal. App. 5. (Bonin refused her offer. *Id.*)

Throughout the proceedings below, Bonin repeatedly tried to defend himself on the ground that he had never purported to act under federal authority.[3]

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[1] The district court had jurisdiction under 18 U.S.C. § 3231 as Bonin was charged with violating a federal statute.

[2] The guard and officer confirmed that the badge did not say "Marshal." App. 44–45, 47.

[3] Bonin also denied claiming to be a U.S. Marshal. He testified that he told the officers he was a fugitive recovery agent (a bounty hunter). App. 22. The miscommunication then arose when he explained the job of a fugitive recovery agent as best he could, in a confused analogy to the job of the U.S. Marshals. For example, he explained that his actual employer-issued identification card as a fugitive recovery agent set out "the laws that allows us to

The judge allowed some parts of this defense, but not all. For instance: Licensed private individuals such as Bonin may lawfully carry a concealed firearm into private businesses such as movie theaters unless the business posts a statutorily specified sign at the entrance to the theater. 430 ILCS § 66/65(a). It was undisputed that the AMC River East had not posted such a sign at the entrance, though the district judge forbade Bonin from presenting that evidence to the jury. App. 32–33. The district judge likewise forbade Bonin from presenting evidence that the manner in which he carried the firearm was lawful under Illinois law. *Id.*

Most importantly, the district court refused Bonin's request to instruct the jury that a defendant "acts as such" only when he performs an act that "asserted authority as a United States Marshal." App. 55, 58–59. The district court declined to issue Bonin's proposed instructions, or any other instruction requiring an assertion of ostensible federal authority. App. 35–41, 52–53.

The district judge explained that he had "done a lot of thinking about [the instructions]," and criticized Bonin's proposal overall as "assum[ing] he's being charged with the second part of the statute."[4] App. 39.

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pursue fugitives as the United States Marshals' jobs are." App. 51.

[4] Section 912 authorizes two different kinds of impersonation charges: first, for impersonation and "act[ing] as such," or, second, for impersonation and "in such pretended character demand[ing] or obtain[ing] any money, paper, document, or thing of value." 18 U.S.C. § 912. Bonin was charged with the first kind of

As for the "authority" instruction in particular, the court rejected it as not "appropriate," without further explanation. App. 41. The judge also explained that he would not issue Bonin's proposed First Amendment instruction because this was "not a First Amendment case." App. 41, 59–60.

Ultimately, the district judge appended his definition of "acts as such" to the statutory language. First,

> In order for you to find the defendant guilty of these charges, the government must prove each of the following two elements beyond a reasonable doubt:
>
> 1. That the defendant falsely assumed or pretended to have been an officer or employee acting under authority of the United States Marshals Service; and
>
> 2. That the defendant acted as such.

App. 20, 52–53. The next instruction then elaborated:

> With respect to acting 'as such,' the government must prove that the defendant acted in a manner consistent with his pretended authority as an officer or employee of the United States Marshals Service.

Id.

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impersonation, not the second; for ease of reading, this petition treats the first version of Section 912 and Section 912 itself as interchangeable.

In light of the evidence presented at trial and the jury instructions, the jury convicted Bonin, without ever finding that he asserted federal authority.

II. Proceedings before the Seventh Circuit.

On appeal, Bonin argued that the plain text of the statute required his proposed authority instruction, because acting "as such" means to act as an officer "acting under the authority of the United States." 18 U.S.C. § 912; App. 22–23. Bonin also argued that the statute risked creating an unconstitutional restriction on expression without that robust "acts" requirement. App. 11, 17.

The Seventh Circuit rejected both challenges. First, as to the statutory interpretation argument, the appellate court rejected it as contrary to the text of Section 912. App. 22–23. The opinion neither addressed nor even acknowledged the statute's express "acting under the authority" language, 18 U.S.C. § 912, nor the other circuits that disagreed.

Second, as to the First Amendment arguments, the appellate court concluded that the statute survived First Amendment analysis because it requires an "intent to defraud" as well as an overt act—any act "in conformity with" the impersonation. App. 15–17. (The appellate court also found that the district court had erred in denying a proposed "intent to defraud" instruction, though it found the error harmless. App. 21–22.) The appellate court also summarily dismissed

Bonin's numerous examples of the statute's troubling breadth as "far-fetched." App. 18.

REASONS FOR GRANTING THE PETITION

This petition presents a recurring and important question of statutory interpretation with First Amendment implications. There is a five-three split about the meaning of Section 912. Moreover, the Seventh Circuit is wrong: It disregards the plain text of Section 912 by reading "authority" out of the offense's "acts" requirement, disconnects the statute from its purpose of protecting the integrity of government authority, and risks violating the First Amendment. That makes this case an especially compelling vehicle for review.

I. The circuits are deeply split.

At least eight circuits have examined the "acts as such" language of Section 912, and come to two different conclusions about what it means. Five circuits—the D.C. Circuit, Second Circuit, Third Circuit, Fourth Circuit, and Eleventh Circuit—all conclude that an offender's "acts as such" must include an explicit or implicit assertion of pretended federal authority. *See United States v. Rosser*, 528 F.2d 652, 656 (D.C. Cir. 1976); *United States v. Wells*, 893 F.2d 535, 540 (2d Cir. 1990); *United States v. Wilkes*, 732 F.2d 1154, 1158 (3d Cir. 1984); *United States v. Roe*, 606 F.3d 180, 188 (4th Cir. 2010); *United States v. Parker*, 699 F.2d 177, 180 (4th Cir. 1983); *United States v. Gayle*, 967 F.2d 483,

487 (11th Cir. 1992) (en banc).[5] These courts agree that satisfying the "acts as such" element means showing "that the defendant 'asserted his pretended authority over' another person." *United States v. Kornse*, 708 F. App'x 135, 136 (4th Cir. 2018) (quoting *Parker*, 699 F.2d at 180).

The D.C. Circuit explains that the statute's robust authority requirement reinforces its purpose because "[a]ttempting to exercise pretended authority is far more offensive to the interests of the United States than is 'mere bravado.'" *Rosser*, 528 F.2d at 656; *see also Alvarez*, 567 U.S. at 721 (recognizing Section 912 as "protect[ing] the integrity of Government processes") (plurality opinion). Because "'[i]t is the false pretense of Federal authority that is the mischief to be cured,' the narrowing definition of 'acts as such' . . . does not reduce the usefulness of Section 912(1) in protecting the governmental interests with which Congress was concerned." *Rosser*, 528 F.2d at 657–58 (quoting *Barnow*, 239 U.S. at 78).[6]

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[5] In *United States v. Neidlinger*, the Tenth Circuit rejected the minority position, but did not make clear whether it adopted the majority position. *See United States v. Neidlinger*, 354 F. App'x 357, 360–61 (10th Cir. 2009) (unpublished); *see also United States v. Wright*, 300 F. App'x 608, 611 n.3 (10th Cir. 2008) (unpublished). It nonetheless expressly relied on the defendant's assertion of authority to affirm his conviction. *Neidlinger*, 354 F. App'x at 362 ("Neidlinger attempted to use his 'status' as a United States Marshal to see the mayor, asserting that his position gave him the authority to see the mayor immediately.").

[6] The Fourth Circuit does not agree with every aspect of *Rosser*. *See Parker*, 699 F.2d at 179 n.3. It nonetheless has repeatedly relied on the authority requirement. *Id*. ("By demonstrating

The majority circuits' cases accordingly focus on acts implicating claimed federal authority, not mere courtesy: "'[T]he government need only show that [the defendant] asserted his pretended authority over [the victim] in some fashion.'" *Roe*, 606 F.3d at 189 (quoting *Parker*, 699 F.2d at 180). In *Rosser*, the leading majority case, a fake IRS agent "asserted authority over the operations of the [gas] station" by, for example, directing the owner to post a sign and dictating who could fill up on gas and who could not. *Rosser*, 528 F.2d at 653. More recent cases such as the Fourth Circuit's *Roe* likewise conclude that a false federal police officer acted "as such" when he "asserted police authority that he did not possess" by attempting to perform a traffic stop. *Roe*, 606 F.3d at 188.

Only three circuits—the Fifth, Seventh, and Ninth—reject Section 912's "authority" requirement. *See United States v. Tullos*, 356 F. App'x 727, 728 (5th Cir. 2009) (unpublished); App. 22–23; *United States v. Tomsha-Miguel*, 766 F.3d 1041, 1046 (9th Cir. 2014).[7]

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that Parker asserted the authority to investigate Brooks' tax status, the government has met its burden of proof."); *Kornse*, 708 F. App'x 135, 136 (4th Cir. 2018) (unpublished) (affirming denial of Rule 29 motion because "[Kornse] asserted in the dealership that his purported authority to carry the firearm derived from his affiliation with DHS[.]"); *Roe*, 606 F.3d at 188 (assertion of federal authority by conducting traffic stop).

[7] The Ninth Circuit erroneously claims support from the Eleventh Circuit for its side of the circuit split. *See Tomsha-Miguel*, 766 F.3d at 1046 (citing *Gayle*, 967 F.2d at 487). The Eleventh Circuit expressly rejects that position: It interprets *the statute* to mean that defendants must "in some manner assert[] authority by acting 'as such.'" *Gayle*, 967 F.2d at 487 (quoting

These circuits "require[] only that the government show 'any overt act *consistent with* the assumed character.'" *Tomsha-Miguel*, 766 F.3d at 1046 (quoting *United States v. Cohen*, 631 F.2d 1223, 1224 (5th Cir. 1980)) (emphasis added); *see* App. 20, 22–23. For example, *Tullos*, a relatively recent Fifth Circuit case, affirmed the conviction of a fake Coast Guard officer who acted "as such" in order to avoid close scrutiny by border patrol agents; the opinion carries no suggestion that he actually asserted authority over the agents. *See Tullos*, 356 F. App'x at 728. This split marks a divide about the core purpose of Section 912—whether it is a statute designed to protect government process and authority, or instead designed to more broadly criminalize false expression.

II. The minority position is wrong.

By eliminating the Section 912's "authority" requirement, the Seventh and the two other minority circuits contradict the plain language of the offense and unmoor it from its statutory purpose.

Section 912's "acts" offense has two parts: impersonation and an act. 18 U.S.C. § 912. First, an offender impersonates a federal officer when he "falsely assume[s] or pretend[s] to be an officer or employee

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Rosser, 528 F.2d at 656). The Ninth Circuit's error is presumably based on misreading a different section of *Gayle*, which holds that an *indictment* is sufficient if it merely recites the statutory "acts as such" language and need not allege additional facts further specifying what those acts were. *Gayle*, 967 F.2d at 488.

acting *under the authority of the United States* or any department, agency or officer thereof." 18 U.S.C. § 912 (emphasis added). Second, the offense is complete when an offender "acts as such." *Id*.

As a matter of basic grammar, an offender "acts as such" under the second part by committing an act that asserts the pretended federal authority referenced in the first part. *See Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) ("[O]ur job is to interpret the words consistent with their ordinary meaning. . . ." (quotation omitted; alteration in original)). "Act[ing] as such" means acting in the manner previously defined.[8] In Section 912's terms, that means "act[ing] as" someone "acting under the authority of the United States or any department, agency or officer thereof" (the first part of the statute). 18 U.S.C. § 912. In other words, it means "performing an overt act that asserts, implicitly or explicitly, authority that the impersonator claims to have by virtue of the office he pretends to hold." *Rosser*, 528 F.2d at 656.

Allowing conviction for acts that are merely "consistent with" the impersonation not only ignores the plain language of the statute, *supra*, but also effectively reads any separate "acts as such" requirement

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[8] When Section 912 was last revised in 1948, "as" meant "in a manner like that of." Webster's New International Dictionary of the English Language 159 (2d ed. 1943). "Such" then referred back to the first part of the offense, meaning that one acts as "previously indicated." *Id.* at 2518 ("Of this or that kind, character or measure; of the sort or degree previously indicated or contextually implied. . . .").

out of the statute entirely. *Any* act that does not break character is "consistent with" that character. *Cf. United States v. Robbins*, 613 F.2d 688, 692 (8th Cir. 1979) (affirming conviction of fake FBI agent who carried gun and handcuffs while "cashing a check [that he was entitled to cash] and carrying on his business"). A definition that broad means that there will never be an impersonation without an act, rendering the separate "acts" requirement "mere surplusage." *Neidlinger*, 354 F. App'x at 361 (criticizing minority circuits); *Rosser*, 528 F.2d at 657 (rejecting minority's "consistent with" position because "the two elements defined by the statute could always be found in the same action").

To appropriately interpret the text and intent of Congress, this Court should adopt the majority approach that Section 912 requires an act that asserts the pretended government authority. This case presents this Court with a clean opportunity to address the minority circuits' erroneous interpretation of Section 912.

III. The minority position violates the First Amendment.

This Court regularly grants certiorari to resolve splits such as this one, over the reach of federal criminal law. *See*, *e.g.*, *Marinello*, 138 S. Ct. at 1105; *McDonnell*, 136 S. Ct. 2355; *Elonis*, 135 S. Ct. 2001; *Black*, 561 U.S. at 471; *Skilling*, 561 U.S. at 410–11. But the issue in this case is especially important because

of the First Amendment concerns raised by the minority interpretation.

When approaching a statute with alternative interpretations, courts assume "that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). In *United States v. Alvarez*, this Court struck down the Stolen Valor Act as an unconstitutional restriction on false speech. *Alvarez*, 567 U.S. at 729–30 (2012) (plurality opinion); *id.* at 739 (Breyer, J., concurring). This Court and the government recognized that doing so also risked implicating Section 912. *Id.* at 721 (plurality opinion); *id.* at 735 (Breyer, J., concurring); Brief for the United States at 31–33, *United States v. Alvarez*, 567 U.S. 709 (2012) (No. 11-210), 2011 WL 6019906. The Court concluded, however, that Section 912 survived only because it was a more "targeted prohibition[]" than the Stolen Valor Act. *See Alvarez*, 567 U.S. at 721 (plurality opinion) (distinguishing Section 912 "to the extent . . . [it] implicate[s] fraud or speech integral to criminal conduct . . . "); *id.* at 735 (Breyer, J., concurring) (distinguishing Section 912 for "focus[ing] on *acts* of impersonation, not mere speech"). Broadening Section 912 thus collides with the Constitution by removing the very features that distinguished it from the Stolen Valor Act. This First Amendment question provides an additional reason to grant certiorari.

Absent an authority requirement, Section 912's extraordinary breadth bears a troubling resemblance to the unconstitutional Stolen Valor Act. Like the Stolen Valor Act, the minority interpretation of Section

912 applies "in almost limitless times and settings." *Alvarez*, 567 U.S. at 723 (plurality opinion); *id.* at 736–37 (Breyer, J., concurring). Those include not only "in family, social, or other private contexts" but also "political contexts." *Id.* at 736 (Breyer, J., concurring); *id.* at 722 (plurality opinion) (criticizing Stolen Valor Act for criminalizing lies "made in a public meeting" as well as "within a home").

As to private contexts, the minority interpretation criminalizes, for example, impersonation in pursuit of any of the many social courtesies police officers receive—free drinks at a bar or being seated first at a restaurant. It likewise sweeps up intimate conduct—picking someone up via an online dating profile by claiming to be a federal employee. And it is no less applicable to family settings—an adult child lying to her parents about flunking out of the FBI academy or a husband lying to his wife to save face. These private lies may cause interpersonal strife, but they do not undermine the governmental integrity or authority that otherwise justifies the statute's criminalization of false speech.

The minority position also reaches "political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high." *Id*. at 736 (Breyer, J., concurring). For example, political candidates would violate the statute by impersonating an Army officer to attract votes, as would a politician touting her (fake) experience as a DEA agent to garner support for a "war on drugs" bill. The broad reach of this statute into political realms,

without limitation, is alone cause for serious concern. *See 281 Care Comm. v. Arneson*, 766 F.3d 774, 785–87 (8th Cir. 2014); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–67 (2014).

Nor does the minority circuits' version of Section 912 contain any other "limitations on [its] scope" that narrow it to "lies most likely to be harmful or . . . contexts where such lies are most likely to cause harm." *Alvarez*, 567 U.S. at 737–38 (Breyer, J., concurring); *id.* at 722–23 (plurality opinion). It is not enough that an offender's lie is "intentional"—*Alvarez* assumed the same of the Stolen Valor Act. *Compare* App. 15–17, *with Alvarez*, 567 U.S. at 719 (plurality opinion), *and id*. at 732 (Breyer, J., concurring). Moreover, as detailed in the examples above, requiring acts "in conformity with" the pretense does little (if anything) to narrow the reach of the statute to the "subset of lies where specific harm is more likely to occur." *Compare Alvarez*, 567 U.S. at 736 (Breyer, J., concurring), *with* App. 15–17. Worse yet, criminalizing conduct *because* it reinforces an expressive lie risks worsening the First Amendment problem. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989) (prohibiting criminalizing "particular conduct *because* it has expressive elements").

By contrast, the majority approach's robust "acts" requirement solves the statute's tailoring and overbreadth problems by focusing on "lies most likely to be harmful or in contexts where such lies are most likely to cause harm." *Alvarez*, 567 U.S. at 738 (Breyer, J., concurring); *see United States v. Stevens*, 559 U.S. 460, 473 (2010). Section 912's purpose is undoubtedly

compelling—protecting the government's interest in "the integrity of government processes." *Alvarez*, 567 U.S. at 722 (plurality opinion); *see also* App. 13. But "[a]ttempting to exercise pretended authority is far more offensive" to that interest than the petty lies that the minority interpretation criminalizes. *Rosser*, 528 F.2d at 656. The majority approach thus constitutes a "more efficient means of safeguarding" the government's interest in light of the constitutional concerns. *Id*. at 658.

Certiorari is therefore warranted in order to safeguard the First Amendment rights threatened by a broad criminalization of false speech.

IV. This case is a good vehicle.

This case is an excellent vehicle for the Supreme Court to address the deep circuit split over the elements of Section 912 and its First Amendment implications.

First, this case has no procedural barrier. Bonin consistently challenged the elements of the offense below. *See supra* at 5–9; App. 10–25, 57–60.

Second, there is no ambiguity about the Seventh Circuit's position on the circuit split. The opinion below expressly rejects the majority position that the statute requires an assertion of authority. App. 22–23.

Third, the omitted instruction matters to the outcome of this case. Bonin repeatedly introduced and attempted to introduce evidence at trial that directly related to the omitted authority instruction. *Supra* at

5–6. In the absence of an authority instruction, however, the jury was never allowed to make that determination. The Seventh Circuit found that Bonin claimed to be a U.S. Marshal in order to get back into the movie room and to placate the audience. App. 16, 22. But to the degree he was merely trading on ostensible professional courtesy or esteem, that does not involve asserting federal authority, and it would not be enough for a properly instructed jury to convict him. Moreover, in sharp contrast to its other holdings, the Seventh Circuit pointedly declined to issue an alternate holding that omitting the authority instruction was harmless. App. 21–22.

This case presents an ideal vehicle for this Court to answer an important question that has divided the Courts of Appeals, and to reinforce the requirement that any statute criminalizing false speech must comply with the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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