No. 88720-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,

v.

K.L.B.
Juvenile Petitioner,

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

SARAH A. DUNNE, WSBA #34869
dunne@aclu-wa.org
NANCY L. TALNER, WSBA #11196
talner@aclu-wa.org
LA ROND BAKER, WSBA #43610
lbaker@aclu-wa.org
JASON ZOLLE, Legal Intern
zollejd@umich.edu
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Attorneys for *Amicus Curiae*
American Civil Liberties Union of Washington

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ISSUE TO BE ADDRESSED BY *AMICUS* 1

STATEMENT OF THE CASE 1

ARGUMENT 3

I. FALSE SPEECH CAN BE CRIMINALIZED ONLY IF ASSOCIATED WITH A LEGALLY COGNIZABLE HARM 5

II. THE "MATERIALITY" AND "PUBLIC SERVANT" ELEMENTS OF RCW 9A.76.175 MUST BE NARROWLY CONSTRUED TO AVOID UNCONSTITUTIONAL OVERBREADTH 8

A. "Materiality" Under RCW 9A.76.175 is Read Less Stringently than *Alvarez*'s Harm Requirement 9

B. A Broad Reading of "Public Servant" Exacerbates This Overbreadth 11

III. RCW 9A.76.175 MUST BE NARROWLY CONSTRUED TO AVOID OTHER CONSTITUTIONAL CONCERNS 13

A. Criminalizing False Statements Can Provide an "End Run" Around the Fourth Amendment 13

B. Criminalizing False Statements Can Lead to Selective Prosecution Against Minority Views and Groups 14

CONCLUSION 17

TABLE OF AUTHORITIES

State Cases

City of Seattle v. Montana, 129 Wn.2d 583, 598, 919 P.2d 1218 (1996) 9

City of Tacoma v. Luvene, 118 Wn.2d 826, 827 P.2d 1374 (1992) 5, 9

O'Neill v. Crawford, 970 N.E.2d 973 (Ohio 2012) 7

Rickert v. State of Wash. Pub. Disclosure Comm'n, 161 Wn.2d 843, 168 P.3d 826 (2007) 1, 7, 9

State v. Chester, 133 Wn.2d 15, 940 P.2d 1374 (1997) 5, 9

State v. Crawley, 819 N.W.2d 94 (Minn. 2012) 7, 8

State v. Godsey, 131 Wn. App. 278, 127 P.3d 11 (2006) 11

State v. Immelt, 173 Wn.2d 1, 12–13, 267 P.3d 305 (2011) 5, 6, 9

State v. Regan, 97 Wn.2d 47, 52, 640 P.2d 725 (1982) 9

State v. Stephenson, 89 Wn. App. 794, 950 P.2d 38 (1998) 7

State v. Williams, 171 Wn.2d 474, 251 P.3d 877 (2011) 2, 4, 13, 16

State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982) 14, 15

State ex. rel Pub. Disclosure Comm'n v. 119 Vote No! Comm., 135 Wn.2d 618, 168 P.3d 826 (1998) 1, 3, 7, 10–11

Federal Cases

Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004) 5

Broadrick v. Oklahoma, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) 4, 8–9

Brown v. Entm't Merchants Ass'n, 564 U.S. __, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) 5–6

Gertz v. Robert Welch, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) 6

Lewis v. City of New Orleans, 415 U.S. 130, 133–34, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) 4, 9, 16–17

Marks v. United States, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) 7

R.A.V. v. St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) 5–6

Talley v. California, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960) 11

United States v. Alvarez, 567 U.S. __, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012) ..... passim

United States v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) 5

Statutes

RCW 9A.04.110 ..... 1, 4, 12

RCW 9A.72.020 10

RCW 9A.76.020 ..... 2, 4, 14, 15

RCW 9A.76.175 ..... passim

RCW 46.61.020 10

RCW 74.08.331 10

18 U.S.C. § 1001 ..... 8, 12

Constitutional Provisions

U.S. Const. amend. I ..... passim

U.S. Const. amend. IV 4, 13, 14

Other Authorities

Office of Professional Accountability, "Auditor's Report on Obstruction Arrests, January 2006–July 2008," (2008) 15-16

Eric Nalder, et. al, "Anti-Crime Team Has a Tough Reputation– Maybe Too Tough: Unit Racks Up Most 'Obstructing' Arrests," *Seattle Post-Intelligencer* (Feb. 28, 2008) 16

Unpublished Opinions

The following unpublished opinions cited in this brief are not cited as or relied on as "authorit[ies]." GR 14.1. Instead, they are listed in a footnote to show the Court examples of how the police have used RCW 9A.76.175 to justify otherwise unconstitutional searches and arrests.

State v. Enlow, No. 21218-1-III, 2004 WL 100331 (Wash. Ct. App. Jan. 22, 2004)..... 14

State v. Gamboa, No. 23844-0-III, 2006 WL 3734927 (Wash. Ct. App. Dec. 19, 2006) 14

State v. Hewey, No. 34704-1-II, 2007 WL 2122430 (Wash. Ct. App. July 25, 2007)..... 14

United States v. Butler, CR06-0301RSL, 2007 WL 208360 (W.D. Wash. Jan. 23, 2007).....14

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 members dedicated to the preservation of civil liberties. The ACLU has consistently advocated against the criminalization of protected speech. *See State ex. rel Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 957 P.2d 691 (1998); *Rickert v. State of Wash. Pub. Disclosure Comm'n*, 161 Wn.2d 843, 168 P.3d 826 (2007).

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether RCW 9A.76.175 exceeds its legitimate scope and criminalizes protected speech, and whether the First Amendment requires a narrowing construction of the statute's "materiality" and "public servant" elements.[1]

STATEMENT OF THE CASE

In addition to the parties' presentation of the case, a few facts are particularly relevant to the argument below.

While riding the light rail, K.L.B., a fifteen-year-old African-American boy, and two other African-American boys were confronted by a transit fare enforcement officer seeking to verify that they had paid their

[1] "Materiality" is defined by RCW 9A.76.175. "Public servant" is defined by RCW 9A.04.110(23).

fares. RP 31 (mentioning race of individuals). The bus transfer passes they presented were no longer accepted as fare payment on the light rail, so the fare officer ejected them from the bus. RP 65–67; *see also* RP 22–23 (discussing officer's authority). The fare officer asked their names, and after K.L.B. gave a name but was unable to provide an address, a deputy sheriff was called to verify K.L.B.'s identity. RP 68–72.

K.L.B. initially repeated the false name to the sheriff. RP 94. The sheriff then told K.L.B. that "lying to the police, if we find out [you're] lying and [you're], you know, hindering our ability to get to find out who [you are], that [you] could be charged with obstructing a law enforcement officer." *Id.* K.L.B. then gave the officer his real name. *Id.*

The transit fare officer mailed K.L.B. a citation for fare nonpayment, RP 80, but the state went further and pressed criminal charges for his false statements: one count of obstructing a police officer under RCW 9A.76.020 (for his statements to the sheriff) and one count of making a false statement to a public servant under RCW 9A.76.175 (for his statements to the transit fare officer). RP 4. This Court's recent decision in *State v. Williams* precluded the obstruction charge as a matter of law because it was based solely on the false statements regarding his identity. 171 Wn.2d 474, 486, 251 P.3d 877 (2011) (holding that obstruction requires "some conduct in addition to making false

statements"). Rather than dismiss the charge, the state amended the obstruction count to a second false statement count. RP 4–5. The trial court acquitted K.L.B. for false statements to the sheriff but convicted him for false statements for giving a false name to the transit fare officer. RP 153–55. The Court of Appeals affirmed.

ARGUMENT

The First Amendment of the U.S. Constitution protects false speech. *United States v. Alvarez*, 567 U.S. __, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012); *119 Vote No!*, 135 Wn.2d at 632. False statements cannot be criminalized because of "falsity and nothing more." *Alvarez*, 132 S. Ct. at 2545 (plurality opinion), 2553–54 (Breyer, J., concurring). They can only be proscribed if "associated with" a "legally cognizable harm." *Id.*

RCW 9A.76.175 criminalizes making a "false or misleading material statement to a public servant." RCW 9A.76.175. While this statute certainly has a number of legitimate applications, a broad construction of the statute's "materiality" and "public servant" elements allows it to criminalize a substantial amount of protected speech. First, when the definition of "materiality" does not rise to the level of legally cognizable harm required by *Alvarez*. Second, the Court of Appeals broadly construed "public servant" as defined by RCW 9A.04.110(23), ensuring that RCW 9A.76.157 criminalizes speech that does not "work

particular and specific harm by interfering with the functioning of a government department." *Id.* at 2554 (Breyer, J., concurring). This renders the statute unconstitutionally overbroad under the First Amendment. *See Lewis v. City of New Orleans*, 415 U.S. 130, 133–34, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974).

Moreover, a broad statute prohibiting false speech is susceptible to abuse. This Court recently recognized that criminalizing false speech to the police under RCW 9A.76.020, the obstruction statute, provides an "end run" around the Fourth Amendment's limitation on searches. *State v. Williams*, 171 Wn.2d at 486. The same concerns are present with RCW 9A.76.175. There is a significant probability that the statute may be selectively enforced against minority or disfavored groups.

These constitutional concerns mandate a narrow interpretation of both the "materiality" and "public servant" elements of RCW 9A.76.175. *City of Tacoma v. Luvene*, 118 Wn.2d 826, 842–44, 827 P.2d 1374 (1992) (narrowing construction to avoid unconstitutional overbreadth); *State v. Chester*, 133 Wn.2d 15, 21–22, 940 P.2d 1374 (1997) (affirming reversal of conviction under narrowing construction to avoid constitutional problems); *cf. State v. Immelt*, 173 Wn.2d 1, 12–13, 267 P.3d 305 (2011) (facially invalidating statute not susceptible to narrowing construction).

I. FALSE SPEECH CAN BE CRIMINALIZED ONLY IF ASSOCIATED WITH A LEGALLY COGNIZABLE HARM.

Criminal laws that prohibit speech based on content "have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004). The government has broad latitude to impose content-based regulations on only a "few" "historic and traditional categories" of speech: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010) (internal citations omitted) (collecting cases). But, there has "never" been "a freedom to disregard these traditional limitations." *Id.* at 1584–85 (rejecting the government's attempt to add depictions of animal cruelty as an unprotected category). Courts apply strict scrutiny to content-based restrictions of speech outside of these categories. *Brown v. Entm't Merchants Ass'n*, 564 U.S. __, 131 S. Ct. 2729, 2738, 180 L. Ed. 2d 708 (2011) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)) (applying strict scrutiny to restriction on violent video games).

In *United States v. Alvarez*, the Court rejected the idea that false speech categorically lacks First Amendment protection. 132 S. Ct. at

2546–47 (plurality opinion), 2553 (Breyer, J., concurring) (invalidating a statute prohibiting lies about the receipt of military medals). Though earlier opinions had suggested that "there is no constitutional value in false statements of fact," *Gertz v. Robert Welch*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), the Court confirmed that this language was properly confined to defamation law. *Alvarez*, 132 S. Ct. at 2544–45 (plurality opinion), 2553 (Breyer, J., concurring).

A majority of the Court did not agree on what level of scrutiny to apply. *Cf. id.* at 2543 (plurality opinion) (exacting scrutiny) *with* 2551–52 (Breyer, J., concurring) (intermediate scrutiny). Nevertheless, six justices applied heightened scrutiny and held that false speech can only be proscribed if it is "associated with" a "legally cognizable harm." *Id.* at 2545 (plurality opinion), 2554 (Breyer, J., concurring) (explaining that proscription of false speech requires "proof of specific harm to identifiable victims," that the speech is "made in contexts in which a tangible harm to others is especially likely to occur," or that the speech is "particularly likely to produce harm").[2]

---

[2] The U.S. Supreme Court has explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). While courts after *Alvarez* have used strict scrutiny to analyze false speech statutes, *see State v. Crawley*, 819 N.W.2d 94,

Even before *Alvarez*, this Court recognized that false statements can be proscribed only if they are accompanied by a legally cognizable harm. In *119 Vote No!*, this Court invalidated a statute prohibiting false statements of material fact in political advertisements because it did not require defamatory harm. 135 Wn.2d at 627–28. *Rickert* did the same to a narrower statute prohibiting false statements about candidates for public office because it lacked a "requirement that the prohibited statements tend to be harmful to a candidate's reputation." 161 Wn.2d at 852; *see also State v. Stephenson*, 89 Wn. App. 794, 804, 950 P.2d 38 (1998) (upholding a statute criminalizing threats to public servants because it only reached threats of "substantial harm").

Under *Alvarez*, sufficient harm may result from defamation, commercial fraud, perjury, impersonation of government officers, and speech integral to criminal conduct (e.g., threats or conspiracy). *Id.* at 2545–46. In the context of false speech to government officials, the state can criminalize lies that are "likely to work particular and specific harm by

---

105 (Minn. 2012); *O'Neill v. Crawford*, 970 N.E.2d 973 (Ohio 2012), this Court need not reach that question, as RCW 9A.76.175 is overbroad under *Alvarez* regardless of what level scrutiny is used.

interfering with the functioning of a government department." *Alvarez*, 132 S. Ct. at 2554 (Breyer, J., concurring).[3]

However, RCW 9A.76.175 reaches beyond such statements. Its "materiality" and "public servant" elements are construed so broadly that RCW 9A.76.175 reaches a substantial amount of speech that does not create harm and interfere with government functioning as *Alvarez* requires. This First Amendment overbreadth requires facial invalidation or a narrowing construction.

II. THE "MATERIALITY" AND "PUBLIC SERVANT" ELEMENTS OF RCW 9A.76.175 MUST BE NARROWLY CONSTRUED TO AVOID UNCONSTITUTIONAL OVERBREADTH.

First Amendment overbreadth doctrine reflects a concern that some statutes are written so broadly that, even when they are valid in some circumstances, they can also reach protected speech, and their "very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*,

---

[3] It is in this context that *Alvarez* referenced a federal statute that criminalizes false material statements "within the jurisdiction of the executive, legislative, or judicial branch" of the federal government. 18 U.S.C. § 1001. However, § 1001 is narrower in scope than RCW 9A.76.175. The false speech it criminalizes is limited by the type of governmental matter that potentially could be disrupted and excludes false speech made in certain contexts. *Cf.* 18 U.S.C. § 1001 ("in" government matters under the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States) *with* RCW 9A.76.175 ("to" make[] a false or misleading statement to a public servant). Moreover, none of the opinions [in *Alvarez*] explicitly assert that section 1001 passes First Amendment scrutiny and any such statements would have been dicta. *See State v. Crawley*, 819 N.W.2d 94, 124 (Minn. 2012) (Stras, J. dissenting).

413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); *City of Seattle v. Montana*, 129 Wn.2d 583, 598, 919 P.2d 1218 (1996). Courts can strike an overbroad statute on its face and reverse the defendant's conviction.[4] *Lewis*, 415 U.S. at 133–34; *Immelt*, 173 Wn.2d at 12–13. Otherwise, courts can place a "sufficiently limiting construction" on the statute so that it ceases to reach protected speech. *Luvene*, 118 Wn.2d at 840, 844. The court then considers whether the defendant's speech falls within the constitutionally narrowed interpretation.[5]

A narrowing construction of RCW 9A.76.175 must bring both the "materiality" and "public servant" elements into harmony with *Alvarez*'s requirement of harm and interference with the functioning of a government department.

A. "Materiality" Under RCW 9A.76.175 is Read Less Stringently than *Alvarez*'s Harm Requirement.

Alvarez holds that false speech can only be outlawed if it is "associated with" "some other legally cognizable harm." *Alvarez*, 132 S. Ct. at 2545 (plurality opinion), 2554 (Breyer, J., concurring). But RCW

---

[4] This Court has repeatedly invalidated overbroad statutes that criminalize a type of speech without including all the necessary elements of proscription. *See State v. Regan*, 97 Wn.2d 47, 52, 640 P.2d 725 (1982) (obscenity); *Rickert*, 161 Wn.2d at 852, 857 (Alexander, C.J., concurring) (defamation); *Immelt*, 173 Wn.2d at 12 (harassment).

[5] Courts also can read the statute narrowly and reverse the conviction to avoid even raising constitutional questions. *Chester*, 133 Wn.2d at 21–22 (1997).

9A.76.175 does not require harm. It only requires that a statement be material: "reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties." RCW 9A.76.175. In some cases, a material statement is associated with harm as required by *Alvarez*—e.g., perjury or fraudulent attempts to secure benefits.[6] But reasonable likelihood of reliance by a public servant in the discharge of official duties does *not necessarily* create a legally cognizable harm, and the statute therefore can criminalize protected speech.

For instance, it would be material for a citizen to mischaracterize facts when urging a state legislator how to vote, even though those statements create no legally cognizable harm. It would also be material for a parent to give a false name at a school board meeting while complaining about school policies, even though no harm was created. However, both of those statements are explicitly protected by the First Amendment. *See 119 Vote No!*, 135 Wn.2d at 632 (protecting false speech in political debate); *Talley v. California*, 362 U.S. 60, 64–65, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960) (protecting anonymous political speech).

---

[6] In fact, many of the legitimate applications of RCW 9A.76.175 are *also* criminalized under more focused statutes. *See* RCW 9A.72.020 (outlawing perjury); RCW 74.08.331 (specifying that false statements to obtain public benefits, *inter alia*, constitutes theft); RCW 46.61.020 (making it a criminal offense to, *inter alia*, give a false name to a "police officer" while "operating or in charge of any vehicle").

Material statements under RCW 9A.76.175 also include harmless white lies that "may prevent embarrassment [or] protect privacy." *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring). For instance, the statute makes it a crime for a parent to tell a school principal that her child is home sick when the child is really receiving mental health counseling, or for a driver to tell a police officer during a traffic stop that she is driving home when she is really driving to a private medical appointment. These statements would certainly be material under the statute, but they create no harm and are in fact protected by *Alvarez*. *Id.*

At least one Washington Court of Appeals found materiality in circumstances in which false speech caused no harm whatsoever. *State v. Godsey* held that a statement was material when Godsey denied his name while being arrested, even though the police already knew who he was because an undercover task force had been following him. 131 Wn. App. 278, 283, 291, 127 P.3d 11 (2006). It is certainly questionable what legally cognizable harm—if any—resulted from that false statement.

These examples demonstrate that RCW 9A.76.175 is unconstitutionally overbroad unless "materiality" is narrowly construed in harmony with *Alvarez*'s requirement of legally cognizable harm.

B. A Broad Reading of "Public Servant" Exacerbates This Overbreadth.

Even if RCW 9A.76.175 is narrowly construed to reach only lies that are associated with a legally cognizable harm, this Court must also narrowly construe the statute's "public servant" element, defined by RCW 9A.04.110(23), to avoid unconstitutional overbreadth.

There is no question that the state can criminalize lies to government officials that are "likely to work particular and specific harm by interfering with the functioning of a government department." *Alvarez*, 132 S. Ct. at 2554 (Breyer, J., concurring). In fact, the federal government prohibits false material statements in matters "within the jurisdiction of the [United States] executive, legislative, or judicial branch." 18 U.S.C. § 1001. But while the federal statute focuses on the circumstances in which the speech occurs, RCW 9A.76.175 focuses on the individual to whom the speech is directed: public servants. *Cf.* 18 U.S.C. § 1001 ("in" government matters) *with* RCW 9A.76.175 ("to" public servants).

The Court of Appeals' application of "public servant" in this case expands the reach of RCW 9A.76.175 to cover statements made to *any* private actor working for a private company that contracts with a government entity. The definition as construed by the trial court is even broader, reaching *anyone* in *any* capacity performing a government function. RP 155. By construing public servant so broadly, RCW 9A.76.175 RCW 9A.76.175 reaches speech that does not create harm by

interfering with government operations, which is unconstitutionally broader than what *Alvarez* permits. 132 S. Ct. at 2554 (Breyer, J., concurring).[7]

The "public servant" element of RCW 9A.76.175 as defined in 9A.09.110(23) must be narrowly construed to apply only to those tied to the proper "functioning of a government department" to ensure that the statute stays within the bounds of *Alvarez*.

III. RCW 9A.76.175 MUST BE NARROWLY CONSTRUED TO AVOID OTHER CONSTITUTIONAL CONCERNS.

This Court and the U.S. Supreme Court have expressed concerns that statutes criminalizing false statements have a high potential for abuse. RCW 9A.76.175 must be narrowly construed to minimize such abuse.

A. Criminalizing False Statements Can Provide an "End Run" Around the Fourth Amendment.

In *State v. Williams*, this Court expressed concern that criminalizing false statements to law enforcement officers under the obstruction statute provided an "'end run' around constitutional limitations on searches and seizures" by allowing invasive searches and arrests for nothing more than suspicion of a false statement to an officer. 171 Wn. 2d at 485–86. RCW 9A.76.175 raises identical concerns. *See also State v.*

[7] This is also contrary to the intent of the statute, which appears in the chapter of the criminal code entitled "Obstructing Governmental Operation." RCW 9A.76 *et seq*.

White, 97 Wn.2d 92, 106, 640 P.2d 1061 (1982) ("Statutes such as RCW 9A.76.020 purport to create a substantive offense, but have the effect of negating the probable cause requirement basic to the Fourth Amendment.").[8]

The "materiality" and "public servant" elements of RCW 9A.76.175 must be narrowly construed to minimize this potential for abuse by ensuring that the statute is only used when there is legitimate harm to the functioning of a government department.

B. Criminalizing False Statements Can Lead to Selective Prosecution Against Minority Views and Groups.

In *Alvarez*, Justice Breyer expressed concern that false statements statutes can be used selectively to prosecute individuals speaking on views disfavored by the government:

> [T]he pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately . . . provides a weapon to a government broadly empowered to prosecute falsity without more.

---

[8] A number of unpublished Court of Appeals decisions demonstrate exactly how police officers use RCW 9A.76.175 to justify arresting and searching individuals who are suspected of no crime whatsoever other than giving a false name. *See State v. Gamboa*, No. 23844-0-III, 2006 WL 3734927 (Wash. Ct. App. Dec. 19, 2006); *State v. Hewey*, No. 34704-1-II, 2007 WL 2122430 (Wash. Ct. App. July 25, 2007); *State v. Enlow*, No. 21218-1-III, 2004 WL 100331 (Wash. Ct. App. Jan. 22, 2004); *see also United States v. Butler*, CR06-0301RSL, 2007 WL 208360 (W.D. Wash. Jan. 23, 2007). In only one of these cases (*Hewey*) was the defendant actually charged with violating RCW 9A.76.175. Yet in every case, the statute justified searches that would have otherwise been unconstitutional for lack of probable cause of a crime.

132 S. Ct. at 2553 (Breyer, J., concurring). There is a substantial risk of selective prosecution here, given the relationship between RCW 9A.76.175 and the obstruction statute, RCW 9A.76.020,[9] which has an unnerving history of being disproportionately enforced against racial minorities.

For example, a 2008 report from the Auditor of the Office of Professional Accountability for the City of Seattle found that 51% of the obstruction charges filed in Seattle during a two-year period were filed against African-Americans, even though African-Americans constitute less than 8% of Seattle's population. Office of Professional Accountability, "Auditor's Report on Obstruction Arrests, January 2006–July 2008," at 7 (2008). Furthermore, a *Seattle Post-Intelligencer* investigation, which studied arrests over a six-year period, found that Seattle police officers arrest African-

[9] Enacted in 1975, RCW 9A.76.020 made it a crime to "knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties" or to "make any knowingly untrue statement to a public servant" if "lawfully required." 1975 ESSB 2092, chap. 285. In 1982, the "lawfully required" statement language was held unconstitutionally vague by *State v. White*, 97 Wn.2d at 101. The legislature responded in 1994, rewriting the entire statute such that section (1) read: "A person is guilty of obstructing a law enforcement officer if the person: (a) willfully makes a false or misleading statement to a law enforcement officer who has detained the person during the course of a lawful investigation or lawful arrest, or (b) willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." 1994 SSB 6138, chap. 196 § 1. In 1995, the legislature removed subsection (a) and created the separate and much broader crime at issue here for false or misleading material statements to public servants. 1995 SSHB 1557, chap. 285 § 32.

Americans "for the sole crime of obstruction—when it is not accompanied by an underlying charge—at a rate more than eight times as often as whites." Eric Nalder, et. al, "Anti-Crime Team Has a Tough Reputation–Maybe Too Tough: Unit Racks Up Most 'Obstructing' Arrests," *Seattle Post-Intelligencer* (Feb. 28, 2008).

While racial statistics are not available for RCW 9A.76.175, this statute has served as a substitute for obstruction after *Williams*. RP 4–5 (amending the obstruction charge to a false statements charge because of *Williams*). In fact, the sheriff in this case threatened to arrest K.L.B., a young African-American male, for obstruction based on a false statement alone, telling him that "lying to the police, if we find out [you're] lying and [you're], you know, hindering our ability to get to find out who [you are], that [you] could be charged with *obstructing a law enforcement officer*." RP 94 (emphasis added). Although this statement is legally incorrect after *Williams*, without a narrowing construction of "materiality" officers are able to effectively find probable cause for searches and seizures when individuals engage in unpopular speech even though no actual harm has occurred and even though the courts have rejected similar convictions for obstruction on the grounds that the First Amendment protects from such convictions when they are based solely on speech.

These concerns provide compelling reasons to narrowly construe RCW 9A.76.175. *See Lewis*, 415 U.S. at 136 (Powell, J., concurring) ("The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.").[10]

CONCLUSION

Broad constructions of "materiality" and "public servant" result in RCW 9A.76.175 criminalizing speech that is neither associated with a "legally cognizable harm" nor "likely to work particular and specific harm by interfering with the functioning of a government department." *Alvarez*, 132 S. Ct. at 2545, 2554. These elements must be narrowly construed consistent with *Alvarez* in order for the statute to be constitutional. A narrow construction will also lessen the likelihood that the statute will be selectively enforced or used to justify otherwise unconstitutional searches.

[10] This Court should also note that a criminal conviction under this statute has serious consequences, even when the punishment is trivial ("no further sanctions"). RP 164. Not only was K.L.B.'s conviction accompanied by a mandatory Victim Penalty Assessment, *id.*, he must admit to having a criminal conviction of a crime of dishonesty in future attempts to seek employment and housing, which carries serious consequences.

Respectfully submitted this 16th day of August, 2013.

BY: /s/ La Rond Baker_____
Sarah A. Dunne, WSBA #34869
Nancy L. Talner, WSBA #11196
La Rond Baker, WSBA #43610
Jason Zolle, Legal Intern
ACLU of Washington Foundation
Attorneys for *Amicus Curiae*
American Civil Liberties Union of Washington

Appendix A

Relevant Statutes

18 U.S.C. § 1001

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

RCW 9A.76.020

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor.

RCW 9A.76.175

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. “Material statement” means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

RCW 9A.04.110(13)

“Officer” and “public officer” means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government, and includes all assistants, deputies, clerks, and employees of any public officer and all persons lawfully exercising or assuming to exercise any of the powers or functions of a public officer.

RCW 9A.04.110(23)

“Public servant” means any person other than a witness who presently occupies the position of or has been elected, appointed, or designated to become any officer or employee of government, including a legislator, judge, judicial officer, juror, and any person participating as an advisor, consultant, or otherwise in performing a governmental function.