Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

RAPHAEL GOLB,

Defendant-Appellant.

AMICI CURIAE BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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STATEMENT PURSUANT TO RULE 500.1(f)

The proposed *Amici Curiae*, the National Association of Criminal Defense Lawyers (NACDL) and the New York State Association of Criminal Defense Lawyers (NYSACDL) have no parents, subsidiaries, or affiliates.

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BRIEF *AMICUS CURIAE* FOR THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

STATEMENT OF INTEREST

The New York State Association of Criminal Defense Lawyers, an affiliate of the National Association of Criminal Defense Lawyers and the state's largest private criminal bar group, is a nonprofit membership organization of some 750 criminal defense attorneys practicing throughout New York. It assists its members in better serving their clients and works to enhance their professional standing. NYSACDL strives to protect individual rights and liberties for all.

NYSACDL files this brief in support of appellant Raphael Golb because we believe that consistent application of the criminal law helps

ensure the fairness and accuracy of trials, and is vital to the justice system's reliability and predictability — values impugned by the decisions below.

QUESTIONS PRESENTED

1. In refusing to limit the definitions of "benefit," "harm," "injury" and "fraud" to tangible or legal effects, did the trial court impermissibly expand the scope of Penal Law § 190.25, essentially forcing the jury to punish conduct that has never been subject to this law?

2. Is the criminal impersonation statute unconstitutionally vague as applied, violating due process by penalizing conduct that appellant could not reasonably have viewed as criminal?

ARGUMENT

I. THE DEFINITIONS OF "FRAUD," "BENEFIT" AND "INJURY" SHOULD BE LIMITED TO TANGIBLE, MONETARY OR LEGAL BENEFITS AND HARMS TO AVOID UNCONSTITUTIONAL VAGUENESS, VINDICATE THE LEGISLATIVE PURPOSE AND IMPLEMENT EXISTING CASE LAW.

Golb's conviction of second degree criminal impersonation extends the reach of PL § 190.25(1) far beyond its historical and reasonable bounds. By its terms, the statute requires that the defendant impersonate a third party "with intent to obtain a benefit or to injure or

defraud another." A review of the relevant case law reveals that the statute has been applied primarily in two distinct areas: (1) traditional "fraud" cases where the perpetrator impersonates someone else to effect a financial deceit[1] and (2) cases where the defendant pretends to be someone else to avoid arrest or prosecution for a separate offense.[2] That is § 190.25(1)'s proper reach. Using it to criminalize conduct causing intangible harm as slight as professional annoyance sweeps well beyond the law's intended purpose and creates a minefield of questionable application.

a. Decisional law supports a construction limiting § 190.25 to actions involving monetary fraud or disruption of government and law enforcement functions.

The cases interpreting § 190.25 uniformly involve either financial fraud or obstruction of government and law enforcement activity.

To reiterate, the statute prohibits impersonating a third party "with intent to obtain a benefit or to injure or defraud another."

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1 *E.g., People v. Swift*, 278 A.D.2d 110 (1st Dept. 2000) (defendant applied for bank loan while impersonating a client); *People v. Calderon*, 143 Misc. 2d 315 (Sup. Ct. Bronx Co. 1989) (defendant used stolen credit card to make purchases from Sears).

2 *E.g., Tracy v. Freshwater*, 623 F.3d 90 (2d Cir. 2010) (defendant gave false name during traffic stop due to outstanding drug warrant); *Caridi v. Forte*, 967 F. Supp. 97 (S.D.N.Y. 1997) (defendant gave brother's name during traffic stop while driving with suspended license).

Of the 25 cases available for review, eight entailed conventional monetary fraud. The remaining 17 featured defendants who either falsely identified themselves to police or pretended to be someone else to escape liability for earlier crimes. Not a single case supports extending the statute to the kind of abstract and amorphous benefits and injuries alleged here.

By way of background, the People accused Golb of sending emails appearing to be from a professor, Lawrence Schiffman, and purporting to admit that he plagiarized writings by Golb's father. (A220) Golb testified, without contradiction, that he sought no pecuniary gain. Instead, he hoped to spark academic debate by focusing attention on what he saw as disreputable scholarship. (T1001)

The trial court's instructions on "benefit" and "injure" were so broad that virtually any intended benefit or harm, no matter how intangible or inconsequential, would criminalize any communication made in another's name. As for "benefit," the court told the jury it "mean[t] *any* gain or advantage to the beneficiary or ... a third person." (A77) Despite defense objection, the court did not define "injury" at all (A57), leaving it to cover every type of harm or wrong imaginable — including, as the People actually claim, "anything detrimental to one's

looks, comfort, health or success." (Resp. Br. 62) The Appellate Division cursorily affirmed, approving the broad definition of "benefit" and the unconstrained reach of "injure" and "defraud." *People v. Golb*, 102 A.D.3d 601, 602 (1st Dept. 2013).

Again, it is worth repeating that Golb sent emails to the NYU community to provoke scholarly dialogue over what he perceived as unethical plagiarism. (T1001) He did not want Prof. Schiffman to be wrongly disciplined for something he hadn't done, and sought no benefit apart from encouraging frank academic discussion. (T1001, 1006-07) But if the jury found, as the People urged, that he incidentally intended to advance his father's career, to annoy or irritate Schiffman, or even to hurt his feelings, then it was compelled to convict.

The limitless scope of the trial court's "benefit" and "injure" instructions punishes conduct that has never been the focus of criminal impersonation. The law was initially and paradigmatically applied to financial fraud. *People v. Bentley*, decided in 1974, involved the defendant's signing a supermarket receipt with a false name and promising to return to pay her bill, which she never did. 78 Misc. 2d 578 (2d Dept.) (App. Term). Other cases dealt with insurance fraud, credit card fraud and fraudulent bank loans — equally natural and sensible

applications. *E.g. Russo v. N. Y.*, 672 F.2d 1014, 1017 (2d Cir. 1982), *modified on reh'g*, 721 F.2d 410 (2d Cir. 1983); *Calderon*, 143 Misc. 2d 315; *People v. Nawrocki*, 163 A.D.2d 887 (4th Dept. 1990).

The balance of the cases involve defendants who falsely identified themselves to law enforcement in hopes of evading arrest or prosecution for other crimes. As noted in *People v. Chive,* the "benefit" sought need not be monetary but "may consist of the desire to avoid apprehension or prosecution." 189 Misc. 2d 653, 655 (Crim. Ct. Queens Co. 2001).

This has become the most common application of § 190.25. Examples include defendants who provide another's identification while driving with suspended or revoked licenses, or to skirt outstanding arrest warrants. *E.g., People v. Turner,* 234 A.D.2d 704 (3d Dept. 1996); *ante* n.2 & cases cited. In *People v. Hooks*, the defendant called the police while pretending to be a crime victim in a bid to close her own criminal case. 71 A.D.3d 1184 (3d Dept. 2010). These situations all represent instances of defendants trying to "put one over" on the government, and potentially interfering with the operation of police and the courts.

Though the statute need not be strictly confined to defendants seeking financial gain, extending it into the realm of the intangible is

unprecedented and inappropriate. As Golb argues, New York courts have wisely limited the application of fraud statutes to tangible, well-defined benefits and harms. App. Br. 45. The checkered history of federal honest services fraud, 18 U.S.C. § 1346, offers a cautionary contrast, illustrating the pitfalls of wedging intangible private wrongs into the domain of criminal law.

In *McNally v. United States*, the Supreme Court reversed a federal mail fraud conviction, 18 U.S.C. § 1341, holding that the term "defraud" referred only to the deprivation of tangible property, and not to the intangible deprivation of public employees' "honest services." 483 U.S. 350, 358 (1987). Along the way, the justices rejected the unanimous interpretation of every federal circuit court, explaining that they had incrementally expanded the term's reach and eventually stretched it beyond permissible bounds. *Id.* Cabining the statute to traditional money and property fraud avoided ambiguity and kept it from transgressing acceptable limits. *Id.* at 359.

In response to *McNally*, Congress amended the definition of "scheme to defraud" to expressly include deprivation of the "intangible right of honest services." 18 U.S.C. § 1346. That expansion sowed decades of confusion, as courts searched for a principled way to limit

the conduct constituting a deprivation of this "intangible right." *Sorich v. United States*, 555 U.S. 1204 (2009) (Scalia, J. dissenting from *cert.* denial).

The uncertainty culminated in a return to the Supreme Court, which significantly narrowed § 1346 to obviate notice and vagueness concerns – substantially the same concerns that fueled *McNally* in the first place. *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896, 2931 (2010). Just as *Skilling* pared the honest services law to its bribery and kickback core, this Court should restrict the criminal impersonation statute to pecuniary and governmental harms to avoid the pull of inexorable expansion — and the quagmire that results from mixing intangible rights with criminal fraud.

b. Expanding this fraud statute to cover intangible private harms finds no support in the precedents cited by the courts below.

The lower courts erred in relying on *People v. Kase*[3] to stretch § 190.25's parameters because Golb did not interfere with the exercise of government functions. *Kase* and the decision driving it, *Hammerschmidt v. United States*, 265 U.S. 182 (1924), both sounded in

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3 76 A.D.2d 532 (1st Dept. 1980), *aff'd*, 53 N.Y.2d 989 (1981).

harm against the government. As this case involves no such injury or fraud, the inclusion of intangible harms is unsupported.

Kase was a lawyer convicted of filing a false sales contract, PL § 175.35, along with an application to transfer a tavern's liquor license to new owners. The contract indicated a $15,000 purchase price though it was really $75,000, $60,000 to be paid under the table. 76 A.D.2d at 536. Kase argued that the People failed to prove he intended to "defraud the [s]tate," claiming it suffered no pecuniary loss — actual or potential — from his submitting the bogus document. *Id.* at 537. The court disagreed, citing *Hammerschmidt*, 265 U.S. at 188, for the proposition that "[t]here are few government responsibilities ... more important than the obligation faithfully to carry out its own law." 76 A.D.2d at 537.

As for Hammerschmidt, he was convicted of conspiring to defraud the government by circulating handbills and other items exhorting young men to disobey the Selective Service Act. 265 U.S. at 185. To "conspire to defraud the United States," the Court made clear, "means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions." *Id.* at 188. As in *Kase*, the statute at issue proscribed actions taken with intent to defraud the government, not a third party.

Unlike the governmental harms in *Kase* and *Hammerschmidt*, the injury asserted here was to a private individual. While *Kase* might support using the impersonation statute against defendants who aim to defraud the government, its logic is inapplicable to alleged harms visited on private citizens. Absent in such circumstances is any hint of interference with the state's ability to "faithfully carry out its own law," the basis for the ruling in *Kase*. 76 A.D.2d at 537. With no impairment of the state's ability to govern, intent to "obtain a benefit or to injure or defraud another" should be limited to (1) tangible monetary benefits or harms and (2) deliberate disruption of law enforcement to dodge liability for prior crimes.

c. Purely intangible private wrongs are properly addressed through civil, not criminal, law.

Adequate civil remedies exist to redress the sort of ephemeral personal grievances aired in this case, making criminal recourse ill-advised and unnecessary. If Golb's emails accusing Schiffman of plagiarism caused any residual harm beyond mere annoyance, irritation or hurt feelings, Schiffman could easily sue in tort.

To be sure, the People were unable to establish any intended or actual damage on the facts at hand. *Golb*, 102 A.D.3d at 603 (vacating

identity theft conviction for want of proof that Golb intended or attempted to defraud anyone of over $1000 in property). But if Schiffman or others similarly aggrieved could show non-speculative harm resulting from recklessly false allegations of professional impropriety, they could recover for defamation. Indeed, even in the absence of concrete harm, a claim for libel per se would lie on a bare preponderance showing — never mind proof beyond a reasonable doubt — that the charges "tend[ed] to injure another in his ... trade, business or profession." *Liberman v. Gelstein*, 80 N.Y.2d 429, 435 (1992).

Once again, the federal experience in this area is both instructive and cautionary. Courts and commentators alike lament Congress's penchant for criminalizing private sector wrongs that are fundamentally civil in character. *See generally, e.g.,* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, 26 Heritage Foundation Legal Memorandum 1 (June 16, 2008). The resulting expansion of federal jurisdiction has turned the U.S. Code into a sprawling compendium of "technically distinct []though factually overlapping" statutory offenses, *United States v. Bailin*, 977 F.2d 270, 277 (7th Cir. 1992), punishing everything from economic espionage and trade secret theft to copyright infringement, violations of online service terms and even personal use

of office computers. *E.g.*, 17 U.S.C. § 506; 18 U.S.C. §§ 1030, 1831-32, 2319.

As the criticism mounts, Congress is finally trying to reverse this regrettable trend. To avoid trapping the unwary, it is now considering a bill that would require public disclosure of each and every federal law and regulation that carries a criminal sentence. *See Smarter Sentencing Act of 2013*, S. 1410, 113th Cong. (2013).

Federal judges, too, have begun to push back. In one recent example, the en banc Ninth Circuit Court of Appeals narrowly construed the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, finding that a broad reading would "make criminals of large groups of people" with "little reason to suspect that they are committing a federal crime." Garden-variety employment relationships, the court added pointedly, are better governed by the law of tort and contract. *United States v. Nosal*, 676 F.3d 854, 859-60 (2012).

As the federal experience attests, the idea that every private harm demands a criminal remedy has adverse consequences. Among them are executive aggrandizement, increased bureaucracy, exploding court dockets and diversion of investigative, prosecutorial and judicial resources. The impulse to over-criminalize should thus be resisted

absent clear legislative intent to the contrary. *Cf. Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011) (discussing "clear statement rule"). With no such clear indication here, the elusive injuries alleged are appropriately addressed in a civil forum. And to flip the coin, the lower courts' broad interpretation penalizes conduct that most people would not recognize as criminal.

If Schiffman and others like him feel aggrieved by online speech with academic value, they have adequate remedies in tort. It is one thing to prosecute a man for actions that defraud another of money or property or deceptively impede government functions. But it is something else entirely to jail the actor for causing a bruised ego or, at worst, diminished credibility as a scholar.

d. A limiting construction is necessary because the lower courts' expansive interpretation of "benefits" and "harms" provides inadequate notice of prohibited conduct and renders the statute void for vagueness.

The novel and surprising interpretation of the courts below renders § 190.25 unconstitutionally vague as applied. To survive a vagueness challenge, a penal law must define the conduct proscribed with "sufficient definiteness" and not encourage "arbitrary and discriminatory enforcement." *Skilling*, 130 S. Ct. at 2927.

The vices of vagueness are on full display in this case, extending the impersonation statute far outside its historical bounds. The unprecedented excursion into intangible private harms — including "anything detrimental" to one's "comfort" (Resp. Br. 62) — so alters the scope of prohibited conduct that Golb could not have realized he was violating the law prior to the lower courts' rulings.

That § 190.25 contains an intent requirement does not save it from vagueness when the intent required is so unbridled. Though an intent element makes a statute less susceptible to vagueness, *People v. Shack*, 86 N.Y.2d 529, 539 (1995), it still must specify what the intent entails to pass constitutional muster. *See Skilling*, 130 S. Ct. at 2927. To say that a scienter requirement relieves a statute of vagueness only begs the question of what a defendant must intend. And the lower courts' conception of what a defendant must intend is excessively broad, verging on absurd. With no delineation of the types of benefits and harms required, anyone who assumes another's identity for any purpose at all would be guilty of criminal impersonation.

Golb did not seek to "benefit," "injure" or "defraud" anybody as those terms have hitherto been construed. While he may have intended to fool the email recipients regarding his identity, the deception's

intended result scarcely resembles the pecuniary or legal advantages typically in play. And even if he incidentally intended to enhance his father's professional stature — or to annoy, harass, alarm or insult Prof. Schiffman — those objectives alone cannot suffice to trigger penal liability. Indeed, even under *Kase*'s capacious definition of "defraud," no state entity was interfered with — and no lawful government function obstructed — when Golb sent emails purporting to come from Schiffman. If the interpretation below is upheld, then the statute is impermissibly vague as applied to Golb.

That interpretation is particularly problematic in the context of digital media. Subsection (4) explicitly extends § 190.25 to electronic communications. And combating online impersonation is certainly a worthy goal. Still, as the Ninth Circuit aptly observed in a parallel setting, sweeping in intangible benefits and harms risks criminalizing large groups of people who would have little reason to know they are breaking the law. *Cf. Nosal*, 676 F.3d at 859-60 (strictly construing CFAA to avoid vagueness and curb threat of arbitrary and discriminatory prosecution). The ease of online impersonation makes financial fraud a legitimate concern. But the broad interpretation adopted below would

penalize virtually anyone who impersonates others on the Web for wholly innocuous reasons.

The inclusion of intangible "benefits" and "harms" without a limiting principle leads to absurd results, punishing conduct that no ordinary person would perceive as illegal. It would criminalize behavior as benign as accessing a friend's Facebook account and posting a status update saying, "I'm a loser." Or sending text messages from a third party's phone to trick the recipient into thinking the subscriber wrote them.

If "benefit" includes *any* benefit, however slight, then the practical joker in these cases commits a crime if he intends to get a laugh when the truth comes out. And if "injury" is left undefined, a jury could convict on a mere finding that the prankster intended to ridicule or embarrass his mark.

That is not the sort of conduct the legislature meant to proscribe. No ordinary person pulling such stunts would expect to be hauled into court on criminal charges. But without a limiting construction the stunts would nonetheless result in penal sanction.

Because the statute is open to multiple interpretations, one of which risks constitutional infirmity, the court must "embrace that which

will preserve its validity." *People v. Couser*, 258 A.D.2d 74, 80 (4th Dept. 1999), *aff'd*, 94 N.Y.2d 631 (2000). Such fuzzy laws must be read narrowly, in a way that "avoids injustice, hardship, constitutional doubts or other objectionable results." *Matter of Jacob*, 86 N.Y.2d 651, 667 (1995). Straining the intent requirement to reach intangible harms like professional distress or wounded feelings makes it virtually limitless and intolerably vague.

The rule of lenity further supports a narrow construction. Ambiguity in a criminal statute must be resolved in favor of those who are subject to it. *See United States v. Santos*, 553 U.S. 507, 514 (2008). Criminal law requires clarity and certainty, so an interpretation that delimits the bounds of liability and fosters consistent application is preferred over one that creates uncertainty and unpredictability. *See Burrage v. United States*, No. 12-7515, 2014 WL 273243 (Jan. 27, 2014). Doubt about a statute's proper scope must be resolved in favor of lenity. *Id* at *7.

A limiting construction requiring intent to cause financial benefit or harm — or to disrupt government or police functions — is the correct interpretation of § 190.25. This reading preserves the core aims

of the criminal impersonation ban and rescues it from constitutional frailty.

Augmenting the statute's traditional uses, our interpretation would cover defendants who, say, exploit others' personal information to apply for credit cards or electronic bank loans. It reaches those who create online profiles in other peoples' names to duck responsibility for unlawful internet scams. Finally, under *Kase* and *Hammerschmidt*, it could conceivably encompass any digital impersonation that inhibits the operation of government, such as registering to vote or applying for a municipal license while using another's identity.

In sum, clearly delineated limits on what a defendant must intend are necessary to ensure the statute's consistent application and prevent unconstitutional vagueness.

CONCLUSION

Properly understood, PL § 190.25 neither captures the conduct ascribed to Raphael Golb nor subjects him to criminal condemnation. His conviction crumbles accordingly.

Dated: New York, NY
Feb. 11, 2014

Respectfully submitted,

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AFFIDAVIT OF SERVICE

ROBERT CALIENDO, being duly sworn, deposes and says that he is over the age of eighteen (18) years, that he is not a party to this action, and that on February 11, 2014, he served one (1) true and correct copy of the Notice of Motion for Leave to be Recognized as *Amici Curiae*, Affirmation in Support of Motion for Leave to File Brief *Amici Curiae*, and Proposed Brief *Amici Curiae* upon the parties to this appeal via Federal Express addressed to the following:

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Sworn to before me this
11th day of February 2014

Notary Public – State of New York