No. 05-929

In the Supreme Court of the United States

UNITED SENIORS ASSOCIATION, INCORPORATED,
PETITIONER

v.

SOCIAL SECURITY ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1. Whether Section 1140(a)(1) of the Social Security Act, 42 U.S.C. 1140(a)(1), which prohibits a private entity from using the term "Social Security" and related terms in a manner that conveys the message that it comes from, or has the approval or endorsement of, the Social Security Administration, is substantially overbroad, in violation of the First Amendment.

2. Whether Section 1140 of the Social Security Act is unconstitutionally vague.

3. Whether Section 1140 of the Social Security Act is unconstitutional as applied to petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 423 F.3d 397. The decisions of the Department of Health and Human Services (Pet. App. 30a-32a, 33a-70a, 71a-80a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2005. A petition for rehearing was denied on October 25, 2005 (Pet. App. 88a-89a). The petition for a writ of certiorari was filed on January 23, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In legislation enacted in 1988, Congress addressed the problem posed by private entities whose

mass mailings could easily be confused with official government communications. See Staffs of the Subcomm. on Oversight and the Subcomm. on Social Security of the House Comm. on Ways and Means, 102d Cong., 2d Sess., *WMCP 102-45*, *Deceptive Solicitations* 3 (Comm. Print 1992) (1992 Report). Congress was particularly concerned that the envelopes of certain mass mailings could falsely convey an affiliation with the Social Security Administration (SSA). For example, certain mailings included "on the front of the envelope" "the words[] 'Important Social Security Information Enclosed[.]'" *Ibid.* Furthermore, some organizations used envelopes that "closely resemble[d] a typical Government envelope," *id.* at 4, or included references to Postal Service regulations "concerning the delivery and forwarding of mail" in order "to make [the] envelopes appear official," *id.* at 5.

The official appearance of those communications made it difficult for recipients to distinguish between private mailings and formal government communications. See *1992 Report* 4-5. The private mailings thus interfered with the ability of the SSA to convey important information to the public. See *id.* at 5 ("Such deception potentially interferes with the ability of the Government to effectively correspond with the public and increases the likelihood that true Government mailings will be destroyed without being opened."). To combat the problem, Congress enacted Section 1140 of the Social Security Act. That provision prohibits a person from "us[ing], in connection with any item constituting an advertisement, solicitation, * * * or other communication," the term "Social Security" or related terms—

> in a manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false

> impression that such item is approved, endorsed, or authorized by the Social Security Administration [or related agencies] or that such person has some connection with, or authorization from [those government agencies].

42 U.S.C. 1320b-10(a)(1).[1] An entity that violates Section 1140 is subject to a civil monetary penalty. 42 U.S.C. 1320b-10(b).

b. The statute and accompanying regulations provide a detailed procedure for the enforcement of Section 1140. The SSA initially provides written notification identifying the statements in a mailing that it believes problematic and explaining the basis for a proposed penalty. 20 C.F.R. 498.109(a). The notice explains that such an initial determination may be challenged in a hearing before an administrative law judge (ALJ). See 20 C.F.R. 498.109(a)(5). At the hearing, a party may be represented by counsel; conduct discovery; present evidence; present and cross-examine witnesses; and present oral argument to the ALJ. See 42 U.S.C. 1320a-7a(c)(2); 20 C.F.R. 498.203(a). The agency bears the burden of proving a violation of Section 1140 by a preponderance of the evidence. 20 C.F.R. 498.215(b) and (c).

Any party can appeal the ALJ's decision to the Departmental Appeals Board of the Department of Health and Human Services (Appeals Board). 20 C.F.R.

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[1] Congress originally enacted the provision in 1988 as part of the Medicare Catastrophic Coverage Act. See Pub. L. No. 100-360, Tit. IV, § 428(a), 102 Stat. 815. The law was amended in 1994. See Pub. L. No. 103-296, Tit. I, § 312, 108 Stat. 1526. The law was further amended in March 2004, but those amendments do not apply to the communications at issue here. See Pub. L. No. 108-203, Tit. II, § 207(b), 118 Stat. 513.

498.221(a). The Appeals Board has the discretion to affirm, reverse or modify the ALJ's determination, or to decline review. See 20 C.F.R. 498.221(h). The Commissioner of Social Security then has the authority to reverse or modify the recommended decision of the Appeals Board. 20 C.F.R. 498.222(a). If the Commissioner declines to exercise that authority within 60 days of the Board's decision, the determination of the Appeals Board becomes the final decision of the agency. *Ibid.*

The agency's final decision is subject to direct review in the court of appeals. 42 U.S.C. 1320a-7a(e). The appellate court has the authority to affirm, modify, or set aside the agency's determination in whole or in part, or remand the case to the agency for further consideration. *Ibid.*

2. a. Petitioner United Seniors Association distributed two mailers entitled "SOCIAL SECURITY ALERT." See Pet. App. 4a-5a, 24a, 26a. The envelope of the first mailer stated in large bold letters "URGENT—SOCIAL SECURITY INFORMATION ENCLOSED" and directed the recipient to "OPEN IMMEDIATELY." *Id.* at 25a. The envelope on the second mailer contained similar language. See *id.* at 5a, 26a-27a. Each envelope also included specific "Handling Instructions" that appeared to direct the Postal Service to deliver each as an "Urgent Alert." See *id.* at 4a-5a, 24a, 26a; see also *ibid.* (containing a "Postal Audit Control" number, a "Package Tracking" number, and a block apparently authorizing delivery without a signature). In fact, however, petitioner's mailers were delivered via standard, third-class mail. See *id.* at 5a. According to a postal inspector, the "additional instructions on the envelopes such as the tracking number, handling instructions, and authorization for delivery without

signature served no legitimate postal function." *Id.* at 5a-6a.

b. For several years prior to the distribution of the two mailers at issue here, the Social Security Administration received complaints about mailers sent out by petitioner. See Pet. App. 5a. The SSA had sent several informal "cease and desist" letters to petitioner, stating that the agency had made an initial determination that petitioner's use of phrases like "Social Security Alert" and "Urgent Social Security Information Enclosed" violated Section 1140, and requesting voluntary compliance. See *id.* at 54a, 84a-85a. Petitioner did not correct the problems with its mailers, and the agency ultimately sent petitioner written notice of its intent to assess a penalty. See *id.* at 81a-87a.

3. The Administrative Law Judge found that petitioner violated Section 1140. See Pet. App. 33a-66a. The ALJ explained that Section 1140 applied to "words or symbols on the outside of an envelope * * * without consideration of the envelope's contents," *id.* at 36a-37a, noting that that interpretation was supported by both the plain text of the statute and its legislative history.[2] See *id.* at 36a-39a; *id.* at 38a (Congress enacted Section 1140 because recipients could "become so inured to deceptively worded envelopes that they might throw out unopened mailings that were actually from government agencies").

The ALJ found that petitioner knew or should have known that its envelopes would falsely convey the endorsement of the SSA, stating that petitioner's "intent to deceive is evident from the design of the envelopes."

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[2] The ALJ reiterated an earlier ruling that Section 1140 applied to envelopes. See Pet. App. 75a-78a.

Pet. App. 51a. The ALJ noted in particular the "incessant repetition of the phrase 'Social Security'" and the "use of phrases such as 'Social Security Alert'" and "Social Security Information Enclosed" in conjunction with "Open Immediately" and "Urgent." *Id.* at 53a. The ALJ found that the handling instructions on the envelopes, which indicated that the mailers were sent by express mail or overnight delivery, would further mislead recipients into believing that they contained important and official material on Social Security. See *id.* at 52a-53a. Those same features also led the ALJ to conclude that petitioner's envelopes could reasonably be construed as falsely conveying the endorsement of the agency. See *id.* at 41a-45a.

Petitioner sought further administrative review. The Appeals Board and the Commissioner declined to reverse or modify the ALJ's decision, see Pet. App. 29a, 31a, thereby leaving it in place as the agency's final determination. See 20 C.F.R. 498.222(a).

4. The court of appeals affirmed. Pet. App. 1a-23a. First, the court rejected petitioner's contention that Section 1140, which prohibits the improper use of specified terms "in connection with any * * * advertisement, solicitation, * * * or other communication," 42 U.S.C. 1320b-10(a)(1), did not apply to the envelopes of petitioner's mailers. See Pet. App. 8a-11a. The majority deferred to the agency's reasonable construction of the statute as applicable to envelopes. *Id.* at 10a-11a. In a concurring opinion, Judge Shedd stated that, in his view, the statute by its plain terms applied to envelopes. See *id.* at 21a-23a.

The court further held that the record amply supported the agency's conclusion that the envelopes of petitioner's mailers violated Section 1140. See Pet. App.

12a-16a. The court found that the "repeated references to 'Social Security', the 'Social Security Alert' border, the phony handling instructions, and the envelopes' resemblance to special shipping methods could reasonably lead recipients to believe that the envelopes contain official information relating to their Social Security benefits[.]" *Id.* at 15a-16a.

Finally, the court rejected petitioner's assertions that the statute is unconstitutionally vague or overbroad. The court observed that Section 1140 prohibits communications that use the term "Social Security" and related terms in a manner that the speaker "knows or should know would convey" or that "*reasonably could* be interpreted * * * as conveying" the false impression of an SSA endorsement. Pet. App. 18a-19a. The court concluded that those two statutory prongs "overlap[] significantly," noting that petitioner had "not suggested a single instance" in which a communication "'reasonably could' be construed as conveying the false impression of governmental endorsement without also constituting a use that a 'person knows or should know' would convey a false impression of governmental endorsement." *Id.* at 19a. The court noted that in this case, for example, the ALJ had "found that [petitioner] knew or should have known that its envelopes were misleading *and* that the envelopes reasonably could be construed as conveying the false impression of governmental endorsement." *Ibid.* Accordingly, for purposes of its constitutional analysis, the court treated the two prongs as creating similar standards of objective reasonableness. See *id.* at 19a-21a.

With respect to petitioner's overbreadth challenge, the court found that Section 1140 does not burden a substantial amount of protected speech. See Pet. App. 17a-

20a. The court determined that the statute does not target protected speech, but simply seeks to prohibit private entities from speaking in a manner that reasonably conveys the endorsement of the SSA. The court found that "[o]ne who intends to mislead individuals into thinking that the government has endorsed his message is not entitled to First Amendment protection, nor is one whose message is so deceptive and misleading that he should have known that the message conveyed the false impression of governmental endorsement." *Id.* at 18a. The court determined that, to the extent Section 1140 reaches protected speech, such as charitable solicitation, it simply "regulates the manner in which a charity may solicit[.]" *Id.* at 19a. The court held such a time, place, and manner restriction on charitable solicitation to be justified by the government's "overriding" interest "in protecting Social Security recipients from deceptive mailings." See *ibid.*

The court of appeals dismissed petitioner's assertion that, by prohibiting petitioner from distributing deceptive envelopes, the statute might suppress the protected speech within those envelopes. See Pet. App. 17a. The court reasoned that "nothing in § 1140(a)(1) * * * prohibits [petitioner] from mailing the same information in a non-deceptive envelope." *Ibid.* The court stated that "[a]ll that is at issue is a statute that forbids the impersonation of a federal agency by a private organization bent on sowing confusion among beneficiaries of a program and thereby thwarting the purposes it was intended to serve." *Id.* at 21a (quoting *National Taxpayers Union* v. *SSA*, 376 F.3d 239, 244 (4th Cir. 2004) (Wilkinson, J., concurring)).

The court also rejected petitioner's vagueness challenge. See Pet. App. 19a-21a. The court observed that

the statute "proscribes in clear, common language" that a speaker may not use specified words and phrases "in a manner that could reasonably confuse or deceive the intended audience." *Id.* at 21a n.5 (internal quotation marks omitted). The court found that, because the statute incorporates an "objective standard of reasonableness," it is not unconstitutionally vague. See *ibid.* The court also noted that petitioner did "not mount a serious vagueness challenge" to the first prong of the statute, which prohibits communications that the speaker "knows or should know" would convey the false impression of an SSA endorsement. *Ibid.* Although petitioner did challenge the second, "reasonably could be interpreted" prong, the court had already concluded, as noted above, that "the vast majority of violators of § 1140(a)(1)"—including petitioner itself, in this case—"will be adjudged in violation under the first prong" and the first prong therefore "will subsume most of the second prong." *Ibid.* In those circumstances, petitioner's challenge to the second prong simply reduced to "[s]peculation about possible vagueness in hypothetical situations not before the court," which, the court held, "will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Id.* at 20a-21a (quoting *Hill* v. *Colorado*, 530 U.S. 703, 733 (2000)).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, no other court of appeals has issued a published opinion addressing or construing the

provisions of Section 1140.[3] Further review therefore is not warranted.

1. Section 1140 prohibits private entities from using the term "Social Security" or related terms "in a manner" that the entity "knows or should know would convey" or that "reasonably could be interpreted * * * as conveying" the "false impression" that its communication has been approved, endorsed, or authorized by the Social Security Administration. 42 U.S.C. 1320b-10(a)(1). As the court of appeals concluded, the statute thereby serves the "overriding" purpose of protecting the line of communication between the SSA and the beneficiaries of that program. See Pet. App. 2a-3a, 19a. It is essential that the agency be able to convey important information to program participants. Many current beneficiaries rely on Social Security checks as a significant—if not primary or sole—source of income, and many other people covered by the program rely on vital information conveyed by the SSA to plan for their future needs. See *id.* at 2a.

As Congress recognized, private communications that falsely convey the authorization or endorsement of the SSA imperil the agency's ability to communicate with the population that it serves. If recipients and other members of the public cannot readily distinguish between official communications and private mailings, they may give short shrift to government communications, ignoring them altogether or treating them with suspicion. Avoiding confusion is also important because

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[3] One brief, unpublished decision of the Fifth Circuit affirmed a decision imposing a fine under Section 1140 and rejected the argument that the statute was unconstitutionally overbroad and vague. See *National Fed'n of Retired Persons* v. *Social Sec. Admin.*, 115 Fed. Appx. 763 (2004).

the SSA is the recipient of much confidential and carefully protected information. It is vital that individuals participating in the program feel absolutely secure in their communications with the agency. As the court of appeals determined, Section 1140 addresses those concerns by "forbid[ding] the impersonation of a federal agency by a private organization bent on sowing confusion among beneficiaries of a program and thereby thwarting the purposes it was intended to serve." Pet. App. 21a (quoting *National Taxpayers*, 376 F.3d at 244 (Wilkinson, J., concurring)).

In serving that overriding purpose, Section 1140 does not infringe First Amendment rights. Indeed, as the court of appeals determined, Section 1140 does not target protected speech, but instead prohibits private entities from speaking in a manner that reasonably conveys the authorization or endorsement of the SSA. As the court of appeals observed, "[o]ne who intends to mislead individuals into thinking that the government has endorsed his message is not entitled to First Amendment protection, nor is one whose message is so deceptive and misleading that he should have known that the message conveyed the false impression of governmental endorsement." Pet. App. 18a.

2. Petitioner contends (Pet. 8-14) that the court of appeals should have evaluated Section 1140 under a strict scrutiny standard.

a. As an initial matter, petitioner did not properly raise its "strict scrutiny" claim in the court of appeals, nor did that court pass upon it.[4] For that reason alone, further review is not warranted. See *United States* v.

[4] Petitioner did not make its "strict scrutiny" argument until its petition for panel rehearing and rehearing en banc. The court of appeals denied the petition without opinion.

United Foods, Inc., 533 U.S. 405, 416-417 (2001); *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

b. In any event, petitioner's argument is mistaken and does not warrant this Court's review. The crux of petitioner's argument (Pet. 12-14) is that Section 1140 prevents petitioner from distributing non-fraudulent, non-commercial speech pertaining to Social Security. By its terms, however, the statute regulates only the *manner* in which a private entity may communicate, prohibiting the use of the term "Social Security" and related terms "in a manner" that is reasonably understood to convey the approval or endorsement of the SSA. See Pet. App. 19a. Thus, private entities may say whatever they wish about Social Security (or any other subject matter) without running afoul of the statute. What a private entity may not do is "speak for" the government. *Downs* v. *Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1017 (9th Cir. 2000), cert. denied, 532 U.S. 994 (2001).

In an analogous context, this Court upheld a statute that prohibited unauthorized use of certain words ("Olympic," "Olympiad," etc.) to promote exhibitions, athletic performances, or other competitions. *San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522 (1987). Like Section 1140, that statute restricted both commercial and noncommercial speech. See *id.* at 540. Indeed, the statute in *San Francisco Arts & Athletics* was broader than Section 1140, because it required no showing that the use of the proscribed words would or reasonably could cause confusion. This Court concluded, however, that the statute "restricts only the manner in which [the user] may convey its message." *Id.* at 536. Accordingly, the Court analyzed it as a time, place, or manner restriction that is constitutional if it is not "greater than necessary to further a substan-

tial governmental interest." *Id.* at 537. Like the statute in *San Francisco Arts & Athletics*, Section 1140 too is subject at most to an intermediate level of scrutiny, and must be sustained as a regulation that does not burden substantially more speech than necessary to serve a significant government interest. See *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 189 (1997); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799-800 (1989).

Indeed, petitioner's arguments underscore the importance of ensuring that private entities not "speak for," or take actions that lead people to believe they are speaking for, the SSA. As petitioner observes (Pet. 13), the First Amendment protects non-commercial speech, even when it is "false, deceptive, or misleading." Section 1140 thus does not prevent private entities from making inaccurate or misleading statements about Social Security. But it is particularly important that entities that may be making such statements do not convey the message that they are speaking for or on behalf of the SSA or have its endorsement or approval. The agency plainly has an overriding interest in ensuring that people who receive messages concerning social security know whether those messages come from, or have the endorsement or approval of, the agency itself.

3. Petitioner contends (Pet. 14-17) that Section 1140 is vague and overbroad.[5] The court of appeals correctly rejected those contentions.

a. Section 1140 embodies an objective standard that offers "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" and that discourages "arbitrary and discriminatory enforce-

[5] Petitioner does not challenge (Pet. 8) the court of appeals' conclusions that Section 1140 applies to envelopes and that petitioner's envelopes violated the statute.

ment." Pet. App. 20a (quoting *Hill* v. *Colorado*, 530 U.S. 703, 732 (2000). The statute prohibits the use of the term "Social Security" and related terms only "in a manner" that the speaker "knows or should know would convey," or that "reasonably could be interpreted * * * as conveying," the approval or endorsement of the agency. 42 U.S.C. 1320b-10(a)(1). As the court of appeals correctly held, that "objective standard of reasonableness" ensures that the statute is not unconstitutionally vague. Pet. App. 21a n.5; see *Artistic Entm't, Inc.* v. *City of Warner Robins*, 223 F.3d 1306, 1310 (11th Cir. 2000) (rejecting a vagueness challenge in part because of the "objective standard" established by the statute), cert. denied, 541 U.S. 988 (2004); *Hotel & Rest. Employees Int'l Union Local 54* v. *Read*, 832 F.2d 263, 268-269 (3d Cir. 1987) (same); see also *Grayned* v. *City of Rockford*, 408 U.S. 104, 113 (1972) (a statute is more likely to be unconstitutionally vague if it relies on a "completely subjective standard"). The statute "proscribes in clear, common language" that a speaker should not use specified terms in a manner that the speaker knows or should know would confuse or deceive the intended audience into believing that the speaker's message was approved by the SSA. See Pet. App. 21a n.5.

Indeed, the "reasonable recipient" standard created by Section 1140 mirrors the "reasonable reader" standard under libel law, which applies an objective standard in determining whether a reader would regard an erroneous statement as fact or opinion. See *Potomac Valve & Fitting Inc.* v. *Crawford Fitting Co.*, 829 F.2d 1280, 1288 (4th Cir. 1987); *Levin* v. *McPhee*, 119 F.3d 189, 196 (2d Cir. 1997) (the "dispositive inquiry" in libel "is whether a reasonable [reader] could have concluded that [the publications were] conveying facts about the

plaintiff") (internal quotation marks omitted). Such an objective standard provides adequate notice to potential violators and prevents the agency from enforcing the provision in an arbitrary or subjective manner. See *Hill* v. *Colorado*, 530 U.S. 703, 732-733 (2000).

Petitioner argues (Pet. 16-17) that Section 1140 is vague because entities may not escape liability under the statute merely by including on their communications a disclaimer of affiliation with the SSA. See 42 U.S.C. 1320b-10(a)(3) ("Any determination of whether the use of one or more words * * * is a violation of this subsection shall be made without regard to any inclusion in such item * * * of a disclaimer of affiliation with the United States Government or any particular agency or instrumentality thereof."). The legislative history shows that Congress enacted that provision because "[m]any consumers do not read, or cannot read, disclaimers on mass mailings." H.R. Rep. No. 506, 103d Cong., 2d Sess. 72 (1994). In any event, petitioner did not properly raise an objection to the disclaimer provision in the court of appeals and may not do so for the first time in this Court. See *United Foods, Inc.*, 533 U.S. at 416-417; *Glover*, 531 U.S. at 205. Moreover, petitioner does not contend (and, indeed, could not contend) that either of its envelopes contained any disclaimer of affiliation with the SSA. Accordingly, this case provides no occasion for examining that provision.

b. The court of appeals also correctly rejected the contention that Section 1140 suppresses a substantial amount of protected speech and is therefore overbroad. The breadth of Section 1140 is cabined by the objective reasonableness standard it embodies. As the D.C. Circuit observed in the analogous context of libel, a "reasonable reader" standard will not be satisfied simply

because "some small number of careless readers might be misled[.]" *Lebron* v. *Washington Metro. Area Transit Auth.*, 749 F.2d 893, 897 n.8 (1984). The enforcement structure underlying Section 1140 also serves to safeguard protected speech, requiring the final administrative decisionmaker to examine a communication on the basis of a hearing. See 20 C.F.R. 498.203(a). The administrative review scheme also protects First Amendment rights by placing the burden on the government to prove a statutory violation. See 20 C.F.R. 498.215(b)(2); *Illinois* v. *Telemarketing Assoc., Inc.*, 538 U.S. 600, 620 (2003) (an enforcement scheme better protects free speech when it places the "full burden of proof" on the government). The objective reasonableness standard of Section 1140, and its extensive procedural protections, ensure that the provision is tailored to reach only those mailings that threaten the ability of SSA to communicate with program participants.

Petitioner focuses its overbreadth attack on the "reasonably could be interpreted" prong of Section 1140. See Pet. 2, 12, 13, 14-16. In so doing, petitioner does not appear to challenge the first prong of the statute, which prohibits communications that the sender "knows or should know would convey" such agency approval. The court of appeals, however, determined that the two prongs "overlap[] significantly" and that the "reasonably could be interpreted" prong independently prohibits "at most * * * a minuscule portion of the speech reached by the statute." Pet. App. 19a. Indeed, petitioner's conduct itself was found to have violated both the "knows or should know" and the "reasonably could be interpreted"

prongs of the statute.[6] There is no concrete indication that Section 1140 ever has or ever could be applied in a circumstance in which the speaker neither knew nor should have known of the false impression being conveyed, and in the court of appeals petitioner could not identify a "single instance" of such an application. *Ibid.* In those circumstances, the "reasonably could be interpreted" prohibition could not render the statute "substantially overbroad." *Virginia* v. *Hicks*, 539 U.S. 113, 122 (2003).

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[6] Petitioner argues (Pet. 15) that the ALJ's finding that it knew or should have known that its envelopes conveyed a false impression "arose solely because [petitioner] disagreed with the [Social Security Inspector General's] interpretations of the law." Petitioner refers to the ALJ's observation that the SSA, the entity "charged by Congress * * * with interpretation and enforcement of" Section 1140, had repeatedly "expressed serious concerns" about petitioner's envelopes, and that "[t]hese discussions put [petitioner] on notice" that it was "at risk for being charged with" statutory violations. See Pet App. at 54a-55a. Petitioner's argument, even if correct, would have nothing to do with its claim that Section 1140 is *facially* overbroad. In any event, petitioner's contention that the ALJ's finding was based solely on petitioner's disagreement with the agency is unfounded. The ALJ did correctly note that petitioner had received ample warning from SSA regarding its violations before this enforcement action was initiated. Such warning was indeed relevant in applying the "know or should have known" standard. But the ALJ's decision was primarily based on the ALJ's extensive analysis of the objective features of petitioner's envelopes. See Pet. App. 52a-54a (noting, *inter alia*, petitioner's "sophistication" and "vast experience in making mass mailings," the fact that "[m]uch of the information on the address labels had nothing to do with the fact that these envelopes were being sent as bulk rate mailings," the "incessant repetition of the phrase 'Social Security'" and the use of "Social Security Alert'" in conjunction with "Open Immediately" and "Urgent," and "the incorporation of the phrase 'Social Security Alert' into the address label part of the envelopes").

4. Finally, petitioner asserts (Pet. 17-19) that Section 1140 is unconstitutional as applied to it. To a large extent, petitioner simply restates its facial challenge in as-applied terms. Petitioner repeats its assertions (Pet. 17-18) that Section 1140 prohibits it from distributing non-commercial, non-fraudulent speech pertaining to Social Security. But, as discussed, Section 1140 does not prevent petitioner from "conveying its message," *San Francisco Arts & Athletics*, 483 U.S. at 536, but simply prohibits it from speaking "in a manner" that conveys that it is speaking for or on behalf of, or with the endorsement or approval of, the SSA.

Petitioner also contends (Pet. 18-19) that the statute is unconstitutional as applied because the SSA did not produce specific evidence demonstrating that assessing a penalty against petitioner for these violations would "reduce the likelihood that SSA mailings will be destroyed without being opened" or would remedy other evils targeted by the statute. Petitioner does not clearly explain how that contention pertains to the constitutionality of the statute. And there was evidence before the ALJ, including testimony from a professor of elder law, that "typical Social Security recipients would believe that [petitioner's] envelopes 'contain[ed] information about their social security benefit.'" Pet. App. 6a (quoting testimony). In any event, the SSA is not required to demonstrate, every time it seeks to enforce Section 1140, that particular mailers distributed by a single private entity will (standing alone) disrupt the line of communication between the SSA and the general public. The statute was enacted to address the cumulative effect of *all* the private mailings that would, in the absence of the prohibition, convey the authorization or endorsement of the agency. The SSA therefore amply satisfied

its burden by showing that the envelopes on petitioner's mailers would convey that false impression to a reasonable recipient.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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