No. 08-1245

In the Supreme Court of the United States

NATIONAL TAXPAYERS UNION, PETITIONER

v.

SOCIAL SECURITY ADMINISTRATION,
OFFICE OF THE INSPECTOR GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that Section 1140(a)(1) of the Social Security Act, 42 U.S.C. 1320b-10(a)(1), which prohibits communications that deceptively use the term "Social Security" and related words "in a manner which [the author] knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression" of endorsement by the Social Security Administration, may be applied to petitioner's conduct consistently with the First Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is not published in the *Federal Reporter* but is reprinted in 302 Fed. Appx. 115.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2008. A petition for rehearing was denied on January 9, 2009 (Pet. App. 58a-59a). The petition for a writ of certiorari was filed on April 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1140(a)(1) of the Social Security Act prohibits a person from "us[ing], in connection with any item constituting an advertisement, solicitation, * * *

or other communication," the term "Social Security" or related words—

> 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 that such person has some connection with, or authorization from, the Social Security Administration.

42 U.S.C. 1320b-10(a)(1).[1] A determination as to whether a communication comports with these strictures "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." 42 U.S.C. 1320b-10(a)(3). An entity that violates Section 1140(a)(1) by sending a mass mailing is subject to a civil monetary penalty "not to exceed" $5,000 for each piece of offending mail. 42 U.S.C. 1320b-10(b); see 20 C.F.R. 498.103(c).

Congress enacted Section 1140(a)(1) to address its concern that "the number of mass mailing appeals to Social Security beneficiaries with inaccurate and misleading information was dramatically increasing." *United Seniors Ass'n* v. *SSA*, 423 F.3d 397, 399 (4th Cir. 2005) (internal quotation marks omitted), cert. denied, 547 U.S. 1162 (2006); see Staffs of the Subcomm. on

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[1] Congress originally enacted the provision in 1988 as part of the Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 428(a), 102 Stat. 815. The law was amended in 1994 to reflect the Social Security Administration's newly independent status. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 312, 108 Stat. 1526.

Oversight and the Subcomm. on Social Security of the House Comm. on Ways and Means, 102d Cong., 2d Sess., *Deceptive Solicitations* 3 (Comm. Print 1992) (*1992 Report*) ("During the past decade, soliciting senior citizens by deceptive means has become a big and lucrative business."). Congress found that there was "a proliferation of marketing techniques designed to give the public the false impression that they are dealing with a Government agency," and that "[m]any of these solicitations are targeted at the elderly who are particularly vulnerable to these unscrupulous practices." H.R. Rep. No. 7, 103d Cong., 1st Sess. 47 (1993).

In particular, Congress was concerned that "a number of individuals and organizations have adopted marketing techniques utilizing words, phrases, names, and symbols which give the public the impression that they are dealing directly with a Government agency or an organization endorsed by the Federal Government." *1992 Report* 1. "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." *Id.* at 5.

2. In 2002, the Social Security Administration (SSA) received a complaint about a mailing by petitioner, a non-profit corporation that engages in taxpayer advocacy. Pet. App. 2a. Among other things, the envelope for the mailing declared in underlined capital letters and in red ink that it contained an "*OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY*." *Id.* at 29a. The envelope further indicated that the survey, which it described as "certified," had been "commissioned by [petitioner] for the Social Security Administration, White House and Congress of the United States." *Ibid.* The

envelope instructed recipients (in boldfaced capital letters) to "PLEASE OPEN *IMMEDIATELY* AND *KINDLY RESPOND* AS SOON AS POSSIBLE." *Id.* at 31a. It also purported to request from the postmaster "IMMEDIATE DELIVERY * * * IN ACCORDANCE WITH POSTAL REGULATIONS: DMM300.1.0." *Ibid.* No such postal regulation exists.

The text of the mailing identified the recipient by name and listed specific identifying information about the recipient. Pet. App. 33a. It stated in red, underlined, and capitalized text that "*YOUR NAME WAS SPECIFICALLY CHOSEN* to receive this *OFFICIAL SURVEY ON SOCIAL SECURITY*" because "you have a *VALID SOCIAL SECURITY NUMBER* and live in one of the *QUALIFYING ZONES* from which *we are required* to select at least *ONE* participant." *Id.* at 33a-34a. The mailing further indicated that petitioner was an "*authorized* sponsor" of the survey. *Id.* at 36a (emphasis added). The mailing closed with an exhortation to "do your part to help [petitioner] save Social Security by enclosing your donation." *Ibid.*

After making a preliminary determination that the communication violated Section 1140(a)(1), SSA sent petitioner a letter asking it to "cease and desist" from sending any additional communications that appeared to be authorized or endorsed by SSA. Pet. App. 19a. Petitioner indicated that it would revise the mailings to remove any impression of SSA authorization. *Id.* at 19a-20a. Petitioner then sent out thousands of additional mailings that omitted the language stating that the survey was commissioned for SSA, but continued to declare in red ink and in capital letters that it was an "*OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY*," that it had been "COMMISSIONED BY [PETITION-

ER] FOR THE WHITE HOUSE AND CONGRESS OF THE UNITED STATES," and that petitioner was the "authorized sponsor" of the survey. *Id.* at 37a, 52a. SSA concluded that the revised mailing was also misleading and, accordingly, sent a second cease-and-desist letter. *Id.* at 20a.[2]

Petitioner then sent out a third version of the mailing, which was materially similar to the second, except that it also included a disclaimer in capital letters stating, in part, that petitioner was "LEGALLY RECOGNIZED AND REGISTERED AS A NOT FOR PROFIT ORGANIZATION BY THE UNITED STATES GOVERNMENT" and was "INDEPENDENT FROM SAID GOVERNMENT." Pet. App. 39a-40a. This disclaimer was followed immediately by an assertion that "SAID OFFICIAL NATIONWIDE POLL ON SOCIAL SECURITY" was commissioned for the President of the United States and Congress. *Id.* at 41a.

SSA concluded that this third version of the mailing was likewise deceptive. Pet. App. 21a. In early May 2005, SSA sent petitioner a letter proposing a civil penalty of $274,582, or 50 cents for each of the more than 500,000 deceptive mailings that petitioner had sent. *Id.* at 3a, 21a.

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[2] Although SSA requested that petitioner provide a written plan to comply with Section 1140(a)(1), petitioner declined to do so, and instead filed a pre-enforcement challenge in federal district court. Pet. App. 20a-21a. The district court dismissed the suit on the ground that the comprehensive adjudicatory scheme established by Section 1140 precluded pre-enforcement challenges. *Ibid.* The Fourth Circuit affirmed, and this Court denied the petition for a writ of certiorari. *National Taxpayers Union* v. *SSA*, 376 F.3d 239 (2004), cert. denied, 543 U.S. 1146 (2005).

3. Following a two-day hearing, an administrative law judge (ALJ) issued a decision authorizing the imposition of SSA's proposed penalty. Pet. App. 18a-57a. The ALJ heard testimony from numerous witnesses, including recipients of petitioner's mailings, the copywriter who designed the mailings, petitioner's president and other officers, and an expert in gerontology and surveys. Analyzing the text and appearance of the three mailings in detail, the ALJ found that all three mailings "use[d] the term 'Social Security' as 'part of an overall design' that conveys the impression that the mailer contains an important Social Security document (the survey) sent on behalf of official government sources." *Id.* at 38a; *id.* at 31a-43a. The text of each mailing repeatedly used prohibited terms in conjunction with language designed to sound official and to convey the impression that SSA authorized the survey. *Ibid.* In addition, petitioner's witnesses stated that they had deliberately used misleading language and personalized references to the recipients' benefits in order to increase the likelihood that recipients would open the mailings. *Id.* at 45a-48a. And despite SSA's repeated warnings, petitioner made only "minimal, cosmetic changes" to the mailers that did not remedy the fundamentally deceptive nature of the solicitations. *Id.* at 48a. Accordingly, the ALJ held that petitioner's solicitations deceptively conveyed the impression that SSA had authorized the mailings, in violation of Section 1140(a)(1), and that petitioner knew or should have known about the misleading effect that its solicitations conveyed. *Id.* at 43a-44a.

SSA's Departmental Appeals Board affirmed the ALJ's decision in April 2007. Pet. App. 4a. That decision became final in June 2007, and petitioner sought review of that decision in the court of appeals. *Ibid.*

4. In an unreported decision, the court of appeals affirmed SSA's decision and upheld the monetary penalty. Pet. App. 1a-14a. As relevant here, petitioner argued that Section 1140(a)(1)'s application to petitioner's conduct violated the First Amendment, on the ground that *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), requires a showing of intent to defraud before the government may limit speech. Pet. App. 5a. The court rejected that contention, reasoning that *Village of Schaumburg* "acknowledged that a direct and substantial limitation on protected activity is constitutional if it serves a sufficiently strong subordinating interest." *Ibid.* (citation and internal quotation marks omitted). The court found that Congress has a strong and substantial interest in protecting Social Security recipients from deceptive practices like petitioner's, and in ensuring that such mailings do not encourage recipients to discard communications actually sent by SSA. *Id.* at 5a-6a.[3]

ARGUMENT

Petitioner renews its contention that Section 1140(a)(1) is unconstitutional as applied to its conduct, arguing that the court of appeals' decision conflicts with *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), and subsequent decisions of this Court. The court of appeals' decision is correct, and it does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

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[3] The court also rejected petitioner's facial challenge to the statute; its argument that the monetary penalty violated the Eighth Amendment; and its *Daubert* challenge to the government's expert witness. Pet. App. 6a-14a. Petitioner does not renew those contentions before this Court. See Pet. 8-10; Pet. App. 9a.

1. Section 1140(a)(1) bars the use of the term "'Social Security' * * * in a manner which [the author] 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 [SSA]." 42 U.S.C. 1320b-10(a)(1). As the court of appeals noted, insofar as use by charities is concerned, this provision requires "only that charities refrain from using deceptive language when soliciting." Pet. App. 6a. Private entities may say whatever they wish about Social Security or any other topic, so long as they do not use the term "Social Security" and related words "in a manner" that they know or should know would convey the endorsement of SSA. Section 1140(a)(1) thus does not prohibit petitioner from disseminating its chosen message, but simply regulates the *manner* in which petitioner may communicate.

This Court has previously characterized an analogous prohibition on the unauthorized use of certain words related to the Olympic Games as a time, place and manner restriction that may be upheld when tailored to a substantial government interest. See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 536 (1987) (noting that statute applied to non-commercial speech, but that it "restrict[ed] only the manner in which [the speaker] may convey its message," not the speaker's ability to convey its chosen message by using other words). In addition, even a "direct and substantial" limitation on charitable solicitation is valid if it serves a "sufficiently strong, subordinating interest." *Village of Schaumburg*, 444 U.S. at 636.

The court of appeals correctly concluded that "the government has a substantial interest in protecting So-

cial Security recipients from deceptive mailings" like petitioner's. Pet. App. 5a-6a (citing *Village of Schaumburg*, 444 U.S. at 636, which stated that protecting the public from deception is a "substantial" interest). Section 1140(a)(1) is designed to protect the line of communication between SSA and Social Security beneficiaries, and to "ensure that when the SSA sends legitimate mail to beneficiaries, the recipients will open it and not perceive it as 'junk mail.'" *Ibid.* (characterizing that interest as "strong [and] subordinating"). When Social Security recipients are bombarded with deceptive mailings, there is an "increase[d] * * * likelihood that true Government mailings will be destroyed without being opened," *1992 Report* 5, and that recipients who do open government mailings will be uncertain as to their legitimacy. In addition, because SSA is the recipient of confidential and sensitive information, it is critical that individuals participating in the program feel absolutely secure in their dealings with the Agency. Deceptive communications threaten to dampen that confidence. See *United Seniors Ass'n* v. *SSA*, 423 F.3d 397, 407 (4th Cir. 2005) (government has an "overriding" interest in preventing deceptive mailings targeting Social Security recipients), cert. denied, 547 U.S. 1162 (2006).

Petitioner's solicitations contain precisely the sort of misleading invocation of the term "Social Security" that Congress determined would harm SSA's relationship with Social Security recipients. The ALJ found that the mailings "were fraught with deliberately ambiguous and deceptive language" that petitioner knew or should have known conveyed the impression not only that petitioner's survey was authorized by SSA, Pet. App. 34a, 43a, but that petitioner had obtained confidential information about mailing recipients from SSA, *ibid.*, and

that failure to return the survey could adversely affect recipients' benefits, *id.* at 42a. The ALJ also concluded that petitioner is "an experienced mass marketer of ideas that knew exactly what it was doing when it designed the mailers," *id.* at 45a, and that it "deliberately employed protected language to induce recipients to open its mailers and to respond," *id*. at 50a. The ALJ's findings were based on the testimony of recipients of the solicitations, as well as the mailings' creator, who admitted to deliberately using Social Security-related terms in order to increase the chance that the mailings would be opened. *Id.* at 45a-48a.

Petitioner does not contest these findings, which demonstrate beyond doubt that the government has an overriding interest in preventing the harm arising from petitioner's deceptive mailings. SSA's application of Section 1140(a)(1) to petitioner's deceptive conduct directly supports the government's strong interests, and therefore does not infringe on legitimate First Amendment concerns. See *United Seniors Ass'n*, 423 F.3d at 407 ("[O]ne whose message is so deceptive and misleading that he should have known that the message conveyed the false impression of governmental endorsement" is "not entitled to First Amendment protection."); see also *San Francisco Arts & Athletics*, 483 U.S. at 539 (recognizing, in rejecting First Amendment claim, substantial public interest in preventing confusion in use of word "Olympics").[4]

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[4] Amicus Free Speech Defense and Education Fund (FSDEF) contends (Br. 19-22) that the second prong of Section 1140(a)(1), which prohibits using the listed terms "in a manner which reasonably could be interpreted or construed" as conveying SSA's endorsement, has no meaningful limit. To the contrary, Section 1140(a)(1)'s use of an objective reasonableness standard cabins the reach of the statute. See

2. Petitioner contends (Pet. 8-10; see Amicus Br. 12-18) that *Village of Schaumburg*, 444 U.S. 620 (1980), and *Madigan* v. *Telemarketing Associates, Inc.*, 538 U.S. 600 (2003), permit the government to regulate only those charitable solicitations that involve "actual fraud." The only other court of appeals to consider that argument rejected it, see *United Seniors Ass'n*, 423 F.3d at 407, and in any event, petitioner's argument is meritless.

In *Village of Schaumburg* and its progeny, this Court applied its "strong, subordinating interest" test, 444 U.S. at 636, to invalidate a series of "prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level." *Telemarketing Assocs.*, 538 U.S. at 612. The Court did not suggest that only solicitations involving actual fraud may constitutionally be prohibited; rather, the Court simply invalidated the blanket prohibitions at issue in those cases because they were not adequately tailored to the government's interest in preventing fraud. *Id.* at 615; see *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988) ("[U]sing percentages * * * is not narrowly tailored to the State's interest in preventing fraud."); *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 966 (1984) (statute "operate[d] on a fundamentally

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United Seniors Ass'n, 423 F.3d at 407-408; *Lebron* v. *Washington Metro. Area Transit Auth.*, 749 F.2d 893, 897 n.8 (D.C. Cir. 1984) (discussing reasonableness standard in the libel context). The fact that the burden is on the government to prove a violation, Pet. App. 26a, provides further protection. See *Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). In any event, the ALJ found, and petitioner does not contest, that petitioner knew or should have known that its mailings were deceptive within the meaning of Section 1140(a)(1)'s first prong.

mistaken premise that high solicitation costs are an accurate measure of fraud"); *Village of Schaumburg*, 444 U.S. at 636 (requirement that charities use at least 75% of their donations for charitable purposes served the government's interest "only peripherally").

Nor does *Telemarketing Associates* hold or suggest that the government may not target "representations made in individual cases," 538 U.S. at 617, unless those representations are made with fraudulent intent. The only question at issue in *Telemarketing Associates* was whether *Village of Schaumburg* "rule[d] out, as supportive of a fraud claim [brought by the Illinois Attorney General] against fundraisers, any and all reliance on the percentage of charitable donations fundraisers retain for themselves." *Id.* at 606. In upholding the State's complaint, the Court emphasized that the State's fraud claim was not based solely on the percentage of donations kept by the fundraiser, which would be impermissible, but instead was founded on allegations of specific knowing misrepresentations. *Id.* at 618. The Court did not consider the government's ability to prohibit deceptive solicitation where it need not rely on the percentage of donated funds retained, and the Court also noted that it "confine[d] * * * consideration to the complaint in this case, which alleged" knowledge of falsity. *Id.* at 621 n.10.

Telemarketing Associates and the *Village of Schaumburg* line of cases thus do not suggest that the government can regulate a non-profit organization only by prohibiting actual fraud. See *United Seniors Ass'n*, 423 F.3d at 407. Moreover, under *San Francisco Arts & Athletics*, the government has a distinct and substantial interest in preventing confusion regarding suggestions of endorsement by or connections with the govern-

ment in communications regarding the Social Security program. 483 U.S. at 539-540. In declining to require a showing of fraudulent intent, Pet. App. 5a, the court of appeals did not contravene any decision of this Court, and further review is not warranted.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Amicus FSDEF raises an additional argument not within the question presented (Br. 22-26), namely, that the court of appeals' use of an unpublished decision to dispose of this case violated Article III. That contention is meritless. The fact that a case is disposed of without a formal published opinion "in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983) (per curiam); see *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) (courts of appeals "have wide latitude in their decisions of whether or how to write opinions").