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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 09-cr-00497-REB

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. RICK GLEN STRANDLOF,

a/k/a/ Rick Duncan,

Defendant.

PROPOSED BRIEF OF *AMICUS CURIAE* EUGENE VOLOKH

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INTEREST OF THE *AMICUS CURIAE*

Eugene Volokh has taught First Amendment law for more than 10 years, and has written over 30 law review articles on the First Amendment, as well as the casebook *The First Amendment and Related Statutes: Problems, Cases, and Policy Arguments* (Foundation Press, 3d ed. 2007). In particular, he has looked closely at the "false statements of fact" exception to First Amendment protection.

In response to this Court's Dec. 18, 2009 order, he is filing this brief, which offers an impartial analysis of the First Amendment question raised by this case. This brief was not solicited by either of the parties, or by anyone else; Volokh has no relationship to the defense or the prosecution in this case, nor has he conferred with the defense or the prosecution. The brief is being filed pro bono, with no financial support from the parties or any other organization (except that the filing fees are being paid out of Volokh's UCLA Faculty Support Account).

INTRODUCTION AND SUMMARY OF ARGUMENT

The boundaries of the "false statements of fact" exception to First Amendment protection are not well-defined. The exception is not limited solely to defamation and fraud: It covers many kinds of false statements of fact, including false light of invasion of privacy, intentional infliction of emotional distress through false statements (even when the statements are not defamatory), trade libel, perjury, unsworn false statements of fact made to government officials, and falsehoods that are likely to lead to physical harm. And while some of these statements are not only false but very harmful (libel is the classic example), others are considerably less harmful: Consider, for instance, false statements about a person that are not defamatory but that distress the person because they

place him in a false light.

But some false statements of fact are immune from liability, even if they are knowingly false. This is settled for knowingly false statements about the government. It is also probably true for knowingly false statements about broad historical, scientific, or current-events controversies, such as the Holocaust or global warming. And the Court has never articulated a clear rule for which knowingly false statements of fact are constitutionally protected and which are not.

Still, even in the absence of such a clear rule, punishing lies about one's own medals is probably constitutionally permissible, because the reasons for protecting some knowing falsehoods do not apply to such lies. In particular, because claims about having gotten a medal are so objective and verifiable, punishing false statements in this field is especially unlikely to deter true statements.

Finally, the Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), has made clear that some content discrimination within unprotected categories of speech is unconstitutional because it poses the risk of viewpoint discrimination. But the Stolen Valor Act does not pose such a risk, and seems likely to fit within one of the exceptions the *R.A.V.* court identified.

ARGUMENT

I. The Supreme Court Has Never Fully Defined the Scope of the "False Statements of Fact" First Amendment Exception

As this Court's Dec. 18, 2009 order recognizes, it is not clear exactly when false statements of fact—even knowingly false statements—are constitutionally unprotected. ("Knowingly false" is used in this brief as shorthand for statements (1) made with knowledge of their falsehood or with conscious reckless disregard of a substantial risk that they are false—the *New York Times v. Sullivan*

"actual malice" standard—and (2) reasonably perceived as statements of fact, rather than as fiction, hyperbole, humor, or parody, see *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970); *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988).)

On one hand, this zone of no protection extends beyond just defamation and fraud, *see New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003). It also covers false light invasion of privacy, where the only damage is the offensiveness of the falsehood, not its injury to reputation. *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974). It apparently covers knowingly false statements that intentionally inflict severe emotional distress, even in the absence of defamation or invasion of privacy. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). It covers perjury. *Konigsberg v. State Bar*, 366 U.S. 36, 50 n.10 (1961). It likely covers unsworn false statements to federal officials, which are punishable under 18 U.S.C. § 1001. *See, e.g., Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982). It likely covers "trade libel," even outside the special context of commercial advertising, *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990), even though trade libel does not injure the special individual dignitary interests that have long justified defamation law, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990) (quoting with approval *Rosenblatt v. Baer*, 383 U.S. 75, 92-93 (1966) (Stewart, J., concurring)). It probably explains the continued soundness of Justice Holmes' statement that "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919).

And it makes sense that such statements are generally constitutionally unprotected, because

"there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Once a sufficient mens rea—usually, "actual malice"—is shown, such false statements of fact are constitutionally punishable.

But on the other hand, the Court has made clear that some speech may not be constitutionally punished without regard to whether a factfinder concludes that the statement was made with "actual malice." *New York Times Co. v. Sullivan* held that false statements *about a government agency* (as opposed to false statements about a particular government official) may not be punished, period. "For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.'" *New York Times Co. v. Sullivan*, 376 U.S. at 291 (quoting *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923)); *see also Rosenblatt v. Baer*, 383 U.S. 75, 83 (1966) (following *New York Times Co. v. Sullivan* on this).

Likewise, the First Amendment probably limits prosecutions for alleged lies about history or science (at least outside commercial advertising, and absent defamation of a specific living person). A case like *State v. Haffer*, 162 P. 45 (Wash. 1916), in which defendant was found guilty of libeling President Washington—the relevant state law then allowed prosecutions for defaming the dead—might well come out differently today. *Schaefer v. United States*, 251 U.S. 466 (1920), in which speakers were convicted for "willfully . . . [publishing] false reports" during World War I, might similarly come out in favor of First Amendment protection today. *See id.* at 494 (Brandeis, J., dissenting) (concluding that allowing such prosecutions "subjects to new perils the constitutional liberty of the press," and "will doubtless discourage criticism of the policies of the government").

Prosecutions for Holocaust denial are probably forbidden by the First Amendment, even if a factfinder could be persuaded that the deniers are knowing liars and not just fools. *See, e.g.*, Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 Fla. St. U. L. Rev. 1 (2008) (so concluding); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1116-20 (2006) (likewise); James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 Case W. Res. L. Rev. 1091, 1105 n.64 (2004) (saying that such statements "may well" be protected); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 52 U. Chi. L. Rev. 225, 239-40 (1992) (concluding that false statements about science and about the government should be protected). *But see* Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 Geo. Mason L. Rev. 35, 85 (1997) (concluding that Holocaust denial could be punished, but as part of a broader argument—which is likely inconsistent with current First Amendment law—that "hate speech" and "[g]roup[ ]libel" can be punished as well).

Perhaps because of this uncertainty, there is also controversy about whether false statements of fact in election campaigns may be punished, even using comparatively mild civil sanctions. *Compare, e.g.*, *State v. Davis*, 499 N.E.2d 1255 (Ohio Ct. App. 1985) (affirming criminal conviction for knowingly making false statements in a political campaign), *with State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691 (Wash. 1998) (striking down, by a 5-4 vote on this score, a law imposing civil fines for knowingly false statements in election campaigns). Likewise, the law is unsettled for some other categories of false statements as well. Many knowingly false

statements are unprotected, because false statements of fact lack constitutional value. But some knowingly false statements are protected, and others may well be, too.

II. Punishing False Statements About One's Own Credentials Is Especially Unlikely to Deter Valuable Speech

A. The Reasons for Protecting Some Knowing Falsehoods

This uncertainty in the false-statements-of-fact caselaw means that there is no clear answer to whether the Stolen Valor Act is constitutional. Nonetheless, several factors point to the conclusion that the Act probably is constitutional, if it is limited—as the Court's Dec. 18, 2009 suggests—to knowingly false claims.

Why would any knowingly false statements of fact be constitutionally protected? The chief reason is probably the one the Supreme Court identified in *New York Times v. Sullivan*: The risk of liability for falsehoods tends to deter not just false statements but also true statements. *New York Times v. Sullivan*, 376 U.S. at 278-79. Some speakers may sincerely believe, for instance, that some statement about the government is true, but may realize that they might be mistaken. Other speakers may be confident that the statement is true, but may worry that a hostile jury will wrongly conclude that the statement is false. In either case, the speakers may be deterred from making true and therefore constitutionally valuable statements for fear that the statements will be punished as false statements. That is the famous "chilling effect" of punishment for false statements. *Id.* at 300-01 (Goldberg, J., concurring in the judgment).

New York Times v. Sullivan generally tried to deal with this risk by requiring clear and convincing evidence that the speaker knew the statement was false. *Id.* at 285-86. But for statements

about the government, the Court created a rule of per se constitutional protection, without any need for a jury to infer whether the speaker knew that his statement was false. The Court did not explain in detail its rationale for creating this per se rule; the Court said, "For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence,'" *id.* at 292, but it did not elaborate on that "good reason." But probably the reason the Court had in mind was that an "actual malice" rule for alleged libels on the government would only diminish, and not eliminate, the chilling effect of defamation liability.

The same per se rule of constitutional protection might well apply to false statements about historical figures, historical events, war news, or scientific theories. The truth about such matters is especially likely to be uncertain, and outside the speaker's personal knowledge. Resolving what is true may be an especially politicized endeavor, with judges, prosecutors, and jurors of different ideological persuasions reaching different conclusions about science, history, or complex current events. The chilling effect of possible liability would thus be especially great in many such cases.

Moreover, "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New York Times*, 376 U.S. at 279 n.20 (quoting John Stuart Mill, *On Liberty* 15 (1947)). What is our main assurance that conventional wisdom among historians or scientists is likely to be correct, even when we ourselves lack the expertise to personally evaluate the question? Precisely that scholars have reached and maintained a consensus on the conventional wisdom, in the face of others' unfettered and continued freedom to challenge and try to rebut that consensus.

But say that factual criticism of a historical or scientific theory were banned, even using a ban limited only to criticism that a jury finds to be false and insincere. Confidence in the consensus view would then be less justified. First, we could not know whether the continued consensus stems from scholars' not being exposed to outsider challenges, rather than from its continued scholarly acceptance despite the challenges. Second, we could not know whether the continued consensus is more apparent than real, because scholars who do find themselves having doubts are deterred from expressing them.

B. The Reasons for Protecting Some Knowing Falsehoods Do Not Apply Here

Punishing people's false claims about their own military decorations implicates none of these concerns. Whether I have received a military decoration is unusually easy for me to be sure about, and much easier than it is for me to be sure about whether some other person has committed a crime or done his job incompetently (the issue in many libel cases). *Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.25 (1976) (concluding that false statements in commercial advertising should be more easily punishable than other false statements because "[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else"). The truth of such claims is also unusually easy for the jury to determine with precision, so jurors' ideological sentiments are relatively unlikely to influence their judgment. And protecting false statements about such matters is not necessary for protecting the reliability of historical or scientific debate.

C. Knowing Falsehoods May Be Punished Even When They Are Only Modestly Harmful

It is true that false claims about one's medals will not ordinarily cause as much harm as, say, libel may. But because false statements of fact are seen as generally lacking constitutional value, the Court has never required a showing of any "compelling government interest" in order to restrict such statements. The compelling interest test has generally been reserved for restrictions on valuable speech—such as expression of opinion, *see, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989), or true factual assertions, *see, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989)—and not for restrictions on low- or no-value speech. None of the cases cited at the start of Part I, which authorized punishment or liability for false statements of fact, used the compelling interest test.

In fact, some false statement cases involve harms that are considerably more modest than those implicated in the typical libel case. Liability for false light invasion of privacy, for instance, is not premised on any injury to a person's reputation, and on the often devastating personal, social, and professional effects that reputational harm can cause. Rather, false light liability is aimed at compensating for the sense of "mental distress from having been exposed to public view" in a misleading way, even when the speech is "laudatory" rather than derogatory. *Time, Inc. v. Hill*, 385 U.S. 374, 385 n.9 (1967). Such distress is a nontrivial harm, but not nearly as grave as that caused by libel. It is far from clear that there is a compelling government interest in preventing such distress. Yet even such a relatively modest harm can justify restricting knowingly false statements of fact, where the factors discussed above—the danger of an undue chilling effect, or the value of unfettered debate to scientific or historical inquiry—are absent.

And the harm caused by false claims of military honors is substantial, though not as great as the

harm caused by other statements. People who lie about decorations generally do so for a reason: They may want to get elected to public office, *see, e.g.*, Government's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss Indictment, *United States v. Alvarez*, No. 2:07-cr-01035-ER (C.D. Cal. Jan. 14, 2008), http://volokh.com/files/alvarezresponse.pdf, or to get more credibility for their own statements in another's election campaign, or to get more credibility in some nonelectoral political debate, or even just to get more respect from neighbors, acquaintances, and potential business associates. They are thus trying to manipulate people's behavior through falsehood, and their false claims are quite likely to indeed affect others' behavior (especially since having a military decoration is often seen as an especially important mark of good character). *Cf. Long v. State*, 622 So. 2d 536 (Fla. Ct. App. 1993) (holding constitutional a state law that criminalizes false claims of possessing an academic degree). Just as trying to affect federal agent's behavior through falsehoods is a significant enough harm to justify punishment of such falsehoods, *see* 18 U.S.C. § 1001, so trying to affect private citizens' behavior through falsehoods is a significant enough harm.

III. Though the Stolen Valor Act Treats Some False Statements Differently from Others, Such Content Discrimination Is Likely Constitutionally Permissible

Finally, any restriction on certain kinds of false statements of fact must be consistent with the nondiscrimination principle of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992): "[C]ontent discrimination" even within a class of "proscribable speech" is presumptively unconstitutional, *id.* at 387, because it may "impose special prohibitions on those speakers who express views on disfavored subjects," *id.* at 391. Thus, for instance, a law punishing knowingly false statements about the war in

Afghanistan might well be unconstitutional, because it might be an attempt to specially burden one side of the debate, and make criticisms of the war more dangerous.

But though the Stolen Valor Act does treat false statements about one's military decorations differently from other false statements, it appears to fit within one of the exceptions to the *R.A.V.* principle: "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 390. False claims of military honors are not limited to any particular viewpoints, or even particular topics of debate. They can equally be raised by people who are anti-war, who are pro-war, or who are just trying to get themselves elected to an office that is entirely unrelated to the military.

CONCLUSION

For these reasons, the Stolen Valor Act, if read to apply only to knowingly false representations, is likely constitutional.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2010, I electronically filed the foregoing

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