IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 09-CR-00497-REB

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. RICK GLEN STRANDLOF,
a/k/a Rick Duncan,

Defendant.

**AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

Pursuant to this Court's **Order for Supplemental Briefing** [#20], The Rutherford Institute submits this *amicus curiae* brief in support of the **Motion to Dismiss** [#13] filed by the Defendant, Rick Glen Strandlof. For the reasons set forth below, *amicus* supports the Defendant's claim and argument that the Stolen Valor Act, 18 U.S.C. § 704, violates the First Amendment to the United States Constitution, both on its face and as applied to the Defendant.

ARGUMENT

The Court's Supplemental Briefing order understandably expresses confusion over the scope of protection granted by the First Amendment to false statements of facts. Although the government cites to excerpts from Supreme Court opinions indicating that false statements of fact have "no constitutional value," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), that Court has on other occasions granted constitutional protection

to false statements in order to allow sufficient "breathing room" for the exercise of the right of expression secured by the First Amendment. *Id.* at 341 (citing *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964)).

While the government may stress the passages in case law that intentionally false statements are not protected by the First Amendment, it is clear that this categorical approach to false statements is not consistent with the broad protection afforded pure speech under the First Amendment. Any claim that intentionally false statements are not protected by the First Amendment ignores the fact that much speech that is false and misrepresents reality, even knowingly so, is allowed in our society and its status as protected expression is beyond question. For example, an author's fictional work is clearly protected by the First Amendment, even if the work is not labeled a "novel" or readers are not otherwise alerted to the fact that the events represented in the work are not true. Indeed, it seems axiomatic that such fictional works would be protected by the First Amendment even if the author intended that readers believe the events depicted were true. *See American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 830 F.2d 294, 306 (D.C. Cir. 1987) (narrative fiction deserves considerable First Amendment protection, even if the narrative fails to convey its fictional nature).[1]

In this same vein, there is little question that fictional works that are intended to deceive persons into believing they are true are protected by the First Amendment despite the knowing falsity. Thus, the *Blair Witch Project*, a 1999 film about film students'

[1] Although the court in *American Postal Workers Union* distinguished narrative fiction from intentionally false statements of fact, it did not hold that intentionally false statements are beyond First Amendment protection. The court was careful to point out that "deliberate, *harmful* lies" may be the basis for government sanction. *American Postal Workers Union*, 830 F.2d at 306.

search for a fabled witch is presented as a documentary but is in reality fiction.[2] Similarly, the October 30, 1938 broadcast of a radio play based on H.G. Welles' "War of the Worlds" involved a fictional depiction of on-the-scene news reporters describing an invasion of Earth by aliens, was presented with the hope that listeners would believe it described actual, ongoing events in order to increase the effect upon the listening audience. Additionally, performance or conceptual art sometimes involves falsity and deception as a way of making a point. *See* Peter Goldie, *Conceptual Art, Social Psychology, and Deception*, 1 Postgraduate Journal of Aesthetics, No. 2 (Aug. 2004).[3] In each case, there is little doubt that the presentations were protected by the First Amendment, notwithstanding that they were knowingly false and presented as real events.

Thus, any unqualified assertion that knowingly false statements of fact are unprotected by the First Amendment is belied by the actual scope of protection afforded by the Free Speech Clause of that provision. One commentator on the First Amendment has written that although the government clearly has the power to ban and regulate many kinds of falsehoods,

> the First Amendment forbids government restriction of some forms of deception. Indeed, accepting unlimited government power to prohibit all deception in all circumstances would invade our rights of free expression and belief to an intolerable degree, including, most notably—and however counterintuitively—our rights to personal and political self-rule. A regime of zero tolerance for any form of deception, enforced at will by government officials or random opponents, undoubtedly would curtail unacceptably the willingness of the populace to speak, especially in ways that might anger, or perhaps merely involve, the antideception police. Ironically perhaps, but realistically, policing deception would tend to undermine the enlightenment function of free expression. Such a regime also could interfere with expressive autonomy and tend to inhibit

[2] *See* http://en.wikipedia.org/wiki/The_Blair_Witch_Project (last visited January 18, 2010).

[3] Available at http://www.british-aesthetics.org/uploads/Peter%20Goldie%20FINAL.pdf.

> creativity and experimentation, privacy, and the joys and solace that may come from spreading small, private, or otherwise benign delusions. It would not be a regime compatible with a system of free expression.

Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex and Somewhat Curious Relationship*, 53 U.C.L.A. L. Rev. 1107, 1109 (2006).

Protection under the First Amendment should not depend upon the absence of any knowing falsehood, but instead upon whether the false statement threatens to inflict the kind of harm the government has an interest in preventing or punishing. A categorical refusal to extend protection to knowing falsehoods, regardless of whether they inflict any cognizable harm, is inconsistent with the general principle that "the First Amendment bars the government from dictating what we see or read or speak or hear." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002). *See also United States v. Carmichael*, 326 F. Supp. 2d 1267, 1290 (M.D. Ala. 2004) ("[S]peech is presumptively protected by the First Amendment."). Where the Supreme Court has carved out exceptions to this general principle, it has done so on the basis of some concrete, particularized harm that would result from the speech. As Dean Varat has pointed out, "[e]ach time the Supreme Court has applied the knowing or reckless falsity exception in the past, it has done so in the context of a lie focused on targeted instances of injury to individuals or in a specific judicial proceeding with a very focused aim." Varat, *supra*, at 1117.

This view is borne out by an examination of the falsehoods deemed unprotected by the courts. As the Defendant has pointed out, knowing falsehoods are not entitled to First Amendment protections where they damage an individual's reputation, are calculated to cause emotional harm, or invade his or her privacy. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988); *Gertz v. Robert Welch, Inc.*, 481 U.S. 323, 324 (1974);

Time, Inc. v. Hill, 385 U.S. 374, 389-90 (1967). A person who commits perjury or knowingly makes a false statement under oath may be punished for that expression under the First Amendment. *Gates v. City of Dallas*, 729 F.3d 343, 346 (5th Cir. 1984) (citing *Garrison v. Louisiana*, 379 U.S. 64 (1964)).

What the Supreme Court has not held is that speech, false or otherwise, is beyond the scope of the First Amendment or otherwise subject to government prohibition or punishment because the speech is considered offensive by society. To the contrary, "[i]t . . . is well established that speech may not be prohibited because it concerns subjects offending our sensibilities." *Ashcroft*, 535 U.S. at 245. *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"). Thus, it is widely accepted that speech which denies that the Holocaust perpetrated by Nazi Germany ever occurred and asserts, even as a matter of fact, that the extermination of Jews never occurred is protected by the First Amendment. *See* Steven G. Gey, *The First Amendment and Socially Worthless Untruths*, 36 Fla. St. U. L. Rev. 1, 4 (2008); Varat, *supra*, at 1116-18; Robert A. Kahn, *Informal Censorship of Holocaust Revisionism in the United States and Germany*, 9 Geo. Mason U. Civ. Rts. L.J. 125, 138 (1998). One rationale for protecting even this highly offensive and knowingly false speech is that the false speech does not inflict any particularized, focused injury which the government may justifiably seek to prevent or punish. *See* Gey, *supra*, at 5 ("In the modern era, the basic First Amendment rule is that speech is constitutionally protected in the absence of proof that the speech creates a much more individualized and concrete harm than simple offense.") and Varat, *supra*, at 1117.

Another example is knowingly false speech in the course of a political campaign, which the Washington Supreme Court found to be protected expression in a 1998 decision. On appeal from a fine imposed under Washington's False Political Advertising statute, that court found that even if the defendants acted knowingly in making false statements about the implications of a referendum placed on the ballot, punishing that speech was inconsistent with the protection afforded by the First Amendment because there was no state interest justifying the regulation of speech. *State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wash. 2d 618, 957 P.2d 691, 697-98 (1998). As Dean Varat writes concerning this decision, "authorizing the state to separate the true from the false for the citizenry is anathema to the First Amendment, especially in suits to enforce a cause of action created for the government against a private person where there was no competing state interest in vindicating private reputation or other injury." Varat, *supra*, at 1121.

The First Amendment recognizes and protects the basic autonomy of individuals to read, speak and hear what they choose. *Ashcroft*, 535 U.S. at 245. Government authority to proscribe or punish that autonomy should be limited to those instances where concrete or well-recognized harm (such as harm to reputation) exists. As written by Prof. Charles Fried:

> At its limit, where no injury is done to others by unwanted speech, silencing offends a pure autonomy interest: a right to act (here speak) where there is no harm to others. But cannot the frustration of the audience's wish that the speaker be silent constitute a kind of harm to it? Perhaps, but not one that should be cognizable in law. It is central to the idea of a fundamental right to liberty that no one should curtail (or ask the state to curtail) the liberty of another when the only reason is disagreement about another's conception of the good.

Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 236 (1992). Prof. Fried went on to write that "the First Amendment precludes punishment for generalized, 'public' frauds, deceptions, and defamation. In political campaigns the grossest misstatements, deceptions, and defamations are immune from legal sanction unless they violate private rights—that is, unless individuals are defamed." *Id.* at 238. *Accord 119 Vote No! Comm.*, 957 P.2d at 697.

Therefore, the categorical exclusion of intentionally false statements of fact from First Amendment protection urged by the government in this case should be rejected. Instead, the focus should be on whether the falsehood threatens to inflict the kind of focused harm that the government has an interest in preventing.

When measured against this standard, it must be concluded that the Stolen Valor Act, 18 U.S.C. § 704(b), is inconsistent with the First Amendment. The government cites to legislative history showing that Congress meant to prevent the "cheapening" of the accomplishments of those who actually earned military awards through their acts of courage and distinction in defense of our nation. *See* 151 Cong. Rec. S12684-01. But false claims of military distinction do not in any real sense diminish the honor earned and bestowed on those who have truly earned this nation's highest military award. Save the situation where there is a false claim that a medal or decoration recipient did not earn his or her award (a situation which would involve the kind of individualized harm the government may prevent or punish), the false, self-aggrandizing statements of others cannot lessen the honor bestowed on those who have achieved their military awards. This is not a zero-sum situation where a claim of battlefield distinction or courage by one (false or otherwise) necessarily diverts respect and honor from others who have actually

earned their awards. As pointed out in *Texas v. Johnson*, 491 U.S. 397, 418-19 (1989), concerning flag burning, "we submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude toward its flag." By the same token, a false claim to a military honor does not change the attitude of citizens towards those who truthfully claim military distinction.

The "cheapening" referred to in the legislative history instead reflects Congress' revulsion at the idea of persons falsely claiming to have earned military distinction. But, as noted above, the fact that society finds particular speech offensive is no basis for punishing or suppressing that speech. *Pacifica Foundation*, 438 U.S. at 745. As the Defendant has pointed out, the governmental interest asserted here is little different from the interest found insufficient to justify a state's prohibition on flag burning in *Texas v. Johnson*, *supra*. Clearly, the harm to the symbolic value of military awards and decorations is not an individualized or concrete harm which may justify punishment consistent with the First Amendment. The kind of false, self-aggrandizing statements at issue in this case are instead generalized public frauds and deceptions for which punishment should not be allowed under the First Amendment. Fried, *supra*, at 238.

It also is no justification for the Stolen Valor Act and its application to the Defendant to argue that the kind of false statements allegedly made by the Defendant have no "value" and so may not claim any protection under the First Amendment. This argument is flawed because it places with the government the power to determine what expression is valuable and what is not valuable. Prof. Fried also criticizes the idea that, in the context of public frauds and deceptions, the government should be allowed to determine what is and is not valuable expression through the enforcement of laws.

Explaining why actions for deception are allowed in the private but not the public domain, he writes that "in the public domain the state is enforcing a view of the truth about itself. Because it is interested, it cannot be trusted. The public must be left to sort out the truth for itself." Fried, *supra*, at 239. Allowing the government to determine what expression is valuable presents the same problem as is presented by regulations exhibiting viewpoint discrimination. "Singling out one or a small group of lies for government condemnation, while leaving others unregulated, signifies a 'realistic possibility that official suppression of ideas is afoot.'" Varat, *supra*, at 118 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)).

Moreover, there is no workable standard for determining what expression is "valuable" and what is not. Indeed, one line of thought holds that even false statements are valuable because "its encounter with truth may make truth clearer and more robust[.]" Varat, *supra*, at 119. "Even 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.' Mill, On Liberty (Oxford: Blackwell, 1947), at 15[.]" *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 n. 19 (1964). In his classic response to Parliament's Licensing Order of 1643, under which many prior restraints upon publication were reinstated in Britain, John Milton wrote in *Areopagitica* as follows:

> And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter.

Areopagitica; A Speech of Mr. John Milton, for the Liberty of Unlicenc'd Printing to the Parliament of England.[4]

The First Amendment and its broad protection of free speech is inconsistent with a regime that places the government in the role of the "truth police." While there is certainly a role for the government and neutral laws that regulate, restrict, and punish knowing falsehoods where the communication threatens to inflict concrete, identifiable and focused harm, falsehoods respecting the receipt of military awards and decorations are not that kind of falsehood. Such expression remains within the presumptive protection afforded pure speech by the First Amendment. As such, the Stolen Valor Act is an unconstitutional restraint on the freedom of speech and the Defendant's motion to dismiss the charge against him under the Act should be dismissed.

Respectfully submitted,

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[4] Avaliable at http://www.dartmouth.edu/~milton/reading_room/areopagitica/.