Constitutional Court of the Russian Federation

1 Senate Square, St. Petersburg

190000 Russian Federation

BRIEF OF JEFFREY KAHN AS AMICUS CURIAE

In relation to the complaints of

Aptysheva, Olga Romanovna (case № 3919/15-01/2023),

Vasiliev, Konstantin Olegovich (case № 4020/15-01/2023),

Markus, Kristina (case № 3912/15-01/2023),

Metz, Aleksandr Vadimovich (case № 3930/15-01/2023),

Rubnenkov, Ivan Andreevich (case № 3940/15-01/2023),

Filippov, Maksim Sergeevich (case № 3921/15-01/2023),

Shatryuk, Kristina Evgenievna (case № 3938/15-01/2023),

Isaev, Evgenii Maksimovich (case № 3954/15-01/2023),

Vasilieva, Ekaterina Stanislavovna (case № 3965/15-01/2023),

Kononov, Aleksei Andreevich (case № 4001/15-01/2023),

Yashin, Ilya Valerievich (case № 4325/15-01/2023),

Demyanchuk, Darya Andreevna (case № 4418/15-01/2023),

Lagodich, Konstantin Sergeevich (case № 4327/15-01/2023),

Savinov, Sergei Gennadievich (case № 4513/15-01/202),

Serdyukov, Yurii Petrovich (case № 4515/15-01/2023),

Evdokimova, Maria Andreevna (case № 4723/15-01/2023),

Krechetova, Anna Valerievna (case № 4744/15-01/2023),

Summ, Lyubov Borisovna (case № 4879/15-01/2023),

Sherchenkov, Aleksandr Aleksandrovich (case № 5210/15-01/2023),

Shutova, Kristina Olegovna (case № 5078/15-01/2023),

Orlov, Oleg Petrovich (case № 5267/15-01/2023)

for violation of constitutional rights and freedoms by parts 1 and 2 of Article 20.3.3

Code of the Russian Federation on Administrative Offenses

I. Introduction

1. This brief is respectfully submitted in connection with twenty-one complaints registered by the Secretariat of the Court concerning the violation of constitutional rights and freedoms by part 1 (20 complaints) and part 2 (1 complaint) of Article 20.3.3 of the Russian Federation Code of Administrative Offences.[1]

2. The brief is signed by twenty-eight professors of law who by training and experience are competent to provide the history and analysis contained in it. Their names and academic affiliation (for purposes of identification only) are provided in Appendix I.

3. The brief provides a concise legal history of relevant experience in the United States protecting freedom of speech and thought, especially during times of war, national emergency, or other perceived threats to state security. It responds to erroneous and hyperbolic assertions by Russian Federation officials who contend that the U.S. violates human rights by prosecuting dissenters. Quite to the contrary, the U.S. Constitution protects speech and expressive conduct that challenges government policies and actions.[2] An accurate summary of the actual experience and current law may be useful as this Court considers these complaints.

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[1] Аптышева Ольга Романовна (дело № 3919/15-01/2023); Васильев Константин Олегович (дело № 4020/15-01/2023); Маркус Кристина (дело № 3912/15-01/2023); Мец Александр Вадимович (дело № 3930/15-01/2023); Рубненков Иван Андреевич (дело № 3940/15-01/2023); Филиппов Максим Сергеевич (дело № 3921/15-01/2023); Шатрюк Кристина Евгеньевна (дело № 3938/15-01/2023); Исаева Евгения Максимовна (дело № 3954/15-01/2023); Васильева Екатерина Станиславовна (дело № 3965/15-01/2023); Кононов Алексей Андреевич (дело № 4001/15-01/2023); Яшин Илья Валерьевич (дело № 4325/15-01/2023); Демьянчук Дарья Андреевна (дело № 4418/15-01/2023); Лагодич Константин Сергеевич (дело № 4327/15-01/2023) (under part 2); Савинов Сергей Геннадьевич (дело № 4513/15-01/202); Сердюков Юрий Петрович (дело № 4515/15-01/2023); Евдокимова Мария Андреевна (дело № 4723/15-01/2023); Кречетова Анна Валерьевна (дело № 4744/15-01/2023); Сумм Любовь Борисовна (дело № 4879/15-01/2023); Шерченков Александр Александрович (дело № 5210/15-01/2023); Шутова Кристина Олеговна (дело № 5078/15-01/2023); Орлов Олег Петрович (дело № 5267/15-01/2023).

[2] See, e.g., Interview with Vladimir Putin by NBC correspondent Keir Simmons recorded June 11, 2021, in the Kremlin:

> Vladimir Putin: Do you know that 450 individuals were arrested after entering the Congress? And they didn't go there to steal a laptop. They came with political demands. 450 people...
>
> Keir Simmons: You're talking about the Capitol riot.
>
> Vladimir Putin: ...have been detained. They're facing a jail time, between 15 and 25 years. And they came to the Congress with political demands. Isn't that persecution for political opinions?

Transcript available at: http://en.kremlin.ru/events/president/transcripts/interviews/65861

See also Statement of the Russian Foreign Ministry in connection with the introduction of personal sanctions against US citizens, 19.05.2023 ("The attached 'list-500' also includes those in government and law enforcement agencies who are directly involved in the persecution of dissidents in the wake of the so-called 'Storming of the Capitol'.") https://mid.ru/ru/foreign_policy/news/1871495/; Foreign Ministry Spokeswoman Maria Zakharova's replies to media questions on the statements by the British, US and Canadian ambassadors in connection with the verdict passed on Vladimir Kara-Murza, April 17, 2023 ("These are the ambassadors of countries that shamelessly violate human rights and prosecute dissenters at home that are called "domestic terrorists" as happened with those who took part in the so-called "storm on the Capitol" or the Canadian "Freedom Convoy." Now they are demanding the

II. SUMMARY OF ARGUMENT

4. The constitutions of the Russian Federation and the United States both explicitly protect freedom of expression. The Constitution of the Russian Federation provides: "Everyone shall be guaranteed freedom of thought and speech."[3] Given that this right is among those that "comprise the basis of the legal status of an individual" in the Russian Federation, it "may not be amended by the Federal Assembly."[4] Only a constitutional assembly convened (by a supermajority of both houses of the Federal Assembly) could propose to amend it as part of a new constitution.[5]

5. Likewise, the First Amendment to the U.S. Constitution provides, *inter alia*, that "Congress shall make no law ... abridging the freedom of speech[.]" Because this right is considered so fundamental, its reach extends to all levels of state and federal government.[6] The freedom it protects has been described by the U.S. Supreme Court as grounded in "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[7]

6. The default position of U.S. constitutional law is the rejection of government censorship, punishment, or suppression of opinions that dissent from government preferences, policies, or official viewpoints. In this fundamental premise that there is no obligatory state ideology imposed on citizens, the constitutional law of the Russian Federation and the United States shares a common starting point.[8] As Justice Robert Jackson observed in a famous case decided at the height of the Second World War that upheld the rights of dissenters against government demands for public affirmations of patriotism: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

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release of a Western-financed foreign agent. This is the height of cynicism.") https://mid.ru/en/press_service/spokesman/answers/1863921/; Briefing by Foreign Ministry Spokesperson Maria Zakharova, Moscow, June 4, 2020 ("I would like to believe that before showing their zeal in protecting the rights of the "suppressed" and "dissenters" in other countries, US authorities will start to scrupulously observe democratic standards and ensure the freedoms of their citizens at home. It's high time for that.") https://mid.ru/en/press_service/spokesman/briefings/1434046/.

[3] See Konst. RF art. 29(1).

[4] See Konst. RF arts. 64 & 135(1).

[5] See Konst. RF art. 135(2) & (3).

[6] *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

[7] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[8] See Konst. RF art. 13(2) ("No ideology may be established as a state or mandatory one."). As this is a fundamental principle of the constitutional system of the Russian Federation, no other provision of the Constitution may contradict it. See Konst. RF art. 16(2) ("No other provisions of the present Constitution may contradict the foundations of the constitutional order of the Russian Federation.").

prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[9]

7. Maintaining that standard has not always been an easy task. During some periods of acute national crisis, regrettably, the United States did not meet the standard this default required. The leading scholar of free speech in the United States summarizes this history:

> In each of these episodes, the nation faced extraordinary pressures – and temptations – to suppress dissent. In some of these eras, national leaders cynically exploited public fears for partisan political gain; in some, they fomented public hysteria in an effort to unite the nation in common cause; and in others, they simply caved in to public demands for the repression of "disloyal" individuals. Although each of these episodes presented a unique challenge, in each the United States went too far in sacrificing civil liberties – particularly the freedom of speech.[10]

8. As a result of those hard-learned and painful experiences, the United States has now established strong support for the constitutional rule that freedom of speech and thought must not be limited, even in times of national emergency or war, except as is necessary to prevent such speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[11] It matters not whether that speech asserts opinion or fact, whether it is true or false, or if it is beloved or offensive.[12]

9. Article 20.3.3 would not pass this test. It is not even a close question. Representations to the contrary mislead by focusing on these historical episodes without acknowledging the lessons learned from them, and established by law for over fifty years, including in that time grave crises of war, domestic unrest, and national security. A defense of Article 20.3.3 that alleges parallel practices in the United States conjures a world that does not exist outside of history books that teach the error of past approaches rightly abandoned.

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[9] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). This case overruled *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). In so doing, the Court rejected the assumption at "the very heart of the *Gobitis* opinion" that the state could compel measures to strengthen the degree of national unity that "is the basis of national security." *Barnette*, 319 U.S. at 640.

[10] GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 13 (2004).

[11] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

[12] For that reason, analysis of part 1 of Article 20.3.3 of the Russian Federation Code of Administrative Offences and Article 207.3 of the Russian Federation Criminal Code would be the same under U.S. constitutional law.

III. ARGUMENT

A. The Lessons Learned from the Sedition Act of 1798 Strengthened Freedom of Speech

10. The enactment and short life of the Sedition Act of 1798 presents an early, shameful episode long since repudiated. The statute was passed by Congress during the Quasi-War with France, with Napoleon's armies on the march in Europe while the French navy seized U.S. ships and treated its sailors as pirates. Within the United States, emerging political parties fought viciously for power to pursue sharply different visions for the new country.

11. The statute punished with fine and imprisonment "any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, ..."[13] The statute narrowly passed by a two vote margin with a provision that it would expire less than 2 ½ years later.

12. Though framed as a measure necessary for the national security, the Act was used by the incumbent government in a vain effort to retain power. Approximately twenty-five arrests were made under the Act and fifteen indictments were secured to prosecute leading political opponents, ten of which led to trials all ending in convictions.

13. Everything about this statute is viewed with repugnance today and taught in U.S. law schools as a dark stain on American law. The Act's rushed origin as a response to national emergency was pretextual. Its automatic expiry was timed to prevent use by opponents of the slim majority that enacted it. The Act's constitutionality was not considered by the U.S. Supreme Court at that time, but all those convicted were ultimately pardoned, those jailed were freed, and all fines imposed under it were repaid with interest.

14. When later establishing the strict rule under American law that now protects critics of government policies and officials from retaliatory lawsuits for defamation or libel, the U.S. Supreme Court noted the "broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[14] This is a repudiation as well of the concept of seditious libel. This "central meaning of the First Amendment" protection of free speech was also summarized by the leading scholar on the subject at the time:

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[13] An Act for the punishment of certain crimes against the United States, § 2, 1 Stat. 596 (1798).

[14] *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

> The Amendment has a 'central meaning' – a core of protection of speech without which democracy cannot function, without which, in Madison's phrase, 'the censorial power' would be in the Government over the people and not 'in the people over the Government.' This is not the whole meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt why it is being protected.[15]

15. This understanding of the Sedition Act remains firmly in place today, as does the rationale for repudiating what James Madison called 'the censorial power' of the government over the opinions of the people in any state that would call itself a democracy. Although an initial misstep by a young democracy, the Act in the end taught the importance of strengthening protection for free speech and thought.

B. Wartime Experiences and Cold War Crises Ultimately Strengthened Freedom of Speech

16. Shortly after the United States entered World War I, the U.S. Congress passed the Espionage Act of 1917.[16] Some of its prohibitions on espionage, since augmented and amended, remain part of U.S. law; a recent example is found in the criminal complaint filed against Edward Snowden.[17] Although Russian Federation officials draw attention to their use, those provisions are neither the source of judicial precedents that developed U.S. protection of freedom of speech nor a relevant analogue to Article 20.3.3.[18]

17. Perhaps more analogous to Article 20.3.3 was § 3 of the Espionage Act, which prohibited, *inter alia*, speech intended to "cause insubordination, disloyalty, mutiny, or refusal of duty" in the armed forces in times of war and false statements intended "to interfere with" their success.[19] The Supreme Court upheld the conviction under this provision of two leafleteers who opposed conscription. In a brief opinion, the Court held that wartime

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[15] Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 208 (1964).

[16] Espionage Act of 1917, Pub. L. 65-24, 40 Stat. 217 (1917).

[17] Criminal Complaint, *U.S. v. Edward J. Snowden*, 1:13 CR 265 (E.D. Va. June 14, 2013), citing 18 U.S.C. § 793(d).

[18] See, e.g., Remarks by President Vladimir Putin at news conference with President of Finland Sauli Niinistö, June 25, 2013, available at: http://en.kremlin.ru/events/president/transcripts/press_conferences/18407 ("There is a similar case with Mr Assange, regarding whom we have also received extradition demands and who is also considered a criminal. Like Mr Snowden, he considers himself a human rights activist and fights for the freedom of information. Ask yourself this: should we extradite such people so that they can be imprisoned on [sic] not? In any case, I personally would prefer not to get involved in such cases. It's like shearing a piglet: there's a lot of squealing and very little wool.").

[19] The Sedition Act of 1918 amended § 3, *inter alia*, to criminalize speaking or writing "disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States," its military or flag, or language intended to bring the same "into contempt, scorn, contumely, or disrepute," or even to "advocate, teach, defend, or suggest" the same. See Pub. L. 65-150, 40 Stat. 553 (1918).

lessened the protection of free speech.[20] The weak test established by that case was only to ask "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[21] A week later, the Court upheld the conviction of a leading politician, Eugene V. Debs, under the same law.[22]

18. These opinions did not last long. Eight months later, the first weaknesses in the "clear and present danger" test were exposed when the Court decided Abrams v. United States, concerning a conspiracy conviction again under the same law. The Court's previous unanimity was pierced by the dissent of Justice Oliver Wendell Holmes, Jr., who had written both the Schenck and Debs opinions. Joined by Justice Louis Brandeis, he reasserted the importance of free speech even in wartime: "Congress certainly cannot forbid all effort to change the mind of the country."[23]

19. Holmes and Brandeis perceived early what their colleagues did not, recognizing the risk to democracy in construing such statutes even with a narrow and demanding standard to ascertain a defendant's intent.[24] In words that have become iconic, Holmes concluded:

> If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. ... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[25]

20. Justice Holmes would have required protection of dissenting voices "unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[26] This was a far stronger test of government action to suppress or punish speech, but even this evolution of the

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[20] *Schenck v. United States*, 249 U.S. 47, 52 (1919).
[21] Id.
[22] *Debs v. United States*, 249 U.S. 211 (1919).
[23] *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).
[24] Judge Learned Hand perceived the danger earlier still. See *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) ("Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government.").
[25] Id., at 630.
[26] Id.

doctrine protecting freedom of speech, especially during times of crisis, was far from complete.

21. The meaning of "clear and present danger," bolstered by the powerful arguments of Justices Holmes and Brandeis, grew ever stricter and more protective of speech in the interwar period. Even at this point in U.S. history, the protection of speech was already strong enough to forbid a law akin to Article 20.3.3.[27]

22. Unfortunately, the "clear and present danger" test did not respond adequately to the fears that challenged the United States during World War II or the anti-Communist hysteria with which it was swept into the Cold War. Protection of free speech weakened before it grew stronger. The Smith Act of 1940, made criminal, *inter alia*, "knowingly or willfully [to] advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government".[28]

23. In Dennis v. United States, the Supreme Court upheld the conviction under the Smith Act of members of the Communist Party of the United States who conspired to teach and advocate for the violent overthrow of the government. The reasoning that the "clear and present danger" test warranted this result was only joined by a plurality of the Court. But the setback to protecting free speech was recognized in the dissent of Justice Hugo Black: "There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[29]

24. This law, judicial precedents upholding its use, and the brief era of repressive McCarthyism that followed, are sources of opprobrium, studied now only to recognize their faults. It took half a century to overcome these "dismal precedents ... Yet it was in these decisions that we find the origins of the First Amendment as we know it today."[30]

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[27] See, e.g., *Stromberg v. California*, 283 U.S. 359 (1931) (reversing conviction of member of the Young Communists League and invalidating law criminalizing display of red flag or other "sign, symbol or emblem of opposition to organized government"); *Thornhill v. Alabama*, 310 U.S. 88, 98-99 (1940) (reversing conviction under anti-picketing statute interpreted "to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head".).

[28] Alien Registration Act, Pub. L. 76-670, § 2(a)(1), 54 Stat. 670, 671 (1940). The publication of materials or organization of associations for that purpose was also forbidden.

[29] *Dennis v. United States*, 341 U.S. 494, 581 (1951)(Black, J., dissenting).

[30] STONE, supra note 10, at 138.

C. No Equivalent to Article 20.3.3 is Remotely Conceivable in U.S. Law Today

25. Six years after the Dennis decision, the Supreme Court developed a robust protection of free speech. The Smith Act was so narrowly construed as to make further such prosecutions under it impossible. In Yates v. United States, the Court overturned the convictions of Communist Party USA members for conduct remarkably similar to the Dennis defendants. The Court noted that in interpreting the Smith Act "we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked" in the Court's prior cases.[31] The Court overwhelmingly held that a much more immediate call for action, rather than mere advocacy of belief or opinion was required for a conviction.[32]

26. No further prosecutions were filed under the Smith Act.[33] And that call for imminence, echoing Justice Holmes's dissent in Abrams (noted supra at ¶ 20), anticipated what would become the judicial test announced in Brandenburg v. Ohio in 1969 that has protected speech in the United States ever since. Only speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" may be subject to government restraint.[34] It is thus error to point to the existence of this moribund statute in the United States Code as some sort of evidence of equivalence with Article 20.3.3.[35] Characterizing speech as opinion or fact, true or false, likewise makes no difference to the analysis.

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[31] *Yates v. United* States, 354 U.S. 298, 319 (1957).

[32] Id., at 324-25 ("The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something.").

[33] STONE, supra note 10, at 415.

[34] *Brandenburg*, supra note 11, at 447.

[35] For example, some may imagine a parallel with 18 U.S.C. § 2387, codifying that part of the Smith Act that criminalizes speech that "with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States: (1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or (2) distributes or attempts to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States[.]" However, even before the stricter *Brandenburg* test, this provision was interpreted extremely narrowly to exclude speech expressing mere opinion or even the strongest dissent from official government policy: "Neither by terms nor fair intendment does this section limit expressions of opinion or of criticisms of the Government or of its policies (civil or military) or of any officials or officers (civil or military) or of their actions so long as such expressions are not made with intent to bring about the unlawful things and situations covered by the section and, in addition, so long as they do not have a natural tendency and a reasonable probability of effecting these forbidden results." *Dunne v. United States*, 138 F.2d 137, 142 (8th Cir., 1943), *certiorari denied* 320 U.S. 790 (1943), *rehearing denied* 320 U.S. 814 (1944), *and rehearing again denied* 320 U.S. 815 (1944). Research has uncovered no judicial opinion after adoption of the tougher *Brandenburg* test concerning a successful conviction under what is now § 2387 other than a single, Vietnam-era general court-martial of a United States Marine who actively encouraged fellow servicemen, about to complete training for service in Vietnam, to refuse to be sent to war. See *U.S. v. Daniels*, 42 C.M.R. 131 (1970). A court-martialed Marine urging refusal of duty *en route* to Vietnam is not a civilian protesting government policy in the public square.

27. The United States now has long experience protecting the right of people there to protest against its wars, foreign policies, and armed forces deployed to pursue its goals (not to mention the right to express all manner of opinion about domestic politics and policies). These protests have often been much more dramatic, even outrageous, than the modest words, posters, or expressive conduct at issue in the complaints concerning Article 20.3.3.[36] Peaceful toleration of dissenting views, and government protection of the right to express those views in the face of widespread or even official opposition, is a point of pride considered to be a sign of the strength of the democracy built in the United States.

28. During the Vietnam War, for example, protesters performed a mocking, antiwar skit outside a military induction center that depicted U.S. soldiers killing a pregnant woman. They were convicted under laws that criminalized the wearing of military uniforms without authorization and in a manner that tended "to discredit" the armed forces. The U.S. Supreme Court unanimously found such an exception an unconstitutional restraint on free speech because a law "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment."[37]

29. A prominent case in the free speech pantheon is Cohen v. California, which reversed the defendant's conviction for breach of the peace for wearing a jacket bearing the offensive profanity "Fuck the draft" in a courthouse with children present.[38] It was easy for the Court to conclude that "the State certainly lacks power to punish Cohen for the underlying content of the message," for the simple reason that the public expression of his opinion "on the inutility or immorality" of military conscription was none of the state's business.[39] In words presciently applicable to Article 20.3.3, the Court concluded that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[40]

Section 2388 of Title 18, which codifies a provision originally found in the Espionage Act of 1917, prohibits the same "when the United States is at war," as well as the willful making or conveyance of "false reports or false statements with intent to interfere with the operation or success of the military or naval forces[.]" The same rigid requirements regarding intent, and the same exceptions for opinions and criticisms, must likewise be understood to apply with even greater protection for speech than in that earlier period. It is thus specious to analogize either provision to Article 20.3.3. In any event, as noted supra at ¶ 21, even earlier precedents would have foreclosed prosecution for any of the speech or acts in the complaints filed with the Russian Constitutional Court, see supra note 1.

[36] Because the complaints, supra note 1, do not involve incitement, fighting words, commercial or sexually charged speech, all of which the First Amendment accords less protection, these are not discussed in this brief.

[37] *Schacht v. United States*, 398 U.S. 58, 63 (1970).

[38] *Cohen v. California*, 403 U.S. 15 (1971).

[39] Id., at 19.

[40] Id., at 26.

30. Even at the height of the nuclear arms race, when President Reagan described the Soviet Union as an adversary with "the aggressive impulses of an evil empire,"[41] the Supreme Court upheld the right of protestors to burn the U.S. flag. In fact, this flag-burning was held constitutional even though the flag was stolen in the course of acts of vandalism, while chanting "America, the red, white, and blue, we spit on you", and at a demonstration opposing (indeed, occurring in the same city hosting the political convention for) President Reagan's nomination for a second term in office.[42]

31. Flag burning is an act, not speech, but the Court has interpreted the First Amendment to protect expressive conduct as well. The Court in that case noted that "a principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[43] Even the desire of the state to protect symbols of national unity is not enough to escape the "enduring lesson, that the government may not prohibit expression simply because it disagrees with its message."[44]

32. Even false statements may be protected from the state's power to censor or otherwise punish the speaker. That was the Supreme Court's conclusion in striking down the "Stolen Valor Act" that punished false claims to have earned military commendations, including the nation's most cherished award, the Congressional Medal of Honor.[45] Referencing George Orwell's dystopian classic, 1984, Justice Breyer explained the same rationale that previous times and cases have repeatedly taught:

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[41] Remarks of the President to the 41st Annual Convention of the National Association of Evangelicals, Orlando, Florida, March 8, 1983, at page 8, https://www.reaganlibrary.gov/public/digitallibrary/smof/speechwriting-speechdrafts/box-077/40-534-5709750-077-013-2017.pdf. The "Doomsday Clock" of the Bulletin of the Atomic Scientists was moved forward to three minutes to midnight in 1984. See *Three Minutes to Midnight,* 40 BULL. ATOMIC SCI. 2 (Jan. 1984), https://thebulletin.org/files/1984%20Clock%20Statement.pdf

[42] *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

[43] Id., at 408-09 (internal quotation marks and citation omitted). Likewise, the Court protected the right to engage in highly offensive picketing at the funeral of a war hero. See *Snyder v. Phelps*, 562 U.S. 443 (2011). Among the signs they carried were those including statements such as "God Hates the USA/Thank God for 9/11", "America is Doomed", and "Thank God for Dead Soldiers". Id., at 448.

[44] Id., at 416. As the Court noted in conclusion, quoting Justice Brandeis: "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. 'To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.'" (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))."

[45] *U.S. v. Alvarez*, 567 U.S. 709 (2012). Justice Breyer's concurring opinion distinguished laws punishing perjury or lying to or impersonating a government official as narrowly aimed at the compelling government interest in protecting the integrity of government processes, including a functional judicial system. Id., at 720-721.

> Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth.[46]

33. Attorney General Merrick Garland acknowledged the importance of the First Amendment's restraint on government action in his remarks made on the first anniversary of the attack on the United States Capitol: "As we do this work, we are guided by our commitment to protect civil liberties, including the First Amendment rights of all citizens. The department has been clear that expressing a political belief or ideology, no matter how vociferously, is not a crime. We do not investigate or prosecute people because of their views."[47]

34. Indeed, the sentences handed down to date in these cases reveal not a single instance of prosecution for First Amendment protected speech or expressive conduct.[48]

IV. Conclusion

35. Writing at a time of global war, Justice Jackson observed that the lesson of history is that every effort by states to compel conformity of thought and speech in their citizens is ultimately futile: "from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[49]

36. Article 20.3.3 finds no parallel in the law of the United States or the acts of its government. This brief responds to any contrary notion in the way that hard-learned experience over the course of more than two centuries has shown to be the proper response to falsehoods, at least in the United States, but as also might be proper in a state that asserts itself to be

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[46] Id., at 723.

[47] Merrick B. Garland, Remarks on the First Anniversary of the Attack on the Capitol, Washington D.C., January 5, 2022, https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-first-anniversary-attack-capitol

[48] U.S. Attorney's Office for the District of Columbia Capitol Breach Investigation Resource Page, https://www.justice.gov/file/1579211/download (last updated April 18, 2023).

[49] *Barnette*, 319 U.S. at 641.

"a democratic, federal, rule-of-law state with a republican form of government",[50] as Justice Kennedy wrote in striking down the Stolen Valor Act:

> The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth. ... Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.[51]

8 June 2023

[50] Konst. RF art. 1(1).

[51] *Alvarez*, 567 U.S. at 727-28 (2012)(internal citations omitted).

APPENDIX I

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