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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. XAVIER ALVAREZ, Defendant.	NO. CR 07-1035-ER GOVERNMENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT DATE: January 14, 2008 TIME: 10:00 a.m.

The government hereby respectfully submits its opposition to defendant's motion to dismiss the indictment.

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Introduction

Defendant's challenge boils down to the startling proposition that the First Amendment protects a politician who lies to the public about his military record. As defendant puts it, "[f]alse speech is protected speech" and "[t]he Court's scrutiny [here] . . . should be especially demanding . . . where the statement was made by an elected official . . . on an issue of public concern: his qualifications for office." As discussed below, defendant's argument, if accepted, would turn the First Amendment on its head and also contradicts applicable law.

While no one can deny that the warning *caveat emptor* applies to politicians, the First Amendment does not, cannot, and should not shield a politician who tries to subvert the very democratic process that the amendment seeks to protect. In truth, settled First Amendment jurisprudence provides that deliberate falsehoods fall outside the amendment's protective shield. It is only in the realm of ideas -- unlike the case here which involves a readily verifiable misstatement of fact -- that falsehoods garner any free speech protection.

Moreover, even if the Court were to conclude that defendant's lie deserves a modicum of protection, the government's undeniable interest in protecting from dilution the significance of the nation's highest military distinction and the magnitude of the accomplishment of those who actually earned it clearly outweighs that interest.

Defendant's remaining arguments fall short as well. First, the statute does carry a scienter requirement. The law provides that the term "falsely" means more than a mistake. And even if

that were not the settled meaning of the word, when the Court has two choices over how to read a statute, it should opt for the one that preserves it constitutionality. Second, the cases defendant relies upon for the proposition that a criminal penalty is not justified in this context involve pre-speech restraints. Laws, like the present, that impose post-speech sanctions are entirely consistent with the First Amendment.

Discussion

I. THE FIRST AMENDMENT DOES NOT PROTECT A POLITICIAN WHO LIES ABOUT HIS MILITARY RECORD

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. "[S]tatutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973). The First Amendment doctrine of overbreadth provides that a law is unconstitutionally overbroad if it punishes a substantial amount of constitutionally protected speech. Virginia v. Hicks, 539 U.S. 113, 118-19 (2003) (citation omitted). However, to prevail defendant must show "from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14 (1988).

Stated another way, "[i]n a facial challenge to the overbreadth of a law, "a court's first task is to determine

whether the enactment reaches a substantial amount of protected conduct." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982). And as one court further explained: "Although the Supreme Court has not explicitly listed the factors to be considered in an overbreadth analysis, those factors have been identified as 'the number of valid applications, the historic or likely frequency of conceivably impermissible applications, the nature of the activity or conduct sought to be regulated, and the nature of the state interest underlying the regulation.'" Gibson v. Mayor and Council of the City of Wilmington, 355 F.3d 215, 226 (3d Cir. 2004) (citation omitted).

The first step, then, is to determine whether the statute at issue burdens a substantial amount of protected speech. The law here -- either on its face or as applied -- clearly does not do so. In fact, contrary to the defendant's claim that "[f]alse speech is protected speech," when measured against applicable law the challenged statute may not burden protected speech at all. Under applicable law, "intentional or reckless falsehood, even political falsehood, enjoys no First Amendment protection[.]" Colson v. Grohman, 174 F.3d 498, 507 (5th Cir. 1999) (citing McDonald v. Smith, 472 U.S. 479, 487 (1964); see also Herbert v. Lands, 441 U.S. 153 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); Solano v. Playgirl, 292 F.3d 1078 (9th Cir. 2002) ("The First Amendment does not protect knowingly false speech.").

This settled principle was applied in a closely analogous context in the case of Pestrak v. Ohio Elections Commission, 926

F.2d 573 (6th Cir. 1991). In Pestrak, the defendant was a candidate for office and was investigated by the Ohio Elections Commission ("the Commission") for violations of a law that made it a crime to intentionally disseminate falsehoods concerning a candidate for election. The defendant had taken out newspaper ads in which he suggested that his opponent committed illegal acts. The Commission found probable cause to believe that defendant violated the law and referred the case for criminal prosecution.

In rejecting the defendant's First Amendment challenge to the law, the court explained that the law "specifically affect[ed] only the knowing making of false statements" and that as such the relevant portions of the statute "clearly come within the Supreme Court holdings in Garrison v. Louisiana, 379 U.S. 64, 75 (1964) and New York Times v. Sullivan, 376 U.S. 254 (1964). Id. At 577. In the court's view,

> ***[Those] cases indicate that false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth.*** The Court in Garrison stated simply because 'speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution . . . the knowingly false statement and false statement made with reckless disregard of the truth do not enjoy constitutional protection.

Id. (emphasis added). The explained that "on its face, the statute is directed against, and Pestrak was charged with issuing, speech that is not constitutionally protected. [As such], [t]he court below was correct in holding that the statute is not unconstitutional on its face for those reasons." Id.

Applying the holding in Pestrak to the statute here, it is

clear that the statute does not abridge protected speech to begin with -- either on its face or "as applied" to defendant's so-called "political" speech. Nor should it apply to such speech. Defendant tries mightily to elevate his lie to the realm of protected political discourse, but he falls well short. While it is true that "speech on public issues occupies the highest rung of the heirarchy [sic] of First Amendment values and is entitled to special protection," Connick v. Myers, 461 U.S. 138, 145 (1983), and when in that realm falsehoods garner some degree of protection, defendant's lie is hardly the kind that warrants such protection.

As the Gibson court explained, "[w]hile it is true that certain types of false statements seem to be protected, they are false statements that ultimately promote an 'uninhibited marketplace of ideas.'" Gibson, 355 F.3d at 228 (quoting Virginia v. Hicks, 539 U.s. 113 (2003). Defendant's lie in this case does not promote the marketplace of ideas; defendant's lie subverts that marketplace.[1] As the Court explained,

> ***[T]here is no constitutional value in false statements of fact.*** Neither the intentional lie nor the careless error materially advance society's interest in "uninhibited robust, and wide-open" debate on public issues. (Citation omitted). They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Gertz v. Welch, 418 U.S. 323, 340 (1974) (internal citations

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[1] As will be explained at trial, it is fairly certain that but for his medal of honor lie, defendant would not have won his election or received at least one key endorsement.

omitted) (emphasis added).

Thus, it is difficult to see how defendant's lie or the lies the statute seeks to punish should merit any constitutional protection whatsoever. Notwithstanding this defendant argues that if the Court does not strike down the statute there is a risk of "intolerable self-censorship." (Motion, at 2). In other words, the statute will have a chilling effect on politicians who would otherwise lie to voters about their military records. But that is exactly the sort of self-censorship and chilling effect that a well-ordered democracy demands. As one court put it, "there [are] those unscrupulous enough and skillful enough to use the deliberate . . . falsehood as an effective political tool . . . [but] the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." Colson v. Grohman, 174 F.3d 498, 507 (5th Cir. 1999).

The statute and defendant's statement do not involve protected speech to begin with. But even assuming that the statute did cover protected speech, it is equally clear that any minimal value in the prohibited speech is outweighed by the government's strong interest in preserving the integrity of the medal and the reputation of those who earned it. While defendant tries to deny that the government's interest is legitimate, such a position is simply untenable. In the one case to address the issue, the court in United States v. McGuinn, 2007 WL 3050502 (S.D.N.Y.) rejected a similar challenge to the constitutionality of the statute. There the court found "that the government has a legitimate interest in preventing damage to the reputation and

meaning of military decorations and medals caused by wearing such medals and decorations without authorization."[2]

Thus, whether the Court chooses to balance the interests involved or accepts that defendant's conduct did not involve protected speech to begin with, the Court should reject defendant's constitutional challenge.

II. DEFENDANT'S CLAIM THAT THE STATUTE SHOULD BE STRUCK DOWN BECAUSE CRIMINAL PENALTIES ARE MORE THAN NECESSARY TO PREVENT THE CONDUCT MISSES THE POINT

Defendant argues that the statute here is not narrowly tailored to preserving the government's interest. Stated another way, defendant argues that even if exposing phony war heros is appropriate, punishing them criminally is not. Defendant misreads the law.

Even if "more speech," as defendant puts it, would expose phonies like defendant, that alone does not prevent Congress from punishing them as well. The cases on which defendant relies involve the pre-publication context where the courts are most concerned with prior restraints. In the post-publication context, by contrast, the law is well-settled in allowing for punishment as a means of deterrence. As one court explained in a

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[2] Defendant also tries to equate what he did to the First Amendment protected conduct of flag burning -- what he refers to as "symbolic" speech. He argues that since flag burning is protected so should lying about winning the Congressional Medal of Honor. The argument, however, misses a critical distinction between the two types of conduct. Flag burning can be speech that conveys an idea about this nation and its institutions. If the challenged statute here had prohibited "medal burning," the analogy might have applied, but it does not. Rather, the statute punishes a false statement of fact about the speaker and conveys no idea at all, about the country or otherwise. As such, the analogy is inappropriate.

slightly different context:

> [W]e are dealing with the supposed chilling effect that the mail fraud statute would have upon authors if, after publication, they could be called to account for a conscious falsehood about the contents of a book. Thus the body of case law establishing that prior restraints on expression must be justified by compelling state interest, and that the restraint can go no further than necessary for protection of that interest, provides at best limited enlightenment for present purposes.

In re Grand Jury Matter Gronowicz, 764 F.2d 983, 987 (3d Cir. 1985).

The most obvious example of laws that punish post-publication conduct are the laws of criminal defamation. The same argument about "more speech" being a sufficient remedy for defendant's lie could be made about defamatory statements as well. But the fact remains that "while it is unlikely that the Supreme Court would uphold an injunction against publication of an allegedly libelous book, it has consistently refused to strike down libel laws imposing post-publication sanctions. Id. (citations omitted). Post-publication punishment of a conscious falsehood is intended to have and does have an inhibiting effect upon speech and "[t]he law of civil and criminal libel is intended to have just that effect." Id. Similarly, Congress could in its wisdom seek to punish, and thereby inhibit, the type of lie told by defendant here.

III. DEFENDANT'S CLAIM THAT THE STATUTE IS OVERBROAD BECAUSE IT DOES NOT CONTAIN A SCIENTER REQUIREMENT IGNORES ITS PLAIN LANGUAGE

Defendant's final argument is that statute is overbraod because it does not contain a scienter requirement. Without such a requirement, the argument goes, the statute could be read to

punish simple mistakes or "innocent lies." Defendant misreads the statute.

The statute punishes only those who "falsely represent" that they have earned a Congressional Medal of Honor. Under settled law, the use of the word "falsely" is itself a scienter requirement. As one court explained, "[t]he words 'false' and 'falsely' . . . signify more than incorrect or incorrectly, and mean knowingly or intentionally or negligently false or falsely[.]" United States v. Ninety-Nine Diamonds, 139 F. 961 (8th Cir. 1905). See also United States v. Snider, 502 F.2d 645, 652 (4th Cir. 1974) (falsely "implies something more than a mere untruth"); United States v. Martinez, 73 F. Supp. 403, 407 (M.D.Pa. 1947) ("falsely" in statute making it a crime to lie about being a citizen meant "something more than untrue" and implied "an intention to perpetrate some treachery or fraud"); Black's Law Dictionary ("[false] usually means something more than untrue . . . and implies an intention to perpetuate some treachery or fraud").

Moreover, even if one could read the statute as defendant suggests, the Court should imply scienter. Where a court has a choice between two interpretations of statutory language, one rendering the statute unconstitutional and the other preserving it, the court must opt for the latter. As the Ninth Circuit explained in Gray v. First Winthrop Corporation, 989 F.2d 1564 (9th Cir. 1993), "courts are obliged to impose a saving interpretation of an otherwise unconstitutional statute so long as it is 'fairly possible to interpret the statute in a manner that renders it constitutionally valid.'" Id. (citations

omitted).

Here, if the Court concludes that the word "falsely" does not mean intentional wrongdoing, it should imply that meaning to save the constitutionality of the statute.

Conclusion

For all of the foregoing reasons, the government respectfully requests that the Court deny defendant's motion in its entirety.

Dated: January 2, 2008

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