NO. 04-1496

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS MINK; THE HOWLING PIG, an unincorporated association Plaintiffs - Appellants, v. KENNETH R. BUCK, District Attorney for the 19th Judicial District, in his official capacity; JOHN W. SUTHERS, in his official capacity as Attorney General of the State of Colorado; SUSAN KNOX, a Deputy District Attorney working for the 19th Judicial District Attorney's Office, in her individual capacity, Defendants – Appellees.	On Appeal from the United States District Court for the District of Colorado Case No. 04-1496

BRIEF *AMICI CURIAE* OF STUDENT PRESS LAW CENTER AND SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW IN SUPPORT OF PLAINTIFFS – APPELLANTS THOMAS MINK AND THE HOWLING PIG

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Fed. App. P. Rule 26.1, *amicus curiae* Student Press Law Center discloses that it is a non-profit organization. The Student Press Law Center has no parent corporation and no stock, and thus, no publicly-held corporation owns 10 percent or more of its stock.

Pursuant to Fed. App. P. Rule 26.1, *amicus curiae* Silha Center for the Study of Media Ethics and Law discloses that it is a non-profit academic

center established in 1984 through an endowment from Otto and Helen Silha. It is located within the School of Journalism and Mass Communication at the University of Minnesota, a state land-grant university. The Silha Center has no parent corporation and no stock, and thus, no publicly-held corporation owns 10 percent or more of its stock.

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This brief is respectfully submitted on behalf of *amici curiae* in support of the appeal of Plaintiffs-Appellants. The undersigned counsel of record are providing legal services in connection with the preparation of the *amicus* brief on a pro bono basis.

INTEREST OF THE *AMICI CURIAE*

The *amici* are:

1. The Student Press Law Center is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the free expression rights of student journalists. As the only national organization in the country devoted exclusively to defending the legal rights of the student press, the Center has collected information on student press cases nationwide and has submitted various *amicus* briefs, including to the Supreme Court of the United States and many federal courts of appeal.

2. The Silha Center for the Study of Media Ethics and Law is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media. The Silha Center also sponsors an annual lecture series; hosts forums, conferences and symposia; produces the *Silha Bulletin*, a quarterly newsletter, and other publications; and provides information about media law and ethics to the public.

Amici's interest in this case is preserving the right of speakers to be free from criminal investigation motivated by the content of their speech.

Amici believe civil libel provides adequate remedy for victims of defamation and that the additional burden of criminal libel creates an unconstitutional chilling effect on the freedom of speech. As groups concerned with the ability of journalists to publish free from unnecessary government interference or intimidation, *amici* are well-suited to present these questions to this court.

This brief is filed pending leave of this court and is unopposed by the parties in interest.

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SUMMARY OF ARGUMENT

In the present case, a criminal libel law was used to arrest the student publisher of an independent Web site, search his home, seize his property, and ultimately, to intimidate him with the threat of imprisonment — his only alleged crime being the words he published. Despite the fact that no charges were ultimately filed, the arrest and investigation did real harm to the plaintiff-appellant. This case presents the court with an opportunity to decide whether other vulnerable members of our society will fall victim to the same harm and be subject to the same chill on their expression.

The question *amici* ask the court to decide is whether any statute that criminalizes defamatory speech can survive First Amendment scrutiny. Despite the fact that the Supreme Court, in *Garrison v. Louisiana*, 379 U.S. 64 (1964), declined to adopt a wholesale rejection of criminal libel statutes, more recent decisions from the Court require reconsideration of this issue. The Supreme Court today consistently uses strict scrutiny to analyze restrictions on speech once thought to be outside the protection of the First Amendment. Moreover, both the history of criminal libel and recent examples of its use make clear that its continued existence is antithetical to the First Amendment's guarantees of free speech and a free press.

If this court does not find that a student arrested solely for his speech has standing to challenge the constitutionality of the underlying statute he supposedly violated, it will be giving a green light to police and prosecutors who use these statutes to intimidate speakers who are young and politically powerless but who have exercised their constitutional right to criticize government employees. By the expedient of dropping the matter before a person is charged, prosecutors can perpetuate the use of criminal libel statutes as tools to harass and intimidate speakers into silence even when the statutes themselves are unconstitutional.

Amici urge this court to recognize the changes in Supreme Court analysis of speech restrictions over the last four decades; to apply the strict scrutiny standard to criminal libel statutes; to determine that criminal libel statutes fail the strict scrutiny test, as they are less effective and more restrictive than tort law in protecting personal reputation; and to rule that criminal libel statutes in any form are per se unconstitutional.

ARGUMENT

I. Criminal libel statutes present a clear and present danger to constitutionally protected speech resulting in genuine harm to those least capable of defending themselves.

It is beyond dispute that criminal libel statutes, which carry the threat of jail time and criminal fines, can have a chilling effect on any speaker. But

those on the political fringes of society, including young people, are most vulnerable to the intimidation these laws inevitably cause.

These outsiders seldom have the support of politically influential community leaders who could persuade a prosecutor not to pursue a criminal libel case. Rarely will they have the financial resources to hire the best advocates to advance their defense. Often forced to seek whatever representation is available immediately, defendants may find it challenging to retain a competent criminal defense attorney who also has the expertise to fully understand the First Amendment issues raised.

Appellant is not the first student publisher to be accused of criminal libel in the geographic area covered by this Circuit in recent years. Another case, *I.M.L. v. State*, 61 P.3d 1038 (Utah 2002), began under circumstances similar to those at issue here. During the 1999-2000 academic year, 16-year-old student Ian Lake created a Web site on which he allegedly published defamatory statements about employees of the public high school he attended. He was arrested, spent seven days in a juvenile detention center, and was charged with the violation of Utah criminal slander and libel statutes. *Id.* at 1040. In 2002, the Utah Supreme Court found that that the criminal libel statute under which Lake was prosecuted was facially

unconstitutional because it failed to incorporate *Garrison*'s requirements. *I.M.L.*, 61 P.3d at 1038.

However, the threat of prosecution against Lake did not end there. The criminal libel law struck down by the Utah Supreme Court was the basis for only one of the two initial charges against Lake, and prosecutors moved to prosecute him on the second charge, criminal defamation. Ultimately, that charge was dropped. *Prosecutor Closes Case Against Teen*, STUDENT PRESS LAW CENTER REPORT, Spring 2003, at 42.

Lake's family was left with $50,000 in legal fees. *Id.* But the harm done by this kind of prosecution is not solely financial. The possibility of arrest, detention and criminal sanctions for any student who speaks his mind too forcefully remains an intimidating prospect, even if state officials elect not to pursue the case.

Cases such as Ian Lake's, as well as the instant case, illuminate how the continuing threat of a criminal libel prosecution can undermine and eradicate the First Amendment's protection for speech critical of the government.

II. Criminal libel statutes are fundamentally and irreconcilably inconsistent with the First Amendment.

A. Criminal libel is the last vestige of seditious libel.

The survival of criminal libel in the American legal landscape, despite being facially and ideologically inconsistent with the principles of the First Amendment, is difficult to understand without a review of the history of its infamous progenitor: seditious libel. The Court of Star Chamber developed common law criminal libel law rules in 1488 primarily to protect the British monarchy from even truthful criticism propagated via the newly invented printing press — although non-political libelous statements were also punishable. Jane E. Kirtley, *Criminal Defamation: An "Instrument of Destruction," in* ENDING THE CHILLING EFFECT: WORKING TO REPEAL CRIMINAL LIBEL AND INSULT LAWS 89-101, 90 (Ana Karlsreiter and Hanna Vuokko, eds. 2004).

The American repudiation of seditious libel predated the Declaration of Independence. John Peter Zenger, publisher of the *New York Weekly Journal*, was accused of seditious libel for publishing anonymous criticism of the colonial governor. On August 5, 1735, Zenger was acquitted, even though his attorney, Andrew Hamilton, did not dispute the key question of whether publication of the criticism had taken place. Doug Linder, *The Trial of John Peter Zenger: An Account*, UMKC School of Law, *at* http://www.law.umkc.edu/faculty/projects/ftrials/zenger/zengeraccount.html (2001). Instead, Hamilton convinced the jury to nullify the law based on his

argument that truth should be a defense to a claim of seditious libel. At the time, the idea that one should be permitted to write truthful criticism of the state was revolutionary, but it was just that notion that set the stage for the Declaration of Independence, which arguably "was the most monumental seditious libel in British history." CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 83 (1969), *as cited in* Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. LAW & POL'Y 433, 452 (2004). It is no exaggeration to say, therefore, that without repudiating the Star Chamber's concept of seditious libel, the United States could not have been created at all.

As the law continued to evolve, America's own experiment with seditious libel, the Alien and Sedition Acts of 1798, "came to an ignominious end and by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment." *New York Times v. Sullivan*, 376 U.S. 254, 296 (1964) (Douglas, J., concurring). In 1799, James Madison condemned the Acts and noted the conflict of interest in placing the power to punish speech against the government in the hands of a prosecutor with an incentive "to court the pleasure of Government." Excerpt from Madison's Address, January 23,

1799, *as quoted in Garrison v. Louisiana*, 379 U.S. 64, 85 (1964), (Douglas, J., concurring).

Madison's assessment of seditious libel as being inherently pro-government in application is no less true of criminal libel today. Because the civil courts provide an adequate forum to adjudicate libel cases, there is simply no need for government officials to devote scarce public resources to seek criminal sanctions for libelous speech. Moreover, recent history provides ample evidence that some prosecutors will use their authority to punish criticism of the government under the rubric of criminal libel.

According to a recent study, of the 11 threatened and actual libel prosecutions brought between January 2002 and December 2004, seven cases — including the instant case — were threatened or brought against speakers who allegedly libeled government employees. *Developments in Criminal Defamation Law since 2002,* MLRC BULLETIN (Media Law Resource Center), March 2003, at 4-9. Because the majority of recent criminal libel cases appear to be designed primarily to intimidate or prosecute those who speak out against the government rather than to provide compensation to those whose reputations allegedly have been damaged, it is clear that criminal libel is nothing more than seditious libel given a thin veneer of constitutionality by the purported inclusion of private libels, so as

to deflect a viewpoint discrimination claim. *See generally R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) (noting that it would be unconstitutional for the government to prohibit anti-government libel alone).

B. States legislatures, courts and commentators have consistently moved away from criminal libel.

Since 1964, sixteen states and the District of Columbia have repealed criminal libel laws. Jane E. Kirtley, *Criminal Defamation: An "Instrument of Destruction," in* ENDING THE CHILLING EFFECT: WORKING TO REPEAL CRIMINAL LIBEL AND INSULT LAWS 89-101, 92 (Ana Karlsreiter and Hanna Vuokko, eds. 2003). Courts in ten other states struck down criminal libel statutes.[1] Seventeen states still have criminal defamation laws in place. *Developments in Criminal Defamation Law since 2002,* MLRC BULLETIN (Media Law Resource Center), March 2003, at 15.

One reason that criminal libel laws remain on the books is that they are seldom used. To the extent they are invoked at all, most prosecutions are

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[1] *I.M.L. v. State*, 61 P.3d 1038 (Utah 2002); *Ivey v. Alabama*, 821 So.2d 937, 29 Media L. Rep. 2089 (Ala. 2001); *Nevada Press Ass'n v. Del Papa*, CVS-98-00991 (D. Nev. 1998); *State v. Helfrich*, 922 P. 2d 1159 (Mon. 1996); *Fitts v. Kolb*, 779 F. Supp. 1502 (D.S.C.1991); *Gottschalk v. Alaska*, 575 P.2d 289 (Alaska 1978); *Eberle v. Mun. Court for LA Judicial Dist.*, 127 Cal. Rptr. 594 (Cal. App. 1976); *Weston v. Arkansas*, 528 S.W.2d 412 (Ark. 1975); *Pennsylvania v. Armao*, 286 A. 2d 626 (1972); *Boydstun v. Mississippi*, 249 So. 2d 411 (Miss. 1971). Although the Montana Supreme Court struck down the state's criminal libel statute in 1996, the state

merely threatened, and then not pursued. Of the 11 threatened and actual prosecutions between 2002 and 2004 identified in one study, four threatened prosecutions (including the one at issue in the present case) were either dropped or never brought; the outcome in two cases is unknown; and in another, prosecutors lost at trial, requested an appeal, and then asked that the case be dismissed. *Developments in Criminal Defamation Law since 2002,* MLRC BULLETIN (Media Law Resource Center), December 2004, at 4-9.[2]

The fact that no convictions resulted does not mean that no constitutional rights were implicated. Indeed, the pernicious effect of threatened criminal libel prosecutions that are then discontinued is to intimidate the speaker with potential penal sanction, then to terminate the process early enough to elude judicial review. As a result, state officials can arrest speakers for the content of their speech, seize the physical embodiment of that expression (e.g., a computer) as evidence, and ultimately evade review of the unconstitutional law under which the arrest and seizure

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legislature amended that statute in 1997, and it remains in force. *See* Mont. Code § 45-8-212 (1997).

[2] Subsequent to the dismissal of one of these cases, *de Jesus-Mangual v. Rodriguez*, 383 F.3d 1 (1st Cir. Sept. 2, 2004), *dismissed on remand*, No. 99-2049 (D.P.R. Nov. 5, 2004), the Puerto Rico legislature passed a new penal code, effective May 2005, that eliminated the criminal defamation provisions altogether. MLRC Bulletin, *Developments in Criminal Defamation Law since 2002*, March 2003, at 8. It is likely that the attention

were made giving them carte blanche to detain and harass at will all who speak out against the government. Such an outcome cannot square with the First Amendment.

C. Criminal libel's international use is primarily to suppress speech in ways inconsistent with the First Amendment.

Perhaps the strongest indication that criminal libel violates the First Amendment is to see how frequently it is abused in countries with no law preventing the government from regulating the content of speech. "The sanctions that flow from criminal prosecutions — fines and imprisonment — constitute a profound threat to freedom of expression and to the free flow of information. [...] This, in turn, discourages the public debate on political issues that is the lifeblood of any democracy. This, of course, is exactly what the governments in the jurisdictions which continue to retain and utilize criminal libel wish to do." Jane E. Kirtley, *Criminal Defamation: An "Instrument of Destruction," in* ENDING THE CHILLING EFFECT: WORKING TO REPEAL CRIMINAL LIBEL AND INSULT LAWS 89-101, 98 (Ana Karlsreiter and Hanna Vuokko, eds. 2004).

In 2003, Journalists in Russia, Belarus, and Azerbaijan were convicted and sentenced to prison terms for criticism of public officials and their

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gained from the initial prosecution contributed to the legislative movement to eliminate the criminal libel law.

relatives. *Id.* As of December 31, 2004, journalists in China, Sierra Leone, Algeria, the Maldives, and Morocco remained imprisoned on charges of defamation after criticizing government officials. Committee to Protect Journalists, *Journalists in Prison as of December 31, 2004, at* http://www.cpj.org/Briefings/2005/imprisoned_04/imprisoned_04.html. Internationally, criminal libel law is used by governments to chill freedom of the press and to discourage debate wherever journalists report critically against government officials. It is troubling, however, that no meaningful distinction can be drawn between the application of these foreign laws and the application of the various domestic criminal libel laws here in the United States. At best, domestic criminal libel laws are less offensive because they are seldom used. But they are all the more insidious because they seek to intimidate speakers without the formality of actually completing a prosecution, thus avoiding the scrutiny and public outcry that has followed the actions of countries like China and Russia.

III. Supreme Court decisions since *Garrison* have rendered criminal libel statutes per se unconstitutional.

Congress passed a seditious libel law in 1798; in 1964, the Supreme Court recognized that such laws were unconstitutional. *New York Times v. Sullivan*, 376 U.S. at 296. Just as the law evolved between 1798 and 1964, it

has continued to evolve from 1964 to the present. Precedent must be given deference only to the extent it does not offend the Constitution. *See, e.g.*, *Dred Scott v. Sandford*, 60 U.S. 393 (1856), *superseded by* U.S. CONST. amend. XIII and XIV; *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954); *Betts v. Brady*, 316 U.S. 455 (1942), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963); *Penry v. Lynaugh*, 492 U.S. 302 (1989), *overruled by Atkins v. Virginia*, 536 U.S. 304 (2002). If the First and Fourteenth Amendments do not protect speakers from criminal sanction for criticism of the government or government officials, it is difficult to imagine what the Constitutional guarantees of free speech and press are intended to protect.

A. Strict scrutiny is the appropriate standard of review for criminal statutes that punish speech.

When the Supreme Court upheld the constitutionality of certain criminal libel statutes more than 40 years ago in *Garrison v. Louisiana*, it did so without applying a strict scrutiny test. 379 U.S. 64 (1964). In the decades since *Garrison*, however, the Court has adopted a strict scrutiny standard to evaluate content-based restrictions on speech. The Court no longer reflexively applies lower levels of scrutiny to speech merely because

the speech appears to be unprotected. In fact, it frequently has used strict scrutiny to evaluate restrictions on speech once thought to be outside the protection of the First Amendment. *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1985) (reversing ban on indecent "dial-a-porn" telephone activity). The Court has also recognized that its "decisions since the 1960's have narrowed the scope of the traditional categorical [First Amendment] exceptions for defamation [...]." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

This shift has come, at least in part, from the Court's recognition that some areas of prohibited speech — specifically libel and obscenity— are identified by an examination of content:

> We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," [...] or that the "protection of the First Amendment does not extend" to them [...]. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all" [...] What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) – not that they are categories of speech entirely invisible to the Constitution[...].

R.A.V. v. City of St. Paul, 505 U.S. at 383 (citations omitted) (emphasis in original). Similarly, criminal libel statutes, by their nature, require

government officials to pass judgment on the content of speech. Content-based speech prohibitions are subject to strict scrutiny. *Turner Broadcasting System v. FCC*, 512 U.S. 622, 643 (1994); *Burson v. Freeman,* 504 U.S. 191, 197 (1992). That the speech may ultimately be held constitutionally proscribable does not change the fundamental nature of criminal libel statutes as content-based and therefore requiring strict scrutiny.

Strict scrutiny is also mandated because of the burden criminal libel statutes place on *lawful* speech. It is impossible for a government official to enforce a content-based speech prohibition such as a criminal libel statute without affecting protected speech because the application of such statutes requires a government official to make subjective and arbitrary judgments about the named speech (e.g., whether or not the community's esteem for the alleged victim has been lowered, whether the speaker acted with actual malice, etc.). Inevitably, at least occasionally, these judgments will be wrong.

Similarly, false allegations of criminal libel place additional burdens on lawful speakers by subjecting them to potential arrest and confiscation of property, as was the situation in the instant case, and by creating a chilling effect that makes the speaker less likely to criticize the same, or any other, government official in the future. *See* Gregory C. Lisby, *No Place in the*

Law: The Ignominy of Criminal Libel in American Jurisprudence, 9 COMM. LAW & POL'Y 433, 482 (2004). The mere threat of a criminal libel prosecution chills lawful speech, particularly of those who have been threatened with such prosecution in the past, as will be the case for the appellants. When a criminal statute imposes a burden on lawful speech, strict scrutiny is the appropriate level of review. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997) (striking down a law criminalizing the knowing online communication to minors of material obscene as to minors because, *inter alia*, the statute's existence would create a "heckler's veto" allowing an adult to claim to be 17 in order to chill speech in a chatroom that would be, in fact, lawful for all those present to hear). *See also American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1157 n.6 (10th Cir. 1999) (*citing Reno v. ACLU*, 521 U.S. at 880).

Strict scrutiny is also necessary because criminal prohibitions on speech are, in the Court's view, especially suspect. Last year, the Court noted that

> [c]ontent-based prohibitions, **enforced by severe criminal penalties**, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid [...] and that the Government bear the burden of showing their constitutionality.

Ashcroft v. American Civil Liberties Union, 124 S.Ct. 2783, 2788 (2004) (citations omitted) (emphasis added). This court has also recognized that criminal provisions that punish speech pose an unusual threat to free expression. *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1157 (10th Cir. 1999). Criminal prohibitions on speech are especially suspect when civil remedies covering exactly the same subject matter already exist, as is the case with libel. As noted by the drafters of the Model Penal Code (the American Law Institute's model, adopted in 1962, for how state legislatures should update penal codes in light of modern legal understanding),

> It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. * * * It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country. * * *

Model Penal Code, Tent. Draft No. 13, 1961, s 250.7, Comments, at 44, *cited in Garrison v. Louisiana*, 379 U.S. at 69-70.

Criminal libel imposes an *additional* and separate burden on speakers of allegedly libelous speech. Yet, although the burden on speakers wrongly

accused of libel is exponentially greater, the recompense afforded to genuine victims of libel is actually less. Civil libel is designed to make victims whole through monetary damages. Criminal libel, on the other hand, provides no compensation for the victim at all. Accordingly, strict scrutiny is essential to ensure the additional burden on speech by a criminal provision is necessary to serve a compelling government interest that cannot be served by the less restrictive civil means.

B. Criminal libel statutes fail the strict scrutiny standard because they are less effective than tort law in protecting the rights of individuals.

To pass strict scrutiny review, criminal libel statutes not only must serve a "compelling" government interest, but must also be "necessary" to achieve that purpose. In other words, no less restrictive, equally effective means of achieving that purpose can exist. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 118 (1991). Criminal libel laws fail the strict scrutiny test, therefore, because they are not "necessary" to protect any of the speculative interests they purport to protect.

From its common-law origins with the Court of Star Chamber, the original justification for criminal libel laws was "to avert breaches of the peace, by dueling or vigilantism, by those who sought satisfaction for affronts to their honor or dignity." Jane E. Kirtley, *Criminal Defamation: An*

"Instrument of Destruction," in ENDING THE CHILLING EFFECT: WORKING TO REPEAL CRIMINAL LIBEL AND INSULT LAWS 89-101, 90 (Ana Karlsreiter and Hanna Vuokko, eds. 2004). At the time, truth was no defense to a criminal libel claim, as a truthful affront to honor and dignity was just as likely — if not more likely — to provoke a duel. *Id.* at 3.

Such a justification could hardly be used to support criminal libel today. Even the Supreme Court in *Garrison* acknowledged that there was no longer any compelling need for criminal libel laws to prevent a breach of the peace:

> Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that "* * * under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation."

Garrison v. Louisiana, 379 U.S. 64, 69 (1964), *quoting* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 924 (1963). Indeed, the heart of the *Garrison* decision — that criminal libel statutes may punish libelous statements on matters of public concern only when those statements are made with knowledge of falsity or reckless disregard of the truth — reflects that reputation, and not public order, is the interest at stake, because truthful information is as likely to trigger a breach of the peace as

false information. Criminal libel statutes must therefore be subjected to strict scrutiny to determine whether or not they are necessary to protect the rights of individuals to their reputation.

The disuse of criminal libel statutes in the United States demonstrates that such laws are neither a necessary nor an adequate remedy for libel. One study found that between 1965 and 2002, an allegation of criminal libel was formally investigated or prosecuted 77 times. *Developments in Criminal Defamation Law since 2002,* MLRC BULLETIN (Media Law Resource Center), December 2004, at 35. The relatively few prosecutions for criminal libel, even in those states that have such laws, reflects what most state legislatures have already realized — that criminal libel laws are not necessary. Currently, only 17 of 50 states have criminal libel laws. *Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan & Garrison*, MLRC BULLETIN (Media Law Resource Center), March 2003, at 15. No evidence suggests that the majority of defamed Americans have lacked a sufficient remedy under a civil cause of action. Civil laws may, in fact, be the least restrictive means of punishing defamatory statements about third parties. This is certainly not true for criminal libel because of the availability of civil libel. Criminal libel laws are

clearly inferior to civil libel laws because whatever remedy they do allow does not flow to the wronged victim, but to the state.

To the extent criminal libel laws implicate any interests, those interests tend to be ones upon which the constitution places the highest burden — i.e., discussions of matters of public concern. Of the 77 investigations or prosecutions of criminal libel between 1965 and 2002, 53 of them — 68.8 percent — involved issues of "public concern." *Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan & Garrison*, MLRC BULLETIN (Media Law Resource Center), March 2003, at 38. If there is such a compelling need for the state to vindicate the rights of individuals, one wonders why so few prosecutions involve private matters. This lack of evidence itself causes criminal libel statutes to fail under the strict scrutiny standard:

> As a matter of constitutional tradition, **in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.** The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

Reno v. ACLU, 521 U.S. 844, 885 (1997) (emphasis added). Nor does the complementary possibility — that the purpose of criminal libel is to punish those who wish to speak against the government — fare any better. Statutes

intended primarily to punish libel against the government and its employees would be unconstitutional viewpoint discrimination. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) ("Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.").

The Court in *Garrison* stated that "[w]here criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws[…]." *Garrison v. Louisiana*, 379 U.S. at 68. Moreover, there is no evidence that criminal libel statutes serve any purpose for *private* individuals distinct from the purpose such statutes serve for *public* officials. It is, in fact, less likely that criminal libel law serves any distinct purpose for private individuals who lack the unilateral authority to invoke a criminal libel statute to protect their reputations.

Criminal libel laws, in short, were less effective than tort remedies and placed a higher burden on speakers even when the Supreme Court decided *Garrison* in 1964. What has changed, however, is the Court's willingness to uphold a statute criminally punishing speech where less restrictive methods of regulating that speech are effective. For over a decade, the Supreme Court consistently has struck down speech restrictions in cases

where the government could not show a compelling need, either because less restrictive means were equally effective, or because the criminal restrictions themselves were ineffective. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. at 377; *Ashcroft v. ACLU*, 124 S.Ct. at 2783; *Reno v. ACLU*, 521 U.S. at 844; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). Both of these defects are present in criminal libel statutes.

C. Criminal libel statutes are not the least restrictive means of protecting personal reputations.

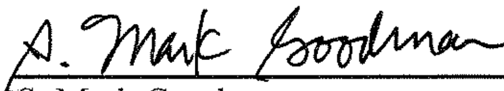
Criminal libel cannot survive strict scrutiny unless it is the least restrictive effective means of protecting personal reputations. *Reno v. ACLU*, 521 U.S. at 885. As discussed *supra*, criminal libel already fails strict scrutiny by its rejection in the majority of states, and disuse in most states that retain it. But even if evidence were presented that a particular criminal libel statute was as effective in protecting personal reputations as civil libel, and even if the protection of personal reputation was a "compelling" state interest, criminal libel would still fail strict scrutiny review on the basis that it is not the least restrictive means of providing that protection. Criminal libel purports to protect no interest other than that already protected by civil libel — and it does not accomplish even that much.

Given criminal libel's utter lack of utility, it is sufficient to note that it clearly imposes *some* burden on lawful speakers by forcing them to defend their speech in court. Although some may argue this is a *de minimis* burden on speech, "[t]here is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. at 567 (reversing height limitation on the placement of cigarette advertisements after Court of Appeals upheld the rule because, despite its "questionable efficacy," "the burden on speech imposed by the provision is very limited"). Criminal libel cannot survive strict scrutiny merely by arguing that it has not appeared to burden many speakers. The primary reason it has not burdened many speakers is that it is seldom utilized because it is less effective in protecting and restoring reputations than is civil libel. This court should not ratify the continued existence of criminal libel statutes on the ground that these statutes are too antiquated or useless to be harmful. The prosecution at issue in the instant case is an example of the serious harm criminal libel statutes can inflict.

CONCLUSION

In light of the above, *amici* urge the court to declare that all criminal libel statutes are contrary to the First Amendment.

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 5678 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I relied on the word processor, Microsoft Word 98, to obtain the count.

I further certify that this brief complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in the proportional Times New Roman typeface in 14-point size using Microsoft Word 98.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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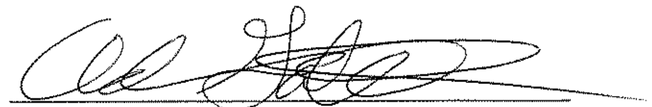

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