16-0452 16-0647 (XAP)

United States Court of Appeals

for the

Second Circuit

RAPHAEL GOLB,

Petitioner-Appellant-Cross Appellee,

-- v. –

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN RESPONSE AND REPLY OF PETITIONER-APPELLANT-CROSS APPELLEE RAPHAEL GOLB

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INTRODUCTION

The long legal slog over the past decade of Petitioner-Appellant-Cross-Appellee Raphael Golb (hereinafter "Golb" or "Appellant"), and the tens of thousands of documents generated therein, cannot obscure the single most significant aspect of this case: Golb's jury was instructed that it must find him guilty if he intended to annoy — and thus, to harm — the targets of his literary impersonation campaign. Because the jury was directed to interpret the term "harm" in each of the statutes — and not just the aggravated harassment statute, later declared unconstitutional — to be literally anything, Golb's criminal convictions are fundamentally infirm. The First Amendment simply does not allow the State of New York to criminalize writing with the intent to annoy, no matter the name chosen by the author.

COUNTER-STATEMENT OF SPECIFIC FACTS

Both parties' briefs set forth the factual and procedural history of this lengthy case. Respondent-Appellee-Cross-Appellant (hereinafter "the prosecution"), however, laces its "statement of the case" with innuendos, omissions, and other distortions of the evidence, all to support its "harmless error" claim. This reply will focus only on the most material of the prosecution's distortions.

1. The State of Dead Sea Scrolls Scholarship

At the outset, to create an image of Raphael Golb as vindictive and at war with all those who do not support "his father's theory," the prosecution seeks to marginalize Professor Norman Golb's scholarship by describing the sectarian theory as the "prevailing" one in which "most scholars… believe." Appellee's Br. at 3. This is simply false. The prosecution's own witness, Dr. Susan Braunstein, Curator of Archeology and Judaica and Chair of Curatorial Affairs at the Jewish Museum in New York, and the curator of that museum's Dead Sea Scrolls (DSS) exhibit, was the only academically neutral witness. She testified that there are today "two basic theories" regarding the Scrolls. Tr. 277, JA-290. See also JA-1360-1361 (quoting Jewish Museum in New York press releases: "it may be many years before scholars can come to a consensus on who wrote and used the Dead Sea Scrolls" and "scholars still do not agree about the origins and meaning of the scrolls decades after their discovery").

The prosecution's own trial exhibits document, cite, refer to, and link extensive news coverage of divided scholarship in this field, if only because informing people of such coverage was a basic part of Raphael Golb's blogging campaign. Thus, in 2002, Pulitzer-laureate John Noble Wilford of the New York Times quoted the organizer of a Scrolls conference at Brown University as stating that there was no longer any "consensus" about who wrote the DSS. JA-1351. In

2006, on the eve of Golb's campaign, the same author wrote of a "rising tide of opposition" to the view the prosecution wishes to defend. JA-1040. In 2008, an article in Le Monde (Paris) asserted, albeit in French, that "the ties between the Essenes and Qumran have now been reduced to nothing, just as the major American historian and paleographer Norman Golb had already written." *Id.* In the same year, an article in the National Post (Toronto) stated that "academics are *divided* between two principal theories regarding the origin of the scrolls." *Id.* (italics added). [1] Opposition to the old theory has become so strong that the Israel Antiquities Authority has stopped making any "sectarian" claims on its website and in its press releases. There is no legitimate reason for the District Attorney of New York to disregard the documentation provided in the course of Golb's campaign, contradict The Jewish Museum in New York, and play the champion of one academic view over another.

2. Pecuniary Harm

The prosecution also continues to argue that there was some pecuniary injury or benefit intended by Golb, no matter how remote or attenuated. The prosecution's most extensive mischaracterizations focus on the Jewish Museum's

[1] All of this news coverage is, of course, still available online. See: http://www.nytimes.com/2002/12/24/science/debate-erupts-over-authors-of-the-dead-sea-scrolls.html; http://www.nytimes.com/2006/08/15/science/15scroll.html; http://www.lemonde.fr/culture/article/2008/11/05/les-manuscrits-de-la-mer-morte-viennent-d-etre-traduits-en-francais_1115194_3246.html; http://www.pressreader.com/canada/national-post-latest-edition/20081113/282140697219398.

exhibit of the Dead Sea Scrolls in 2008. The prosecution argues that Golb was attempting to manipulate Dr. Braunstein for the purpose of having Professor Schiffman's lecture cancelled, and Golb's father invited in his stead, thus financially harming the former and benefiting the latter. Appellee's Br. at 6-14.

This argument simply repackages the prosecution's position with respect to the original Count One of the indictment, which alleged attempted pecuniary gain or loss in excess of $1,000.00. The First Department held that "there was no evidence that defendant intended to defraud one or more persons of property in excess of $1,000 or that he attempted to do so…. The People's assertions in this regard rest on speculation." *People v. Golb*, 102 A.D.2d 601, 603 (1st Dept. 2013). Yet much of the prosecution's brief rehashes and disputes the First Department's finding of fact to create a false narrative that somehow this was about money. Appellee's Br. at 6-14, 34, 48-50, 61-63. This argument is belied by the testimony at trial.

Dr. Braunstein testified that there were prominent scholars on both sides of the two basic theories. Tr. 277-78, JA-290-91. *Her* critique of prior DSS exhibits — just like Raphael Golb's — was that they had tended to champion only the "sectarian" view. She was determined that the Jewish Museum exhibit would present both sides to the public but advocate neither: "I felt that neither side had proven their case." Tr. 278, JA-291. Nonetheless, the exhibit ended up scheduling

only two speakers, Lawrence Schiffman and Eileen Schuler (who was recommended by Schiffman), both of them defenders of the sectarian theory.

Dr. Braunstein testified that receiving demands that a view be represented is a normal part of museum life, Tr. 281, JA-294, and that the Museum was never contacted with any suggestion that Schiffman's lecture be canceled. Tr. 280, JA-293; Tr. 283-84, JA-296-97. She testified that a curator emeritus of the museum, Daniel Friedenberg, did contact her with a request that a lecture by Professor Golb be added to the exhibit, and offered to pay for it himself. Tr. 274-75, JA-287-88. However, Dr. Braunstein declined this offer, as there was not sufficient time to redo the program. Tr. 284, JA-297. There was no acrimony and the former curator remained a good friend of the museum after the exhibit closed.

As to Raphael Golb, Dr. Braunstein met him only after the exhibit, and he chatted with her politely and pleasantly. Tr. 285, JA-298. The Larry.Schiffman Gmail "confessions" were never addressed to anyone at the Jewish Museum. No one in any way ever suggested, nor did anyone in any way consider, that Schiffman be dropped as a speaker. Schiffman was simply not a part of these discussions.

Equally important, the trial record contains no evidence that Raphael Golb has ever advocated canceling or silencing any speaker, for any reason. In his blogs, Raphael Golb repeatedly argued for scientific neutrality of exhibiting

institutions. *See, e.g.,* Peo. Ex. 40A1; JA-1206 (signing with pseudonym "We Demand a Neutral Scientific Exhibit"); Peo. Ex. 40A5; JA-1237 ("Not one of 22 opponents of old theory invited to museum lecture series"); Peo. Ex. 40B1; JA-1258-1269, at 1266 ("Well, who are the bigots here? . . . Did I ever say that proponents of the old Qumran-Essene theory should be *silenced in a six-million-dollar museum exhibit*?") (italics in original). Golb consistently advocated more speech, not less.

In order to create a more sinister interpretation, the prosecution takes a deep dive into the email exchanges among various members of the Golb family, which were introduced at trial but never highlighted for the jury or argued by either side. Because so little time was spent at trial on these matters, there was very little examination of them, allowing the prosecution to distort and speculate, *post hoc*.

For example, Raphael Golb sought to meet with Dr. Braunstein before the exhibition to inform her of "recent developments that could be of interest" to her. The prosecution suggests that these "recent developments" had something to do with the allegations that Schiffman committed plagiarism. But another draft of the proposed email to Braunstein states that these are "developments of a political nature regarding the scrolls," words that the prosecution has omitted. *See, e.g.,* Peo. Ex. 15; JA-1081. The surrounding exchanges clarify what is meant by "recent developments." At the time, Professor Golb and Ruth Golb were in

Jerusalem, where Professor Golb met with his colleague Benny Kedar — a well-known historian and Chairman of the Israel Antiquities Authority (IAA) — and with Hava Katz, Chief Curator of that same institution. In a major policy reversal, Dr. Kedar instructed Ms. Katz to end the IAA's previous support for the sectarian theory of Scroll origins. *See, e.g.,* Peo. Ex. 15; JA-1082. Since the IAA controls most, if not all, Dead Sea Scroll museum exhibits, this decision, in 2008, would have been of major importance to Scroll scholars and to museum exhibitors.[2]

Raphael Golb thought it would be important to inform Jewish Museum curator Dr. Braunstein of the result of Professor Golb's meetings with Kedar and Katz, but this idea was vetoed by Professor Golb himself, who informed his son, via Mrs. Golb, that his meetings were "strictly confidential." Peo. Ex. 15; JA-1093.[3] In this regard, the prosecution yanks Ruth Golb's email warning that Dr. Braunstein would "recognize something is afoot" out of context. In the relevant email, Mrs. Golb makes the point that it would be odd for Norman Golb's

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[2] Shortly after this decision, a review of a Scrolls exhibit at the North Carolina Museum of Natural Sciences referred to one of Raphael Golb's pseudonymous articles and acknowledged: "the exhibition, while paying lip service to the controversy … gives the secular interpretation short shrift…." See http://www.indyweek.com/indyweek/unraveling-the-continuing-mystique-of-the-dead-sea-scrolls/. When this review was shown to Professor Golb, he rightly observed that his son's campaign appeared to be having an impact. *See* Peo. Ex. 15; JA-1113-1114.

[3] The prosecution also denigrates Professor Golb, asserting that he "discovered he could not influence Braunstein through his connections in Israel." Appellee's Br. at 12. The emails show no such "discovery," they show merely that Professor Golb explained that he did not have such connections, or did not feel it would be appropriate for him to ask them to intercede in such a matter even if he did have them.

friend, former curator Daniel Friedenberg, to meet with Dr. Braunstein, and then for Raphael Golb to contact Dr. Braunstein separately with an offer to meet, as if Raphael were unaware of the previous meeting with Friedenberg. It would be better, she points out, for Mr. Friedenberg himself to introduce Raphael to Braunstein — which, as Dr. Braunstein testified, is what ultimately happened. Tr. 273, JA-286; Tr. 285, JA-298. Again, there is nothing untoward in any of this. (Compare Peo. Ex. 15; JA-1091 and the proposed email draft to which Mrs. Golb was referring, at Peo. Ex. 15; JA-1090 and JA-1092.) More important, none of this had anything to do with Professor Schiffman or with Raphael Golb's purported desire to tarnish the latter's reputation, contrary to the prosecution's suggestion. *See, e.g.*, Appellee's Br. at 25, n8.

It is certainly true that when Raphael Golb learned that only Schiffman and another defender of the old theory had been invited to speak at the Jewish Museum exhibit, which contradicted the exhibit's announced neutrality on the question of the Scrolls' origins, he urged his father to "write to Braunstein, pointing out that the speakers are not balanced and that he would be willing to give a talk at his own expense to rebut them." Peo. Ex. 15; JA-1098, 1099. Raphael Golb reiterated that the speaker could be either his father "or another proponent of the Jerusalem theory so that the talks are balanced." Peo. Ex. 15; JA-1098. These informal, family discussions reflect both the content and tenor of Raphael Golb's consistent fight

for a full presentation of both major Scroll theories and his disgust that one side could use the power of tradition to stifle an academic debate. Yet, somehow the prosecution has replaced the idea of a rebuttal to be delivered at Dr. Golb's "own expense" with intent to obtain a financial benefit or cause financial loss.

3. Golb's Assertions of Plagiarism and the "Institutional Problem"

With respect to the academic context of the "Larry.Schiffman" emails, the prosecution tries to suggest that the underlying allegations of misconduct were somehow mere pretexts. Appellee's Br. at 8. But Raphael Golb's blogging extensively addressed two major areas of Schiffman's misconduct: 1) his plagiarism of certain ideas and arguments from Norman Golb's work, and 2) his deliberate misrepresentation of other parts of that work. *See, e.g.*, Peo. Ex. 40A7; JA-1247-1254; Peo. Ex. 40B3; JA-1317-1319. Schiffman himself was forced to concede that the allegations had some merit, and that they were similar to accusations made by other scholars, including well-known Israeli academic and journalist Dr. Avi Katzman.[4] Tr. 90, JA-104; Tr. 136, JA-150; Tr. 185-186, JA-198-199; Tr. 216-218, JA-227-229. The prosecution misleadingly refers to Dr. Katzman as a "reporter," and fails to inform this Court that another scholar

[4] See https://institute.mandelfoundation.org.il/english/Faculty/Pages/Avi-Katzman.aspx (Katzman "teaches at several institutions of higher education throughout Israel and has edited numerous books").

reacted to a blog discussing the allegations by stating that he had "heard about this" and that there was "no question," in his view, that Schiffman had "crossed the line." Peo. Ex. 16; JA-1148.[5] Raphael Golb did not invent Dr. Katzman's allegations of misconduct; he publicized them and sought to have them investigated by the relevant authorities at NYU.

The prosecution tries to suggest that an email from Raphael Golb to his brother, stating that he was "focused on the institutional problem," must somehow mean that Raphael Golb didn't really seriously believe Dr. Katzman's plagiarism allegations, and just wanted to harm Schiffman financially. Appellee's Br. at 14. In context, Raphael Golb's statement simply signals his concern with NYU's institutional failure to investigate the plagiarism allegations. Peo. Ex. 15; JA-1126. The statement, in fact, sheds light on the intent that motivated the "Larry.Schiffman" hoax: it was designed to call attention to those allegations, at the institution where they should have been investigated, by ridiculing efforts to suppress discussion of them. In another message to his brother, Raphael Golb described his NowPublic treatment as "an article exposing Schiffman's plagiarism." Peo. Ex. 15; JA-1107. In still another email, to his father, he expressed his concern that a lecture by Schiffman would "egregiously misinform

[5] The email in question was received from Dr. Andrew Flescher, a professor of religion at California State University at Chico, who co-authored that institution's Academic Integrity Policy. *See* http://www.csuchico.edu/corh/crel/faculty-staff/biographies/flescher_andrew.shtml.

the public with respect to the fundamental disagreement between scholars concerning the scrolls." Peo. Ex. 15; JA-1102. These additional emails, as well as the ones quoted *supra*, all carefully expurgated from Respondent's "statement of the case," make it clear that Raphael Golb — not only on the witness stand as the prosecution insinuates, but while he was conducting his campaign — saw himself as laboring to inform people of serious injustices.

4. The "Cross" Emails and Bart Ehrman

Respondent's treatment of Golb's "FrankCross2" emails and interaction with Bart Ehrman also reflects the prosecution's unsupported view that Golb wanted certain speakers cancelled and his father invited in their place, creating financial benefits to the latter and harm to the former. Ignoring Raphael Golb's demands for a "neutral scientific exhibit" and his list of 22 uninvited opponents of the Qumran-Essene theory, the prosecution simply asserts that Raphael Golb was "perturbed that University of North Carolina Professor Bart Ehrman was slated to lecture at the Raleigh exhibit while his father was not." Appellee's Br. at p. 5.

In fact, as the actual correspondence with Dr. Ehrman makes clear, Raphael's concern was that Ehrman, who admitted "I am not an archaeologist or scrolls expert myself…," had been invited by a North Carolina State-sponsored science museum to present an authoritative public lecture on the topic on which he disclaimed expertise. Peo. Ex. 40C13; JA-1356. Raphael Golb indeed was

"perturbed" that a scholar who had no expertise had agreed to participate in an exhibit defending the sectarian theory, while all of that theory's opponents were excluded. The prosecution misleads this Court by reducing Raphael Golb's reproduction of the exchange with Ehrman to a mere matter of "criticizing Ehrman's arguments therein and promoting his father's theory." *Id*.

The prosecution's treatment of these emails has also been tailored to fit the current posture of the case. During the trial, the prosecution never raised Raphael Golb's exchange with Bart Ehrman at all. On appeal, Respondent's "statements of the case" originally formulated the grievance that Raphael Golb's "FrankCross2" emails "ridiculed" a third scholar. But since criminalizing ridicule invites, well, *ridicule*, the prosecution has elected to remove that word and obscure the nature of what was actually at stake.

5. The "Seidel" Emails

The prosecution has similar difficulties formulating any harm or benefit Golb could have intended from the "Seidel.Jonathan" emails. At trial, the prosecution made a passing reference to "attempting to draw another person into the controversy." Tr. 26-27, JA-48-49. That cannot be a crime. Nor can it be a legally cognizable injury or benefit to criticize a museum exhibit, or to ask the curator to respond to criticism — the "injury" the prosecution now puts forth. Appellee's Br. at 15.

The prosecution's particular difficulty in conjuring up any cognizable benefit or harm at all that Golb could have hoped to obtain or cause by these emails is due to the fact (although the jury disagreed) that *unlike* "Schiffman" and "Cross," and like the other approximately 70 avatars created by Golb, the name "Jonathan Seidel" was actually invented by Golb, based on the well-known New York poet Frederick Seidel. Tr. 1018-1019, JA-692-693. There is no evidence in the voluminous record of this case to indicate that Golb knew Rabbi Seidel, or vice-versa. Rabbi Seidel is not a Dead Sea Scrolls scholar. While it is true both men graduated from Oberlin, Rabbi Seidel did so in 1977, when Golb was still a high school student in Chicago. Nor can Raphael Golb be expected to have known that Rabbi Seidel, like hundreds of fans over the years, had a casual coffee with his father in England in 1987, when Raphael was a graduate student preparing Ph.D. exams at Harvard; or that Rabbi Seidel had taken some "divinity" classes with Schiffman in 1986 and had then decided not to return to New York.

"Jonathan Seidel" is a common name. There are 21 individuals who go by this name in New York alone, just as there are 66 Richard Saunders (one of the many pseudonyms used by Benjamin Franklin). The name, moreover, is similar to many others used by Raphael Golb in the course of his campaign. None of the emails were signed "Rabbi Jonathan Seidel." The emails focused on the Toronto Scrolls exhibit and on Stephen Goranson's attacks on Norman Golb, and none of

them referred to Oregon, to Oberlin College, or to anything else associated in any way with Rabbi Jonathan Seidel.

The prosecution asserts that Raphael Golb's "Seidel.Jonathan" emails "received replies that do not reflect any suspicion that the sender had not been Seidel," Appellee's Br. at 20, as some proof that Golb intentionally impersonated the Rabbi. But none of the replies reflected any belief to begin with that the sender was the individual Raphael Golb is accused of impersonating: Rabbi Jonathan Seidel, in Oregon. In fact, none of them reflect any knowledge of the existence of Rabbi Seidel. One recipient even asked the purported author of the emails ("Jonathan Seidel") to explain who he was, and Raphael Golb did not answer. *See* Peo. Ex. 12; JA-1050. If Raphael had wished to impersonate Rabbi Seidel, surely he would have done so when given the opportunity.

It is true that the prosecution can rely upon the black box of the jury verdict to assert that Golb intended to impersonate Rabbi Jonathan Seidel. But that does not give the prosecution license to fabricate harms or benefits that Golb intended to gain or cause with respect to a man he swore he never heard of before.

6. Golb's Disputes with Cargill and Goranson

To complete the narrative that Golb intended to financially harm *someone, somehow*, the prosecution resurrects the aggravated-harassment charges with respect to Robert Cargill and Stephen Goranson, despite those charges having been

vacated by the Court of Appeals based upon the unconstitutionality of the statute. Appellee's Br. at 3-5. As noted in Golb's opening brief, the requisite "injury" analysis has been distorted from the beginning by the prosecution's overzealous, and ultimately unconstitutional, attempt to criminalize anything intended to annoy, and that is likely to annoy. Ironically, it is the prosecution's repeated focus on speech as annoyance that makes it impossible to determine whether the jury verdict was reached on a legally permissible basis.

To revisit the matter briefly, Stephen Goranson was employed at the Duke University library in "stacks maintenance," keeping books in proper condition and available to readers. Honorable and important work, to be sure, but not a teaching position. This, however, did not preclude him from virulent on-line activity and pretensions of authority. He testified that he had a "disagreement online" with someone using the name "Charles Gadda" over the origin of the Dead Sea Scrolls, Tr. 627, JA-455, and that he discovered "attacks online on people who didn't support the views of Norman Golb." Tr. 628, JA-456. But in this vigorous online clash of ideas, Goranson himself was in full attack mode. He admitted that he had numerous online fights, was permanently removed from one website for making personal attacks, Tr. 631, JA-459, and had been suspended from a number of other websites. Tr. 633, JA-461. Goranson acknowledged that he has regularly attacked Professor Golb's scholarship, probably close to a hundred times, Tr. 635, JA-463,

and that he had his computer set to inform him every time Norman Golb's name was mentioned online. He admitted his attacks were "vehement disagreements" and that, "many years ago," they degenerated into name-calling. Tr. 641, JA-469.

Contrary to the prosecution's assertion, Raphael Golb never "lodged complaints with university officials in an unsuccessful effort to get [Goranson] fired." A review of all of the Goranson-related emails demonstrates that Raphael Golb sent email complaints in an effort — which was apparently *successful* — to call the attention of Duke officials to Goranson's use of library computers and his "Duke.edu" email address to repeatedly post unscholarly ad hominem attacks, sometimes with anti-Semitic innuendos, on Norman Golb over a period of at least a decade. Duke officials took notice and informed Goranson of his responsibilities as a member of the Duke community. These complaints were not only constitutionally protected speech, but entirely justified. Golb never requested that Goranson be removed from his post. *See*, e.g., Peo. Ex. 18; JA-1189 (suggesting that Goranson "be prevailed upon to moderate his tone and avoid unseemly personal attacks on a respected historian of Jewish Civilization").

Dr. Robert Cargill, another proponent of the sectarian theory, testified to a litany of hurt feelings. He felt very unhappy with Norman Golb's scholarly criticism of his digital film about Qumran, Tr. 713, JA-512, and with anonymous criticism of his work in blogs and online discussion forums. He was also

displeased that administrators in his department received "negative" emails that communicated "complaints" whose contents he could not recall. Tr. 714-715, 768-770; JA-513-514, 567-569. Cargill was additionally upset that the writings criticized the exclusion of Professor Golb from academic conferences and museum lecture series controlled by defenders of the sectarian theory, Tr. 719, JA-518, and that they criticized academics who physically controlled access to the DSS during the period when Jewish scholars were excluded. Tr. 740, JA-539. Cargill testified that Raphael Golb's online aliases characterized him and his work as "mendacious" and "spurious," asserted that he "failed to consider" opposing archaeological research, and asked whether he was "going to be allowed to get his Ph.D. for shoddy work like this." Tr. 744, JA-543. He particularly despaired when other scholars at UCLA read these critiques.

But again, Raphael Golb's actual communications reveal nothing that can legitimately be regarded as evidence of an intent to cause any legally cognizable harm to Cargill. For example, in one email, Golb wrote to Near Eastern Languages department members at UCLA about the film authored by Cargill. The key portion of the email, omitted in the prosecution's narrative, states:

> My concern is as follows . . . The accumulation of transparently erroneous and mendacious statements made throughout the film . . . can hardly be called an example of ethical conduct on the part of a doctoral candidate . . . I hope you will understand that my intent in writing to you has not been to harm Mr. Cargill's career prospects; but surely we are dealing with a very serious issue here that cannot be

> neglected in a Near Eastern studies department at a major university such as UCLA . . . and . . . your department should take steps to make sure that the damage is repaired.

Peo. Ex. 17; JA-1162. A request that untruthful assertions be corrected is not a demand that the speaker be fired or that a career be derailed. To be sure, Raphael Golb's brother felt that the words "not … to harm Mr. Cargill's career prospects" would be taken the wrong way by recipients, but in the course of this crucial exchange with his brother, Raphael specifically explained that his aim was "not to destroy Cargill or Schniedewind… but to embarrass them by informing people of the truth (which many of them may not know)." *See* Peo. Ex. 17; JA-1171.

For all his sensitivity to criticism, Cargill himself created online identities referring to Raphael Golb and his brother Joel (although it took a lot of cross-examination to get him to admit it). Tr. 799-805, JA-598-604. And when Cargill grew irate, he contacted one of the blog sites, told them that a criminal investigation was pending against the probable author, and persuaded them to take down Raphael Golb's articles criticizing the museum exhibits and digital film. Tr. 807-808, JA-606-607.

That is one of the two examples in this litigation of a scholar being silenced; the other is the suppression of "dissenting" research in museum exhibits. While Raphael Golb was arguing for neutrality and *more* speech, Cargill was helping to implement a policy never to mention Norman Golb in the exhibits; Cargill noted

with approval that due to the "vigilance" of the exhibitors, "the Golbs experienced increasing difficulty in getting out their message." Tr. 760, JA-559. Such vigilance, however, was understood to be only a temporary necessity. Cargill ended a draft of an article he submitted for publication by quoting with approval the words of a member of the original DSS monopoly team: "When will the world be free of [Norman] Golb? When he dies." Tr. 764-765, JA-563-564. Professor Golb was 81 at the time.

7. Vigorous Academic Debate

In summation at trial, the prosecution acknowledged — and sneered at — Raphael Golb's efforts to prompt debate about DSS research ethics. Golb, the prosecutor declared, "knows how to twist language, stir up controversy. As a result, what he can do is … devious and disturbing…." Tr. 1246, JA-921. Throughout its brief, the prosecution expresses the same attitude towards combative intellectual speech. Thus, Raphael Golb's use of expressions like "demolish" is repeatedly cited to suggest that there is something criminal about his mentality. *E.g.*, Appellee's Br. at 22. Such expressions are perfectly normal in any academic controversy, just as they are in talking about legal disputes (e.g., "the defendant has demolished the prosecution's argument"). The prosecution repeatedly uses innuendos to cast aspersions, characterizing, for example, Raphael Golb's academic opponents as "perceived adversaries" or as "fiercely despised."

Appellee's Br. at 8. But were it not for scholarly enmities and arguments about even the most painful ethical issues (including plagiarism and misrepresentation), the history of academic discourse would be a barren field. Few have ever contributed to intellectual history by being discreet; engaging in criticism, even of the most aggressive kind, is not to "target in order to derail a career." Appellee's Br. at 8-9.

To defend or advance a scholarly argument is not appropriately described as "promoting" a theory, Appellee's Br. at 10 — the prosecution seems to regard academic culture as a sort of commercial enterprise. To be concerned about scientific neutrality is not to be "perturbed." Appellee's Br. at 10. To discuss ways of enlightening the public through a lecture to be delivered free of charge is not to "scheme" or "plot." Appellee's Br. at 11-12. To demand that long-standing allegations of plagiarism be investigated in accordance with academic regulations, and to call attention to that demand with mock confessions, is not to "trick" an academic institution into investigating them. Appellee's Br. at 11. To criticize a biased museum exhibit is not to "malign" it. Appellee's Br. at 15. And to refer to Voltaire as an example of anonymity, irony, and satire, is not to "compare oneself to Voltaire," contrary to the prosecution's sarcastic assertion, itself adopted from a

New York Times article.[6] Appellee's Br. at 24. If the prosecution wishes to play academic supervisor, there are posts available — but they do not permit criminalization and incarceration.

8. Computer Cleaning

Finally, the prosecution suggests that Raphael Golb was being untruthful when he testified that he procured a computer-cleaning program because his home computer was running too slowly; according to the prosecution, Golb's real motive was to conceal evidence by wiping data from his laptop. Appellee's Br. at 21. This claim rests on the notion that Golb had some consciousness of criminal wrongdoing, even though the laws ultimately used to criminalize him had never before been used against this type of non-pecuniary "injury" and First Amendment case law dictated they could not. But the truth is more mundane. Golb, in emails sent to his brother and father shortly before procuring the program, specifically expressed frustration that he was having a "terrible problem" with his computer at home and that his computer was "very slow." *See* Peo. Ex. 15; JA-1111, 1114. This took place in August, 2008, eight months before his arrest.[7]

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[6] See A Trial on Identity Theft, With Scholarly Discourse, New York Times (Sept. 27, 2010, A25), at: http://www.nytimes.com/2010/09/28/nyregion/28scrolls.html ("'I used ... satire, irony, parody and any other form of verbal rhetoric…' he said, likening himself to Voltaire.").

[7] The program in question is widely advertised for speeding up slow computers. *E.g.*, https://www.piriform.com/ccleaner: "Faster Computer: Is your computer running slow?... CCleaner cleans up … files and makes it faster instantly."

Sometimes a cigar is only a cigar.

ARGUMENT

I. APPLICATION OF *SHUTTLESWORTH* AND THE SIXTH AMENDMENT PRINCIPLES SET FORTH IN *IN RE WINSHIP* REQUIRE A NEW TRIAL ON ALL COUNTS.

A. The Court of Appeals Never Addressed the Merits of the *Shuttlesworth* Claim and no AEDPA Deference is Due.

When the state appellate court fails to reach the merits of a federal constitutional claim raised in a habeas petition, no deference is due to that court's decision. 28 U.S.C. Sec. 2254(d). While the prosecution correctly notes that there is an initial presumption of merits adjudication when the state court is silent on the merits, "[t]he presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Harrington v. Richter*, 562 U.S. 86, 100 (2011), *citing*, *Ylst v. Nunemaker*, 501 U.S. 797, 803 (1991).

Here, all the evidence indicates that the Court of Appeals did not, either in deciding the case or in summarily denying Golb's motion to reargue, reach the merits of the *Shuttlesworth* claim. *See Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). That claim first arose on May 13, 2014, when the Court of Appeals, charting a course that none of the parties or the lower courts suggested or anticipated, narrowed the hitherto limitless sweep of the terms "benefit" and "injury" to pecuniary gain or loss, interference with government administration,

and damage to reputation, yet still affirmed the conviction gained based upon the broader statute. Neither party had briefed the question of whether the conviction could be upheld if the unconstitutionally broad statute under which the case was tried was subsequently narrowed. None of the questions from the bench foreshadowed the Court of Appeal's ultimate disposition.

The briefs in the Court of Appeals, and the lower courts, and all the arguments made by both sides, mirrored each other: the prosecution repeatedly asserted (as it still does with respect to the forgery statute) that writing under the name of another real person with the intent to gain *any* benefit or cause *any* harm was criminal, whereas Golb argued that such a construction of these statutes would render them overbroad and vague, in violation of the United States and New York State constitutions. The question of whether the term "any" harm or "any" benefit could be retroactively narrowed, but the conviction still upheld, simply never arose.

The lack of engagement on an issue from the parties is one of the scenarios suggested by the Court in *Johnson v. Williams*, 133 S. Ct. 1088 (2013), that would rebut the presumption of merits adjudication. *Id.* at 1096-1097. Indeed, in *Johnson*, the Court held that "a judgment is normally said to have been rendered 'on the merits' only if it was 'delivered after the court … heard and *evaluated* the evidence and the parties' substantive arguments.'" *Id.* at 1097, *citing* Black's Law

Dictionary 1199 (emphasis in original). In Golb's case, there was no substantive argument to evaluate. Nor can the *Shuttlesworth* argument be fairly deemed "too insubstantial to merit discussion." *Johnson*, 133 S.Ct., at 1095. Regardless of whether the district court's decision on the merits of the claim was erroneous or not, its extensive treatment of the issue demonstrates its substance.

The prosecution's reliance on Chief Judge Lippman's dissent as evidence that the Court of Appeals reached the merits of a federal claim that was neither raised on the brief nor argued by either party is also fallacious. Chief Judge Lippman found the relevant statutes unconstitutionally overbroad and in violation of the First Amendment, even as narrowed by the majority. *People v. Golb*, 23 N.Y.3d 455, 471 (2014). That is why the relief he proposed was outright dismissal of all of the charges, rather than a remand for a new trial under the narrowed standard. Id. While he did point out the inconsistency of upholding the conviction notwithstanding the majority's overbreadth holding, *id*., he did not cite any federal or other case putting the majority on notice that a federal constitutional right to due process was implicated. The majority did not engage him on his observation, but ignored it.

The *Johnson* presumption has also been rebutted with respect to the Court of Appeals' summary denial of the Motion to Reargue, in which the *Shuttlesworth* issue was first raised. Such a summary denial is not and cannot be a merits

determination. As explained more fully in Appellant's Brief at 32-35, denial of a motion for rehearing is not — by definition under New York law — a merits determination.

Furthermore, it is hard to imagine that the Court of Appeals would issue a merits determination of this issue without some reference to its past holdings that are uniformly in opposition to the "merits" determination the prosecution wishes to find in the word "denied." In *People v. Finkelstein*, 9 N.Y.2d 342 (1961), the defendant was convicted of violating Penal Law § 1141, which criminalized possession of obscene material. The statute did not have a *scienter* requirement. Subsequently, the Court of Appeals, to save the constitutionality of the statute, construed it to require *scienter*, and held that "[a]t the time of the prosecution of the violations herein, the prevailing precedent … declared that *scienter* was *not* an element of the crime … [Thus] new trials are warranted by the circumstances and in the interests of justice…." *Id.* at 345 (emphasis in original). In *People v. Ryan*, 82 N.Y.2d 497 (1993), the Court of Appeals held — on state-law grounds alone — that a defendant must know that his or her possession of controlled substances exceeds a particular quantity; simple possession of the substance without knowing its quantity was insufficient for criminal liability. The Court of Appeals — despite the fact that the federal Constitution was not implicated in its decision — accordingly reversed the convictions on all counts that, under the newly-narrowed

statute, required knowledge of weight.

B. Even with AEDPA Deference, the Court of Appeals' Decision was Contrary to, and Unreasonably Applied, Supreme Court Precedent.

The prosecution reads *Shuttlesworth* to apply "only when the statute's construction was narrowed due to a perceived constitutional defect in it." Appellee's Br. at 39. The prosecution then asserts that the Court of Appeals' narrowing of the statute "resorted only to state statutes and legislative intent in explaining the meaning of New York statutes." Appellee's Br. at 42. This interpretation is not only unreasonable; it is absurd. The prosecution cites not a single case in support of this position.

None exist.

First, the prosecution is flatly wrong in asserting *Shuttlesworth* has no applicability when appellate narrowing is done on state-law grounds. The requirement that the prosecution must prove every element of each offense beyond a reasonable doubt was established in *In re Winship*, 397 U.S. 358 (1970). That principle is violated when a jury is told it must convict if it finds facts that do not make out a material element of the offense. *Osborne v. Ohio*, 495 U.S. 103, 123 (1990). Osborne expressly based its holding on *In re Winship*, reiterating that "'the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Osborne*, 495 U.S. at 123 n.17, *quoting*, *In re Winship*, 397

U.S. at 364. Here, the jury was told it must convict if it found that the defendant, among other things, intended to be annoying. Because such an intent does not suffice, under the Court of Appeals' later ruling, to make out the offense, *a fortiori* the conviction is unfair, violates *Winship*, and must be overturned.[8]

The constitutional violation that arises when a defendant is convicted for conduct that does not fully make out the offense under state law does not depend upon the reason for the statute's narrowing. As the Fifth Circuit noted in *Cameron v. W. B. Hauck*, 383 F.2d 966 (5th Cir. 1967), *Shuttlesworth* is applicable:

> [W]here the jury is told that it may convict upon any of several inculpatory theories which are all supported by evidence, and the jury renders a verdict of guilty, and on appeal one of the theories upon which the jury was charged is held legally incapable of supporting a conviction. In such cases it is impossible to tell from the general verdict upon which of the theories the jury had convicted. The obvious assumption is that the jury, being incapable of deciding whether a legal theory is valid or invalid, might decide to convict upon an invalid theory which is supported by the evidence. Such convictions violate due process.

Id. at 973.

Second, there is every reason to view the Court of Appeals' decision to narrow the statute on appeal as a direct response to Golb's extensive Federal Constitutional arguments in the briefs and at all oral arguments, and the

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[8] See, e.g., *In Royal v. Sup. Ct. of New Hampshire*, 531 F.2d 1084, 1088-89 (1st Cir. 1976) ("fairness requires evaluation of the law as it existed at the time of [the] arrest and conviction"; "[w]hatever the merits of the New Hampshire Supreme Court's construction . . . it cannot validate retroactively the . . . conviction.").

prosecution's equally extensive rebuttals, rather than upon some state-law ground. While the Court of Appeals did not articulate the basis for its decision, it can only be a Constitutional basis — otherwise there is no reason why it would not give full effect to the broad, indeed, limitless definition of "injure" and "benefit."

The Court of Appeals did not point to any legislative history or principle of New York State law that required the narrowing. And, going back to first principles, a statute that would criminalize writing under the name of another with the intent to cause any harm or any benefit, "no matter how slight," would plainly be overbroad and in violation of the First Amendment. There is thus every basis to think that the Court of Appeals construed the statute in accordance with these basic principles, rather than some fanciful interpretation of New York law.[9]

C. The Error was not Harmless, and the Court of Appeals Made No Harmless Error Determination.

Golb's opening brief fully addresses the district court's errors in its harmless-error determination, and rebuts the prosecution's argument that harmless error is established merely by legally sufficient evidence of an intent to damage reputation. Appellant's Br., 35-40. The Court of Appeals specifically stated that

[9] Even if the Court of Appeals' decision to narrow the statute somehow subtly resulted from concluding that the state legislature itself intended the words "any harm or benefit" to be limited to financial harm and damage to reputation, rather than the infinite range of meanings they were liberally given at Golb's trial, that legislative intent would itself result from — and, indeed, be necessitated by — the legal requirement that any criminal statute comply with the due process clause of the Fourteenth Amendment. The end result is a tautology, a contrived argument whose apparent aim is to obscure, as much as possible, the clear import of *Shuttlesworth*.

there was "sufficient" evidence at trial for the jury to convict under the narrowed statute, not that the evidence compelled conviction beyond a reasonable doubt. *Golb*, 23 N.Y.3d at 466.

It is ironic that the prosecution, by the terms of its own argument, must concede that the Court of Appeals did not address the issue of harmless error. The prosecution maintains that the Court of Appeals' decision was in no way erroneous, and that Court of Appeals did not narrow the statute on constitutional grounds. Therefore, the prosecution should not be heard to argue that the constitutional trial court error, which the prosecution does not concede, was somehow at the same time determined by the Court of Appeals to be harmless. Although courts will often find no error, and then determine, in the alternative, that any error was harmless, the Court of Appeals did not do so. Since, according to the prosecution, the Court of Appeals found no constitutional trial error, that Court cannot be deemed by inference to have decided harmless error.

The prosecution also misreads *Osborne*. In that case, the defendant was charged under an Ohio child pornography statute which prohibited possession of nude photographs of minors, with certain exceptions not relevant to the holding. At trial, the defendant testified that he knowingly possessed photographs of a fourteen year-old-boy with his anus exposed, with his penis erect, and with a plastic object inserted into his anus. *Osborne*, 495 U.S. at 107 n.1. On appeal, the

Ohio Supreme Court construed the statute to require scienter and that the materials must depict either a lewd exhibition or a graphic focus on genitals. *Id.* at 123. Although the Court rejected Osborne's First Amendment and overbreadth claims, it still, relying on *In re Winship*, overturned Osborne's convictions because the "jury in this case was not instructed that it could convict Osborne only for conduct that satisfied [these newly-imposed] requirements." *Id.* at 123. That is precisely the flaw in Golb's case.

Even with Osborne's admissions that he knowingly possessed clearly lewd materials, the Court still reversed the convictions on due process grounds, and remanded the matter for a new trial to ensure that "Osborne's conviction stemmed from a finding that the State had proved each of the elements of [the newly and narrowly construed Ohio statute]." *Id.* at 125-26. That is precisely the relief Golb seeks.

To fairly posit an analogy of Golb's conduct to Osborne's, Golb would have had to testify that he expressly intended to harm the reputations of Messrs. Schiffman, Seidel, and Cross. Even then, his conviction would **still** have to be reversed to ensure that he was not criminalized simply for intending to be

annoying.[10] *Osborne* provides no help to the prosecution.

Third and last, the prosecution misapplies *Mauer v. Minnesota*, 625 F.3d 489 (8th Cir. 2010), by removing language in the Eighth Circuit's holding from its context. In *Mauer*, the defendant was convicted after a *bench* trial where the trial judge made "detailed findings of fact and conclusions of law in writing." *Id.* at 490. After the statute was narrowed on appeal, the habeas court agreed that remanding the matter to the same *judge* for application of the new law to the facts was a proper method of protecting Mauer's right to be convicted only under the new standard. *Id.* at 492. The habeas court noted that Mauer's situation differed materially from *Osborne* and *Ashton*, as there, "the defendants had originally been convicted in *jury trials* for violating statutes that were later narrowly construed . . . ." *Id.* at 493 (emphasis in original). Golb, of course, was convicted by a jury, so the *Mauer* method of protecting his rights, by its own terms, is unavailable.

II. THE CRIMINAL IMPERSONATION AND FORGERY STATUTES, AS CONSTRUED BY THE COURT OF APPEALS, ARE CONTENT-BASED RESTRICTIONS ON SPEECH AND CANNOT BE JUSTIFIED.

As discussed at length in Golb's opening brief, no AEDPA deference is due the Court of Appeals decision. But even with AEDPA deference, the decision violates clearly established Supreme Court law. *United States v. Stevens*, 559 U.S.

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[10] Such admissions (which did not take place) would of course preclude Golb from arguing that he was not fairly on notice that a narrowed law could be applied to his conduct, just as Osborne's "notice" challenge was rejected by the Supreme Court in light of his testimony.

460 (2010) and *United States v. Alvarez*, 567 U.S. ___, 132 S.Ct. 2537 (2012) clearly establish that all content-based speech is protected unless it falls into one of the historically unprotected categories of speech or can survive strict scrutiny. *Reed v. Town of Gilbert*, ___U.S. ___ , 135 S.Ct. 2218 (2016) clearly establishes that the criminalization of Golb's speech was content-based. *Hustler v. Falwell*, 485 U.S. 46 (1988) and *Alvarez* clearly establish that the criminal sections in question, as construed by the Court of Appeals, cannot survive strict scrutiny. This reply is confined to responding to the prosecution's arguments to the contrary.

A. Both the Forgery and Criminal Impersonation Statutes, as Construed by the Court of Appeals and the District Court, are Content-Based Restrictions.

The prosecution asserts that the forgery statute is not content-based because it bases liability on the intent of the message's maker "to defraud, deceive, or injure another" rather than on the "topic or issue to be discussed or conveyed therein." Appellee's Br. at 53. But as *Reed v. Town of Gilbert*, ___U.S. ___ , 135 S.Ct. 2218 (2016) made clear, if a restriction is based on the *function or purpose* of the communication it is by definition content-based:

> Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Id. at 2227. *See also, e.g., Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663-664

(2011) (Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed). Content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R.A.V. v. St. Paul*, 505 U.S. 377, 395, 112 S. Ct. 2538 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 S. Ct. 501 (1991).

Reed also set forth a clear and unequivocal method, particularly applicable to statutes such as the ones at issue here, to determine whether a law is content-based:

> Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "justified without reference to the content of the regulated speech," ….

Reed, 135 S.Ct. at 2227 (*quoting Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989)). This is simple enough. If, as here, one must examine the content of the speech to determine whether it falls in the permissible or impermissible category, it is a content-based restriction. *Reed*, 135 S.Ct. at 2230. *See also*, *Cincinnati v. Discovery Network*, Inc., 507 US 410, 429 (1983) (describing as "common sense" the rule that where liability is "determined by the content" of speech the restriction

is content based).

Liability under the forgery statute (Penal Law § 170.05) and the criminal impersonation statute (§ 190.25) cannot be determined without reference to the content of the speech. Under § 170.05 it is necessary for a fact finder to review the content of a communication ("a written instrument") to ascertain the maker's intent ("to defraud, deceive, or injure another"). Under § 190.25, as narrowed by the Court of Appeals, it is necessary for a fact finder to review the content of a communication to determine whether the maker intended to cause injury to a reputation.

The prosecution continues to assert that "it is not the content of the emails that got Golb into trouble for forgery." Appellee's Br. at 54. But both the literal reading of the statute (as construed by the Court of Appeals), and the record in this case, belie that assertion. The prosecution repeatedly elicited testimony regarding the allegedly "false" and hurtful accusatory contents of the emails, and then in summation exhorted the jury to examine the emails during deliberation, amalgamating the unconstitutional "harassment" charges with all the other ones. *See, e.g.*, Tr. 158, JA-172 ("terrible allegation"), Tr. 250, JA-263 ("false confession and accusations"), Tr. 301, JA-314 (complainant "very upset" at allegation of misconduct); Tr. 322, JA-335 ("accusation or false confession"; plagiarism allegations "not credible" because made with fake identity rather than "true name"), Tr. 742, JA-541 ("attacks" were "personal," "crossed a big line"),

passim (defendant made "accusations," or "accused" others of misconduct, or was an "accuser"), Tr. 1247, JA-922 ("So look at *exhibit 10*, these binders down here at the bottom… that are *emails from the Larry dot Schiffman*…. Look at all the evidence. Look at the totality of what he did. Look at why he did it because he hated him and resented him."); Tr. 1255, JA-930 (allegations of plagiarism "not true").[11]

All of this harangue merged throughout the trial into a single, repetitive indictment of the content of Golb's emails as well as of his character, the constant motif being that Golb, in his criminalized emails, inappropriately "attacked," "accused," and "upset" the distinguished complainants; at no point did anyone tell the jurors that they somehow might not examine the content of the "Larry.Schiffman" emails to determine whether Golb acted with an intent to "deceive, defraud, or injure." Quite the contrary: they were told to "look at the emails from the Larry dot Schiffman" as well as "other emails pertaining to Dr. Schiffman," and to "look at the totality of what he did." Id. at 1247. Having used

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[11] This is, of course, only a partial list. The trial transcript reveals 30 occasions on which the prosecution explicitly claimed and elicited testimony that Raphael Golb's blogs and emails had made "false" or otherwise offending accusations — and, after this purported understanding had been ensconced in the jurors' minds, 140 occasions, by our count, on which the prosecution sneeringly or sarcastically referred to those same "accusations." For some of these additional occasions, *see* Tr. 25-26, 30, 64, 66-67, 81, 149, 156-157, 249, 255, 300, 302-304, 461-462, 466, 646, 717-718, 720, 722, 727, 729, 740, 742-744, 1104, 1219-1221, 1229, 1241, 1248-1249, 1254, 1260; JA-47-48, 52, 78, 80-81, 95, 163, 170-171, 262, 268, 313, 315-317, 402-403, 408, 474, 516-517, 519, 521, 526, 528, 539, 541-543, 777, 894-896, 904, 916, 923-924, 929, 935. Golb was not allowed to controvert this effort because "neither good faith nor truth" was allowed as a "defense." See Pretrial Order of Feb. 11, 2010 at 2, n1. JA-34.

the content of the communications as the basis for criminalizing Golb, the prosecution cannot now be heard to claim that the content of the communications is not relevant.

The prosecution also argues that the statutes, as construed, are not content-based restrictions because "Professor Schiffman could have sent those emails with identical content and he would not have been subject to criminal liability." Appellee's Br. at 54. Whether someone else could have said the same things without liability is not, and cannot be, a test. For example, in *Alvarez*, a Congressional Medal of Honor winner could have said exactly the same things as Mr. Alvarez and not been subject to criminal liability. Thus, under a content-based restriction (such as the content-based Stolen Valor Act that was at issue in *Alvarez*) liability may depend on the identity of the speaker as well as the content of the communication.

The correct test is whether the accused could have said *different things* in the same time, manner, and place without liability. The answer is "yes" — even if Raphael Golb had impersonated Professor Schiffman in the same inappropriately deadpan or "deceptive" manner, different content — a commonplace "Happy Holidays," for example — would have evinced no intent to injure. Because liability under either statute depends on the content of communications, both statutes are content-based restrictions.

B. Golb's Convictions Cannot Survive the Application of Strict Scrutiny.

Of course, applying strict scrutiny does not end the inquiry. The First Amendment leaves speech unprotected when it is fraudulent. If either statute restricted only speech intended to defraud, properly narrowed ("a misrepresentation that is material, upon which the victim relied, and which caused actual injury," *Alvarez*, 132 S.Ct. at 2554 (Breyer, J., concurring)), then the statute would likely pass constitutional muster, as all of the forbidden speech would be unprotected. But neither statute is so limited. Under the forgery statute, speech is criminalized if it is intended to cause any benefit or create any harm, no matter how trivial. The criminal impersonation statute, as construed by the Court of Appeals, criminalizes speech intended to damage reputations. But criminal penalties for defamation were declared unconstitutional in *Ashton v. Kentucky*, 384 U.S. 195 (1966), and the prosecution cannot simply rebrand defamation by calling it "fraud."

The prosecution gamely attempts to twist *Alvarez* to support the proposition that falsity, plus intent to deceive or injure, equals unprotected speech. Of course, it does not. As to "deception," in *Alvarez* the concurrence would have held the Stolen Valor statute unconstitutional even if "construed to prohibit only knowing and intentional acts of deception." 132 S.Ct. at 2555 (Breyer, J., concurring). Justice Breyer's concurrence puts to rest the notion that deception might render speech unprotected.

Alvarez merely reaffirmed a long line of First Amendment jurisprudence confining allowable content-based restrictions to a few "historic and traditional categories of expression long familiar to the bar." Speech outside these categories is protected, and may not be restricted based on its content. These categories are: 1) advocacy intended, and likely, to incite imminent lawless action; 2) obscenity; 3) defamation; 4) speech integral to criminal conduct; 5) fighting words; 6) child pornography; 7) fraud; 8) true threats; and 9) speech presenting some grave and imminent threat the government has the power to prevent. 132 S. Ct. at 2544.

The prosecution pushes aside that clear rule, and instead tries to lump the alleged harms in this case with the cognizable harms that are listed above. On pages 55 and 56 of Appellee's brief, the prosecution casually refers to "injury to reputation" and "deception" as evils unworthy of First Amendment protection, and claims, bafflingly, that the divided *Alvarez* Court was unanimous to this extent: "there is no First Amendment right to engage in deceptive conduct aimed at duping victims into acting in reliance on the deception." Appellee's Brief, at 56. That interpretation is flat wrong. Justice Kennedy's plurality opinion had this to say on the topic:

> Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. *See, e.g., Virginia v.*

> *Bd. of Pharmacy*, 425 U.S. at 771 (noting that fraudulent speech generally falls outside the protections of the First Amendment). But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

Alvarez, 132 S.Ct. at 2548 (citation to George Orwell omitted). *Alvarez* simply precludes the government from creating a free-floating test for First Amendment coverage, or criminalizing speech that does not fall within the narrow areas where speech has never been protected. The prosecution cannot take forms of expression that it regards as social ills and cobble them together, under the contrived pretext that they are not really "speech," into a new, unprotected category, without meeting the compelling-state-interest test. The prosecution analogizes with sexual assault, Appellee's Br. at 62, but unlike "deceptive" speech or speech with academic value that stirs up controversy and may have the effect of diminishing a reputation, "nonconsensual sex acts" are not protected by the First Amendment, and so the analogy fails.

Alvarez clearly holds that speech, even if it is "false" and intended to gain a non-pecuniary benefit, is fully protected. And even speech that is actually intended to injure a reputation and does injure a reputation is largely protected.

Only false statements of material fact, made intentionally or with reckless disregard for the truth (depending upon the status of the aggrieved party), that cause damage to reputations are actionable. And that action lies only in tort, not the criminal law. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Hustler v. Falwell*, 485 U.S. 46 (1988).

As the *Golb* trial court itself admitted, "there is no longer a criminal penalty for libel." Pretrial Order of Feb. 11, 2010 at 2, n1. JA-34. It would be ironic and at odds with basic principles of civil, criminal, and First Amendment law to authorize the government to pursue with the full force of the criminal law one who merely *intended* to damage a reputation, while disallowing criminal sanctions when a reputation is *actually* injured.

Just as speech intended to *deceive* is not rendered unprotected by mere virtue of that intent, speech intended to injure is not rendered unprotected by mere virtue of *that* intent. If we trick each other to commit fraud, our speech falls into the unprotected category "fraud." If we injure each other by spreading falsehoods, our speech may fall into the unprotected category "defamation." If we deceive each other under oath, our speech may fall into the unprotected category "perjury." But speech that is merely deceptive cannot be criminalized simply because the government chooses to call it "fraud." And the forgery statute, allowing conviction if Mr. Golb had the intent to defraud, deceive, *or* injure, forbids a real

and substantial amount of protected speech — speech that deceives but does not defraud — and so is overbroad under the First Amendment. The trial court's definition of "defraud" as to "deprive that person of his or her right or in some manner to do him or her an injury," Tr., 1279, JA-954, does nothing to cure the constitutional problem — it merely repeats it.

C. The Overbreadth is Substantial.

Arguably most disturbing, the prosecution asserts that "[a]s the district court aptly noted, parody and satire in fact require that the intended audience recognize the impersonation, not that they are deceived by it." (Appellee's Br. at 58). This assertion simply asks this Court to ignore the historic and contemporary examples that prove the contrary: there is a genre of satire and parody that relies for its impact precisely on its "deceptive" quality, which then has the intended result of provoking controversy and debate. The deceptive satires and hoaxes published (always pseudonymously) by authors like Swift, Defoe, Benjamin Franklin and Mark Twain, the fake, satirical, and embarrassing "memoirs" and collections of "letters" attributed to French nobles during the eighteenth century, all manifestly relied for their impact on the specific expectation that many readers would *not* understand that they were reading fictions — and would then realize that the joke was on *them* when they became apprised of that reality. The authentic-sounding tweets that regularly go out in the "names" of university presidents today, as well as the documented satirical stunts of the "Yes Men" and other internet groups —

who deceitfully impersonate individuals, entities and organizations for purposes of controversy — continue the same tradition.[12]

It is a feeble and toothless parody that deceives nobody and injures nobody. Even if parody is so unsophisticated that the dimmest of audience members would not mistake it for earnestness, it still has a sting. It makes people see its subject a little bit differently, usually at the subject's expense, and often at the expense of the subject's reputation. The requirement of an intent to deceive or injure cannot prevent the statutes' chilling effect on satire and parody, as the satirist now "must take care in every word to create no impression" that he intends to deceive or injure. *See Thomas v. Collins*, 323 U.S. 516, 535 (1945). The wise satirist, in avoiding that impression, will "hedge and trim," eschewing even constitutionally protected speech to avoid running afoul of the law. *Id.* Tucker Carlson would have been well advised to put a disclaimer on or otherwise water down his impersonation of Keith Olbermann, lest his intent be misconstrued by a prosecutor and a jury. Where, on page 59 of its brief, the prosecution asserts that "the jury's verdict would not convict petitioner for mere satire or parody," it ignores the fact that "[s]uch a distinction offers no security for free discussion." *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

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[12] The Yes Men call their well-documented deceptive technique "identity correction." See: https://en.wikipedia.org/wiki/The_Yes_Men. Similarly, if Tucker Carlson wanted the reader to *know* that he was impersonating Olbermann, the "joke" would be very different. It was the very conflating of the written diatribe with the Olbermann identity that gave the satire its desired effect. It was precisely the effectiveness of the deception that made it a news story.

CONCLUSION

For the foregoing reasons, the writ of habeas corpus must be granted.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the word count of this brief, exclusive of tables and this certification, totals 10,544 words, based upon the word count program in Windows.

. /s/ .

Ronald L. Kuby

Dated: New York, NY
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