

Constitutional Court of the Russian Federation

1 Senate Square, St. Petersburg

190000 Russian Federation

**BRIEF OF JEFFREY KAHN AS AMICUS CURIAE**

In relation to the complaints of

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

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

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

Mozh Aleksandr Vladimirovich (case № 3920/15-01/2023)

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

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

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

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

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

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

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

Davydenko, Denis Andreevich (case № 4449/15-01/2023)

**I. INTRODUCTION**

1. This brief is respectfully submitted in connection with ~~twenty-one~~ complaints registered

[REDACTED]

by the Secretariat of the Court concerning the violation of constitutional rights and freedoms by part 1 (20 complaints) and part 2 (1 complaint) of Article 20.3.3 of the Russian Federation Code of Administrative Offences.<sup>1</sup>

2. The brief is signed by ~~twenty-eight~~ professors of law who by training and experience are

[REDACTED]

competent to provide the history and analysis contained in it. Their names and academic affiliation (for purposes of identification only) are provided in Appendix I.

3. The brief provides a concise legal history of relevant experience in the United States protecting freedom of speech and thought, especially during times of war, national emergency, or other perceived threats to state security. It responds to erroneous and hyperbolic assertions by Russian Federation officials who contend that the U.S.

[REDACTED]

## II. SUMMARY OF ARGUMENT

a. The constitutions of the Russian Federation and the United States both explicitly protect

freedom of expression. The Constitution of the Russian Federation provides: "Everyone

prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>9</sup>

7. Maintaining that standard has not always been an easy task. During some periods of acute national crisis, regrettably, the United States did not meet the standard this standard



required. The leading scholar of free speech in the United States summarizes this history:

In each of these episodes, the nation faced extraordinary pressures – and temptations – to suppress dissent. In some of these eras, national leaders cynically exploited public fears for partisan political gain; in some, they fomented public hysteria in an effort to unite the nation in common cause; and in others, they simply caved in to public demands for the repression



III. ARGUMENT

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

10. The enactment and short life of the Sedition Act of 1798 presents an early shameful

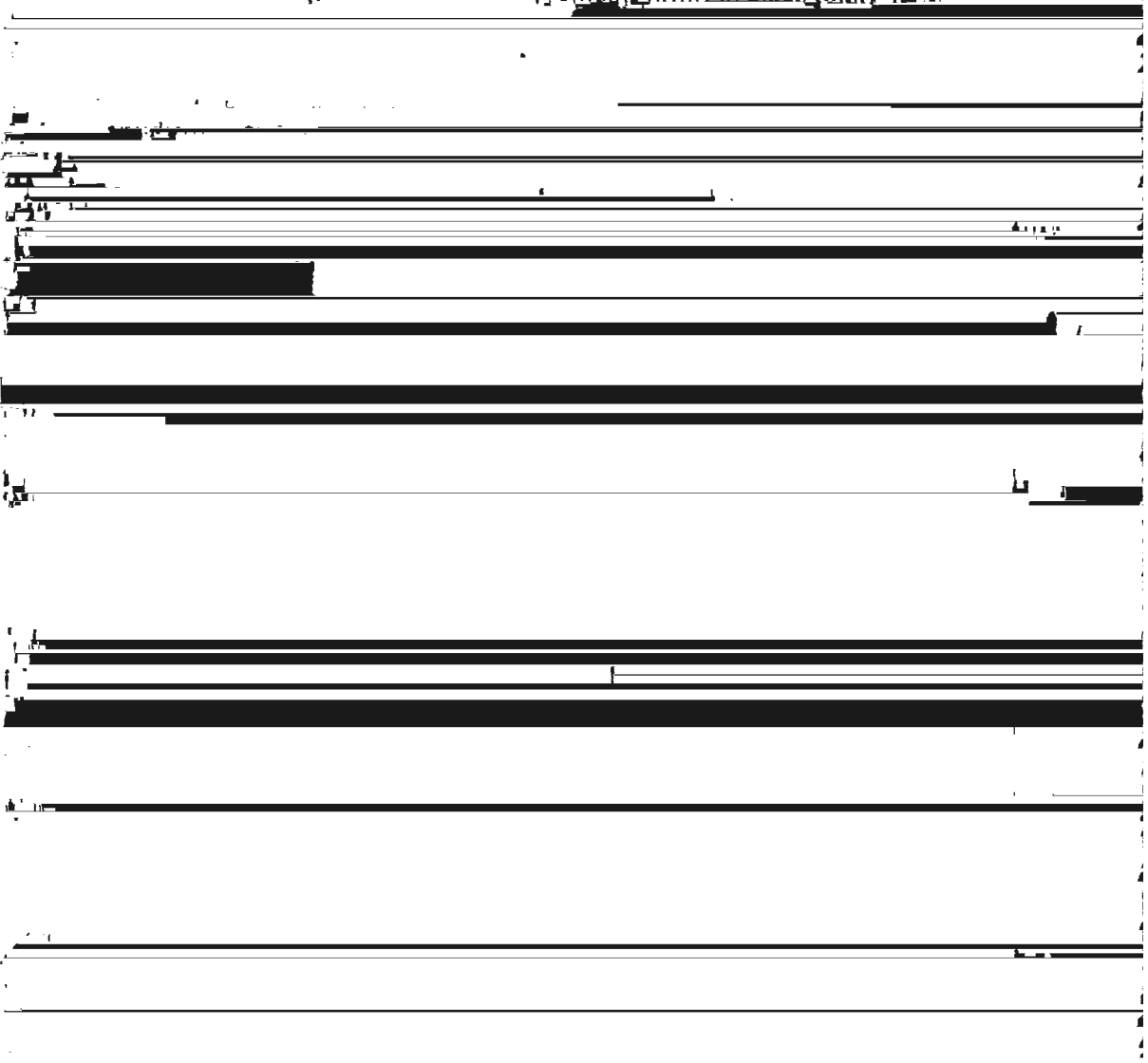


with France, with Napoleon's armies on the march in Europe while the French navy seized

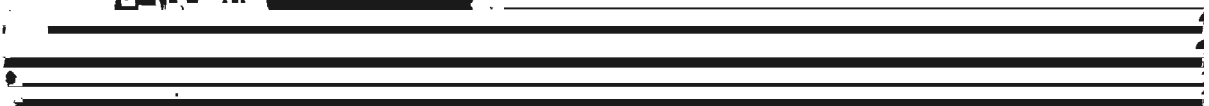


The Amendment has a 'central meaning' – a core of protection of speech without which democracy cannot function, without which, in Madison's phrase, 'the censorial power' would be in the Government over the people and not 'in the people over the Government.' This is not the whole meaning of the Amendment.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

15. This understanding of the Sedition Act remains firmly in place today as does the rationale



the opinions of the people in any state that would call itself a democracy. Although an initial misstep by a young democracy, the Act in the end taught the importance of strengthening protection for free speech and thought



Legislation is not subject to a First Amendment test established by that case, and only

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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to ask "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."<sup>21</sup> A week later, the Court upheld the conviction of

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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

21. The meaning of "clear and present danger" bolstered by the powerful arguments of

[REDACTED]

Justices Holmes and Brandeis, grew ever stricter and more protective of speech in the interwar period. Even at this point in U.S. history, the restriction of speech

[REDACTED]



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

26. No further prosecutions were filed under the Smith Act.<sup>33</sup> And that call for imminence,

27. The United States now has long experience protecting the right of people there to protest

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mention the right to express all manner of opinion about domestic politics and policies).

These protests have often been much more dramatic

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30. Even at the height of the nuclear arms race, when President Reagan described the Soviet Union as an adversary with “the aggressive impulses of an evil empire,”<sup>41</sup> the Supreme

held constitutional even though the flag was stolen in the course of acts of vandalism

while chanting “America, the red, white, and blue, we spit on you”, and at a demonstration opposing (indeed, occurring in the same city hosting the political convention for) President Reagan’s nomination for a second term in office.<sup>42</sup>

Permitting the government to decree this speech to be a criminal offense,  
whether shouted from the rooftops or made in a barely audible whisper

would endorse government authority to compile a list of subjects about  
which false statements are punishable. That government

<sup>46</sup> *Id.*, at 723

"...federal rule of law state with a republican form of government" 50

[REDACTED]

Justice Kennedy wrote in striking down the Stolen Valor Act:

The ~~comp~~ for ~~speech~~ that is ~~false~~ ~~speech~~ that is true. This is the

[REDACTED]

APPENDIX I

(institutional affiliation for purposes of identification only)

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**Lawrence Lessig**, Roy L. Furman Professor of Law and Leadership, Harvard Law School

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Professor of Law and Political Science, Thomas R. Kline School of Law, Duquesne University)

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