CASE NO. A14-1408
STATE OF MINNESOTA
IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs.

Timothy Robert Turner,

Appellant.

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF APPELLANT

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[*] Counsel would like to thank Jeffrey Brandt, a UCLA School of Law student who helped write this brief.

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Electronic Frontier Foundation is a nonprofit, member-supported civil liberties organization that works to protect (among other things) freedom of speech in a world of sophisticated technology. EFF has long opposed laws that restrict truthful speech online, whether that speech is about major public controversies or about people's daily lives. It has participated as *amicus curiae* supporting civil rights in many cases throughout the country, including *McCaughtry v. City of Red Wing*, 831 N.W.2d 518 (Minn. 2013).[1]

SUMMARY OF ARGUMENT

Minn. Stat. 609.765 imposes defamation liability for truthful speech. This is unconstitutional, given modern First Amendment precedents and our nation's and Minnesota's commitment to the freedom of speech. Moreover, even to the extent that this statute punishes false speech, its terms are not consistent with First Amendment defamation caselaw.

Because the statute criminalizes a substantial amount of constitutionally protected speech, the statute is overbroad and thus violates the First Amendment. Even if Mr. Turner could be prosecuted under a narrower law that specifically outlawed knowing defamatory falsehoods, Minn. Stat. 609.765 is facially invalid. In particular:

1. The reason that defamation may, in some situations, be punished is that there is "no constitutional value in false statements of fact," *Gertz v. Robert Welch, Inc.*, 418 U.S.

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[1] This brief was not authored in whole or in part by counsel for a party. No person or entity, other than UCLA School of Law, has made a monetary contribution to the preparation or submission of this brief.

323, 340 (1974), at least when the statements are defamatory.[2] Yet Minn. Stat. 609.765 outlaws as defamation even speech that is true, so long as the jury concludes the speaker lacked a "good motive." Such a prohibition is therefore unconstitutionally overbroad, even as to speech on matters of private concern.

2. Minn. Stat. 609.765 also criminalizes true statements on matters of public concern, unless they are "fair comment made in good faith"—a term that Minnesota courts have interpreted to likewise require good motives. But the U.S. Supreme Court has held that true speech on matters of public concern is categorically protected, regardless of the speaker's motives. *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). The statute is thus unconstitutionally overbroad in this respect as well.

3. The statute also allows punishment for false statements on matters of public concern, even without a showing of "actual malice" in the sense set forth by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Yet *New York Times* and *Gertz* require such a showing before speech on matters of public concern can be punished in this way.

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[2] *United States v. Alvarez*, 132 S. Ct. 2537 (2012), holds that this categorical lack of protection for false statements is limited to defamation and a few other narrow categories of speech that are not at issue in this case; outside those areas, even knowingly false statements can often be constitutionally protected. *Id.* at 2545 (plurality opinion); *id.* at 2553 (Breyer, J., concurring in the judgment); *281 Care Comm. v. Arneson*, 2014 WL 4290372 (8th Cir. Sept. 2, 2014) (striking down a Minnesota statute that prohibited knowingly false statements in election campaigns).

ARGUMENT

I. True Statements on Matters of Private Concern are Constitutionally Protected Regardless of Motive.

Defamation can, under some conditions, be punished on the grounds that there is "no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Indeed, even the U.S. Supreme Court's leading private-concern libel case—*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), which allowed presumed and punitive damages to be imposed absent "actual malice" in private-concern cases—repeatedly noted that it involved false statements. *See, e.g., id.* at 751, 762, 763 (lead opinion); *id.* at 772-73 (White, J., concurring in the judgment).

Yet Minn. Stat. 609.765 criminalizes true statements on matters of private concern if the statements are not said with "good motives and for justifiable ends." This potentially outlaws everyday conversation among family, friends, and acquaintances, leaving what constitutes "good motives" and "justifiable ends" to the discretion of the fact finder.

For instance, after breaking up with a cheating boyfriend, a woman may naturally want to talk to her friends and family about what happened, or inform her Facebook "friends." Yet under Minn. Stat. 609.765 she could be criminally convicted if the jury decided she had bad motives (perhaps such as revenge or a desire to humiliate the ex-boyfriend) rather than good motives (such as a desire to warn her friends about the ex-boyfriend's tendencies or to explain her conduct to her loved ones).

Likewise, a person who had a poor experience at a local restaurant would naturally tell his friends and give the restaurant a bad review—but this review could expose him to

criminal liability if a jury was not satisfied with his motive.[3] People may thus become hesitant to criticize others (especially when those others are known to have the ear of the local prosecutor) for fear of a prosecution. Even when they know their own motives are pure, they may worry that the prosecutor and a jury might wrongly conclude otherwise. And this is especially so given the established Minnesota criminal defamation precedent that, "[a]fter the production of proof showing the publication of the libel, the *burden [is] upon the defendant* to establish such justification, or to show that, in excuse of the same, it was published upon reasonable grounds of belief, and from good motives." *State v. Shippman*, 86 N.W. 431, 445 (Minn. 1901) (emphasis added); *see also State v. Hage*, 595 N.W.2d 200, 206, 207 (Minn. 1999) (concluding that criminal statutes may require justifications to be proven by the defendant by a preponderance of the evidence, so long as the justification does not "disprove or negate any element of the crimes with which [the defendant] was charged").

This chilling effect is exacerbated by the difficulty of determining motive, and the uncertainty about what motives are good. Is the desire to expose a cheating ex-boyfriend to social ostracism a good motive (on the theory that it will deter other such behavior in one's social circle) or a bad motive (on the theory that it is simply the desire to harm)? What about the desire to expose a woman's alleged promiscuity? It is hard to predict how a jury would evaluate such motivations, especially given the lack of Minnesota caselaw on what constitutes bad motive.

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[3] The statute outlaws defamation of "person[s]," and "[f]or purposes of construing statutes, generally, the term 'person' may include partnerships, associations, and corporations," such as a restaurant-owning corporation. *State v. Coonrod*, 652 N.W.2d 715, 717 (Minn. Ct. App. 2002).

Moreover, people often have multiple motives for what they say. For instance, people may post negative restaurant reviews both because they want to warn others about what they see a terrible restaurant, and because they personally dislike the restaurant owner. Indeed, human nature being what it is, one motivation is likely to help produce the other; we are more likely to be unhappy with our experience at a business if we dislike its owner, and vice versa. And it is unclear from the statute whether the "good motives" defense is satisfied when at least one of the speaker's motives is good, only when all of the speaker's motives are good, or when the good motive predominates (whatever that might mean).

The potential reach of the law, and thus its potential chilling effect, is therefore broad. And this effect falls on constitutionally protected speech. Statements on matters of purely private concern do not fall within a generally unprotected category of speech, such as obscenity or fighting words. As the Supreme Court has held, "*[m]ost* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation." *United States v. Stevens*, 559 U.S. 460, 479 (2010). "[S]peech on private matters" does not "fall[] into one of the narrow and well-defined classes of expression [such as obscenity] which carries so little social value . . . that the State can prohibit and punish such expression by all persons in its jurisdiction." *Connick v. Myers*, 461 U.S. 138, 146 (1983).

Nor can the unconstitutional reach of the statute be justified on the grounds that prosecutors will wisely use their discretion in choosing whom to prosecute. As the U.S. Supreme Court has held, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute

merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 479. And even the mere existence of a statute can inhibit speech out of fear that some prosecutor will choose to prosecute such speech.

Partly because of the difficulty in determining a speaker's true motivation, and the chilling effect stemming from that difficulty, the U.S. Supreme Court has held that, "'[u]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection.'" *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (quoting Martin Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy* 91 (2001)). Whether or not this is true in all instances, it makes sense when it comes to criminal libel law. And unsurprisingly, other courts that have considered similar criminal libel statutes—statutes that punished even true speech when it was said with supposedly improper motives—have held them to be unconstitutional. *See, e.g.*, *State v. Helfrich*, 922 P.2d 1159, 1161 (Mont. 1996); *Commonwealth v. Armao*, 286 A.2d 626, 632 (Pa. 1972); *Weston v. State*, 528 S.W.2d 412, 416 (Ark. 1975).

To be sure, a narrow range of true statements on matters of private concern may lead to civil liability under the public disclosure of private facts tort. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998); Restatement (Second) of Torts § 652D (1977). But that tort of course only provides for civil liability, not criminal punishment. It is limited to cases where the statement would be highly offensive to a reasonable person. And it is limited to situations where facts are communicated to the public at large. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553-54 (Minn. 2003). Communications

to a small circle of friends are expressly excluded even from civil liability. *Id.* Minn. Stat. 609.765 lacks these limitations.

II. Minn. Stat. 609.765 Criminalizes True Statements on Matters of Public Concern.

Minn. Stat. 609.765 also unconstitutionally criminalizes true statements on matters of public concern. Even accurate statements about someone involved in a public controversy—for instance, statements that a political candidate had smoked marijuana in college, or had an affair with an employee—might be punished under Minn. Stat. 609.765 if the jury finds that the speaker's motives were not good (for instance, if the jury thinks the speaker was merely trying to discredit a political opponent, rather than acting out of pure public-spiritedness).

And the "fair comment" privilege available for speech "with respect to persons participating in matters of public concern" does not adequately protect true statements on such matters, because it requires that the comment be made "in good faith." Minn. Stat. 609.765 subd. 3(3). The Minnesota Supreme Court has made clear that the fair comment privilege may be defeated by a showing that the speaker "was motivated by malice," in the ordinary sense of being "hostile" to a person. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 258 (Minn. 1980). Indeed, the Court held, "a communication, to be privileged, must be made upon a proper occasion, *from a proper motive*, and must be based upon reasonable or probable cause," and, when the communication is so made "in good faith," the privilege is established. *Id.* at 256-57 (citation omitted, emphasis added). Thus,

if a person has an "[im]proper motive," his speech may be found to lack "good faith" based on that motive alone.[4]

Yet the U.S. Supreme Court has stated that truth is a constitutionally required defense to defamation claims related to matters of public concern, regardless of the speaker's motive. *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964), so held as to statements about public officials, expressly rejecting a "good motives and for justifiable ends" limitation. And *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986), held that even in cases brought by private figures, "the plaintiff bear[s] the burden of showing falsity," "[t]o ensure that true speech on matters of public concern is not deterred." In *Hepps*, the Court rejected the traditional common law rule that the defendant speaker had to prove the truth of an allegedly libelous statement; that rule, the Court held, would create "a 'chilling' effect" that "would be antithetical to the First Amendment's *protection of true speech* on matters of public concern." *Id.* at 777 (emphasis added). Given that a plaintiff in a civil defamation case must show the falsity of a statement, *a fortiori*, a prosecutor in criminal defamation cases must do the same—yet Minn. Stat. 609.765 does not contain this constitutionally prescribed requirement.

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[4] *See also, e.g., Dadd v. Mount Hope Church*, 780 N.W.2d 763, 770 (Mich. 2010) ("To overcome the presumption of good faith the circumstances must be such as to show that the defendant was actuated by a bad motive, which led him to take advantage of the occasion to injure the plaintiff.") (internal quotation marks and citation omitted); *Belcher v. Wal-Mart Stores, Inc.*, 568 S.E.2d 19, 27 (W. Va. 2002) ("A qualified privilege exists when a person publishes a statement in good faith" about certain subjects, but "a bad motive will defeat a qualified privilege defense."); *360 Const. Co., Inc. v. Atsalis Bros. Painting Co.*, 915 F. Supp. 2d 883, 895 (E.D. Mich. 2012) ("Courts have used the term 'good faith' to describe the statement-maker's proper motive.").

Even outside defamation law, the Supreme Court has applied near absolute protection for the publication of truthful statements that pertain to matters of public interest. "As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979)). As the Court has "repeatedly held," the publication of a truthful statement about a matter of public significance can be punished only to satisfy a "need of the highest order." *Id.* at 527-28. Thus, for instance, in *Bartnicki*, the Supreme Court held that third parties who receive copies of illegally recorded conversations remain free to publish them; and in *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989), the Supreme Court invalidated a statute that barred newspapers from publishing the names of sexual assault victims. *See also Jean v. Mass. State Police*, 492 F.3d 24, 25, 30 (1st Cir. 2007) (holding that "the broad interest in permitting 'the publication of truthful information of public concern'" protects "an individual's internet posting of an audio and video recording of an arrest and warrantless search of a private residence" even "when the individual who posted the recording had reason to know at the time she accepted the recording that it was illegally recorded" (quoting *Bartnicki*)).

In each case, the laws, though well-intentioned and supported by important public policies, were invalidated after failing this scrutiny. Because of these precedents—both the libel law cases and the other cases—it is unsurprising that state courts have indeed struck down criminal libel statutes that failed to make truth an absolute defense as to matters of public concern. *See Gottschalk v. State*, 575 P.2d 289, 292 (Alaska 1978) ("The First Amendment to the United States Constitution requires that truth be an absolute defense regardless of the motive of the utterer, at least where public officials and public fig-

ures *or* issues of general or public interest are involved.") (emphasis added); *Farnsworth v. Tribune Co.*, 253 N.E.2d 408, 410 (Ill. 1969) (taking the same view as to speech about public figures); *Dworkin v. L.F.P., Inc.*, 839 P.2d 903, 920 (Wyo. 1992) (likewise).

Moreover, whatever protection the "fair comment" defense does offer to true statements on matters of public concern, that protection can offer little assurance of safety to speakers. The line between speech on matters of public concern and speech on matters of supposedly purely private concern has proven hazy; it is hard for speakers to predict where the line will be drawn.

For instance, are allegations of criminal conduct speech related to a matter of public concern? The New Jersey Supreme Court recently held that a person's online allegation that his uncle had molested him when the person was a child was a matter of purely "private concern" for libel law purposes. *W.J.A. v. D.A.*, 43 A.3d 1148, 1157 (N.J. 2012). Likewise, the Texas Court of Appeals held that a newspaper's allegations about how a sheriff's son behaved in an interaction with police officers who had stopped him did not constitute speech on a "matter of public concern." *Klentzman v. Brady*, 41 Media L. Rep. 2613 (Tex. Ct. App. 2013) (not yet released for publication in S.W.3d).

On the other hand, the California Court of Appeal held that the inclusion, in a leaflet posted around town listing alleged sexual attackers, of a claim that a particular man had attempted to rape a woman was speech on a matter of "public concern." *Carney v. Santa Cruz Women Against Rape*, 271 Cal. Rptr. 30, 32, 37 (Ct. App. 1990). Likewise, the Alabama Court of Civil Appeals held that a broadcast showing a man slapping his child at the child's baseball game, in the context of a discussion of excessive pressure on children

in youth sports, "brought up a matter of public concern." *Forrester v. WVTM TV, Inc.*, 709 So. 2d 23, 26 (Ala. Civ. App. 1997).

The same lack of clarity is visible for allegations of drug or alcohol abuse by people who hold positions in which they can endanger the public. A D.C. Court of Appeals case, for instance, held that a letter to an airline alleging marijuana use by one of the airline's pilots—the defendant's ex-boyfriend—was merely on a subject of "private concern." *Ayala v. Washington*, 679 A.2d 1057, 1068 (D.C. 1996). A Tenth Circuit case, on the other hand, held that an allegation that a supervisor at a tax assessor's office had an alcohol problem was a matter of "public concern," because it revealed improper behavior by a government official. *Starrett v. Wadley*, 876 F.2d 808, 817 (10th Cir. 1989). And a First Circuit case expressly concluded that a truck driver's "drug test results were of legitimate public concern." *Veilleux v. NBC*, 206 F.3d 92, 134 (1st Cir. 2000). *Compare also Mississippi Comm'n on Judicial Performance v. Osborne*, 11 So. 3d 107 (Miss. 2009) (holding that speech critical of whites by a trial judge running for reelection was not on "a matter of legitimate public concern," but was "merely an expression of [the judge's] personal animosity"), *with Mississippi Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006 (Miss. 2004) (holding that speech critical of gays by a trial judge was on a matter of public concern).

Whatever the merits of a line between public and private concerns might be for civil liability as to false statements in libel cases, or for review of government employment decisions, that line is too unclear to provide adequate protection for speakers who are risking *criminal* punishments for *true* statements. Faced with Minn. Stat. 609.765, people who are considering publishing even true statements related to allegations of crime, alle-

gations of drug abuse that jeopardizes the public, or matters of race or sexual orientation, might rightly worry that their statements would be seen as not on "matters of public concern," so that the "fair comment" privilege might be unavailable to them. And they might worry that a jury would conclude that their statements were not made "with good motives and for justifiable ends," so that the "good motives" privilege might be unavailable to them, too. Such people would thus be chilled from speaking even on important public matters.

III. Minn. Stat. 609.765 Criminalizes False Statements on Matters of Public Concern Even Without a Showing of "Actual Malice."

Speech about people participating in matters of public concern may be punished only if the statements are false and said with so-called "actual malice"—knowledge that they are false or reckless disregard of whether they are false. The U.S. Supreme Court so held as to speech about public officials in *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964). And it held the same as to speech about private figures in *Gertz*, 418 U.S. at 347. *Gertz* held that only proven *compensatory* damages are allowed on a showing of mere negligence. *Id.* Presumed and *punitive* damages cannot be recovered absent the same showing of "actual malice," even for private figures. *Id.* at 349. *A fortiori*, criminal punishment must require at least the same showing; it cannot be permissible to jail people under a lesser showing than that required to collect punitive damages from them.

Moreover, the U.S. Supreme Court has made clear that "actual malice" in the sense of knowing or reckless falsehood—not "malice" in the sense of bad motives—must be shown before speech on matters of public concern can be punished. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510-11 (1991). "Actual malice under the *New York*

Times standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Id.* at 11 (citing *Greenbelt Coop. Pub. Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970)). Thus, a defamation verdict cannot stand when "[t]he jury was instructed in part that it could find for the [plaintiff] if it were shown that [defendant] had published the editorials 'with bad or corrupt motive,' or 'from personal spite, ill will or a desire to injure plaintiff.'" *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (quoting *New York Times*, 376 U.S. at 279-80). Instead, the jury must be asked whether the defendant spoke with "'actual malice'—that is, . . . knowledge that [the speech] was false or . . . reckless disregard of whether it was false or not." *Id.*

But Minn. Stat. 609.765 does not require such a showing of "actual malice," including in the fair comment defense (subdivision 3(3)), and the statute thus fails to incorporate the *New York Times/Gertz* constitutional rule. *Stuempges v. Parke, Davis & Co.* expressly held that the "fair comment" defense, with its requirement of "good faith," does not incorporate the "actual malice" test. 297 N.W.2d at 257-58. Likewise, *Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997) (quoting *McBride v. Sears, Roebuck & Co.*, 235 N.W.2d 371, 374 (Minn. 1975)), concluded that having made an allegation "in good faith" "upon a proper occasion, from a proper motive, and . . . based upon reasonable or probable cause" is the *threshold* for claiming a defamation law qualified privilege, and that this threshold triggers the further requirement of plaintiff's showing "[a]ctual malice" on defendant's part. The *Ferrell* Court did not treat "good faith" as itself a synonym for absence of "actual malice." Rather, it concluded that, if there is no "good faith" showing of "proper motive," then actual malice need not be shown.

Minn. Stat. 609.765 is thus unconstitutionally overbroad, in a manner that the fair comment defense does not cure.

CONCLUSION

For the above stated reasons, the amicus respectfully requests that the Court overturn the lower court's order on the grounds that Minn. Stat. 609.765 is unconstitutional.

Respectfully submitted,

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LR 7.1(c) WORD COUNT COMPLIANCE CERTIFICATE

I, Erick G. Kaardal, certify that the Brief of Amicus Curiae Electronic Frontier Foundation in Support of Appellant complies with Local Rule 7.1(c).

I further certify that, in preparation of this memorandum, I used Microsoft Word 2007, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 3949 words.

Dated: September 19, 2014

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