No. 11-210

In the
Supreme Court of the United States

UNITED STATES OF AMERICA, Petitioner,
v.

XAVIER ALVAREZ, Respondent.

ON THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

IN SUPPORT OF RESPONDENT

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STATEMENTS OF INTEREST OF *AMICUS CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

SUMMARY OF ARGUMENT

It is a hallmark of First Amendment law that expression is presumptively protected unless it falls within one of several carefully prescribed exceptions. *Brown v. Entertainment Merchants Association*, 564 U.S. ____, 131 S.Ct. 2729, 2733 (2011). While this Court has stated that there may be some historically unprotected categories of speech that have yet to be "identified or discussed" in its case law, the Government cannot establish an exception to First Amendment protection "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Id.* at 2734 (internal citations omitted). The Ninth Circuit Court of Appeals correctly concluded that false speech which may affect the reputation of the military, but which does not directly interfere with

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[1] This *amicus curiae* brief is filed with the written consent of the parties, copies of which have been filed with the Clerk of Court for the Supreme Court of the United States.

military efforts relating to the nation's safety, does not fall into one of these exceptions. *United States v. Alvarez*, 617 F.3d 1198, 2000 (9th Cir. 2010) (noting that "[a]ll previous circumstances in which lies have been found proscribable involve not just knowing falsity, but additional elements that serve to narrow what speech may be punished").

Although this case raises a number of First Amendment issues, the Thomas Jefferson Center for the Protection of Free Expression believes it could best assist this Court by focusing this amicus curiae brief on the topic of whether the speech restricted by the Stolen Valor Act has a tradition of proscription in American history. Such a review reveals a lack of historical precedent for restricting false speech about military decorations. As such, and because the Act fails to meet the strict scrutiny test that is therefore required, the opinion of the Ninth Circuit Court of Appeals should be affirmed.

ARGUMENT

I. THE STOLEN VALOR ACT CREATES AN UNPROTECTED CATEGORY OF SPEECH NOT PREVIOUSLY RECOGNIZED IN THIS COURT'S FIRST AMENDMENT DECISIONS.

"[A]s a general matter . . . Government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U. S. 564, 573 (2002) (internal quotation marks omitted). Permissible content-based speech restrictions have traditionally been limited to a small and circumscribed number of categories. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").[2] This Court has said, "[W]e cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions . . . to the usual rule that Governmental bodies may not

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[2] Traditional categories of unprotected speech include obscenity (*Miller v. California*, 413 U.S. 15 (1973)), defamation (*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), commercial fraud (*Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)), incitement (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)), "true threats" of violence (*Watts v. United States*, 394 U. S. 705, 708 (1969)), and child pornography (*New York v. Ferber*, 458 U.S. 747 (1982)).

prescribe the form or content of individual expression." *Cohen v. California*, 403 U.S. 15, 24 (1971). Non-defamatory, non-fraudulent false statements of fact have never been included in any historically unprotected class, and a categorical First Amendment exception for the prohibition of non-commercial misrepresentation to the public has never been created.

A. The statute does not regulate fraudulent or defamatory speech.

Although defamatory and fraudulent speech have a tradition of proscription, the Supreme Court has never held that mere "false speech" is categorically unprotected under the First Amendment. Indeed, this Court has recognized the need "to insulate even *demonstrably* false speech from liability" in order to insure First Amendment freedoms. *See Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 778 (1986).

To the extent that the Court has held that false speech is constitutionally unprotected—as in fraud and defamation—such speech has featured concrete harm to a specific party. The Stolen Valor Act does not work to remedy any similar harm. Fraud statutes protect contracting parties from detrimental and material reliance on false statements. Defamation laws provide restitution when a party suffers reputational loss resulting from false statements. In both cases, the relief remedies concrete injuries. When there is no particularized injury to a specific person—as in the group libel context—no cause of action arises. *See*, *e.g., Fowler v. Curtis Publishing Co.*, 182 F.2d 377 (D.C. Cir.

1950) (agreeing with the district court opinion that "in case of a defamatory publication directed against a class, without in any way identifying any specific individual, no individual member of the group has any redress").

No comparable individualized harms exist here. The Government's assertion that the Stolen Valor Act protects military recruiting efforts and soldier morale is highly speculative at best. There is little to support the conclusions that recruitment efforts or military morale have been detrimentally affected by a few individuals making false claims about military honors, much less to warrant the subjugation of First Amendment rights.

B. The historical tradition of stringent restrictions on the speech of military personnel does not encompass false statements about military service made by civilians.

While this Court has on occasion sustained provisions regulating speech on military bases and the speech of military personnel,[3] the justifications for those restrictions are found in the unique interests of the military and do not apply in the context of the civilians making false claims about military honors. In *Parker v. Levy*, this Court upheld

[3] For example, Article 117 of the "Manual of Courts-Martial" identifies as an actionable offense, using "provoking or reproachful words or gestures towards any other person" – speech that would be clearly protected under the First Amendment in a civilian setting. Art. 117(a), Uniform Code of Military Justice, 10 U.S.C. § 917.

the court-martial of an army captain who challenged his conviction under the Uniform Code of Military Justice. 417 U.S. 733 (1974). The captain claimed that the prosecution of his public statements "urging Negro enlisted men to refuse to obey orders to go to Vietnam" violated the First Amendment. *Id.* at 733. In rejecting this argument, the Court stated:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for the imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Id. at 758. The Court continued, quoting the opinion of the U.S. Court of Military Appeals:

> Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities . . . . Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.

Id. at 758-59 (citing *United States v. Priest*, 45 C.M.R. 338, 344 (1972)) (internal citations omitted). *See also Brown v. Glines*, 444 U.S. 348 (1980) (upholding punishment for an officer who distributed petitions without permission); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that prohibition on wearing yarmulkes while on duty is allowable).

All of the cases cited above involve circumstances where a current member of the military refused to obey orders. Although the context in which the disobedience arose varied—such as urging disobedience by others, disrupting order with unauthorized petitions, and upsetting the uniformity of appearance—all of these incidents involved individuals who refused to comply with the authority to which they had voluntarily submitted, thereby undermining the effective functioning of the military. *Parker*, 417 U.S. at 759; *Brown*, 444 U.S. at 354; *Goldman*, 475 U.S. at 516. Those prosecuted under the Stolen Valor Act have not made this commitment of obedience. They have not voluntarily submitted to military authority. And they are not in positions to disrupt the current efficacy of the armed forces.

Although the Stolen Valor Act's concern is the reputation of American military forces, it does not relate in any way to the actual functioning and success of the military through the people who are entrusted with that solemn duty. As such, it fails to serve the only state interest that historically has been deemed to outweigh First Amendment

protections in the unique and limited context of matters involving military service.

II. HISTORY REJECTS AN EXCEPTION TO THE FIRST AMENDMENT BASED ON PROTECTING THE REPUTATION OF GOVERNMENT INSTITUTIONS.

Historically, the United States has not maintained broad provisions relating to wearing, manufacturing, or selling military decorations. In determining whether there is a historical basis for accepting the Stolen Valor Act's restrictions on free speech, therefore, it is appropriate to look at other efforts through time to meet the same broad objective—protecting the reputational interest of the Government. Absent a clear tradition of exempting speech from protection because of its potential effect on citizens' respect for the Government, such speech may not be considered an unprotected category that was contemplated with the drafting of the First Amendment but has yet to be addressed by this Court. *See Brown*, 131 S.Ct at 2733. The most closely analogous area of law is seditious libel. Its blemished history in this country indicates that the nation long ago abandoned criminalizing speech for the simple reason that it might discredit Government.

A. Origins of seditious libel laws

The origin of sedition law is found in English common law. The 1606 case *De Libellis Famosis* criminalized seditious libel because it posed the danger of undermining confidence in and respect for

Government, its policies, and officials. *See De Libellis Famosis*, 77 Eng. Rep. 250, 251 (Star Chamber 1606). The doctrine flourished in England where it was frequently utilized by the Crown to suppress unwanted political speech and to prosecute political rivals.

In America, however, seditious libel failed to take root. The colonies initially broke with English common law in the case of John Peter Zenger in 1735. *See generally* Peter Finkelman, A Brief Narrative of the Case and Tryal of John Peter Zenger (1st ed. 1997). Zenger was a publisher who was prosecuted for seditious libel for his criticism of the royal governor of New York. In contrast to the claims of the prosecution, Zenger's attorney argued that a conviction must be based not only on the question of whether Zenger made the statements at issue, but whether they were in fact false. Despite a charge by the judge to do otherwise, the jury acquitted Zenger. *See* Michael Kent Curtis, Free Speech 41-42 (2000).

The decision to acquit Zenger set a foundation for a liberal speech regime. Zenger's case stood for the proposition that statements on matters of public concern, even if critical of Government, were speech of value to the American public.

A second false start to establishing a seditious libel regime occurred with the passage of the Sedition Act of 1798. In an attempt to silence the political speech of its opponents, the Federalist Congress made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government . . . with

intent to defame." Sedition Act, 1 Stat. 596. The Act purported to criminalize political criticism only if it was "false . . . and malicious" and the author intended it to "defame." In practice, however, these statutory requirements proved not to be a substantial obstacle to jailing political opponents. *See* Harry Kalven, Jr., *A Worthy Tradition* 64 (1988). Judges assumed an alleged defamatory statement was false and it was the burden of the defendant to prove otherwise. *See* Anthony Lewis, *Make No Law* 58 (1992).

The Sedition Act caused a public outcry and led to James Madison's authoring of a resolution in the Virginia legislature condemning the Act as "palpable and alarming infractions of the Constitution." *See* Lewis, *supra*, 61. The public outrage against the Act eventually died in 1801 when Congress opted not to renew it. Although its constitutionality was never directly addressed by the Supreme Court, the expiration of the Sedition Act of 1798 reflected Americans' appreciation for the centrality of free speech to democracy. *See* Lewis, *supra*, at 65. Madison's view that the people are sovereign and must be free to engage in speech about the Government and its institutions even when that speech is critical or disrespectful triumphed. *See* Lewis, *supra*, 153-154.

A third attempt to establish a seditious libel exception to First Amendment protection was the 1918 amendments to the Espionage Act of 1917—sometimes referred to as "the Sedition Act of 1918"—which made it a felony to publish "any disloyal . . . or abusive language about the form of government of

the United States" while the county was at war. Espionage Act, 40 Stat. 217, amended by Act of May 16, 1918, 40 Stat. 553. In *United States v. Abrams*, 250 U.S. 616 (1919), the defendants were convicted on four counts under the Espionage Act for printing leaflets critical of the U.S. Government's military intervention in Bolshevik Russia. On appeal, the Supreme Court did not address the constitutionality of the two seditious libel counts and upheld the convictions on the concurrent counts of obstructing the draft and war effort against Germany during World War I. *See Abrams* at 624; *Kalven* at 65.

In the wake of *Abrams*—and Justice Holmes' compelling dissent—Congress repealed the Sedition Act of 1918 at the end of 1920. Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* 230 (2004) (citing 66th Cong, 3d Sess, in 60 Cong Rec H 293-94 (Dec 13, 1920)).

B. The Court's reflections on seditious libel laws

Despite not directly addressing the constitutionality of a seditious libel regime, *Abrams* did shed some light on its place in the American legal tradition. In his dissent, Justice Holmes voiced the understanding that the adoption of the First Amendment proscribed the common law action of seditious libel and, as a consequence, that the Sedition Act of 1798 was a regrettable deviation for which Congress later repented.

> I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.[4]

Abrams, 250 U.S. 616 at 630 (Holmes, J., dissenting).

In 1964, the Supreme Court confirmed that seditious libel had no place in American political and legal traditions. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), a libel suit was brought by a public official against several civil rights activists who had criticized the Government's imprisonment of Martin Luther King, Jr., the Court held that it violated the First Amendment to impose liability for defamation of a public official unless the aggrieved party showed that the damaging false statements had been made

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[4] "Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (citing Act of July 4, 1840, c. 45, 6 Stat. 802; H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840)). "Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: 'I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.'" *Id.* (citing Letter to Mrs. Adams, July 22, 1804, 4 Jefferson's Works (Washington ed.) 555, 556).

with "actual malice." *See id.* at 279-80. The Court's reasoning cut directly to the impermissibility of seditious libel:

> [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on Government and public officials.

Id. at 270.

The Court then buried seditious libel once and for all: "[N]o court of last resort in this country has ever held, or even suggested, that prosecutions for libel on Government have any place in the American system of jurisprudence." *Id.* at 291. On the contrary, the Court noted several instances in which the unconstitutionality of seditious libel laws had been assume:

> [John] Calhoun, reporting to the Senate on February 4, 1836, assumed that [seditious libel's] invalidity was a matter 'which no one now doubts.' Report with Senate bill No. 122, 24th Cong., 1st Sess., p. 3. The invalidity of the Act has also been assumed by Justices of this Court. *See* Holmes, J., dissenting and joined by Brandeis, J., in *Abrams v. United States*, 250 U.S. 616,

> 630; Jackson, J., dissenting in *Beauharnais v. Illinois*, 343 U.S. 250, 288-289 . . . . These views reflect a broad consensus that the [Sedition] Act, because of the restraint it imposed upon criticism of Government and public officials, was inconsistent with the First Amendment.

Id. at 276.

It is evident that the English common law tradition of seditious libel never firmly established itself in American political and legal traditions because it contradicted the fundamental American understanding of the democratic process. The rejection of seditious libel sweeps away any historical support for Congress to enact legislation designed to protect the reputation of the U.S. military. The Stolen Valor Act is as historically unfounded as it is legally unsound.

III. NEITHER CONGRESS NOR THE COURTS MAY SIMPLY CREATE NEW CATEGORIES OF UNPROTECTED SPEECH BASED ON A BALANCING TEST.

In two recent First Amendment cases, the Government has argued that "lack of historical warrant did not matter; that it could create new categories of unprotected speech by applying a 'simple balancing test' that weighs the value of a

particular category of speech against its social costs and then punishes that category of speech if it fails the test." *Brown* 131 S.Ct. at 2734 (citing *United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010)). This Court rejected the Government's argument in both *Brown* and *Stevens*, holding that "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'" *Id.*

The Court's opposition to the creation of new categories of unprotected speech applies just as strongly in this case. A new category of unprotected speech may not be created simply by balancing the interests at stake. The speech at issue in the Stolen Valor Act falls outside the scope of traditionally unprotected speech and thus warrants continued First Amendment protection.

IV. BECAUSE A COMPELLING GOVERNMENTAL INTEREST IS NOT EFFECTIVELY SERVED BY THE STOLEN VALOR ACT, IT CANNOT SURVIVE STRICT SCRUTINY REVIEW.

As with laws criminalizing seditious libel, the Stolen Valor Act attempts to protect the Government's reputation at the expense of free expression. The Act declares that it is intended "to enhance protections relating to the reputation and meaning of the Medal of Honor and other military decorations . . . ." Stolen Valor Act of 2005, PL 109–

437, 120 Stat 3266 (2006). In addition, the Act states as a Congressional finding that "[l]egislative action is necessary to permit law enforcement officers to *protect the reputation* and meaning of military decorations and medals." *Id.* at § 2 (emphasis added).

Additional legislative history further demonstrates that one of Congress' most important concerns when passing the Stolen Valor Act was the reputational interests of the military. Most statements by legislators who supported the Act are directed toward the honor that the military conveys through these awards. *See* Stolen Valor Act of 2005, 152 CONG. REC. H8819-01, H8820, 4 ("Those that impersonate combat heroes dishonor the true recipients of such awards"); *id.* at 3 ("[T]he Act] protects the precious medals that are awarded."). The debate cites the potential for false assertions from individuals that they received a medal to dilute the honor and significance of such awards. *Id.* at 10 (stating that the Act prevents attempts by "imposters to cheapen the value of these honors"); *id.* at 9 (stating that a false claim of having won a medal "dilutes the significance attached to each lawfully awarded decoration"); *id.* at 5 (asserting that false statements about the receipt of military honors have "denigrated the service, patriotism, and gallantry" of military personnel). These statements make it clear that the legislative intent behind the Act was to safeguard the esteem for the military and for Government service that the award of such medals was intended to inspire.

A. The reputation of the military is not a Government interest sufficiently compelling to restrict the First Amendment

The Court has made clear as a general principle that preserving respect for the Government is not a sufficiently compelling interest to justify the deprivation of First Amendment rights. *See Texas v. Johnson*, 491 U.S. 397, 418-20 (1989) In *Schacht v. United States,* this Court considered the more specific interest of protecting the reputation of the military when it assessed the constitutionality of a statute that criminalized dramatic theatrical portrayals that "tend to discredit" the military. 398 U.S. 58, 62-63 (1970). The defendant in *Schacht* was charged with violating 18 U.S.C. § 772(f), which stated that "[w]hile portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force *if the portrayal does not tend to discredit that armed force*." (emphasis added). Schacht was charged and convicted for engaging in a street performance that was highly critical of the United States' involvement in the Vietnam War. Writing for the majority, Justice Black's opinion overturned the conviction and struck down the final clause of § 772(f) on First Amendment grounds, noting that "[a]n actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right to openly criticize" and that "[t]he final clause of § 772(f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First

Amendment." *Id.* at 63. Much like the unconstitutionality speech-restrictive statue in *Schacht*, the Stolen Valor Act aims, at its core, to criminalize speech that would "tend to discredit" the military.

Yet the Government suggests that diluting the meaning or significance of medals of honor, by allowing anyone to claim to possess such decorations, could reduce the motivation of soldiers to engage in valorous or dangerous behavior. In other words, the Government argues that the challenged provision of the Stolen Valor Act is designed to avert the serious substantive evil of disrespect for the military and its deleterious consequences.

In the case of judicial officers, this Court recognized long ago that respect for the judicial branch cannot be coerced through the threat of criminal process. In *Bridges v. California*, 314 U.S. 252 (1941), the Court overturned a contempt sanction against a labor leader for an out-of-court statement highly critical of a federal judge. The concern for the dignity and reputation of the courts simply did not justify the punishment: "an enforced silence, however limited, solely in the name of preserving the dignity of the [Government], would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Id.* at 271-72. Reflecting on *Bridges* in *New York Times v. Sullivan,* the Court stated,

> This is true even though the utterance contains half-truths and misinformation. Such repression can be

> justified, if at all, only by a clear and present danger of the obstruction of justice. If judges are to be treated as men of fortitude, able to thrive in a hardy climate, surely the same must be true of other Government officials, such as elected city commissioners.

Id. at 273 (internal citations and quotations omitted).

And the same surely must be true of members of the military. As the district court stated in *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1190-91 (D. Colo. 2010) (holding the Stolen Valor Act facially unconstitutional as a content-based restriction on speech), argued, No. 10-1358 (10th Cir. May 12, 2011), the Government's

> wholly unsubstantiated assertion is, frankly, shocking, and indeed, unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor…[T]he reputation, honor, and dignity military decorations embody are not so tenuous or ephemeral as to be erased by the mere utterance of a false claim of entitlement.

Id.

Protecting the armed forces from disrespect in the civilian world or from the dilution of their reputational standing American society fails to rise to a compelling Governmental interest.

B. The statute is not narrowly tailored to achieve the stated goal.

1. It has no demonstrated effect on recruitment.

During the House floor discussion on the statute, at least one member of Congress stated that the prospect of military medals served the purpose of inspiring others to serve, suggesting that the Act plays an important role in aiding the military's recruitment efforts. Stolen Valor Act of 2005, 152 CONG. REC. H8819-01, H8820, 7. ("Military decorations and medals honor our Nation's brave service men and women and inspire future generations to military service.").

While this Court has previously held that the Government has a valid interest in "raising and supporting the Armed Forces" (and, by proxy, in bolstering recruitment efforts),[5] the Government has not presented any evidence that its recruitment efforts have been affected by false claims of medal ownership. In fact, enlistment figures for the years before and after the passage of the Stolen Valor Act show that the statute does not appear to have had an appreciable effect on recruitment numbers. In percentage terms, a comparison between the year before the Stolen Valor Act was proposed (fiscal year

[5] *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 67 (2006) (upholding the Solomon Act, which withheld funding from universities that disallowed military recruiters on campus).

2004) and the year after the Act was passed (fiscal year 2007) does not show any appreciable difference in recruitment numbers, with all four branches meeting their target numbers in both of those years.[6] Additionally, while a gradual increase in overall recruitment numbers took place between 2006 to 2008, there is nothing to suggest that this spike was related to the passage of the Act. Indeed, a host of other factors very well may have been responsible for the boost in recruitment numbers.[7]

2. The Act is severely underinclusive because it does not address similar speech that would have the same effect on respect for the military.

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[6] In fiscal year 2004, the Army (101%), Navy (101%), and Air Force (101%) all exceeded their active component recruitment goals, and the Marine Corps (100%) met theirs. LAWRENCE KAPP, RECRUITING AND RETENTION: AN OVERVIEW OF FY 2004 AND FY 2005 RESULTS FOR ACTIVE AND RESERVE COMPONENT ENLISTED PERSONNEL, Congressional Research Service (June 25, 2005), http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA481087. In fiscal year 2007, the Army (101%) and Navy (101%) exceeded their active component recruitment goals, and the Marine Corps (100%) and Air Force (100%) met theirs. Defense.gov, *DoD Announces Recruiting and Retention Numbers for FY 2007*, U.S. DEPARTMENT OF DEFENSE, October 10, 2007, http://www.defense.gov/releases/release.aspx?releaseid=11398.

[7] Lizette Alvarez, *Army Giving More Waivers in Recruiting*, THE NEW YORK TIMES, February 14, 2007, http://www.nytimes.com/2007/02/14/us/14military.html?pagewanted=all.

A statute is facially invalid if it so underinclusive that it would cast doubt on the compelling nature of the government's asserted interest. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984) ("[P]atent . . . underinclusiveness . . . undermines the likelihood of a genuine [governmental] interest," and because a statute is underinclusive, it "provides only ineffective or remote support for the government's purpose."); *R.A.V. v. St. Paul*, 505 U.S. 377, 391, 112 S.Ct. 2538, 2547 (1992) (facially invalidating an ordinance that applied only to "fighting words" that provoke violence "on the basis of race, color, creed, religion or gender"); *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) ("[T]he [challenged provision] is so woefully underinclusive as to render belief in purpose a challenge to the credulous.").

The Stolen Valor Act thus is facially invalid because it is not tailored to encompass the full range of threats to the motivation of soldiers posed by false statements relating to medals. Most obviously, it does not criminalize false claims about *another person's* receipt of military awards, which, under the Government's logic, would have the same negative effect. Nor does it criminalize the false representation made when a properly decorated soldier *denies* having won an award, a type of falsehood that could equally harm the esprit de corps in the armed forces. And finally, the stated goal of protecting soldier morale is itself underinclusive. The same justification could be used to defend laws criminalizing speech in other traditionally protected contexts, including domestic criticism of the Government's military and foreign policy. Indeed, it

seems more plausible that criticism of military missions would have more of an impact on soldier morale than the few instances when individuals make false claims about their military honors. While the desire to punish the uttering of such falsities is understandable, it simply is not compelling enough nor tailored with enough precision to justify establishing an additional exception to first Amendment protections.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to affirm the judgment of the Ninth Circuit Court of Appeals in favor of respondent.

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