No. 11-210

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER ALVAREZ,

Respondent.

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

BRIEF OF PROFESSORS EUGENE VOLOKH AND JAMES WEINSTEIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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I

QUESTION PRESENTED

Section 704(b) of Title 18, United States Code, makes it a crime when anyone "falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."

The question presented is whether 18 U.S.C. § 704(b) is facially invalid under the Free Speech Clause of the First Amendment.

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INTEREST OF *AMICI CURIAE*[1]

Professors Eugene Volokh (UCLA School of Law) and James Weinstein (Sandra Day O'Connor College of Law at Arizona State University) have taught First Amendment law for many years, and have written about it extensively, with a special focus on the development of practically workable free speech doctrine.

In this brief, they attempt to identify the practical consequences for free speech doctrine that might arise from various approaches available to this Court in deciding this case—consequences that they expect the parties will likely not discuss in detail. While *amici* think the Stolen Valor Act is facially constitutional when properly construed, and is also constitutional as applied to respondent Alvarez's speech, their main concern is for the coherent development of First Amendment law.

SUMMARY OF ARGUMENT

Consistent with this Court's repeated observation that "there is no constitutional value in false statements of fact," *Gertz* v. *Robert Welch, Inc.*, 418

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief, except that the printing and filing costs for the brief were reimbursed from the *amici*'s university faculty support accounts. All counsel of record received notice of *amici*'s intention to file an amicus brief at least ten days before the filing date, and have consented to this filing in letters that have been lodged with the Clerk of the Court.

U.S. 323, 340 (1974), various state and federal laws restrict a wide range of knowingly false statements, and not just the familiar categories of defamation, fraudulent solicitation of money, and perjury. Most of these laws are broadly accepted as constitutional, and we expect that this Court will believe that the laws should indeed be upheld.

The best way to do so would be for this Court to (1) treat knowing falsehoods as a categorical exception to First Amendment protection, while (2) recognizing some limitations to this rule (for instance, with regard to statements about the government, science, and history) in order to avoid an undue chilling effect on true factual statements, statements of opinion, or other constitutionally valuable expression. Recognizing such a general First Amendment exception for knowing falsehoods will avoid a proliferation of First Amendment exceptions, and of cases upholding content-based speech restrictions under strict scrutiny—developments that would threaten the coherence of free speech doctrine and dangerously dilute the protection currently provided to valuable speech by the strict scrutiny test.

ARGUMENT

I. State and Federal Laws Criminalize or Impose Civil Liability for Many Categories of Knowingly False Statements

We begin by outlining some of the ways that the law punishes knowing falsehoods—restrictions that are generally seen by courts as not violating the First Amendment.

We use the term "knowing falsehoods" in this brief as shorthand for false statements of fact that the speaker knows are false, and that are reasonably perceived as factual assertions. We exclude from this category statements that are likely to be understood as fiction, humor, parody, or hyperbole, *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 57 (1988), rather than as false statements of fact. To our knowledge, the laws we discuss likewise exclude such statements, and we believe the Stolen Valor Act, properly interpreted, does so as well. See *United States* v. *Perelman*, 658 F.3d 1134, 1138 (9th Cir. 2011) (holding that the provision of the Stolen Valor Act that bears the unauthorized wearing of medals, 18 U.S.C. § 704(a), should be interpreted as limited to situations where the wearer "has an intent to deceive").

We do not discuss how the law should treat statements that result from an honest mistake, whether negligent or without fault, on the speaker's part; most of the laws described below do not cover such innocently mistaken statements. We also do not specifically discuss recklessly false statements, though we note that recklessly false statements are generally treated similarly to knowingly false statements under this Court's "actual malice" standard, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Here then is a partial list of the categories of knowing falsehoods that are restricted, largely uncontroversially:

1. *Defamatory falsehoods*, which is to say knowing falsehoods that injure an individual's reputation.

New York Times Co. v. *Sullivan* (holding that such speech is generally unprotected).

2. *Perjury*, false statements under oath in government proceedings. *Konigsberg* v. *State Bar*, 366 U.S. 36, 49 n.10 (1961) (stating that such speech is constitutionally unprotected).

3. *Fraudulent attempts to obtain money*, including within otherwise fully protected speech—such as charitable solicitation—and not merely within the less protected category of "commercial speech." *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U.S. 600 (2003) (holding that such speech is constitutionally unprotected).

4. Speech actionable under the *false light tort*, which covers even nondefamatory but offensive knowingly false statements about another person. *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245 (1974) (holding that this cause of action is constitutionally permissible); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (likewise). In some states, this tort is limited to speech that is both knowingly false and "[a]n unwarranted and/or wrongful intrusion * * * [into plaintiff's] private or personal affairs with which the public had no legitimate concern," *Cantrell*, 419 U.S. at 250 n.3. But in other states the tort has no such limitation, and extends even to statements about a person that do not deal with matters that are normally confidential or embarrassing, *e.g.*, *Hill*, 385 U.S. at 385, 390, though sometimes with the limitation that the falsehood be "highly offensive" to a reasonable person, Restatement (Second) of Torts § 652E.

5. *Intentional infliction of severe emotional distress through knowing falsehoods*, even in the absence of defamation or invasion of privacy. See *Hustler*, 485 U.S. at 56 (allowing recovery in such cases). The classic example of such an actionable statement is knowingly falsely telling someone that his or her spouse "has been badly injured in an accident," Restatement (Second) of Torts § 46 ill. 1.

6. *Trade libel*, at least when limited to knowingly false statements disparaging a product (even outside the special context of commercial advertising), and the related tort of *slander of title*, at least when limited to knowingly false statements denying a person's ownership of property. *Unelko Corp.* v. *Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (holding that the trade libel tort is constitutional, so long as "actual malice" is shown); *SCO Group, Inc.* v. *Novell, Inc.*, 692 F. Supp. 2d 1287, 1296 (D. Utah 2010) (likewise as to slander of title). This is so even though trade libel does not injure the individual dignitary interests that have long justified defamation law, *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 22 (1990) (quoting with approval *Rosenblatt* v. *Baer*, 383 U.S. 75, 92-93 (1966) (Stewart, J., concurring)).

7. *Unsworn knowingly false statements to government officials*, punishable under laws such as 18 U.S.C. § 1001 and state and federal laws prohibiting obstruction of justice or the making of false police reports. *E.g.*, *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982) (upholding the constitutionality of § 1001); *United States* v. *Konstantakakos*, 121 Fed. Appx. 902, 905 (2d Cir. 2005) (noting that "deliberate falsehoods enjoy no First Amendment protection," in the context of

a prosecution for knowingly false statements on an immigration application); *People* v. *Hanifin*, 77 A.D.3d 1181 (N.Y. App. Div. 2010) (rejecting First Amendment challenge to defendant's conviction for calling 911 to falsely claim that "he had gasoline and was going to set himself of fire"); *State* v. *Bailey*, 644 N.E.2d 314 (Ohio 1994) (holding that lying to a police officer in order to interfere with the officer's attempt to apprehend defendant's brother was obstruction of justice); *Howell* v. *State*, 921 N.E.2d 503 (Ind. Ct. App. 2009) (holding that falsely representing one's identity in sending e-mails aimed at deceiving a police officer during an investigation was obstruction of justice). This likely includes knowingly false crime reports made to the public in general, if they seem certain to come to the attention of law enforcement officials. *Haley* v. *State*, 712 S.E.2d 838 (Ga. 2011) (rejecting First Amendment challenge to defendant's conviction when defendant released YouTube videos claiming to be a serial killer and was then prosecuted for making a false statement on a matter within the jurisdiction of a state agency).

8. *Knowing falsehoods likely to provoke public panic*. *Schenck* v. *United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."); 47 C.F.R. § 73.1217 (banning knowingly false statements on broadcast radio or television that foreseeably cause "direct and actual damage to property or to the health or safety of the general public, or diversion of law enforcement or other public health and safety authorities from their duties"); 18 U.S.C. § 1038(a)(1) (banning knowingly false statements claiming, among other

things, that an attack involving weapons of mass destruction "has taken, is taking, or will take place"); *United States* v. *Brahm*, 520 F. Supp. 2d 619, 626-27 (D.N.J. 2007) (citing *Schenck* in upholding 18 U.S.C. § 1038(a)(1) against a constitutional challenge, in a case in which defendant posted a message on a Web site stating that the following month "there will be seven 'dirty' explosive devices detonated in seven different U.S. cities: Miami, New York City, Atlanta, Seattle, Houston, Oakland, and Cleveland. The death toll will approach 100,000 from the initial blast and countless other fatalities will later occur as a result from radio[a]ctive fallout.").

9. *Knowingly falsely representing oneself as a government official and acting in that capacity*, even when this does not involve fraudulently depriving anyone of money or property. Thus, for instance, the federal statute barring impersonation of federal officials, 18 U.S.C. § 912, has been read to require only "that the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." *United States* v. *Lepowitch*, 318 U.S. 702, 704 (1943). "[A] person may be defrauded although he parts with something of no measurable value at all." *Id.* at 705.

Accordingly, this Court in *Lepowitch* upheld a conviction under a former version of 18 U.S.C. § 912 for defendant's pretending to be an FBI agent and thereby causing someone to yield information about another person's whereabouts. The Eight Circuit upheld a § 912 conviction for defendant's pretending to be an FBI agent, including in conversations with his girlfriend, though the opinion does not report on

any evidence that the pretense was the but-for cause of anyone's giving defendant money or property. *United States* v. *Robbins*, 613 F.2d 688 (8th Cir. 1979). The Seventh Circuit upheld a § 912 conviction for defendant's pretending to his landlady to be an FBI agent, apparently with no attempt to use the pretense to get money or property. *United States* v. *Hamilton*, 276 F.2d 96 (7th Cir. 1960). Likewise, the Kansas Supreme Court upheld a conviction under a Kansas false impersonation statute for defendant's representing himself to a neighbor as an undercover state police officer, apparently with no attempt to use the pretense to get money or property. *State* v. *Messer*, 91 P.3d 1191 (Kan. 2004).

And courts have upheld similar statutes against a First Amendment challenge. *Chappell* v. *United States*, 2010 WL 2520627 (E.D. Va. June 21), for instance, upheld a state ban on impersonating a police officer. *United Seniors Ass'n, Inc.* v. *Social Sec. Admin.*, 423 F.3d 397, 404, 407 (4th Cir. 2005), upheld a federal ban on any use of the words "Social Security" to falsely represent the material as authorized by the Social Security Administration, though the ban covered not just solicitation of money but also, for instance, posters seeking viewers for a television broadcast. And *State* v. *Wickstrom*, 348 N.W.2d 183 (Wis. Ct. App. 1984), upheld a state ban on falsely acting as a public officer, in a case where the actions included making public statements, making private statements, and filing documents falsely indicating that the speaker was a municipal judge or town clerk.

These statutes are not limited to impersonation of government officials who have coercive power such

as that possessed by FBI agents or police officers. See, *e.g.*, 18 U.S.C. § 912 (covering impersonation of any federal government agent); *State* v. *Cantor*, 534 A.2d 83 (N.J. Super. Ct. App. Div. 1987) (upholding conviction for defendant newspaper reporter's impersonating a county morgue employee in order to get information about a homicide victim from the victim's mother).

10. *Knowingly falsely representing oneself as having a particular university degree or professional license*, regardless of whether the false representation is intended to defraud a prospective employer or professional client. *Long* v. *State*, 622 So. 2d 536 (Fla. Ct. App. 1993) (upholding against First Amendment challenge a statute barring knowingly false claims of having a university degree); *People* v. *Kirk*, 310 N.Y.S.2d 155 (Cnty. Ct. 1969) (likewise, though reading the statute as limited to situations where there is an "intent to deceive"); *State* v. *Marino*, 929 P.2d 173 (Kan. Ct. App. 1996) (upholding against First Amendment challenge a statute barring knowingly false claims of having a professional license, as applied to a defendant who claimed to be a member of the Kansas bar when speaking on a television program to publicize a screenplay that he had written).

11. *Knowingly providing a false social security number*, even when there was no purpose to defraud anyone of anything of "pecuniary value," and the statement is not made to government agents. *E.g.*, *United States* v. *Silva-Chavez*, 888 F.2d 1481, 1483-84 (5th Cir. 1989); *United States* v. *Manning*, 955 F.2d 770 (1st Cir. 1992), *abrogated as to other parts of the decision, as recognized by United States* v. *Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006).

12. *Knowing falsehoods to voters about the authorship or endorsement of political campaign materials*, when the statements violate trademark law or other legal rules, even when no money is involved. *E.g.*, *United We Stand America, Inc.* v. *United We Stand, America New York, Inc.*, 128 F.3d 86 (2d Cir. 1997) (rejecting First Amendment arguments and upholding injunction against defendant's using the name "United We Stand, America"); *United We Stand America, Inc.* v. *United We Stand, America New York, Inc.*, 941 F. Supp. 39 (S.D.N.Y. 1996) (stating that the Lanham Act applies not just to deceptive uses of another organization's name with respect to fundraising, but also with respect to "holding public meetings and press conferences" and "propounding proposals") (quoting *Brach Van Houten Holding, Inc.* v. *Save Brach's Coalition for Chicago*, 856 F. Supp. 472, 475-76 (N.D. Ill. 1994)); *Tomei* v. *Finley*, 512 F. Supp. 695 (N.D. Ill. 1981) (rejecting First Amendment arguments and enjoining Democratic candidates from using the acronym "REP," as in "Vote REP April 7," as shorthand for the Representation for Every Person Party, a name seemingly chosen precisely to deceive voters into thinking that the candidates were Republicans); *Schmitt* v. *McLaughlin*, 275 N.W.2d 587, 590 (Minn. 1979) (rejecting First Amendment arguments in holding that the defendant's use of initials "DFL" in advertisements and lawn signs violated a state law barring false claims of support or endorsement by a political party, there the Democratic Farmer Labor party); *People* v. *Duryea*, 351 N.Y.S.2d 978, 988 (Sup. Ct. 1974) (dictum) (stating that a ban on false claims of endorsement by a political party would be constitutional), *aff'd*, 354 N.Y.S.2d 129 (App. Div. 1974).

13. *Making a knowingly false statement about which office one currently holds in an election campaign. Treasurer of the Comm. to Elect Gerald D. Lostracco* v. *Fox*, 389 N.W.2d 446 (Mich. Ct. App. 1986) (upholding against First Amendment challenge a statute banning false claims that one is the incumbent); *Ohio Democratic Party* v. *Ohio Elections Comm'n*, 2008 WL 3878364 (Ohio. Ct. App. Aug. 21) (upholding against First Amendment challenge a statute banning candidates from claiming to hold an office that they do not currently hold).

II. How First Amendment Doctrine Could Deal With Such Restrictions on Knowing Falsehoods

There are six general approaches that this Court might take to these sorts of restrictions.

(For purposes of our discussion, we will set aside the question whether, under *United States* v. *Stevens*, 130 S. Ct. 1577, 1584-86 (2010), the approach must be chosen based solely on which First Amendment exceptions have been historically long recognized. We will assume that statements in this Court's precedents that "there is no constitutional value in false statements of fact," *Gertz* v. *Robert Welch*, *Inc.*, 418 U.S. 323, 340 (1974), and "[c]alculated falsehood falls into that class of utterances" which are categorically unprotected, *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964), leave this Court with flexibility in choosing how to define the constitutional protection offered to knowing falsehoods.

We anticipate that the parties and other *amici* will discuss the historical question, which is complicated by the fact that many restrictions that were ac-

cepted by the courts shortly after the Framing—including seditious libel law—have since been rightly rejected by this Court. But our tentative view is that there is some evidence, though not overwhelming evidence, that the freedoms of speech and of the press were seen in the early Republic as excluding falsehoods generally, and not just personal libels, financial fraud, or perjury. See, *e.g.*, *The Law Practice of Alexander Hamilton: Documents and Commentary* 811 (Julius Goebel ed. 1981) (reprinting Alexander Hamilton's defense argument in *People* v. *Croswell*, 3 Johns. Cas. 337 (N.Y. Sup. 1804), that the freedom of the press extends to "the right of publishing the truth, from good motives and justifiable ends, though it reflect on government, on magistrates, or individuals," an argument that was not included in the *Johnson's Cases* report but that was printed elsewhere at the time); *Respublica* v. *Dennie*, 4 Yeates 267, 1805 WL 911, *4 (Pa. 1805) (expressly adopting Hamilton's view, in a case involving alleged libel against the government); *United States* v. *Sheldon*, 5 Blume Sup. Ct. Trans. 337, 1829 WL 3021, *11 (Mich. Terr. 1829) (expressly adopting Hamilton's view, apparently with reference to false statements that interfere with "the good of society" and not just with private rights); *Commonwealth* v. *Kneeland*, 20 Pick. 206, 219 (Mass. 1838) (taking the view that "falsehood against * * * institutions and governments" as well as against "individuals" was constitutionally unprotected).)

A. Holding that Most Restrictions on Knowing Falsehoods are Unconstitutional

This Court could broadly state that restrictions on knowingly false statements are generally not permitted under the First Amendment, with the exception, perhaps, of the most firmly entrenched restrictions, such as those on defamation, perjury, and fraud. This approach would not only invalidate the Stolen Valor Act, but would also effectively overrule *Time, Inc.* v. *Hill* and *Cantrell* v. *Forest City Publishing Co.* and thus reject the false light tort; would lead to the conclusion that knowing falsehoods cannot lead to liability under the emotional distress tort (at least unless they are also defamatory); would invalidate bans on the use of deceptive party and group names in election campaigns; and so on. We are skeptical that this is the right result, and we doubt that this Court is inclined to embark on such a path.

B. Recognizing Many First Amendment Exceptions for Various Kinds of Knowing Falsehoods

Another approach would be to hold that, though knowingly false statements of fact are generally constitutionally protected, there are many narrow exceptions to this rule: one for defamation, one for perjury, one for fraudulent solicitation of money, one for the false light tort, one for intentional infliction of emotional distress through knowing falsehoods, one for the knowing use of deceptive party names in campaigns, and so on.

This, though, would make it impossible for this Court to say, at it has before, that the exceptions to the general ban on content-based restrictions apply

only to "a few limited areas," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382-83 (1992); *Brown* v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011) (indirectly quoting *R.A.V.*); *United States* v. *Stevens*, 130 S. Ct. 1577, 1584 (2010) (quoting *R.A.V.*); *Virginia* v. *Black*, 538 U.S. 343, 358-59 (2003) (quoting *R.A.V.*); *Simon & Schuster*, *Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment) (describing the exceptions as "a few legal categories"). The list of recognized First Amendment exceptions would grow from a handful—incitement, obscenity, threats, speech closely linked to conduct, fighting words, and false statements of fact—to more than fifteen (the first five of these, plus the dozen or so needed to accommodate the restrictions discussed above).

And this growth in the number of exceptions will likely stimulate calls for more exceptions, including ones not limited to false statements of fact. If more than fifteen categories of speech are excluded from First Amendment protection, why not more—perhaps "hate speech" or speech depicting violence or the like? Arguments such as this would gain more traction:

> [O]ver the past century the courts have carved out or tolerated dozens of "exceptions" to free speech. These exceptions include: speech used to form a criminal conspiracy or an ordinary contract; speech that disseminates an official secret; speech that defames or libels someone; speech that is obscene; speech that creates a hostile workplace; speech that violates a trademark or plagia-

> rizes another's words; speech that creates an immediately harmful impact or is tantamount to shouting fire in a crowded theatre; "patently offensive" speech directed at captive audiences or broadcast on the airwaves; speech that constitutes "fighting words"; speech that disrespects a judge, teacher, military officer, or other authority figure; speech used to defraud a consumer; words used to fix prices; words ("stick 'em up—hand over the money") used to communicate a criminal threat; and untruthful or irrelevant speech given under oath or during a trial.
>
> Much speech, then, is unprotected. The issues are whether the social interest in reining in racially offensive speech is as great as that which gives rise to these "exceptional" categories, and whether the use of racially offensive language has speech value.

Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. Rev. 343, 377 (1991); see also Kim Chandler Johnson & John Terrence Eck, *Eliminating Indian Stereotypes from American Society: Causes and Legal and Societal Solutions*, 20 Am. Ind. L. Rev. 65 (1995-96) (supporting a proposed exception for "racially offensive speech" by arguing that "there are dozens of 'exceptions' to free speech," and repeating largely the same list as that given in the Delgado article); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 Cal. L. Rev. 871, 892 (1994) ("Perhaps * * * in twenty or fifty years we will look upon hate speech rules with the

same equanimity with which we now view defamation, forgery, obscenity, copyright, and dozens of other exceptions to the free speech principle, and wonder why in the late twentieth century we resisted them so strongly.").

Today one could respond to such arguments by saying that permissible content-based speech restrictions actually fit within a few narrow categories—for instance, combining "speech that defames or libels someone," "speech that violates a trademark or plagiarizes another's words," "speech used to defraud a consumer," and "untruthful * * * speech given under oath or during a trial" in an exception for knowing falsehoods—or involve the government acting in a special capacity, such as employer or educator. But if the list of First Amendment exceptions grows longer, such arguments for new exceptions would become more appealing to many. Indeed, people who might today accept the protection of speech that they find offensive and harmful might be more inclined to call for new restrictions. "If proponents of all those many other exceptions got theirs," they might argue, "why can't I get mine?"

More broadly, this Court's decisions have powerful and long-term effects on the public's understanding of how our legal system should behave. Just as "[o]ur Government is the potent, the omnipresent teacher," *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), so in particular the Judicial Branch of the Government is a powerful teacher with regard to the Constitution. So long as the rule is "no content-based speech restrictions, subject to only a few exceptions," citizens are likely to

absorb the rule, even in cases where they do not like the result to which this rule leads.

But as the exceptions become more plentiful, they may begin to seem like they swallow the rule. As Justice Scalia noted in the Fourth Amendment context, once a rule (there, the warrant requirement) "become[s] so riddled with exceptions that it [is] basically unrecognizable," it is easy to see new exceptions not "as some momentous departure, but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years," and to conclude that the rule needs to be jettisoned altogether. *California* v. *Acevedo*, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring in the judgment). We recognize that there is disagreement about whether indeed the warrant requirement should be retained, despite its exceptions; our point is simply that the multiplication of exceptions (from "only * * * a few specifically established and well-delineated exceptions," *Katz* v. *United States*, 389 U.S. 347, 357 (1967), to a vast array of such exceptions) undermines the normative force of the rule.

For this reason, the creation of a large array of free speech exceptions ought to be avoided. Having a dozen exceptions for subcategories of knowingly false statements may seem more speech-protective than having a general exception for all knowingly false statements. But such a proliferation of exceptions may ultimately prove to be less speech-protective, because it may open the door to more exceptions that will not be limited to knowing falsehoods.

C. Recognizing Several Broad Exceptions Covering Various Kinds of Knowing Falsehoods

The danger discussed in the previous subsection could be diminished if, instead of recognizing a dozen exceptions, this Court recognizes a few exceptions that are capacious enough to fit the examples given above. Thus, for instance, this Court might recognize a general exception for "false statements about other individuals, companies, or products," a category that includes defamation, false light, and trade libel. Likewise, this Court might recognize another exception for "deceitful statements that 'cause the deceived person to follow some course he would not have pursued but for the deceitful conduct'" (quoting *United States* v. *Lepowitch*, 318 U.S. 702, 704 (1943)), or that attempt to cause such a result. This category would cover fraud, attempted fraud, perjury, unsworn knowing falsehoods to government agents, impersonation (the field from which the *Lepowitch* quote is drawn), misuse of trademarks in an attempt to deceive voters, and so on.

But a definition broad enough to include the many kinds of fraud and attempted fraud, beyond just fraudulent attempts to get money, would likely cover nearly all knowing falsehoods—including knowing falsehoods about one's military medals. After all, the usual reason people lie is precisely to get something from listeners, and to deceive listeners in order to get them "to follow some course [they] would not have pursued but for the deceitful conduct." The

speakers might be seeking money,[2] a job,[3] a vote (which, when political candidates do it, is indeed an attempt to get a job), a good grade,[4] information,[5] business opportunities, romantic opportunities, or even just unearned respect. But all such attempts are a form of attempted fraud, once the requirement of trying to get money or property is relaxed.

And indeed it is not clear why, as a First Amendment matter, knowing falsehoods aimed at getting a $50 contribution should be constitutionally unprotected, but knowing falsehoods aimed at getting a vote, a high grade, a business opportunity, information, friendship, or sex should get First Amendment protection. Such line-drawing is doubtless often sensible as a matter of the substantive law of crimes or

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[2] *See Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U.S. 600, 623-24 (2003) (holding that knowing falsehoods aimed at getting charitable contributions are constitutionally unprotected)

[3] *See Durgins* v. *City of East St. Louis*, 272 F.3d 841, 843 (7th Cir. 2001) (stating that "resumé fraud is not protected speech"); *Food Lion, Inc.* v. *Capital Cities/ABC, Inc.*, 194 F.3d 505, 512-14 (4th Cir. 1999) (treating resumé fraud as potentially tortious, though concluding that on the facts of the case plaintiff had not proved detrimental reliance on the false statements).

[4] *See Brown* v. *Li*, 308 F.3d 939, 956 (9th Cir. 2002) (dictum) (stating that plagiarism and cheating are not protected by the First Amendment).

[5] *See State* v. *Cantor*, 534 A.2d 83 (N.J. Super. Ct. App. Div. 1987) (upholding impersonation conviction for defendant newspaper reporter's impersonating a county morgue employee in order to get information about a homicide victim from the victim's mother).

torts. But we see no basis for viewing knowing falsehoods to get sex, friendship, votes, information, or even respect and attention as more protected *as a First Amendment matter* than knowing falsehoods to get modest amounts of money.

D. Upholding Various Restrictions on Knowing Falsehoods Under Strict Scrutiny

Another approach would be to conclude that much of the listed knowingly false speech falls outside any First Amendment exception, but that the restrictions discussed in Part I nonetheless pass strict scrutiny, just as some restrictions on true statements or on opinions could in principle pass strict scrutiny. But this would pose three difficulties.

First, it would lead to results that are inconsistent with this Court's precedents, precedents that treat false statements as less protected than true statements and opinions even when both kinds of statements implicate the same interest.

Consider, for example, statements about a person on a matter of public concern that are highly offensive to a reasonable person. If the statements are knowingly false, they are actionable under the "false light" tort, Restatement (Second) of Torts § 652E, and are not constitutionally protected, *Time* v. *Hill*. Yet if the statements are true or consist of opinion that does not imply false factual assertions, they are generally constitutionally protected even if they are not merely highly offensive but "outrageous" and cause "severe emotional distress." *Snyder* v. *Phelps*, 131 S. Ct. 1207 (2011). The existence of both *Time* v. *Hill* and *Snyder* v. *Phelps* as First Amendment precedents reflects the judgment that knowing false-

hoods do *not* have the same First Amendment value as other speech.

Second, upholding many restrictions on knowing falsehoods under strict scrutiny, coupled with insisting that the same strict scrutiny is applicable both to knowing falsehoods and to other speech, risks diluting the protection offered to that other speech. What this Court said in *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), as to commercial speech is even more true as to knowingly false speech: "To require a parity of constitutional protection for [false] and [true] speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech."

Third, today there is only one Supreme Court majority opinion that is still good law that upholds a content-based speech restriction under strict scrutiny: *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010), which involved national security and at the same time repeatedly stressed how narrow the burden of the speech restriction was. See, *e.g.*, *id.* at 2723, 2726, 2728 (stressing that the statute did not apply to independent advocacy defending or justifying the action of terrorist groups, and was limited to speech that is coordinated with those groups); *id*. at 2730 (stressing that "we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations" and that "[w]e also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organization"). The rarity of such decisions helps maintain a high level of speech protection. But if instead of one

such decision there end up being half a dozen or a dozen, those precedents will make other restrictions easier to uphold, much as recognizing many additional First Amendment exceptions will make it more likely that other exceptions will also be recognized, see *supra* Part II.B.

E. Recognizing a General First Amendment Exception for Knowing Falsehoods

The better solution, we believe, is to treat knowing falsehoods as categorically constituting a First Amendment exception, with some limitations we note below. Such a rule would reflect this Court's repeated judgment that "there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch*, *Inc.*, 418 U.S. 323, 340 (1974); *Illinois ex rel. Madigan* v. *Telemarketing Associates*, *Inc.*, 538 U.S. 600, 612 (2003) (relying in part on *Gertz*'s holding that "the 'intentional lie' is 'no essential part of any exposition of ideas'" in concluding that fraud is constitutionally unprotected); see also, *e.g.*, *Herbert* v. *Lando*, 441 U.S. 153, 172 (1979) (quoting *Gertz*); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, *Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.") (citing *Gertz*); *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964) ("Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality * * *.'") (quoting *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942)).

Such a rule would keep the list of exceptions manageably small, and thus less likely to grow. And by reserving strict scrutiny for content-based restrictions on true statements, statements of opinion, and other constitutionally valuable expression, such a rule would allow strict scrutiny in free speech cases to remain the very demanding, almost never satisfied test that it is today.

To be sure, as this Court's libel cases have recognized, some restrictions on falsehoods also tend to unduly deter true statements. "[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz*, 418 U.S. at 340. Because of this, reasonable mistakes and even negligent falsehoods should generally remain constitutionally protected, except in special cases, such as when compensatory damages for negligent errors are sought by private-figure libel plaintiffs, as in *Gertz*.

Furthermore, even some restrictions on knowing falsehoods involve an unusually high risk of factfinder error, factfinder bias, prosecutorial bias, legislator bias, or interference with scientific or historical investigation. For instance, *New York Times Co.* v. *Sullivan* held that false statements *about a government agency* (as opposed to a particular government official) may not be punished, period. "For good reason, 'no 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.'" *New York Times Co.* v. *Sullivan*, 376 U.S. at 291 (quoting *City of Chicago* v. *Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923)); see also *Rosenblatt* v.

Baer, 383 U.S. 75, 83 (1966) (following *New York Times Co.* v. *Sullivan* on this point).

Likewise, the First Amendment should limit prosecutions for alleged lies about history or science (at least outside commercial advertising, and absent defamation of a specific living person). The truth about such matters is especially likely to be uncertain, and outside the speaker's personal knowledge. Resolving what is true may be an especially politicized endeavor, with judges, prosecutors, and jurors of different ideological persuasions reaching different conclusions about science, history, or complex current events. The chilling effect of possible liability would thus be especially great in many such cases.

Moreover, "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New York Times Co.* v. *Sullivan*, 376 U.S. at 279 n.20 (quoting John Stuart Mill, *On Liberty* 15 (1947)). What is our main assurance that conventional wisdom among historians or scientists is likely to be correct, even when we ourselves lack the expertise to personally evaluate the question? Precisely the fact that scholars have reached and maintained a consensus on the conventional wisdom, in the face of others' unfettered freedom to challenge and try to rebut that consensus.

But say that factual criticism of a historical or scientific theory were banned, even using a ban limited only to criticism that a jury finds to be false and insincere. Confidence in the consensus view would then be less justified. First, we could not know

whether the continued consensus stems from scholars' not being exposed to outsider challenges, rather than from its continued scholarly acceptance despite the challenges. Second, we could not know whether the continued consensus is more apparent than real, because scholars who do find themselves having doubts are deterred from expressing them.

Thus, a case like *State* v. *Haffer*, 162 P. 45 (Wash. 1916), in which defendant was found guilty of libeling George Washington—Washington state law then allowed prosecutions for defaming the dead—would almost certainly come out differently today. To give another example, prosecutions for Holocaust denial should be similarly forbidden by the First Amendment, even if a factfinder could be persuaded that the deniers are knowing liars and not just reprehensible fools.[6] Likewise, *Schaefer* v. *United States*, 251 U.S. 466 (1920), in which speakers were convicted for "willfully * * * [publishing] false reports" during World War I, should also come out in favor of First Amendment protection today. See *id.* at 494 (Brandeis, J., dissenting) (concluding that allowing such prosecutions "subjects to new perils the consti-

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[6] See, *e.g.*, Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 Fla. St. U. L. Rev. 1 (2008) (so concluding); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1116-20 (2006) (likewise); James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from* Nike v. Kasky, 54 Case W. Res. L. Rev. 1091, 1105 n.64 (2004) (saying that such statements "may well" be protected).

tutional liberty of the press," and "will doubtless discourage criticism of the policies of the government").

But while this means that the boundaries of the false statements of fact exception will be in some ways complex, such complexity cannot be avoided by choosing the many-exceptions or several-exceptions models described in Parts II.B and II.C. For instance, even a narrow exception for fraudulent attempts to get money could in principle end up being potentially applicable to statements about the government, science, or history: A candidate running for office could be prosecuted for making false claims about the government, on the theory that he was lying to his prospective employers (the people) in order to get money (the salary that he would get as an officeholder). The lower courts are currently split on whether general prohibitions on knowing falsehoods in election campaigns are constitutional.[7]

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[7] For cases stating that such prohibitions are constitutional, see *State* v. *Davis*, 499 N.E.2d 1255, 1259 (Ohio Ct. 1985); *Pestrak* v. *Ohio Elections Comm'n*, 926 F.2d 573 (6th Cir. 1991); *Snortland* v. *Crawford*, 306 N.W.2d 614, 623 (N.D. 1981) (dictum); *Commonwealth* v. *Wadszinski*, 422 A.2d 124, 129-30 (Pa. 1980) (dictum); *Vanasco* v. *Schwartz*, 401 F. Supp. 87, 91-93 (S.D.N.Y. 1975) (3-judge court) (dictum). For cases so stating as to judicial elections, see *North Carolina State Bar* v. *Hunter*, 2010 WL 2163362, *10 (N.C. Ct. App. June 1); *In re Chmura*, 608 N.W.2d 31, 40 (Mich. 2000); *Mahan* v. *State of Nevada Judicial Ethics & Election Practices Comm'n*, 2000 WL 33937547, *4 (D. Nev. Mar. 23); *Weaver* v. *Bonner*, 309 F.2d 1312, 1319 (11th Cir. 2002) (dictum). Under *Republican Party* v. *White*, 536 U.S. 765 (2002), restrictions on the speech of candidates of judicial office are subject to the same First Amend-

Likewise, a book author might be sued or prosecuted for fraud on the theory that he was making money through knowingly false allegations about the government, or knowingly false claims about history. The majority in *In re Grand Jury Matter*, *Gronowicz*, 764 F.2d 983 (3d Cir. 1985) (en banc), held that it was indeed constitutional to prosecute an author for allegedly defrauding a publisher and a movie producer based on the author's alleged misrepresentations about his contacts with Pope John Paul II, misrepresentations that appeared in the book itself. But three judges disagreed with the majority on this. See *id.* at 993 (Hunter, J., dissenting) (concluding that such fraud prosecutions were unconstitutional); *id.* at 1001 (Sloviter, J., dissenting) (concluding that such fraud prosecutions were unconstitutional, though civil liability would be constitutional); *and id.* at 997-98 (Leon Higginbotham, J., dissenting) (agreeing with Judges Hunter and Sloviter as a matter of First Amendment first principles, but concluding

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ment scrutiny as restrictions on the speech of candidates for other offices.

For cases holding that restrictions on knowing falsehoods in political campaigns are or might be generally unconstitutional, see *State ex rel. Public Disclosure Comm'n* v. *119 Vote No! Comm.*, 957 P.2d 691 (Wash. 1998) (striking down a law imposing civil liability for knowingly false statements in election campaigns); *281 Care Committee* v. *Arneson*, 638 F.3d 621 (8th Cir. 2011) (holding that a law criminalizing knowingly false statements in election campaigns had to be reviewed to determine whether it passes strict scrutiny, and remanding for such review). For a case in which the judges split 3-3 on the question, compare *In re Gableman*, 784 N.W.2d 605, 618, 624 (Wis. 2010) (Abrahamson, C.J.), with *In re Gableman*, 784 N.W.2d 631, 644-45 (Wis. 2010) (Prosser, J.).

that the then-existing First Amendment precedents did allow punishment of such fraud).

Presumably in such cases courts would have to be careful to prevent undue restrictions on First Amendment rights, whether the relevant exception is a general exception for knowing falsehoods or a specific exception for fraudulent attempts to get money. Whether courts conclude that an "actual malice" *mens rea* requirement suffices to avoid undue deterrence of speech in such cases (the view taken by the *Gronowicz* majority), or that there should be categorical protection even for some alleged knowing falsehoods (the view taken by the *Gronowicz* dissenters), that difficult inquiry would have to take place regardless of which broad approach this Court takes to crafting the First Amendment exceptions.

Finally, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992), would provide some extra protection against improper speech restrictions even if a general exception for knowing falsehoods is recognized. "[C]ontent discrimination" even within a class of "proscribable speech" is presumptively unconstitutional, *id.* at 387, because it may "impose special prohibitions on those speakers who express views on disfavored subjects," *id.* at 391. Thus, for instance, a law specifically punishing knowingly false statements about the war in Afghanistan might well be unconstitutional, because it might be an attempt to specially burden one side of the debate, and make criticisms of the war more dangerous. Likewise, a law banning Holocaust denial would likely violate the *R.A.V.* principle.

We recognize that our proposed approach means that, in principle, the government could criminalize a

wide range of lies, including on comparatively minor matters, such as lying about one's age on a dating service or lying to a spouse about how much one lost at poker. See *United States* v. *Alvarez*, 638 F.3d 666, 673-75 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc). And we agree that many such lies should not be criminalized.

But the very fact that such lies are generally not illegal shows that the political process can generally be trusted to prevent the imposition of criminal liability for casual social lies. Indeed, the very fact that many such social lies are common, *id.* at 674-75, is a powerful political check on the growth of the criminal law in this area.

Yet when lawmakers think that a particular kind of lie is harmful enough, they should generally be free to prohibit it. Thus, for example, if legislators conclude that adults should not be allowed to falsely claim to be children in order to build an online relationship with a real child, the legislature would be free to criminalize such speech. See *United States* v. *Drew*, 259 F.R.D. 449 (C.D. Cal. 2009) (describing the Lori Drew/Megan Meier case, in which the 13-year-old Megan Meier committed suicide after having been psychologically manipulated by Lori Drew, an adult woman who won Meier's trust and affection by pretending to be a 16-year-old boy in her communication with Meier).

Under the approach we propose in this subsection, the Stolen Valor Act would be constitutional, precisely because it is highly unlikely to unduly chill true statements or statements of opinion. Whether we have received military decorations is easy for us

to be sure about, and generally much easier than it is for us to be sure about whether some other person has done something (the issue in most defamation cases). Cf. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, *Inc.*, 425 U.S. 748, 771 n.25 (1976) (concluding that false statements in commercial advertising should be more easily punishable than other false statements because "[t]he truth of commercial speech * * * may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else").

The truth of such claims is also unusually easy for the jury to determine with precision, so jurors' ideological sentiments are relatively unlikely to influence their factual judgment, compared even to jury decisions made when implementing permissible speech restrictions, such as libel law. Protecting false statements about such matters is not necessary for protecting the soundness of historical or scientific debate. And though the Stolen Valor Act does treat false statements about one's military decorations differently from other false statements, it appears to fit within one of the exceptions to the *R.A.V.* principle: "[T]he nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." 505 U.S. at 390. False claims of military honors are not limited to any particular viewpoints, or even particular topics of debate. They can equally be made by people who are anti-war, who are pro-war, or who are just trying to

stay in an office that is unrelated to the military or to have more influence in such an office.

F. Providing for Intermediate Scrutiny of Restrictions on Knowing Falsehoods

One other possible approach is to view knowing falsehoods as "low-value" speech, so that restrictions on the speech are judged under intermediate scrutiny rather than strict scrutiny. Commercial speech, for instance, is generally treated this way.

But such an approach is unlikely to yield results materially different from what the "no-value speech" approach described in Part II.E would yield, at least so long as restrictions such as those described in Part I remain generally upheld. Restrictions on fraudulent statements that seek to get money or votes would likely be justified on the theory that the restrictions are sufficiently "narrowly tailored" to the "substantial government interest" in protecting listeners against getting deceived. But the same interest would be applicable with regard to nearly all knowing falsehoods.

Consider the Stolen Valor Act itself. As we noted in Part II.C, people who lie about decorations generally do so for a reason: They may want to get elected to public office,[8] to get more credibility for their own statements in another's election campaign, to get

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[8] See, *e.g.*, Government's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss Indictment, *United States* v. *Alvarez*, No. 2:07-cr-01035-ER, at 5 n.1 (C.D. Cal. Jan. 14, 2008), http://volokh.com/files/alvarezresponse.pdf.

more credibility in some nonelectoral political debate, or even just to get more respect from neighbors, acquaintances, potential business associates, or potential romantic partners.

They are thus trying to manipulate listeners' behavior through falsehood, and their statements are quite likely to indeed affect listeners' behavior, particularly since having a military decoration is often seen as an especially important mark of merit. Just as trying to affect a federal employee's behavior through falsehoods creates a significant harm, see 18 U.S.C. § 1001, so trying to affect private citizens' behavior through falsehoods creates a significant harm—sometimes less significant, sometimes more significant, but significant nonetheless, because it involves manipulating people through deception. And if there is a substantial government interest in protecting people from being deceived into giving $50 to a charitable fundraiser, there is likewise a substantial government interest in protecting people from being deceived into giving others votes, respect, or attention.

We are not persuaded by the government's argument that the Stolen Valor Act can be justified by a compelling government interest in "conveying gratitude and recognition and fostering morale within the armed forces," Petitioner's Brief at 41. We share the Ninth Circuit's doubt that citizens lose respect for military decorations simply because some people falsely claim to have won such decorations. *United States* v. *Alvarez*, 617 F.3d 1198, 1217 (9th Cir. 2010). If the Stolen Valor Act is struck down, military medals will still maintain their power to express

our nation's gratitude to true heroes, and to foster morale within the military.

Rather, a more certain and concrete harm of knowing falsehoods about military honors is the harm to listeners who are defrauded by such falsehoods—a harm that can often be greater than the harm from knowing falsehoods aimed at getting political contributions, and that is especially great precisely because military honors are so respected and valued. The interest in preventing this harm, like the interest in preventing harms stemming from other forms of fraud, would adequately justify the Stolen Valor Act even under intermediate scrutiny. And the interest would likewise justify nearly any restriction on knowing falsehoods.

At the same time, focusing chiefly on intermediate scrutiny might distract from the important task identified in Part II.E—identifying when certain restrictions on false statements are unconstitutional because they unduly chill true statements. Consider, for instance, this Court's conclusion that false statements often cannot be restricted unless they are made with "actual malice." Such a result could not have been reached under intermediate scrutiny: A strict liability regime in libel cases, for example, could easily be defended as "narrowly tailored" to a substantial government interest in protecting reputation, or to a substantial government interest in protecting listeners against being misled. After all, such a strict liability regime would advance those interests more than an "actual malice" requirement would, and would thus "promote[] a substantial government interest that would be achieved less effectively absent the [regime]." *Ward* v. *Rock Against*

Racism, 491 U.S. 781, 799 (1989) (quoting *United States* v. *Albertini*, 472 U.S. 675, 689 (1985) (describing the requirements of narrow tailoring under intermediate scrutiny); *Board of Trustees of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 476-78 (1989) (adopting a similar standard under intermediate scrutiny for commercial speech). Likewise, even prohibitions on seditious libel, rejected by this Court in *New York Times Co.* v. *Sullivan*, might pass intermediate scrutiny, because they could well be seen as narrowly tailored to the substantial government interest in preventing citizens from being intentionally defrauded.

What is doing the work in this Court's decisions that impose *mens rea* requirements in false statement cases, and in this Court's rejection of seditious libel, is not any analysis of whether the restriction is necessary to serve a sufficiently important government interest under intermediate scrutiny or even strict scrutiny. Rather, it is a judgment about the degree to which the restrictions chill valuable speech—a judgment that is best exercised in defining the scope of the exception, rather than in applying intermediate or strict scrutiny.

CONCLUSION

For these reasons, the Stolen Valor Act, if read to apply only to knowingly false representations, should be seen as constitutional, on the grounds that the First Amendment generally does not protect knowingly false statements of fact.

Respectfully submitted.

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