No. 11-210

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

- v. -

XAVIER ALVAREZ

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Stolen Valor Act of 2005, codified at 18 U.S.C. § 704(b), which makes it a crime to falsely claim to have received the Congressional Medal of Honor (and other service medals) verbally or in writing, is unconstitutional on its face, or as applied to Xavier Alvarez, a political office holder, because it violates the Free Speech Clause of the First Amendment to the Constitution.

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Xavier Alvarez respectfully requests that this Court deny the petition for a writ of certiorari. This case represents the first challenge to the constitutionality of the Stolen Valor Act, and the identical issue is currently pending in four different circuits. The passage of time and opportunity for further percolation in the lower courts will no doubt allow the Court to determine whether a split will develop, and assist the Court in assessing the far-reaching consequences that a decision in this case might have on application of the Free Speech Clause and on criminal prosecutions throughout the country. Moreover, the court of appeals' decision is nothing more than a straightforward application of this Court's precedents and strict scrutiny analysis to the content-based restriction on speech enshrined in the Act. Review by this Court is therefore unnecessary.

STATEMENT

In the Stolen Valor Act of 2005, Congress made it a misdemeanor offense to "falsely represent . . . verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." 18 U.S.C. § 704(b). An additional penalty attaches to false claims of particular military decorations, including the Medal of Honor. *Id.* § 704(c)-(d).[1] The findings that accompanied the law state that "[f]raudulent claims surrounding the receipt of the Medal of Honor [and other military decorations] damage the reputation and meaning of such decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266.

The bill was signed into law on December 20, 2006. *Id.* In the nearly five years since the law went into force, prosecutions under section 704(b) have averaged less than ten filings per year, accounting for less than 0.0001% of federal prosecutions.[2]

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[1]Petitioner dedicates much of its petition for certiorari to establishing that the military has long used military decorations to foster esprit de corps and that it continues to believe awards are important to that end. Respondent does not contend otherwise. As Judge M. Smith noted, concurring in the denial of rehearing en banc, "the majority opinion does not impugn the reputation of any of our brave men and women in uniform. On the contrary. The strict scrutiny analysis of the majority opinion affirms that our men and women in uniform put themselves in harm's way because they are honorable and brave, and not because they seek to be awarded one or more of the medals covered by the Act." (App. 94a-95a).

[2]Respondent does not have access to Department of Justice databases, but has tried to be inclusive: Respondent has reviewed all Section 704 prosecutions reported in the Transactional Records Access Clearinghouse ("TRAC"), which compiles statistics about federal prosecutions, as well as all prosecutions reported in

One of the first individuals charged under the Stolen Valor Act was Xavier Alvarez. Alvarez was an elected member of the Board of Directors of the Three Valleys Municipal Water District in Pomona, California. (App. 4a).[3] On July 23, 2007, at a public water board meeting, Alvarez was asked to introduce himself. He stated that he was a retired Marine of 25 years, that he had been awarded the Congressional Medal of Honor, and that he had been wounded many times. (App. 4a). In fact, Alvarez had never served in the military. (App. 4a).

Alvarez's statement harmed no one, and there was no evidence that his "series of bizarre lies" helped him obtain any tangible or intangible benefits, or that anyone detrimentally relied on his false statement. (App. 4a, 29a, 94a). But the repercussions from the statement were swift: Alvarez was immediately perceived as a phony, even before the FBI began investigating him. (App. 26a). Almost immediately after Alvarez made his claim, a recording of the meeting was forwarded to the FBI for investigation. (App. 5a). In September 2007, Alvarez was indicted on one count of violating the Stolen Valor Act. (App. 5a). Even as his case was proceeding through the trial court, he was pilloried in the community and in

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United States Attorney's Offices press releases or on the websites that track the Stolen Valor Act. Respondent has included in this number any prosecution reported in the above sources that included a Section 704(b) charge, or where it was not clear whether the individual was charged under Section 704(b) or 704(a). Respondent located 45 cases over the five-year period that met that definition. TRAC reports that the yearly total of federal prosecutions, for the last five years, ranges from 117,651 to 165,346.

[3]The opinion inadvertently indicates that Alvarez won a seat on the Board in 2007; in fact, he was elected to the Board on November 7, 2006.

the press, labeled an "idiot," "jerk," and worse. (App. 26a).

In the district court, Alvarez filed a motion to dismiss the indictment, in which he raised both a facial and an as-applied challenge to the constitutionality of the Stolen Valor Act. (App. 140a). The district court denied the motion. (App. 141a-144a). It held that *Garrison v. Louisiana*, 379 U.S. 64, 64-66 (1964), rendered knowing false statements of fact entirely unprotected by the First Amendment. (App. 142a). The court added that it saw no other basis for a facial challenge; the statute is "narrowly written to proscribe deliberate false statements concerning a very specific subject matter," and "does not suppress legitimate political speech . . . [or] risk chilling public discourse." (App. 144a).

The Ninth Circuit reversed. It started from the principle that content-based restrictions on speech are generally subjected to strict scrutiny. (App. 7a). The Court then dispensed with the government's and dissent's starting premise that false statements of fact are valueless. (App. 10a-11a). The Court held that, while false statements of fact may not be protected for their own benefit, "the right to speak and write whatever one chooses . . . without cowering in fear of a powerful government is . . . an essential component of the protection afforded by the First Amendment." (App. 14a). To take the dissent's perspective would be to "turn[] customary First Amendment analysis on its head," because "'[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.'" (App. 10a-11a, 13a [quoting *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010)]).

Thus, only "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problems" are excepted from strict scrutiny. (App. 7a [quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)]). The ""historic and traditional categories long familiar to the bar[ ]" includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. . . ." (App. 7a [quoting *Stevens*, 130 S. Ct. at 1584 (internal citations omitted in original, alterations in original)]).

After reviewing *Stevens*' categories, the Court determined that false factual speech was not among the historically-unprotected categories, nor could the statements at issue be squeezed into any of the existing categories of unprotected speech. As to the first question, the Court recognized that the Supreme Court had sometimes made broad pronouncements declaring false statements to be unworthy of protection in their own right. (App. 16a). At the same time, in order to provide the proper breathing space for the First Amendment, the Court had always placed boundaries about what kind of false speech can be prohibited. (App. 17a-19a). In the past, the Court had upheld limitations on false factual speech, but only in circumstances where the statement was made knowingly and caused some harm. (App.13a-19a). The *Stevens* Court confirmed this understanding when it included defamation on its list of historically unprotected categories of speech, rather than false statements of fact generally. (App. 19a).

As to the second question, the Court concluded that the Stolen Valor Act did

not fall under *Stevens*' defamation category, because it lacked two hallmarks of defamation – a knowledge or intent requirement, and a requirement of harm. (App. 22a-23a). While the Court was willing to read a scienter requirement into the statute, this would not cure the absence of a requirement of harm. (App. 22a-23a). Moreover, while defamation safeguards the strong interest in protecting individuals from injury to their reputation, it is far from clear that the government can use defamation law to restrict speech "as a means of self-preservation," or, in other words, where the only value threatened is the reputation of some government institution or symbol. (App. 24a). For similar reasons, the Stolen Valor Act is not sufficiently akin to perjury or fraud to warrant protection under those categories. (App. 27a-28a).

Because false statements of fact are not historically unprotected, the Court concluded that strict scrutiny applied. (App. 35a). And, as even the dissent had conceded, the Act did not satisfy that standard. (App. 36a). While the end was legitimate, even "noble," a criminal sanction is not a narrowly tailored means; there is no evidence false claims actually affect the integrity of the medals, and the remedy is more speech, or an act that actually targets fraud. (App. 38a-39a).

Judge Bybee dissented, charging the majority with "turn[ing] the exceptions into the rule and the rule into an exception." (App. 44a). In the dissent's view, the starting place for analysis is that false statements of fact are valueless in the constitutional calculus, and therefore should be protected only to the extent necessary to protect speech "that matters." (App. 42a). In that category, the dissent

would place satire, fiction, and rhetorical hyperbole. (App. 49a). The dissent grounded its argument in broad statements in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), and other cases to the effect that false statements of fact have no constitutional value. (App. 45a). The dissent concluded that the *Stevens* Court's use of the term defamation, instead of false statements, was "nothing interesting," because most of the cases in the category of false statements of fact arose in the defamation context and because the Court had used both terms to describe speech within the unprotected category. (App. 56a). Using that construct, the dissent concluded that the Stolen Valor Act was constitutional because it would not suppress speech that "mattered." (App. 69a, 76a).

Rehearing en banc was sought, but denied. (App. 91a-92a). Judge M. Smith authored a concurrence from denial of rehearing, joined by Chief Judge Kozinski, in which he reiterated that the Supreme Court had upheld limitations on false statement of fact only where such limitations required a culpable state of mind and caused injury. (App. 99a). Such nuance, it concluded, would have been unnecessary if false factual speech was simply unprotected. (App. 99a). Not only did *Stevens*' categories of unprotected speech not include "false statements of fact," but six decades of such formulations had consistently omitted the dissent's proposed classification from the list of unprotected categories. (App. 100a). And, "as Judge O'Scannlain's Dissent appears to acknowledge, *all* of the cases and statutes [the dissent] relies upon either fit within one of the categories discussed in *Stevens* (or its predecessors) or were subjected to First Amendment scrutiny." (App. 101a). The

concurrence also pointed out that the dissent did not cogently define "speech that matters," and that its proposed test invites courts to engage in the very "ad hoc," "free-wheeling," "case-by-case" approach that *Stevens* found so "startling and dangerous." (App. 106a [quoting *Stevens*, 130 S. Ct. at 1585-86]).

One dissent from denial of rehearing en banc, authored by Judge O'Scannlain and joined by six judges, pressed Judge Bybee's analysis, and was along the same lines. (App. 116a-135a). A second dissent, authored by Judge Gould, would permit Congress more leeway to legislate in the context of the military. (App. 135-138a).

Chief Judge Kozinski authored a separate concurrence from denial of rehearing in which he teased out the importance of one's right to define oneself in the manner of one's choosing:

> So what, exactly, does the dissenters' ever-truthful utopia look like? In a word: terrifying. If false factual statements are unprotected, then the government can prosecute not only the man who tells tall tales of winning the Congressional Medal of Honor, but also the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a bit. Phrases such as "I'm working late tonight, hunny," "I got stuck in traffic" and "I didn't inhale" could all be made into crimes. Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as "rational basis review."

(App. 107a). This, Judge Kozinski reasoned, ran contrary to the First Amendment principles: "[O]ne fundamental concern of the First Amendment is to 'protec[t] the individual's interest in self-expression,'" and "[s]elf expression that risks prison if it

strays from the monotonous reporting of strictly accurate facts about oneself is no expression at all." (App. 108a-109a [internal citation omitted]). In other words: "Saints may always tell the truth, but for mortals living means lying." (App. 109a).

ARGUMENT

Xavier Alvarez, a newly-elected member of an obscure local water board, stood up at a board meeting and boasted that twenty years earlier he had been awarded the Medal of Honor. It was a lie. No one detrimentally relied on his false statement or was caused harm in any way; and it did not help him to obtain any tangible or intangible benefit. (App. 29a, 94a). But as a result of that non-defamatory lie about himself, the government prosecuted Mr. Alvarez under the Stolen Valor Act of 2005, 18 U.S.C. § 704(b), which makes it a crime to falsely claim, either verbally or in writing, the receipt of military decorations or medals. In a lengthy, well-reasoned decision, the court of appeals applied the strict scrutiny standard applicable to content-based restrictions on speech, *see United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000), and held that the Act is not narrowly tailored to achieving a compelling government interest and therefore was unconstitutional on its face. Having been unable to convince the court of appeals that the "*mere utterance*" (App. 2a) of a non-defamatory falsehood about oneself is unprotected by the First Amendment's guarantee of freedom of speech, the government seeks review by this Court in a renewed effort at arguing that falsehoods, as a general rule, are among those categories of speech that receive no constitutional protection. This Court has never so expressly held, and should

decline the invitation to do so here.

The government's argument for why its petition should be granted boils down to two assertions: (1) a federal statute was declared unconstitutional, and (2) it should not have been. But while the fact that a law has been declared unconstitutional can be a weighty factor in this Court's certiorari decision, it is not alone sufficient. *See* Pub. L. No. 352, 100th Cong., 2d Sess., 102 Stat. 662 (1988) (codified at 28 U.S.C. § 1254 (2006)) (repealing congressional mandate that the Court review all cases in which a federal statute is declared unconstitutional). And myriad factors present here weigh against granting the petition. These include:

- there is no conflict among the circuits;
- the law has been infrequently applied;
- the issue is currently pending in four circuits thus giving this Court multiple opportunities to consider the question in the near future with the benefit of their collective wisdom before settling such a significant constitutional matter; and
- legislation has been introduced in Congress to amend the Act in an attempt to address the constitutional concerns raised by the court of appeals in this case.

Moreover, the court of appeals' holding that § 704(b) is facially unconstitutional is based on a straightforward application of this Court's precedents and a strict scrutiny analysis of the content-based restriction on speech. This Court, in fact, has denied review of similar constitutional rulings when the court of appeals' analysis

simply applies well-settled constitutional law or has limited practical implications for the government. *See, e.g.*, *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009) (denying Solicitor General's petition seeking review of a court of appeals decision holding the Child Online Protection Act unconstitutional, where the court of appeals simply applied established First Amendment law); *Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998) (denying Solicitor General's petition for review of a decision striking down a prohibition on advertising of casino gambling on First Amendment grounds where the court of appeals' ruling followed established precedent); *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997) (denying review after court of appeals struck down the federal Lead Contamination Control Act as unconstitutional); *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992) (denying review of decision holding that part of the National Labor Relations Act violated the First Amendment). Denial of certiorari is likewise warranted here.

A. **Because no conflict currently exists among the courts of appeals, cases addressing this issue are currently pending in four other circuit courts, and the law has been applied infrequently, this Court's review of the issue is not necessary at this time**.

As the government itself acknowledges, "the decision below is the first court of appeals decision to address section 704(b)'s constitutionality." (Pet. 13). Moreover, while Alvarez may have been the first to challenge the Stolen Valor Act

on constitutional grounds, he is not the last. "[T]he question is currently pending in four other circuit courts." (Pet. 13).[4] Thus – should any conflict develop – there will be ample opportunity in the very near future for this Court to review the constitutionality of the Act, and its implications regarding First Amendment protection for false statements of fact, but with the added benefit of having input and wisdom from multiple additional sources. As Justice Stevens has noted, "experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process." John Paul Stevens, "Some Thoughts on Judicial Restraint," 66 Judicature 177, 183 (1982). And allowing further percolation in the lower courts also will assist the Court in fully evaluating the ramifications that a decision in this case might have on First Amendment jurisprudence and on criminal prosecutions throughout the country. *See* Eugene Gressman et al., *Supreme Court Practice* (9th

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[4]In the Tenth Circuit, the court heard argument on May 12, 2011, in *United States v. Strandlof*, No. 10-1358 (10th Cir.), a case in which the district court dismissed § 704(b) charges on First Amendment grounds. The Eleventh Circuit is set to hear argument on the constitutionality of the Stolen Valor Act on November 29, 2011, in *United States v. Amster*, No. 10-12139 (11th Cir.). In the Eighth Circuit, the issue is fully briefed in *United States v. Kepler*, No. 11-2278 (8th Cir.), a government appeal of another district court decision declaring the Stolen Valor Act facially unconstitutional, and is thus waiting for argument. And finally, in the Fourth Circuit, two trial courts have addressed the issue. In *United States v. Robbins*, No. 11-4757 (4th Cir.), the district court upheld the constitutionality of the Stolen Valor Act and the issue is on appeal. A magistrate court in the District of Maryland found the law unconstitutional, Memorandum Opinion and Order*, United States v. Lawless*, No. 11-cr-475-PJM/11-mj-173-TMD (D. Md. Aug. 29, 2011); that decision is set to be reviewed by the district court, and almost certainly will proceed to the Fourth Circuit as well.

ed.), § 6.37(i)(1), at 503-04 ("The more important an issue is, the more the Court would benefit by allowing the issue to percolate so it may avail itself of the wisdom of other courts before settling a momentous matter."). Indeed, the "perspective of time" may help shed more light on the important constitutional question posed by the petition. *See Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting).

It may turn out that the other circuits will concur with the Ninth Circuit's result here. For example, the Eighth Circuit recently relied on the Ninth Circuit's decision in this case in holding that knowingly false campaign speech is not categorically outside the protection of the First Amendment. *See 281 Care Comm. v. Arneson*, 638 F.3d 621, 633-36 (8th Cir. 2011).[5] And district judges in the District of Colorado and the Southern District of Iowa, and a magistrate judge in

[5]There, the district court, relying on the same cases the government relies on here, concluded – just as the government argues here – that knowingly false speech is "is valueless and categorically exempt from First Amendment protection." *281 Care Comm.*, 638 F.3d at 634. The court of appeals rejected that argument, finding that "the Supreme Court has never placed knowingly false campaign speech categorically outside the protection of the First Amendment," and explaining that "all the language the district court and defendants cited comes from cases dealing with otherwise unprotected speech, namely fraudulent or defamatory speech. We follow the lead of the Ninth Circuit in concluding that this language dismissing the value of knowingly false speech, when read in context of the opinions, does not settle the question here today." *Id.* (citing *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010)). It expressly rejected the identical argument the government presents here that "the categorical exemption of defamatory speech is actually an exemption of all knowingly false speech," explaining that "defamation-law principles are justified not only by the falsity of the speech, but also by the important private interests implicated by defamatory speech." *Id.* at 634-35 (citations omitted).

the District of Maryland, have also declared the Stolen Valor Act facially unconstitutional. *See supra* n.3.[6] As such, the question presented is best left for further analysis and evaluation in the lower courts unless and until categorical disagreements emerge.

Moreover, because the law is so infrequently used, and when it is, it is often charged in combination with other crimes, *see infra*, 15-16, there is little need at this time to address the law's constitutionality. *Cf.* U.S. Cert. Br. 11, *Small v. United States*, No. 03-750, 2004 WL 349912, at *11 (2004) (Solicitor General suggests that review of decision concerning the scope of criminal prohibition could be postponed given the infrequency with which the issue arises). In the nearly five years since the law went into force, prosecutions under § 704(b) have averaged less than ten filings per year, accounting for less than 0.0001% of federal prosecutions.[7] Notably, the Solicitor General himself has argued against review on grounds that

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[6]In the one district court case upholding the constitutionality of the Act, the court was able to do so *only* because it read an additional element of fault into the law – an intent to deceive – that simply does not exist. *See United States v. Robbins*, 759 F. Supp. 2d 815, 819 (W. D. Va. 2011) ("The government concedes that the statute should be read to criminalize only *knowingly* false statements. I conclude that the statute should be read to include a mens-rea requirement that the defendant *intended to deceive*.") (emphasis in original).

[7]A review of all § 704 prosecutions reported in the Transactional Records Access Clearinghouse ("TRAC"), which compiles statistics about federal prosecutions, as well as all prosecutions reported in United States Attorney's Offices press releases or on the websites that track the Stolen Valor Act, indicate that no more than 45 cases have been prosecuted in the five years since the law was enacted. TRAC reports that the yearly total of federal prosecutions, for the last five years, ranges from 117,651 to 165,346.

apply with equal force here, reasoning that "[t]his is a case of first impression and, at least to this point, does not appear to be of recurring significance." U.S. Br. in Opp., Wilson, *supra*, at 16 (No. 90-1362). Likewise here, as there, "there is no court of appeals conflict on this issue and, indeed, no other court of appeals decisions on the subject." *Id.*[8]

Respondent acknowledges that to deny certiorari in this case in order to allow other circuits to weigh in would leave the status of the Stolen Valor Act uncertain. At the same time, this uncertainty will not leave prosecutors entirely powerless to combat military fraud. A significant number of the relatively few § 704(b) prosecutions also charge some other related conduct. *See, e.g.*, Indictment, *United States v. Barnhart*, No. 09-59 (W.D. Va. Oct. 15, 2009), ECF No. 3 (charging, in addition to § 704(b), one count of 18 U.S.C. § 641, theft of government property, based on false claims of veteran's disability benefits); Indictment, *United States v. Perkins*, No. 08-353 (W.D. Wash. Oct. 23, 2008), ECF No. 1 (also charging 18 U.S.C. § 498, use or possession of falsified or forged DD-214, military discharge papers, in connection with false claim for Veteran's Administration benefits); Superseding Indictment, *United States v. Robbins*, No. 10-6 (W.D. Va. Nov. 18, 2010), ECF No. 25 (also charging 18 U.S.C. §§ 498 and 1341, fraud based on false claim for

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[8]The government argues here that because there are four pending circuit cases involving the constitutionality of the Stolen Valor Act that "the issue is a substantial and recurring one." (Pet. 14). But, in actuality, it represents nothing more than the fact that a relatively recent law that is infrequently applied has been challenged a handful of times and the law is starting to be reviewed for the first time.

veteran's benefits); Indictment, *United States v. Kepler*, No. 11-17 (S.D. Iowa Feb. 24, 2011), ECF No. 2 (also charging 18 U.S.C. § 1347, health care fraud, for false claim for veteran's health care benefits); Indictment, *United States v. Bishop*, No. 10-554 (D. Ariz. Apr. 28, 2010), ECF No. 1 (also charging 18 U.S.C. §§ 498 and 1343, wire fraud, based on false claim that led to unwarranted salary increases from federal agency). Thus denying certiorari will not leave the government without ammunition to combat false claims of military honors. Perhaps more importantly, there are adequate bases to prosecute and obtain restitution where such fraud results in loss to the government, which is perhaps the context in which the government has the strongest interest in immediate prosecution. Thus the institutional cost of allowing the issue to percolate in the courts of appeals for another year – in which an additional four circuits may weigh in on the issues – is not as substantial as the government claims.

B. **As a legislative "fix" may be in the offing, it is unnecessary to review the issue at this time**.

On May 5, 2011, in direct response to the Ninth Circuit's decision in this case, Representative Joe Heck introduced H.R. 1775, the Stolen Valor Act of 2011, in the House of Representatives. *See* H.R. 1775, 112th Cong.; 157 Cong. Rec. H3108 (daily ed. May 5, 2011). He was joined by fifty-one co-sponsors, representatives from both political parties. The bill would strike subsection (b) of 18 U.S.C. § 704, the provision under which Alvarez was convicted, and replace it with a provision that would criminalize "knowingly mak[ing] a misrepresentation regarding his or

her military service" "with the intent to obtain anything of value." H.R. 1775 § 2. In the case of misrepresentations "that such individual served in a combat zone, served in a special operations force, or was awarded the Congressional Medal of Honor," the offense is punishable by not more than one year in custody; in "any other case," the offense is punishable by six-months imprisonment. *Id.* The bill also establishes a defense if the thing of value is "de minimis." *Id.* As Representative Heck explained, "[a] previous version of this bill was passed by Congress, and although it was very popular, it was struck down by the 9th Circuit Court as violating free speech. My bill takes a different approach – making it illegal for individuals to benefit from lying about their military service or record." "Heck Introduces Stolen Valor Act of 2011," Congressman Joe Heck, Press Releases, May 5, 2011, <http://heck.house.gov/press-release/heck-introduces-stolen-valor-act-2011> (last visited Sept. 14, 2011). He indicated he was "confident this approach will pass constitutional review." *Id.* The bill was referred to the Judiciary Committee, and the Sub-Committee on Crime, Terrorism, and Homeland Security, on June 1, 2011.

Given that Congress is considering amending the statute in an effort to address the constitutional concerns raised by the court of appeals in this case – and that there have been only a small number of prosecutions brought under the current law – this Court need not waste its limited time reviewing a law that may soon cease to exist in its present form. And allowing Congress the opportunity to fix the law would be preferable to judicial intervention. Should the proposed

legislative changes ultimately fail, the Court still will have multiple opportunities to consider the constitutional question presented given the number of cases currently under review in the lower courts.

C. Review is unnecessary to address the court of appeals' straightforward application of this Court's precedents and strict scrutiny analysis to the content-based restriction on speech enshrined in the Act.

The Ninth Circuit's holding that the Stolen Valor Act is unconstitutional rests on the proper application of well-settled First Amendment law. The government's arguments for why the Act is constitutional, and the analysis it believes should apply for determining the law's constitutionality, are based on a fundamental misreading of this Court's precedents and were rightly rejected by the court of appeals. Judge M. Smith summed up well the issues presented by this case and what actually is in dispute. "This case presents two issues:

> (1) Does the government bear the burden of proof to show that speech forbidden by the Stolen Valor Act (the Act), 18 U.S.C. § 704(b), is unprotected by the First Amendment, or does a criminal defendant charged under the Act bear the burden of proof to show that the targeted speech is protected by the First Amendment? (2) Is the speech forbidden by the Act protected by the First Amendment, or does it fall into one of the "well-defined and narrowly limited classes of speech" that is unprotected by the First Amendment, *United States v. Stevens*, — U.S. —, 130 S. Ct. 1577, 1584 [] (2010) (internal quotation mark omitted)?

(App. 92a). There was no dispute among the judges below, whether in majority or dissent, that "the Act 'seek[s] to regulate "only . . . words,"' that the Act targets words about a specific subject (military honors), and that the Act is plainly a

content-based regulation of speech." (App. 93a-94a) (citations omitted). Also, there was no dispute that "because the Act imposes a content-based restriction on speech, it is subjected to strict scrutiny, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 [] (2000), unless the speech it criminalizes falls into one of the 'well-defined and narrowly limited classes of speech' that is unprotected by the First Amendment, *Stevens*, 130 S. Ct. at 1584 (internal quotation mark omitted)." (App. 94a). "There [wa]s also no meaningful dispute between the majority and the Dissenters concerning whether the Act survives strict scrutiny if it does not fall into one of the *Stevens* subcategories of speech that is unprotected by the First Amendment." (App. 94a). Indeed, although the dissent did not believe that strict scrutiny analysis applied, even it agreed that *if* the Act were subjected to strict scrutiny, "the Act would not satisfy this test." (App. 70a).[9]

What the government and dissent argued below is that there is a "general rule" that "false statements of fact are not protected by the First Amendment," with "certain limited exceptions where First Amendment protection is necessary 'to protect speech that matters.'" (App. 44a-50a). Indeed, the government argues that the court of appeals "erred in applying strict scrutiny simply because it concluded that the speech prohibited by Section 704(b) does not fall within a category of speech that historically has been completely unprotected by the First Amendment."

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[9]The government maintains that § 704(b) can be upheld even if strict scrutiny applies. (Pet. 29-30). That position is entirely meritless. Despite its best efforts below, the government was unable to persuade even a single one of the seven dissenting judges to that position.

(Pet. 23). It argues that the court instead should have applied a so-called "'breathing space' analysis." (Pet. 23). It apparently rejects as the general, fundamental rule, the rule outlined in the First Amendment itself that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I.

Thus, the primary dispute here is whether knowing falsehoods are among the very limited categories of speech, "the prevention and punishment of which have never been thought to raise any Constitutional problem." *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

But, as this Court recently explained, "[f]rom 1791 to the present . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas," and has never 'include[d] a freedom to disregard these traditional limitations.' These 'historic and traditional categories long familiar to the bar,'" include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id.* (citations omitted). Previously, the Court explained that "[t]hese include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572 (citation omitted).[10] In *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), a defamation case, the Court also listed other low value speech categories as including "insurrection,

[10]The Court has since held that profanity is protected by the First Amendment. *See Cohen v. California*, 403 U.S. 15 (1971).

contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business."[11] In *no* prior case, however, has this Court included knowing falsehoods or lies among those categories of speech unprotected by the First Amendment.[12]

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[11]This Court recently noted that "[t]he First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008).

[12]As one commentator has explained, "[s]ome hints can be found in the defamation cases that falsehoods are inherently pernicious; but thus far the Court has not given the concrete and particularized account of the evil to be redressed that would provide a credible explanation for why nondefamatory falsehoods are punishable in the face of protections for freedom of speech." Dianne M. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. Rev. 364, 423 (1989). Another commentator similarly has found nothing in this Court's precedents expressing that non-defamatory falsehoods are generally not entitled to First Amendment protection: "It is unclear whether, as a doctrinal matter, there is a constitutional right to utter intentionally false statements under any circumstances. Obviously there is no constitutional right to commit fraud, perjury, libel or myriad other wrongs that can be committed through speech." Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest For a Constitutional Right to Lie*, 78 Temple L. Rev. 151, 157 (2005) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating in dicta that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.")). "On the other hand, in other statements the Court has suggested that even if no constitutional protection exists for false statements for their own sake, the theory that the costs associated with policing the veracity of speech on matters of public concern are higher than those associated with permitting false expression may nevertheless make intentionally false statements relatively immune from liability in some contexts." *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (arguing that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive . . . .'") (citing *NAACP v. Burton*, 371 U.S. 415, 433 (1963)). "Indeed, one of the current members of the Court, while working as a law professor, recognized '[t]he near absolute protections given to false but

To the contrary, in *Sullivan*, this Court explained that "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving truth on the speaker." 376 U.S. at 271. And the Court made clear that this applies even to the patently erroneous statement made in bad faith. *Id.* at 272 & n.13 (citation omitted). "Even 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." *Id.* at 279 n.19 (citations omitted). In *Meyer v. Grant*, 486 U.S. 414, 419 (1988), this Court explained that "the First Amendment is a value-free provision whose protection is not dependent on the truth, popularity or social utility of the ideas and beliefs which are offered." (internal quotation marks omitted). And this Court has cautioned that "in this field every person must be his own watchman for the truth, because the forefathers did not trust any government to separate the true from the false for us." *Id.* at 419-20 (internal quotation mark omitted); *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

"[A]dopt[ing] the government's approach as the general rule for false factual speech [would] turn[] customary First Amendment analysis on its head." (App.

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nondefamatory statements of fact outside the commercial realm.'" (App. 100a) (quoting Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 477 (1996)).

11a). As the court of appeals correctly explained, "[a]ny rule that certain speech is not protected by this foundational principle [the Free Speech Clause] is the exception, which may in turn be subject to other exceptions to protect against such exceptions swallowing the rule." (App. 14a). "In other words, we presumptively protect *all* speech against government interference, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection in this case, for some reason other than the mere fact that it is a lie." (App. 14a).

The fact is, "the right to speak and write whatever one chooses – including, to some degree, worthless, offensive, and demonstrable untruths – without cowering in fear of a powerful government is . . . an essential component of the protection afforded by the First Amendment." (App. 14a).

And the right to speak about oneself – even to lie – is "the kind of speech that is intimately bound up with a particularly important First Amendment purpose: human self-expression." (App. 108a). As Justice Marshall has explained:

> The First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's self worth and dignity.

Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring). *See also* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1009 (2006) ("[A]ccepting

unlimited government power to prohibit all deception in all circumstances would invade our rights of free expression and belief to an intolerable degree, including most notably – and however counterintuitively – our rights to personal and political self rule."). And this Court recently recognized that "[o]ne fundamental concern of the First Amendment is to 'protec[t] the individual's interest in self-expression.'" *Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 534 n.2 (1980)) (second alteration in original). "Speaking about oneself is precisely when people are most likely to exaggerate, obfuscate, embellish, omit key facts or tell tall tales. Self-expression that risks prison if it strays from the monotonous reporting of strictly accurate facts about oneself is no expression at all." (App. 108a-109a).

Justice Brandeis long ago explained that our nation's founders "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that . . . discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . ." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). And as Chief Judge Kozinski correctly explained here,

> Political and self expression lie at the very heart of the First Amendment. If the First Amendment is to mean anything at all, it must mean that people are free to speak about themselves and their country as they see fit without the heavy hand of government to keep them on the straight and narrow. The Stolen Valor Act was enacted with the noble goal of protecting the highest

> honors given to the men and women of our military, but the freedoms for which they fight include the freedom of speech. The ability to speak openly about yourself, your beliefs and your country is the hallmark of a free nation.

(App. 115a).

To uphold the Stolen Valor Act would be to tread new ground for another reason. This Court has recognized, in different contexts, that the government cannot limit speech for the purpose of protecting the reputation of the government itself, or of its symbols. As the Ninth Circuit pointed out, "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." (App. 24a [quoting *Sullivan*, 376 U.S. at 291]). Likewise, in *Johnson v. Texas*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990), this Court struck down laws that would criminalize flag-burning. While "the government has a legitimate interest in making efforts to 'preserv[e] the national flag as an unalloyed symbol of our country,'" the Court nonetheless "decline[d] . . . to create for the flag an exception to the joust of principles protected by the First Amendment." *Johnson*, 491 U.S. at 418 (citation omitted). And yet the law here was enacted for the very purpose of protecting the "reputation" of military decorations. *See* Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266. It is therefore repugnant to the First Amendment. The speech at issue in *Johnson* shares another characteristic with this case: In *Johnson*, this Court concluded that Texas's fear that flag-burning would cause riot or strong offense proved that the special role of the flag was not in

danger, *id.* at 419; likewise, the rancor with which individuals who falsely claim military honors are treated in the community proves that the high esteem given to military decorations is not in serious danger.

Criminalizing the telling of a lie about oneself – even a lie which might tend to tarnish the reputation of a military honor – is simply beyond the limited exceptions to the constitutional dictate that "Congress shall make no law . . . abridging the freedom of speech." It is especially so where, as here, the lie harmed no one, and no benefit was sought or received. The court of appeals' decision was correct, broke no new ground and, as a result, further review by this Court would not materially contribute to First Amendment jurisprudence. The petition should therefore be denied.

D. **Because the Act is also unconstitutional as applied to Mr. Alvarez, a political office holder, resolution of the facial constitutional issue would likely not change the outcome of this case**.

Finally, as the Solicitor General argued in *Wilson*, *supra*, review of a decision invalidating a statute on constitutional grounds is not warranted when "resolution of the constitutional issues [would] have very little effect on the resolution of the underlying dispute." U.S. Br. in Opp., *Wilson*, *supra*, at 17. In this case, apart from its facial invalidity, the statute is also unconstitutional as applied to Mr. Alvarez because he was an elected public official at a public meeting describing his qualifications for the office he held when he made the statement at issue in this case. The statement was quintessential political speech. Government intrusion

into speech made by politicians is particularly suspect. Discussions of qualifications of political candidates is considered core political speech to which the highest scrutiny is afforded. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

Indeed, the Washington Supreme Court, for example, relying on this Court's unequivocal precedents addressing First Amendment protection for political speech, has twice declared facially unconstitutional state statutes that prohibited political advertisement containing false statements of material fact. *See Rickert v. State, Public Disclosure Comm'n*, 168 P.3d. 826 (Wash. 2007); *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691 (Wash. 1998). The court noted that "[o]ur constitutional election system already contains the solution to the problem that [the statutes were] meant to address. 'In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of "more speech, not enforced silence," thus has special force.'" *Rickert*, 168 P.3d at 832

(quoting *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))). "In other words, the best remedy for false or unpleasant speech is more speech, not less speech." *Id.*

In fact, the breadth of the protection afforded to political speech under the First Amendment is difficult to overstate in light of this Court's recent precedents. *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Citizens United v. FEC*, 130 S. Ct. 876 (2010). In *Citizens United*, this Court struck down a ban on political-campaign contributions by corporations, explaining that "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 130 S. Ct. at 898. Although the Court concluded that the application of strict scrutiny was sufficient to protect the speech in that case, the Court went so far as to suggest that "it might be maintained that political speech simply cannot be banned or restricted as a categorical matter." *Id.* at 898. The Court's recent decision in *Snyder* is similarly protective of political speech. The Court's decision to overturn the verdict against defendants hinged largely on the fact that the speech defendants were held liable for was speech about matters of public concern, which the Court noted is the "'essence of self-government.'" *Snyder*, 131 S. Ct. at 1215 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

Accordingly, even were this Court to conclude that the law was not facially unconstitutional, because Mr. Alvarez would likely succeed on his as-applied challenge, this case is not a good vehicle for this Court's review.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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