No. 11-210

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER ALVAREZ

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

SEAN K. KENNEDY
Federal Public Defender
Central District of California

JONATHAN D. LIBBY
Deputy Federal Public Defender
Counsel of Record

BRIANNA J. FULLER
Deputy Federal Public Defender

OFFICE OF THE FEDERAL PUBLIC DEFENDER
321 East 2nd Street
Los Angeles, California 90012
Jonathan_Libby@fd.org
(213) 894-2905

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Stolen Valor Act of 2005, 18 U.S.C. § 704(b), which 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," is facially invalid under the Free Speech Clause of the First Amendment.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

IN THE
SUPREME COURT OF THE UNITED STATES

No. 11-210

UNITED STATES OF AMERICA,
Petitioner,

v.

XAVIER ALVAREZ

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

BRIEF FOR RESPONDENT

STATEMENT

Xavier Alvarez lied. He lied when he claimed to have played professional hockey for the Detroit Red Wings. He lied when he claimed to be married to a Mexican starlet whose appearance in public caused paparazzi to swoon. He lied when he claimed to be an engineer. He lied when he claimed to have rescued the American ambassador during the Iranian hostage crisis, and when he said that he was shot going back to grab the American flag. A colleague was being charitable when he said, "I think after anyone meets Mr. Alvarez for the first time, one questions the

veracity of his statements." Pet. App. 4a-5a; Ninth Cir. Excerpts R. 18, 21; Will Bigham, *Records Claim More Alvarez Misdeeds*, Inland Valley Daily Bull., Oct. 25, 2007, http://www.dailybulletin.com/ci_7284004.

But none of those lies were crimes.

On July 23, 2007, Alvarez, an elected member of the Three Valleys Municipal Water District Board in Pomona, California, stood up at a meeting of a neighboring water board and introduced himself:

> I'm a retired Marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around.

Pet. App. 4a. In fact, Alvarez had never served in the military. *Id.* Alvarez's statement garnered him no tangible benefits, and there is no evidence that anyone relied on his false statement or even that anyone believed it. Pet. App. 4a, 29a, 94a. Nevertheless, as a result of that non-defamatory lie about himself, Alvarez was one of the first people prosecuted under the Stolen Valor Act of 2005, in which Congress made it a crime 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). A heightened penalty attaches where the false claim involves the Medal of Honor or certain other medals. *Id.* § 704(c)-(d). The findings that accompanied the law state that "[f]raudulent claims surrounding the receipt of

[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 public reaction was faster than the prosecution: Alvarez was immediately perceived as a phony, even before the FBI began investigating him. Pet. App. 26a. And just as quickly, he was pilloried in the community and in the press, labeled an "idiot," "jerk," and worse. Pet. App. 26a; Bigham, *supra* ("an embarrassment"); *Xavier Alvarez – Phony Soldier*, The Violence Worker! (Jan. 17, 2008), http://www.violenceworker.com/my_weblog/2008/01/xavieralvarez.html ("cretinous," "idiotic," "ultimate slime").

As this public shaming was playing out in the press, the district court denied Alvarez's motion to dismiss the indictment, in which he raised both facial and as-applied challenges to the constitutionality of the Act. Pet. App. 139a-44a. On appeal, the Ninth Circuit reversed. 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." *Id.* at 14a. As such, content-based restrictions on speech are subject to strict scrutiny except for "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Id.* at 7a (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). Those

"historic and traditional categories long familiar to the bar include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *Id.* (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (internal quotation marks and alterations omitted)).

False factual speech, however, is not one of the historically unprotected categories, nor could the statements at issue be squeezed into any of those categories. The court of appeals recognized that this Court had sometimes made broad pronouncements declaring false statements to be unworthy of protection in their own right, but only in contexts where the statement was made knowingly and caused some harm. Pet. App. 13a-19a. The Act did not constitute "defamation" for just this reason: it did not require scienter (which the court believed could be read into the statute under this Court's precedents) or harm (which could not). *Id.* at 22a-23a. 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 a government institution or symbol. *Id.* at 24a. For similar reasons, the Stolen Valor Act is not sufficiently akin to perjury or fraud statutes to warrant exemption under those categories. *Id.* at 27a-28a.

Because false statements of fact are not historically unprotected, the court of appeals applied strict

scrutiny. Pet. App. 35a. Even the dissent conceded the Act did not satisfy that standard. *Id.* at 36a, 70a. While the end was "noble," a criminal sanction is not a narrowly tailored means; there is no evidence false claims actually affect the integrity of the medals, and to the extent they do, the government should encourage counterspeech or legislate against actual fraud. *Id.* at 37a-39a.

Judge Bybee dissented. His view, based on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1974), was that false statements of fact are valueless in the constitutional calculus and should be protected only to the extent necessary to protect speech "that matters." Pet. App. 42a. Using that construct, he concluded that the Stolen Valor Act was constitutional because it would not suppress such speech. *Id.* at 69a, 76a, 90a.

Rehearing en banc was sought, but denied. Pet. App. 91a-92a. Judge M. Smith authored a concurrence from denial of rehearing 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. *Id.* at 99a. He 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." *Id.* at 106a (quoting *Stevens*, 130 S. Ct. at 1585-86).

A dissent by Judge O'Scannlain was along the same lines as Judge Bybee's analysis. Pet. App. 116a-35a. A second dissent, authored by Judge Gould, would permit Congress more leeway to legislate in the context of the military. *Id.* at 135a-138a.

Chief Judge Kozinski separately concurred:

> 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."

Pet. App. 107a. This, Judge Kozinski reasoned, ran contrary to 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." *Id.* at 108a-109a (citation omitted). In other words: "Saints

may always tell the truth, but for mortals living means lying." *Id.* at 109a.

SUMMARY OF ARGUMENT

The Stolen Valor Act criminalizes the simple act of lying about oneself. To uphold the law, the government asks this Court to read elements and caveats into its text and to ignore the contexts in which false statement laws have been upheld. It would create a new *sui generis* test that would have broad implications and would require the Court to evaluate the government's interest and First Amendment credentials of the false statements on an ad hoc, case-by-case basis. But no special test is required for false statements. Under well-settled precedent, the Act is a content-based restriction on speech, is subject to strict scrutiny, and cannot meet that standard. It is therefore unconstitutional.

I. The First Amendment excepts from its coverage only limited, historically unprotected categories of speech. The government admits that the category of speech at issue here – false statements of fact – does not lay claim to the historical pedigree required under *Stevens*, 130 S. Ct. at 1584-86, for categories to be considered "unprotected." This admission should be deemed fatal. The general rule is that content-based restrictions on speech are subject to strict scrutiny, and the Stolen Valor Act cannot meet that standard. The government's interest in protecting the

reputation of military medals is legitimate, but not compelling. As its own *amici* concede, false claimants cannot tarnish the reputation of medal winners. And, in light of the many steps the military takes to honor award winners, it is not credible that false claims are actually a serious impediment to the military's attempts to foster morale. Moreover, even if the interest were compelling, criminalization – the most extreme option – is not necessary; government speech and education, prosecutions targeting fraud, and, most importantly, public refutation of claims – more speech – are all less-restrictive alternatives.

The government is wrong, moreover, about the scope of the statute. While this Court could, consistent with its precedents, read a scienter element into the statute, it strains the text too far to read "falsely represents" to include only "serious" representations and to exclude satire, hyperbole and the like.

II. In contrast to the straightforward strict scrutiny analysis, the government seeks to create a new test – completely unmoored from this Court's precedents – that would permit prosecution of lies so long as the government was able to conjure an "important" interest, and so long as the law leaves breathing space for fully protected speech. This test is insufficiently protective for several reasons. It requires an evaluation of harm and value that harks back to the test this Court found "startling and dangerous" two Terms ago. It presumes that false factual speech is entirely valueless and should only

be protected to the extent necessary to protect valuable "true" speech. But, in fact, falsehoods are valuable for innumerable reasons: in refining truth, in expressing personal autonomy, and in greasing the wheels of social interaction. More than that, there is a realm of harmless prattle and puffery generally considered beyond government control. This, in and of itself, is a reason not to put false statements beyond the purview of First Amendment protection.

The government asserts that this Court has routinely subjected false statements to a breathing space test and that its proposed test explains this Court's diverse jurisprudence. But in fact, the Court has not imposed a "breathing space" test on false statements broadly, but rather only on a subset of false factual statements that are unprotected: those that, under *Chaplinsky*, have never been thought to fall within the circle of First Amendment protection. Breathing space is a minimal protection, appropriate to areas that have historically been viewed as outside the First Amendment, but is insufficiently protective of speech that is not unprotected.

Finally, even if this Court were to adopt the government's rule, the Stolen Valor Act should still be deemed unconstitutional. The government's attempt to prevent the offense caused by false claimants is laudable but does not warrant the intrusion on speech it causes, and thus "goes farther than necessary."

III. The Act is also unconstitutional as applied to Alvarez, a political officeholder, who was describing his background and qualifications for office when he made the statement at issue. A politician discussing his qualifications is core political speech. Were the Court to conclude the Act was not facially unconstitutional, it is still unconstitutional as applied to Alvarez.

ARGUMENT

Everyone lies. We lie all the time. Sometimes we lie to feel better about ourselves, sometimes to make others feel better about themselves, sometimes to help, sometimes to hurt. For good or bad, right or wrong, everyone lies. Pet. App. 109a-110a. Xavier Alvarez is no exception. He has told a bunch of whoppers, *see supra* p.1, his claimed receipt of the Medal of Honor being just one of many. But exaggerated anecdotes, barroom braggadocio, and cocktail party puffery have always been thought to be beyond the realm of government reach and to pass without fear of criminal punishment. After all, the First Amendment commands, in unequivocal terms, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

Congress, however, through passage of the Stolen Valor Act, 18 U.S.C. § 704(b), has ordained that making a false claim about receiving military honors should be criminally sanctioned. The Act prohibits

the "*mere utterance or writing*," Pet. App. 2a, of a non-defamatory falsehood about oneself. Indeed, 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." *Id.* at 93a-94a (citations omitted).

Because the Act is a content-based restriction on speech that serves neither a compelling government interest nor is the least restrictive means necessary to satisfy any government interest, it cannot survive strict scrutiny. In an attempt to avoid this straightfoward analysis, the government has invented a new, unworkable "breathing space" balancing test, which entirely undervalues false statements of fact, is inconsistent with this Court's precedents, and should be rejected by this Court. But even were the Court to adopt the government's harm/value test, the government's failure to demonstrate the need for the law, the fact that the government's interest is sufficiently protected by other means, and the fact that the government is attempting to impose a certain viewpoint about the "importance" of medals, all show that the government cannot satisfy even its own test of constitutionality. Accordingly, the judgment of the Ninth Circuit should be affirmed.

I. THE STOLEN VALOR ACT IS A CONTENT-BASED RESTRICTION ON SPEECH AND IS FACIALLY UNCONSTITUTIONAL.

Although the words appear nowhere in the government's argument, the starting place for the analysis must be the First Amendment's unambiguous text: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Framers, rightly concerned that an all-powerful government might try to limit an individual's right to speak what he thinks, enshrined in our Constitution a prohibition on enacting laws that interfere with our right to speak and write what we choose. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Recognizing the occasional tyrannies of governing majorities, [those who won our Independence] amended the Constitution so that free speech and assembly should be guaranteed."). Indeed, in each of the past two Terms, this Court reiterated that "[t]he most basic of [the principles of freedom of speech and the press] is this: '[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Brown v. Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002)) (alterations in original); *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (same).

The Court has, however, recognized limited exceptions to this general rule: "'From 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." *Stevens*, 130 S. Ct. at 1584 (citations omitted). "[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'" *Entertainment Merchs. Ass'n*, 131 S. Ct. at 2734 (quoting *Stevens*, 130 S. Ct. at 1585). That is, apart from those narrow grounds, when "a law is directed to speech alone [and] where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm . . . [n]o further inquiry [should be] necessary to reject the [government]'s argument that the statute should be upheld." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring).

Falsely claiming receipt of military honors, though surely offensive to many, is not obscene, nor is it defamatory or libelous; there is no clear or present danger in the utterance of the falsehoods – no incitement to riot or an intent to bring about imminent

harm is required. The law does not require fraud, *i.e.*, that the statement was made to obtain some benefit, caused reliance, or was material. It simply criminalizes the false claim to certain military decorations in every context. Such restriction on speech is not amongst those "well-defined and narrowly limited classes of speech . . . [that have] never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), and the government does not claim otherwise. Br. for United States ["Gov't Br."] 19.[1] As such, the Court should start from the premise that the statements at issue here are not unprotected speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271-80 (1964) ("Authoritative interpretations of the First Amendment

---

[1] The government suggests that prohibiting lies about military honors dates back to George Washington's Revolutionary War order that "any who . . . assume the badges of [honorees] . . . be severely punished." Gov't Br. 3 (quoting *General Orders of George Washington Issued at Newburgh on the Hudson, 1782-1783*, at 34-35 (Edward C. Boynton ed., 1883; reprint 1909)). But *General* Washington's order, issued years before the Constitution or the Bill of Rights existed, plainly applied to those over whom the General had authority – members of the military. Then, as now, a false claim made by a servicemember might be punishable while a similar claim by a civilian might not. "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Parker v. Levy*, 417 U.S. 733, 758 (1974).

guarantees have consistently refused to recognize an exception for any test of truth. . . . ; '[t]he constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'") (citation omitted); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (speakers may often use "exaggeration," "vilification," "and even . . . false statement[,] [b]ut the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy ").

A. The Government Has Not, And Cannot, Demonstrate That The Stolen Valor Act Passes Strict Scrutiny, The Standard Applicable To This Content-Based Restriction On Speech.

"Content-based regulations are presumptively invalid, and the Government bears the burden to rebut that presumption." *United States v. Playboy Entertainment Group*, 529 U.S. 803, 817 (2000) (quotation marks and citation omitted). This Court has consistently held that content-based statutes are facially invalid unless the government can meet the rigors of strict scrutiny. *See, e.g.*, *Entertainment Merchs. Ass'n*, 131 S. Ct. at 2738 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)); *Playboy Entertainment Group*, 529 U.S. at 813, 817; *Simon & Schuster*, 502 U.S. at 123. To meet the rigors of strict scrutiny, the government

"must specifically identify an 'actual problem' in need of solving," *Entertainment Merchs. Ass'n*, 131 S. Ct. at 2738 (quoting *Playboy Entertainment Group*, 529 U.S. at 822-23), "and the curtailment of free speech must be actually necessary to the solution," *id.* (citing *R.A.V.*, 505 U.S. at 395). Given this "demanding standard . . . '[i]t is rare that a regulation restricting speech because of its content will ever be permissible.'" *Id.* (quoting *Playboy Entertainment Group*, 529 U.S. at 818).[2]

Significantly, there is no real dispute that the Stolen Valor Act constitutes a content-based restriction on speech, nor could there be. The law restricts speech, not on the basis of *where* or *how*, but on *what* is said. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And both the majority and the dissent below agreed that if the law were subject to strict scrutiny, it could not meet that standard. Pet. App. 70a, 94a. This Court should follow suit.

---

[2] "The vice of content-based legislation – what renders it deserving of the high standard of strict scrutiny – is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Hill v. Colorado*, 530 U.S. 703, 743-44 (2000) (Scalia, J., dissenting) (internal quotation marks omitted).

1. The government has failed to demonstrate a compelling government interest in enacting the Stolen Valor Act.

To satisfy strict scrutiny, the government must demonstrate that the law is narrowly tailored to achieving a compelling government interest. *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010). Preserving the reputation of military decorations is certainly a legitimate government interest, but it is not a "compelling" one for purposes of strict scrutiny.[3] A compelling government interest is an interest "of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). "Accordingly, the universe of interests sufficiently compelling to justify content-based restrictions on pure speech is extraordinarily limited." *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1189 (D. Colo. 2010) (citing *Sable Commc'ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (recognizing a compelling interest in "protecting the physical and psychological well-being of minors"); *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("no governmental interest is more compelling than the security of the Nation")). In *Strandlof* – the first case to declare the Stolen Valor Act unconstitutional –

---

[3] The court of appeals acknowledged that the government might have a compelling interest in protecting the integrity of the military award system, Pet. App. 37a, but did so hurriedly on its way to the heart of its analysis, which was that the Act was not narrowly tailored to achieve a government interest.

the court rejected the government's claim that the Act served "a compelling interest of protecting the sacrifice, history, reputation, honor, and meaning associated with military medals and decorations." *Id.* Relying on *Texas v. Johnson*, 491 U.S. 397, 417 (1989), in which this Court vacated a conviction under a law banning flag desecration as an unconstitutional content-based restriction on speech, the court concluded that preserving the symbolic meaning of military awards is not sufficiently compelling to survive strict scrutiny. *Strandlof*, 746 F. Supp. 2d at 1190. It similarly rejected the government's dilution argument as insufficiently compelling, concluding: "Servicemen and women may be motivated to enlist and fight by the ideals the medals represent, but I give no credence to the notion, and, more to the point, the government has offered no evidence in support of its burden to prove, that the medals themselves provide potential recipients any incentive to act to protect their comrades-at-arms or the interests of this nation they have sworn to defend." *Id.* at 1191.

Here, the government does not appear to support protecting military medals for their own sake, but because it believes false award claims dilute the prestige and gratitude afforded actual medal winners, and hamper its ability to foster military morale. Gov't Br. 37-44. These were not rationales supplied by Congress. Indeed, there was little discussion of the magnitude of the problem or the efficacy of the proposed solution in any testimony, hearings, or floor debate – a mere five pages of House debate supplies

nothing more than patriotic bombast with a few false claims anecdotes sprinkled in. *See* 152 Cong. Rec. H8819-8823 (daily ed. Dec. 6, 2006). This, in and of itself, is problematic to the government's argument.

Moreover, for these newly proffered rationales to gain purchase, the government must actually prove its assertion that false claims have an impact on military morale. The government has not done so, as even its own *amici* concede. As to the reputations of honorees, *amici* Veterans of Foreign Wars et al. are correct that "there is nothing that charlatans such as Xavier Alvarez can do to stain their honor." Br. for Veterans of Foreign Wars et al., as *amici curiae* for petitioner ["VFW Br."], at 1. Indeed, there can be no doubt that individuals like Alvarez claim to have military decorations precisely because of the prestige and gratitude afforded medal winners. And the public outcry at false claims is likewise strong evidence that the reputation of these military honors is not endangered in the least. *See Johnson*, 491 U.S. at 419 (noting that the public's strong reaction to flag burning evidenced that the value of the flag as a symbol of national unity was not in serious danger).

As to fostering morale, "there is no evidence – nor any reasonable basis for assuming – that some people's false claims to have received the medal has a demotivating impact on our men and women in uniform." Pet. App. 39a. False claims do not prevent the military from honoring those within its ranks or from publicizing its honorees. They do not keep the military from telling even generals to salute those

who have received the Medal of Honor, from using awards to determine promotions within their own ranks, or from bestowing other benefits on medal winners and their families – all of which the military currently does, in ways ensuring those benefits flow to true honorees. *See* 10 U.S.C. § 3991 (providing for 10% retirement pay increase for those recognized for "extraordinary heroism in the line of duty"); Marine Corps Order P.1610.7F, at 4-8 (2006) ("fitness reports" – that is, periodic evaluation of a Marine for purposes of "retention and promotion" – require documentation of any awards); 38 C.F.R. § 3.802(a), 32 C.F.R. §§ 553.15(d), 575.3(b)(3) (describing other benefits to medal winners, including special pension, burial in Arlington National Cemetery, and special priority for their children to enter military academies). As the government ably demonstrates, when a servicemember sees a comrade-in-arms being awarded a medal, he or she knows that there are internal investigations, checks, and limitations that make that award meaningful, and respect to the honoree naturally flows. False claims do nothing to impede the military's ability to take those steps. Gov't Br. 40-41.

In light of the measures the military takes to reward honorees within its ranks, it is simply ludicrous to believe that false claimants are truly standing in the way of the government's attempt to ensure that medals are meaningful. In other words, "[i]f 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." Br. for Volokh & Weinstein, as *amici curiae* for petitioner ("Volokh Br."), at 32-33 (rejecting the government's claim of a compelling government interest). In light of these facts, it seems clear that the motivating factor behind this law and the true interest it protects is to avoid the offense that is experienced by real medal winners and those in society who – rightly – are offended when others try to appropriate honor and gratitude they do not deserve. While perhaps appropriate sentiments, such reasons are not sufficiently compelling to curtail speech.

To support its claim of a compelling interest, the government offers only that "it is common sense that false representations have the tendency to dilute the value and meaning of military awards." Gov't Br. 54. This is not enough. "[T]he Government must present more than anecdote and supposition"; it must prove "an actual problem." *Playboy Entertainment Group*, 529 U.S. at 822. Moreover, it is not enough to say that false claims are prevalent in society, or even that false claims have the possibility to dilute; the government must show that false claims have such a serious impact on morale that the problem rises to the level of a compelling interest. This it failed to do. While protecting the reputation of military decorations is not an illegitimate government pursuit, it is certainly not compelling and does not pass muster here.

2. Even if a compelling interest exists, criminalizing false claims to receipt of military decorations is not the least restrictive means necessary to achieve that interest.

A law is not narrowly tailored when less speech-restrictive means exist to effectively achieve the interest. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997). There is no reason to think that criminal prosecution is necessary to ensure that false claims of military decorations will not dilute the meaning of such awards.[4] In addition to the reasons discussed above, the government has at its disposal numerous less-restrictive alternatives to satisfy its interest. It can create a publicly-searchable database that would allow for immediate verification of awards claims. The military can redouble its efforts to honor and timely reward medal recipients. *See Examination of Criteria for Awards and Decorations: Hearing Before the Military Personnel Subcomm. of the House*

---

[4] The government suggests that it will use "carefully chosen prosecutions – where the government can prove that the defendant's claim was false and that he was aware of its falsity – to deter all knowingly false claims to have received military honors." Gov't Br. 55. But this Court has repeatedly rejected the suggestion that prosecutorial discretion can serve as a substitute for the Court's protection of First Amendment rights. *See, e.g.*, *Stevens*, 130 S. Ct. at 1591 ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

Comm. on Armed Services, 109th Cong., 2d Sess. 6 (2006) ("Excessive delay is the Medal's worst enemy."). The government could publicize the names of false claimants and embarrass those individuals as frauds, a task that currently is shouldered primarily by private citizens. It could create educational programs to teach the citizenry why these decorations are important, and what servicemembers have done to receive them. It could recommend enhancements in the United States Sentencing Guidelines for those who commit fraud while falsely claiming military honors. The Act could be more carefully circumscribed, to criminalize only false claims made in an attempt to obtain a "thing of pecuniary value." And the Executive could use existing fraud statutes to target individuals who wrongly obtain government benefits by posing as veterans or as medal winners. The government has offered no answer to any of those suggestions, let alone any evidence that such measures would be inadequate. Congress chose instead to leap to the extreme option of criminal prosecution. *Cf. Reno*, 521 U.S. at 872 (criminal sanctions pose greater First Amendment concerns than those implicated by civil regulation).

Finally, and perhaps most importantly, there is no reason to believe that counter-speech – public refutation of false claims – cannot adequately protect the government's interest. "Whenever compatible with the underlying interests at stake, under the regime of [the First Amendment], we depend for correction not on the conscience of judges and juries

but on the competition of other ideas." *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (citations omitted). That is, wherever possible, the preferred remedy for false speech is *more speech*. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."). When a false claim to an award is exposed as a self-aggrandizing lie, scandal results and the media flocks. These imposters lose their jobs, lose their standing in the community, and suffer long-term embarrassment and shame. *See, e.g.*, VFW Br. 13-15 nn.19-34, and articles cited therein. If the prospect of public ridicule in the press and the attendant likelihood of losing jobs and social status does not deter, it is hard to imagine that the relatively small chance of being prosecuted will.

The government argues – and appears primarily to argue – that public refutation is inadequate and many false claims will go undiscovered because creation of a publicly accessible database of medal recipients is impracticable and its data would be insufficiently comprehensive. Gov't Br. 50, 55.[5] It derives this notion from a Department of Defense (DoD) report to Congress. *Id.* at 50 (citing Office of the Under Sec'y of Defense, *Report to the Senate and*

[5] This claim is curious, as the government also maintains that no chilling effect would result from the Act because "any false claim is objectively verifiable." Gov't Br. 47.

House Armed Services Committees on a Searchable Military Valor Decorations Database 5-8 (2009) (*Decorations Database*)).

But the government overstates the barriers to a database. The Congressional Medal of Honor Society already maintains a database of Medal of Honor recipients – the medal at issue in this case – that can be accessed instantaneously to settle any doubts about a claim. Gov't Br. 40. With respect to other medals, the DoD concluded that a database was feasible but unnecessary because most of the information was already available to individuals who made public records requests. *Decorations Database* 7. That is, it did not consider whether such a database was worthwhile because it permitted the public – even those without sufficient motivation to make a public records request – to quickly verify medal claims.

Moreover, a response to the DoD report by Douglas Sterner, a veteran and leader of the Stolen Valor movement, shows that a complete database is not only possible but entirely practicable. *See generally*, C. Douglas Sterner, *Response to the Report to the Senate and House Armed Services Committees on a Searchable Military Valor Decorations Database* (2009) (*Sterner Response*), www.reportstolenvalor.org/pdf/Sterner%20HR%20666%20Response.pdf. Using only FOIA requests and private funds, Sterner has created a database – routinely relied on by the FBI – that was "considered 99% complete for the top three levels of awards (Medal of Honor, Distinguished Service Cross,

Navy Cross, Air Force Cross, and the Distinguished Service Medals), and . . . 75% complete [for Silver Stars] for all wars and all branches of service." *Sterner Response* 1; Christian Davenport, *Exposing Falsified Valor: One Man's Database Helps Protect Medals' Integrity*, Wash. Post, May 10, 2010, at A1 (quoting FBI agent who investigates false military claims and uses Sterner's database as his "first source"). Sterner also refutes the DoD's argument that a 1973 fire, which destroyed millions of military records, rendered a complete database impossible. Because "the military is redundant in paperwork," nearly all of the relevant information is also at the National Archives and Records Administration; it will just take work to index it. *Sterner Response* 5-6. The problem, in Sterner's view, is not that a comprehensive database cannot be created, but that "it has fallen to private researchers to insure that the men and women who receive awards from our military branches are never lost to history." *Sterner Response* 7. Thus, contrary to the government's primary argument, a comprehensive, searchable database of awards recipients is practicable, if only Congress wanted to create it.

And, in Sterner's experience, a searchable Internet database would decrease false claims. He explained that since the Medal of Honor database became available online, he "encounter[s] a false claim to the Medal of Honor only a few times each year, and reports to the F.B.I. have also dropped dramatically . . . because [individuals can easily] verify a Medal of Honor claim with a quick Internet

search." *Sterner Response* 2. If a database would be effective to reduce false claims, the government cannot leap to criminalization.

The government also claims that the public is insufficiently motivated to root out all military claims. But it ignores that an Internet database would drastically decrease the motivation required to verify claims, much in the same way that Google permits individuals to chase down even idle curiosities that they might never go to a library to research. This too answers the government's concern about a skeptical public, Gov't Br. 42, which is hardly a compelling problem if one's doubts can quickly and easily be resolved. And, it warrants mention, that the Founders were far more concerned about a government that selected truth and falsity for its constituents than a public prone to skepticism that investigated and decided truth for itself. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

The fact is, false claims of military decorations have not gone unnoticed or unchallenged. It was no doubt the public exposure of such claimants that spurred Congress to believe that the Stolen Valor Act was necessary. Certainly, public exposure of those who have falsely claimed to have received a military decoration is sufficient to protect the meaning of the medal to true military honorees. Accordingly, because the government entirely failed to show – and is plainly unable to show – that the Stolen Valor Act

satisfies strict scrutiny, the law is facially unconstitutional.[6]

B. The Act Does Not Have The Limited Meaning The Government Ascribes To It.

The government's view of the Act is also flawed because it rests on faulty assumptions about the statute's scope. The government reads into the law a scienter requirement where there is none, and assumes the statute does not cover "parody, satire, hyperbole, performances, and any other statement that cannot reasonably be understood as factual claims." Gov't Br. 17. This is not rewriting the statute, it claims, because these elements are implicit in the phrase "falsely represents."

---

[6] The court of appeals also indicated that the "clear and present danger" test might be better authority "for defining the relevant subset of false speech that is historically unprotected." Pet. App. 32a-35a (discussing, *e.g.*, *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.")). It suggested that courts could "articulate the class of false factual speech unprotected by the First Amendment to be that false factual speech which creates a clear and present danger." Pet. App. 32a-33a. It concluded that because "the speech targeted by the Stolen Valor Act does not pose any immediate and irreparable harm[, and] any harm it does cause can be remedied by more speech," the Act fails this test also, and is thus unconstitutional. Pet. App. 35a.

The first assumption is, perhaps, tenable. "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951); *see also Morissette v. United States*, 342 U.S. 246, 250-52 (1952). As such, this Court has often read a mens rea element into the law despite Congress's failure to explicitly include one, *see, e.g.*, *Staples v. United States*, 511 U.S. 600, 605-06 (1994); *Morissette*, 342 U.S. at 250-52, and certainly the Court could do so here, if that would save the statute.[7]

Further afield, however, is the government's suggestion that "represents" can be read to exclude all manner of statements that cannot reasonably be understood as factual claims. This reads a lot into one word. The government says represents means "to place (a fact) clearly before another; to state or point out explicitly or seriously to one, with a view to influencing action or conduct." Gov't Br. 16 (citing the *Oxford English Dictionary* (2d ed. 1989)). But the ordinary meanings of "represent" include "to depict, portray," "to describe evoke, conjure," "to portray in an artistic medium or by artistic means," "to depict by

[7] The one district court case (other than this one) upholding the Act did so *only* because it "conclud[ed] that the statute should be read to include a mens-rea requirement that the defendant *intended to deceive*." *United States v. Robbins*, 759 F. Supp. 2d 815, 819 (W. D. Va. 2011) (emphasis in original). The government apparently does not ask the Court to read in an element of intent to deceive or to defraud.

acting or miming; to perform or produce on stage," "to present in words; set forth; describe; state." *See Oxford English Dictionary* (3d ed. 2009). In fact, the government's proffered definition does not appear in the current edition of the Oxford English Dictionary. The closest equivalent excises "seriously" – the word on which the government presumably rested its argument for excluding satire – in favor of a new definition: "to set out clearly" or "submit formally . . . with a view to influencing action or opinion." It moves even that definition far down on its list of accepted meanings. *Id.*[8]

But perhaps the greater linguistic offense is the government's attempt to read its chosen dictionary definition as excluding satire, hyperbole and the like. Even accepting the government's definition, *arguendo*, satire is precisely a false fact presented to another as truth, often with a view to influencing action or conduct, and quite often seriously. As the court of appeals explained, "[s]atirical entertainment such as The Onion, The Daily Show, and The Colbert Report thrives on making deliberate false statements of fact." Pet. App. 31a. Indeed, "Colbert relies on deadpan, a specific type of satire that uses a straight-faced approach to joke telling[,] . . . [he] rarely breaks character and maintains a level of seriousness as he parodies conservative pundits." Heather L. LaMarre

[8] Indeed, the range of definitions for "falsely represents" is so broad as to suggest the Act is impermissibly vague.

et al., *The Irony of Satire: Political Ideology and the Motivation to See What You Want to See in* The Colbert Report, 14 Int'l J. Press/Politics 212, 216 (2009). Satire thus would appear to fall in the heartland of the dictionary definition the government selected.[9]

As written, the Stolen Valor Act criminalizes even those statements that are plainly incredible and not worthy of actual belief.[10] The Act applies to innocent bragging. It includes parody and satire. But "whether it be method actors getting into character, satirists being ironic or sarcastic, poets using hyperbole, or authors crafting a story, creative persons often make factual statements or assertions which, as they are fully aware, are entirely untrue. Such creative uses of knowingly false speech are highly

---

[9] Even if satire is excepted, the government apparently feels comfortable assuming that prosecutors will always get the joke. But individuals often recall satirical statements literally and "assume th[e] message was true," particularly when it suits their ideological view. LaMarre, *supra*, at 228. LaMarre's study showed that "conservatives were more likely to report that Colbert only pretends to be joking and genuinely meant what he said while liberals were more likely to report that Colbert used satire and was not serious when offering political statements." *Id.* at 223.

[10] Alvarez often "invent[ed] stories, usually to kid people or to brush them off." Ninth Cir. Excerpts R. 19. He told such stories to make people think he is a "psycho from the mental ward with Rambo stories." Pet. App. 4a. At sentencing, the district court indicated that Alvarez's stories completely lack "credibility" and might be related to "a psychological" or "alcohol" problem. Pet. App. 5a; Ninth Cir. Excerpts R. 65, 67.

protected." Pet. App. 32a. This Court's job is not to rewrite statutes in the image preferred by the Executive; it is to interpret the language that Congress provided. It cannot do so by twisting the language of the statute beyond recognition.

II. THE GOVERNMENT MERELY REPACKAGES A TEST THAT WAS RIGHTLY REJECTED IN *STEVENS* AND SIGNIFICANTLY UNDERVALUES FALSE STATEMENTS OF FACTS.

In contrast to the straightforward, well-grounded strict scrutiny analysis, the government proposes that false statements of fact can be criminalized if the government has a strong or important interest and if "breathing space" is left such that the law does not impinge on fully protected speech. *See* Gov't Br. 18, 36, 46, 52. Moreover, it argues that even where a law limiting false statements does intrude on speech that matters, the law may nevertheless be saved if it reaches no farther than is necessary. Gov't Br. 37, 49. It is not clear whether the government would have this Court declare that false statements that cannot pass its test are a new category of unprotected speech, or whether it asks this Court to create a special rule of "limited protection" for false statements of fact. Either way, what the government attempts to do is "startling and dangerous" and ignores the lessons of *Stevens*.

A. The Government's Test Calls For Evaluating The Value Of Speech Against The Government's Interest In Curtailing It.

In *Stevens*, the government argued that new categories of unprotected speech can be generated based on "a categorical balancing of the value of the speech against its societal costs." 130 S. Ct. at 1585. The Court called such a test "startling and dangerous." *Id.* The First Amendment "does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Id.* While *Chaplinsky* stated that certain categories of speech were "'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,'" this language was merely descriptive, and was not to be taken as a test for generating new categories of unprotected speech. *Id.*[11] The unprotected status of the categories of speech listed in *Chaplinsky* flowed from the speech being viewed as historically outside First Amendment protection, not because it survived an ad hoc balancing test. *Id.*

Against this backdrop, the government appears to acknowledge that it would be an uphill battle to

---

[11] Indeed, this Court has not recognized any new areas of unprotected speech for 25 years, and even the existing categories of unprotected speech have been consistently narrowed. *See R.A.V.*, 505 U.S. at 383 ("[This Court's] decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation and obscenity.").

have "false statements of fact" designated a category of *unprotected* speech. It concedes that "the broad general category of false factual statements has not historically been treated as completely unprotected by the First Amendment." Gov't Br. 19. It instead offers a test for false statements that would result in "at most" limited protection for false statements that pass its test. This proposition is startling and dangerous in its own right. As discussed above, this Court has made clear that a content-based restriction on speech is subject to strict scrutiny if it does not fall within a category of unprotected speech by virtue of its historical pedigree. The government cites no other examples of "limited protection" categories; it apparently believes that false statements of fact are so low value as to require their own unique application of the First Amendment.

Before returning to the value of false speech, however, it is important to call this test what it is: a return to elements of the test the government offered in *Stevens*. In *Stevens*, the government proposed balancing the societal costs versus the First Amendment value of speech; here, the government is somewhat more modest, in that it asks the Court to evaluate *false factual statement laws* in light of the government interest and breathing space for the First Amendment. But the two tests share an essential feature: Once again, the government asks the Court to declare a category of speech outside the realm of full First Amendment protection, not because it has always been thought to be outside the protection of the Free Speech Clause, but because the government

believes it to be valueless. And, once again, the government would say that valueless speech can be criminalized if society's interests are sufficiently weighty in the balance. For the same reasons such a test was rejected in *Stevens*, it should be rejected here.

A grounding principle of the First Amendment is to put speech beyond the whim of fickle majorities and "limits dictated by expediency, political opinion, [and] . . . other legislative desideratum." *Beauharnais v. Illinois*, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting). For this reason, a test that weighs harms and values – whether the weighing is conducted by legislatures or judges – is incongruous with the First Amendment. *See Stevens*, 130 S. Ct. at 1585. A test focused on historical pedigree, rather than on the evaluation of harm and value, ensures that First Amendment protection is withheld only from those categories of speech that the Constitution was never thought to protect, not simply from any speech that a present majority of legislators or judges deems insufficiently valuable to protect.

The government's test is thus laid bare: it attempts to sidestep the requirement of historical grounding and, at the same time, to avoid the rigors of strict scrutiny. In the place of these pillars, the government would create a test that replaces strict scrutiny's requirement of a "compelling" state interest with a test that requires only an "important" government interest. Gone entirely is the requirement of fit – rather than worrying about whether restriction on speech is closely hewn to the interest, it would permit

the legislature to be as sloppy in its line drawing as it wants, so long as a law did not impinge on "fully protected speech," which, apparently, it would limit to true facts and opinion. Knowing that it can no longer seek "unprotected" status without some historical foundation, it instead seeks the status of "at most limited protection" for its newly created category. But it would eviscerate strict scrutiny and the requirement of a historical pedigree for categories of unprotected speech if the government could get around both requirements by simply creating a new category of "limited protection" for speech it believed was not valuable. What the government asks for is unprecedented and seeks to avoid the two standards by which content-based laws have been measured – historical pedigree and constitutional scrutiny – and replace it with a freewheeling weighing of harm and First Amendment value. This Court should reject any move in this direction.

B. To Say That False Speech Can Be Limited Except Where It Has Some Derivative Value For Promoting "True Speech" Significantly Undervalues False Speech.

The government presumes that its test should succeed where *Stevens* failed because it believes false statements of fact are not valuable *per se*. Indeed, its test collapses unless the Court accepts that the only reason to protect false factual statements is, derivatively, to protect other more valuable speech. Certainly this Court has made passing statements to this

effect. *See, e.g.*, *Gertz*, 418 U.S. at 340. At the same time, the Court has never had to consider the value of false speech in its purest form – where there was no history of criminal or civil liability and where the purported harm is to reputation of a government symbol, not harm targeting an individual. *Cf. Nike v. Kasky*, 539 U.S. 654, 664 (2003) (Stevens, J., concurring in dismissal of cert.) (noting that the Court has "(perhaps overbroadly) stated that 'there is no constitutional value in false statements of fact'"). Before relegating false statements of fact to second-class status, and before creating a balancing test with broad implications, it is important to step back from the case at hand and examine the myriad reasons why false statements are valuable.

First, this Court has recognized that "[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.'" *Sullivan*, 376 U.S. at 279 n.19 (citing John Stuart Mill, *On Liberty* 21 (Bantam Classic ed. 1993) (1859); John Milton, *Areopagitica*, in *Areopagitica and Other Prose Writings* 22 (E. Rhys ed. 1927) (1644). In its most classic exposition, Mill wrote that a person can be confident in his own concept of truth only if it "has been his practice to listen to all that could be said against him; to profit by as much of it as was just, and expound . . . the fallacy of what was fallacious." Mill, *supra* at 25. Many ideas now considered true were once considered false, even heretical, and currently held truths can

only evolve where there is "a standing invitation to the whole world to prove them unfounded," including by making statements that most people at the time believe to be false. *Id.* at 26. *See also* Thomas Cooper, *A Treatise on the Law of Libel and the Liberty of the Press; Showing the Origin, Use and Abuse of the Law of Libel* 6 (1830) ("[D]iscussion of any opinion, generally brings out many important truths collaterally which would never have been known or attended to if the discussed fallacy had not been advanced."). For this reason, it is important that the barriers to entry into the marketplace of ideas be kept low, and not turn on the perceived falsity – or even knowing or suspected falsity – of the statement.

While this rationale is perhaps best known, it is not the only reason for protecting false speech. Limitations on false statements of fact also impinge on the First Amendment's role in promoting autonomy, and specifically, the right to be "master of the identity one creates in the world." Laurence H. Tribe, *American Constitutional Law* 887-88 (1978). This Court has recognized that the right to autonomy is not protected for instrumental reasons; rather, the "freedom to speak one's mind is . . . an aspect of individual liberty – and thus a good in itself." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-04 (1984); *First Nat'l Bank v. Belotti*, 435 U.S. 765, 777 n.12 (1978) ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion.").

In particular, human beings are constantly forced to choose the persona we present to the world, and our choices nearly always involve intentional omissions and misrepresentations, if not outright deception. College students portray different personae to their parents, their professors, and their peers. Individuals lie about everything, from things as trivial as their weight, to things as fundamental as their sexual orientation. Such deceptions are part of the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). Indeed, in protecting autonomy, the constitutional protections for freedom of religion, speech, and press form a barrier against government interference with the process through which the individual develops his or her intellectual capacities and emotional life. *See, e.g.*, Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 Calif. L. Rev. 1159, 1164-65 (1982). Falsehoods are therefore indistinguishable in value from other speech because they facilitate the development of critical thinking and because their utterance represents an aspect of self-determination. *Cf.* Alexander M. Bickel, *The Morality of Consent* 62 (1975) ("The social interest that the First Amendment vindicates is the interest in the successful operation of the political process, so that the country may better be able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is

founded in truth."). While the right to autonomy is not absolute, this Court has consistently recognized that the right to "think as [one] will and speak as [one] think[s]," *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring), is an important goal of the First Amendment, and the right to define oneself to the world is an important component of that goal.

In addition to lies about ourselves, there is a class of lies told about others and about the world that is generally viewed as socially useful. These range from the important – Kant's hypothetical of lying to a person intent on murdering about the whereabouts of his would-be victim – to the mundane – lying to one's spouse about whether an outfit is flattering.[12] Such lies are part of the fabric of our socialization, so innate as to be a milestone in child development and a feature of most everyone's daily lives. *See* Victoria Talwar & Kang Lee, *Development of Lying to Conceal a Transgression*, 26 Int'l J. Beh. Dev. 436, 439 (2002) (concluding that a majority of children age four will lie to avoid admitting they violated a rule, with that number steadily increasing as children age); Jochen Meckel, *Cultures of Lying* 8 (2007) (estimating that Americans tell somewhere

[12] Indeed, "[t]he wheels of society undoubtedly run more smoothly because the wearers of hideous ties and youngsters in dance recitals are generally assured by others that their taste or performances are impeccable." Dianne M. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. Rev. 364, 426 (1989).

between two and fifty lies each day). The pervasiveness of such lies should give this Court pause before balancing away the value of such lies as merely "derivative" in the search for truth.

Knowingly false statements also have secondary meanings that are valuable, apart from the content of the speech itself. Lies often betray to the listener that we are trying to flatter them, that we are clumsily trying to avoid causing them pain, that we are trying to show allegiance with a group, and other secondary meanings. In this sense, many false statements reveal important truths about the world, apart from their content. Indeed, a person listening to Alvarez could infer that Alvarez was willing to lie about himself to get ahead, that his easily disproved lie meant that he was unsophisticated, that some mental pathology was afoot, or that his desire to impress caused truth to fall to the wayside. Such lessons are not valueless.

To err and exaggerate in heated discussions, to define oneself to the world, to smooth over social situations, and to play devil's advocate are all part of who we are. To say that lies are only important to the extent that limiting them might impede the search for valuable speech grossly distorts the role lying plays in our daily lives.

And, in fact, many of the lies discussed here would not pass the government's test if lies were protected only where the government could conjure no important interest or where banning the speech

would chill true statements of fact or opinions. Perhaps a government could not state a sufficient harm to criminalize lying about one's weight. But it is not impossible to imagine a legislature that viewed the value of strong marriages and the harm caused by adultery as sufficiently important to prohibit lying about extramarital dalliances. Or one that viewed the potential danger of strangers meeting over the Internet as significant enough to permit prosecution for factual lies or exaggerations in dating profiles. *See Cybersecurity: Protecting America's New Frontier: Hearing Before Subcomm. on Crime, Terrorism, and National Security* 7 (2011) (statement of Richard W. Downing, Dep't of Justice) (arguing that violation of website's terms of service should continue to be a crime); *United States v. Drew*, 259 F.R.D. 449, 454 (C.D. Cal. 2009) (prosecution under Computer Fraud and Abuse Act for a fictitious MySpace profile where website's terms of service required that "all registration information [be] truthful and accurate"). Or one that viewed the integrity of the state's hiring process as so important that any factual lies on one's resume were punishable by criminal prosecution. Or one that viewed the integrity of elections to require truth-telling at all moments by all candidates for election. *See Rickert v. State Pub. Disclosure Comm'n*, 119 P.3d 379, 387 (Wash. 2005) (en banc) (striking down a statute that prohibited knowingly false statements by candidates for office). And certainly, Congress, concerned about a distracted President during a time of war, might make it a crime to falsely represent that the President is not "a natural born citizen" of the

United States. Each of these laws would seem to be supported by a government interest and would not trample true speech or opinion. In other words, the prospect of such laws if the government prevails is not as remote as the government claims.

Other countries make it a crime to deny the Holocaust or the Armenian genocide. It has generally been believed that such a law would not be permissible under the First Amendment, *see, e.g.*, Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 Fla. St. U. L. Rev. 1, 3 (2008), but it would seem to pass the government's test: the government has an interest in ensuring that such tragedies are not repeated, which is hindered if some percentage of the population does not believe it occurred, and a law forbidding people to deny particular facts of the Holocaust that are beyond reasonable dispute – such as that six million Jews died – certainly does not threaten true facts or opinions.

Indeed, if the government wishes to suppress a particular form of lying, it would be the rare case where the government could not phrase its concern in terms of some "important" interest or concern of societal harm. If this, together with "breathing space" for "fully protected" speech, were the only limitation on a government's authority to prohibit lying, it would provide only illusory protection for speech. As the court of appeals concluded, "in nearly *every* case, an isolated demonstrably false statement will [] not be considered 'necessary' to promoting core First Amendment values." Pet. App. 12a. But 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." Pet. App. 14a.

This is not because all false facts are good in and of themselves, or because all of the above rationales will apply in every case, but because the cure is worse than the cold. To place the government in judgment, not only of truth and falsity, but of which lies are worth protecting and which should be prosecuted (and where to draw the line between false fact and opinion) is worse than a proliferation of worthless lies. Gey, *supra*, at 21-22; *Cohen v. California*, 403 U.S. 15, 21-25 (1971); *see also United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.) ("The First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."). This is because "once force is thrown into the argument, it becomes a matter of chance whether it is thrown in on the false side or the true." Zechariah Chaffee, *Free Speech in the United States* 31 (1941); *see also* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. Rev. 897, 918 (2010) (concluding that, if the First Amendment renders the law "toothless to deal with the problem of public factual falsity," it is because "it was designed to serve a quite

limited purpose in preventing government suppression, rather than serving as a guarantor of the accuracy" of public debate). Just as the Free Exercise Clause of the First Amendment includes government agnosticism among religious viewpoints, the Free Speech Clause also prescribes a certain agnosticism, at least to the extent that it prohibits using the law to enforce the government's view – of fact or opinion – on those who disagree. Gey, *supra*, at 18, 21.

This brings the argument full circle. The government's proposed test starts from the premise that false speech can be prohibited unless it is necessary to promote "valuable" speech. Little speech, even true speech, could meet a test that required it to prove its First Amendment worth. But, as *Stevens* makes clear, the balancing has already been done: "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." 130 S. Ct. at 1585. False statements of fact are not so valueless that they should be protected only if they can pass the government's credentialing test.

C. The Court Has Only Relied On A Breathing Space Analysis To Provide A Measure Of Protection For Unprotected Speech, Not To Sanction Laws Limiting False Statements More Broadly.

The government reviews this Court's precedents and concludes the Court has, in fact, been applying a

"breathing space" test for false factual statements all along. But the government mistakes the role that "breathing space" plays in the cases it cites. This Court has frequently applied a "breathing space" analysis to laws that restrict defamation, fraud, and the like, that is, speech that is unprotected because its prohibition has, throughout our Nation's history, never been thought to be a constitutional problem. In those contexts, it makes sense that "breathing space" for protected speech is all that is required to satisfy the First Amendment. But the government is on thinner ice when it tries to extrapolate from these examples a general rule that breathing space is sufficient protection for false factual statements laws outside the context of unprotected speech. The examples it cites, on close examination, demonstrate that "breathing space" is insufficiently protective of speech except in very narrow circumstances.

1. This Court has never held that falsity is a sufficient condition to impose criminal liability, and should not do so here.

A brief survey of unprotected areas proves this point. Defamation was criminalized long before the First Amendment was penned. At common law, the "malicious defamations of any person" was prohibited, and was defined as statements made "in order to provoke [a person] to wrath, or expose him to public hatred, contempt, and ridicule," where "[t]he direct tendency of these libels is the breach of the public

peace, by stirring up the objects of them to revenge, and perhaps to bloodshed." 4 William Blackstone, *Commentaries on the Laws of England* 150 (1769). In other words, libel suits gave individuals a way to defend their honor and reputation through the courts rather than on the dueling field. Until 1964, the First Amendment had not been interpreted as a significant limit on defamation laws. *See, e.g.*, *Patterson v. Colorado*, 205 U.S. 454, 462-63 (1907). In *Sullivan*, however, the Court stated that its prior precedent had not ceded its authority to "nullify action which encroaches on freedom of utterance under the guise of punishing libel." 376 U.S. at 268 (citation omitted). It therefore concluded that existing defamation law did not sufficiently protect speech on public questions. *Id.* at 269-75. Because erroneous statements were inevitable in spirited debate, they must be protected by a requirement of scienter "if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *Id.* at 271-72 (citation omitted). Similar statements in *Gertz* refined *Sullivan*'s rule but did not change its essence: even though defamation was historically unprotected, laws concerning defamation cannot chill core First Amendment speech. *Gertz*, 418 U.S. at 340-44.

Fraud laws count among, perhaps, the oldest prohibitions, *see, e.g.*, The Code of Hammurabi § 265, at 48 (L.W. King trans., NuVision Publications 2007) ("If a herdsman, to whose care cattle or sheep have been entrusted, be guilty of fraud and make false returns of the natural increase, or sell them for

money, then shall he be convicted and pay the owner ten times the loss."), and were certainly part of the common law tradition received from England. Fraud's prohibition has always been part of the fabric of our criminal laws. *See, e.g.*, *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established"). Nevertheless, this Court has required the elements of scienter, materiality and reliance so as to leave breathing room for the First Amendment in the context of fraud laws. *Ill. ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003).

A prohibition on perjury, likewise, was part of the legal tradition inherited from England and recognized in the colonies. *See* Michael D. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts*, 24 Am. J. L. Hist. 145, 146 (1980) (discussing the Perjury Statute of 1563); 1 *Colonial Laws of New York, 1664-1719*, ch. 8, pp. 129-30 (1894) (reprinting "An Act to prevent wilfull Perjury" (enacted Nov. 1, 1683)). The Court has said in passing that perjury is not fully protected, *Konisberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961), and certainly a good case could be made that it is one of the unrecognized but historically grounded categories of unprotected speech to which *Stevens* alludes. But perjury, too, generally requires scienter and materiality, not to mention an oath, all of which could be seen as securing breathing space for the First Amendment. *See, e.g.*,

18 U.S.C. § 1621; *Johnson v. United States*, 520 U.S. 461, 465-66 (1997).

In each of these examples, "breathing space" is clearly a limitation on an area of unprotected speech. But, the government would claim, other examples demonstrate that the application of the "breathing space" test is not limited to areas of unprotected speech.

The government points to the torts of intentional infliction of emotional distress (IIED) and false light privacy as examples of the application of the breathing space test outside the area of historically unprotected speech. While the Court in both *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967), and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988), abjured any claim that its decision was a blind application of defamation law, false light privacy and IIED torts are more similar to defamation than different. Indeed, William Prosser, in the article that first established the taxonomy of privacy torts, said of false light claims "[t]he interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation." William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 400 (1960), *quoted in Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). Where a defamation claim is stated, a plaintiff can recover for harm to reputation as well as any emotional harm. *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976). Likewise the false light tort permits damages for harm to reputation and emotional harm. *See* Restatement (Second) Torts § 652h, cmt. a, b (1977).

While false light, IIED, and defamation are often said to cover slightly different interests – an objective interest in one's reputation as opposed to a subjective interest in avoiding injury to one's emotional sensibilities – the difference is illusory in most cases. *See Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1100, 1105 (Fla. 2008) (declining to recognize false light as a tort because it "is largely duplicative of existing torts" "both in the conduct alleged and the interests protected"); *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 902 (Colo. 2002) (same, because "the same publications that defame are likely to offend, and publications that offend are likely to defame"); *see also* J. Clark Kelso, *False Light Privacy: A Requiem*, 32 Santa Clara L. Rev. 783, 785 (1992) (concluding, after reviewing over six hundred false light cases, "there is not even a single good case in which false light can be clearly identified as adding anything distinctive to the law," predominantly because it generally duplicates defamation or IIED). While hornbook law is that the speech underlying a false light tort or intentional infliction of emotional distress need not be defamatory, the similarities in these torts counsel in favor of permitting false light claims and IIED to lay claim to defamation's historical pedigree for the purposes presented here.[13]

---

[13] One of the government's examples – baseless lawsuits – requires significantly less exposition. In *Bill Johnson's Restaurants, Inc. v. NLRB*, the Court said that liability for baseless lawsuits was analogous to false statements, *i.e.*, "[j]ust as false

The government also counts "demonstrably false campaign promises" among the applications of its false statements test. Gov't Br. 26. But *Brown v. Hartlage* is a much narrower case. It involved Kentucky's law prohibiting the buying of votes. 456 U.S. at 49. Because paying consideration in exchange for a vote is illegal, *offering* to pay consideration for a vote is speech integral to illegal conduct – another historically unprotected area. *See Chaplinsky*, 315 U.S. at 572. Thus, in many applications, the law limits entirely unprotected speech. *Hartlage*, 456 U.S. at 54-55. But a candidate's promise to reduce his salary if elected is "different in character from the corrupting agreements and solicitations historically recognized as unprotected by the First Amendment." *Id.* at 56-57. That is, it was inconsistent with the First Amendment to prohibit all promises that could be seen to have a remote impact on voters' bottom line; it is perfectly acceptable and indeed common, for people to vote for candidates they think will make their personal lives better. This use of breathing space, like

---

statements are not immunized by the First Amendment right to speech, baseless litigation is not immunized by the First Amendment right to petition." 461 U.S. 731, 743 (1983). The government tries to parlay this statement into an additional example where this Court, *sub silentio*, applied its test. *See* Gov't Br. 27-28. But *Bill Johnson's* was merely recognizing that both the right to speech and the right to petition (the constitutional provision at issue there) are not absolute. In no other respect does a frivolous lawsuit resemble a false statement of fact; indeed frivolous lawsuits are often based on true facts for which there is no viable legal theory.

the other cases discussed above, can be seen as nothing more than a limitation within an historically unprotected area.[14]

The government and *amici* Volokh & Weinstein present numerous other examples of laws concerning false statements or false representations. Gov't Br. 21-28; Volokh Br. 3-11. Many of those laws, however, have not been passed on by this Court in the First Amendment context, and thus do not shed light on this Court's doctrinal development in this area. Some of those laws may fall under historically unprotected areas, some may pass strict scrutiny,[15] or – particularly in the case of state laws – the analysis of some laws is not sufficiently developed to read much into their existence.[16]

---

[14] The real battlefield is not vote-buying statutes, but state-level "truth-in-politics" laws. *See* Volokh Br. 11. For example, in Ohio, a right-to-life group is currently being sued for saying that a candidate's vote for "Obamacare" was a vote "for taxpayer funding of abortion." *See* George Will, *Who Gets to Judge Political Truth?*, Wash. Post, Nov. 13, 2011, at A21.

[15] Although some have questioned the constitutionality of the federal false statements law, 18 U.S.C. § 1001, *see* Steven R. Morrison, *When is Lying Illegal?*, 43 J. Marshall L. Rev. 111, 112 n.2 (2009) (collecting articles), the law, if properly interpreted, may well meet strict scrutiny. But the Court need not decide that issue here.

[16] *Amici* Volokh & Weinstein would place falsehood in a category of unprotected speech, subject to exceptions for opinions, mistakes, and negligent falsehoods, and – more troubling – falsehoods that involve "an unusually high risk of fact-finding error, factfinder bias, prosecutorial bias, legislative bias, or

It is thus clear that the government is wrong when it says this Court has applied a breathing space test to false factual statements, apart from those limited false statements that fall under unprotected categories. But the Court need not accept a unitary theory of free speech in order to decide this case. What is absolutely clear is that this Court has never punished "falsity in the air." Defamation loses its protection not merely by virtue of the fact that it encompasses false speech, but by falsity "*and* by its alleged defamation of [the plaintiff]." *Sullivan*, 376 U.S. at 271. Fraud loses its protection by its falsity *and* by the fact that it steals money or a valuable thing from another. But falsity, alone, without any proof of specific harm, has never stripped speech of its protection; courts have "consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials." *Id.* A statute that criminalizes the mere utterance of a falsehood cannot stand under this Court's precedent.

---

interference with scientific or historical investigation." Volokh Br. 23. This is a difficult boundary to police. First, it should be viewed with skepticism that *judges* will be able to sniff out these sorts of biases better than legislatures, and that they are above their own biases about what kind of speech they would prefer. Gey, *supra*, at 21-22 (expounding "the First Amendment['s] . . . deep skepticism about the good faith of those controlling the government"). Second, if scientific and historical investigation is excepted because it is uncertain, outside the speaker's knowledge, and may be politicized, Volokh Br. 24, it is both underinclusive and overinclusive as a category.

2. The government's test accepts a kind of harm categorically different from any this Court has previously examined.

The government's test is novel, not only for its suggestion that areas of speech not historically protected can be criminalized on a showing of "important" governmental interest, but in accepting the nebulous harm that this case presents. The Stolen Valor Act was aimed at protecting the reputation of military medals by preventing dilution of the honor bestowed on a large group of individuals, an interest different in kind from the harms reached by defamation, fraud, perjury, and other traditionally covered areas.

The government has always had a legitimate interest in protecting its citizens from individualized harm – pecuniary harms, assaults on their person, and harm to their standing in the community. Mill, *supra*, at 12 ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). To this end, since early in our history, the freedom of speech has been read to be "the right of every man, *as far as by it he does not hurt and control the right of another*; and this is the only check which it ought to suffer, the only bounds which it ought to know." Cato's Letters (Letter No. 15, Feb. 4, 1720) (emphasis added). Under this theory, defamation and deception are "actionable wrongs . . . [because they] vindicate private rights invoked by, or at least on

behalf of, private individuals." Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 238 (1992). But falsehood, it has long been held, is not stripped of protection as long as it does not cause another individual specific harm. *See* Thomas Cooley, *Constitutional Limitations* 886 (8th ed. 1927) (noting, in his 1868 treatise – which this Court has called "massively popular" and "influential" – that freedom of speech "implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications . . . as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals."); Frank Mott, *Jefferson and the Press* 14 (1943) (attributing to Thomas Jefferson, "The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty or reputation of others. . . .").

The government argues that the false claims criminalized under the Act, by diluting the cachet of medals, steal a small piece of the reputational value to which each true medal winner could otherwise lay claim. This, as has been argued in a previous section, is highly contestable. But even granting it to be true, *arguendo*, strict lines have been drawn around claims of harms – even direct harms – to the reputation of groups.

A defamatory statement that ran to a broad group of individuals did not traditionally give rise to

a claim for each individual. *See, e.g.*, *King v. Alme & Nott*, 91 Eng. Rep. 790, 790 (K.B. 1701) ("Where a writing which inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, this is no libel, but it must descend to particulars and individuals to make it a libel."). Rather, the law of defamation evolved such that the only people who could state a claim would be those who could show some "special application" of the defamatory matter to himself. Joseph Tanenhaus, *Group Libel*, 35 Cornell L.Q. 261, 263 (1950). Indeed, this fits with defamation's historical purpose: if a defamation suit is an alternative to dueling, the claim should only run to statements pointed enough than an individual would take up the sword to protect his personal honor.

The government's dilution theory is even a step further afield from group libel, as it depends not on the direct harm of a scurrilous claim against a large group, but on the indirect harm of dilution of a group's members' accumulated goodwill. The more diffuse and indirect the harm, however, the more likely it is that the harms caused by speech can and will be adequately addressed by counter-speech. *See* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1116-17 (2006).

It is not arbitrary that defamation and fraud have been so long prohibited; they reflect society's interest in preventing tangible harms to specific individuals. But the "First Amendment precludes

punishment for generalized 'public' frauds, deceptions, and defamation." Fried, *supra*, at 238. Thus even if the Court does not draw the line at those areas that have been deemed historically unprotected, it should hesitate before accepting the government's attempt to prove a harm that is so drastically different from those that ground the *Chaplinsky* test.

3. Even if the government's test applied, it has not demonstrated the need for this law.

For the same reasons the Act fails strict scrutiny, it fails the government's proposed test as well. *See supra* pp. 17-28. The government's interests here are legitimate, but not important or strong. The government has not shown that false claims actually impede the government's ability to foster morale. Moreover, the law includes within its scope fully protected speech such as parody and satire, *see supra* pp. 29-31, and fails to include any requirement of harm. It therefore does not leave sufficient breathing space for speech. And, contrary to the government's position, Gov't Br. 49-50, this law *does* go farther than necessary, in that the government's interests can be sufficiently protected by having an easily accessible means to root out false claims and by numerous other steps the government could take to protect the reputation of military medals. *See supra* pp. 19-27.

The government maintains that the Act is not directed at "any particular message about a

government symbol." Gov't Br. 45. But, of course, the Stolen Valor Act *does* impose a certain viewpoint: that military awards are sacrosanct, that they are too important to be the subject of tall tales, and that military heroes should not have to suffer the same foolishness to which others are subjected. In this, the Act shares more in common with the flag-burning statutes than the government admits: both attempt to take a symbol that most view with respect and reverence, and put it beyond the normal rules of speech. The flag burner shows his disdain through protest; the military award claimant shows his disrespect through treating a military honor as no different from an exaggeration he might tell about his weight – or, say, having played professional hockey. But both should lay claim to the same protection: "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries." *Johnson*, 491 U.S. at 417-20. As with flags, "[t]he way to preserve the [medal's] special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Id.* at 419.[17]

---

[17] This suggests that the Court could decide this case on a narrow basis: that is, even if the category of false statements receives lesser or no First Amendment protection, the government cannot choose to legislate even unprotected areas of speech based on hostility towards the underlying message. *R.A.V.*, 505 U.S. at 386. Congress criminalized lies about military honors, not false claims about the presidential medal of freedom (for

III. THE LAW IS OVERBROAD AS APPLIED TO XAVIER ALVAREZ, A POLITICAL OFFICEHOLDER.

Apart from its facial invalidity, the Stolen Valor Act is also unconstitutional as applied to Alvarez because he was an elected official at a public meeting describing his background and his qualifications for office. Government intrusion into speech made by politicians is particularly suspect. Discussions of qualifications of political candidates are considered core political speech to which the highest scrutiny is afforded. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995). The government argues that Alvarez "was free to express . . . his qualifications for office in any way he wished," just not by

---

contributions to, inter alia, national interest or security) or the medal of valor (for acts of bravery by law enforcement). It did not criminalize lies about government employment, military service, or any other lies one can tell about oneself. As in *R.A.V.*, it claimed to do so based on particular harms, but the clear motivation was that those lies are particularly offensive both to award winners and to the public at large. And, as in *R.A.V.*, the end was honorable but the means were unconstitutional. The court of appeals suggested that the Stolen Valor Act might fall into the third *R.A.V.* exception, the exception for cases where "there is no realistic possibility that suppression of ideas is afoot." Pet. App. 12a. The court emphasized the word *ideas*, and believed that, because the Act curtailed only purported statements of facts, no viewpoint discrimination was afoot. Respondent believes that the key word from *R.A.V.*'s exception is not ideas, but *suppression*, and that improperly motivated government suppression can be found just as often in suppression of facts as in suppression of ideas. Moreover, as discussed, the Act *does* involve a certain viewpoint discrimination.

"misrepresent[ing] that he had been awarded the Nation's highest military honor." Gov't Br. 53. But the government cannot have it both ways. Plainly, a politician detailing his qualifications for office – even a false statement about those qualifications – is political speech.

The breadth of protection afforded political speech under the First Amendment is difficult to overstate in light of this Court's recent precedents. For example, in *Citizens United*, this Court explained that "political speech must prevail against laws that would suppress it, whether by design or inadvertence." 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.* Accordingly, even were this Court to conclude that the law was not facially unconstitutional, the Act is unconstitutional as applied to Mr. Alvarez.

* * *

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 Stolen Valor Act is a content-based

restriction of speech that fails strict scrutiny review. As such, it is facially unconstitutional under the Free Speech Clause of the First Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender
Central District of California

JONATHAN D. LIBBY
Deputy Federal Public Defender
Counsel of Record

BRIANNA J. FULLER
Deputy Federal Public Defender

JANUARY 2012