No. 11-210

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

XAVIER ALVAREZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE LEGION OF VALOR OF THE UNITED STATES AND THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amici Curiae
Legion of Valor of the United States
Criminal Justice Legal Foundation

QUESTIONS PRESENTED

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

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

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INTEREST OF *AMICI CURIAE*

The Legion of Valor of the United States of America, Inc.[1] was founded in 1890 by Civil and Indian Wars recipients of the Medal of Honor. See Legion of Valor, Legion of Valor History, http://www.legionofvalor.com/history.php. The organization was chartered by Congress in 1955, see Pub. L. 84-224, 69 Stat. 486, and includes only Medal of Honor, Distinguished Service Cross, Navy Cross, and Air Force Cross recipients. See 36 U. S. C. § 130303.

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission.

One of the objectives of the Legion of Valor is to "[c]herish the memories of the valiant deeds for which the Medal of Honor, Distinguished Service Cross, Navy Cross, and the Air Force Cross are the insignia." Legion of Valor History, *supra*. The decision of the Court of Appeals for the Ninth Circuit in this case would allow frauds who have not earned these honors to claim them with impunity, contrary to the purpose of the Legion of Valor and the interests of its members.

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision of the Court of Appeals for the Ninth Circuit in this case is an expansive view of the First Amendment, going far beyond what is needed to protect free speech and endangering the ability of government to nip potential frauds in the bud. It is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The Stolen Valor Act, Pub. L. 109-437, 120 Stat. 3266, was enacted in 2006, passing the Senate by unanimous consent, 152 Cong. Rec. 17549 (2006), and the House on a motion requiring a two-thirds vote. See *id*., at 22577, col. 3 (actual vote not recorded). The bill was supported by members across the political spectrum, including Congressmen Sensenbrenner and Conyers. See *id*., at 22575, col. 1 (statement of Mr. Conyers). No one spoke against the bill in either house. The bill amended a preexisting statute against

falsely wearing military medals, extending it to false claims of having been awarded a medal. See 18 U. S. C. § 704(b).

Xavier Alvarez was elected to a California water district board in 2007. Soon afterward, at a public meeting, he made a number of extravagant claims about his military record, including award of the Congressional Medal of Honor. In fact, he has never served in the military at all. See *United States* v. *Alvarez*, 617 F. 3d 1198, 1200-1201 (CA9 2010). Following investigation by the FBI, he was indicted for violation of the Stolen Valor Act. The District Court rejected his constitutional challenge to the Act. He pleaded guilty, reserving the right to appeal the constitutional challenge, and was sentenced to three years probation, a $5000 fine, and 416 hours of community service. See *id*., at 1201.

A majority of a divided panel of the Court of Appeals declared the Act to be unconstitutional. See *id*., at 1218. Judge Bybee dissented. See *ibid*. The full court denied rehearing en banc, *United States* v. *Alvarez*, 638 F. 3d 666 (2011), seven judges dissenting. See *id*., at 677.

Two other District Courts have come to opposite conclusions on this issue. See *United States* v. *Strandlof*, 746 F. Supp. 2d 1183 (Colo. 2010) (unconstitutional); *United States* v. *Robbins*, 759 F. Supp. 2d 815 (WD Va. 2011) (constitutional). Appeals in both cases are pending as of this writing. This Court granted certiorari in the present case on October 17, 2011.

SUMMARY OF ARGUMENT

The Stolen Valor Act should be understood as prohibiting false statements made with knowledge that they are false and with an intent to deceive. This law is

not about honest mistakes, fiction, theater, or parody. Simply put, this law is about lies. Along with the wording of the statute, the rule of *Morissette* v. *United States* supports this interpretation, and there is nothing pointing to the contrary.

The Act supports an important government interest. A fraud such as Alvarez may or may not do any tangible harm with his false claims, but the collective harm caused by such frauds is real, even if intangible. Medals of valor are a kind of reputational currency issued by the government, and fraudulent representations are analogous to counterfeiting. The honor due the genuine heroes is diminished and subject to suspicion by the large number of fakers. Military morale is enhanced by a system of recognition that gives credit where and only where it is due, and widespread fraud diminishes the integrity of that system. The existence of a criminal statute facilitates the investigation of frauds. Alvarez was exposed by an FBI investigation, but without the statute there would have been nothing for the FBI to investigate.

The Act is viewpoint neutral. A person may represent that he has won a medal to oppose government policy, to support it, or to take no position at all. As illustrated by this Court's decision involving a similar law on the wearing of uniforms, the government may regulate in this area as long as it does not discriminate between viewpoints.

There is generally no constitutional right to lie. Where constitutional protection of lies exists, it is merely incidental to protecting other speech such as opinion or honest mistakes. The passage of *United States* v. *Stevens* relied on by the Court of Appeals majority should not be understood to hold that constitutional regulation of the content of speech is limited to the few, narrow categories actually regulated histori-

cally. Such a limitation would overturn large areas of settled law.

Unlike other parts of the Bill of Rights, there is no settled law we can look to at the time of adoption to tell us what was accepted practice then. The law of free speech was still a work in progress at that time. Looking at historical practice in the colonial and founding eras, we see that regulation of falsehoods was broader than just the law of defamation, further negating the notion that the limited categories listed in *Stevens* are the only lies that can be prohibited.

Congress and the States have prohibited lies without a showing of individualized, tangible harm in many statutes. In *United States* v. *Wells*, this Court interpreted a law against making false statements to a financial institution to have no requirement of materiality, without any indication this would raise a constitutional problem. Many states have laws against impersonation of officers with no requirement of any tangible harm or further act.

Some kind of state interest requirement might be deemed necessary to prevent regulation of the trivial or personal lies noted in Judge Kozinski's opinion. However, all federal statutes regulating speech, or anything else, must have a connection to one of the enumerated powers to be constitutional, so this aspect of the problem could be deferred to a case where a state statute is at issue. The case may never arise, as democracy and not litigation is the best defense against excessive government intrusion. If an explicit standard is deemed necessary in this case, the "legitimate state interest" noted in *Gertz* v. *Robert Welch, Inc.* should be adopted. This standard is well known to courts in the context of equal protection law, and it provides the protection needed (if any is needed) to protect against Judge Kozinski's nightmare scenario.

Whatever standard of government interest might be adopted, this statute clearly passes. The panel majority in this case conceded that 18 U. S. C. § 704 serves a compelling government interest, the highest standard, and the Ninth Circuit so held in another case upholding another subdivision of the same statute.

ARGUMENT

I. The Act should be interpreted as including a mental element of knowledge of the falsehood and intent to deceive.

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States* v. *Williams*, 553 U. S. 285, 293 (2008). That is also a good place to begin in this case, whether the attack is strictly characterized as "overbreadth" or not.

The statute applies to "[w]hoever 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 . . . ." 18 U. S. C. § 704(b). As the Government has explained, from the word "represents" it is clear that Congress did not intend to prohibit fictional statements not intended to deceive, such as theatrical performances or parodies. See Brief for the United States 17.

Along with the wording of the Act, there is the more general principle that the legislature is presumed to intend an element of *mens rea* when it creates a new crime, even when the statute includes no wording to that effect.

> "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning

> mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.[9] As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." *Morissette* v. *United States*, 342 U. S. 246, 251-252 (1952).

The most common mental element is intent, following from the very basic belief that intentional harm is far more blameworthy than accidental harm. Footnote 9 in the passage above quotes Justice Holmes, "Even a dog distinguishes between being stumbled over and being kicked." Criminal intent may, in some circumstances, be synonymous with knowledge. See *id*., at 271. Morissette intended to take the shell casings, but he was not guilty if he believed them to be abandoned property. See *id*., at 276.

The principle of *Morissette* has been invoked repeatedly by this Court to supply a *mens rea* element where none is in the statute. For example, in *Staples* v. *United States*, 511 U. S. 600, 603 (1994), the defendant possessed a rifle that is normally semiautomatic but had been modified to fully automatic, and hence it was a "machine gun" requiring registration. The statute "is silent concerning the *mens rea* required for a violation . . . . Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal." *Id*., at 605 (citing *Morissette*, *supra*, and *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436-437 (1978)). Relying on these

precedents, the Court found a knowledge requirement to be implied. See *id*., at 619-620.

For the medals of valor that Congress was primarily concerned with, see 18 U. S. C. § 704(c) and (d), it is highly unlikely that any mentally sound person could be mistaken whether he earned them. However, the base statute, *id*., subd. (b), extends to all decorations, and a great many are awarded for achievements of far less moment. A veteran with many rows of ribbons might make an honest mistake as to one of the minor ones, and the statute should not be interpreted to criminalize a mistake. Similarly, a person who suffers from schizophrenia with grandiose delusions might genuinely believe he has been awarded the Medal of Honor. While he would probably qualify for the insanity defense, see 18 U. S. C. § 17, such delusions can also serve to negate the *mens rea* of the crime, and the statute should not be construed to reach this situation.

This interpretation is reinforced by the findings in the enacting statute. Congress specifically referred to fraudulent claims in enacting the statute. See Pub. L. 109-437, § 2, 120 Stat. 3266 (2006). This Court has noted the problems with "judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I," and other "extrinsic materials." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 568 (2005). These findings, however, are not extrinsic, and they *have* been through the Article I enactment process. While the prefatory language of an enactment cannot limit or expand the operative language, it can resolve ambiguity. See *District of Columbia* v. *Heller*, 554 U. S. 570, 577-578 (2008). Under *Morissette* and *Staples*, courts presume the legislature intended to include a *mens rea* requirement absent an indication to the

contrary. The references to fraud in the findings in § 2 are an indication to the affirmative.

The statute in this case is not about making statements that happen to be literally false. It is narrower and more important than that. This statute prohibits false statements made with the knowledge that they are false and with the intent to deceive. In plain English, this statute punishes lies.

II. The Stolen Valor Act serves an important government interest and is viewpoint neutral.

A. Real Harm.

Defendant Alvarez claims that he "harmed no one" and did not "obtain any tangible or intangible benefits" through his lies. See Brief in Opposition 3. The Court of Appeals majority was also dismissive of the harm caused by the fakers. See *Alvarez*, 617 F. 3d, at 1217. But the legitimate government interest in preventing harm is not limited to preventing tangible harm. Nor is it limited to punishing successful attempts to obtain "tangible or intangible benefits." Alvarez did attempt to obtain intangible benefits of esteem he did not deserve, and the criminal law has always punished unsuccessful attempts as well as successful ones.

A medal of valor does not directly confer any tangible benefit. It has nearly zero intrinsic value, being only a piece of nonprecious metal and cloth. The value lies in what it represents and the esteem of one's fellow citizens for what it represents.

The Brief for the United States 2-6 traces the history of military medals. That discussion need not be repeated here. We will focus on the intangible but very real harm caused by those who falsely claim them.

The title of the Act comes from the 1998 book Stolen Valor by B. G. Burkett and Glenna Whitley. See 152 Cong. Rec. 22575, col. 3 (2006) (statement of Mr. Salazar).

> "The authors show that killers have fooled the most astute prosecutors and gotten away with murder. They show phony heroes who have become the object of national award-winning documentaries on national network television. They show liars and fabricators who have flooded major publishing houses with false tales of heroism which have become best-selling biographies.
>
> "Not only do the authors show the price of the myth has been enormous for society, but they spotlight how it has severely denigrated the service, patriotism, and gallantry of the best warriors America's ever produced." *Ibid*.

The fakers noted by Burkett and Whitley include some who used their false claims to obtain tangible benefits and some who did not. They include Circuit Judge Michael O'Brien of Illinois, who hung a fake medal in his chambers, included a story of his heroism in a pamphlet distributed there, applied for special license plates, and was scheduled to speak at a veterans' rally in a gubernatorial campaign before he was finally exposed. Burkett & Whitley, *supra*, at 360-361. Another faker who caused both tangible and intangible harm is Boyer Westover, whose fake tales of heroism produced a glowing story in a newspaper, a job as a researcher for a publisher, and even a seat on the board of *amicus* Legion of Valor. *Id*., at 367-369.

The Court of Appeals majority demands proof that these fakes cause harm to the integrity of the military medal system, see 617 F. 3d, at 1216, but this Court has rejected the premise that quantifiable proof is required

in the First Amendment area. "There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 129 S. Ct. 1800, 1813, 173 L. Ed. 2d 738, 753 (2009). The harmful effect of widespread fakery regarding military medals is another.

The crime at issue here is in some ways analogous to counterfeiting. Paper money is not exchangeable for gold or silver any more. Bills circulate until worn out and are replaced with newly printed bills. One might say that a counterfeiter so skilled that his counterfeit is never discovered does no harm. The person he passes his fake to passes it to someone else and buys actual goods with it, and so on. Yet every real bill is worth a little less for the existence of a fake. The existence of fakes causes real bills to be examined with some suspicion upon tender. We have all experienced tendering a bill and seeing the cashier mark it with a counterfeit detection pen. There is a trace of insult there, however small.

Military medals are a kind of government-issued currency of valor. They represent an official recognition of exemplary service which most people in this country honor and respect. There is a loss, however intangible, when fakers claim honors they have not earned, especially when they can do so with impunity. Will a newspaper embarrassed by a story on a hero who turned out to be a fake run another on a real hero? It might, with thorough checking, or it might just pass. Congress was well aware of this dilution effect when it passed the Act. "The FBI estimates that for every legitimate Navy SEAL team member, there are roughly 300 imposters. Moreover, there are roughly only 124 living recipients of the Medal of Honor, yet more than twice as many falsely claim to have received it." 152

Cong. Rec. 22575, col. 1 (statement of Mr. Sensenbrenner).

Defendant notes that he has paid a price for his own fakery in loss of reputation. "Even as his case was proceeding through the trial court, he was pilloried in the community and in the press, labeled an 'idiot,' 'jerk,' and worse." Brief in Opposition 3-4. Good. Loss of reputation is indeed a consequence of being proven a fake, as it should be. It will very often be a greater loss than the minor punishment imposed under the statute. Yet the existence of the statute may be necessary to provide an authoritative determination that the faker is indeed fake. Not all liars are as outrageous and obvious as Alvarez. Without a federal statute against fakery in force, there is nothing for the FBI to investigate. A misdemeanor conviction, even with a slap-on-the-wrist sentence, is an official adjudication of the fakery, and as such it is valuable in itself as public notice.

Sometimes the loss of reputation is posthumous. Officers of *amicus* Legion of Valor sometimes have the distasteful duty to inform the families of recently deceased service members that their loved ones were not the heroes they claimed to be. The pain of grief is compounded by the revelation that the deceased family member was a fraud. This is a kind of harm Congress probably did not anticipate, but it is real and poignant. To the extent such incidents can be deterred by the knowledge that a fraud can be officially investigated and exposed in his lifetime, the pain can be avoided.

As the Government has explained, the integrity of the military awards system serves the vital function of fostering morale and esprit de corps. See Brief for the United States 38-44. This requires both integrity before the fact in the issuance of the medals and integrity after the fact in honoring only those who

actually did receive them. A system of recognition must be seen as based on actual merit to fulfill its purpose. This is not to say that specific acts of heroism are motivated by the desire to receive a medal. Cf. 617 F. 3d, at 1217. They generally are not. It is to say that morale and esprit de corps are enhanced when service members perceive that recognition is given where it is due and only where it is due. The importance of these psychological factors may not be readily apparent to those without military experience, but they have been uniformly recognized by military experts for centuries. "Military leaders and scholars of military psychology have long recognized the importance of morale as a critical determinant of performance during different types of military operations [citations]." Britt & Dickinson, Morale During Military Operations: A Positive Psychology Approach, in Military Life: The Psychology of Serving in Peace and Combat 157 (T. Britt, A. Adler, & C. Castro eds. 2006). Recognition for performance is one of the factors that goes into morale. See *id*., at 160, 171.

The false claims at issue here cause real harm. The harm may not always be tangible, but it is real and important nonetheless.

B. Viewpoint Neutrality.

Even otherwise unprotected speech cannot be regulated in a way that discriminates against one viewpoint in favor of another. See *R. A. V.* v. *City of St. Paul*, 505 U. S. 377, 388 (1992). The statute at issue in the present case does not suffer that defect.

In *Schacht* v. *United States*, 398 U. S. 58 (1970), this Court dealt with the viewpoint neutrality issue regarding a closely related statute. In 18 U. S. C. § 702, Congress prohibited the wearing of military uniforms without authority. Another statute, 10 U. S. C. § 772(f),

provided, " 'While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force *if the portrayal does not tend to discredit that armed force*.' " *Schacht*, *supra*, at 59-60 (emphasis added by the Court).

Schacht was prosecuted for wearing a uniform in an anti-war street skit. The Court held that the general prohibition statute was clearly valid on its face under the test for expressive conduct, see *id*., at 61, but § 772(f) was invalid for authorizing expression favorable to the military but criminalizing expression critical of it. See *id*., at 62-63. In the more recent terminology of *R. A. V.*, § 702 was viewpoint neutral but § 772(f) was viewpoint discriminatory.

Under *Schacht*, the statute in the present case is viewpoint neutral. It makes no difference why a person represents himself as having received a medal. People do sometimes represent themselves as medal recipients to criticize the government. See Oliphant, I Watched Kerry Throw His War Decorations, The Boston Globe, Apr. 27, 2004[2] (describing a well-known, highly controversial protest by Vietnam Veterans Against the War at the Capitol in 1971). Regardless of what viewpoint, if any, a person intends to express by representing that he was awarded a medal, the representation is legal if it is true and criminal if it is a lie.

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2. Available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/04/27/i_watched_kerry_throw_his_war_decorations/ (as visited Dec. 2, 2011).

III. There is generally no constitutional right to lie, with constitutional protection being the exception rather than the rule.

Is there a constitutional right to lie? On its face, the question seems absurd. Government prohibits and punishes lies in such a wide variety of contexts, from the momentous to the minor, that it would seem clear that the decision of which lies to prohibit rests with the legislators and administrators who make the rules, not with the courts. If a schoolchild spends ten minutes in "time out" for saying, "the dog ate my homework," can he sue the teacher under the civil rights law, 42 U. S. C. § 1983? Cf. *Morse* v. *Frederick*, 551 U. S. 393, 399 (2007) (civil rights lawsuit for school discipline, asserting First Amendment claim). That would be the implication of a constitutional right to tell lies as long as they do no tangible, provable harm in the individual case.

A. United States v. Stevens.

The cornerstone of the Court of Appeals' opinion, see *Alvarez*, 617 F. 3d, at 1202-1204, is an expansive interpretation of a passage from *United States* v. *Stevens*, 559 U. S. __, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010), the "crush video" case. In that passage, the Court was responding to an argument that a category of speech could be excluded from protection and subject to unlimited content-based regulation based on "a simple balancing test . . . 'of the value of the speech against its societal costs.' " *Id*., 130 S. Ct., at 1585, 176 L. Ed. 2d, at 444-445 (quoting Brief for the United States). The Court noted that past exclusions from protection have involved traditionally recognized categories. See *id*., 130 S. Ct., at 1584, 176 L. Ed. 2d, at 443-444. However, the Court did not go so far as to hold that these categories were exclusive, much less

that they are limited to particular varieties of speech that were actually banned in a prior era.

> "Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that 'depictions of animal cruelty' is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them." *Id*., 130 S. Ct., at 1586, 176 L. Ed. 2d, at 446.

If *Stevens* really mandated a purely historical analysis for determining what is included in "the freedom of speech" protected by the First Amendment, an enormous amount of settled law would be overturned. The *Stevens* opinion, 130 S. Ct., at 1584, 176 L. Ed. 2d, at 444, includes a quote from *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Considering the sentence from *Chaplinsky* quoted in *Stevens* with the one that immediately follows illustrates the problem. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have *never been thought to raise any Constitutional problem*. These include the lewd and obscene, *the profane*, the libelous, and the insulting or 'fighting' words—those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace." *Chaplinksy*, *supra*, at 571-572 (emphasis added; footnote omitted.) But of course banning the profane *has* been thought to raise a constitutional problem since 1971, see *Cohen* v. *California*, 403 U. S. 15, and it continues to raise issues today, as in *FCC* v.

Fox Television Stations, Inc., No. 10-1293, presently before the Court.

Is historical practice then a constitutional ratchet? Does "the freedom of speech" include everything that was not banned in 1791 plus some things that were? Is the legislative branch barred from addressing any speech-related issue that was not considered serious enough to warrant legislative action in the founding era, including those that simply did not exist then, and also barred from regulating any speech that the judicial branch decides should now be added on to the historically recognized scope? Such a result would be cheered by those who favor the absolutist view that the government should not regulate any speech whatever,[3] but it can hardly be squared with a respect for the separation of powers and the people's right to govern themselves through the democratic process.

This Court's precedents refute the notion that regulation of falsehoods is limited to the categories recognized at an early point in our history. The tort of "false light" is a modern invention, reaching falsehoods not covered by the traditional law of defamation. See *Time, Inc.* v. *Hill*, 385 U. S. 374, 380-387 (1967) (describing law much broader than common law). Yet the Court upheld a jury verdict for "knowing falsehoods" placing the plaintiff in a false and embarrassing but not defamatory light in *Cantrell* v. *Forest City Pub. Co.*, 419 U. S. 245, 248, 254 (1974). In this context of a modern tort not fitting into the classical mold of defamation, the Court in *Time, Inc.*, *supra*, at 389, noted, "But the

3. "The absolutist view of free speech has been championed and most closely associated with Justices Black and Douglas, but it has never been explicitly adopted by a majority of the Court." 5 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 20.7(b)(i), p. 33 (4th ed. 2008) (footnote omitted).

constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function." (Emphasis in original).

Nor could a strict historical practice theory be reconciled with the extensive regulation of commercial speech. To cite just one example, 15 U. S. C. § 78n(d)(1) prohibits certain offers to buy stock, even if completely truthful, unless the offeror has complied with certain filing requirements. This prohibition does not remotely fit within the common law definition of fraud, even though its underlying purpose may be to prevent fraud. The prohibition is vastly broader. Could this sweeping prohibition pass the "strict scrutiny" test? Surely not. Securities laws survive because they are judged with a more lenient test. See *Bulldog Investors Gen. Pshp.* v. *Secretary*, 460 Mass. 647, 658-659, 953 N. E. 2d 691, 701-702 (2011) (citing *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 561-562 (1980)). This more lenient test for commercial speech is not based in history. See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 522 (1996) (Thomas, J., concurring in part).

The thesis that strict scrutiny applies to every content-based regulation that does not fit within the four corners of a historically recognized limitation on speech is insupportable. One might infer such a rule from reading *Stevens* in isolation, but not if one reads *Stevens* in the context of the rest of First Amendment law.

B. Lies, History, and "the Freedom of Speech."

"Congress shall make no law . . . abridging the freedom of speech . . . ." U. S. Const., Amdt. 1. History, precedent, and common sense indicate that lying is simply not within "the freedom of speech." See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974). There

are, to be sure, some limitations in this Court's precedents on the ability of government to punish lies. However, these limitations are invariably for the purpose of protecting the expression of opinions and of facts honestly believed (whether or not actually true).

In some applications of the Bill of Rights in recent years, the Court has looked to practices in the founding era to determine what would have been allowed then as an indication of what the constitutional text means. See, *e.g.*, *Crawford* v. *Washington*, 541 U. S. 36, 53-54 (2004). This approach is more problematic with First Amendment. Defining freedom of speech was a work in progress. The 1735 trial of John Peter Zenger in New York is celebrated for advancing the proposition that truth is a defense to libel. See 5 Rotunda & Nowak, *supra*, § 20.4(a), at 18-19. Yet as late as 1805, there was sufficient doubt on this subject that the New York legislature needed to enact a statute on it. Even under the statute, truth was not a defense by itself but admissible to establish "the matter charged as libelous, was published with good motives and for justifiable ends." See *People* v. *Croswell*, 3 Johns. Cas. 337, 411-412 (N. Y. 1804) (annotation to the opinion noting subsequent statute).[4] Massachusetts also followed a rule of truth as relevant to motivation rather than a defense in itself, effectively making truth a defense for criticism of public officials but not in private matters. See *Commonwealth* v. *Clap*, 4 Mass. 163, 168-170 (1808).

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4. *Croswell* was an ironic twist on the Sedition Act controversy. The defendant was prosecuted for libel against President Jefferson for alleging Jefferson's involvement in the libel of Presidents Washington and Adams. See also D. McCullough, John Adams 488 (2001).

The development of freedom of speech during the colonial era was in substantial part based on an increasing recognition of the importance of truth.

> "And 'development' is the operative word, for the Zenger case did not occur in isolation. It was part of an ongoing process. It helped crystallize public opinion and virtually ended common law prosecutions for seditious speech in the colonies, thus helping to set the stage for later changes in the law regarding truth as a defense. But in so doing, it drew upon a growing, practical colonial tradition. *A tradition that truth really did matter* when a colonist impugned authority." Eldridge, Before Zenger: Truth and Seditious Speech in Colonial America, 1607-1700, 39 Am. J. Legal Hist. 337, 357-358 (1995).

The increasing importance of truth was partly the result of the increase in the use of "false news" laws, where falsity of the speech was an element of the offense. See *id.*, at 355. These laws were not limited to defamation. They also included spreading false news about events. See *ibid.*

> "Spreading false news appeared clearly as a crime in colonial law. A 1645 Massachusetts statute ordered punishment for 'every person of the age of discretion, which is accounted fourteen years, who shall wittingly and willingly make or publish any lie which may be pernicious to the common weal.' " *Id.*, at 352.

Virginia's similar statute prohibited spreading false news "tending to the trouble of the country." See *ibid.*

Statutes prohibiting falsehoods deemed injurious to the public good continued during the Revolutionary era. Soon after the Declaration of Independence, legislatures of the new States enacted new laws on treason and

sedition, including new versions of the "false news" statutes. For example, New Jersey enacted a law to punish those who "maliciously and advisedly spread such false Rumours concerning the American Forces, or the Forces of the Enemy as will tend to alienate the Affections of the People from the Government . . . ." Act of Oct. 4, 1776, ch. V, § 3 in Acts of the General Assembly of the State of New-Jersey 5 (1784) (reprinted in The First Laws of the State of New Jersey (J. Cushing comp. 1981)). New Hampshire similarly punished those who "shall wittingly and willingly make or spread any false news, or reports with the intent to deceive . . . and to injure the common cause . . . ." Act of Jan. 17, 1777, in Acts and Laws of the State of New-Hampshire in America 63 (1780) (reprinted in The First Laws of the State of New-Hampshire (J. Cushing comp. 1981)).

Amici do not contend that these statutes would be constitutional today. Phrases such as "tending to the trouble of the country" are excessively vague. See *Smith* v. *Goguen*, 415 U. S. 566, 573 (1974) ("greater degree of specificity" required in regulations of expression). Some of the laws are viewpoint discriminatory on their face, and the others would be in application.[5] What these broad founding-era statutes demonstrate is that the government's authority to prohibit falsehoods was not thought to be confined to the narrow channels of defamation of persons or fraud, as the Court of Appeals majority believed in the present case. See *Alvarez*, 617 F. 3d, at 1207-1209. To the extent that any original understanding can be discerned, it appears to be consistent with the clear statement in *Gertz* v.

5. The last surviving "false news" statute in an English common law country was struck down by the Supreme Court of Canada in the case of a Holocaust denier. See *Queen* v. *Zundel*, [1992] 2 S. C. R. 731, 732. The result would probably be the same under our First Amendment, but not necessarily the reasoning.

Robert Welch, Inc., 418 U. S. 323, 340 (1974), that intentional lies on matters of fact are simply outside the constitutionally protected freedom of speech. Constitutional limitations on the government's authority to punish lies exist not to protect lies but to protect "speech that matters" from self-censorship when people fear that they might be falsely accused of lying. See *id.*, at 340-341; *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279 (1964).

C. "Breathing Space" Limitations.

The two landmark defamation cases, *New York Times Co.* and *Gertz*, established a variety of rules based on the variables of opinion, truth, and public concern. Opinion has no official "truth" and cannot be excluded from protection based on falsity. *Gertz*, 418 U. S., at 339-340. Between the poles of pure opinion and pure fact, there are opinions about facts and statements of opinion with factual implications. A factual allegation is not immunized by phrasing it as an opinion. See *Milkovich* v. *Lorain Journal Co.*, 497 U. S. 1, 19 (1990). An opinion about a fact may be honestly held even if contrary to overwhelming evidence. Strange as it seems, some people genuinely believe that the moon landing was faked or that the Holocaust is a myth. As the present case involves an objective fact within the defendant's personal knowledge, there is no need to explore this aspect of the First Amendment here.

For facts, truth is protected but lies are not, at least not for their own sake. See *Gertz*, 418 U. S., at 340. In the middle ground between truth and lies, *New York Times Co.* established constitutional protection for "erroneous statements *honestly* made." 376 U. S., at 278 (emphasis added).

Yet even for citizens' criticisms of public officials in the performance of their duties, the type of speech warranting the very highest measure of First Amendment protection, *New York Times Co.* did not extend immunity to bald-faced lies. Speakers can still be held liable[6] for a false statement made "with knowledge that it was false or reckless disregard of whether it was false or not." *Id.*, at 280.[7] To ensure that the statements are on the intentional/reckless side of the line rather than the honest mistake side before liability is imposed, the burden is placed on the plaintiff to show the requisite mental state with "convincing clarity." See *id.*, at 285-286. This tilt toward the defendant in borderline cases means that some lies will be incidentally protected in the interest of ensuring that honest mistakes are protected. Cf. *In re Winship*, 397 U. S. 358, 372 (1970) (Harlan, J., concurring) (burden of proof in criminal cases based on difference in "social disutility" of two potential errors). This is a "breathing space" limitation. See *Gertz*, 418 U. S., at 342.

As we move away from criticism of public officials, the demands of the First Amendment become less demanding. A private defamation plaintiff is not required to meet the *New York Times* "actual malice" standard, but he is limited to actual damages if he does not, at least if the speech involves matters of public

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6. Or criminally prosecuted. There is no difference in the scope of First Amendment protection. See *id.*, at 277.

7. The *New York Times Co.* Court labeled this *mens rea* requirement "actual malice." *Ibid.* That was a confusing and unfortunate choice, having nothing to do with what "malice" means in common usage. See *Herbert* v. *Lando*, 441 U. S. 153, 199 (1979) (Stewart, J., dissenting). The term should be replaced with the more appropriate "scienter." See 5 Rotunda & Nowak, *supra*, § 20.33(a)(iii), at 306-307.

concern. See *id*., at 418 U. S., at 347, 350. Even the *Gertz* limitation may not apply when the matter is purely private. See *Dun & Bradstreet, Inc*. v. *Greenmoss Builders, Inc*., 472 U. S. 749, 761 (1985) (plurality opinion) (false statement in credit report).

The great danger that the First Amendment primarily protects against is government restriction of speech that suppresses dissent on matters of public concern. Absent a "'threat to the free and robust debate of public issues,'" the First Amendment's "protections are less stringent." *Id*., at 760 (quoting *Harley-Davidson Motorsports, Inc*. v. *Markley*, 279 Ore. 361, 366, 568 P. 2d 1359, 1363 (1977)). Viewpoint discrimination is the core problem, forbidden even when the speech lies within an otherwise unprotected category. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 388 (1992).

The Court of Appeals majority in the present case thought that defamatory lies were a special category singled out for less First Amendment protection than other lies. See *Alvarez*, 617 F. 3d, at 1207-1208. The long and ignoble history of defamation laws as an instrument for suppressing political dissent cautions against such a conclusion. The *scandalum magnatum* action was used in England against "slandering or scandalizing the great men of the realm" and in the colonies against "deriding or criticizing high-level colonial officials . . . ." Eldridge, 39 Am. J. Legal Hist., at 338. John Peter Zenger was tried for seditious libel for publishing articles critical of the royal governor. See 5 Rotunda & Nowak, *supra*, § 20.4(a), at 18-19. The notorious Sedition Act was "levelled against the right of freely examining public characters and measures, and of free communication among the people thereon . . . ." Virginia Resolutions of Dec. 21, 1798, reprinted in 5 The Founders' Constitution 135, 136 (P. Kurland & R. Lerner eds. 1987). When alleged defamation involves

public officials, matters of public interest, or both, this history calls for special scrutiny, not special laxity. Prohibition of other kinds of lies does not carry this historical baggage, and the decision as to which lies to prohibit has been largely and correctly seen to be a matter of policy, not constitutional law.

D. Punishment of Simple Lies.

The Court of Appeals majority in this case said, "We are aware of no authority holding that the government may, through a criminal law, prohibit speech *simply* because it is knowingly factually false." 617 F. 3d, at 1213. Actually, governments do that often, in statutes not thought to present any constitutional difficulty. See Brief for Professors Eugene Volokh and James Weinstein as *Amici Curiae*, Part I.

In *United States* v. *Wells*, 519 U. S. 482, 484 (1997), this Court considered whether materiality is an element in the statute prohibiting a false statement to a bank. The Court decided it was not. See *ibid*. Justice Stevens dissented strongly, but as a matter of statutory interpretation, not constitutional law. He gave the colorful hypothetical of an applicant who lies on a subject not material to his creditworthiness but simply to butter up the loan officer. See *id*., at 512.[8] He could not imagine that Congress *intended* to prohibit such lies. He did not question that Congress had the *power* to prohibit such lies. The majority opinion noted, " 'There can be no question that Congress was entitled to require that the

8. Justice Stevens' hypothetical applicant flatters the loan officer, a known bow-tie aficionado, by falsely claiming he always wears one himself. See *id*., at 512, n. 14. One can only wonder if there is a true story behind the hypothetical. Cf. *Alvarez*, 638 F. 3d, at 675 (Kozinski, J., concurring in denial of rehearing en banc) ("to get a clerkship").

information be given in good faith and not falsely with intent to mislead.' " *Id*., at 494 (quoting *Kay* v. *United States*, 303 U. S. 1, 5-6 (1938)). The doctrine of constitutional doubt would have bolstered Justice Stevens' statutory interpretation argument, cf. *Zadvydas* v. *Davis*, 533 U. S. 678, 689 (2001), but he did not invoke it. Why not? Probably because there is no doubt.

One might try to brush off this case as a commercial speech case, assigning commercial speech to a marginally protected subbasement of the First Amendment. But that is not easily done. It is not clear that this is commercial speech. It is certainly not within the core meaning of the term. The loan application proposes a transaction, see *Central Hudson Gas & Elec. Corp*. v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 562 (1980), but the flattery of the loan officer does not. While the Court has stated that the government can prohibit false or misleading commercial speech, see *id*., at 566, it has not stated that this extends to any speech having a tenuous connection with a commercial transaction. See *Nike, Inc.* v. *Kasky*, 539 U. S. 654, 676 (2003) (Breyer, J., dissenting from denial of certiorari) ("mixture of commercial and noncommercial"). If the government can prohibit such tangential lies, it is more likely because government can prohibit lies generally.

The statutes most closely analogous to the one in this case are the false impersonation statutes. Such laws are in force in most jurisdictions. Curiously, the Court of Appeals majority opinion states broadly that such statutes require an additional element of obtaining a benefit at a cost to another, but it only cites one such statute to support that proposition, the federal one. See 617 F. 3d, at 1212. While many such statutes do have an additional element, many others do not. For example, Hawaii Rev. Stat. § 710-1016.7(1) provides, "A person commits the offense of impersonating a law

enforcement officer in the second degree if, with intent to deceive, the person pretends to be a law enforcement officer." This is a misdemeanor, see *id*., subd. (2), as is the offense in the present case. Similar laws include Minn. Stat. § 609.475 (police, military, or public officer, misdemeanor), Idaho Code § 20-219A (probation/parole officer, misdemeanor), and Mass. Gen. Laws, ch. 21A, § 10D (environmental officers, fine of $10-$100). In Wisconsin, impersonating a peace officer with intent to mislead is a crime with or without the additional element of facilitating another crime, but that additional element elevates the offense from a misdemeanor to a felony. See Wis. Stat. § 946.70. The pattern shows that impersonation alone is a minor offense, a lesser degree of offense, or not an offense at all as the legislature of the particular jurisdiction chooses. This is a question of policy, not of constitutional limitation.

IV. A viewpoint-neutral law prohibiting a lie requires no more than a legitimate government interest.

In the present case, concurring in the denial of rehearing en banc in the Court of Appeals, Chief Judge Kozinski wrote a colorful opinion describing the "terrifying" world where the government attempts to prohibit all lies, no matter how trivial or personal. See *United States* v. *Alvarez*, 638 F. 3d 666, 673 (CA9 2011). He lists a variety of "white lies" that government ought not prohibit. See *id*., at 674-675.

Yet the very next paragraph reveals the flaw in the argument. Minor deception can be achieved by conduct as well as by words, see *id*., at 675, and the First Amendment protects expressive conduct to a lesser

degree.[9] A statute forbidding people to lie about their height in an online dating profile would be offensive, but a statute forbidding people to wear elevator shoes, one of Judge Kozinski's examples in the second paragraph, would be equally offensive *for the same reason*. The reason these laws would be offensive is not because they restrict speech—the second one does not—but because they involve government intrusion into private matters.

There are constitutional limitations on government intrusion in private matters under the Due Process Clause, see, *e.g.*, *Troxel* v. *Granville*, 530 U. S. 57 (2000) (grandparent visitation), but these cases are among the most controversial the Court has decided, and they have reached only a few areas. For the most part, the defense against excessive intrusion by state governments is democratic rather than judicial. Legislators know that if they actually did outlaw all the minor verbal deceptions in Judge Kozinski's first paragraph or the minor conduct deceptions in the second one, the voters would surely give them the boot in the next election. Judge Kozinski's nightmare scenario assumes a legislature chomping at the bit to outlaw every speck of falsehood it constitutionally can, but no such legislature exists in any state in this country.

This case, of course, involves a federal statute. The people have an additional constitutional protection against federal legislation regulating minor matters. Congressional legislation is limited to the powers enumerated in the Constitution. Regulation of speech

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9. Indeed, after the decision now under review, the Ninth Circuit upheld subdivision (a) of the same statute, prohibiting the false wearing of medals, applying the expressive conduct test. See *United States* v. *Perelman*, 658 F. 3d 1134 (2011) (petition for rehearing held in abeyance pending resolution of the present case).

is not an enumerated power. This was the primary argument against the Sedition Act, with freedom of speech and press being secondary. See Virginia Resolutions of Dec. 21, 1798, reprinted in 5 The Founders' Constitution 135-136 (P. Kurland & R. Lerner eds. 1987); see also *Garrison* v. *Louisiana*, 379 U. S. 64, 83-88 (1964) (appendix to opinion of Douglas, J., excerpt from address by James Madison). Today, Congress is understood to have the power to regulate speech in a variety of contexts under the Necessary and Proper Clause. While that clause grants Congress "broad authority," see *United States* v. *Comstock*, 560 U. S. __, 130 S. Ct. 1949, 1956, 176 L. Ed. 2d 878, 889 (2010), that authority is not unlimited. "[W]e look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Id*., 130 S. Ct., at 1956, 176 L. Ed. 2d, at 890. There is, therefore, a constitutional government interest requirement for *every* federal statute, whether it regulates speech or conduct.

For the states, the question of whether there is a constitutional state-interest floor to prevent the punishment of the trivial and personal lies that Judge Kozinski mentions could be left to another case, when a state statute is at issue. Alternatively, the Court could pass on setting a standard on the ground that this statute obviously passes whatever test might be established. The situation is analogous to *Herrera* v. *Collins*, 506 U. S. 390 (1993). In that case, the Court did not need to decide on the standard for free-standing claim of innocence by a condemned inmate because the evidence of Herrera's guilt was so strong and his contrary evidence so weak that he could not meet any conceivable standard. See *id*., at 417-419. As the Ninth Circuit found in *Perelman* regarding the expressive conduct subdivision of the same statute, this law meets the *compelling* government interest standard, *United*

States v. *Perelman*, 658 F. 3d 1139-1140 (2011), the highest that might be invoked.

However, if the Court believes it is necessary to establish a limiting principle, it can look to *Gertz*. The *Gertz* Court referred repeatedly to a "legitimate state interest." See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341-349 (1974). The requirement that a statute be rationally related to a legitimate state interest is a familiar one from equal protection law, and it is not a toothless one. See, *e.g.*, *Romer* v. *Evans*, 517 U. S. 620, 631-632 (1996). That standard is sufficient to proscribe government intrusion into the trivial and personal falsehoods that Judge Kozinski is concerned about. No further constitutional protection of outright lies is needed. Let the legislative branch decide which lies are important enough for the government to bother punishing.

To sum up, *amici* suggest that a viewpoint-neutral prohibition of an intentional lie (a false statement of fact known by the speaker to be false, made with the intent to deceive) is consistent with the First Amendment if the prohibition is rationally related to a legitimate state interest. For the reasons stated in part II of this brief, Part III-A of the Brief for the United States, and by the Ninth Circuit in *Perelman*, this statute easily passes that test.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amici Curiae
Legion of Valor of the United States
Criminal Justice Legal Foundation