

No. 11-210

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**In the Supreme Court of the United States**

UNITED STATES, PETITIONER,

v.

XAVIER ALVAREZ, RESPONDENT.

*ON WRIT OF CERTIORARI TO THE U.S. COURT  
OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR VETERANS OF FOREIGN WARS OF THE  
UNITED STATES; AMVETS; DISABLED AMERICAN  
VETERANS; JEWISH WAR VETERANS OF THE  
UNITED STATES; MILITARY ORDER OF THE  
WORLD WARS; VIETNAM VETERANS OF AMERICA;  
MILITARY OFFICERS ASSOCIATION OF AMERICA;  
NON-COMMISSIONED OFFICERS ASSOCIATION;  
NATIONAL ASSOCIATION FOR UNIFORMED  
SERVICES; ASSOCIATION OF THE UNITED STATES  
ARMY; ASSOCIATION OF THE UNITED STATES  
NAVY; AIR FORCE ASSOCIATION; MARINE CORPS  
LEAGUE; AIR FORCE WOMEN OFFICERS  
ASSOCIATED; RESERVE OFFICERS ASSOCIATION;  
ARMY RESERVE ASSOCIATION; FLEET RESERVE  
ASSOCIATION; NATIONAL GUARD ASSOCIATION  
OF THE UNITED STATES; MILITARY ORDER OF  
THE PURPLE HEART; DISTINGUISHED FLYING  
CROSS SOCIETY; SPECIAL FORCES ASSOCIATION;  
U.S. ARMY RANGER ASSOCIATION, INC.; FLAG AND  
GENERAL OFFICERS' NETWORK; WEST POINT  
ASSOCIATION OF GRADUATES; AND ASSOCIATION  
OF GRADUATES, U.S. AIR FORCE ACADEMY AS  
*AMICI CURIAE* SUPPORTING PETITIONER**

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## **QUESTION PRESENTED**

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

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

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**INTRODUCTION AND  
INTERESTS OF *AMICI CURIAE*<sup>1</sup>**

*“These I earned with blood.”<sup>2</sup>*

So stated Marine Lance Corporal Evan Reichenenthal, referring to the Combat Action Ribbon and Purple Heart he was awarded after losing his legs to an improvised explosive device in Afghanistan. Contrary to the arguments of the parties below, this case is not about protecting the reputations of heroes such as Lance Corporal Reichenenthal; there is nothing that charlatans such as Xavier Alvarez can do to stain their honor.

Under both this Court’s First Amendment precedents and the Stolen Valor Act itself, 18 U.S.C. § 704, there is a nearly limitless range of contemptible expression and expressive conduct in which a person such as Alvarez may engage regarding military awards, including those he has not earned. He may burn them, deface them, or mutilate them. *Texas v. Johnson*, 491 U.S. 397 (1989). He may disparage them and denigrate their

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<sup>1</sup> Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. Pursuant to S. Ct. R. 37.6, *amici curiae* certify that no counsel for a party authored any part of this brief, nor did any person or entity, other than the *amici*, their members, or their counsel, make a monetary contribution to fund the preparation or submission of this brief.

<sup>2</sup> Natalie Sherman, *You Get Used to Being Shot At*, Boston Herald, Nov. 11, 2011, available at 2011 WLNR 23543262.

worth. *Street v. New York*, 394 U.S. 576, 592-93 (1969). He may mock or condemn the heroes who risked or even sacrificed their lives to earn them. *Snyder v. Phelps*, 562 U.S. \_\_\_, 131 S. Ct. 1207 (2011). He may damn the Government that awards them and denounce in the harshest terms the military actions that gave rise to them. *Cohen v. California*, 403 U.S. 15 (1971). He even may declare that he should have received an award himself, or that the awards' actual recipients were not deserving. He simply may not wear or claim them as his own.

*Amici curiae* are 25 military and veterans service organizations who collectively represent millions of current and former members of the U.S. Armed Forces, including members of the Active Component, Reserves, and National Guard; currently serving, separated, disabled, and retired personnel; officers and enlisted; and members of the Army, Navy, Air Force, Marine Corps, and Coast Guard. Their members collectively have earned virtually every available military decoration, medal, and badge, including the Medal of Honor. The Appendix contains a brief description of each *amicus* group. *Amici* share a strong interest in preventing pretenders from appropriating for themselves, and enjoying the benefits of, the goodwill and prestige associated with military awards.

## STATEMENT

The Stolen Valor Act provides, in relevant part:

Whoever 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, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

18 U.S.C. § 704(b). The Act provides enhanced penalties of imprisonment for up to one year if the “decoration or medal involved in [the] offense” is the Congressional Medal of Honor, *id.* § 704(c)(1), Distinguished Service Cross, Navy Cross, Air Force Cross, Silver Star, or Purple Heart, *id.* § 704(d).

The Act applies to military decorations, medals, and badges (collectively, “military awards”). A “decoration” is “a distinctively designed mark of honor denoting heroism, or meritorious or outstanding service or achievement.”<sup>3</sup> Decorations

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<sup>3</sup> *Wear and Appearance of Army Uniforms and Insignia*, Army Reg. (AR) 670-1, ¶ 29-6(a) (Feb. 3, 2005); *U.S. Navy Uniform Regulations*, § 5302(1)(b) (Jan. 2006); *Marine Corps Uniform Regulations*, Marine Corps Ord. (MCO) P1020.34G, § 5101(2) (Mar. 31, 2003).

include, but are not limited to, those listed above, as well as the Distinguished Service Medal, Legion of Merit, Distinguished Flying Cross, and Bronze Star Medal.<sup>4</sup>

The term “medal”<sup>5</sup> embraces decorations, the Good Conduct Medal,<sup>6</sup> and service medals, which generally “denote honorable performance of military duty within specific limited dates in specified geographical areas.”<sup>7</sup>

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<sup>4</sup> *Military Awards*, AR 600-8-22, ¶ 3-2(a) (Dec. 11, 2006); AR 670-1, ¶ 29-6(a); accord *Navy and Marine Corps Awards Manual*, Sec’y Navy Instr. (SECNAVINST) 1650.1H, Ch. 1, App. B, § a (Aug. 22, 2006); *id.* § 230; *U.S. Navy Uniform Regulations*, § 5305(1); MCO P1020.34G, § 5102(5). The Army also classifies unit awards such as the Presidential Unit Citation as “decorations,” AR 600-8-22, ¶ 7-12(a), but the Navy and Marine Corps do not, *U.S. Navy Uniform Regulations*, §§ 5302(1)(c), 5306; MCO P1020.34G, § 5101(2)-(3).

<sup>5</sup> AR 600-8-22, at 184; see also AR 670-1, ¶ 29-6(d); *U.S. Navy Uniform Regulations*, § 5302(1)(e); MCO P1020.34G, § 5101(5).

<sup>6</sup> AR 600-8-22, ¶ 4-1.

<sup>7</sup> AR 600-8-22, ¶ 5-1. Whereas the Army broadly refers to all medals other than decorations and the Good Conduct Medal as “service medals,” AR 600-8-22, ¶ 5-1, the Department of Defense recognizes three categories of medals: campaign, expeditionary, and service. 1 *Manual of Military Decorations and Awards*, Dep’t of Def. Manual (DoDM) 1348.33, ¶ 4(a) (Oct. 12, 2011). The Navy, Air Force, and Marine Corps categorize most medals as “campaign and service awards.” SECNAVINST 1650.1H, Ch. 1, App. B, § d; *id.* § 410; *Air Force Awards and Decorations Program*, Air Force Instr. (AFI) 36-2803, ¶¶ 6-1.6.3 (June 15, 2001); *Dress and Personal Appearance of Air Force*

Finally, a “badge” is “awarded to an individual for identification purposes, or for attaining a special skill or proficiency.”<sup>8</sup> Examples include the Combat Action Badge, Expert Infantryman Badge, and Parachutist badges. The term “badge” also includes “tabs authorized to indicate skill,” including the Ranger and Special Forces tabs.<sup>9</sup>

Respondent Xavier Alvarez was an elected member of the Three Valley Water District Board of Directors. Pet. App. 4a. In September 2007, the Government filed a one-count Information against Alvarez,<sup>10</sup> charging him with violating the Stolen Valor Act, 18 U.S.C. § 704(b), by falsely declaring, during a joint meeting with a neighboring water district board, that he had been “awarded the Medal of Honor.” Pet. App. 4a. The Government later filed a superseding Information against Alvarez, alleging that he also violated the Stolen Valor Act on a different occasion by making other false claims about receiving the Medal of Honor. J.A. 12-13.

The District Court denied Alvarez’s motion to dismiss the Information, holding that the First

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*Personnel*, AFI 36-2903, ¶¶ 11-5 (July 18, 2011); MCO P1020.34G, § 5102(8).

<sup>8</sup> AR 670-1, ¶ 29-13; accord *U.S. Navy Uniform Regulations*, § 5302(1)(g); MCO P1020.34G, § 5101(7); see also AFI 36-2903, at 174-77.

<sup>9</sup> AR 670-1, ¶ 8-2(b), (d).

<sup>10</sup> Information, Dist. Ct. Dock. #1, at 1-2 (Sept. 26, 2007).

Amendment does not protect “false statements made knowingly and intentionally \* \* \* even when political in nature.” Pet. App. 142a. It further declared that, in any event, Alvarez’s false statement was “not political in nature,” but rather “a lie intended to impress others present at the meeting.” Pet. App. 143a.

Following this ruling, Alvarez agreed to plead guilty to Count I, regarding his lies at the water board meeting, and acknowledged that he was factually guilty of both counts.<sup>11</sup> Under his agreement, Alvarez retained the right to appeal the court’s denial of his First Amendment challenge to the Stolen Valor Act. Pet. App. 1a-2a. The court accepted Alvarez’s plea and sentenced him to three years of probation; a \$5,000 fine; a \$10 special assessment; and 416 hours of community service, which the court recommended occur at a veterans hospital.<sup>12</sup>

Alvarez appealed his conviction, and a split panel of the Ninth Circuit reversed it, ruling that the Stolen Valor Act is “facially invalid,” and had been “unconstitutionally applied” to Alvarez. Pet App. 39a. The majority began by holding that the Act is subject to strict scrutiny, because the First Amendment generally protects false speech, *id.* at

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<sup>11</sup> Plea Agreement for Defendant Xavier Alvarez, Dist. Ct. Dock. #31, at 1-2, ¶¶ 2-3 (Apr. 30, 2008).

<sup>12</sup> Judgment and Probation/Commitment Order, Dist. Ct. Dock. #41, at 1-2 (July 23, 2008).

2a-4a, 32a, 35a, particularly “false statements of fact” by satirists, method actors, poets, and fiction authors, *id.* at 31a-32a. The majority conceded that the Government has a “compelling interest[] in preserving the integrity of its system of honoring our military men and women.” *Id.* at 37a. It determined, however, that the Stolen Valor Act is not a “narrowly tailored means of achieving that noble interest,” because the “remedy of ‘more speech’ [i]s \* \* \* available to repair any harm” caused by lies about military awards. *Id.* at 37a-38a.

Judge Bybee dissented, declaring that “[f]alse statements are unprotected by the First Amendment except in a limited set of contexts where such protection is necessary ‘to protect speech that matters.’” *Id.* at 42a, quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). He stated that protecting “false, self-aggrandizing statements by public servants” is not necessary to preserve any constitutionally valuable speech. *Id.* at 72a. Thus, there was no need to subject the Act to strict scrutiny, *id.* at 76a, and Alvarez’s as-applied challenge also failed, *id.* at 69a-70a, 72a. He further concluded that the Act could not reasonably be interpreted as applying to fictional or satirical works. *Id.* at 88a-90a.

The Government moved for rehearing and rehearing *en banc*, but the Ninth Circuit denied the motion. *Id.* at 91a-92a. Seven judges dissented from the court’s refusal to rehear the case *en banc*. *Id.* at 116a; see also *id.* at 135a.

## SUMMARY OF ARGUMENT

This case is about theft, not lying in general. Alvarez, and others like him, have misappropriated for their own benefit an unearned share of the two centuries' worth of goodwill and prestige associated with American military awards. As the panel below recognized, "[T]he most obvious reason people lie about receiving military honors is because they believe that their being perceived as recipients of such honors brings them acclaim." Pet. App. 23a. In this case, Alvarez's own attorney admitted, "Mr. Alvarez told a lie to try to make himself look good in the eyes of his constituents and colleagues."<sup>13</sup>

The principal question in this case is whether the First Amendment allows the Government to prevent impersonators from wrongfully attempting to misappropriate for themselves the intangible, non-pecuniary benefits and goodwill—the "acclaim," Pet. App. 23a—that have become associated with military awards as a result of the Government's longstanding efforts. Thus, although *amici* agree with the Government's showing that the Act should not be subject to strict scrutiny—because the First Amendment generally does not protect false speech, unless such protection is necessary to prevent chilling of other, more valuable speech—this Court need not reach that broader issue.

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<sup>13</sup> Defendant's Position Re: Sentencing, Dist. Ct. Dock. #35, at 4 (July 7, 2008).

Part I begins by providing crucial context for the Stolen Valor Act, demonstrating that the problem of people falsely claiming to have received military awards that they did not, in fact, earn is both serious and widespread. Such imposters—who have included state and federal officials, as well as many other successful, prominent people—have enjoyed undeserved praise, honors, and other intangible, non-pecuniary benefits by wrongfully taking advantage of the goodwill associated with those awards.

Part II demonstrates that, under this Court's ruling in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 533 (1987), Congress may, consistent with the First Amendment, prohibit charlatans from wrongfully attempting to tap into the enormous reservoir of goodwill and prestige associated with military awards. The Government created these awards, endowed them with meaning, and cultivated their reputation over the course of decades by establishing and enforcing strict requirements for them. The Government's agents—Soldiers, Sailors, Airmen, Marines, and Coast Guard members—hallowed these awards through their service, sacrifice, and achievements. These emblems are thus akin to “certification marks,” attesting to the valor and accomplishments of their recipients. Regardless of its authority under the First Amendment to punish false statements in general, the Government constitutionally may prevent others from reaping, or

attempting to reap, the intangible fruits of this labor.

This Part also shows that the Government's authority to bar third parties from *wearing* unearned military awards with the intent to deceive others, see 18 U.S.C. § 704(a); see also *Schacht v. United States*, 398 U.S. 58, 61 (1970); *Smith v. Goguen*, 415 U.S. 566, 596 (1974) (Rehnquist, J., dissenting), strongly suggests that Congress may likewise prohibit people from falsely *claiming* to have received those awards, 18 U.S.C. § 704(b). During the Revolutionary War, General George Washington established the earliest ban on the unauthorized wearing of military awards,<sup>14</sup> and Congress has prohibited such conduct for nearly a century, see, e.g., Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286, *formerly codified at* 10 U.S.C. § 1425. The Stolen Valor Act is a constitutionally permissible extension of such provisions.

For these reasons, this Court should reverse the Ninth Circuit's ruling, and uphold the Stolen Valor Act.

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<sup>14</sup> Gen. George Washington, Gen. Orders (Aug. 7, 1782), in 24 *The Writings of George Washington from the Original Manuscript Sources, 1745-1799*, at 487, 487 (John C. Fitzpatrick, ed. 1938).

**ARGUMENT****I. FALSE CLAIMS ABOUT MILITARY DECORATIONS, MEDALS, AND BADGES ARE A SERIOUS, WIDESPREAD PROBLEM.**

On January 25, 2008, during a combat reconnaissance patrol in Afghanistan, Staff Sergeant Robert J. Miller's squad was ambushed by "a large, well-coordinated insurgent force \* \* \* assaulting from elevated positions with ample cover."<sup>15</sup> His patrol was exposed, "totally vulnerable to enemy rocket propelled grenades and automatic weapon fire."<sup>16</sup>

[W]ith total disregard for his own safety, [Staff Sergeant Miller] called for his men to quickly move back to covered positions as he charged the enemy over exposed ground and under overwhelming enemy fire in order to provide protective fire for his team. While maneuvering to engage the enemy, Staff Sergeant Miller was shot in his upper torso. Ignoring the wound, he continued to push the fight, moving to draw fire from over one hundred enemy fighters upon himself. He

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<sup>15</sup> Medal of Honor Official Citation, Staff Sergeant Robert J. Miller (Oct. 6, 2010), *available at* <http://www.army.mil/medalofhonor/miller/citation.html> (last referenced Nov. 28, 2011).

<sup>16</sup> *Ibid.*

then again charged forward through an open area in order to allow his teammates to safely reach cover. After killing at least 10 insurgents, wounding dozens more, and repeatedly exposing himself to withering enemy fire while moving from position to position, Staff Sergeant Miller was mortally wounded by enemy fire. His extraordinary valor ultimately saved the lives of seven members of his own team and 15 Afghanistan National Army soldiers.<sup>17</sup>

Staff Sergeant Miller was awarded the Congressional Medal of Honor for his uncommon valor.

Hearing of such gallant exploits fills most people with a sense of awe, gratitude, and admiration. And it is the desire to evoke such feelings in others that generally motivates impersonators like Alvarez to falsely claim they received military honors that they did not, in fact, earn. The Stolen Valor Act is a narrow, carefully tailored response to the ever-growing number of people falsely claiming to have received prestigious military awards.<sup>18</sup>

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<sup>17</sup> *Ibid.*

<sup>18</sup> See generally B.G. Burkett & Glenna Whitley, *Stolen Valor: How the Vietnam Generation Was Robbed of Its Heroes and Its History* (1998).

The Ninth Circuit misapprehended, or erroneously minimized, both the scope and nature of the problem. See Pet. App. 38a (“[T]he greatest damage done seems to be to the reputations of the liars themselves.”). Pretenders have included a U.S. Attorney,<sup>19</sup> Member of Congress,<sup>20</sup> ambassador,<sup>21</sup> judge,<sup>22</sup> Pulitzer Prize-winning historian and bestselling author,<sup>23</sup> manager of a Major League

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<sup>19</sup> Chris Roberts, *State Withdraws Herring’s Hero Status*, El Paso Times, July 2, 2010, available at 2010 WLNR 13296932 (explaining that former U.S. Attorney and state senator Charles Ferguson Herring had not earned the Navy Cross, three Purple Hearts, and a Bronze Star, as he contended in an oral history).

<sup>20</sup> Bryan Denson, *Cooley Convicted of Lying*, Oregonian, Mar. 19, 1997, available at 1997 WLNR 6186536 (discussing former Oregon Congressman Wes Cooley’s state law conviction for falsely claiming in a voter pamphlet that he served in “Army Special Forces, Korea”).

<sup>21</sup> Thomas Farragher, *Lies Seen Catching Up With Top Officials, Even in the Grave*, Boston Globe, Dec. 14, 1997, available at 1997 WLNR 2350132 (discussing the exhumation of former U.S. Ambassador to Switzerland Larry Lawrence from Arlington National Cemetery, after it was discovered that he had not served in the Merchant Marine or suffered a severe head injury from a German torpedo slamming into his ship).

<sup>22</sup> Linda Young, *Judge Censured Over Fake Medal*, Chicago Tribune, July 25, 1995, available at 1995 WLNR 4564620 (discussing Kane County Circuit Judge Michael F. O’Brien, who falsely claimed to have earned two Medals of Honor and purchased two such medals, displaying one in his chambers).

<sup>23</sup> Josh Tyrangiel, *A History of His Own Making*, Time, July 2, 2001, available at <http://www.time.com/time/magazine/>

Baseball team,<sup>24</sup> Navy Captain,<sup>25</sup> police chief,<sup>26</sup> top executive at a world-famous research laboratory,<sup>27</sup> director of state veterans programs,<sup>28</sup>

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article/0,9171,165175,00.html (discussing historian Joseph Ellis' admittedly false claims during class lectures that he had served as a platoon leader and paratrooper in Vietnam and on General William Westmoreland's staff).

<sup>24</sup> Jason Diamos, *Jays' Manager is Hounded by War Tales*, New York Times, Dec. 15, 1998, available at 1998 WLNR 2974342 (discussing the admission of Tim Johnson, then-manager of the Toronto Blue Jays, that he "had lied on his resume and in stories he had told his players about having been in combat in Vietnam").

<sup>25</sup> *Making a Sham of Military Honors*, Virginian-Pilot & Ledger Star, Aug. 9, 2004, available at 2004 WLNR 3452826 (explaining that Navy Capt. Roger Dean Edwards had an "impressive chest of medals" including the Silver Star, Legion of Merit, and Purple Heart, but "nearly half the medals he wore were fraudulent").

<sup>26</sup> Perry Brothers, *Veteran Pleads Guilty to Lying*, Cincinnati Enquirer, Mar. 14, 2000, available at 2000 WLNR 10389561 (discussing false claims of Donald R. Nicholson, former Chief of Police for Amelia, Ohio, that he earned the Distinguished Service Cross).

<sup>27</sup> Liz Chapman, *Jackson Lab Official Resigns, Warren Cook Sr. Admits to Including False Listings on Resume*, Bangor Daily News, Sept. 30, 2003, available at 2003 WLNR 1718170 (discussing the resignation of the former vice president of government relations for Jackson Laboratory, who "admitted he falsely listed the prestigious Navy Cross as a military accomplishment on his job resume").

<sup>28</sup> Adrienne Lu, *Ex-N.J. Veterans Director Lied About War Record*, Philadelphia Inquirer, Dec. 7, 2008, available at 2008

university administrator,<sup>29</sup> pastor,<sup>30</sup> candidate for countywide office,<sup>31</sup> mayor,<sup>32</sup> physician,<sup>33</sup> and more than one police officer.<sup>34</sup>

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WLNR 23511558 (discussing William Devereaux, the former N.J. Director of Veterans Programs who stepped down after admitting that he lied about receiving a Purple Heart, Bronze Star, and Soldier's Medal as a paratrooper in Vietnam).

<sup>29</sup> Vimal Patel, *Lies Catch Up to Kemos*, The Eagle, June 27, 2010, available at 2010 WLNR 12961531 (discussing the resignation of Alexander Kemos, former Senior Vice President for Administration of Texas A&M University, because of his "false claims of being an ex-Navy SEAL").

<sup>30</sup> Associated Press, *Exposing the Phony SEALs*, Herald News, May 12, 2011, available at 2011 WLNR 12129433 (false claim about having served as a Navy SEAL).

<sup>31</sup> Louise Popplewell, *Navy Says Candidate Was No SEAL*, Victoria Advocate, Mar. 3, 2000, available at <http://tinyurl.com/8yeze5k> (false claim about having served as a Navy SEAL).

<sup>32</sup> John Crewdson, *False Courage: Claims for Top Military Honors Don't Hold Up*, Chicago Tribune, Oct. 26, 2008, available at 2008 WLNR 20423903 (false claim of John Agenbroad, mayor of Springboro, Ohio, about receiving the Silver Star).

<sup>33</sup> *Ibid.* (false claim about receiving the Silver Star).

<sup>34</sup> *Silver Star Faker Avoids Jail, Loses Cop Job*, Marine Corps Times, Dec. 14, 2009, available at 2009 WLNR 26014214 (false claim about receiving the Silver Star); see also Dannie Oliveaux, *Sumner Man Convicted for Fake Medals*, Bonney Lake & Sumner Courier Herald, Mar. 23, 2009, available at <http://www.blscourierherald.com/news/41714627.html>.

An investigation by the *Chicago Tribune* revealed that, of the 333 people listed in the online edition of *Who's Who* as having received a top military award, “fully a third of those claims cannot be supported by military records.”<sup>35</sup> Likewise, “[a] look at 273 obituaries published in the past decade alone found that in more than four of five cases, official records didn’t support decorations for bravery attributed to the deceased.”<sup>36</sup> When the Library of Congress compiled veterans’ oral histories for its Veterans History Project, 25 of the 49 Medal of Honor recipients it identified, as well as 32 Distinguished Service Cross recipients and 14 Navy Cross recipients, apparently had not actually been awarded those decorations.<sup>37</sup>

Although many people lie about their military records to obtain government benefits, false claims often lead instead to more intangible, non-pecuniary advantages and honors. For example, in 2008, the House of Representatives passed a bill to name a post office after Irving Joseph Schwartz, who had

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<sup>35</sup> Crewdson, *supra* note 32, at 1.

<sup>36</sup> *Ibid.* (“[T]he *Tribune* used military records to unearth 84 bogus Medals of Honor, 119 Distinguished Service Crosses, 99 Navy Crosses, five Air Force Crosses and 96 Silver Stars.”).

<sup>37</sup> *Half of MOH Entries in Oral History Project are Incorrect*, Marine Corps Times, Oct. 1, 2007, available at 2007 WLNR 27917486. The Library of Congress attributes at least some of the mistakes regarding the Medal of Honor to data entry problems. *Ibid.*

falsely claimed that he received a Silver Star and three Purple Hearts as a paratrooper from the 82nd Airborne Division who jumped into Normandy six days before D-Day.<sup>38</sup> The Air Force named a national award after retired Chief Master Sergeant Spencer B. Dukes, who had falsely claimed he received numerous medals, including the Silver Star, and survived the Bataan Death March; it rescinded the award after Dukes' lies came to light.<sup>39</sup> Similarly, the Boxing Writers of America established the Pat Putnam Award for perseverance in overcoming adversity—which it awarded to Muhammad Ali—in honor of well-known *Sports Illustrated* writer Pat Putnam, who falsely claimed to have received four Purple Hearts and a Navy Cross, and to have spent 17 months in a Chinese POW camp during the Korean War.<sup>40</sup>

In further example, Joseph A. Cafasso, who was discharged from the Army as a Private First Class after only 44 days, falsely claimed to have been a

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<sup>38</sup> Keith Rogers & Steve Tetreaul, *Attention Reveals Lie About WWII Record*, Las Vegas Review-Journal, Nov. 9, 2008, available at 2008 WLNR 21588206; see also H.R. 6837, 110th Cong. (Sept. 10, 2008).

<sup>39</sup> Associated Press, *Pentagon Sleuths Discover Bataan March Hero Lied*, Fresno Bee, Jan. 19, 1997, available at 1997 WLNR 1826684.

<sup>40</sup> Bernard Fernandez, *Revelations About Boxing Writer Pat Putnam*, Philadelphia Daily News, May 2, 2008, available at 2008 WLNR 8181576.

Lieutenant Colonel in the Special Forces and to have received the Silver Star; he became a military consultant for Fox News for four months (initially unpaid), providing information to reporters, producers, and on-air consultants.<sup>41</sup> Jesse Macbeth—who had been discharged from the Army after only a month—falsely claimed that he had been an Army Ranger who received a Purple Heart, to lend credibility to his fabricated stories about the mass murders and other war crimes he purportedly witnessed American troops committing during the liberation of Iraq.<sup>42</sup> Likewise, Micah Wright, who never served in the military, sold nearly 20,000 copies of his antiwar book *You Back the Attack, We'll Bomb Who We Want*, in which he falsely claimed to have been an Army Ranger.<sup>43</sup> Similarly, the National Educational Television Network broadcast lectures by Dan Gisel, who spoke of “his experiences as a Green Beret in Vietnam” while wearing an Army uniform bearing the Distinguished Service

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<sup>41</sup> Jim Rutenberg, *At Fox News, the Colonel Who Wasn't*, New York Times, Apr. 29, 2002, available at 2002 WLNR 4054043.

<sup>42</sup> Colin McDonald, *Iraq War “Veteran,” Hero Lied About it All*, Seattle Post-Intelligencer, June 8, 2007, available at 2007 WLNR 10765581.

<sup>43</sup> Calvin Reed, *Seven Stories Cancels Book*, Publishers Weekly, May 10, 2004, available at 2004 WLNR 12572530. Cf. John Marshall, *Former Warrior’s Art is His Weapon Now*, Seattle Post-Intelligencer, June 13, 2003, available at 2003 WLNR 2952866 (“Sometimes it takes a warrior to make a real anti-war statement. Such is the case with Micah Ian Wright, a former Army Ranger who took part in the invasion of Panama.”).

Cross; Gisel was neither a Green Beret nor a Distinguished Service Cross recipient.<sup>44</sup>

Impersonators also have worn unearned medals, or lied about their awards and badges, at military funerals,<sup>45</sup> veterans' functions,<sup>46</sup> on Veterans' Day floats,<sup>47</sup> and during ceremonies to honor true military heroes. One such example is Charles T. White who, based on his false claims that he received four Purple Hearts and had been a POW for seven months during the Vietnam War, was invited to be "the keynote speaker at a ceremony honoring former prisoners of war at Naval Air Station Jacksonville."<sup>48</sup>

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<sup>44</sup> Tom Bowman, *Old Soldier Unveils Veteran Liars*, Baltimore Sun, Jan. 13, 1998, available at 1998 WLNR 1137484.

<sup>45</sup> John P. Martin, *A Dressing Down for a Marine Imposter*, Star Ledger, Apr. 24, 2004, available at 2004 WLNR 18066039 (discussing Walter Carlson, who apologized in court for wearing a Marine uniform with an unearned Navy Cross, Silver Star, Bronze Star, and Purple Heart to the funeral of a Marine officer who died in Iraq).

<sup>46</sup> Gregg Zoroya, *Frauds Put Up a Decorated Front*, USA Today, June 21, 2006, available at 2006 WLNR 10676418.

<sup>47</sup> Patricia C. McCarter, *Man Accused in Medals Case to Change Plea*, Huntsville Times, Apr. 9, 2010, available at 2010 WLNR 7420597.

<sup>48</sup> Chad Smith, *Veteran Pleads Guilty to Lying About Purple Hearts*, St. Augustine Record, Jan. 31, 2009, available at [http://staugustine.com/stories/013109/news\\_013109\\_036.shtml](http://staugustine.com/stories/013109/news_013109_036.shtml).

In addition to the pretenders who have been caught in their lies, it is impossible to know how many others have not been exposed. It is apparent, however, that false claims concerning military medals, decorations, and badges are a widespread and troubling problem, even when they are not directly tied to pecuniary benefits. It is an affliction that “more speech” frequently cannot wholly remedy, and often is not available to remedy, particularly in a timely manner. Cf. Pet. App. 38a-39a.

In short, whether it is a person masquerading as a decorated general at a veterans’ celebration,<sup>49</sup> or a braggart whose false claims of receiving prestigious decorations move a young neighbor to write a school essay about him entitled “The Hero Next Door,”<sup>50</sup> lies about military honors take advantage of the public’s trust. They allow con men to benefit in innumerable tangible and intangible ways from the virtually inexhaustible reservoir of goodwill, admiration, and honor that military heroes have

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<sup>49</sup> Greg Moran, *Man Who Wore Unearned Medals Gets Probation*, Union Tribune, Apr. 16, 2010, available at 2010 WLNR 8028488 (discussing David Weber, who wore the uniform of a two-star general officer, two Purple Hearts, and several Legion of Merit medals at a VFW celebration of the Marine Corps’ birthday).

<sup>50</sup> Mark Morris, *Charge Against Bogus “Hero” Could Be Dropped*, Kansas City Star, June 5, 2010, available at 2010 WLNR 11487052 (explaining that Timothy Watkins, who served for one month in the Army, admitted that his claims about receiving the Silver Star and Purple Heart were false and agreed to 18 months of pretrial supervision in a diversion agreement).

earned over the past 235 years. As Part II demonstrates, the Government has ample constitutional authority to prevent such piracy.

**II. THE GOVERNMENT CONSTITUTIONALLY MAY PREVENT PEOPLE FROM WRONGFULLY TAKING ADVANTAGE OF THE GOODWILL AND PRESTIGE ASSOCIATED WITH MILITARY AWARDS THEY HAVE NOT EARNED.**

At its core, this case is about theft, not lying in general. It is undisputed that the First Amendment does not protect people who falsely claim to have received military awards in order to fraudulently receive tangible or pecuniary benefits such as tax breaks, increased government benefits, or veterans' preferences or set-asides. See, e.g., *United States v. Swisher*, 790 F. Supp. 2d 1215, 1223 (D. Idaho 2011). This Court likewise should conclude that the First Amendment does not protect those who wrongly appropriate for themselves the intangible, nonpecuniary advantages and "acclaim," Pet App. 23a, that flow from the goodwill associated with military awards they have not earned.<sup>51</sup> Indeed, the

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<sup>51</sup> Because the Act applies only to a person who "falsely represents" himself as having received a military award, 18 U.S.C. § 704(b), it covers only statements that are intended to be understood as allegedly truthful factual assertions. See *Williams v. United States*, 458 U.S. 279, 284 (1982) (holding that a person did not "make any representation" or "statement" by depositing a check, because "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'"); *United States v. Guzman*, 781 F.2d 428, 431 (5th

“[f]acial invalidation” of the Stolen Valor Act that Alvarez seeks is “manifestly[] strong medicine that has been employed by the Court sparingly and only as a last resort.” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (quotation marks omitted); see also *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008).

Under this analysis, this Court need not resolve the sweeping question, posed by the parties and courts below, of whether lies are presumptively excluded from First Amendment protection. Cf. Pet. App. 3a (analogizing Alvarez’s false statements about receiving the Medal of Honor to “lying about one’s height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one’s mother that one does not smoke”); see also Pet. App. 109a-110a (Kozinski, C.J., concurring in denial of rehearing *en banc*). As Section A explains, the First Amendment unambiguously permits the Government to prevent third parties from wrongfully attempting to claim for themselves, or potentially benefit in any way from, the goodwill associated with military awards, because the Government created

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Cir. 1986) (*per curiam*) (“A false representation is one that is incorrect and untrue and is made with an intent to deceive or mislead.”); see also *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 26 (1990) (holding that statements of “hyperbole” are “not understood as actual assertions of fact”) (Brennan, J., dissenting). Thus, despite the concerns of the panel below, Pet App. at 31a-32a, the Act does not cover satire, parody, hyperbole, statements by actors, and the like that do not constitute “false[] represent[at]ions.”

them, endowed them with meaning, and has issued them selectively over the course of centuries in accordance with exacting requirements, and the members of the Armed Forces have consecrated such awards through their courage, dedication, and sacrifice. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 533 (1987). Section B demonstrates that the Government's interest in preventing third parties from wrongfully appropriating the goodwill associated with military awards is distinct from its asserted interest in preserving their value or meaning, which this Court has questioned in other contexts. And Section C shows that this same conclusion follows from the Government's well-established authority to prevent the *wearing* of unearned military decorations.

**A. Under *U.S. Olympic Committee*, Third Parties Do Not Have a Constitutional Right to Reap the Advantages of the Goodwill and Prestige That, As a Result of the Government's Efforts, Have Become Associated With Military Awards.**

The First Amendment does not impede the Government from restricting speech in order to prevent third parties from potentially benefiting, or attempting to benefit, from the goodwill associated with the intellectual property of others, including trademarks, service marks, collective marks, and certification marks, as well as certain other terms and symbols specially designated by Congress. Some

courts have gone so far as to declare these types of restrictions to be content-neutral. See, e.g., *Dr. Seuss Enters., L.P. v. Penguin Books, USA, Inc.*, 109 F.3d 1394, 1397 n.1 (9th Cir. 1997); *Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979).

Courts have enforced such restrictions even where a person was attempting to use someone else's intellectual property in order to facilitate political speech, which enjoys the highest level of First Amendment protection. See, e.g., *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 788 (8th Cir. 2004) (holding that the First Amendment does not “protect[] [the defendant's] appropriation of plaintiff's marks in order to spread his protest message”); *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 93 (2d Cir. 1997) (“Even assuming that [the defendant] might communicate its political message more effectively by appropriating [the plaintiff's] Mark, such appropriation \* \* \* \* is not protected by the First Amendment.”). Courts likewise have enforced such restrictions where the intellectual property at issue was the name of a church—a non-commercial issue squarely at the heart of the First Amendment. See, e.g., *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 414-16 (6th Cir. 2010) (enforcing trademark rights in “Seventh-day Adventist”); *TE-TE-MA Truth Found. v. World Church of Creator*, 297 F.3d 662, 665 (7th Cir. 2002) (enforcing trademark rights in “Church of the Creator”).

1. In *U.S. Olympic Committee*, 483 U.S. at 533, this Court upheld the constitutionality of the Amateur Sport Act of 1978, Pub. L. No. 95-506, 92 Stat. 3045 (Nov. 8, 1978), *formerly codified at* 36 U.S.C. § 380. Section (c) of the Act declared that the U.S. Olympic Committee (“USOC”) “shall have exclusive right to use \* \* \* the words ‘Olympic’, ‘Olympiad’, ‘Citius Altius Fortius’, or any combination thereof.” *Id.* at 526 n.4, quoting 36 U.S.C. § 380; see also *id.* at 530 (“Congress intended to provide the USOC with exclusive control of the use of the word ‘Olympic’ without regard to whether an unauthorized use of the word tends to cause confusion.”). Section (a) further provided that a person could not, among other things, use those terms “to promote any theatrical exhibition, athletic performance, or competition,” regardless of whether such use was commercial. *Id.* at 528, quoting 36 U.S.C. § 380(a).

This broad prohibition, like the Stolen Valor Act, went even further than traditional federal intellectual property protections. See 483 U.S. at 531. The Court nevertheless held that these restrictions were permissible in part because “Congress reasonably could conclude that the commercial and promotional value of the word ‘Olympic’ was the product of the USOC’s ‘own talents and energy, the end result of much time, effort, and expense.’” *U.S. Olympic Comm.*, 483 U.S. at 532-33, quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977). It later reiterated, “Because Congress reasonably could conclude that the USOC

has distinguished the word ‘Olympic’ through its own efforts, Congress’ decision to grant the USOC a limited property right in the word ‘Olympic’ falls within the scope of trademark law protections, and thus certainly within constitutional bounds.” *Id.* at 534-35; see also *FTC v. A.P.W. Paper Co.*, 328 U.S. 193, 198 (1946) (recognizing Congress’ authority to prevent a person from adopting or using “words or symbols” to “creat[e] the impression that [his] products were sponsored by or otherwise carried the imprimatur of the Red Cross”). The Court expressly recognized that such protections could be either civil or criminal. See *U.S. Olympic Comm.*, 483 U.S. at 532 n.8; see also *Garrison v. Louisiana*, 379 U.S. 64, 67 & n.3 (1964) (treating civil and criminal libel comparably for First Amendment purposes).

The Court went on to reject the argument that the plaintiff had a First Amendment right to use the term “Olympic” because it wished to do so for a non-commercial purpose, to “make a political statement about the status of homosexuals in society.” *U.S. Olympic Comm.*, 483 U.S. at 535. The Court noted that the plaintiff’s “expressive use of the word cannot be divorced from the value the USOC’s efforts have given to it,” *id.* at 541, and that the plaintiff’s “proposed use of the word ‘Olympic’ was a clear attempt to exploit the imagery and goodwill created by the USOC,” *id.* at 541 n.19. The Court concluded, “The mere fact that the [plaintiff] claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to ‘appropriat[e] to itself the harvest of those who have

sown.” *Id.* at 541, quoting *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 239-40 (1918).

Thus, this Court in *U.S. Olympic Committee* squarely recognized that Congress may, consistent with the First Amendment, prohibit a third party from associating itself with, or taking advantage of the goodwill associated with, certain symbols that have acquired their value and goodwill primarily through the efforts of others. Such a prohibition may validly be applied even if that third party is engaged in a non-commercial activity or attempting to express a political message that, in all other respects, is protected by the First Amendment. *U.S. Olympic Comm.*, 483 U.S. at 532-35, 541; *Coca-Cola Co.*, 382 F.3d at 788; *United We Stand Am.*, 128 F.3d at 93.<sup>52</sup>

2. The principles of *U.S. Olympic Committee* should govern here. Indeed, those principles highlight the Ninth Circuit’s error in focusing

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<sup>52</sup> This principle defeats Alvarez’s claim that the Stolen Valor Act is unconstitutional as applied to him, because his lie about receiving the Medal of Honor purportedly concerned his qualifications for public office. An otherwise valid prohibition on knowingly false statements need not contain an exception to permit knowingly false statements of fact in the political context. *Harte-Hanks Comms., Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (affirming libel verdict against a newspaper for its false statements about a candidate for municipal judge made with “actual malice”); *Garrison*, 379 U.S. at 75 (“That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government.”).

primarily on whether false claims about receiving military awards “cause damage to the [awards] reputation and meaning.” Pet. App. 23a. As that court itself recognized, “the most obvious reason people lie about receiving military honors is because they believe that their being perceived as recipients of such honors brings them acclaim.” *Ibid.* Alvarez’s attorney admitted that Alvarez lied “to try to make himself look good in the eyes of his constituents and colleagues.”<sup>53</sup> And the district court found that Alvarez’s claims about receiving the Medal of Honor “appear[] to be merely a lie intended to impress others present at the meeting.” *Id.* at 143a.

Here, as in *U.S. Olympic Committee*, the value and goodwill associated with military awards is “the end result of much time, effort, and expense”—by both the Government itself, as well as those serving in its military forces. *U.S. Olympic Comm.*, 483 U.S. at 532-33, quoting *Zacchini*, 433 U.S. at 575. The meaning of each award was established by the Government,<sup>54</sup> the awards’ value has been

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<sup>53</sup> Defendant’s Position Re: Sentencing, Dist. Ct. Dock. #35, at 4 (July 7, 2008).

<sup>54</sup> *E.g.*, 10 U.S.C. §§ 3741, 6241, 8741 (providing that the Medal of Honor may be awarded only to a person who “distinguishes himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty” in combat operations); *id.* §§ 3742, 6242, 8742 (providing that a person may be awarded a service cross if he “distinguishes himself by extraordinary heroism not justifying the award of a medal of honor” in combat operations); *id.* § 1129 (establishing criteria for Purple Heart).

maintained by the Government's selectivity in awarding them,<sup>55</sup> and their esteem in the eyes of the public has been cultivated over the years through the service and achievements of the military personnel—the Government's agents—who earned them. Such awards are impressive because of the efforts of heroes such as Lance Corporal Reichenthal, *supra* at 1, Staff Sergeant Miller, *supra* at 11-12, and Justice Byron White, who earned two Bronze Stars from the Navy.<sup>56</sup> The Stolen Valor Act's narrow prohibition is a valid exercise of Congress' authority to prevent third parties from wrongfully taking advantage of that goodwill, and “harvest[ing]” what others have sown. *U.S. Olympic Comm.*, 483 U.S. at 541, quoting *Int'l News Serv.*, 248 U.S. at 239-40.

The Act's legislative history confirms that Congress enacted the statute in part to prevent third parties from being able to wrongfully take advantage of the goodwill that has become associated with military awards. The Act's sponsor, Senator Conrad, explained that the Act was necessary to prevent “imposters” who “claim to have medals that they have not earned” from “gain[ing] credibility in their communities.” 151 Cong. Rec. S12684, S12688 (Nov.

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<sup>55</sup> See, e.g., DoDM 1348.33; AR 600-8-22; SECNAVINST 1650.1H; AFI 36-2803; *Administrative and Issue Procedures for Decorations, Medals, and Awards*, MCO 1650.19J (Feb. 5, 2001).

<sup>56</sup> Joan Biskupic, *Supreme Court Jurist Was a Star On and Off the Bench*, USA Today, Apr. 15, 2002, available at 2002 WLNR 4508093.

10, 2005) (statement of Sen. Conrad); see also *id.* at S12689 (statement of Sen. Conrad) (arguing that people who “have [not] rightfully earned these awards” should not be permitted to “exploit these honors for personal gain”).

Representative Salazar, who assisted in drafting the Stolen Valor Act, echoed these sentiments when he said, “In addition to diminishing the meaning, on several occasions phonies have used their stature as a decorated war hero to gain credibility that allows them to commit more serious frauds.” 152 Cong. Rec. H8819, H8821 (Dec. 6, 2006) (statement of Rep. Salazar). He explained that such “phony heroes” have “become the object of national award-winning documentaries on national network television,” and “flooded major publishing houses with false tales of heroism which have become best-selling biographies.” *Ibid.* Representative Graves likewise declared, “[W]e cannot allow imposters to seek fame and fortune from falsehood.” *Id.* at H8823 (statement of Rep. Graves); see also *id.* at H8821 (statement of Rep. Davis) (condemning those who “have displayed false symbols of service” for, among other things, “misleading our citizens”).<sup>57</sup>

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<sup>57</sup> The White House press release announcing President Bush’s signature of the Act characterized it as “expand[ing] criminal penalties” for “fraud relating to military decorations and medals.” *Statement by the Press Secretary on Bill Signings*, 2006 WL 3737637, at \*1 (Dec. 20, 2006). The committee report accompanying an amendment to the Act’s predecessor likewise noted that one of the statute’s purposes was to “protect[] against fraud.” *P.L. No. 103-442, Crimes Relating to Congressional Medals of Honor*, H.R. Rep. No. 103-786 (Oct. 3,

In short, notwithstanding the congressional findings accompanying the Act, it should not be viewed exclusively as a means of attempting “to protect the reputation and meaning” of military awards, Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266, 3266 (Dec. 20, 2006), a main issue on which the arguments and opinions below focused, see, *e.g.*, Pet. App. 35a, 37a,

3. Although the Stolen Valor Act, like the Amateur Sports Act, goes beyond the scope of traditional intellectual property laws, a rough analogy may be made to certification marks. A “certification mark” is a “seal of approval” of the “quality” or “some other characteristic” of the goods or services of someone other than the mark’s owner. 3 Callmann, *Unfair Competition, Trademarks & Monopolies*, § 17.18 (4th ed. 2009); see also 15 U.S.C. § 1127. Certification marks are “generally treated the same as trademarks.” *Levy v. Kosher Overseers Ass’n of America, Inc.*, 104 F.3d 38, 39 (2d Cir. 1997). The creator of a certification mark, such as the “Good Housekeeping Seal of Approval,” may stop third parties, whose products or services do not satisfy the requirements for the mark, from deriving the benefits that flow from using it. See, *e.g.*, *Jos. S. Cohen & Sons Co. v. Hearst Mags.*, 220 F.2d 763, 766 (C.C.P.A. 1955); see also *United States v. 4500 Audek Model No. 5601 AM/FM Clock Radios*, 220 F.3d 539 (7th Cir. 2000).

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1994); accord 140 Cong. Rec. H10476, H10476 (Oct. 3, 1994) (statement of Rep. Brooks); *id.* (statement of Rep. Fish).

So too with a military award: although bestowed directly upon a person, rather than his or her goods or services, such an award functions as an official “seal of approval,” certifying the recipient’s valor, dedication, or achievements. Although the Stolen Valor Act prohibits a broader range of false statements about military awards than does the Lanham Act regarding certification marks, see 15 U.S.C. §§ 1114, 1118, 1124, 1125, the net interference with expression—a prohibition on falsely claiming a certification one has not earned—is essentially the same, and constitutionally permissible under *U.S. Olympic Committee*, 483 U.S. at 532-35, 541. Thus, this Court should affirm Congress’ reasonable attempt to prevent third parties from enjoying the “acclaim,” Pet. App. 23a, and goodwill associated with military awards that accrued through the efforts of the Government and members of its Armed Forces.

**B. The Government’s Interest in Preventing Third Parties From Wrongfully Taking Advantage of the Goodwill Associated With Military Awards Differs From Its Asserted Interest in Preventing People From Disrespecting Symbols Such as the Flag.**

This Court’s precedents invalidating prohibitions on flag burning, *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989), do not require invalidation of the Stolen Valor Act. In *Johnson*, 491 U.S. at 410, the State of Texas

attempted to defend its flag-burning statute, which prohibited a person from damaging the flag in a way likely to cause serious offense, by arguing that the measure was necessary to “preserv[e] the flag as a symbol of nationhood and national unity.” This Court rejected that argument, declaring that the Government may not “compel conduct that would evince respect for the flag,” *id.* at 414, or “ensure that a symbol [is] used to express only one view of that symbol or its referents,” *id.* at 417; see also *Eichman*, 496 U.S. at 319.

This case, however, is not primarily about undermining the meaning and value of symbols, but rather misappropriating and wrongfully taking advantage of the meaning and value they have acquired through the longstanding efforts of others. The Act does not prohibit false statements about military awards on the grounds that such assertions contain unpopular, offensive, or disrespectful ideas, cf. *Johnson*, 491 U.S. at 414, but rather because they improperly allow imposters to enjoy “acclaim,” Pet. App. 23, to which they are not entitled. *Johnson* and its progeny thus do not bar the Government from attempting to prevent third parties from wrongfully appropriating for themselves such undeserved intangible and nonpecuniary benefits.

**C. The Government’s Ability to Prohibit People From Falsely Claiming to Have Received Military Awards Is Confirmed By Its Recognized Authority to Bar People From Wearing, With Intent to Deceive, Military Awards They Have Not Earned.**

Another reason the Stolen Valor Act is constitutional—and decisions like *Johnson* are inapt—is because Congress may undoubtedly prohibit people from wearing, with the intent to deceive, military awards they have not earned, see 18 U.S.C. § 704(a),<sup>58</sup> and that ban on expressive conduct is the constitutional equivalent of the Act’s prohibition on false statements concerning the receipt of military awards, see *id.* § 704(b). The earliest prohibition on the unauthorized wearing of military awards dates back to the Revolutionary War. Immediately after directing the creation of “Honorary Badges of distinction” for “veteran Non-Commissioned officers and soldiers of the army who have served for more than three years with bravery, fidelity and good conduct,” General George Washington ordered, “[S]hould any who are not entitled to these honors have the insolence to assume the badges of them they shall be severely

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<sup>58</sup> Courts have inferred both a scienter and an “intent to deceive” requirement in 18 U.S.C. § 704(a) to help ensure its constitutionality. See, e.g., *United States v. Perelman*, 658 F.3d 1134, 1137-38 (9th Cir. 2011); *United States v. Robbins*, 759 F. Supp. 2d 815, 818 (W.D. Va. 2011).

punished.”<sup>59</sup> Such conduct has been legislatively proscribed for nearly a century. See, e.g., Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286, *formerly codified at* 10 U.S.C. § 1425; Act of April 21, 1928, ch. 392, 45 Stat. 437, *formerly codified at* 10 U.S.C. § 1425.

In *Schacht v. United States*, 398 U.S. 58, 61 (1970), citing *United States v. O’Brien*, 391 U.S. 367, 376 (1968), a First Amendment case, this Court opened its analysis by declaring that “18 U.S.C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face.”<sup>60</sup> If the unauthorized wearing of a military uniform—even without an attempt to exercise official authority, claim any special rights or privileges, or defraud anyone—constitutionally may be prohibited, there can be little doubt that the unauthorized wearing of military awards by people who have not earned them likewise may be proscribed. See also *Smith v. Goguen*, 415 U.S. 566, 596 (1974) (Rehnquist, J., dissenting) (attributing “significance” to the fact that the statute “prohibit[ing] the unauthorized wearing of service medals \* \* \* h[as] never been judicially

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<sup>59</sup> Washington, *supra* note 14.

<sup>60</sup> A separate statute allowed actors to wear military uniforms in theatrical performances only “if the portrayal d[id] not tend to discredit” the military. *Schacht*, 398 U.S. at 59-60, *quoting* 18 U.S.C. § 772(f). The *Schacht* Court invalidated that limitation on the theatrical performance exception, ruling that it constituted impermissible viewpoint discrimination. *Id.* at 63.

construed or even challenged”), citing 18 U.S.C. § 704(a).<sup>61</sup>

*Wearing* a military award with the intent to deceive, in turn, must be regarded as the constitutional equivalent of falsely *claiming* to have received that award. To be sure, several courts have resisted this conclusion, holding that wearing an award is “conduct” that is not entitled to full First Amendment protection. See, e.g., *Perelman*, 658 F.3d at 1139-40. This Court’s precedents, however, make clear that the First Amendment protects not only pure speech, but also expressive conduct, in which “‘speech’ and ‘nonspeech’ elements are combined in the same course of action.” *O’Brien*, 391 U.S. at 376.

For example, in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 632 (1943), this Court recognized that the use of “[s]ymbolism,” including “emblem[s],” is “a primitive but effective way of communicating ideas” and “a short cut from mind to mind.” See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995) (holding that “walking \* \* \* in [a] uniform displaying [a] swastika \* \* \* constitutes expressive conduct”); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393

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<sup>61</sup> Numerous military courts likewise have upheld convictions under Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, for wearing unauthorized military awards, albeit without considering any First Amendment concerns. See, e.g., *United States v. Armon*, 51 M.J. 83 (C.A.A.F. 1999); *United States v. Zander*, 46 M.J. 558 (N.-M. Ct. Crim. App. 1997).

U.S. 503, 505 (1969) (“[T]he wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause.”). A restriction on expressive conduct that is aimed at the communicative component of that conduct is treated the same as a restriction on pure speech. *Johnson*, 491 U.S. at 406 (“A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.”) (quotation marks omitted); see also *O’Brien*, 391 U.S. at 377, 382.

Under this Court’s precedents, wearing military awards with the intent to deceive others must be considered expressive conduct, because it conveys a message—that the actor has received the awards at issue. Moreover, § 704(a), which prohibits a person from wearing unearned military awards, is aimed at that communicative component of the conduct; it does not appear that the Government has any interest in restricting such wear apart from the false message it conveys about the actor (which, in turn, may undermine the awards’ meaning or lead to undeserved benefits for the actor). Cf. *Robbins*, 759 F. Supp. 2d at 822; *Perelman*, 658 F.3d at 1138-39.

Because § 704(a)’s prohibition on the false wearing of military awards is constitutionally permissible, see *Schacht*, 398 U.S. at 61, § 704(b)’s ban on falsely claiming, through pure speech, to have received those awards must be upheld, as well. Conversely, affirming the panel’s ruling would call

into question the constitutionality of § 704(a)'s prohibition on the unauthorized wearing of military medals—an implausible result that further undermines the panel's ruling. Thus, Congress's decision to punish those who falsely claim to have received military honors was entirely consistent with the First Amendment.

### CONCLUSION

For the foregoing reasons, the Stolen Valor Act is constitutional, both facially and as applied to Alvarez. This Court should reverse the judgment of the U.S. Court of Appeals for the Ninth Circuit and reinstate Alvarez's conviction.

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**APPENDIX – LIST OF *AMICI***

The 25 *amici* submitting this brief share a strong interest in preserving the meaning and integrity of military decorations, medals, and badges, and preventing pretenders from appropriating for themselves, and enjoying the benefits of, the tremendous goodwill and prestige associated with those awards.

The *Veterans of Foreign Wars of the United States* (“VFW”) is a congressionally chartered veterans service organization, dating back to 1899, of more than 1.5 million veterans who have served overseas in war zones or areas demanding arduous duty. The VFW’s four main objectives are preserving and extending veterans’ rights, advocating a strong national defense, promoting patriotism, and serving local communities. It lobbies Congress on behalf of veterans, monitors care and seeks assistance for veterans, examines overseas troop deployments and the Pentagon’s budget, offers educational programs for schoolchildren, and provides assistance for the families of deployed troops. See <http://www.vfw.org>.

*AMVETS* is a congressionally chartered veterans service organization with a proud history of assisting veterans and sponsoring programs that serve the United States and its citizens. Membership is open to anyone who is currently serving, or who has honorably served, in the U.S. Armed Forces. *AMVETS* maintains a network of national service offices accredited by the Department of Veterans

Affairs to provide advice and action on veterans' compensation claims at no charge to the veteran. It also lobbies Congress on behalf of veterans, provides companionship to hospitalized and disabled veterans, supports community programs, and sponsors a carillon program to honor deceased servicemen and women. See <http://www.amvets.org>.

The *Disabled American Veterans* ("DAV") is a 1.2 million-member, congressionally chartered, 501(c)(4) non-profit organization dedicated to building better lives for America's disabled veterans and their families. The DAV represents more than 200,000 veterans and their dependents with claims for benefits from the Department of Veterans Affairs and Department of Defense. It also operates a comprehensive network of volunteers who provide veterans free rides to and from veterans' medical facilities and help improve care and morale for sick and disabled veterans. Its members also provide grassroots advocacy and services nationwide, including educating lawmakers and the public about issues relevant to disabled veterans and lobbying on behalf of legislation to help them. See <http://www.dav.org>.

The *Jewish War Veterans of the United States* ("JWV") was founded in 1896 to combat bigotry and anti-Semitism, particularly as they affect Jewish members of the armed forces and veterans; assist veterans and their families in obtaining benefits;

foster veterans' education; and help maintain the graves of our nation's heroic dead. See <http://www.jwv.org>.

The *Military Order of the World Wars* ("MOWW") is a congressionally chartered nonpartisan organization established in 1919 to promote the nation's welfare; preserve the memories of the World Wars; inculcate love of country and flag; defend the integrity and supremacy of the federal government and the U.S. Constitution; and encourage and assist in the holding of commemorations and the establishment of memorials of the world wars. The MOWW is open to all officers of the federal uniformed services. See <http://www.militaryorder.net>.

The *Vietnam Veterans of America* ("VVA") is a congressionally chartered, non-profit organization that is exclusively dedicated to Vietnam-era veterans and their families. It aims to promote and support the full range of issues important to Vietnam veterans, create a new identity for this generation of veterans, and change public perception of Vietnam veterans. See <http://www.vva.org>.

The *Military Officers Association of America* ("MOAA") is the nation's largest association of military officers, founded in 1929, with 370,000 members from all branches of service. It is an independent, nonprofit, politically nonpartisan organization dedicated to maintaining a strong national defense that plays an active role in

proposed legislation affecting the career force, the retired community, and veterans of the uniformed services. The MOAA also offers career transition assistance, military benefits counseling, educational assistance to children of military families, and strong involvement in military professionalism activities. See <http://www.moaa.org>.

The *Non Commissioned Officers Association of the United States of America* (“NCOA”) was established in 1960 and congressionally chartered in 1988 to enhance and maintain the quality of life for noncommissioned and petty officers in all branches of the Armed Forces, including the National Guard and Reserves. The NCOA offers a wide range of benefits and services designed especially for enlisted service members and their families. See <http://www.ncoausa.org>.

The *National Association for Uniformed Services* (“NAUS”) was founded in 1968 to protect and enhance the earned benefits of uniformed servicemembers, retirees, veterans, and their families and survivors, while maintaining a strong defense. It also seeks to foster *esprit de corps* among uniformed services personnel and veterans of the United States, through nonpartisan advocacy on Capitol Hill and with other government officials. See <http://www.naus.org>.

The *Association of the United States Army* (“AUSA”), founded in 1950, is a private, non-profit educational organization that supports America’s

Army. It represents every American Soldier by being the voice for all components of America's Army, fostering public support of the Army's role in national security, and providing professional education and information programs. It also provides recreational and educational opportunities to Soldiers and their families worldwide. See <http://www.ausa.org>.

The *Association of the United States Navy* ("AUSN"), founded in 1955, promotes the interests of Navy service members and their families by writing to the President, hosting House and Senate meetings, working with key Members of Congress, and encouraging members to support key legislation. Comprised of over 20,000 members, the AUSN also encourages the professional development of officers and enlisted personnel, and educates the public and government officials regarding the nation's welfare and security. See <http://www.ausn.org>.

The *Air Force Association* ("AFA") is an independent, nonprofit, civilian education organization promoting public understanding of aerospace power and the pivotal role it plays in the security of the nation. The AFA advocates aerospace power and a strong national defense, and supports the United States Air Force, the Air Force family, and aerospace education. It conducts national symposia, disseminates information through outreach programs, sponsors professional development seminars, and presents national awards and scholarships. See <http://www.afa.org>.

The *Marine Corps League* (the “League”) is a 501(c)(4) nonprofit organization, founded in 1923 and chartered by Congress in 1937. With more than 76,000 members, the League perpetuates the traditions of the Marine Corps; renders assistance to Marines, as well as their widows and orphans; and provides volunteer assistance at veterans hospitals. The League also assists veterans in obtaining benefits; sponsors the Young Marines, a physical fitness program, and scholarships for youths; and represents the interests of Marines before Congress concerning military readiness, benefits, and entitlements. See <http://www.mcleague.com>.

The *Air Force Women Officers Associated* (“AFWOA”) is a non-profit, tax-exempt veterans’ organization that was formed in 1975 and has over 1,000 members, including active duty, separated, and retired female officers of the Regular Air Force and the Reserve Component. AFWOA fosters comradeship through reunions, maintains ties between active and retired women officers, preserves the history and promotes recognition of the role of military women, and lends support to women engaged in education and training programs. See <http://www.afwoa.org>.

The *Reserve Officers Association* (“ROA”) is a 60,000-plus member professional association for all uniformed services of the United States. Created in 1922 and chartered by Congress in 1950, the ROA supports and promotes the development and execution of a military policy for the United States

that will provide adequate national security. It provides professional development workshops, mentoring programs, and a career center to meet the unique needs of military Reservists. It advocates for equipment, training, recruitment, and retention incentives, and employment rights for the Reserve Components, and offers expert legal information on various federal statutes of particular importance to Reservists. See <http://www.roa.org>.

The *Army Reserve Association* (“ARA”) is a private, non-profit educational organization formed in 1993 that supports America’s Army as well as members of the U.S. Army Reserves of all ranks. The ARA represents the interests of both the Army Reserve Component and its members before Congress, the Department of Defense, and the Department of the Army. See <http://www.armyreserve.org>.

The *Fleet Reserve Association* (“FRA”) is a congressionally chartered, non-profit organization that represents the interests of the Sea Service community before Congress. The FRA lobbies Congress on behalf of Sea Service Personnel, presents legislative seminars about key bills on Capitol Hill, and sponsors patriotism essay awards and scholarships. See <http://www.fra.org>.

The *National Guard Association of the United States* (“NGAUS”), created in 1878, includes nearly 45,000 current and former Guard officers and provides unified Guard representation in

Washington, D.C. It lobbies Congress and the Executive Branch to obtain modern equipment, training, missions, and personnel benefits for the Army and Air National Guard. See <http://www.ngaus.org>.

The *Military Order of the Purple Heart* (“MOPH”), chartered by Congress in 1958, is a nonprofit organization comprised of military men and women who received the Purple Heart for wounds suffered in combat. It is the only veterans service organization comprised exclusively of combat veterans. The MOPH promotes awareness of, and respect for, the Purple Heart; offers assistance to all veterans in matters involving the Department of Veterans Affairs; and provides volunteers for veterans hospitals, as well as funds for the welfare or rehabilitation of wounded and disabled veterans. See <http://www.purpleheart.org>.

The *Distinguished Flying Cross Society* is a 501(c)(19) nonprofit organization, founded in 1994, dedicated to the preservation, perpetuation, and publication of the history of the Distinguished Flying Cross, as well as the heritage and traditions of the men and women, from all military services worldwide, who have been awarded the Distinguished Flying Cross “as a result of deeds accomplished during aerial flight.” See <http://www.dfcsociety.org>.

The *Special Forces Association* serves as the voice of the Special Forces community, perpetuates

Special Forces traditions and brotherhood, advances the public image of Special Forces, and promotes the general welfare of the Special Forces community. See <http://www.specialforcesassociation.org>.

The *U.S. Army Ranger Association, Inc.* is a § 501(c)(19) tax-exempt organization dedicated to promoting and preserving the heritage, spirit, image, and service of U.S. Army Rangers. It participates in many Ranger community causes such as the Ranger Memorial Foundation, Ranger Hall of Fame and Best Ranger Competition; provides scholarships to Rangers' dependents; and offers emergency financial assistance to Rangers and families of deceased Rangers. See <http://www.ranger.org>.

The *Flag and General Officers' Network* ("TFGON") is a § 501(c)(19) network and forum for over 3,100 Active Duty, Reserve, Guard, and Retired Flag and General Officers from every Armed Service. TFGON supports veteran memorial ceremonies and observations, as well as widows and orphans of fellow war veterans. See <http://flagandgeneralofficersnetwork.org>.

The *West Point Association of Graduates* ("WPAOG") is the Alumni Association for the United States Military Academy ("USMA"). It serves West Point and its graduates by furthering the ideals and promoting the welfare of the USMA. The WPAOG was founded in 1869 to reunite Academy graduates who found themselves on opposing sides during the American Civil War. Today, it continues to

strengthen the bonds of the “Long Gray Line” through communications and services to graduates, Classes, and Societies, as well as building relationships with current West Point Cadets. See <http://www.westpointaog.org>.

The *Association of Graduates, U.S. Air Force Academy* is the alumni association of the U.S. Air Force Academy. It is a § 501 (c)(3) non-profit organization dedicated to serving its graduates and members, enhancing the heritage of the U.S. Air Force Academy, and enriching the cadet experience by funding programs not supported by appropriated funds. It helps chronicle and publicize graduates’ accomplishments, creates programs and services to support and foster camaraderie among graduates, and assists the Academy in producing great leaders for the Air Force. It also acts as a liaison between the Academy’s leadership and graduates. See <http://www.usafa.org>.