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No. 11-210

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER ALVAREZ

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

BRIEF OF TEXAS, ALABAMA, ALASKA, COLORADO, FLORIDA, HAWAII, IDAHO, INDIANA, KANSAS, LOUISIANA, MAINE, MICHIGAN, MINNESOTA, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, TENNESSEE, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The States have a substantial and often compelling interest in punishing knowingly false statements of fact. States enact such laws to prevent, among other things, false impersonation, kidnapping, bomb-threat hoaxes, and false claims of military honors. The Ninth Circuit's decision unjustifiably calls this legal tradition into question.

States also organize and maintain the National Guard, 32 U.S.C. § 109, so they share the federal government's compelling interest in fostering troop morale. The Ninth Circuit's decision gives no deference to military leaders' conclusion that laws against stolen valor are vital to preserving morale,

and thereby threatens military preparedness in a time of war.

Seeking to preserve their ability to regulate knowingly false statements of fact, and supporting the United States military's efforts to bestow honor on its heroes, the amici States respectfully submit this brief in support of petitioner United States of America.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PROTECT KNOWINGLY FALSE STATEMENTS OF FACT ABOUT A SPEAKER'S OWN CREDENTIALS.

States have a long tradition of punishing impostors who lie about their credentials. For example, States have laws substantively identical to the Stolen Valor Act, prohibiting knowingly false statements about military decorations. See, *e.g.*, CONN. GEN. STAT. § 53-378(b); 720 ILL. COMP. STAT. 5/17-2(e)(1); MO. STAT. § 578.510(3); TENN. CODE § 58-1-118; UTAH CODE § 76-9-706(2). States have many other prohibitions on knowingly false statements of fact, including laws punishing speakers who falsely claim to be members of a veteran's organization, KAN. STAT. ANN. § 21-6410; the parents of a child, 720 ILL. COMP. STAT. 5/17-2(b)(7); or public officials, IOWA CODE § 718. These laws punish speech, even in the absence of harm or intent to mislead. Indeed, contrary to the Ninth Circuit's assertion, many impersonation statutes target false speech without regard to "conduct performed in order to obtain, at a cost to another, a benefit to which one is not entitled." Pet. App. 28a. Examples of state laws against knowingly false

statements of fact, including such impersonation statutes, are set out in the margin.[1]

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[1] See, *e.g.*, 11 DEL. CODE § 907(3) ("A person is guilty of criminal impersonation when the person . . . pretends to be a public servant."); 720 ILL. COMP. STAT. 5/17-2(a) (impersonating a member of a veterans' organization); 720 ILL. COMP. STAT. 5/17-2(b)(2) (impersonating a public employee, public official, or employee of the federal government); 720 ILL. COMP. STAT. 5/17-2(b)(8), (11) (impersonating a firefighter or emergency management worker); IOWA CODE § 718 ("Any person who falsely claims to be . . . an elected or appointed officer, magistrate, peace officer, or person authorized to act on behalf of the state or any subdivision thereof . . . commits an aggravated misdemeanor."); KAN. STAT. ANN. § 21-5917(a) (imposing criminal liability for "representing oneself to be a public officer, public employee or a person licensed to practice or engage in any profession or vocation for which a license is required by the laws of the state of Kansas, with knowledge that such representation is false"); N.D. CENT. CODE § 12.1-13-04 ("A person is guilty of an offense if he falsely pretends to be . . . a law enforcement officer."); N.D. CENT. CODE § 20.1-01-24 ("No person may falsely claim the authority of or impersonate a game warden."); NEV. REV. STAT. § 197.120 ("Every person who shall falsely personate or represent any public officer . . . shall be guilty of a gross misdemeanor."); 59 OKLA. STAT. ANN. § 2069 ("It is a misdemeanor for any person to . . . [i]mpersonate in any manner or pretend to be a perfusionist."); REV. CODE WASH. § 19.94.500 (making it a crime to "impersonate in any manner" a weights and measures official); TENN. CODE § 68-140-515 ("It is a Class C misdemeanor for any person to . . . [i]mpersonate . . . an emergency medical services provider."); TEX. PENAL CODE § 37.12(d) ("A person commits an offense if the person intentionally or knowingly misrepresents an object as property belonging to a law enforcement agency."); VA. CODE § 3.2-5644 (making it a crime to "impersonate in any way" a weights and

(continued…)

These laws against imposture are consistent with First Amendment principles. As petitioner explains, Br. at 18-20, false statements of fact have "no constitutional value," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), and so they receive no constitutional protection unless necessary to provide adequate "breathing space" for fully protected speech, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272 (1964).

Punishing speakers who lie about their credentials does not deter truthful or otherwise

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measures official); VA. CODE § 47.1-29 ("Any person who shall willfully act as, or otherwise impersonate, a notary public while not lawfully commissioned as a notary public or other official authorized to perform notarial acts, shall be guilty of a Class 6 felony."); 9 VT. CODE ANN. § 2763 (punishing "[a]ny person who impersonates in any way" a weights and measures official); 13 VT. CODE ANN. § 3002 (punishing "[a]ny person who impersonates . . . a sheriff, deputy sheriff, constable, police officer, fish and game warden, or any other state, county or town officer"); WIS. STAT. § 29-945 (punishing "[a]ny person who falsely represents himself or herself to be a [game] warden"); WY. STAT. § 33-43-118(a)(iv) (making it a crime to "[i]mpersonate in any manner . . . a respiratory care practitioner"); see also FLA. STAT. ANN. § 817.567(1) ("No person in the state may claim, either orally or in writing, to possess an academic degree . . . unless the person has, in fact, been awarded said degree."), repealed May 5, 2011, by Laws 2011, c. 2011-37; cf. CAL. PENAL CODE § 148.1(c) ("Any person who maliciously informs any other person that a bomb or other explosive has been or will be placed or secreted in any public or private place, knowing that the information is false, is guilty of a crime."); MINN. STAT. ANN. § 609.505(2) (making it a crime to knowingly file a false report of police misconduct).

protected speech. Laws against imposture involve facts that are objectively verifiable, so there is no risk that a speaker might be punished for expressing an opinion. Whether a person actually received the Medal of Honor is not open to debate. Nor is it debatable whether a person is a perfusionist, 59 OK. STAT. ANN. § 2069, or a game warden, N.D. CENT. CODE § 20.1-01-24, or a United States citizen, 18 U.S.C. § 911 ("Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned."); see also *United States* v. *Franklin*, 188 F.2d 182, 186 (7th Cir. 1951) ("A fraudulent purpose in making a false claim of citizenship is not essential to offense under [18 U.S.C. § 911].").

Moreover, laws against imposture involve facts that are plainly knowable to the speaker, so there is no risk that a speaker might be punished for an honest mistake. Every person of sound mind knows whether they possess the significant credentials that are the subject of laws against imposture. See *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) ("The truth of commercial speech . . . may be more easily verifiable by its disseminator . . . . [O]rdinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.").

The Court has observed, to be sure, that "even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New*

York Times, 376 U.S. at 279 n.20 (quoting JOHN STUART MILL, ON LIBERTY 15 (R.B. McCallum ed., Basil Blackwell (1947)) (1859)). Indeed, it is easy to see the value in false statements of historical or scientific fact: We can be more certain of the truth when people have the freedom to contest it. See MILL, ON LIBERTY, *supra*, at 18 ("Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action.").

Speakers' lies about their own credentials, however, do not contribute to the public debate. They are objective facts that we can know for certain, not the sort of empirical questions that benefit from a robust exchange of ideas. Thus, we can be assured that the *prosecutor's* certainty is the same thing as *absolute* certainty. Lies about unearned credentials serve only to cloak the speaker in unwarranted credibility, and frustrate the pursuit of truth.

II. FALSE STATEMENTS ABOUT UNEARNED MILITARY DECORATIONS CAUSE SUBSTANTIAL HARM TO THE MILITARY AND ITS VETERANS BY BLURRING THE SIGNALING FUNCTION OF THOSE AWARDS.

A. Impostors who violate the Stolen Valor Act cause substantial harm to the United States military and to recipients of military honors. Military decorations such as the Purple Heart and the Medal of Honor serve an important signaling function in civil society. It is widely understood that these decorations recognize "acts of valor, heroism, and exceptional duty and achievement." *Examination of Criteria for Awards and Decorations: Hearing Before the Military Personnel Subcomm. of the House*

Comm. on Armed Services, 109th Cong., 2d Sess. 24 (2006) (statement of Lt. Gen. Roger A. Brady). That these awards are rare and exclusive makes their signaling function all the more powerful.

When military impostors proliferate unchecked, they diminish the value of military honors by blurring their signaling function. This blurring effect causes substantial harm to the military and to the recipients of military honors. Courts and economists in the field of trademark law investigate this type of harm, and their account of the damage that imposters inflict on genuine articles is directly relevant to the compelling interests that animate the Stolen Valor Act.

B. Trademark law punishes sellers of knockoff goods, even when the purchaser knows the goods are fake. Lanham Trademark Act, Pub. L. No. 87-772, § 17, 76 Stat. 769, 773-74 (1962) (codified as amended at 15 U.S.C. § 1114). Trademarks owners, as well as consumers who bought the real thing, are harmed when an impostor unjustly acquires the prestige of a luxury trademark without paying the high price. See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 308 (1987) ("If others can buy and wear cheap copies, the signal given out by the purchasers of the originals is blurred."); *Hermes Int'l* v. *Lederer De Paris Fifth Ave., Inc.*, 219 F.3d 104, 109 (2d Cir. 2000) ("[A] loss occurs when a sophisticated buyer purchases a knockoff and passes it off to the public as the genuine article, thereby confusing the viewing public and achieving the status of owning the genuine article at a knockoff price."). Judge Jerome Frank led the way in recognizing the harm that

results from "post-sale confusion," as the doctrine is now known:

> [P]laintiff copied the design of the Atmos clock because plaintiff intended to, and did, attract purchasers who wanted a 'luxury design' clock. This goes to show at least that some customers would buy plaintiff's cheaper clock for the purpose of acquiring the prestige gained by displaying what many visitors at the customers' homes would regard as a prestigious article. Plaintiff's wrong thus consisted of the fact that such a visitor would be likely to assume that the clock was an Atmos clock.

Mastercrafters Clock & Radio Co. v. *Vacheron & Constatin-Le Coultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955). Since that decision, courts have used trademark law to penalize sellers of knockoff goods, preserving the exclusivity of certain trademarks, along with their value to both trademark owners and consumers. See, *e.g.*, *Rolex Watch U.S.A., Inc.* v. *Canner*, 645 F. Supp. 484, 492 (S.D. Fla. 1986) ("[People] who see the watches bearing the Rolex trademarks on so many wrists might find themselves discouraged from acquiring a genuine because the items have become too common place and no longer possess the prestige once associated with them."); *Ferrari S.P.A. Esercizio Fabriche Automobili E Corse* v. *Roberts*, 994 F.2d 1235, 1245 (6th Cir. 1991) (observing that much of Ferrari's value lies in the brand's rarity, which would be destroyed "[i]f the country is populated with hundreds, if not thousands, of replicas of rare, distinct, and unique vintage cars"). These decisions

recognize that the rarity of a luxury good is a critical characteristic of the good itself, and that its value (to both trademark owner and purchaser) is substantially diminished by impostors.

C. Battlefield heroism is certainly not motivated by the desire for ribbons and medals, but military decorations are economically similar to luxury goods in many important respects. The United States military uses these exclusive decorations to confer prestige upon its heroes. Those who receive military decorations have paid a considerable price, and the military has a compelling interest in assuring that impostors cannot unjustly obtain prestige without doing the same. The existence of impostors substantially harms the military by undermining this prestige-conferring function of its decorations.

Impostors also harm the recipients of military honors, both present and future, by giving the public reason to doubt their genuine claims of heroism and sacrifice. In terms of trademark law, once the market is swamped with knockoff Rolex watches, the public will come to suspect that everyone is wearing a fake. Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 976 (1993) ("Rolex's swank image is based on exclusivity, not popularity, and the proliferation of Rolex look-alikes cuts away at that valuable commodity."). The Ninth Circuit gets that concept exactly backwards when it suggests that the increasing number of impostors is evidence that the reputation of military honors remains intact. Pet. App. 23a.

The very existence of the Stolen Valor Act instills confidence in the public that a military hero's story is true. The Ninth Circuit, however, suggests

that the solution to impostors is public exposure through "more speech." Pet. App. 39a. The court's proposal will prove inadequate because of the nature of the harm that the Stolen Valor Act seeks to redress. If the nation relies on the press to expose impostors, those frequent and public revelations will cause the public to overestimate the percentage of fake heroes in their midst. See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163-64 (Daniel Kahneman et al. eds., 1982).

As a result, the Ninth Circuit's proposal of "more speech" would only exacerbate the harm of military impostors. Public exposure of impostors, without any attendant criminal conviction, would cause the public to place less stock in the stories of heroism and excellence that military honors signify. Military honors would be worth less to recipients because the public would be more likely to perceive them as frauds, rather than heroes. See Kozinski, *supra*, at 976 ("[I]f everyone knows you can pick up the same product or an exact replica dirt cheap, how can ownership of the product help telegraph the idea that you're the kind of swell guy who has money to burn?"); see also *id.* ("Keeping the supply low and the price high is thus part and parcel of the good itself.").

In lightly dismissing the harm caused by military impostors, Pet. App. 23a, the Ninth Circuit committed a serious blunder. If military decorations confer exclusive prestige on the wearers, and surely they do, then Congress was correct to find that impostors substantially diminish the value of those awards. Congress made the identical finding in the

trademark context, 15 U.S.C. § 1114, and that finding of harm is supported by the actions of trademark owners, who have used the Lanham Act to pursue infringers in the courts. The Ninth Circuit does nothing to explain why the United States military is not entitled to the same solicitude as the makers of Rolex and Ferrari. See Kozinski, *supra*, at 976 (concluding that "a communicative aspect may be served by wearing a fake Rolex watch" but that "the message is false and should be given relatively little weight" and therefore "is surely outweighed" by the interests of trademark owners and consumers).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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