No. 11-210

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

XAVIER ALVAREZ,

Respondent.

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

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SOUTHERN CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has been committed to protecting the freedoms guaranteed by the First Amendment since its founding in 1920, and has appeared before this Court in numerous free speech cases in the intervening nine decades, both as direct counsel and as *amicus curiae*. The ACLU of Southern California is a regional affiliate of the national ACLU. Because the government has chosen to rest its defense of the challenged statute on an unduly restrictive view of the First Amendment, the proper resolution of this case is a matter of significant concern to the ACLU and its membership throughout the country.

STATEMENT OF THE CASE

The Stolen Valor Act, 18 U.S.C. § 704(b), imposes criminal penalties on those who utter or write specific kinds of falsehoods about themselves. The Act states, 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

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

> 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).[2]

Xavier Alvarez was charged under the Act for statements he made at a water-district board meeting. As an elected member of the Board of Directors of the Three Valleys Municipal Water District in Pomona, California, Alvarez was asked to introduce himself at a public meeting of a neighboring water board. He introduced himself as a retired marine who had been awarded the Congressional Medal of Honor in 1987. This statement was false. Alvarez apparently made a habit of telling lies about his own accomplishments. Previously he had claimed to have played hockey for the Detroit Red Wings, to have worked as a police officer, to have been secretly married to a Mexican starlet, and to have rescued the Iranian ambassador during the 1979 hostage crisis.

There was no evidence that anyone had believed Alvarez's lie about the Medal of Honor, that anyone had relied on his statement, that anyone had been defrauded or otherwise injured by it, or even

[2] The prescribed prison term is increased to one year if the decoration in question is the Congressional Medal of Honor, a distinguished-service cross, a Navy cross, an Air Force cross, a silver star, or a Purple Heart. 18 U.S.C. § 704(c),(d).

that Alvarez had *intended* to defraud or injure anyone. The government charged Alvarez under the Act nonetheless. Alvarez moved to dismiss the indictment, arguing that the Act was unconstitutional on its face and as applied. His motion was denied. He pled guilty, reserving his right to appeal the First Amendment ruling, and was ordered to pay a $100 special assessment and $5,000 fine, serve three years of probation, and perform 416 hours of community service.

The court of appeals reversed by a 2-1 vote. It wrote that "given our historical skepticism of permitting the government to police the line between truth and falsity . . . we presumptively protect all speech, including false statements." *United States v. Alvarez*, 617 F.3d 1198, 1217 (9th Cir. 2010). It acknowledged that there are exceptions to the First Amendment's protection, but it found none of them applicable. It also pointed out that accepting the government's argument that false statements of fact are categorically unprotected by the First Amendment would permit the criminalization of many everyday conversations, and that this would be so even if the categorical exclusion were limited to intentional falsehoods. *See Alvarez*, 617 F.3d at 1200 ("if the Act is constitutional . . . then there would be no constitutional bar to criminalizing 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, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway").

Having rejected the notion that false statements of fact are categorically excluded from the

First Amendment, the court of appeals addressed the nature of the government's asserted interest in this case. While acknowledging that the government's interest in preserving the integrity of its medals and military decorations was legitimate, the majority found that it was "just as likely that the reputation and meaning of such medals is wholly unaffected by those who lie about having received them." *Alvarez*, 617 F.3d at 1217. It further noted that there was no evidence that these lies have a "demotivating impact on our men and women in uniform"; to the contrary, it observed that "[t]he greatest damage done seems to be to the reputations of the liars themselves." *Id.* Finally, the court of appeals observed that the government had available to it many less speech-restrictive – and more effective – means to accomplish its stated purpose. *Id.* For example, as the court of appeals pointed out, the government already provides a published list of those who have won the Medal of Honor. *Id.* at 1210 n.11. The court of appeals therefore held that the Act failed strict scrutiny and was unconstitutional.

The government sought rehearing en banc, which was denied. In a concurring opinion supporting the panel opinion and responding to those who dissented from the denial of rehearing en banc, Chief Judge Kozinski wrote: "Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as 'rational basis review.'" *United States v. Alvarez*, 638 F.3d 666, 673 (9th Cir. 2011) (Kozinski, J., concurring).

This Court granted certiorari to determine whether the Act violates the First Amendment.

SUMMARY OF ARGUMENT

The Stolen Valor Act imposes criminal sanctions on those who falsely claim to have received certain official decorations or awards for military valor. The Act reaches oral statements as well as written ones, and private statements as well as public ones. It reaches statements that do not cause harm as well as those that do. It reaches statements made with intent to deceive, but it reaches satire and parody as well. On its face, it reaches even statements that the speaker does not know to be false. This sweeping content-based restriction of pure speech cannot survive strict scrutiny.

The government argues that the Act should not be subject to strict scrutiny because knowingly false statements are entitled to the First Amendment's concern, if at all, only to protect other speech that is fully protected. The First Amendment does not, however, "recognize an exception for any test of truth." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). While the Court has recognized a small number of exceptions to the First Amendment – "historic and traditional categories long familiar to the bar" – it emphasized only two years ago that these exceptions are "well-defined and narrowly limited," *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010) (internal quotation marks omitted), and none of the historic and traditional exceptions is implicated here. The government's contention that knowingly false statements are categorically

valueless relies almost entirely on dicta pulled out of context from this Court's defamation cases.

To be sure, this Court has held that certain false statements of fact – fraudulent and defamatory ones, particularly – are categorically excluded from the First Amendment. But the fraud and defamation exceptions have two features that are notably absent here: They have an established historical pedigree and they involve demonstrable injury to third parties. In this case, there was no reliance on defendant's statements, and there was no evidence that anyone except defendant himself suffered as a result of defendant's false claims. Neither reliance nor injury, in any event, is required by the statute.

The government argues that the Act is necessary to protect the prestige of official military honors, but it is well-settled that the government cannot constitutionally suppress speech in order to protect its own reputational interests. Moreover, the government's interest in protecting the integrity of its system of military honors could plainly be accommodated without restricting – and criminalizing – the speech that the Act purports to proscribe.

The government's proposal that a "breathing space" analysis would be sufficient to protect the First Amendment interests at stake here should be rejected because its underlying premise – that knowingly false statements of fact are categorically worthless – is constitutionally and empirically unsound. It is true, of course, that some false statements lack obvious social value; some are offensive, cowardly, distressing and even harmful to others. Many knowingly false statements, however

serve important social interests – this is certainly true of satire and parody, at least – and many others are integral to autonomy and self-fulfillment interests that the First Amendment has long been understood to protect. In addition, in many contexts truth is contested; investing the government with the general power to declare speech to be constitutionally valueless on the grounds of its "falsity" would give the government sweeping power to control and censor public debate. It would also permit unprecedented governmental intrusion into private conversations, including the most intimately personal ones.

Because the Act cannot survive strict scrutiny, the Court should affirm the decision below.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT CONTAIN A CATEGORICAL EXCLUSION FOR FALSE STATEMENTS OR KNOWINGLY FALSE STATEMENTS.

The Stolen Valor Act imposes criminal penalties on those who utter or write specific kinds of falsehoods about themselves. There is no dispute that the Act regulates pure speech. Nor is there any dispute that it regulates pure speech based on its content. Ordinarily, the Court's analysis of such a statute would be straightforward. "As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (alterations and internal quotation marks omitted). Here, however,

the government argues that the speech regulated by the challenged Act is beyond the reach of the First Amendment. Gov't Br. 18. It proposes that "knowingly false statements" are constitutionally protected only to the extent necessary to preserve breathing space for speech that is fully protected, Gov't Br. 16-20,[3] and it asks the Court to discard the analytical framework it ordinarily applies to content-based regulations of speech in favor of a novel "breathing space" analysis that balances the regulation's purported costs against its purported benefits, Gov't Br. 20-21.

The Court rejected a similar proposal in *Stevens*, and it should reject the government's proposal here. "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Stevens*, 130 S.Ct. at 1585. While the Court has carved out exceptions to the First Amendment's protection, the "historic and traditional categories long familiar to the bar" – including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct – "are well-defined and narrowly limited." *Id.* at 1584 (internal quotation marks omitted).

Indeed, over the last quarter century, the Court has repeatedly rejected the government's efforts to carve out new exceptions to the First Amendment's protection. *See, e.g., Ashcroft v. Free*

[3] The government argues that the Act can be construed to reach only statements that are "knowingly" false. Gov't. Br. 16. As discussed herein, the Act is unconstitutional even if so construed.

Speech Coal., 535 U.S. 234, 246 (2002) (declining to recognize virtual child pornography "as an additional category of unprotected speech"); *United States v. Eichman*, 496 U.S. 310, 315 (1990) ("The Government . . . invites us to reconsider our rejection in *Johnson* of the claim that flag burning as a mode of expression, like obscenity or 'fighting words,' does not enjoy the full protection of the First Amendment. . . . This we decline to do."); *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (declining to find that an "outrageous" political cartoon was the "sort of expression . . . governed by any exception to the general First Amendment principles"); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 761-62 (1976) (rejecting prior precedent that commercial speech was entirely beyond the protections of the First Amendment); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 589 (2001) (Kennedy, J., concurring) ("In effect, [the Respondents] seek a 'vice' exception to the First Amendment. No such exception exists.").

The Court's "hesitancy" to "mark off new categories of speech for diminished constitutional protection" reflects appropriate "skepticism about the possibility of courts' drawing principled distinctions to use in judging governmental restrictions on speech and ideas." *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 804-05 (1996) (Kennedy, J., concurring in part and dissenting in part). The trend in recent years has been to limit rather than expand the categories of speech that are unprotected. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

The Court's deeply skeptical attitude towards proposed new exceptions to the First Amendment is entirely justified. "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Stevens*, 130 S.Ct. at 1585. In *Stevens*, the Court left open the possibility that it might in the future recognize exceptions to the First Amendment for "some categories of speech *that have been historically unprotected,*" but it expressly disclaimed the "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." 130 S.Ct. at 1586 (emphasis added); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (stating when "a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm . . . . [n]o further inquiry is necessary to reject the State's argument that the statute should be upheld"). The authority the government asks the Court to exercise here is precisely the "freewheeling authority" the Court disclaimed in *Stevens*.

Insofar as the government argues that the Court has *historically* recognized an exception to the First Amendment for knowingly false statements,

the argument is simply incorrect.[4] The Court has observed repeatedly that the "very purpose" of the First Amendment was to ensure that each person could be "his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins,* 323 U.S. 516, 545 (1945); *see also Meyer v. Grant*, 486 U.S. 414, 419 (1988) ("The First Amendment is a value-free provision whose protection is not dependent on 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" (citations omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)); *N.Y. Times Co.,* 376 U.S. at 271 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth."). The First Amendment was meant to ensure that the government would not become the arbiter of truth in the marketplace of ideas; it was "designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." *Cohen v. California*, 403 U.S. 15, 24 (1971).

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[4] As Judge Smith noted below, this Court's "standard list of categorically exempt speech has never used the phrase 'false statements of fact.' Instead, the Court has limited itself to using the words defamation (or libel) and fraud." *Alvarez*, 638 F.3d at 670 (Smith, J., concurring in the denial of rehearing en banc). The government rightly acknowledges that "the broad general category of false factual statements has *not* historically been treated as completely unprotected by the First Amendment." Gov't Br. 19 (emphasis added). It argues nonetheless that this Court should recognize an exception to the First Amendment for knowingly false statements.

The government's argument that knowingly false statements are presumptively unprotected is based almost entirely on isolated language drawn from a handful of cases decided after *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). The government places more weight on this language than it can bear. *Cf. Perry v. New Hampshire*, No. 10-8974, 2012 WL 75048, at *8 (U.S. Jan. 11, 2012) (expressing concern over parties attempt to remove statement from "its mooring" and "thereby attribute[] to the statement a meaning a fair reading of our opinion does not bear"). Most of the cases the government cites focused specifically on the scope and import of the defamation exception. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 69-72 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-45 (1974). To the extent these cases include broad language about the constitutional value of false statements, context makes clear that the cases were concerned with defamatory statements in particular, not false statements more generally. *See also Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967) ("We held in *N.Y. Times* that calculated falsehood enjoyed no immunity *in the case of alleged defamation of a public official concerning his official conduct.* Similarly, calculated falsehood should enjoy no immunity *in the situation here presented us*." (emphases added)); *Nike Inc., v. Kasky*, 539 U.S. 654, 664 (2003) (Stevens, J., concurring in dismissal of writ as improvidently granted) (observing that the Court's statement in *Gertz* that false statements of fact are unprotected was "perhaps overbroad[]"); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 477 (1996) (noting "[t]he near absolute

protection given to false but nondefamatory statements of fact outside the commercial realm").

The cases the government cites cannot fairly be read to stand for the proposition that knowingly false statements in general have the same constitutional status as defamatory statements in particular. Indeed, accepting the government's argument would render the defamation exception entirely superfluous. To accept the government's argument would be to reconceive the well-defined defamation exception as but an instance of a far broader one whose contours the Court has never described and the implications of which the Court has never considered.[5]

A careful reading of the cases cited by the government confirms that defamation is excepted from the First Amendment's protection not because defamatory statements are knowingly false but because they are knowingly false *and cause harm to others*. *See, e.g., N.Y. Times Co.*, 376 U.S. at 271 ("The question is whether [the challenged speech] forfeits that protection by the falsity of some of its factual statements *and by its alleged defamation of respondent*."); *Gertz*, 418 U.S. at 347 (holding that, so long as they do not impose liability without fault, States may impose liability for defamatory

[5] It is also worth noting that the exception the government proposes here would be, in an important sense, far broader than the exceptions the Court has rejected in the past. The rejected exceptions – for virtual child pornography and depictions of animal cruelty, for example – would have rendered speech about specific subjects beyond the First Amendment's reach. The exception the government proposes here, by contrast, would subject speech about *every* subject matter to potential regulation.

statements "injurious to a private individual"). Where the Court has allowed the imposition of liability for other historically unprotected categories of speech, such as fraud and perjury, it has insisted on analogous limitations. *See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) ("In a properly tailored fraud action the State bears the full burden of proof. False statement alone does not subject a [speaker] to fraud liability. . . . [T]he complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so."); *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). As Judge Smith noted below, "circumstances in which lies have been found proscribable involve not just knowing falsity, but additional elements that serve to narrow what speech may be punished." *Alvarez*, 617 F.3d at 1200.

Indeed, the Court has made clear that at least some knowing falsehoods are altogether beyond the reach of government regulation. In *N.Y. Times Co.*, the Court discussed at length the Sedition Act of 1798, which made it a crime to publish "any false, scandalous, and malicious writing or writings against the government of the United States . . . with intent to defame . . . or to bring [it] . . . into contempt or disrepute." Sedition Act of 1798, 1 Stat. 596. The Court noted that it had not had occasion to rule on the Act's constitutionality but that "the attack upon [the Act's] validity has carried the day in the court of history." *N.Y. Times Co.*, 376 U.S. at 276. Congress repaid fines that had been levied under the Act; the

President pardoned those who had been convicted under it; in various cases the Act's unconstitutionality was assumed by Justices Holmes, Douglas, Brandeis, and Jackson. *Id.* Over time there developed "a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *Id.* Today it is well-settled that false statements about a government agency may not be punished at all. "For good reason, 'no court of last resort in this country has ever held, or even suggested, that that prosecutions for libel on government have any place in the American system of jurisprudence.'" *Id.* at 291 (quoting *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923)); *see also Rosenblatt v. Baer*, 383 U.S. 75, 83 (1966).[6]

The government allows that some false statements may be protected, but it contends that this protection is only instrumental. False speech is protected, the government argues, only to the extent necessary to preserve breathing space for other speech that is fully protected. Gov't. Br. 18-20. The government is correct, of course, that the protection for false statements preserves breathing space for true statements. *See, e.g., N.Y. Times Co.,* 376 U.S.

[6] Because restraints on speech meant to protect government reputational interests are *categorically* impermissible under the First Amendment, the Court can resolve this case without deciding the constitutional status of knowingly false statements as a general category. Whatever the constitutional status of knowingly false speech in general, it is well-settled that the government cannot suppress speech – even knowingly false speech – in order to protect its reputational interests. As discussed further below, the Act challenged here is, at bottom, an effort to protect a governmental reputational interest.

at 271-72 ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' they 'need . . . to survive'") (internal citation omitted); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding . . . will create the danger that the legitimate utterance will be penalized . . . . [As a result] a person must steer far wider of the unlawful zone."). This Court has never held, however, that non-defamatory false statements are protected *only* to preserve breathing space for true statements. To the contrary, the Court has recognized that, while there are exceptions to the rule, false statements are protected *in their own right*, not simply instrumentally. *See, e.g., N.Y. Times Co.*, 376 U.S. at 271 ("The constitutional protection does not turn on 'truth, popularity, or social utility of the ideas and beliefs which are offered.'" (internal citation omitted)); *NAACP*, 371 U.S. at 445; *Cohen*, 403 U.S. at 23-24.

To accept the government's theory, moreover, would turn the First Amendment on its head. For a broad category of speech, speakers would bear the burden of demonstrating that their expression should be protected; the government would be spared the ordinary burden of demonstrating that the expression should be suppressed. *See Philadelphia Newspapers, Inc, v. Hepps*, 475 U.S. 767, 776-77 (1986) ("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified."); *Speiser,*

357 U.S. at 526 ("Where the transcendent value of speech is involved . . . the State bear[s] the burden of persuasion to show that the [defendant] engaged in criminal speech."); *N.Y. Times Co.*, 367 U.S. at 271 (rejecting rule that would "put[] the burden of proving truth on the speaker"). Even more perniciously, within this broad category of speech knowingly false statements would be protected only if the speaker could show that the suppression of those statements would chill the expression of "speech that matters" – speech that is protected in its own right. It is difficult to imagine many contexts in which a speaker would be able to carry this burden. As Judge Smith observed below,

> [I]n nearly *every* case, an isolated demonstrably false statement will not be considered 'necessary' to promoting core First Amendment values, and will often be contrary to it. In nearly every case, the false statement will be outweighed by the perceived harm the lie inflicts on the truth-seeking function of the marketplace of ideas. Using such an approach, the government would almost always succeed.

Alvarez, 617 F.3d at 1204 (emphasis in original). [7]

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[7] The government's *amici* propose that the Court should recognize a categorical exception to the First Amendment for knowingly false statements but also recognize exceptions to the exception for (at least) statements concerning science and history, statements about the government, fiction, parody, humor, and hyperbole. Volokh & Weinstein Br. 22-24. This approach would turn a relatively clear mandate – "Congress shall make no law…" – into a patchwork of amorphous caveats

The implications of the government's proposal would be far-reaching. Under the government's proposal, the First Amendment permits the government to impose criminal penalties on the blogger who contends that President Obama is not a citizen of the United States; that the U.S. government was responsible for the bombing of Pan Am Flight 103 over Lockerbie; or that Trig Palin is Sarah Palin's grandson, not son. It permits the government to imprison the job-seeker who falsely states, on a networking site, that he can type 60 words per minute; on the student who, during a campaign for student council, falsely represents that she has attended every one of the football team's games; or on the date-seeker who falsely represents, on Match.com or eHarmony.com, that he is a full 6 feet tall.

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and reservations. One virtue of a rule that presumptively protects knowing false statements is that it spares courts the task of separating, say, parody from earnestness. This task is not always easy. *See, e.g.*, Charles McGrath, *How Many Stephen Colberts Are There?*, N.Y. Times Magazine, Jan. 4, 2012 ("But those forays into public life were spoofs, more or less. The new Colbert has crossed the line that separates a TV stunt from reality and a parody from what is being parodied.").

Amici Volokh and Weinstein contend that a rule generally protective of knowingly false statements would require the Court to recognize "many narrow exceptions." Volokh & Weinstein Br. 13. As they acknowledge, however, the converse is also true: a rule generally *unprotective* of knowingly false statements would also require the Court to recognize many exceptions. *Id.* at 22-24. It is worth noting that some of the purported First Amendment exceptions that Volokh and Weinstein identify are better understood as aspects of the defamation and fraud exceptions. Many of the others have never been endorsed by this Court.

There is no question, of course, that some statements that are knowingly false lack obvious social value; some are offensive, cowardly, distressing and even harmful to others. Many statements that are knowingly false, however, serve important social interests. This Court has already recognized that satire and parody can sharpen political debate. *Hustler Magazine, Inc.*, 485 U.S. at 53-54 ("[F]rom the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate"). False statements can also lead those who articulate the truth to do so more clearly, and more compellingly. *See, e.g., N.Y. Times Co.*, 376 U.S. at 276 n.19 ("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.'" (quoting John Stuart Mill, *On Liberty* 15 (1947))).

Moreover, many false statements are entwined with autonomy and self-fulfillment interests that the First Amendment has long been understood to protect. As Judge Kozinski observed below, for example, perfectly respectable people lie in order to protect their privacy, avoid hurt feelings, make others feel better, avoid recriminations, prevent grief, maintain domestic tranquility, avoid social stigma, avoid loneliness, set up surprise parties, stall for time, keep up appearances, duck minor obligations, maintain their public image, make a point, save face, avoid embarrassment, protect themselves or others from prejudice and bigotry, or simply entertain. *Alvarez*, 638 F.3d at 674-75 (Kozinski, J., concurring).

The First Amendment surely does not permit the government to regulate – and criminalize – all of this speech. "The First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression." *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring); *id.* ("Such [self] expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's self worth and dignity"); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (observing that freedom of speech helps "make men free to develop their faculties"); Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593 (1982) ("constitutional guarantee of free speech ultimately serves only one true value . . . 'individual self-realization'"); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 881 (1963) ("Thought and communication are the fountainhead of all expression of the individual personality. To cut off the flow at the source is to dry up the whole stream. Freedom at this point is essential to all other freedoms.").

The point is not that these commonplace lies and deceptions are justified or useful or appropriate (or not); the point is that the First Amendment generally leaves this matter to the individual, not the government, to resolve. *N.Y. Times Co.*, 376 U.S. at 275 ("[I]n a debate in the House of Representatives, Madison had said: 'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the

Government, and not in the Government over the people'" (quoting 4 Annals of Congress 934 (1794))).[8]

II. THE STOLEN VALOR ACT CANNOT SURVIVE STRICT SCRUTINY.

There is no dispute that the Stolen Valor Act criminalizes speech because of its content. Because the Act imposes a content-based restriction on speech, and because that speech is not categorically excluded from First Amendment protection, the Act is invalid "unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchs. Ass'n*, 131 S.Ct. 2729, 2738 (2011) (citing *R.A.V.*, 505 U.S. at 395); *see also United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 817 (2000) ("Content based regulations are presumptively invalid, and the Government bears the burden to rebut that presumption." (internal citation omitted)). A governmental interest is "compelling" only if it is an "interest[] of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). A law is narrowly tailored only if it is the least restrictive means of achieving

[8] The government attempts to soften the implications of its proposal by emphasizing that the statute at issue in this case suppresses only falsehoods that are "objectively verifiable." Gov't. Br. 47. The First Amendment exception that the government urges the Court to accept, however, is not limited to objectively verifiable falsehoods. In any event, many objectively verifiable falsehoods are worthy of protection, for reasons discussed below. It is also worth remembering that some "objectively verifiable" falsehoods have turned out, in the end, to be spectacularly true. *See, e.g.*, Nicholas Copernicus, STANFORD ENCYCLOPEDIA OF PHIL. (Aug. 16, 2010) http://plato.stanford.edu/entries/copernicus/.

the government's interest. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 879 (1997).

The government argues that it has a compelling interest in "protecting the integrity of the military honors system." Gov't Br. 37. Its core concern is that false claims undermine the reputation and prestige of military honors and thereby undermine the government's ability to foster morale within the military and express official gratitude to military heroes. Gov't Br. 42 ("false claims diminish the value and prestige of the medals for servicemembers by creating the impression that many more people have received military honors than is actually the case").

While the government's interest in protecting the integrity of the military honors program is legitimate, it is not "compelling" within the meaning of First Amendment doctrine. To the contrary, this court has properly recognized that there is something particularly insidious about official restrictions on speech that are meant to protect reputational interests belonging to the government. *See, e.g., N.Y. Times Co.*, 376 U.S. at 291 ("[N]o court of last resort in this country has ever held, or even suggested, that that prosecutions for libel on government have any place in the American system of jurisprudence." (internal quotation marks omitted)); *id.* at 270 (remarking on our "profound national commitment to the principle that debate on public issues should be uninhibited" and noting that this debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government").

The Court has been particularly hostile to restraints meant to protect the reputation of official

institutions and symbols. *See, e.g., N.Y. Times Co.*, 376 U.S. at 272-73 ("[T]his Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains 'half truths' and 'misinformation.'" (citing *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331, 342, 343, n.5, 345 (1946))); *id.* at 276 (quoting with approval President Jefferson's explanation of his decision to pardon those convicted under the Sedition Act: "I discharged every person under punishment or prosecution under the sedition law because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." (citation omitted)); *Texas v. Johnson*, 491 U.S. 397, 415-16 (1989) ("nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it"). While the Stolen Valor Act criminalizes claims rather than criticism, the interest the government asserts here is one that the Court has repeatedly found insufficient to justify restraints on speech.[9]

Even if the governmental interest asserted here could be sufficient in some hypothetical context to justify a content-based restraint on speech, there

[9] Particularly because the Act proscribes satire and parody, the distinction between "claims" and "criticism" here is a distinction without a difference. The government contends that the Act "does not restrict expression of opinion about military policy, the meaning of military awards, the values they represent, or any other topic of public concern," Gov't Br. 13, but whether a false claim expresses any of these things depends on context.

is little evidence that protecting the government's interest here actually requires such a restraint. There is no evidence that false claims about military decorations are widespread. Nor is there evidence false claims have had a "demotivating impact on our men and women in uniform." *Alvarez*, 617 F.3d at 1217. When false claims have been exposed, the pretenders have been condemned and ostracized, and the prestige of military honors has been, if anything, enhanced. *Id.* ("The greatest damage done seems to be to the reputations of the liars themselves."); Veterans of Foreign Wars of the United States, et al. Br. 1 ("there is nothing that charlatans such as Xavier Alvarez can do to stain their honor"). And there is every reason to believe that most false claims will be exposed. Publicly available lists and databases already allow easy confirmation of claims relating to the Medal of Honor.[10] Recent news stories confirm that claims relating to military service and military honors – particularly claims made by public officials and candidates for public office – are closely scrutinized by the news media; claims relating to the Medal of Honor, which appear to be of special concern to the government, Gov't Br. 42, have been subject to particularly searching scrutiny.[11]

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[10] *See, e.g., Medal of Honor*, U.S. Army Center of Military History (Dec. 3, 2010), http://www.history.army.mil/moh.html; *Search for Medal of Honor Recipients*, National Park Service Civil War Soldiers and Sailors System, http://www.itd.nps.gov/cwss/medals.htm (last visited Jan. 18, 2012); *Search Purple Heart Recipients*, National Purple Heart Hall of Honor, http://www.thepurpleheart.com/recipient (last visited Jan. 18, 2012).

[11] *See, e.g.,* Michael Taylor, *Tracking Down False Heroes: Medal of Honor Recipients Go After Imposters*, S.F. Chron., May 31,

If the government believes that existing mechanisms are insufficient to assure the integrity of the military honors system, the government has available to it other mechanisms that would not burden protected speech. It could create a comprehensive database of military honors recipients or otherwise publicize the names of legitimate recipients and false claimants. It could undertake public education campaigns meant to foster respect for military honors. It could criminalize false claims intended to secure government benefits. The Court cannot ignore the availability of these less restrictive alternatives. *See, e.g., Playboy Entm't Group, Inc.*, 529 U.S. at 816 (holding that speech-restrictive provisions in the Telecommunications Act of 1996 were not narrowly tailored because the government could protect its interests by publicizing the availability of a channel-blocking feature); *Reno*, 521 U.S. at 879 (holding that speech-restrictive provisions of the Communications Decency Act were not narrowly tailored because the interests asserted by the government could be accommodated through filters and website tagging); s*ee also Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("when there is time to expose through discussion the falsehoods and fallacies [of the speech], to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence").

1999, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1999/05/31/MN106963.DTL&ao=all;
Abigail Klingbeil, *FBI Agent Nails Medal of Honor Imposters*, The Saratogian, July 4, 1998, *available at* http://www.homeofheroes.com/a_homepage/community/imposters/cottone.html.

Finally, even if a restraint on speech is assumed to be necessary to achieve the government's interest here, the Act reaches too far. The Act reaches oral statements as well as written ones, and private statements as well as public ones. It reaches statements that do not cause harm as well as those that do. It reaches statements made with intent to deceive, but it also reaches satire and parody. The Act reaches the late-night television personality who, in a satirical effort to burnish his national security credentials, claims to have been awarded a Purple Heart. It reaches the stage actor who, playing a part, claims to have received the Medal of Honor. It reaches the undercover investigator who, in an effort to infiltrate a group suspected of defrauding veterans, claims to have received the Navy's silver star. It reaches the satirist, the actor, the comic, the investigator, the eccentric, and the common braggart. It reaches them whether their claims are made in a newspaper ad, a public speech, a dinner table conversation, a love letter, a blog post, or a tweet. And it reaches them even if their claim was not intended to deceive, no one relied on it, no one was harmed by it, and no one other than the government paid it any attention. Even if the governmental interest asserted here is assumed to be compelling, the Stolen Valor Act sweeps far more broadly than necessary to serve this interest.

The Act cannot survive strict scrutiny.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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