

No. 11-210

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioners,

v.

XAVIER ALVAREZ
Respondent.

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

**BRIEF OF PROFESSOR JONATHAN D. VARAT
AS *AMICUS CURIAE* IN SUPPORT OF
RESPONDENT**

JONATHAN D. VARAT
UCLA SCHOOL OF LAW
405 HILGARD AVE.
LOS ANGELES, CA 90095
VARAT@LAW.UCLA.EDU
(310) 825-1538

CARY B. LERMAN
Counsel of Record
LEO GOLDBARD
CLAIRE YAN
RICHARD C. CHEN
MUNGER, TOLLES & OLSON LLP
355 S. GRAND AVE., 35TH FL.
LOS ANGELES, CA 90071-1560
CARY.LERMAN@MTO.COM
(213) 683-9163
Counsel for Amicus Curiae

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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INTEREST OF *AMICUS CURIAE*¹

Jonathan D. Varat is a professor of law and former Dean of the UCLA School of Law. He has taught and written on constitutional law, including the development and application of First Amendment law, for many years. Professor Varat's article, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L.Rev. 1107 (2006), was cited by the Ninth Circuit opinion below in this case. *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010). In this brief, Professor Varat attempts to identify the characteristics of false factual speech that this Court has determined may be regulated consistently with the First Amendment and explain how the regulation of false factual speech without these characteristics does not comport with the First Amendment's comprehensive protection of pure speech and individual expressive autonomy. Professor Varat believes that the Stolen Valor Act is improperly directed at fully protected speech and unconstitutional. His main concern, however, is to further a coherent and workable doctrine of First Amendment law as it applies to deceptive speech.

¹ No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. All counsel of record received notice of *amici's* intention to file an amicus brief at least ten days before the filing date, and have consented to this filing in letters that are filed with the Clerk of the Court with this brief.

SUMMARY OF ARGUMENT

The United States' assertion that all false factual speech is categorically not entitled to First Amendment protection for its own sake fundamentally conflicts with this Court's traditional comprehensive protection of pure speech under the First Amendment. It is inconsistent with this Court's resistance to creating categorical exceptions to the First Amendment and ignores this Court's recognition that all speech can be a vehicle for the expression of ideas and, hence, should be entitled to some degree of First Amendment protection. It also cannot be squared with this Court's traditional insistence that restrictions on pure speech for its communicative impact may be justified only by compelling government interests that cannot be served in less restrictive ways. Finally, it neglects the value of individual expressive autonomy, which this Court has repeatedly stated is protected by the First Amendment.

This Court should reaffirm and clarify that only proscription of false factual speech that causes concrete, targeted injury is permitted by the First Amendment. Those categories of false factual speech that this Court previously has recognized as deserving only limited First Amendment protection (for example, fraud and defamation) all involve concrete, targeted injury to individuals. This requirement protects against the government's use of prohibitions to impose selective punishment on dissidents and also respects individual expressive autonomy by allowing the regulation of false speech only where such speech causes concrete harm and interferes with the individual autonomy of listeners.

The Stolen Valor Act contains no requirement of concrete, targeted injury. Nor is it based on legislative findings of any such injury. Instead, the only harm the Act purports to prevent is a diffuse one to the significance of military honors. Accordingly, the prohibitions authorized by the Stolen Valor Act go well beyond the narrow category of false factual speech that this Court has previously found can be prohibited consistent with the First Amendment. As a content-based regulation on speech, the Stolen Valor Act, therefore, must be subject to strict scrutiny. Because the Act is not narrowly tailored to serve any compelling government interest, it should be found unconstitutional.

ARGUMENT

I. THE UNITED STATES' CATEGORICAL APPROACH THAT WOULD PROVIDE "AT MOST" ONLY LIMITED FIRST AMENDMENT PROTECTION FOR KNOWINGLY FALSE FACTUAL STATEMENTS FAILS TO PROTECT CORE FIRST AMENDMENT VALUES

Congress has made it a federal crime to represent oneself falsely, verbally or in writing, as having been awarded a military medal. It has done so based solely on a concern that such a false statement might influence the attitudes of those who hear or read such false speech. Specifically, Congress is concerned that reading or hearing such false statements conceivably may impair the reputation and meaning of military medals.² First Amendment

² While we share the United States' view that the military honors program promotes important national interests and

values are implicated in even a knowingly false statement about oneself, suggesting that Congress should not be able to impose a criminal sanction on the basis of an alleged injury to a government interest that is so abstract, indirect, and empirically unsubstantiated. Those values are particularly weighty here because what Congress aims to suppress is the communicative impact of pure speech and its alleged tendency to influence listeners to think less well of the value of military awards. Accordingly, this is an especially proper occasion for invoking and reaffirming the well-established First Amendment principle that “more speech, not enforced silence” is the constitutionally preferred method of addressing potentially harmful speech.

In defending the Stolen Valor Act, the United States adopts a narrow view of the values protected by the First Amendment. The United States’ view would essentially confine the First Amendment to its truth-seeking or enlightenment function and brush aside any concern with impairment of self-expression or opinion. As a consequence, the United States would demand too little in the way of needed justification for congressional prohibitions of pure speech.

At the core of the First Amendment is the powerful presumption that pure speech is to be protected against government regulation of its communicative impact. The United States

values and we express our admiration for those who have properly been awarded military honors, the Stolen Valor Act nevertheless impermissibly infringes on the core value of the First Amendment to protect pure speech.

nonetheless urges this Court to view the broad category of knowingly false factual speech as effectively outside this core protection and deserving of limited First Amendment protection “at most.” (Petitioner’s Opening Brief (“POB”) at 18.) In the United States’ view, so long as a prohibition of false factual speech serves an “important government interest” and does not unduly chill protected speech, it does not run afoul of the First Amendment. (POB at 18-20.) Such a rule, however, would be a radical departure from the existing protections afforded by the First Amendment. It cannot be reconciled with the Court’s general resistance to treating categories of pure speech as completely outside the shelter of the First Amendment. Nor would it respect the Court’s traditional insistence that restrictions on pure speech for its communicative impact may be justified only in rare instances implicating truly overriding government interests that cannot effectively be served in less restrictive ways. In addition, such a rule would fail to take into account the full breadth of interests the First Amendment seeks to protect, some of which—especially the interest in self-expression—are inherently part of self-aggrandizing fabrications such as having been awarded a military decoration.

A. The United States’ Proposed Treatment Of False Factual Speech Is Irreconcilable With The First Amendment’s Comprehensive Protection Of Pure Speech

The First Amendment centrally and most fundamentally means that, “as a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter,

or its content.” *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (citation and internal quotation marks omitted). This prohibition is particularly robust with regard to “pure speech” (i.e., speech not intertwined in any way with conduct), which this Court has long held “is entitled to comprehensive protection under the First Amendment.” *Tinker v. Des Moines Independent Cmty. School Dist.*, 393 U.S. 503, 506 (1969). Absent a compelling justification, the default position of the First Amendment is that the government may not regulate the content of pure speech. *See, e.g., Ashcroft*, 535 U.S. at 573; *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009) (“Restrictions on speech based on its content are ‘presumptively invalid’ and subject to strict scrutiny.” (citation omitted)); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”).

The United States’ assertion that false factual speech categorically is not entitled to any more than limited First Amendment protection fundamentally conflicts with this Court’s traditional comprehensive protection of pure speech under the First Amendment in two significant ways. First, it asks this Court to declare a wide-ranging category of speech, including *all* knowingly false factual statements, regardless of their context or effect, or the nature of the government’s purported justifications for criminalizing them, as entitled to at most only limited First Amendment protection. This contradicts this Court’s frequent assertions that the number and scope of exceptions to the First Amendment’s protection for pure speech must be strictly limited. Second, the United States asks the

Court to declare such speech essentially valueless and worthy of protection only where necessary to protect or further truthful speech. This largely ignores the Court's express recognition that all speech can be a vehicle for the expression of ideas, including one's self-presentation, and, hence, is entitled to considerably greater First Amendment protection than the United States would acknowledge.

1. *This Court Has Recognized Only Few And Narrow Exceptions To The First Amendment's Protection Of Pure Speech*

Because the protection of pure speech is at the heart of the First Amendment, this Court has identified only a small number of very narrow exceptions to the First Amendment's prohibition on content-based regulation of pure speech. In particular, this Court has recognized that the First Amendment "permit[s] restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V.*, 505 U.S. at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942)). These have included fighting words, *id.*, obscenity, *Roth v. United States*, 354 U.S. 476, 483 (1957), defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 254-255 (1952), fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447-449 (1969) (per curiam), and speech integral to

criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

Allowing certain classes of speech to be subject to content-based regulation is in inherent tension with the First Amendment's solicitude for pure speech. As a result, this Court repeatedly has stated that these classes of speech must be "well-defined and narrowly limited." *Chaplinsky*, 315 U.S. at 572-572; *see also, e.g., Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2733 (2011) (hereafter "*Entertainment Merchants Ass'n*"). When the Court recently reaffirmed the need to contain these recognized exceptions to the First Amendment's comprehensive protection for pure speech in *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010), it sharply rejected as "startling and dangerous" any notion that new categories of unprotected speech could be recognized based on an "ad hoc balancing of relative social costs and benefits" or on a determination that certain speech was "valueless or unnecessary." *Id.* at 1585-86. Rather, it emphasized that only those categories of speech that historically have been recognized as subject to prohibition could be regarded as outside the protection of the First Amendment. *Id.*

This Court's view that exceptions to the First Amendment's protection for pure speech should be both rare and narrow is further evident from its repeated holdings shrinking the number and scope of already recognized exceptions. For example, the First Amendment's long-standing exception for "fighting words" has been given increasingly limited application by this Court. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 409 (1989) ("No reasonable onlooker

would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs."); *Cohen v. California*, 403 U.S. 15, 20 (1971) ("While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.'). Of similar import are the decisions limiting earlier recognized exceptions for libelous and obscene speech. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 268-69 (1964); *Miller v. California*, 413 U.S. 15, 23-24 (1973). Moreover, commercial speech, a category of speech to which the First Amendment was once considered not to apply, now enjoys broad First Amendment protection. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 758-70. And even when this Court has acknowledged the existence of additional categories of unprotected speech, such as "true threats," *Virginia v. Black*, 538 U.S. 343, 359-60 (2003), and child pornography, *New York v. Ferber*, 458 U.S. 747 (1982), it has been scrupulously careful about confining those categories within narrow definitions demanding that the harmful impact of the speech on identifiable, individual victims be clear and compelling. See, e.g., *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234 (2002) (declining to allow inclusion of virtual child pornography within the unprotected category of actual child pornography).

The United States' proposal that all false factual speech be treated as at best minimally protected by the First Amendment would create an exception to the First Amendment's prohibition of

content-based-regulations whose scope would go well beyond that of the exceptions this Court has previously recognized. Likewise, it would run contrary to this Court's efforts to maintain, if not expand, the existing margins of the First Amendment's protection. While, as the United States points out, this Court has found statutes aimed at various narrow categories of false factual statements, such as defamatory or fraudulent statements, to be consistent with the First Amendment, (POB at 20-28), it has never actually held that the First Amendment allows regulation of *every* false factual statement, regardless of its effect or context, so long as such regulation does not inhibit truthful speech. Though the United States isolates various statements in this Court's past decisions that false factual speech is not protected for its own sake, each of these decisions actually held that only certain narrow types of false factual speech could be prohibited. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64 (1964) (defamation); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (libel); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (false speech causing emotional distress); *Herbert v. Lando*, 441 U.S. 153 (1979) (defamation). Carving out the broad swath of all false factual speech from the First Amendment's protection would, therefore, be a substantial contraction of the First Amendment.

Without carefully circumscribing the conditions under which false factual statements may be criminalized, the United States' approach would reverse the normal presumption against the suppression of pure speech and require speakers to prove that the communicative impact of their speech should not be subject to government restriction. That

reversal of presumptions is incompatible with the traditions of the First Amendment by relieving the United States of *its* normal burden to provide overriding, narrowly defined justifications for prohibiting pure speech because of the communicative impact of that speech. In doing so, the United States' approach risks teaching a systemically unfortunate lesson that speech must justify its freedom. To the contrary, government suppression of speech based on a potential influence on listener attitudes should be permissible only when the government can demonstrate truly powerful justifications for doing so.

2. *This Court Has Recognized That Even Classes Of Speech Formally Identified As Unprotected Remain Subject To Meaningful First Amendment Scrutiny*

In addition to limiting the number and scope of exceptions to the First Amendment's protection, the Court also has emphasized that even so-called "unprotected" categories of speech are neither entirely without value nor genuinely outside the protection of the First Amendment. Regulations directed at unprotected speech "can claim no talismanic immunity from constitutional limitations," but "must be measured by standards that satisfy the First Amendment." *New York Times*, 376 U.S. at 269. For this reason, this Court has tested even regulations directed only at unprotected classes of speech against the First Amendment and not infrequently has declared them invalid. *See, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972) (statute directed at fighting words violated First

Amendment); *Hustler*, 485 U.S. at 46, 57 (recovery for emotional distress caused by false speech violated First Amendment); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (portions of Communications Decency Act aimed at obscenity violated First Amendment). The Court has applied particularly stringent requirements to laws, such as the statute at issue, imposing criminal liability for unprotected speech. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 70 (1964) (criminal libel statutes should be “narrowly drawn” and “designed to reach words tending to cause a breach of the peace . . . or designed to reach speech, such as group vilification, ‘especially likely to lead to public disorders’” (quoting Model Penal Code, Tent. Draft No. 13, 1961, s 250.7, Comments, at 44)).

Most significantly, as the United States acknowledges (POB at 48), even where a statute prohibits only unprotected speech, it may violate the First Amendment where it seeks to proscribe such speech for a reason unrelated to its “constitutionally proscribable content.” *R.A.V.*, 505 U.S. at 383. Hence, the government may not regulate only a subset of unprotected speech based on its content except where “the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.” *Id.* at 388. For example, this Court has found that an ordinance directed to the prohibition of a subset of fighting words violated the First Amendment because it was directed only at fighting words concerning a particular disfavored topic. *Id.* at 391. The First Amendment’s prohibition on regulation of this type flows from the recognition that even unprotected speech is not “in all respects” worthless, but may at times be part of the expression of ideas and,

accordingly and most importantly, that its prohibition by the government may constitute an impermissible means of idea suppression. *Id.* at 385.

The United States' assertion that false speech is wholly without intrinsic value and, therefore, not entitled to any First Amendment protection unless its restriction would unduly chill true speech cannot be squared with this Court's recognition that regulation of even traditionally unprotected speech can implicate the First Amendment. There is no basis to conclude that false factual speech, alone of all classes of speech, is completely valueless and can never be part of the communication of ideas. Simply because a statement is false and fundamentally factual in nature does not mean that it cannot carry within it an idea that the United States may seek to suppress. To take one current example, assertions by segments of the population that the current President is not a United States citizen are fundamentally factual statements, yet they are inextricably intertwined with the expression of subjective beliefs concerning the trustworthiness and legitimacy of the current President. A regulation aimed at the prohibition of such statements could, therefore, be a vehicle for idea suppression. Many other types of false factual statements similarly are intertwined with the expression of contested ideas, including statements regarding the threat of climate change or statements concerning the impact of legislation on the federal budget. For this reason, even false factual speech may in certain circumstances have inherent worth and require protection for its own sake—not to mention that the First Amendment may also seek to protect such speech to curtail the risk that the United States becomes too quick to turn to speech control for

impermissible or simply gratuitous reasons. The United States' proposed treatment of false factual speech as largely categorically unworthy of any First Amendment protection ignores these possibilities.

B. The United States' Proposed Treatment Of False Factual Speech Neglects To Account For The First Amendment's Protection Of Self Expression

The United States' proposed rule for determining the constitutionality of prohibitions on false factual speech not only is at odds with the First Amendment's presumptive protection of pure speech, but it also essentially ignores the First Amendment's independent protection of self-expression. Although the United States purports to acknowledge that “[p]rotecting the right to self-expression is unquestionably an important value underlying the First Amendment[.]” POB at 51, it apparently takes the conclusory position that a false factual assertion about having received a military decoration does not impair that value at all. *Id.* at 52. This leaves open whether other forms of restrictions of false assertions about oneself might impair expressive autonomy.

The First Amendment protects not only the value of speech itself, but also the value of controlling one's own speech. This Court has frequently recognized that “[t]he individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion.” *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *see also, e.g., Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 972

(2010) (“One fundamental concern of the First Amendment is to ‘protec[t] the individual’s interest in self-expression.” (citing *Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 534, n.2 (1980))); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–504, 104 (1984) (“[T]he freedom to speak one’s mind is . . . a good unto itself” and “also is essential to the common quest for truth and the vitality of society as a whole.”). As Justice Marshall explained, “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such 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 worth and dignity.” *Procunier v. Martinez* 416 U.S. 396, 427-428 (1974) (Marshall, J., concurring), *rev’d in part on other grounds, Thornburgh v. Abbott*, 490 U.S. 401 (1989). The protection of self-expression also serves to “make men free to develop their faculties,” *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969), and facilitates “individual self-realization,” Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L.Rev. 591, 594 (1982).

For this reason, the First Amendment can be implicated even by regulations that suppress no speech at all—most notably in cases dealing with compelled speech. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), this Court held that the private organizers of a parade could not be forced consistent with the First Amendment to include in their parade a group

expressing views with which they disagreed. That holding was founded on this Court's recognition that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id.* at 573. *See also, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977) (First Amendment prohibits state from compelling individual to display "Live Free or Die" on his license plate); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (First Amendment prohibits requirement that students salute and pledge allegiance to the flag). The right not to be compelled to speak cannot be founded on the value of speech itself, but necessarily is based on the value of control over one's self-expression.

The United States' view that the prohibition of false factual speech is only of concern to the First Amendment when it chills truthful speech neglects the First Amendment's concern with expressive autonomy. Even when an individual's false factual statement otherwise lacks any inherent value, it reflects a choice by that individual of what to say and is therefore a form of self-expression. False statements about oneself, such as the statements targeted by the statute at issue, are particularly imbued with an individual's autonomy of expression. Indeed, they are an essential means by which many people—the Willy Lomans and Walter Mittys of the world—shape their public and private persona. Whether or not we approve of such deception (often self-deception), the choice to engage in it is indisputably a crucial aspect of the individual autonomy protected by the First Amendment.

Using speech to gain the respect of others, without harming the speaker's audience in any tangible or directed way—such as by taking something from the listeners—is a normal and routine part of self-expression that does include statements deliberately exaggerating or falsifying one's accomplishments. The United States' ability to control how people express themselves in their everyday lives as they negotiate their egos and insecurities should be extremely limited and narrowly circumscribed. False representations for the purpose of self-aggrandizement may be neither admirable nor attractive, but standing alone they are not usually understood as criminal. Accordingly, any determination of whether a prohibition of false statements runs afoul of the First Amendment cannot simply be based, as the United States urges, on whether the prohibition discourages truthful speech. To account for the full breadth of interests the First Amendment seeks to protect, the impact of such a prohibition on the ability of individuals to choose what to say, particularly when speaking about themselves, also must be meaningfully considered in determining its constitutionality.

II. ALLOWING PROHIBITIONS ONLY ON FALSE FACTUAL SPEECH THAT CAUSES CONCRETE INJURY WOULD BETTER COMPORT WITH THIS COURT'S PRECEDENT, THE PURPOSES OF THE FIRST AMENDMENT, AND THE LEGITIMATE REGULATORY INTERESTS OF THE GOVERNMENT

In lieu of the United States' inadequate proposed rule, this Court should affirm the Ninth

Circuit's holding below that only false factual speech that possesses other key characteristics may be prohibited without violating the First Amendment. *United States v. Alvarez*, 617 F.3d 1198, 1209-13 (9th Cir. 2010). The United States' purported justification based on a perceived but unsubstantiated harm that the speech might influence listeners to think less well of the value of government-awarded medals, or the true recipients of such medals, is entirely too speculative, diffuse, and abstract. To make the assertion of this sort of harm a basis for prohibiting pure speech, using what is essentially the balancing test proffered by the United States, would be to risk licensing the United States to outlaw broad swaths of false factual statements in the political, scientific, and historical realms, in a fashion that would tend toward establishing the government's role as the enforcer of truth without regard to particularized harms threatened by the false statements. Making explicit that only proscription of false factual speech causing targeted, concrete injury is permitted by the First Amendment would both be consistent with this Court's previous holdings and better account for the full breadth of interests protected by the First Amendment.

A. Categories Of False Factual Speech This Court Previously Has Held May Be Prohibited Under The First Amendment All Involve Individually Directed Concrete Injury

As the Ninth Circuit recognized, this Court never has allowed false speech to be regulated consistent with the First Amendment without finding that speech to possess other significant

characteristics. *Alvarez*, 617 F.3d at 1209-13. Of particular significance, those categories of false speech that the Court has recognized as deserving of only limited First Amendment protection all involve concrete targeted injury.

For example, defamatory lies are actionable not merely because the defendant has uttered knowingly false statements, but because such defamatory lies are “injurious to a private individual” and cause irreparable damage to an individual’s reputation. *Gertz*, 418 U.S. at 347. Lies in cases involving privacy cause individuals “mental distress from having been exposed to public view.” *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967). Intentionally inflicting emotional distress by telling a particular person a knowing falsehood is another category of actionable false speech with concrete harm targeted at a particular individual. *See, e.g., Hustler*, 485 U.S. at 46. Lies to defraud someone into parting with something of value is an obvious example where speech inflicts concrete injury on particular individuals. Only one-to-one targeted lies that mislead the listener and cause financial injury amount to fraud or common law deceit. *See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). And of course, the First Amendment does not protect false statements that may lead to immediate public panic, such as shouting fire in a theater. *Schenck v. United States*, 249 U.S. 47, 52 (1919). The injuries inflicted in these cases are obvious, directed, and palpable, and certainly not abstract.

In addition, lies that constitute perjury or false statements under oath or misrepresentations to the

government cause a concrete interference with government proceedings with particular and direct harms to individuals involved in those proceedings. See *Gates v. City of Dallas*, 729 F.2d 343, 345 (5th Cir. 1984); *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970); *United States v. Lattimore*, 215 F.2d 847, 860 (D.C. Cir. 1954); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 51 n.10 (1961). Accordingly, consistent with the First Amendment, these falsehoods also may be prohibited.

B. A Requirement Of Targeted, Concrete Injury Provides Appropriate Shelter For The First Amendment's Interests In Avoiding The United States' Suppression Of Ideas And Protecting Self-Expressive Autonomy, Without Unduly Constraining The United States' Ability To Protect The Public

Insisting that false factual speech cause targeted, concrete injury in order to be subject to prohibition under the First Amendment is a crucial limitation. Allowing the United States to police all deceptions regardless of the type of harm they inflict would, as discussed above, *see supra* Part I, lead to an intolerable contraction of the protections provided by the First Amendment. A concrete injury requirement, unlike the United States' proposed rule for false factual speech, would ensure that the United States will not use prohibitions of such speech to engage in idea suppression or too readily resort to restricting speech without a powerful reason to do so. It would also appropriately account for the First

Amendment's protection of expressive autonomy up to the point where overriding government interests in the protection of other individuals or other narrowly confined and carefully circumscribed concerns ought to be allowed to prevail.

The prohibition of even false factual speech may be a vehicle for the suppression of ideas. Rather than punishing speakers for the false content of their statements, the government may opt for selective enforcement as a means of punishing unpopular dissidents for the remaining content, even when in theory only the lies are actionable. Allowing the government to regulate false factual speech when the only harm at issue is an abstract, diffuse one to institutions or values—allegedly accomplished by influencing the attitudes of the listener—provides the government with a perilous opportunity to use its regulatory power to engage in this form of idea suppression.

The danger of selective enforcement is present whenever any speaker makes a false representation in the course of communication and the government takes notice (which is more likely to be the case, as here, when the government feels that the false statement is detrimental to the reputation and meaning of the government's own symbols). This danger is at its height, however, when the false factual speech targeted is addressed to wide audiences about broad institutional, social, or political issues rather than speech causing concrete injury.

For example, suppose a law were passed allowing prosecutors to bring criminal charges

against political candidates for making knowingly false statements in public discourse, such as a statement exaggerating one's achievements. Because the enforcement of such a law would not be necessary to protect against any concrete injury, prosecutors would be tempted to overlook statements by candidates the prosecutor views favorably. Accordingly, there would be a very high risk that prosecutors, consciously or unconsciously, would use their authority under such a law in a censorial or partisan manner. Limiting prohibitions on false speech to instances where there is targeted, concrete injury significantly decreases the risk that the government will regulate false speech in a discriminatory fashion.

Moreover, even where the government does not engage in selective enforcement, a law directed at knowing false statements of fact without any requirement of concrete injury would have an inevitable chilling effect on speech. A speaker always risks the possibility that his or her statements might be inaccurate and that even an inadvertent misstatement might erroneously be found by a jury or other fact-finder in the course of litigation to have been knowing. An aggressive or simply strict prosecutor, with no discriminatory enforcement motive, could put the speaker in that uncertain, risky position. Such a prospect may well deter speakers from taking the risk to speak out. This concern would be particularly acute for speakers who have reason to fear government retribution for their unpopular speech.

In addition, requiring the government to demonstrate a real threat that false speech will

produce targeted and concrete injury will provide greater room for self-expression. Self-aggrandizing false representations like those condemned by Congress in the Stolen Valor Act are likely to be of a more self-expressive sort than false representations deployed to induce listeners to part with something of value or otherwise threaten the integrity of a concrete proceeding involving individualized interests. Thus, the First Amendment interest is stronger and the government interest is weaker when all that the government asserts is that a false representation will influence listeners to think less well of military medals. False factual speech that creates only diffuse injury to values or institutions has little impact on listeners' autonomy and threatens no concrete harm to any individual. At the same time, regulation of speech that threatens only indirect, attenuated interests of the government places a much greater burden on speakers' autonomy. As a result, the promotion of individual expressive autonomy is on balance best served by allowing speakers to engage in false factual speech where no concrete injury will result.

When the government prohibits false factual speech in order to protect the individual autonomy of listeners from a speaker who is scheming to take something from them, the weight of the interests are reversed—the speaker's interest in self-expression is less and the government's interest in protecting potential victims is much greater. The need for intervention is more immediate, and the speaker's presentation of his persona is much less compelling. These targeted lies interfere with the listener's control over his own reasoning abilities and thereby exert control over another in a manner uniquely

offensive to human autonomy. Moreover, they threaten genuine concrete harm to individuals that the government has an interest in prohibiting. Prohibiting speakers from engaging in these narrow forms of deception, meanwhile, has a minimal impact on their own expressive autonomy. Accordingly, in the context of deceptive statements targeted at individuals, the First Amendment's interest in protecting the autonomy of speakers may give way to the protection of listeners' autonomy and the protection of those deceived from concrete harm.

III. THE STOLEN VALOR ACT CANNOT QUALIFY FOR CATEGORICAL EXCLUSION FROM THE FIRST AMENDMENT, NOR FOR ANY SUGGESTED CATEGORY OF LIMITED PROTECTION

The Stolen Valor Act contains no requirement that individual concrete harm be shown. As written, the statute is concerned only with the act of false representation and does not require the government to demonstrate any resulting injury. There is no element analogous to the requirement for defamation that the speech be "injurious to a private individual," *Gertz*, 418 U.S. at 347, or the requirement for fraud that the misrepresentation succeed in misleading a victim, *Ill. ex rel. Madigan*, 538 U.S. at 620. Nor does it require that the speaker intend or attempt to produce any individualized harm to another as a result of the false representation.

Furthermore, the Stolen Valor Act is not based on legislative findings of any such concrete, individualized harm. Instead, the only harm

Congress purported to identify is to the significance of military honors. Specifically, Congress found that “[f]raudulent claims surrounding the [specified honors] damage the reputation and meaning of such decorations and medals.” Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. at 3266 (2006). The United States implies that false statements about military honors harm the value of the awards themselves by diluting the prestige of the awards, thereby undermining the military’s ability to convey gratitude and recognition and to foster morale within the armed forces. (POB at 41.) This harm is a highly diffuse one—to institutions and systemic values—that does not resemble the types of concrete harm involved in other restrictions on false speech. In contrast to defamation and fraud laws, the Stolen Valor Act is not aimed at speech that causes harm in any tangible sense. Likewise, in contrast to laws prohibiting certain misrepresentations to the government, the Stolen Valor Act cannot plausibly be said to protect against any interference with a specific government proceeding. The harmful effects it targets, if they exist,³ are to be measured upon

³ Neither Congress nor the United States as Petitioner has substantiated that false representations of having received military decorations are likely to undermine the government’s asserted interests. Probably equally plausible is that such false claims will be ignored, or easily detected and debunked. In either case, the purported baleful effects are unlikely to occur in any more than a *de minimis* way. It is also more than possible that false representations like those made by Mr. Alvarez will prompt further discussion of how important it is to appreciate those who truly were awarded medals of valor and thereby indirectly further the government’s interests. This may be one of those instances in which false speech ends up reinforcing the truth and its importance by bringing about “the clearer perception and livelier impression of truth, produced by its

entire military programs or governmental institutions or perhaps diffused among the population that derives pride from military honors.

Because of the abstract and diffuse nature of the harm it targets, exempting the Stolen Valor Act from strict scrutiny under the First Amendment is unjustified for three reasons. First, it is precisely the type of regulation that is susceptible to abuse, particularly as it is expressly grounded in a government self-interest rationale. The Court has repeatedly rejected the notion that actions for defamation on the government itself could be constitutionally permissible. *See, e.g., New York Times*, 376 U.S. at 292 (“[N]o court . . . has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.” (quoting *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923) (internal quotation marks omitted))); *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (recognizing that “the spectre of prosecutions for libel on government” is one that “the Constitution does not tolerate in any form”). The concern underlying those cases—that any tool the government could use to require respect from its citizens would be subject to abuse—should make the Court here skeptical and cautious about the supposed need to prevent the devaluing of military honors.

Second, and relatedly, the Stolen Valor Act seeks to target only a subset of false factual speech without any finding that that speech is a particularly

collision with error.” *New York Times*, 376 U.S. at 279 n.19 (quoting Mill, *On Liberty* (Oxford: Blackwell, 1947), at 15) (internal quotation marks omitted).

harmful form of deceptive speech. This is precisely what this Court's decision in *R.A.V.* prohibits. *R.A.V.* holds that the government may not simply pick and choose what unprotected speech will be subject to regulation based on the content of that speech unless such speech is being singled out precisely for the reasons it is unprotected. *R.A.V.*, 505 U.S. at 388-89. The Stolen Valor Act singles out false factual speech concerning military honors not because such lies are especially pernicious or harmful deceptions relative to other types of lies, but rather because such speech concerns military symbols that the government would like to shield from disrespect. This is no different than if the government made it a crime to make a knowingly false statement about the President or the U.S. military or the Founding Fathers. As *R.A.V.* holds, the government simply cannot do this without being subject to strict scrutiny.

Third, the type of false speech governed by the Stolen Valor Act is particularly well suited to correction by counterspeech. Whatever impact the misrepresentations of military honors may have, it is assuredly not immediate or irreparable—leaving opportunity for others to question and rebut any false claims before the purported harm ensues. *See Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”); *cf. Hustler*, 485 U.S. at 52 (reasoning that defamatory falsehoods “cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective”). Moreover, for any given misrepresentation, at least some public databases

exist to verify the receipt of particular medals or decorations. *See, e.g., Alvarez*, 617 F.3d at 1210 n.11 (identifying two websites that make lists of Congressional Medal of Honor recipients publicly available). And while not every misrepresentation will be subject to such easily verifiable investigation, there is reason to think that the ones sufficiently prominent to have any conceivable effect on the significance of military honors will provoke further inquiries, as was the case for Mr. Alvarez. The Court has consistently recognized that more speech and not enforced silence is the “preferred First Amendment remedy.” *Brown v. Hartlage*, 456 U.S. 45, 61 (1982). Here, because counterspeech is on the whole likely to be both available and effective in combating the harm Congress identified, that harm cannot justify the First Amendment exception that the United States seeks.

IV. THE STOLEN VALOR ACT CANNOT SURVIVE STRICT SCRUTINY

Because the Stolen Valor Act imposes a content-based restriction on speech that is not categorically excluded from First Amendment protection, and does so because the communicative impact of the speech is thought to influence listeners’ attitudes toward a government program, it should be evaluated under a strict scrutiny standard—meaning it must be “justified by a compelling government interest and . . . narrowly drawn to serve that interest.” *Entm’t Merchants Ass’n*, 131 S. Ct. at 2738. As even the dissent in the Ninth Circuit acknowledged, the Stolen Valor Act cannot satisfy that standard. *See Alvarez*, 617 F.3d at 1232 n.10 (Bybee, J., dissenting).

First, as to the government interest at stake, the discussion in the previous section demonstrates why the purported interest is far from compelling. The United States argues that it has a compelling interest in protecting the integrity of the military honors system. (POB at 41.) Although that may be a valid and valuable government objective in the abstract, the United States provides no argument as to how this interest supports the limitation of speech rights. As the Court explained in analogous circumstances in *Texas v. Johnson*, “[t]o say that the government has an interest in encouraging proper treatment of the flag . . . is not to say that it may criminally punish a person for burning a flag as a means of political protest.” 491 U.S. at 418.

The United States attempts to limit *Johnson*’s reasoning to state efforts to censor criticism of itself and argues that the Stolen Valor Act is directed at a distinct type of speech. (POB at 44-46.) But as the language quoted by the United States demonstrates, the interest asserted and rejected in *Johnson* was broader than that. Texas argued that the flag was a “symbol of . . . national unity,” and that “if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag’s referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.” (POB at 45 (quoting *Johnson*, 491 U.S. at 413).) Although the Texas statute was focused on a form of political protest as opposed to false representations, the ultimate *harm* it purported to prevent was essentially identical to the one at issue in this case. In short, the Texas statute, like the Stolen Valor Act,

was aimed at protecting the value of a government-created symbol.

Second, the Stolen Valor Act is not narrowly tailored to serve the United States' specified interest. The very premise that restricting false claims of military honors preserves the system's integrity writ large is speculative, falling far short of the required showing that the "curtailment of free speech [is] actually necessary to the solution." *Entertainment Merchants Ass'n*, 131 S. Ct. at 2738; see also *id.* at 2739 (statute was not narrowly drawn where the state had shown "at best some correlation" between the targeted speech and the purported harm it sought to prevent). Indeed, it is unclear what causal mechanism Congress had in mind in linking false claims of military honors with a decline in the value of those honors. Falsely laying claim to something that other people value may not automatically lead to a dilution of the value of that object. For example, a person lying about his height or weight does not dilute or affect the true height or weight of others. Moreover, any negative effect a false claim concerning military honors would have on such honors would require, at a minimum, that the claim reach a sufficiently broad audience, which would in turn make it very likely that the statement would be investigated and corrected without any government involvement. (For similar reasons, the United States' claim that the "cumulative force of all such misrepresentations" would "tarnish the meaning of military honors" (POB at 49) is at least equally speculative and readily subject to correction.)

The availability of less restrictive alternatives—such as the creation of more robust,

publicly available databases of honors recipients, in conjunction with the effectiveness of counterspeech as described above—confirms that the restriction is unnecessary. The United States argues that some unspecified number of records have been lost, “rendering some claims unverifiable.” (POB at 50.) This vague assertion does not even speak to the relevant issue—whether the number of lost records is so high, and a newly constructed database in turn would be so incomplete, that it could not effectively safeguard the value of military honors in the aggregate. Accordingly, it does not satisfy the United States’ burden to prove that this alternative solution would be ineffective. *See Reno*, 521 U.S. at 879 (noting “the absence of any detailed findings by the Congress” in rejecting the United States’ attempt to rebut the availability of less restrictive alternatives); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129-30 (1989) (emphasizing the insufficient congressional record on how effective an alternative technological solution would be).

CONCLUSION

Because the Stolen Valor Act lacks a requirement of concrete, targeted injury, it should be subject to strict scrutiny under the First Amendment. The Stolen Valor Act cannot survive such scrutiny and is, therefore, unconstitutional.

Respectfully submitted,

CARY B. LERMAN
Counsel of Record
LEO GOLDBARD
CLAIRE YAN
RICHARD C. CHEN
MUNGER, TOLLES & OLSON
LLP
355 S. GRAND AVE., 35TH FL.
LOS ANGELES, CA 90071-1560
CARY.LERMAN@MTO.COM
(213) 683-9163

Counsel for Amicus Curiae

JONATHAN D. VARAT
UCLA SCHOOL OF LAW
405 HILGARD AVE.
LOS ANGELES, CA 90095
VARAT@LAW.UCLA.EDU
(310) 825-1538