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No. 11-210

In The
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

XAVIER ALVAREZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE INTELLECTUAL PROPERTY AMICUS BRIEF CLINIC OF THE UNIVERSITY OF NEW HAMPSHIRE SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

The University of New Hampshire School of Law (UNH Law, formerly Franklin Pierce Law Center) has a long history of intellectual property expertise. UNH Law has an established Intellectual Property Amicus Brief Clinic that has filed amicus briefs for this Court as well as lower courts. With faculty guidance and student participation, the Clinic seeks to file amicus briefs that will lead to the development and predictable application of intellectual property law to promote innovation and fair competition. The Clinic submits briefs for selected cases with the hope of contributing important perspectives that might not be adequately represented by the parties.

INTRODUCTION

This case has been litigated on the assumption that the constitutionality of 18 U.S.C. § 704(b) whether as a facial matter or as applied to the false statement of fact that respondent Xavier Alvarez admits to having made, turns on whether the statement falls within a "categor[y] of speech . . . fully

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[1] Counsel for each party has provided the Intellectual Property Amicus Brief Clinic of the University of New Hampshire School of Law with written consent to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members or its counsel made a monetary contribution to its preparation or submission.

outside the protection of the First Amendment." *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010); *see also id.* at 1584 (stating that the categories of speech that may be restricted on the basis of content without regard to First Amendment protections "includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct") (citations omitted). A divided panel of the U.S. Court of Appeals for the Ninth Circuit determined that Alvarez's statement did not fall within such a category after analysis of whether the statement could be regarded as defamatory, fraudulent, or integral to criminal conduct. *See generally United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010). Concluding that it could not be so regarded, the panel applied the strict scrutiny test applicable to ordinary content-based speech restrictions and held the statute facially unconstitutional. *Id*. at 1215-18. Dissenting, Judge Bybee voted to uphold the statute, both facially and as applied, on the ground that false statements of fact such as those proscribed by § 704(b) constitute a category of speech that falls outside of the First Amendment's protection "except in a limited set of contexts where such protection is necessary 'to protect speech that matters.'" *Id.* at 1218-19 (Bybee, J., dissenting) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)).

The undersigned do not address the issues that divided the Ninth Circuit panel. Rather, the undersigned call to the Court's attention an alternative, narrower line of analysis that bears on the constitutional validity of applying § 704(b) to those, such as

Alvarez, who falsely claim to have received the Congressional Medal of Honor. The undersigned submit this brief solely to assist the Court in making a fully informed assessment of the question presented; they recognize that the government did not defend the statute on the narrow basis advanced, and they take no position on the proper disposition of this particular case.

SUMMARY OF THE ARGUMENT

Prohibiting false association or affiliation is an objective of trademark law, which imposes civil and criminal penalties on those who infringe valid trademarks. The phrase "Congressional Medal of Honor" may plausibly be understood to perform a trademark function by distinguishing recipients of the nation's highest military honor – those who compose the federally-chartered collective organization known as the Congressional Medal of Honor Society – from non-recipients. Accordingly, the phrase "Congressional Medal of Honor" may function as a valid collective membership mark, the infringement of which may constitutionally be regulated by measures that satisfy the variants of intermediate First Amendment scrutiny employed in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 535-41 (1987) (rejecting a First Amendment challenge to a federal statute authorizing the United States Olympic Committee to prohibit certain commercial

and promotional uses of the Committee's trademarks, including the word "Olympic").

If § 704(b) were construed to be a measure regulating, inter alia, the infringement of the "Congressional Medal of Honor" collective membership mark, the constitutionality of its application to those who falsely claim to have been awarded the Medal could be assessed under the analysis prescribed in *San Francisco Arts & Athletics*.[2] Under that analysis, the First Amendment permits the prohibition of falsely claiming to have been awarded the Medal. Taking such a narrow decisional tack would obviate any need to answer the broad and ramified question of whether false statements of fact are categorically beyond the reach of the First Amendment except in circumstances where they are necessary to protect speech that matters. In any event, in deciding the question presented, the Court should be aware of the potential applicability of trademark law and consider the potential effects of its ruling on such law.

[2] The undersigned recognize that the parties dispute whether 18 U.S.C. § 704(b) contains a scienter requirement, and that additional constitutional questions could arise if the statute were read not to contain such a requirement. The undersigned do not take a position on this dispute; instead, they confine their argument to how the constitutionality of § 704(b) should be assessed for First Amendment purposes if the statute were treated as a measure prohibiting, inter alia, infringement of the collective membership mark.

ARGUMENT

I. 18 U.S.C. § 704(b) Bans False Statements of Association or Affiliation

On May 5, 2008, Xavier Alvarez pled guilty to one count of falsely claiming to have received the Congressional Medal of Honor, the nation's highest military honor. The charge arose out of a public statement that he made almost a year earlier, when, introducing himself as a newly-elected member of the local water board in Pomona, California, he claimed to be a Medal recipient. In truth, Alvarez is not a recipient of the Medal and has never served in the U.S. Armed Forces. Alvarez's oral claim to be one of an elite group of combat heroes creates exactly the sort of false association that Congress sought to curtail in the 2006 amendment of 18 U.S.C. § 704, known as the Stolen Valor Act, codified in pertinent part at 18 U.S.C. §§ 704(b)-(c).[3] Until the 2006 amendment, § 704 prohibited falsely identifying oneself with Medal recipients but only insofar as such conduct took the form of wearing or displaying an actual Medal or colorable imitation of the Medal. Supporters of the amendment sought to extend the reach of the criminal statute to encompass knowing false verbal or written representations about one's receipt of the

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[3] Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), (3), 120 Stat. 3266, 3266 (2006). The Act covers false claims with regard to other military medals and decorations in addition to the Congressional Medal of Honor.

Medal, in order to close a perceived gap in the statutory scheme.[4]

Prior to passage of the Act, Congress estimated that over 250 imposters existed who were beyond the reach of the law because their false claims of receiving the Medal were purely oral or written in nature.[5] In fact, an additional count against Alvarez charged him with making the same false oral representation in a meeting with the Pomona Police Officer's Association in November 2005 when he was seeking the group's endorsement of his candidacy for mayor of Pomona.[6] The second count was dismissed, however,

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[4] One of the authors of the legislation, U.S. Representative John Salazar, offered the following observations about the proposed amendment:

> Current law basically allows Federal law enforcement to prosecute individuals who physically wear medals on their person. The problem has been occurring where individuals are claiming to have earned these medals and there is no way for authorities to be able to prosecute these individuals. These frauds and these phonies have diminished the meaning and the honor of the recognitions received by our military heroes.
>
> In addition to diminishing the meaning, on several occasions phonies have used their stature as a decorated war hero to gain credibility that allows them to commit more serious frauds.

152 CONG. REC. H8821 (2006) (statement of Rep. Salazar).

[5] *Id.* at 8820.

[6] *See Alvarez to Face More Charges*, SAN GABRIEL VALLEY TRIBUNE, Jan. 13, 2008; First Superseding Information, *United States v. Alvarez*, No. 07-0135(A)-ER (C.D. Cal. Feb. 20, 2008).

apparently because Alvarez's November 2005 statement was made before the amendment's 2006 effective date.[7] Passage of the Act put false claimants such as Alvarez within the reach of federal prosecutors.

II. Trademark Law Regulates False Statements of Association or Affiliation

Generally, a trademark functions to distinguish the goods or services of one commercial entity from those of another. *See Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916) (pre-Lanham Act decision).[8] Judicial enforcement of trademark rights serves a dual purpose, i.e., protection of consumers from deception in the marketplace and protection of the business goodwill engendered by a merchant's use of a particular mark to sell his goods or advertise his services. *See id.* at 412-13. The federal Lanham Act protects unregistered and federally-registered marks from infringement which occurs when one party uses a commercial designation in such a way as to create a likelihood of confusion with regard to its association or affiliation with another or with regard to the origin of their respective goods or services.[9] Likelihood of

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[7] Judgment and Commitment, *United States v. Alvarez*, No. 07-0135(A)-ER (C.D. Cal. July 23, 2008).

[8] *See also* 15 U.S.C. § 1127 (2006) (Lanham Act definition of "mark").

[9] *See* 15 U.S.C. § 1114 (2006) (providing a cause of action for infringement of federally-registered marks); 15 U.S.C. § 1125(a)(1)(A) (2006) (providing a cause of action for infringement of unregistered

(Continued on following page)

confusion is assessed in relation to "ordinary purchasers, buying with ordinary caution," *McLean v. Fleming*, 96 U.S. 245, 251 (1877), unless the mark in issue is a collective membership mark, a type of mark that designates only membership in a specific group and does not involve purchasers of goods or services, *Carefirst of Maryland, Inc. v. FirstHealth of the Carolinas, Inc.*, 77 U.S.P.Q.2d 1492, 1512 (T.T.A.B. 2005). In the latter case, likelihood of confusion is measured by reference to "relevant persons," i.e., "those persons or groups of persons for whose benefit the membership mark is displayed." *See id.* at 1513. The Lanham Act provides civil remedies for trademark infringement but criminal penalties for the most egregious form of infringement are also available at the federal level.[10]

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marks and unfair competition). Courts analyze likelihood of confusion by examining and balancing a variety of factors including, inter alia, the strength of the plaintiff's mark, the similarity of the parties' marks and their respective goods and services, evidence of actual confusion in the marketplace, and the defendant's intent. *See generally* 4 J. THOMAS MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:19 (4th ed. 2011).

[10] 18 U.S.C. § 2320 (2000 & Supp. 2011). *See* Joint Statement on Trademark Counterfeiting Legislation, 130 CONG. REC. 31,675 (1984) ("[A] counterfeit mark is the most egregious example of a mark that is 'likely to cause confusion.' ").

III. The Phrase "Congressional Medal of Honor" Performs a Trademark Function

A. "Congressional Medal of Honor" Distinguishes Recipients of the Nation's Highest Military Honor From Non-Recipients

Congress uses the phrase "Congressional Medal of Honor" to designate members of the U.S. armed services who, having distinguished themselves through conspicuous gallantry and disregard for personal safety while engaged in conflict on behalf of the nation's military, receive the nation's highest military award. The actual title of the honor, awarded by the President in the name of Congress, is "Medal of Honor"; the award is made under separate statutory authorization to members of each branch of the armed services.[11] Section 704(c)(2) of Title 18 utilizes the phrase, "Congressional Medal of Honor," as a composite reference to refer to the Medal as awarded to members of all branches of the armed services, or to duplicates or replacements of the Medal.[12] In the legislative history of the Stolen Valor Act, Congress acknowledged that Congressional Medal of Honor impersonators are motivated by a desire to identify themselves with the heroic characteristics of actual recipients but explicitly recognized the damaging nature

[11] *See* 10 U.S.C. §§ 3741, 6241 (1999) (Army, naval services); 10 U.S.C. §§ 8741 (1998) (Air Force); 14 U.S.C. § 491 (1996) (Coast Guard).

[12] 18 U.S.C. § 704(c)(2) (1996 & Supp. 2011).

of such conduct.[13] Whether done to perpetrate fraudulent activity or simply to aggrandize oneself in the eyes of others, false identification with this distinguished group "denigrates" and "dishonors" the collective members of the group; Congress sought to return to Medal recipients "the dignity and respect taken by those who have stolen it" by enacting the Stolen Valor Act.[14]

B. Recipients of the Medal Compose a Collective Organization, the Congressional Medal of Honor Society

The Congressional Medal of Honor Society was organized in 1948 by a group of recipients of the Medal

> for the purpose of providing a common ground on which all recipients of the Congressional Medal of Honor may meet to preserve the dignity of the Nation's highest award; to protect the medal and the holders thereof from exploitation or other improper action; to provide assistance as may be needed by holders of the medal and their dependents; to bring the medal to the attention of the public wherever possible to inspire the youth of the Nation; and to serve our country

[13] 152 CONG REC. H8820 (2006).

[14] *Id*. at 8820-21.

> in all proper ways in peace as its holders did in time of war.[15]

In 1958, the Society became a Title 36 congressionally-chartered corporation and its purposes are recited in the statutory charter, including, inter alia, "to protect *the name* of the medal . . . from exploitation"[16] and "to protect, uphold, and preserve the dignity" of the Medal at all times.[17] Membership in the Society is restricted to recipients of the Medal and no honorary memberships are allowed.[18] The Society possesses the usual corporate powers, but the Society, its directors and officers, are restricted by statute from participating in any political activity.[19] Today, the Society provides a platform for its members to engage in educational outreach, fundraising for scholarships, and a variety of other initiatives in furtherance of the Society's purposes.[20]

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[15] H. COMM. ON THE JUDICIARY, H.R. Rep. No. 2322, at 11 (1958).

[16] 36 U.S.C. § 40502(3) (1999) (emphasis added).

[17] *Id.* § 40502(2).

[18] *Id.* § 40503(a).

[19] *Id.* §§ 40505-06.

[20] *See* CONGRESSIONAL MEDAL OF HONOR SOCIETY, http://www.cmohs.org (last visited Dec. 2, 2011). The Society's activities in this regard are aided and supported by the Congressional Medal of Honor Foundation, a charitable corporation founded by the Society. *See* CONGRESSIONAL MEDAL OF HONOR FOUNDATION, http://www.cmohfoundation.org (last visited Dec. 2, 2011).

C. The Phrase "Congressional Medal of Honor" Functions as a Collective Membership Mark

The federal government has reserved use of the phrase, "Congressional Medal of Honor," as an identifier for recipients of the Medal so that they may designate their status as recipients and as members of the Society. Under the federal Lanham Act, governmental entities may own, register, and enforce trademarks, including collective membership marks.[21] The owner of a collective membership mark need not be a collective organization itself but may form a collective for the benefit of specific individuals, just as the federal government has done in chartering the Society for the benefit of Medal recipients.[22] *See In re Stencil*

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[21] 15 U.S.C. § 1054 (2006) (Lanham Act authorization for "nations, States, municipalities, and the like" to register collective marks). Examples of federally-registered collective membership marks belonging to a department or agency of the U.S. government include: "SEAL," U.S. Reg. No. 3,285,473, indicating membership in an organization that develops and executes military missions involving special operations strategy, doctrine, and tactics, registered by the Department of the Navy; "MEDICAL RESERVE CORPS" and Design, U.S. Reg. No. 3,007,633, indicating membership in a group of service-providers who have an established group of practicing and retired physicians, nurses, and other health professionals to act in a coordinated manner in times of local emergencies, registered by the Office of the Surgeon General; "AIRBORNE A A" and design, U.S. Reg. No. 2,487,176, indicating membership in the U.S. Army 82nd Airborne Division, registered by the Department of the Army.

[22] Congress has chartered other collective organizations for the benefit of recipients and their family members of other military medals referenced in 18 U.S.C. § 704, specifically medals

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Aero Engineering Corp., 170 U.S.P.Q. 292, 293 (T.T.A.B. 1971). The owner need only exercise legitimate control over the group and its members' use of the mark. *Id.* at 293. Congress asserts control over the Society's use of the phrase "Congressional Medal of Honor" by chartering the Society for purposes that include guarding against exploitation of the name of the Medal and protecting and preserving the reputation of the Medal. Further, Congress controls use of the phrase for self-identification purposes by restricting membership in the collective to actual Medal recipients.

Collective membership marks differ from traditional trademarks in that they do not indicate the commercial origin of goods or services; they serve solely to indicate membership in a group, such as a fraternal society, a cooperative, or a trade union. *See Zimmerman v. National Association of Realtors*, 70 U.S.P.Q.2d 1425, 1428 n.6 (T.T.A.B. 2004) (citing *Ex Parte The Supreme Shrine of the Order of the White Shrine of Jerusalem*, 109 U.S.P.Q. 248, 249-50 (Comm'r. Pat. 1956)). In this case, the phrase "Congressional Medal of Honor" operates as a collective

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referenced in § 704(d) for which misrepresentation results in enhanced penalties. The Legion of Valor of the United States of America, Inc., is authorized to extend membership to the recipients, their parents and lineal descendants, of the Distinguished Service Cross, the Navy Cross, the Air Force Cross, and the Medal of Honor. 36 U.S.C. § 130303 (1999). Similarly, the Military Order of the Purple Heart of the United States of America, Inc., may extend membership to the recipients of the Purple Heart Medal and their immediate families. 36 U.S.C. § 140503 (1999 & Supp. 2011).

membership mark by designating the only individuals eligible to be members of the Congressional Medal of Honor Society. Although collective membership marks may be federally registered, they need not be in order to be enforceable. *See The National Board of the Young Women's Christian Association of the U.S.A. v. Young Women's Christian Association of Charleston, South Carolina*, 335 F.Supp. 615, 623 (D.C.S.C. 1971). Section 704(b) of Title 18 provides a mechanism for enforcing rights in the phrase "Congressional Medal of Honor" against false association or affiliation without any requirement that the phrase be federally registered.[23]

IV. The First Amendment Permits Congress to Prohibit Infringement of the "Congressional Medal of Honor" Collective Membership Mark

If the Court were to accept the argument that § 704(b) functions as a trademark statute prohibiting infringement of the "Congressional Medal of Honor" collective membership mark, it would not need to decide the broad and ramified question of whether

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[23] Congress has authorized criminal penalties for counterfeiting of the unregistered marks of another congressionally chartered organization, the U.S. Olympic Committee. *See* 18 U.S.C. § 2320(e)(1)(B) (2000 & Supp. 2011) (unauthorized use of marks identical to or substantially indistinguishable from trademarks listed in 36 U.S.C. § 220506(a) (1999), including the word "Olympic," constitutes criminal counterfeiting without requiring proof of federal registration).

false statements of fact are categorically beyond the reach of the First Amendment except when necessary to protect speech that matters. Rather, the Court could uphold the constitutionality of the statute's application to those, such as Alvarez, who falsely claim to have been awarded the Congressional Medal of Honor under the First Amendment analysis prescribed in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 535-41 (1987).[24]

San Francisco Arts & Athletics involved a First Amendment challenge to the constitutionality of a federal statute that granted the United States Olympic Committee (USOC) the right to prohibit certain commercial and promotional uses of the word "Olympic." *See id.* at 532-41. Exercising that right, the USOC obtained an injunction prohibiting the petitioner from promoting an athletic event under the name "Gay Olympic Games." *Id.* at 525-27. Petitioner challenged the injunction before this Court, arguing in relevant part that the statute violated the First Amendment by authorizing the USOC to prohibit use of the word "Olympic" without showing that such use was likely to confuse the public.[25] *Id.* at 532.

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[24] The undersigned reiterate that their argument addresses only the First Amendment implications of 18 U.S.C. § 704(b). *See supra* note 2.

[25] Like its civil counterpart, the criminal statute prohibiting counterfeiting of the U.S. Olympic Committee's trademarks does

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In assessing petitioner's argument, the Court concluded that the constitutionality of the infringement on petitioner's commercial and promotional speech rights worked by the statute should be assessed under variants of intermediate First Amendment scrutiny. *See id.* at 535-41. Insofar as petitioner was precluded from engaging in commercial speech, the Court applied the test authorized in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980) (a restriction on non-misleading commercial speech is valid if the government's interest in the restriction is substantial, if the restriction directly advances the government's asserted interest, and if it is no more extensive than necessary to serve the interest). *See San Francisco Arts & Athletics*, 483 U.S. at 537 n.16. Insofar as petitioner was precluded from engaging in non-commercial speech, the Court applied the balancing test applicable to measures that incidentally restrict speech while seeking to further substantial non-speech purposes prescribed in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *San Francisco Arts & Athletics*, 483 U.S. at 537 n.16. Explaining that the application of these two balancing tests to the facts of the case was "substantially similar," *id.*, the Court concluded that the challenged statute passed constitutional muster. *See id.* at 537-41.

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not require proof of a likelihood of confusion. *See* 18 U.S.C. § 2320(e)(1)(B) (2000 & Supp. 2011).

If the Court were to read § 704(b) as a trademark infringement statute similar to the statute upheld against a First Amendment challenge in *San Francisco Arts & Athletics*, and if the Court were to follow the lines of reasoning adopted and applied in that case, it could uphold against a First Amendment challenge the statute's prohibition on falsely claiming to have been awarded the Congressional Medal of Honor. Insofar as the statute prohibits one from falsely making such a claim in the course of commercial self-promotion, the infringement would constitute a lawful restriction on false or misleading commercial speech. *See Central Hudson*, 447 U.S. at 566. Insofar as the statute prohibits one from making such a claim in a non-commercial context, certainly the incidental restriction on one's ability to tell this particular lie could not possibly outweigh Congress's strong interest in preserving the dignity of the Nation's highest military honor. *See O'Brien*, 391 U.S. at 377.

CONCLUSION

In summary, the undersigned do not take the position that the Court should vacate the Ninth Circuit's judgment and uphold the constitutionality of Alvarez's conviction under a trademark infringement analysis. Rather, the undersigned wish to apprise the Court of the potential applicability of such an analysis as it considers the question presented, and, more generally, of their view that resolution of this case does not necessarily require the Court to decide

whether false statements of fact are invisible to the First Amendment except in circumstances where they are necessary to protect speech that matters.

Respectfully submitted,

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