No. 11-210

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER ALVAREZ

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

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
JOSEPH F. PALMER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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.

TABLE OF CONTENTS

Table of Contents—Continued: Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes: Page

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 11-210

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER ALVAREZ

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-90a) is reported at 617 F.3d 1198. The order of the court of appeals denying rehearing en banc (Pet. App. 91a-138a) is reported at 638 F.3d 666. The opinion of the district court (Pet. App. 139a-144a) denying respondent's motion to dismiss is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2010. A petition for rehearing was denied on March 21, 2011. On June 17, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 19, 2011. On July 14, 2011, Justice Kennedy further extended the time to Au-

gust 18, 2011, and the petition was filed on that date. The Court granted certiorari on October 17, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech." Section 704 of Title 18 of the United States Code is reproduced in the appendix. App., *infra*, 1a-2a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Central District of California, respondent was convicted of making a false representation of having earned a military award, in violation of 18 U.S.C. 704(b). The district court sentenced respondent to three years of probation. The court of appeals reversed the judgment of conviction on the ground that Section 704(b) is facially unconstitutional and remanded for further proceedings consistent with its opinion. Pet. App. 1a, 5a, 39a-40a.

1. a. In 18 U.S.C. 704(b), known as the Stolen Valor Act of 2005, Congress made it a misdemeanor criminal offense, punishable by up to six months in prison, to "falsely represent[] * * * verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." Congress provided an enhanced penalty of up to one year of imprisonment for offenses involving certain enumerated awards, including the Medal of Honor. 18 U.S.C. 704(c)-(d).

b. The government's tradition of awarding military honors recognizing accomplishments and acts of valor in

service to the Nation dates back to the Revolutionary War. In 1782, General George Washington ordered the creation of several decorations recognizing military service and a valor award honoring "singularly meritorious action[s]" of "unusual gallantry," "extraordinary fidelity," or "essential service." *General Orders of George Washington Issued at Newburgh on the Hudson, 1782-1783*, at 35 (Edward C. Boynton ed., 1883; reprint 1909) (*General Orders*); Armed Forces Information Service, U.S. Dep't of Defense, *Armed Forces Decorations and Awards* 4 (1992). The purpose of Washington's valor award was "to cherish a virtuous ambition in * * * soldiers, as well as to foster and encourage every species of military merit." *General Orders* 35. General Washington specified that the award should be conferred only after rigorous examination to ensure that recipients were deserving: "the particular fact or facts on which [the award] is to be grounded must be set forth to the Commander-in-Chief, accompanied with certificates from the commanding officers * * * [or] other incontestible proof." *Ibid.* Recipients would be entitled to certain special military privileges, see *ibid.*, and they were also expected to receive more intangible rewards: "it is expected these gallant men who are thus distinguished will, on all occasions, be treated with particular confidence and consideration," *id.* at 34-35. Moreover, General Washington stated, "[s]hould any who are not entitled to the honors, have the insolence to assume the badges of them, they shall be severely punished." *Id.* at 34.

Today, the United States government maintains a system of military decorations and honors that shares its essential characteristics with the first awards authorized by General Washington. The highest military hon-

ors are established by statute or Executive Order, and they have rigorous eligibility criteria. For instance, the Medal of Honor, which occupies the highest position in the hierarchy and was first established during the Civil War in 1861, see Act of Dec. 21, 1861, 12 Stat. 329-330, is awarded by the President, in the name of Congress, to a person who "distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty" while engaged in certain armed conflicts. 10 U.S.C. 3741; see also, *e.g.*, 10 U.S.C. 3742 (Distinguished-Service Cross, awarded for "extraordinary heroism not justifying the award of a medal of honor"), 3746 (Silver Star), 6242 (Navy Cross) and 6245 (Distinguished Flying Cross).[1] See generally The Institute of Heraldry, Office of the Administrative Assistant to the Sec'y of the Army, *Military Decorations*, http://www.tioh.hqda.pentagon.mil/awards/decorations.aspx (last visited Nov. 30, 2011).

The Department of Defense and the armed services branches have guidelines for the award of honors. See U.S. Dep't of Defense, *Manual of Military Decorations and Awards*, No. 1348.33-V1 (2010) (*Awards Manual*); see also, *e.g.*, Marine Corps Order 1650.19J (Feb. 5, 2001); SECNAV Instruction 1650.1H (Aug. 22, 2006); Army Reg. 600-8-22 (Dec. 11, 2006); Air Force Policy

[1] The listed awards are "valor awards," as they are awarded for valorous conduct. The military also confers non-valor honors for achievements, participation in combat, and other forms of meritorious service. Examples include the Combat Infantryman Badge, see Army Reg. 600-8-22, ch. 8, § 8-6; medals for participation in particular campaigns, such as the Iraq Campaign Medal, see SECNAV Instruction 1650.1H, at 4-26; medals for length of service; and badges for achievement in specialized skills such as combat medicine, parachuting, and marksmanship. See generally Army Reg. 600-8-22, ch. 8; SECNAV Instruction 1650.1H, at 4-2 to 4-63.

Directive 36-28 (Aug. 1, 1997) (AFPD). These guidelines specify the extensive criteria for an award; the number and necessary content of eyewitness statements; the standard of proof; and the necessary approvals that the recommendation must garner within the chain of command. See, *e.g.*, *Awards Manual* 30-31; SECNAV Instruction 1650.1H, at 2-5 to 2-8; Marine Corps Order 1650.19J Encl. 1, at 3-4; Encl. 2, at 1-3.

The armed services have long held the view that the awards program performs crucial functions. The conferral of awards is considered "an important aspect of command responsibility at all levels" because the "[p]rompt and judicious recognition of an individual's achievement or service is a vital factor of morale." Marine Corps Order 1650.19J Encl. 1, at 3; see Army Reg. 600-8-22, ch. 1, § 1-1 ("The goal of the total Army awards program is to foster mission accomplishment by recognizing excellence * * * and motivating [individuals] to high levels of performance and service."); SECNAV Instruction 1650.1H at 3-1; AFPD para. 2. "[R]ecognizing acts of valor, heroism and exceptional duty and achievement" fosters pride in service and motivates individuals to higher achievement. *Examination of Criteria for Awards and Decorations: Hearing Before the Military Personnel Subcomm. of the House Comm. on Armed Services*, 109th Cong., 2d Sess. 24 (2006) (*Awards Hearing*) (statement of Lt. Gen. Roger A. Brady, Deputy Chief of Staff, Manpower and Personnel, Headquarters, U.S. Air Force). Military honors also confer prestige on recipients and express the Nation's gratitude for heroic acts and military service. See S. Rep. No. 240, 64th Cong., 1st Sess. 3 (1916).

In view of the importance of the military honors program, Congress and the service branches have taken

steps to guard against dilution of the reputation and meaning of the medals. These measures include publishing the names of Medal of Honor recipients and establishing the Medal of Honor Society. See 38 U.S.C. 1560; Senate Comm. on Veterans' Affairs, 93d Cong., 1st Sess., *Medal of Honor Recipients 1861-1973*, at 4-7 (Comm. Print 1973) (*Medal of Honor Report*) (explaining that false claims and other abuses necessitated various actions to "protect the dignity of the original medal"). In addition, in 1923, Congress prohibited knowingly wearing, manufacturing, or selling a military medal without authorization. See Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286.

In 2006, Congress enacted the Stolen Valor Act in response to concern that the longstanding prohibition on the unauthorized wearing and sale of medals, see 18 U.S.C. 704(a), had proved insufficient to deter false claims to have been awarded a medal. See 151 Cong. Rec. 25,769-25,770 (2005) (statement of Sen. Conrad). Section 704(b), the provision at issue in this case, makes it an offense when anyone "falsely represents himself or herself, verbally or in writing, to have been awarded" a military decoration or medal. Congress expressly declared that the purpose of the prohibition is "to protect the reputation and meaning of military decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266. In passing the Act, Congress found that "[f]raudulent claims surrounding the receipt of [military decorations and medals] damage the reputation and meaning of such decorations and medals" and that "[l]egislative action is necessary to permit law en-

forcement officers to protect the reputation and meaning" of the medals.[2] *Ibid.*

2. a. Respondent was an elected member of the Board of Directors of the Three Valley Water District in southern California. Pet. App. 4a. On July 23, 2007, respondent stated at a public water district board meeting that he was a retired United States Marine, that he had been "wounded many times," and that he had been "awarded the Congressional Medal of Honor" in 1987. *Ibid.* Respondent has never served in the United States Armed Forces. *Ibid.*

After the Federal Bureau of Investigation obtained a recording of the July 23 meeting, the government charged respondent with two counts of "falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [respondent] knew, he had not received the Congressional Medal of Honor," in violation of 18 U.S.C. 704(b) and (c)(1). Pet. App. 5a.

b. Respondent moved to dismiss the charges on the ground that the Stolen Valor Act is invalid under the First Amendment, both facially and as applied to him. Pet. App. 141a.

---

[2] In May 2011, Representative Joseph Heck introduced a bill to amend the Stolen Valor Act in the House of Representatives, and it is currently pending before the Judiciary Committee and its Subcommittee on Crime, Terrorism, and Homeland Security. See H.R. 1775, 112th Cong., 1st Sess.; 157 Cong. Rec. H3108 (daily ed. May 5, 2011). The bill would replace Section 704(b) with a new provision that makes it an offense when someone, "with intent to obtain anything of value, knowingly makes a misrepresentation regarding his or her military service," including misrepresentations about having received a medal or decoration, having attained a particular rank, or having served in the armed forces or a combat zone. H.R. 1775 § 2(a).

The district court denied the motion. Pet. App. 139a-144a. The court found "no dispute that [respondent] made his false statement knowingly and intentionally," *id.* at 142a, and explained that in *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), this Court had held that knowingly false statements are "not protected under the First Amendment," Pet. App. 142a. Respondent's knowingly false statement, the court concluded, was not protected speech, and his as-applied challenge therefore failed. *Id.* at 142a-143a. The court also rejected respondent's facial challenge, reasoning that the Act was "narrowly written" to prohibit only "deliberate false statements concerning a very specific subject matter." *Id.* at 144a n.1. The court emphasized that the Act "does not risk chilling" truthful statements about military service because "[w]hether one actually received a military award is easily verifiable and not subject to multiple interpretations." *Ibid.*

c. Respondent pleaded guilty, reserving his right to appeal the denial of his motion to dismiss the indictment. The district court sentenced respondent to three years of probation and imposed a fine of $5000. Judgment 1.

3. a. The court of appeals reversed and remanded. Pet. App. 1a-40a. The court first held, relying on *United States* v. *Stevens*, 130 S. Ct. 1577 (2010), that "false factual speech, as a general category unto itself," does not fall within those "historical and traditional categories [of unprotected speech] long familiar to the bar." Pet. App. 15a-16a (quoting 130 S. Ct. at 1584); see *id.* at 10a-15a. The court reasoned that *Stevens*, in discussing the historically recognized categories of unprotected speech, mentioned two subsets of false speech—defamation and fraud—without suggesting that false statements, as a general category, are unprotected. *Id.* at 7a. The court

of appeals acknowledged that this Court has repeatedly stated that false speech is "not worthy of constitutional protection," *id.* at 16a (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)), but it observed that the Court has never held "that the government may, through a criminal law, prohibit speech *simply* because it is knowingly factually false," *id.* at 30a-31a. Indeed, the court of appeals found "affirmative constitutional value" in some knowingly false speech, such as "[s]atirical entertainment" and hyperbole. *Id.* at 31a.

The court of appeals next concluded that Section 704(b) cannot be characterized as a regulation of the unprotected categories of defamation or fraud. The court reasoned that Section 704(b) does not "fit[] into the defamation category" because it does not prohibit only speech that is made with actual malice or knowledge of falsity and that is "injurious to a private individual." Pet. App. 22a-23a (quoting *Gertz*, 418 U.S. at 347). The court explained that even if Congress had concluded that false representations to have been awarded a medal cause "presum[ptive] * * * harm" to the meaning and effectiveness of military honors, the First Amendment does not permit the government to protect the reputation of "governmental institutions or symbols," such as military awards, "by means of a pure speech regulation." *Id.* at 24a, 25a. And the court held that the Act prohibits speech that does not constitute fraud because it reaches false statements without regard to scienter, materiality, or reliance, elements that might ensure that the regulated speech causes "bona fide harm." *Id.* at 26a-30a.

Having concluded that the speech prohibited by Section 704(b) "does not fit neatly into any of those well-defined and narrowly limited classes of speech previously considered unprotected," Pet. App. 32a (internal

quotation marks omitted), the court applied strict scrutiny, *id.* at 35a. The court acknowledged that "Congress certainly has an interest, even a compelling interest, in preserving the integrity of its system of honoring our military men and women." *Id.* at 37a. But the court concluded that Section 704(b) is not narrowly tailored because "other means exist to achieve the interest of stopping such fraud, such as by using *more* speech, or redrafting the Act to target actual impersonation or fraud." *Id.* at 39a.

b. Judge Bybee dissented. Pet. App. 41a-90a. He explained that this Court's decisions establish that "the general rule is that false statements of fact are not protected by the First Amendment," *id.* at 46a, except in limited circumstances in which certain false statements made without scienter receive protection in order to ensure adequate "breathing space" to constitutionally protected speech, *id.* at 50a, 53a-55a. Applying that framework to Section 704(b), Judge Bybee concluded that respondent's as-applied challenge must fail because respondent did not dispute that his statements were knowingly false. *Id.* at 68a-69a.

Judge Bybee also would have held that Section 704(b) is not facially overbroad. He reasoned that the Act's prohibition of self-aggrandizing lies does not deter protected expression, even if the Act is interpreted not to contain a scienter requirement, because mistaken claims to have won a medal "will be extraordinarily rare if not nonexistent." Pet. App. 84a. Judge Bybee also argued that Section 704(b)'s prohibition on falsely "represent[ing]" to have been awarded a medal indicates that the Act extends only to statements that can be interpreted as statements of fact, not ambiguous statements, hyperbole, or satire. *Id.* at 82a-83a, 87a-90a. He

therefore concluded that Section 704(b) was free from "any potential overbreadth" and that in any event, any overbreadth was not substantial. *Id.* at 90a.

4. The government petitioned for rehearing en banc. The court of appeals denied rehearing in a published order. Pet. App. 91a-138a. Judge Milan Smith, joined by Chief Judge Kozinski, authored an opinion concurring in the denial of rehearing en banc, in which Judge Smith reiterated the reasoning of the panel majority's opinion. *Id.* at 92a-106a.

Chief Judge Kozinski also authored a separate concurrence, in which he noted that lies about oneself are commonplace in day-to-day social interactions. Pet. App. 107a-115a. In his view, a First Amendment doctrine that did not protect false statements of fact would be "terrifying," because it would permit censorship by "the truth police" of "the white lies, exaggerations and deceptions that are an integral part of human intercourse." *Id.* at 107a-108a.

Judge O'Scannlain, joined by six other judges, dissented from denial of rehearing en banc. Pet. App. 116a-135a. Judge O'Scannlain argued that the panel opinion "runs counter to nearly forty years of Supreme Court precedent," including the Court's decisions on defamation and baseless lawsuits. *Id.* at 116a (emphasis omitted); see *id.* at 118a-125a. That precedent, he explained, established that false statements of fact receive only the derivative protection necessary to ensure that "constitutionally protected non-false speech" is not inhibited. *Id.* at 119a. Judge O'Scannlain therefore argued that "restrictions upon false speech do not receive strict scrutiny," but rather, they are evaluated to determine whether they provide sufficient breathing space for protected speech. *Id.* at 119a-120a. Judge O'Scannlain

reasoned further that the panel majority had erred in concluding that the First Amendment required the criminal prosecution of false statements to be based on a showing of individualized harm, *id.* at 129a-131a, but in any event, all false claims of military awards contribute to the reputational and other harms Congress identified in passing Section 704(b), *id.* at 132a-133a.

Judge Gould, who joined Judge O'Scannlain's dissent, also authored a separate dissent. Pet. App. 135a-138a. He argued that it was "improper to apply strict scrutiny to invalidate this law on its face" in view of Congress's broad power over military affairs and the "lack of any societal utility in tolerating false statements of military valor." *Id.* at 136a. Judge Gould would have held that "Congress's criminalization of making false statements about receiving military honors is a carefully defined subset of false factual statements not meriting constitutional protection." *Id.* at 137a (internal quotation marks omitted).

SUMMARY OF ARGUMENT

Section 704(b) validly prohibits a narrow category of knowingly false factual representations that undermines the capacity of military awards to confer honor on their recipients and to foster morale and esprit de corps within the armed forces. The provision is the most recent of Congress's historical efforts to protect the military awards system against false claims and unauthorized imitations that misappropriate the awards' value and undercut their utility. Section 704(b) furthers this compelling interest by prohibiting only knowingly false representations of fact, which receive, at most, limited protection under the First Amendment when necessary to avoid chilling fully protected speech. The provision

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. Nor does the provision chill such speech. The court of appeals was wrong to hold that Section 704(b) is unconstitutional.

I. Properly construed, Section 704(b) prohibits a discrete and narrow category of factual statements: knowingly false representations that a reasonable observer would understand as a factual claim that the speaker has been awarded a military honor.

II. This Court has repeatedly stated that knowingly false statements of fact are "unprotected for their own sake." *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 531 (2002). False statements are entitled, at most, only to a limited "measure of strategic protection" that derives from the need to ensure that any false-speech restriction does not chill truthful and other fully protected speech. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). The Court has therefore held that content-based restrictions on false factual statements are consistent with the First Amendment if they are supported by a strong government interest and provide adequate "breathing space" for fully protected speech. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272 (1964) (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). In determining whether a restriction provides adequate breathing space, the Court has examined whether the restriction includes a scienter requirement and other elements that ensure that speakers will not be deterred from engaging in truthful speech. See *Gertz*, 418 U.S. at 340-344. When the restriction potentially chills some protected speech, the Court has additionally considered whether the restriction "extends no further than" necessary to

protect the government interest at issue. *Id.* at 348-349. Because this Court has applied this analysis in every context in which it has addressed false factual statements, the court of appeals was wrong to assume that Section 704(b) should be subject to strict scrutiny.

That conclusion is reinforced by Congress's long-established practice of restricting a broad variety of knowingly false factual statements in order to protect the integrity of important governmental programs. See, *e.g.*, 18 U.S.C. 1001. The Court has never suggested that these statutes, many of which do not require the government to prove intent to deceive or actual harm, may impinge on First Amendment concerns unless they are the least restrictive means of achieving a compelling government interest.

III. Under the "breathing space" analysis that this Court has applied to restrictions on false factual statements, Section 704(b) is constitutional. The government has a strong—indeed, compelling—interest in protecting the reputation and integrity of its military honors system against knowingly false claims. Military awards serve as public symbols of honor and prestige, conveying the Nation's gratitude for acts of valor and sacrifice; and they foster morale, mission accomplishment, and esprit de corps within the military. False claims to have received military awards undermine the system's ability to fulfill these purposes. In the aggregate, false claims make the public skeptical of all claims to have received awards, and they inhibit the government's efforts to ensure that the armed services and the public perceive awards as going to only the most deserving few.

Section 704(b) appropriately accommodates the government's compelling interest and First Amendment concerns by providing ample breathing room for pro-

tected speech. Section 704(b) prohibits a narrow category of knowing, objectively verifiable false representations, about which a person is unlikely to be mistaken. Prohibiting those false statements poses little risk of chilling any protected speech or allowing the government to punish disfavored viewpoints or act as the arbiter of truth and falsity on matters subject to public debate. The provision is therefore valid. Even assuming that Section 704(b) risked deterring some protected speech, the restriction is constitutional because it extends no further than necessary to address the cumulative harm caused by false claims. Relying on public discovery and refutation of such claims would be inadequate to prevent the harm targeted by the statute.

IV. Even if the court of appeals was correct to apply strict scrutiny, Section 704(b) is constitutional. The provision serves a compelling interest. Congress, having historically protected the military awards system from misappropriation and dilution, determined that prohibiting knowing misrepresentations is necessary to ensure that the awards continue to serve their important purposes, and Section 704(b) represents the least restrictive means of achieving that end.

ARGUMENT

I. SECTION 704(b) PROHIBITS ONLY KNOWINGLY FALSE STATEMENTS THAT REASONABLY CAN BE UNDERSTOOD AS ASSERTIONS OF FACT

The "first step" in First Amendment analysis is "to construe the challenged statute." *United States* v. *Williams*, 553 U.S. 285, 293 (2008). Section 704(b) makes it an offense when anyone "falsely represents himself or herself, verbally or in writing, to have been awarded" a military decoration or medal. Properly construed, the

provision reaches a discrete and narrow category of statements: knowingly false representations that a reasonable observer would understand as making the factual claim that the speaker has been awarded a military honor.

Although Section 704(b) does not use the term "knowing" or "knowingly," its prohibition on "falsely represent[ing]" that one has received a military award requires knowledge of falsity. To "represent" something is "[t]o place (a fact) clearly before another; to state or point out explicitly or seriously to one, with a view to influencing action or conduct." See 13 *Oxford English Dictionary* 657 (2d ed. 1989) (*Oxford*); see also *Black's Law Dictionary* 1415 (9th ed. 2009) (*Black's*) (a "representation" is made "to induce someone to act"). A "false representation," also known as a "misrepresentation," is "[t]he act of making a false or misleading assertion about something, usu[ally] with the intent to deceive." *Id*. at 1091. Thus, the phrase "falsely represents" connotes making a factual assertion with the knowledge that it is false. See Stolen Valor Act, § 2(1), 120 Stat. 3266 (congressional findings referring to "[f]raudulent claims surrounding the receipt" of awards). That interpretation is buttressed by the presumption that, absent contrary evidence of congressional intent not present here, criminal statutes contain a mens rea requirement even when the statute is silent on that issue.[3] See, *e.g.*,

[3] Section 704(a), which has existed in substantially its present form since 1948, see Act of June 25, 1948, ch. 645, § 704, 62 Stat. 732, prohibits "knowingly wear[ing]," or engaging in certain transactions concerning, any decoration or medal except as authorized by regulation. 18 U.S.C. 704(a). The fact that Section 704(a) contains an explicit scienter requirement does not suggest that Congress intended to omit a knowledge requirement in Section 704(b), given that the two provisions

Staples v. *United States*, 511 U.S. 600, 605-606 (1994); *Morissette* v. *United States*, 342 U.S. 246, 250 (1952).

Similarly, the statutory term "represent" excludes parody, satire, hyperbole, performances, and any other statements that cannot reasonably be understood as factual claims. See *Oxford* 657; *Black's* 1415 ("representation" is a "presentation of fact"); *id.* at 1091 (a misrepresentation is a "false assertion of fact" (quoting Restatement (Second) of Contracts § 159 cmt. a, at 426 (1979)). In enacting Section 704(b), Congress found that "[f]raudulent claims surrounding the receipt" of military medals threaten the reputation of the medals. See Stolen Valor Act, § 2(1), 120 Stat. 3266. Nothing suggests that Congress sought to prohibit statements about having received a medal that would be understood as fictional or hyperbolic rather than as "claims" to have actually received a medal. See *Watts* v. *United States*, 394 U.S. 705, 705, 708 (1969) (per curiam) (interpreting prohibition on knowingly making "any threat" to harm the President as excluding "political hyperbole" in the absence of any evidence of contrary congressional intent); Pet. App. 87a-90a (Bybee, J., dissenting).

---

were enacted over 50 years apart. See *Johnson* v. *United States*, 130 S. Ct. 1265, 1272-1273 (2010). In any event, Section 704(b)'s use of the phrase "falsely represents" connotes knowledge.

II. KNOWINGLY FALSE FACTUAL STATEMENTS ARE ENTITLED AT MOST TO LIMITED FIRST AMENDMENT PROTECTION, AND THEY MAY ACCORDINGLY BE RESTRICTED SO LONG AS THE RESTRICTION SERVES AN IMPORTANT GOVERNMENT INTEREST AND PROVIDES ADEQUATE BREATHING SPACE TO FULLY PROTECTED SPEECH

This Court has long held that knowingly false statements of fact like those prohibited by Section 704(b) are entitled, at most, only to limited First Amendment protection, and only to the extent necessary to ensure that restrictions on false factual statements do not unduly inhibit fully protected speech. Accordingly, the Court has repeatedly upheld content-based restrictions on such statements without applying strict scrutiny. Instead, the Court has examined whether the restriction in question is supported by an important government interest and properly accommodates First Amendment concerns by providing adequate "breathing space" for fully protected speech. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272 (1964) (citation omitted).

A. Knowingly False Statements Of Fact Are Entitled At Most To Limited First Amendment Protection

In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), the Court explained that "[c]alculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas." *Id.* at 75 (citation and internal quotation marks omitted). Since then, the Court has frequently reiterated the principle that false factual statements have no First Amendment value in themselves. See, *e.g.*, *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 531 (2002) (stating that "false statements [are] unprotected for their own sake"); *Hustler Magazine, Inc.*

v. *Falwell*, 485 U.S. 46, 52 (1988) (*Hustler*) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas."); *Herbert* v. *Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating that "there is no constitutional value in false statements of fact," because such statements do not "materially advance[] society's interest in 'uninhibited, robust, and wide-open debate' on public issues") (quoting *New York Times*, 376 U.S. at 270).

Accordingly, this Court's First Amendment decisions have long recognized that false factual statements "are not protected by the First Amendment in the same manner as truthful statements." *Brown* v. *Hartlage*, 456 U.S. 45, 60-61 (1982) (citation omitted); see also, *e.g.*, *BE&K Constr. Co.*, 536 U.S. at 531; *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967) ("[T]he constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function."). Although the broad general category of false factual statements has not historically been treated as completely unprotected by the First Amendment, see *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011) (requiring a "long * * * tradition of proscription" for a category of speech to be wholly unprotected); *United States* v. *Stevens*, 130 S. Ct. 1577, 1584 (2010), the Court has repeatedly stated, in numerous contexts, that false factual statements do not receive First Amendment protection for their own sake. See, *e.g.*, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (*Virginia State Bd.*) ("Untruthful speech, commercial or

otherwise, has never been protected for its own sake."); see also *BE&K Constr. Co.*, 536 U.S. at 531 (stating that false statements are "unprotected for their own sake").

Rather, false factual statements are protected only to the extent needed to avoid chilling fully protected speech. As this Court has recognized, "erroneous statement[s] of fact" are "inevitable in free debate" respecting public issues. *Gertz*, 418 U.S. at 340. Consequently, in certain circumstances, punishing or imposing liability for all false factual statements could inhibit a speaker from voicing his view, "even though [he] believe[s] [it] to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times*, 376 U.S. at 279. To avoid this possibility, false statements of fact receive "a measure of strategic protection" in appropriate contexts, in order to ensure that regulation of such statements does not unduly inhibit fully protected speech. *Gertz*, 418 U.S. at 342; see *id.* at 341.

B. This Court Has Approved Content-Based Restrictions On False Statements Of Fact In A Variety Of Contexts Without Applying Strict Scrutiny

1. The Court has consistently applied the breathing space approach to various restrictions on false factual statements

Because false factual statements are entitled only to limited instrumental protection, the Court has never applied strict scrutiny to a restriction on such statements. Rather, it has approved content-based restrictions on false factual statements outside the commercial context when the restriction in question is supported by a strong government interest and provides adequate

"breathing space" for fully protected speech.[4] See *New York Times*, 376 U.S. at 272 (citation omitted).

The Court has held that the First Amendment permits false-statement restrictions in a variety of contexts, including defamation, see *New York Times*, 376 U.S. at 272; fraud, see *Illinois, ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); intentional infliction of emotional distress through false statements, see *Hustler*, 485 U.S. at 53, 56; and false-light invasion of privacy, see *Hill*, 385 U.S. at 388-389. The Court has also applied the "breathing space" analysis to a state law directed at campaign statements. *Hartlage*, 456 U.S. at 60-61. It has additionally held that liability for filing a baseless lawsuit—a kind of false factual statement—is treated analogously to the "breathing space" approach. See *BE&K Constr. Co.*, 536 U.S. at 531.

The Court has examined whether each of these restrictions serves a strong government interest and chills fully protected speech. When the restriction has little if any chilling effect, the Court has upheld the restriction. See *Telemarketing Assocs.*, 538 U.S. at 619. When the restriction potentially chills some protected speech, the Court has additionally considered whether the restriction "extends no further than" necessary to protect the government interest at issue. *Gertz*, 418 U.S. at 348-349.

a. Defamation

The Court has most often addressed content-based restrictions on false factual statements in the context of of state-law tort actions for defamation, and it is in that

---

[4] In the distinct context of commercial speech, the government has wider latitude to regulate speech that is not literally false, but nonetheless deceptive and misleading. See *Virginia State Bd.*, 425 U.S. at 771-772 & n.24.

context that the Court has most fully explicated the "breathing space" approach. The Court has explained that although "there is no constitutional value in false statements of fact" such as defamation, *Gertz*, 418 U.S. at 340, defamation tort actions risk deterring legitimate speech, including truthful statements and criticism of the government. *New York Times*, 376 U.S. at 279. The First Amendment therefore protects some defamatory statements in order to "avoid self-censorship by the news media." *Gertz*, 418 U.S. at 341.

Although the most effective way to avoid any chilling effect from restrictions on defamation would be to create "an unconditional and indefeasible immunity from liability for defamation," the Court has recognized that First Amendment principles are "not the only societal value at issue." *Gertz*, 418 U.S. at 341; see *Time, Inc.* v. *Firestone*, 424 U.S. 448, 456 (1976). Rather, the State has a "strong and legitimate" interest in compensating individuals for injury to reputation, and that interest necessitates "defin[ing] the proper accommodation between the[] competing concerns" engendered by the First Amendment and the state interest in limiting defamatory speech. *Gertz*, 418 U.S. at 342, 348; *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 22 (1990) ("[T]here is also another side to the equation; we have regularly acknowledged * * * that society has a pervasive and strong interest in preventing and redressing attacks on reputation.") (internal quotation marks and brackets omitted). "[T]he proper accommodation," the Court has held, allows States to remedy the harms from defamation through private tort actions while "assur[ing] to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz*, 418 U.S. at 342 (citation omitted); *New York Times*, 376 U.S. at 272.

To provide the necessary "breathing space," the Court has imposed several limitations on defamation actions. See *Milkovich*, 497 U.S. at 12-17. Most importantly, the Court has held that a scienter requirement is necessary to protect against the chilling effect of a defamation action. Public-figure defamation suits are therefore consistent with the First Amendment if the plaintiff must prove knowledge of falsity or actual malice. See *New York Times*, 376 U.S. at 279-280; *Gertz*, 418 U.S. at 342, 347. The defamation plaintiff also must bear the burden of proving both falsity and fault by clear and convincing evidence. See *Milkovich*, 497 U.S. at 15-16.

While these protections are deemed necessary in public-figure defamation actions to safeguard First Amendment rights, the state's "greater" interest in protecting private individuals from defamation justifies a standard of fault that is less rigorous. *Gertz*, 418 U.S. at 344. Private plaintiffs may therefore recover for negligently false and defamatory statements. *Id.* at 346-347; see *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 774 (1986). In view of the lowered scienter requirement, the Court held that it was "appropriate to require that state remedies * * * reach no farther than is necessary to protect" the state interest involved in private-plaintiff cases, in order to ensure that defamation actions do not "unnecessarily * * * inhibit the vigorous exercise of First Amendment freedoms." *Gertz*, 418 U.S. at 349. The Court therefore held that the state interest in compensating defamation-related injury to private individuals did not justify presumed and punitive damages for negligently false statements—because those remedies would "unnecessarily exacerbate[]" the chilling effect. *Id.* at 350.

b. False-light invasion of privacy

Three years after applying the "breathing space" approach to defamation actions in *New York Times*, the Court extended the analysis to false factual statements that invade an individual's privacy by placing him in a "false light." See *Hill*, 385 U.S. at 388-390.

In *Hill*, the Court addressed a New York statute that gave "newsworthy person[s]" a right to damages "when his or her name, picture or portrait was the subject of a 'fictitious' report or article" that contained "[m]aterial and substantial falsification[s]." *Cantrell* v. *Forest City Publ'g Co.*, 419 U.S. 245, 249 (1974); *Hill*, 385 U.S. at 381, 383-384, 386. The Court began by emphasizing the distinct character of the false-light cause of action, observing that unlike defamation, it did not arise out of a long common-law tradition. *Hill*, 385 U.S. at 380-381 & n.3. Because the government "interest at issue is privacy rather than reputation and the right claimed is to be free from the publication of false or misleading information about one's affairs," *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 490 (1975), the statements giving rise to a false-light action "need not be defamatory" in nature. *Hill*, 385 U.S. at 385 n.9; see 3 Restatement (Second) of Torts § 652E, at 394 (1976). As a result, the Court explained that "the content of the speech itself [may] afford[] no warning of prospective harm to another through falsity." *Hill*, 385 U.S. at 389; see *Cantrell*, 419 U.S. at 251 n.3.[5]

---

[5] The court of appeals therefore erred in assuming that *Hill* and *Cantrell* represent no "more than a variation on defamation jurisprudence." Pet. App. 21a n.10.

Because false-light and defamation actions raised similar concerns about chilling protected speech, the Court held that the "breathing space" analysis established in *New York Times* should also be applied to false-light torts. *Hill*, 385 U.S. at 388-391. Observing that "the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function," the Court held that requiring false-light plaintiffs to prove a "knowing or reckless falsehood" would provide adequate breathing space. *Id.* at 389-390. That standard was necessary to ensure that false-light claims did not chill protected speech, the Court held, because the speech that could give rise to a false-light action might appear innocuous on its face. *Id.* at 389; *Cantrell*, 419 U.S. at 249.

c. Intentional infliction of emotional distress

The Court also has extended the "breathing space" approach to public-figure actions for intentional infliction of emotional distress based on false factual statements. See *Hustler*, 485 U.S. at 53, 56. In holding that the State may permit appropriately cabined emotional-distress actions premised on false statements, the Court rejected the plaintiff's argument that the "breathing space" analysis was inapplicable because the "State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication." *Id.* at 52. Rather, the Court explained, while States had an "understandable" interest in prohibiting outrageous conduct that is intended to cause emotional distress, *id.* at 53, because of the tort's potential chilling effect on provocative speech and the subjective nature of the determination whether such speech was sufficiently outra-

geous to warrant liability, an actual-malice scienter requirement was necessary to provide "adequate 'breathing space' to the freedoms protected by the First Amendment," *id.* at 56. That conclusion, the Court emphasized, was "not merely a 'blind application' of the *New York Times* standard," but a "considered judgment that such a standard is necessary" in the context of false statements that inflict emotional distress. *Ibid.*

d. Fraud

The Court has long held that the government may restrict fraud, observing that the interest in preventing and punishing fraud "has always been recognized in this country and is firmly established." *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 190 (1948). Analogizing to the defamation context, the Court has explained that elements such as scienter, materiality, and reliance "provide sufficient breathing room for protected speech." *Telemarketing Assocs.*, 538 U.S. at 620. These ensure that civil fraud prohibitions do not chill fully protected speech and "properly tailor[]" the limitations to serve the government's interest in protecting the integrity of transactions and compensating injury. See *ibid.*

e. Demonstrably false campaign promises

The Court has also applied the "breathing space" analysis to the application of a state prohibition on offering voters consideration in return for their votes to a candidate who promised not to draw a salary if elected. *Hartlage*, 456 U.S. at 60-61. Because state law would not have allowed the candidate to refuse a salary if elected, the State argued that the statute should be upheld as a prohibition on a false factual statement. The Court agreed with the State that "demonstrable falsehoods are not protected by the First Amendment in the

same manner as truthful statements," but it held that the statute, "as applied in this case, has not afforded the requisite 'breathing space.'" *Ibid.* The statute did not contain a scienter requirement, and therefore imposed "absolute accountability for factual misstatements," creating an unacceptable chilling effect. *Id.* at 61. That significant burden on protected speech could not be justified in light of the "special force" of effective counter-speech in the campaign context and the weakness of the state interest in imposing strict liability for such statements. *Ibid.*

f. Liability for baseless lawsuits

Finally, the Court has treated objectively baseless lawsuits as "analogous to false statements," *BE&K Constr. Co.*, 536 U.S. at 530-531 (internal quotation marks and citation omitted), and it has stated that its treatment of such suits is "consistent with * * * 'breathing space' principles." *Id.* at 531. In recognition of the "strong federal interest in vindicating the rights protected by the national labor laws" and in protecting against anticompetitive lawsuits, *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 743-744 (1983); *BE&K Constr. Co.*, 536 U.S. at 528, the Court has upheld the application of the National Labor Relations Act and the Sherman Act to prohibit objectively baseless lawsuits motivated by an unlawful purpose. At the same time, although such suits "may advance no First Amendment interests of their own," the Court has explained that the requirement of an unlawful purpose is analogous to a "breathing space" requirement. *BE&K Constr. Co.*, 536 U.S. at 531. That requirement properly "balances the risk of anticompetitive lawsuits against the chilling effect on First Amendment petitioning" that

would otherwise be caused by the threat of liability. *Id.* at 528 (internal quotation marks omitted).

2. The Court's decisions establish the attributes of a constitutionally permissible restriction on false factual statements

The Court has consistently applied the breathing space analysis—rather than strict scrutiny—to content-based restrictions on specific types of false factual statements. These decisions thus establish the Court's approach to false factual statements as a general matter. In each case, the Court has emphasized that the government has a strong interest in restricting the false statements at issue. See *Gertz*, 418 U.S. at 341; see also *Milkovich*, 497 U.S. at 22-23. Identifying such an interest also helps uncover efforts to burden disfavored speech by regulating false speech that is unconnected to any identified harm. The Court has then examined whether the restriction risks chilling protected speech. In this respect, a scienter requirement is an important safeguard, as are other elements that enable speakers to reasonably differentiate between actionable and non-actionable statements without forgoing truthful speech or legitimate debate. See *Hill*, 385 U.S. at 389-390. Finally, when the restriction chills some protected speech, the Court has also considered whether the restriction does not extend "farther than is necessary to protect" the government interest at stake. *Gertz*, 418 U.S. at 348-349.

C. Congress Has Enacted Numerous Statutes Prohibiting False Statements Of Fact, And This Court Has Never Suggested That Such Statutes Would Be Invalid Unless They Were Able To Withstand Strict Scrutiny

Congress has long restricted a broad variety of knowingly false factual statements in order to protect the integrity of important governmental programs. The longstanding assumption that these statutes are valid buttresses the conclusion that the government may regulate false factual statements without being subject to searching First Amendment scrutiny. The most frequently used of these statutes do not require the government to prove intent to deceive or defraud, or, in many cases, actual harm resulting from the statements. Yet despite the prevalence and breadth of these statutes, they have rarely—if ever—been subject to challenge on First Amendment grounds, and the Court has never suggested that they may impinge on First Amendment concerns unless they are narrowly tailored to a compelling government interest.

1. The most prominent federal false-statements statute, 18 U.S.C. 1001(a), prohibits "knowingly and willfully" making any "materially false, fictitious, or fraudulent statement or representation" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." As originally enacted in 1918, Section 1001 prohibited false statements made with intent to defraud—*i.e.*, to cause pecuniary or property loss to—the government. *United States* v. *Yermian*, 468 U.S. 63, 70-71 (1984). As a result of concern that the statute was "insufficient to protect the authorized functions of federal agencies from a variety of deceptive practices," Congress amended it in 1934 to remove the requirement of deceptive intent. *Id.* at 71.

Section 1001 also does not require a showing of any actual "pecuniary or property loss to the government"; rather, it protects "agencies from the perversion which *might* result from the deceptive practices described." *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941) (emphasis added). This Court has construed Section 1001 on multiple occasions, reviewing its history in considerable detail, but has never suggested that its broad prohibition infringes on the First Amendment. *United States* v. *Rodgers*, 466 U.S. 475, 480 (1984); see *Brogan* v. *United States*, 522 U.S. 398, 400-406 (1998); *Hubbard* v. *United States*, 514 U.S. 695, 703-708 (1995); *Yermian*, 468 U.S. at 70-74; *United States* v. *Bramblett*, 348 U.S. 503, 504-508 (1955); *Gilliland*, 312 U.S. 86, 91-95.

In addition, the federal offense of perjury prohibits knowingly making a false material statement under oath in connection with a judicial or grand jury proceeding. 18 U.S.C. 1623; 18 U.S.C. 1621; *e.g.*, Act of Apr. 30, 1790, ch. 9, § 18, 1 Stat. 116; see *United States* v. *Dunnigan*, 507 U.S. 87, 94-95 (1993); *United States* v. *Debrow*, 346 U.S. 374, 376-377 (1953). As with Section 1001, perjury does not require a showing of intent to mislead or resulting harm to the tribunal or inquiry. See *ibid.*; *Brogan*, 522 U.S. at 402 & n.1. The Court has repeatedly considered the scope of perjury statutes, see, *e.g.*, *Debrow*, *supra*, but it has never suggested that they impinge on First Amendment concerns.[6] Cf., *e.g.*, *Konigsberg* v.

[6] In addition to Section 1001 and perjury, more than a hundred other federal criminal statutes penalize making false statements in connection with various areas of federal agency concern. See, *e.g.*, 18 U.S.C. 922(a)(6), 924(a)(1)(A) (knowingly false statements with respect to information required by firearms regulations); 22 U.S.C. 2778(c) (Supp. IV 2010) (willfully "untrue" statement on report required for control of arms exports and imports); 18 U.S.C. 1015 (knowingly false statements

State Bar, 366 U.S. 36, 49 n.10 (1961) (absolutist view of First Amendment "cannot be reconciled with the law relating to libel, slander, misrepresentation, [and] perjury"); *Spence* v. *Washington*, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting) (providing perjury as example of speech that may be prohibited when "important countervailing interests are involved").

2. Congress has also enacted numerous statutes that prohibit falsely representing that one is speaking on behalf of, or with the approval of, the government.[7] Some of these statutes are premised on Congress's determination that a false representation of association with the government misappropriates and dilutes the government's authority. For instance, Congress has long prohibited false impersonation of a federal officer or employee, including falsely stating that one is a federal officer. See 18 U.S.C. 912 ("Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any depart-

---

related to citizenship and naturalization); 18 U.S.C. 1027 (knowingly false statements in records required by ERISA); 20 U.S.C. 1097(b) (knowingly false statements in connection with assignment of federally insured student loan); 18 U.S.C. 911 (falsely claiming citizenship); 42 U.S.C. 1973i(c) (knowingly false statement for the purpose of establishing eligibility to vote); see also *United States* v. *Wells*, 519 U.S. 482, 505-507 & nn.8-10 (1997) (Stevens, J., dissenting) (citing "at least 100 federal false statement statutes" in the United States Code).

[7] See, *e.g.*, 18 U.S.C. 709 (knowingly using, without authorization, the names of enumerated federal agencies, such as "Federal Bureau of Investigation" and "Drug Enforcement Administration," in a manner reasonably calculated to convey the impression that a communication is approved or authorized by the agency); 18 U.S.C. 712 (using the words "national," "Federal," and "United States" in the collection of private debts for the purpose of conveying that the communication is from or on behalf of the United States).

ment, agency or officer thereof, and acts as such" shall be prosecuted); *United States* v. *Parker*, 699 F.2d 177, 178-180 (4th Cir.) (upholding conviction where defendant falsely stated that he was an IRS agent, but lacked fraudulent intent and did not receive anything of value), cert. denied, 464 U.S. 836 (1983). This Court has recognized that Congress's purpose in enacting the statute was not only preventing fraud, but also "maintain[ing] the general good repute and dignity" of government service, and as a result, fraudulent intent and an "actual financial or property loss" are not required elements. *United States* v. *Lepowitch*, 318 U.S. 702, 704 (1943) (citation omitted); *United States* v. *Bushrod*, 763 F.2d 1051, 1052-1054 (9th Cir. 1985) (per curiam).

Similarly, Congress has prohibited knowingly using terms associated with the Social Security Administration (SSA) in a manner that is intended to convey a false impression of government endorsement in order to protect the government's ability to communicate with Social Security recipients. 42 U.S.C. 1320b-10(a). The Fourth Circuit has rejected a First Amendment challenge to the statute—without applying strict scrutiny—on the ground that it is appropriately tailored to the government's interest in protecting legitimate SSA communications against dilution and false claims of government endorsement. See *United Seniors Ass'n* v. *SSA*, 423 F.3d 397, 407 (2005), cert. denied, 547 U.S. 1162 (2006).

3. This multitude of statutes reflects long acceptance of the government's power to prohibit specific false factual statements to protect the integrity of its regulatory programs, judicial proceedings, and other functions. This Court has recognized that Congress may reasonably conclude that certain types of false factual statements, even those made without fraudulent intent,

are likely to cause harm to the government's important interests, and that, as a result, these statutes need not require deceptive intent, materiality, or actual harm. See, *e.g.*, *Brogan*, 522 U.S. at 401-404; *id.* at 402 (rejecting the argument that "only those falsehoods that pervert governmental functions are covered by § 1001"); *Wells*, 519 U.S. at 489-491 (holding that materiality of falsehood is not an element under 18 U.S.C. 1014). The long tradition of congressional regulation of false factual statements to protect governmental functions, and the absence of First Amendment concerns despite the breadth of these statutes, is inconsistent with the notion that the First Amendment ordinarily requires that false-statement restrictions be subjected to strict scrutiny.

D. Against This Backdrop, The Court Of Appeals Was Wrong To Apply Strict Scrutiny To Section 704(b)

The court of appeals' conclusion that restrictions on false statements of fact are subject to strict scrutiny cannot be reconciled with this Court's longstanding treatment of false factual statements as subject to regulation and the historical acceptance of federal prohibitions on false statements.

In deciding to apply strict scrutiny to Section 704(b), the court of appeals relied heavily on this Court's statement in *Stevens* that the "historic and traditional categories" of speech that may be punished without "Constitutional problem," "includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." 130 S. Ct. at 1584 (citations omitted); see also *Entertainment Merchs. Ass'n*, 131 S. Ct. at 2734; Pet. App. 7a-8a. In the court of appeals' view, the *Stevens* Court's inclusion of "defamation" and "fraud" in its recitation of categories of wholly unprotected speech, and its failure to

include the general category of "false factual statements" in the same list, indicate that defamation and fraud are the only two types of false statements that may be restricted—and, by implication, that any false factual statement that cannot be characterized as defamation or fraud must be entitled to full First Amendment protection and cannot be subject to regulation unless the government meets the requirements of strict scrutiny. See Br. in Opp. 10-11. That is incorrect.

Stevens concerned the question whether the Court should create a new category of completely unprotected speech, 130 S. Ct. at 1585, and so the Court first canvassed categories of speech that had historically enjoyed that status. As *Stevens* explained, defamation and fraud were historically treated as completely unprotected by the First Amendment. *Id.* at 1584. Once a statement was characterized as defamatory or intentionally deceptive, it could be prohibited, or made the subject of a damages action, without any First Amendment limitation or scrutiny. See *New York Times*, 376 U.S. at 268. Because regulation of other false factual statements had a different historical pedigree, it is unsurprising that the *Stevens* Court did not include them in its enumeration of categories of speech that have historically been treated as wholly unprotected. See 130 S. Ct. at 1584.

But it does not follow from *Stevens*'s inclusion of defamation and fraud among the categories of historically unprotected speech that all other types of false factual statements must be regarded as fully protected. Despite the historical treatment of defamation as completely unprotected, in the 1960s the Court began to treat defamatory statements as entitled to derivative First Amendment protection arising from the need to avoid chilling fully protected speech. See *New York*

Times, 376 U.S. at 271-272. Similarly, the Court has recently explained that restrictions on fraud are permissible not only because fraud is unprotected, but because the traditional elements of fraud provide adequate breathing space for fully protected speech. See *Telemarketing Assocs.*, 538 U.S. at 612, 620-621. Thus, although defamation and fraud are historically unprotected categories of speech, today the Court views content-based restrictions on both categories through the lens of the "breathing space" analysis.

The Court has also made clear that this analysis applies more broadly, to false factual statements in general. Although the Court developed the breathing space approach in the context of defamation, in extending the analysis to new contexts the Court has reasoned from the premise that "*false statements* [are] unprotected for their own sake." *BE&K Constr. Co.*, 536 U.S. at 531 (emphasis added). Accordingly, the Court has not hesitated to apply the breathing space analysis to categories of false factual statements—such as false-light invasion of privacy and intentional infliction of emotional distress—that it understood to be distinct from defamation. See pp. 24-28, *supra*. And the Court has never questioned the government's authority to enforce laws against perjury, false statements, and false claims to be representing federal government agencies, even though none of those regulations fell within the categories *Stevens* identified. Thus, today defamation and fraud are best understood as subsets of the larger category of false factual statements that the Court has held may be subject to content-based restrictions that serve an important government interest and do not unduly chill fully protected speech.

Stevens's specific reference to defamation and fraud in its enumeration of long-recognized categories of wholly unprotected speech thus acknowledged the historical treatment of defamation and fraud. The *Stevens* Court had no occasion to consider the relationship of defamation and fraud to the Court's treatment of false factual statements more generally and its development of a single approach to apply to all such statements. Contrary to the court of appeals' view, then, *Stevens*'s mention of defamation and fraud does not implicitly overrule its previous extension of the "breathing space" analysis to uphold a variety of restrictions on other distinct types of false factual statements. Nor should *Stevens* be read to suggest that the numerous longstanding statutory prohibitions on false factual statements that do not constitute defamation or fraud are invalid unless they survive strict scrutiny.

III. SECTION 704(b) SERVES A COMPELLING INTEREST AND PROVIDES ADEQUATE BREATHING SPACE TO FULLY PROTECTED SPEECH, AND IT IS THEREFORE CONSTITUTIONAL

Under the "breathing space" analysis that this Court has applied to restrictions on false factual statements, Section 704(b) is constitutional. The government has a strong—indeed, compelling—interest in protecting the reputation and integrity of its military honors system against knowingly false claims. Section 704(b)'s narrow prohibition on a discrete category of knowing, verifiably false representations poses no risk of chilling any protected speech. Nor would the provision provide a vehicle for the government to punish disfavored viewpoints or act as the arbiter of truth and falsity in public debate. Section 704(b) therefore appropriately accommodates

the government's interest and First Amendment concerns by providing ample breathing room for protected speech. And even if Section 704(b) did risk chilling some protected speech, such that a further inquiry into whether the prohibition extends further than necessary might be appropriate, the statute prohibits only the narrow category of knowing misrepresentations that is necessary to protect the government's interest.

A. The Government Has A Compelling Interest In Protecting The Integrity Of The Military Honors System

1. The government has a "compelling interest * * * in preserving the integrity of its system of honoring our military men and women." Pet. App. 37a. The military honors program serves two vital and related interests.

First, military medals and decorations serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service. The government intends military honors to bestow prestige on their bearers and convey to the public the high regard in which the government holds the individuals who have sacrificed in service to the Nation. Valor awards educate the public about acts of courage and sacrifice during armed conflict, thereby fostering public support for the individuals serving in the armed forces. See *Awards Hearing* 72 (Defense Department honors program "foster[s] * * * public acknowledgment of our Service member's actions, achievements and sacrifices"); *Medal of Honor Report* 2 (the Medal of Honor was developed in part to inform the public about, and provide recognition for, the sacrifices involved in what might otherwise be seen as obscure and far-away conflicts). Non-valor awards—such as the Combat Infantryman Badge, which was intended as a mark of pres-

tige recognizing the dangers faced by infantrymen who have participated in active ground combat, see Army Reg. 600-8-22, ch. 8, § 8-6—also express the government's appreciation and convey to the public the high degree of skill and dedication that the person has displayed in military service.

Second, military awards, by "recognizing acts of valor, heroism and exceptional duty and achievement," serve vital purposes within the armed services. *Awards Hearing* 24 (statement of Lt. Gen. Roger A. Brady, Deputy Chief of Staff, Manpower and Personnel, Headquarters, U.S. Air Force). The military awards program "fosters morale, mission accomplishment and esprit de corps" among service members. *Ibid.*; see *id.* at 26 (statement of Brig. Gen. Richard P. Mills, Dir., Personnel Mgmt. Div., Manpower and Reserve Affairs, HQ, U.S. Marine Corps) (emphasizing the "importance of a viable and robust military combat awards system in maintaining morale, esprit de corps and pride in [one's] fellow Marines"); Marine Corps Order 1650.19J Encl. 1, at 3; Army Reg. 600-8-22, ch. 1, § 1-1; SECNAV Instruction 1650.1H, at 3-1; AFPD para. 2. By recognizing acts of valor or achievements, military awards convey that the military services value and recognize the underlying conduct. See, *e.g.*, Army Reg. 600-8-22, ch. 8, § 8-6(h)(1)(a) (explaining that Combat Infantryman Badge "was intended as an inducement for individuals to join the infantry while serving as a morale booster for infantrymen serving in every theater").

The award of military honors is particularly important during wartime. For instance, as General George C. Marshall wrote in describing his advocacy during World War II for the creation of the Bronze Star, the medal would be used to "sustain morale and fighting

spirit in the face of continuous operations and severe losses." Charles P. McDowell, *Military and Naval Decorations of the United States* 171 (1984). Indeed, the importance of medals in fostering these values among service members has been recognized since the very first honors were created. General Washington, in establishing the first valor award, explained that it would "cherish a virtuous ambition in his soldiers, as well as * * * foster and encourage every species of military merit." *General Orders* 35. Similarly, when Congress created the Medal of Honor during the Civil War, the bill's sponsor explained that the provision "need[ed] no explanation," as creating the honor would ensure that "the men in Navy shall be encouraged to brave deeds," and would be more effective in that regard than promotions and other incentives.[8] Cong. Globe, 37th Cong., 2d Sess. 72 (1861); *Medal of Honor Report* 3.

2. The extent to which the military honors program serves these critical goals depends on the government's ability to safeguard the program's integrity. See *Awards Hearing* 22 (statement of Lt. Gen. Michael D. Rochelle, Deputy Chief of Staff, G-1, U.S. Army) ("In order for the awards program to be credible to soldiers as well as the American people, it must * * * ensure the integrity of the award, especially valorous awards."). To maintain their status as prestigious symbols of honor

---

[8] The court of appeals wrongly dismissed this established function of military awards as "unintentionally insulting" to service personnel. Pet. App. 39a. It is common sense that those serving in the armed forces do not rise to the occasion purely in hopes of receiving a medal. But acknowledging that fact does not detract from the force of the armed services' longstanding view that military awards are a vital means of inspiring higher performance and maintaining the morale necessary for effective unit performance.

and the Nation's gratitude, military honors—particularly the highest valor awards—must be awarded only to a select group who are unquestionably deserving. See, *e.g.*, Marine Corps Order 1650.19J Encl. 1, at 3 (decorations should be awarded to "personnel whose performance of duty is exceptional and clearly recognized by superiors and contemporaries alike"). The honors also must be perceived as having been awarded through a rigorous process that guarantees accuracy with respect to the conduct at issue and the degree to which the actions merit recognition. See *Awards Hearing* 22.

To that end, Congress and the armed services have gone to great lengths to ensure that only the most deserving individuals receive medals. See pp. 4-6, *supra*; *Awards Hearing* 21, 81, 117. Valor awards, such as the Medal of Honor, are conferred only on those who have committed extraordinary acts of heroism.[9] In order to recognize a range of valorous actions while avoiding awarding the highest honors too frequently, Congress and the armed services have developed a detailed hierarchy of awards, each with its own criteria. Compare, *e.g.*, 10 U.S.C. 3741 (Medal of Honor criteria), with 10 U.S.C. 3742 (Distinguished-Service Cross). The conferral of a particular award therefore reflects a judgment, and communicates a message, about the degree of valor involved and its relation to military tradition. See *Awards Hearing* 22.

The armed services also maintain stringent procedures for evaluating award recommendations. Of particular importance is proof that the individual actually performed the valorous acts that justify the award. All

[9] Indeed, today there are only 85 living recipients of the Medal of Honor. See Congressional Medal of Honor Soc'y, *Archive Statistics*, http://www.cmohs.org/medal-statistics.php.

combat award recommendations must be supported by two eyewitness statements, *Awards Hearing* 118, and the Medal of Honor requires proof beyond a reasonable doubt. *Awards Manual* 31. In addition, all recommendations are subject to multiple reviews designed to satisfy the chain of command that the events in question actually occurred, that they are deserving of recognition, and that the appropriate level of recognition has been chosen. *E.g.*, *id.* at 12-24.

Congress and the armed services have also taken steps to ensure that individuals who receive valor awards have not engaged in conduct that could tarnish the award's meaning. Congress has provided that the highest military honors may not be awarded to someone whose subsequent conduct "has not been honorable." See, *e.g.*, 10 U.S.C. 3744(c) and 6249. The Department of Defense's awards policy provides that medals may be revoked if later-discovered facts would have prevented the award of the medal and that no Departmental or joint-service award may be conferred on someone whose "entire service during or after" the events in question has not been honorable. See *Awards Manual* 4; *Medal of Honor Report* 14 ("[I]t is precisely *because* of these legalistic safeguards that the Medal of Honor is a symbol of such glorious tradition today.").

3. The government thus has a compelling interest in protecting the integrity of the military honors system. One aspect of the government's interest is the need to protect the awards from misappropriation through false claims to have been awarded a medal. The diluting effect of such claims undermines the military awards system's ability to fulfill both of its important purposes, namely, conveying gratitude and recognition and fostering morale within the armed forces.

a. False claims to have been awarded a military medal misappropriate the prestige and honor associated with that medal. The cumulative effect of such claims is, as Congress found in enacting the Stolen Valor Act, to dilute and "damage the reputation and meaning of such decorations and medals." Stolen Valor Act, § 2(1), 120 Stat. 3266. In the aggregate, false representations threaten to make the public skeptical of any claim to have been awarded a medal. Such claims also undercut the government's screening to ensure that the award recipients, the conduct for which the honors are conferred, and the recipients' subsequent military record are deserving of the government's recognition. These cumulative effects diminish the awards' effectiveness in conferring prestige and honor on those who actually have been awarded medals.

False claims to have received military awards also undermine the awards' important function within the armed services. In the aggregate, 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. This is particularly true of the most selective awards, such as the Medal of Honor, which have a small number of actual recipients and are the most likely to be the subject of false representations because of their extraordinary prestige. False claims also may sow confusion about the military's standards for awarding each type of medal and the consistency with which medals are awarded, undermining the morale-promoting effects that the awards are intended to have. Indeed, in order to preserve the awards' value and function within the services, the military prosecutes active-duty service members who falsely claim or wear awards that they have not re-

ceived under the Uniform Code of Military Justice. See 10 U.S.C. 934 (offense of "conduct of a nature to bring discredit upon the armed forces"); see also, *e.g.*, *United States* v. *Avila*, 47 M.J. 490 (1998) (defendant wore and used falsified documents to claim that he had won a Bronze Star). These efforts are undermined if false claims are rampant outside of the military.

In view of the harm caused by false claims to have received military honors, Congress has long taken measures to prevent such claims. Soon after the official establishment of the Medal of Honor, people began using imitation medals, creating "confusion as to who earned and who did not earn the Medal of Honor." *Medal of Honor Report* 4. Congress took various measures to prevent that dilution, including providing for the publication of the names of Medal of Honor recipients and obtaining a patent on the medal's design in order to prevent imitations. *Id.* at 6. Congress also established the Medal of Honor Society as a federally chartered corporation, whose purpose, among other things, is "to protect the name of the medal and individual holders of the medal from exploitation." 36 U.S.C. 40501, 40502. In 1923, Congress prohibited knowingly wearing, manufacturing, or selling a military medal without authorization. See Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286. That provision, now codified at 18 U.S.C. 704(a), was enacted on the recommendation of the War Department, which had expressed concern that unauthorized imitations would "cheapen[] the decorations in question" and noted that "[i]f the decorations of honor * * * awarded by the War Department are to continue to serve the high purpose for which they are intended, they are worthy of being protected." H.R. Rep. No. 1484, 67th Cong., 4th Sess. 1-2 (1923).

Section 704(b) is thus the latest in a long line of congressional efforts to protect military honors from misappropriation and dilution. Congress enacted Section 704(b) in 2006 because it concluded that the existing prohibition on the unauthorized wearing of medals was insufficient to protect against false claims to have been awarded a medal.[10] § 2(3), 120 Stat. 3266 ("[l]egislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals"). The statute thus supplements the existing protections against misappropriation and dilution.

b. Respondent contends (Br. in Opp. 25) that Section 704(b) serves no proper government interest because it is an attempt to prohibit "libel on government." Relying

---

[10] In the years preceding the Act's passage, the press documented an apparent "surge" in false claims to have been awarded a medal. See Pam Belluck, *On a Sworn Mission Seeking Pretenders To Military Heroism*, New York Times, Aug. 10, 2001, available at 2001 WLNR 3382421. In 2001, for instance, 219 Virginia residents claimed to have won the Medal of Honor on their tax returns, but only four people in the State had actually received the medal. See *Making a Sham of Military Honors*, Virginian-Pilot and Ledger-Star, Aug. 9, 2004, available at 2004 WLNR 3452826 (false claim to have been awarded the Silver Star, Legion of Merit, Defense Meritorious Service Medal, and Purple Heart). See generally, *e.g.*, Jeff Long, *Illinois Targets Military Plate Liars*, Chicago Tribune, Dec. 27, 2005, available at 2005 WLNR 23506611 (false claim to have received Purple Heart); *Probation for Phony Medals Claims*, Bucks County Courier Times, Sept. 19, 2004, available at 2004 WLNR 17336228 (claim to have won several medals, including the Navy Cross); Tom Farmer, *Dishonorable Decoration; Marine's Unearned Medal Exposed*, Boston Herald, Feb. 10, 2004, available at 2004 WLNR 401638 (chairman of Marine Honors Society claimed to have received Navy Cross); *Man Held in Cole County on Old Warrant Charged for Wearing Fake Medal of Honor*, July 12, 2002, Jefferson City News-Tribune, available at 2002 WLNR 15346628.

on the Court's decisions invalidating statutes prohibiting flag burning, see *Texas* v. *Johnson*, 491 U.S. 397 (1989); *United States* v. *Eichman*, 496 U.S. 310 (1990), respondent contends that Section 704(b)'s stated purpose of protecting the "reputation" of medals, § 2(3), 120 Stat. 3266, amounts to a prohibition on criticism of the government. Respondent is incorrect. In *Johnson*, the State justified its prohibition on flag burning based on an interest in protecting the flag as a "symbol of * * * national unity," arguing 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." 491 U.S. at 413. The statute thus prohibited a form of criticism of the government, and the Court held that the government may not "ensure that a symbol be used to express only one view of that symbol or its referents." *Id.* at 417. Accord *Eichman*, 496 U.S. at 317-318.

Here, by contrast, Section 704(b) is not directed at criticism of—or any particular message about—a government symbol. Section 704(b) does not prevent anyone from criticizing medal recipients, the military awards system, military policy, or any official action. Nor does it prohibit desecration or destruction of medals in order to express a point of view, or false claims of military heroism. Rather, Section 704(b) prohibits only knowingly false claims to have been awarded a medal—in other words, claims that misappropriate the official honor and approbation that the medals signify, thereby diminishing their ability to serve their important purposes. Preventing misappropriation and dilution of military honors by means of knowing misrepresentations is

a strong—and compelling—government interest that is entirely consistent with the First Amendment and entirely unrelated to the suppression of dissent. This Court has previously recognized as much. See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 535-536 (1987) (*San Francisco Arts*) (prohibition on unauthorized use of the term "Olympics" was unrelated to governmental desire to suppress any particular message and did not prevent people from expressing any point of view); *Johnson*, 491 U.S. at 415 n.10 (distinguishing *San Francisco Arts* on the ground that the misappropriation prohibition in that case did not implicate concerns about suppressing criticism of the government).

B. Section 704(b) Provides Adequate Breathing Space To Fully Protected Speech

Section 704(b) properly accommodates the compelling government interest in protecting the integrity of the military honors system and First Amendment concerns because it provides ample "breathing space" for fully protected speech. *New York Times*, 376 U.S. at 272 (citation omitted). Section 704(b) does not inhibit expression of opinion about military policy, the meaning of military awards, the values they represent, or any other topic of public concern. Nor does the provision have the effect of chilling such speech—or any debate, discussion, or other protected statements on any topic. It therefore provides adequate breathing space to protected speech. And even if Section 704(b) did chill some speech, the provision is constitutional because its prohibition on all knowingly false claims to have won a military award "reach[es] no farther than is necessary." *Gertz*, 418 U.S. at 349.

1. Section 704(b) does not chill any protected speech

A number of Section 704(b)'s attributes ensure that its narrow prohibition will not have the effect of deterring any speech except the knowing misrepresentations that the statute prohibits. Because Section 704(b) does not pose any danger of chilling any protected speech, the provision is constitutional. See *Telemarketing Assocs.*, 538 U.S. at 620-621.

Crucially, Section 704(b) prohibits only knowing misrepresentations, see pp. 15-17, *supra*, on a particular personal subject matter. This scienter requirement provides "an extremely powerful antidote to the inducement to * * * self-censorship." *Gertz*, 418 U.S. at 342; *Telemarketing Assocs.*, 538 U.S. at 620. The Court has never invalidated a false-statement restriction that contained a knowledge requirement. See pp. 22-28, *supra*.

The statute's prohibition of only a discrete category of misrepresentations of fact about the speaker himself reinforces the scienter requirement, making it virtually certain that no one would refrain from engaging in truthful speech about medals in order to avoid the possibility of prosecution. A person is unlikely to be mistaken about whether he has received a military medal, and the accuracy of any such claim is objectively verifiable. As a result, there will rarely be uncertainty about the falsity of the representation or a dispute about the speaker's knowledge, and thus there is little likelihood that people will refrain from truthful speech about military awards out of "doubt whether [truth or lack of knowledge] can be proved in court or fear of the expense of having to do so." *New York Times*, 376 U.S. at 279; cf. *Virginia State Bd.*, 425 U.S. at 772 n.24 (the verifiable nature of commercial assertions means that less breathing room is necessary to "insure that the flow of truthful

and legitimate commercial information is unimpaired"). The government, moreover, must establish any disputed facts beyond a reasonable doubt. See *Telemarketing Assocs.*, 538 U.S. at 620 ("Exacting proof requirements" in fraud actions, where government must prove fraud by clear and convincing evidence, provide "sufficient breathing room for protected speech.").

A speaker need not fear that the statute, though facially viewpoint-neutral, might be used to punish disfavored speech. Cf. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) (government may regulate a class of unprotected speech when "no significant danger of idea or viewpoint discrimination exists"). Because the line between a knowingly false award-related claim and all other statements—about military service, valorous acts, military policy, or the like—is well-defined and objective, the government could not use Section 704(b) to impose its own view of "truth" or punish criticism. Cf. *New York Times*, 376 U.S. at 272; *Meyer* v. *Grant*, 486 U.S. 414, 419 (1988). As a result, this case does not implicate Justice Jackson's admonition that "every person must 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) (Jackson, J., concurring). Although, as Justice Jackson observed, "it is not the right * * * of the state to protect the public against false *doctrine*," *ibid.* (emphasis added), Section 704(b) does not purport to do any such thing. But cf. Br. in Opp. 22. It prohibits only a discrete and narrow category of false factual statements, and the line between such misrepresentations and any "doctrine," viewpoint, or other assertion is objectively clear.

2. Even assuming that Section 704(b) risked chilling some protected speech, the prohibition extends no further than necessary

Because Section 704(b) furthers a strong government interest and does not deter any protected speech, the provision should be upheld. Even assuming that Section 704(b) did chill some speech, however, the provision is constitutional because its prohibition on all knowingly false claims to have won a military award "reach[es] no farther than is necessary." *Gertz*, 418 U.S. at 349.

First, the provision targets only those representations that reasonably can be understood as factual claims to have won a medal—the type of misappropriation that dilutes the meaning and value of the medals.

Second, even if an isolated misrepresentation by itself would not tarnish the meaning of military honors, the cumulative force of all such misrepresentations would. See pp. 41-43, *supra*; Pet. App. 74a (Bybee, J., dissenting). Because that aggregate effect is the harm that Congress sought to remedy, Section 704(b) does not require a showing of particularized injury from individual misrepresentations. Contrary to the court of appeals' view, *id.* at 30a-35a, a restriction on false factual statements need not include an element of particularized injury if it otherwise provides adequate breathing space to protected speech. In *Gertz*, for instance, the Court held that juries may presume injury in defamation cases, so long as the plaintiff is required to prove actual malice. 418 U.S. at 349-350. That holding presupposes that the First Amendment permits a State to conclude that certain false statements are categorically harmful even if particularized injury is not proven in individual cases, so long as other aspects of the restriction ensure adequate breathing space. In addition, Congress has

long prohibited categories of false factual statements that it has determined cause presumptive harm to government programs, see, *e.g.*, 18 U.S.C. 1001, pp. 29-33, *supra*, and these statutes have never been thought to be inconsistent with the First Amendment.

Third, relying on the public to discover and refute false claims would not effectively address the aggregate harmful effects of false claims. But cf. Pet. App. 37a-38a. Although some misrepresentations may be promptly investigated and exposed, many others are not discovered for substantial amounts of time, if ever. See, *e.g.*, *United States* v. *Hinkson*, 585 F.3d 1247, 1254-1256 (9th Cir. 2009) (en banc) (witness used fraudulent military records to fool prosecutors, judge, and defense attorneys with false claim of having won Purple Heart, and district court initially could not determine based on military records whether the claims were true or false). There is no publicly accessible database of medal recipients nor, often, any reason to think that an individual's claim to have received a medal would be subject to skeptical scrutiny by the public. Moreover, public refutation is necessarily an inadequate solution because some military records have been lost, rendering some claims unverifiable. See Office of the Under Sec'y of Defense, *Report to the Senate and House Armed Services Committees on a Searchable Military Valor Decorations Database* 5-8 (2009) (*Decorations Database*). Even if those particular false claims cannot be prosecuted as a result of lost records, Section 704(b) deters them in the first place. And because the medals' meaning is eroded by the aggregate effect of these false claims, including claims that are less susceptible to counterspeech, preventing that cumulative harm requires prosecuting the

claims that are provably false in order to deter all knowingly false claims.

C. Section 704(b) Does Not Unconstitutionally Restrict Legitimate Self-Expression

Despite Section 704(b)'s provision of ample breathing space to fully protected speech, respondent contends (Br. in Opp. 23-25) that Section 704(b) is unconstitutional because "the right to speak about oneself—even to lie—is * * * intimately bound up with a particularly important First Amendment purpose: human self-expression." Br. in Opp. 23 (quoting Pet. App. 108a). Protecting the right to self-expression is unquestionably an important value underlying the First Amendment. The Court has not suggested, however, that statements about oneself are entitled to a higher degree of protection than other forms of speech, or that statements that may otherwise be restricted—such as knowingly false statements that constitute intentional infliction of emotional distress, or fraudulent statements—are less susceptible to restriction simply because they happen to pertain to the speaker himself. Cf. *Firestone*, 424 U.S. at 456 (stating that the Court has avoided using "subject-matter classifications" to draw constitutional lines in the defamation context, because doing so may "too often result in an improper balance between the competing interests in this area").

In any event, respondent is incorrect that Section 704(b) prohibits all but "the monotonous reporting of strictly accurate facts about oneself." Br. in Opp. 24 (quoting Pet. App. 108a-109a (Kozinski, J., concurring)). Section 704(b) prohibits only those misrepresentations that are reasonably understood as assertions of fact, thereby preserving hyperbole, satire, and other expres-

sive statements, and it sweeps no further than necessary to prevent the significant harm arising from deceptive claims. Upholding Section 704(b) on the basis of the government's compelling interest in the integrity of the military honors system and Section 704(b)'s provision of ample breathing space to fully protected speech would not suggest that the government may prohibit all forms of "embellish[ment]" or "tell[ing] tall tales." *Id.* at 24.

The discrete category of false misrepresentations prohibited by Section 704(b) bears little resemblance to the false statements pertaining to one's private life that respondent suggests would be sanctionable if Section 704(b) were upheld. See Br. in Opp. 8 (quoting Pet. App. 107a ("I'm working late"; "I got stuck in traffic") (Kozinski, C.J., concurring)). Upholding Section 704(b) on the basis of the government's compelling interest and the absence of chill of protected speech would not suggest that other restrictions on false statements, which would be evaluated in light of the government interest and the degree of chilling effect involved, would necessarily be constitutional.

D. Section 704(b) Is Not Unconstitutional As Applied To Petitioner

Finally, respondent contends (Br. in Opp. 26-28) that this Court could affirm the judgment below on the alternative ground that Section 704(b) is unconstitutional as applied to him. Because respondent made his false claims while introducing himself as an elected officer at a water district meeting, he argues that he was punished for political speech. To the contrary, respondent's knowingly false representation was not a "[d]iscussion[] of qualifications of political candidates," "governmental affairs," or "public issues," Br. in Opp. 27, nor did it as-

sist in expressing any opinion on these issues. Cf. *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 346-347 (1995).

Under Section 704(b), respondent was free to express his views on public office or his qualifications for office in any way he wished. He was not free, however, knowingly to misrepresent that he had been awarded the Nation's highest military honor. See *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2723-2724 (2010) (holding that material-support statute did not restrict pure political speech because it left people free to express any view on any topic). Respondent's making of his false claims during a political event does not immunize him from prosecution under an otherwise constitutional statute that prohibits a narrow category of knowing misrepresentations without regard to the context in which they are made—any more than the political context would immunize defamation or fraud. One is no more likely to be unsure about having been awarded a medal, or uncertain about whether the truth of one's claim could be proven in court when one is speaking in a political context, compared to other contexts.

The statutes invalidated in the decisions on which respondent relies illustrate how narrowly cabined Section 704(b) is by comparison. In *Rickert* v. *State Public Disclosure Commission*, 168 P.3d 826 (Wash. 2007), and *State ex rel. Public Disclosure Commission* v. *119 Vote No! Committee*, 957 P.2d 691 (Wash. 1998), the Washington Supreme Court invalidated state statutes that prohibited making material false statements in political advertising or about another candidate for office, explaining that the State has no "independent right to determine truth and falsity in political debate." *Rickert*, 158 P.3d at 829 (quoting *119 Vote No! Comm.*, 957 P.2d

at 695); see also *281 Care Comm.* v. *Arneson*, 638 F.3d 621, 633-634 (8th Cir. 2011) (invalidating state ban on knowingly false statements about ballot initiatives for the same reason), petition for cert. pending, No. 11-535 (filed Oct. 25, 2011). That rationale has no application here, because Section 704(b) does not present any danger that the government will act as an arbiter of truth and falsity in public debate.

IV. SECTION 704(b) ALSO CAN BE UPHELD UNDER STRICT SCRUTINY

Even if the court of appeals was correct in subjecting Section 704(b) to strict scrutiny, the statute survives that test. "[T]he statute is carefully drawn to cover only a narrow category of speech," and the prohibition is necessary in order to safeguard the government's compelling interest. *Humanitarian Law Project*, 130 S. Ct. at 2723; see *Burson* v. *Freeman*, 504 U.S. 191, 198 (1992); see also *Entertainment Merchs. Ass'n*, 131 S. Ct. at 2738.

As the court of appeals acknowledged, the government has a compelling interest in protecting the integrity of its military award system against knowingly false claims that dilute the meaning of the awards. See Pet. App. 37a; pp. 37-46, *supra*.

Section 704(b) is necessary to protect the government's compelling interest. *Burson*, 504 U.S. at 198. Although the court of appeals suggested that it is speculative to conclude that the meaning of military awards is harmed by those who lie about having received one, Pet. App. 38a, it is common sense that false representations have the tendency to dilute the value and meaning of military awards. That is why Congress historically has acted to protect military awards from misappropriation.

In enacting Section 704(b), Congress found that these existing measures—including the prohibition on unauthorized wearing of medals, see 18 U.S.C. 704(a)—had proved inadequate to deter and punish false claims that did not involve also wearing a medal. See 120 Stat. 3266. Congress's "persistent battle" against misrepresentations about military honors and its historical experimentation with different methods of combating the problem demonstrates that Section 704(b) is "necessary in order to serve" the government's compelling interest in protecting the integrity of the military honors system. *Burson*, 504 U.S. at 206.

For the reasons stated above, moreover, no less restrictive alternative would adequately serve the government's interest. While members of the public will discover and expose some false claims, many will remain unchallenged. See pp. 50-51, *supra*. Although Congress in 2008 investigated the feasibility of establishing a searchable medals database that would enable the public to verify claims, the Department of Defense concluded that such a database would be impracticable and insufficiently comprehensive. See *Decorations Database* 8-9; H.R. Rep. No. 652, 110th Cong., 2d Sess. 361 (2008). That reinforces Congress's conclusion that Section 704(b)'s prohibition is necessary to prevent the cumulative effect of false claims, including those that are less susceptible to counterspeech, from eroding the meaning of military honors. Section 704(b) permits carefully chosen prosecutions—where the government can prove that the defendant's claim was false and that he was aware of its falsity—to deter all knowingly false claims to have received military honors. No other remedy would adequately vindicate the compelling government interest at stake.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LANNY A. BREUER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

GINGER D. ANDERS
Assistant to the Solicitor General

JOSEPH F. PALMER
Attorney

DECEMBER 2011

APPENDIX

18 U.S.C. 704 provides:

Military medals or decorations

(a) IN GENERAL.—Whoever knowingly wears, purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barters, or exchanges for anything of value any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both.

(b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

(c) ENHANCED PENALTY FOR OFFENSES INVOLVING CONGRESSIONAL MEDAL OF HONOR.—

(1) IN GENERAL.—If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punish-

ment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

(2) CONGRESSIONAL MEDAL OF HONOR DEFINED.—In this subsection, the term "Congressional Medal of Honor" means—

(A) a medal of honor awarded under section 3741, 6241, or 8741 of title 10 or section 491 of title 14;

(B) a duplicate medal of honor issued under section 3754, 6256, or 8754 of title 10 or section 504 of title 14; or

(C) a replacement of a medal of honor provided under section 3747, 6253, or 8747 of title 10 or section 501 of title 14.

(d) ENHANCED PENALTY FOR OFFENSES INVOLVING CERTAIN OTHER MEDALS.—If a decoration or medal involved in an offense described in subsection (a) or (b) is a distinguished-service cross awarded under section 3742 of title 10, a Navy cross awarded under section 6242 of title 10, an Air Force cross awarded under section 8742 of section 10, a silver star awarded under section 3746, 6244, or 8746 of title 10, a Purple Heart awarded under section 1129 of title 10, or any replacement or duplicate medal for such medal as authorized by law, in lieu of the punishment provided in the applicable subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.