

No. 11-210

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*In the Supreme Court of the United States*

UNITED STATES OF AMERICA, PETITIONER,

v.

XAVIER ALVAREZ, RESPONDENT.

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

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**BRIEF OF THE  
CONGRESSIONAL MEDAL OF HONOR  
FOUNDATION  
AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER**

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## **QUESTION PRESENTED**

Section 704(b) of Title 18, United States Code, makes it a crime when anyone “falsely represents himself or herself, ... verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”

The question presented is whether 18 U.S.C. 704(b) is facially invalid under the Free Speech Clause of the First Amendment.

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The Congressional Medal of Honor Foundation (“Foundation”) is a 501(c)(3) nonprofit foundation formed by recipients of the Medal of Honor<sup>2</sup> to help fulfill the missions of the federally chartered Congressional Medal of Honor Society of the United States of America.<sup>3</sup>

As part of its mission, the Foundation is dedicated to perpetuating the Medal of Honor’s legacy through outreach and collaborative efforts, and to promoting American values and the qualities of courage, sacrifice, and patriotism through increased awareness, education, behavior, and

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<sup>1</sup> This brief was not authored, in whole or in part, by counsel for a party. No person or entity other than members of *amicus* and its counsel contributed monetarily to the preparation or submission of this brief, with the lone exception of Jay & Dana Town of Huntsville, Alabama, who gifted monies to the Congressional Medal of Honor Foundation for the specific purpose of filing this brief. The parties have consented to the filing of this brief; copies of their letters of consent have been lodged with the Clerk of the Court.

<sup>2</sup> Since the Medal of Honor is given in the name of Congress it is commonly referred to as the “Congressional Medal of Honor.” However, the Medal’s name is the “Medal of Honor.”

<sup>3</sup> 36 U.S.C. 40501. Only recipients of the Medal of Honor are eligible for membership in the Congressional Medal of Honor Society. Most of the living Medal of Honor recipients have asked to be named, in their individual capacities, as supporting this brief (see Appx. at pp. A-8 to A-10), yet this brief is not being submitted by the Congressional Medal of Honor Society, which has limited powers. 36 U.S.C. §40505.

example. In addition, the Foundation strives to ensure that the Medal of Honor and its recipients—each of whom is a national treasure—are protected from fraud and kept free from exploitation.

The Foundation is committed to supporting and defending the freedoms we enjoy as Americans. It holds sacred these values:

- ***Courage***: the indomitable courage demonstrated by the recipients of our Nation’s highest military honor for valor as an ideal that should endure in all ways of life;
- ***Sacrifice***: sacrifice and service above self as principles that all citizens of a free and prosperous nation should strive for;
- ***Patriotism***: love of country and a commitment to support and defend the freedoms we enjoy as Americans;
- ***Citizenship***: our Country’s destiny lies in its youth, and the Foundation is committed to helping them become worthy citizens of our country in the belief that ordinary Americans have the potential to challenge fate and change the course of history;
- ***Integrity***: the mark of a true hero is to have the moral courage to do what needs to be done because it is the right thing to do;
- ***Commitment***: the Foundation steadfastly supports the valiant men and women who serve their country in the same spirit of

commitment and sacrifice as those who preceded them.

There are no better ambassadors to take this message to the American people than the Medal of Honor recipients.<sup>4</sup>

Conversely, Respondent, who is a proven fraud, is the antithesis to the values embodied in the Medal of Honor. He feigned to be one of those rare citizens whose gallantry and heroism merited an award of the Medal of Honor. He lied. With full knowledge of the falsity of his claim, he lied. His motivation was clear: he hoped to gain for himself the glory, recognition, attention, honors, accolades, and deference that the Medal carries with it and that are reserved for our Nation's true heroes. He was caught in his deceit and was convicted under the Stolen Valor Act for falsely representing that he had received the Medal of Honor. The question for the Court is whether the Free Speech Clause protects Respondent's lie.

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<sup>4</sup> The Appendix hereto recites—as representative examples of the awe-inspiring deeds for which the Medal has been awarded—the award citations for five recipients of the Medal of Honor. *See* Appx. A-1 to A-8. All Medal of Honor citations may be viewed at: <http://www.history.army.mil/moh.html>.

## SUMMARY OF ARGUMENT

The Stolen Valor Act rightfully and constitutionally protects our nation's military decorations, to include the Medal of Honor, from exploitation by frauds. Congress has a need, indeed a duty, to preserve the intrinsic and intangible value of those accoutrements of faithful and gallant service.

The Court is asked to choose between two competing interests. On the one hand, Respondent Xavier Alvarez claims a First Amendment Right to tell a lie—to claim that he was awarded the Medal of Honor. On the other hand, the government has a perhaps impalpable, though undoubtedly compelling, interest in honoring our Nation's heroes and fostering esprit de corps within the military.

The court of appeals did not fully appreciate the government's interest in maintaining the integrity of its system of medals and decorations. For this reason, the Medal of Honor Foundation presents this brief to provide a more complete understanding of that compelling interest.

“The fundamental purpose of awards is to inspire emulation.”<sup>5</sup> That concept is rooted in tradition

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<sup>5</sup> Kenneth W. Estes, *The Marine Officers' Guide* 303 (5<sup>th</sup> ed. 1985); *see, e.g.*, 32 C.F.R. §578.1(c) (“Award of decorations, and to a lesser degree, award of the Army Good Conduct Medal and of service medals, provide a potent incentive to greater effort, and are instrumental in building and maintaining morale.”)

dating back more than 2100 years. And the concept was understood and appreciated by the Continental Congress, George Washington, and others at the time of framing our Constitution.

Today, the ability of the Medal of Honor (and other military decorations) to inspire emulation is even more important than at the time of our Nation's birth. We now have an all-volunteer military force and a civilian populace aware of an ongoing war. So our Nation, as a whole, needs to inspire volunteers to join the military. We also need to inspire troops to engage, both mentally and physically, in the rigors of training, to instill a high degree of competence, morale, esprit de corps, and military discipline—*i.e.*, “the individual or group attitude that ensures prompt obedience to orders and initiation of appropriate action in the absence of orders.”<sup>6</sup>

The Medal of Honor will inspire heroic acts without thought of receiving a medal. The power to inspire unit and individual preparedness for every combat mission—through effective training, mental and physical preparation for combat, arrival on the battlefield, following orders, engaging in combat, acting as a cohesive unit despite chaos, and possessing a will to carry on despite certain danger

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<sup>6</sup> U.S. Marine Corps, *Marine Corps Values: A User's Guide for Discussion Leaders* 15-8 through 15-15 (1998) (“everything we do as Marines is designed to constantly sharpen our ability to succeed in battle. Every Marine must be committed to this goal.”)

to self, and even injury and the deaths of comrades—gives value to every aspect of the military system of medals and decorations.<sup>7</sup>

The court of appeals, however, focused too intently on Alvarez’s freedom to lie about having received the Medal of Honor. The court did not give due consideration to the government’s compelling interest in preserving and maintaining the integrity of its system of military medals and decorations. Indeed, the court gave no deference whatsoever to Congress’s finding that false claims to have received the Medal of Honor and other decorations “damage the reputation and meaning of such decorations and medals.”

Our Nation’s interest in protecting and preserving the value of its system of honors for the armed forces far outweighs whatever minimal First Amendment value may exist for the utterance of lies. False claims regarding the Medal of Honor and other military decorations are not speech that occupies any rung of protected free speech under the First Amendment. Respondent’s speech—his lie—did not address matters of public concern, political discourse or social issues. He did not express an opinion. Nor

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<sup>7</sup> The court of appeals commented on the motivation for engaging in the “riskiest missions” (Pet. App. 39a), but that is too narrow a focus. Medal of Honor Recipient Salvatore Giunta, for example, was ambushed during a routine patrol and responded with “extraordinary heroism and selflessness above and beyond the call of duty.” Appx. A-3 to A-5.

was his speech an attempt to induce societal or governmental change. Respondent's deceit was for his own personal aggrandizement.

A fraudulent claim to a Medal of Honor exploits and misappropriates the goodwill forged into the Medal by the incredible acts of heroism, and often deaths, of its recipients. There is no meritorious reason for falsely claiming to have received a Medal of Honor.

If the Court were to subject the Stolen Valor Act to strict scrutiny, the Court must conclude that the Act is narrowly tailored to achieve a compelling government interest.

## FACTUAL BACKGROUND

### **A. Military Decorations Are Awarded to Inspire Emulation to Serve, to Maintain Discipline, to Excel, and to Endure the Hardships, and Rise to the Challenges, of Combat**

“The fundamental purpose of awards is to inspire emulation.”<sup>8</sup>

The court of appeals recognized that “[e]specially at a time in which our nation is engaged in the longest war in its history, Congress certainly has an interest, even a compelling interest, in preserving the integrity of its system of *honoring* our military men and women for their service and, at times, their sacrifice.”<sup>9</sup> The court, however, did not fully appreciate the purpose and value of military medals and decorations, which are not limited in purpose to honoring service or sacrifice.

The purpose behind such awards is not merely to honor brave and heroic deeds, but to inspire emulation. Public recognition for heroic acts inspires civilians to volunteer to serve in the armed forces. It inspires members of the armed forces to endure the rigors of training to instill military discipline and

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<sup>8</sup> Estes, *supra*, at 303.

<sup>9</sup> Pet. App. 37a (emphasis added).

esprit de corps. It inspires them to prepare physically and mentally for combat, to suffer the hardships of combat duty, to arrive on the battlefield. It inspires them to engage the enemy, and to be ready to act cohesively as a unit despite the danger and chaos they will encounter. It inspires most to carry on while others are falling around them. It inspires many to lead, when their leader has fallen and others have lost their steel. And it inspires many to be prepared to act with gallantry, bravery, and heroism—by trained instinct and without thought of medals—if and when they are put in a situation requiring such action.<sup>10</sup>

This value of military decorations has been recognized for millennia (so too has the need to restrict decorations to those who earned them). The Greek historian, Polybius (ca. 200 to 117 BC), touted the benefits of the Romans' system of honors, which encouraged "young soldiers to face danger," and led to the Romans' success and brilliance in wars:

After a battle in which some of them have distinguished themselves, the general calls an assembly of the troops, and bringing forward those whom he considers to have displayed conspicuous valour, first of all speaks in laudatory terms of the courageous deeds of each

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<sup>10</sup> The five Medal of Honor citations that are reproduced in the Appendix are representative examples of the results of such inspiration. Appx. A-1 to A-8.

and of anything else in their previous conduct which deserves commendation, and afterwards distributes the following rewards. To the man who has wounded an enemy, a spear; to him who has slain and stripped an enemy, a cup if he be in the infantry and horse trappings if in the cavalry, although the gift here was originally only a spear. These gifts are not made to men who have wounded or stripped an enemy in a regular battle or at the storming of a city, but to those who during skirmishes or in similar circumstances, *when there is no necessity for engaging in single combat, have voluntarily and deliberately thrown themselves into the danger. ... By such incentives they excite to emulation and rivalry in the field not only the men who are present and listen to their words, but those who remain at home also.* For the recipients of such gifts, quite apart from becoming famous in the army and famous too for the time at their homes, are especially distinguished in religious processions after their return, *as no one is allowed to wear decorations except those on whom these honours for bravery have been conferred by the consul; ....* Considering all this attention given to the matter of punishments and rewards in the army and the importance attached to both, no wonder that the

wars in which the Romans engage end so successfully and brilliantly.<sup>11</sup>

### **B. Our Founding Fathers Understood the Purpose and Value of Military Awards**

Our Nation's independence was declared with a mutual pledge of our Founder's lives, fortunes, and sacred honor. It is much a part of the history of our great Nation that our military heroes should be honored with medals for valor and treated with a degree of respect. Indeed, in March 1776, the Continental Congress voted for the creation and presentation of our Nation's first medal—to General George Washington as recognition for his "siege and acquisition of Boston."<sup>12</sup>

General Washington later expressed his desire "to cherish a virtuous ambition in his soldiers, as well as to foster and encourage every species of military merit," and issued an order directing that a heart in purple cloth or silk would be worn for "singularly meritorious action" consisting of "instances of unusual gallantry, ... extraordinary fidelity, and essential service in any way." He

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<sup>11</sup> Polybius, *The Complete Histories of Polybius* 251 (W.R. Paton trans., Digireads.com Publishing 2009) (emphasis added); see also John Ross-of-Bladensburg, *On the Causes Which Have Led to the Preeminence of Nations in War*, 21 J. Royal United Svcs. Inst. 383 (photo. reprint 2011) (1877).

<sup>12</sup> J.F. Loubat, LL.D., *The Medallic History of the United States of America, 1776-1876*, Vol. 1, at xi, 3 (1878).

directed that “Men who have merited this last distinction to be suffered to pass all guards and sentinels which officers are permitted to do.” He also directed:

Honorary badges of distinction are to be conferred on the veteran non-commissioned officers and soldiers of the army who have served more than three years with bravery, fidelity and good conduct; ....; *should any who are not entitled to the honors, have the insolence to assume the badges of them, they shall be severely punished. On the other hand, it is expected these gallant men who are thus distinguished will, on all occasions, be treated with particular confidence and consideration.*<sup>13</sup>

And in 1787, Colonel David Humphreys, secretary to General Washington, praised the value of medals to “awaken a noble spirit of emulation”:

In our free republics certainly nothing should be suppressed that can tend to awaken a noble spirit of emulation, to cherish the fine feelings of patriotism, to exhibit alluring examples for

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<sup>13</sup> *General Orders of George Washington Issued at Newburgh on the Hudson, 1782-1783*, at 34-35 (Edward C. Boynton ed., 1883; reprint 1909) (Order dated August 7, 1782) (emphasis added).

imitation, or to extend and perpetuate the remembrance of those heroic achievements which have ennobled the era of the American Revolution. Few inventions could be more happily calculated to diffuse the knowledge and preserve the memory of illustrious characters and splendid events than medals ....<sup>14</sup>

This recognition, at our Nation's birth, of the inspirational value of military decorations highlights the need to preserve and protect our system of medals.

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<sup>14</sup> Loubat, *supra*, XXXIV-XXXV) (letter from Colonel David Humphreys to "The Printer of the American Museum (Mr. Carey), dated Mount Vernon, November 1787").

**C. The Medal of Honor Is the Highest Award for Valor and, Accordingly, Has Great Value to Our Nation**

Among our Nation's medals, the Medal of Honor is distinguished as holding unsurpassable value. It is the highest award for valor in action against an enemy force that can be bestowed upon an individual serving in the armed forces. The present hierarchy of medals for valor, termed the "Pyramid of Honor", began 150 years ago, on December 21, 1861, during the presidency of Abraham Lincoln, upon enactment of the first statute authorizing a Medal of Honor.<sup>15</sup>

The Medal of Honor may be awarded only to a person who

distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty

(1) while engaged in an action against an enemy of the United States;

(2) while engaged in military operations involving conflict with an opposing foreign force; or

(3) while serving with friendly foreign forces engaged in an armed conflict

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<sup>15</sup> Act of Dec. 21, 1861, 12 Stat. 329-330.

against an opposing armed force in which the United States is not a belligerent party.<sup>16</sup>

The Medal is presented ceremoniously by the President of the United States in the name of Congress. Since its origin 150 years ago, the Medal of Honor has been awarded only 3475 times. Nearly half of those Medals resulted from actions in the Civil War. There are currently only 85 living Medal of Honor recipients: 14 from World War II; 13 from the Korean War; 55 from the Vietnam War; and 3 from the War in Afghanistan.<sup>17</sup> The rarity of the Medal reflects the character of its recipients and enhances its precious value: “How numerous would have been our medals if Congress had not been imbued with the conviction that only the very highest achievements are entitled to such a distinction, and that the value of a reward is enhanced by its rarity!”<sup>18</sup>

Medal of Honor recipients enjoy a humble yet prominent stature in their communities and ultimate recognition as heroes. The Medal commands such instant recognition, respect, and admiration, and therefore holds such inherent value,

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<sup>16</sup> 10 U.S.C. §§3741 (Army), 6241 (Navy and Marine Corps), 8741 (Air Force).

<sup>17</sup> Only three years ago there were 115 living Medal of Honor recipients. The current average age of a living recipient is 73.

<sup>18</sup> Loubat, *supra*, at viii (1878).

that the Medal of Honor Society has been charged, by statute, to “protect, uphold and preserve the dignity and honor” of the Medal.<sup>19</sup> The Foundation and the Society also share a common (and for the Society, statutory) purpose “to protect the name of the Medal ... from exploitation.”<sup>20</sup> The statutory use of the word “exploit” evidences clearly that there is something of value that can be misappropriated to the detriment of the Medal and its recipients—*i.e.*, the recognition, respect, admiration, and status that righteously accompany the Medal of Honor.

The significance of the recipients of the Medal of Honor is evidenced by the many statutes and regulations that address the Medal. Wide ranging in nature, those laws give privileged attention and exclusive status to Medal of Honor recipients. For example, the heirs of a recipient of the Medal of Honor may be appointed by the President of the United States for enrollment at the U.S. Military Academy,<sup>21</sup> U.S. Naval Academy,<sup>22</sup> or the U.S. Air Force Academy.<sup>23</sup> Medal of Honor recipients are entitled to be buried in Arlington National Cemetery.<sup>24</sup> And an act was passed to preserve the

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<sup>19</sup> See 36 U.S.C. §40502.

<sup>20</sup> See *id.*

<sup>21</sup> 10 U.S.C. §4342(c).

<sup>22</sup> 10 U.S.C. §6954(c).

<sup>23</sup> 10 U.S.C. §9342(c).

<sup>24</sup> 32 C.F.R. §553.15(d)(1) (2010).

Battle of New Market Heights because “14 black Union soldiers were awarded the Medal of Honor in recognition of their valor during the battle [there].”<sup>25</sup>

The prestigious status associated with the Medal of Honor, and its power to inspire emulation, is at its peak when our Nation is at war, such as now. Moreover, in our civilian population, the values that imbue the Medal of Honor have never been in higher demand or had such a pronounced need for preservation.

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<sup>25</sup> 16 U.S.C. 4231-2; *see also* 16 U.S.C. § 4231-5 (directing the establishment “of a monument or memorial suitable to honor the 14 Medal of Honor recipients from the United States Colored Troops who fought in the Battle of New Market Heights.”).

**D. Our Military Heroes Often Live and Toil Without Fame, Thus Providing Opportunities for Imposters to Assume the Status of a Hero and to Dilute the Precious Value of the Medals**

In 1945, Audie Murphy's face graced the cover of Life Magazine, and his homecoming was accompanied by much fanfare:

First Lieutenant Audie Murphy came home last month covered with ribbons. He fought through the campaigns of Africa, Sicily, Italy and France. He got the ... [Distinguished Service Cross] for capturing an entire German garrison and the Congressional Medal of Honor for stopping a German advance singlehanded .... Altogether he had 14 medals, which made him the most decorated combat infantryman in the Army. It also made him the greatest thing that ever happened to Farmersville, Texas, his home town. When he arrived all the stores closed for a local holiday and crowds stood in the 98° heat to cheer while he made a bashful speech.<sup>26</sup>

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<sup>26</sup> *Life Visits Audie Murphy*, Life, July 16, 1945, at 94 (with cover photo of Audie Murphy, captioned "Most Decorated Soldier"). Other World War II heroes were celebrities and feted with parades. For example, in 1943, Life Magazine reported the

But not all homecomings of military heroes were so widely publicized. And certainly, the heroes of the Vietnam War, USS Liberty (1967), USS Pueblo (1968), SS Mayaguez (1975), Grenada (1983), El Salvador (1987), Panama (1989), Desert Storm (1991), Somalia (1993), Kosovo (1999), and the Global War on Terrorism (2001 to present), have not, on the main, received such individual public acclaim.<sup>27</sup>

Within the last thirteen months, the Medal of Honor has been awarded to three living recipients for actions in Afghanistan: Staff Sgt. Salvatore A. Giunta, Staff Sgt. Leroy A. Petry, and Sgt. Dakota Meyer. They are recognizable heroes among members of our armed forces. Among our general public, however, they perhaps enjoy less fame.<sup>28</sup>

That our military heroes' names are not widely known enables imposters such as Respondent Alvarez to sustain a false image as one of those few,

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homecoming parade in honor of John Basilone. *Life Goes to a Hero's Homecoming*, *Life*, Oct. 11, 1943, at 126. A US Navy destroyer, the USS Basilone, later was commissioned and named in his honor.

<sup>27</sup> See, e.g., the names of Medal of Honor recipients identified in the Appendix. Appx. A-8 to A-10.

<sup>28</sup> Recipients of other medals for heroism—e.g., the Navy Cross, Distinguished Flying Cross, and the Silver Star—are even less likely to be widely recognized among the general population. The value of those medals, too, are protected by the Stolen Valor Act.

and to enjoy the status and respect reserved for our true military heroes. This is true despite the proliferation of websites that try to name recipients of medals.

**E. The Stolen Valor Act Provides Needed Deterrence to False Representations Like Alvarez's**

Since the attacks of September 11, 2001, our society has placed a renewed heightened value on the status of being a veteran. Among all of the honors and decorations associated with military service the greatest value is placed on the status of being a recipient of the Medal of Honor.

Cognizant of that value, Xavier Alvarez crudely and fraudulently boasted to his elected peers and other community leaders of his conquests as, among other things, a retired United States Marine, wounded veteran, and Medal of Honor recipient, all of which were false.<sup>29</sup> Alvarez addressed the Three Valleys Water Board in Claremont, California, and as a newly elected member of the Board, intentionally made false statements about his “conspicuous gallantry.”

Before his election to the water district board, but apparently during the campaign for election, Alvarez also “told ... [a woman] that he won the Medal of Honor for rescuing the American Ambassador during

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<sup>29</sup> Pet. App. 4a.

the Iranian hostage crisis.”<sup>30</sup> He claimed that “he had been shot in the back as he returned to the embassy to save the American flag.” He also claimed to be “a Vietnam veteran helicopter pilot who had been shot down but then, with the help of his buddies, was able to get the chopper back into the sky.”<sup>31</sup> They were all lies.

His motive was clear: to appropriate to himself the status and prestige of the Medal.<sup>32</sup>

To Alvarez (and many others like him<sup>33</sup>), the perceived benefits of making such false claims outweighed the perceived risk and consequences of

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<sup>30</sup> Pet. App. 4a.

<sup>31</sup> *Id.* at 4a-5a. Respondent apparently lied about other aspects of his life, claiming that he played for the Detroit Red Wings, worked as a police officer, and was secretly married to a Mexican starlet.

<sup>32</sup> Pet. App. 23a (stating, “the most obvious reason people lie about receiving military honors is because they believe that their being perceived as recipients of such honors brings them acclaim ....”).

<sup>33</sup> For example, one veteran falsely convinced a U.S. Congressman in 2000 that he had received the Distinguished Service Cross (our Nation’s second-highest military award) for his actions in Vietnam. His story prompted the Congressman to hold a public award ceremony and to sponsor legislation naming a post-office after the imposter. His fraud persisted for a number of years thereafter. See Jim Tice, *Veteran’s Medal Claim Exposed as a Scam*, Army Times, Sept. 1, 2003 ([http://www.armytimes.com/legacy/new/0-ARMY\\_PAPER-2109473.php](http://www.armytimes.com/legacy/new/0-ARMY_PAPER-2109473.php)).

getting caught. He was not deterred by the possibility that his lie might be exposed. He was not deterred by the potential for public humiliation. (Indeed, there is no indication in the record that he felt humiliated after his lies were exposed). Thus, it is no surprise that the remedy of “more speech” to bring about public humiliation (as suggested by the court of appeals) has been insufficient to deter a large number of false claims like Alvarez’s.

Congress, upon finding that “[l]egislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals,” passed the Stolen Valor Act.<sup>34</sup> Legislative action was needed because false claims dilute the meaning of, and instantaneous respect and admiration commanded by, the Medal of Honor. The Act changes the risk-reward balance to deter false claims without impinging on the freedom to express speech having value under the First Amendment.

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<sup>34</sup> 120 Stat. 3266 (2006).

## ARGUMENT

### I. THE STOLEN VALOR ACT IS NARROWLY TAILORED TO ACHIEVE A COMPELLING GOVERNMENT INTEREST

#### A. *The Integrity of the System of Medals and Decorations Is a Compelling Government Interest, Which the Court of Appeals Did Not Fully Comprehend*

The court of appeals properly found that the government has a compelling interest in protecting the integrity of the military honors system.<sup>35</sup> But the court misapprehended the nature and extent of that governmental interest, thus causing the court to doubt the efficacy of the Stolen Valor Act and to reject Congress's findings regarding the need for the Act.

While accurately describing the government's interest as "noble," the court apparently believed the interest was limited to "honoring military men and women for their service and, at times, their sacrifice." This was too narrow a view, which the court used to rationalize its improper rejection of Congress's findings concerning the conspicuous harm caused by false claims to the status and value associated with the Medal of Honor.

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<sup>35</sup> Pet. App. 37a.

## **1. The Value of the Medals System Is Far More Complex than the Court of Appeals Appreciated**

The court of appeals did not appreciate the value of medals to “inspire emulation.” As noted above (pp. 9-12), the government’s interest in protecting the awards system is strongest in the context of inspiring emulation—inspiring volunteerism, faithful service, and diligent pursuit of military training, discipline, and studies, so that each member of our armed forces may be mentally and physically ready for whatever challenges might come. The Medal of Honor, poised at the crown of the medals system, has the greatest ability to foster military discipline, morale and esprit de corps in the armed forces, and to inspire emulation.

The court of appeals, however, discounted the value of the medals system, based on the court’s skepticism that the “riskiest missions” are performed in hopes of receiving a medal.<sup>36</sup> The court also

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<sup>36</sup> The court of appeals’ lack of appreciation for the full value of the Medal to inspire emulation is evidenced by this statement in its opinion, which focuses solely on acts of heroism and “riskiest missions”:

Further, we agree ... that suggesting “that the battlefield heroism of our servicemen and women is motivated in any way ... by considerations of whether a medal may be awarded simply defies ... comprehension” and is “unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor

expressed doubt that “people’s false claims to have received the medal has [sic] a *demotivating* impact on our men and women in uniform.”<sup>37</sup> That superficial analysis failed to appreciate everything that the Medal *inspires*. It also was an implicit and improper rejection of Congress’s express findings.

## **2. The Court of Appeals Improperly Rejected Congress’s Findings**

The court of appeals improperly rejected Congress’s findings that the Stolen Valor Act was necessary to protect the government’s interest at stake. False claims to the Medal and other awards make them appear less rare and less meritorious. The cumulative effect of those claims dilutes the inspirational value of the Medal and other decorations, and undermines the purposes and benefits of the military awards system. Thus, Congress made specific a finding that “[f]raudulent claims surrounding the receipt of the Medal of Honor, ... and other decorations and medals

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Act purports to honor.” ... Even if we were to make the unfounded assumption that our troops perform their riskiest missions in the hope of receiving the Medal of Honor, there is no evidence—nor any reasonable basis for assuming—that some people’s false claims to have received the medal has a demotivating impact on our men and women in uniform.

Pet. App. 39a.

<sup>37</sup> *Id.* (emphasis added).

awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.”<sup>38</sup>

The court of appeals nevertheless suggested imposing a burden on the government to “prove that the defendant’s speech or writing proximately caused damage to the reputation and meaning of military decorations and medals....”<sup>39</sup> The court also stated that “there is no readily apparent reason for assuming, without specific proof, that the reputation and meaning of military decorations is harmed every time someone lies about having received one.”<sup>40</sup> And having only a superficial understanding of the purposes of awarding medals, the court of appeals concluded that it “seems just as likely that the reputation and meaning of such medals is wholly unaffected by those who lie about having received them.”<sup>41</sup> Each of those statements by the court of appeals was an improper rejection of Congress’s findings.

This Court has held, in the First Amendment context, that “when we face a complex problem with many hard questions and few easy answers, we do well to pay careful attention to how the other branches of Government have addressed the same

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<sup>38</sup> 120 Stat. 3266.

<sup>39</sup> Pet. App. 23a.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* 38a.

problem.”<sup>42</sup> Given Congress’s role in regulating the military—our Constitution confers upon Congress the powers “[t]o make Rules for the Government and Regulation of the land and naval Forces”; “[t]o provide for organizing, arming, and disciplining, the Militia”; and “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”<sup>43</sup>—Congress’s findings should have been afforded some degree of deference.

With minimal deference to the Congressional findings, and an appreciation of the value of our Nation’s system of military awards, this Court should have no difficulty holding that the Stolen Valor Act protects a compelling government interest.

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<sup>42</sup> *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94, 103 (1973).

<sup>43</sup> U.S. Const. art. I, § 8; *see also Houston v. Moore*, 18 U.S. 1, 12-13 (1820). The “Militia”, to which the Constitution referred, “comprised all males physically capable of acting in concert for the common defense.” *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (quoting *United States v. Miller*, 307 U. S. 174, 179 (1939)).

## **B. The Stolen Valor Act Is Narrowly Tailored to Protect this Compelling Interest**

The Stolen Valor Act unquestionably will deter false claims to have military medals and decorations, and it is narrowly tailored to achieve that goal. The Act prohibits only knowing lies to have been awarded certain, well-defined decorations and medals of the armed forces. Since it reaches no further than necessary, there is little, if any risk, that it will deter protected speech.

All are in agreement that Alvarez knowingly lied when he claimed that our President had bestowed on him the Medal of Honor. The speech for which he was prosecuted was a deliberate deception to adopt the status and associated discernable value rightfully held by a Medal of Honor recipient. Respondent was crudely exploiting the Medal, and thereby shamefully adopting for his aggrandizement everything that the Medal of Honor represents. This was not speech for the purposes of political discourse. This was not a white lie, hyperbole, an exaggeration, or an inability to tell total truths. It was misappropriation of a status and is unworthy of protection under the guise of free speech.

## 1. Alvarez’s “Speech” and Similar False Claims Are Unprotected Speech

Of course, “the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>44</sup> And there is no disagreement that “[d]ebate on public issues should be uninhibited, robust, and wide-open,”<sup>45</sup> with speech on issues of public concern and political speech occupying the “highest rung of the hierarchy of First Amendment values.”<sup>46</sup> But not all speech is of equal First Amendment importance.<sup>47</sup>

There are a wide range of regulations that curb speech, such as libel, defamation, fighting words, obscenity and fraud, without offending the Constitution.<sup>48</sup> This Court has repeatedly recognized that false factual statements “are not protected by

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<sup>44</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976).

<sup>45</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>46</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

<sup>47</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985).

<sup>48</sup> See App. Br. 20-28.

the First Amendment in the same manner as truthful statements.”<sup>49</sup>

Alvarez’s objectively and knowingly false claims do not occupy any rung of Constitutional protection. His speech was not an expression of his views, a criticism of government, or other political speech. It was a harmful and knowing lie.

Nothing in the Act prohibits, or would suppress, speech concerning the worth or merits of military medals, discipline, training, or values. The Act is viewpoint neutral. It targets only a knowing, verifiable falsehood of a specific fact about the speaker and his or her interaction with the armed forces. In every instance where the Act applies, the speaker’s lie would be an objective fact that would be known to the speaker. The Constitution has never valued such speech.

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<sup>49</sup> *Brown v. Hartlage*, 456 U.S. 45, 60, 61 (1982) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

## 2. The Act Creates Little, if any, Risk of Causing Self-Censorship of Protected Speech

The Court, in *New York Times v. Sullivan*, recognized that false statements have no value under our Constitution, but the Court rejected absolute liability for false statements in the press because doing so might cause self-censorship of protected speech to avoid a risk of liability.<sup>50</sup> Out of concern for the potential that such risk might chill free speech, the Court required a showing of actual malice before liability for defamation would arise.

The Stolen Valor Act creates no such risk of self-censorship of protected speech. This is unlike the situation involving a story in the press. An individual speaking about his or her own personal military service knows the truth. The speaker knows whether he or she truly received a medal. And the facts are objectively verifiable. There is little, if any, risk that a person would censor his or her protected, truthful speech to avoid liability.

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<sup>50</sup> *New York Times Co.*, 376 U.S. at 279-80.

## CONCLUSION

Valor begets valor. Rewarding acts of heroism unites great generations with future generations, and inspires our future heroes. Our military system of decorations, including and most notably the Medal of Honor, exists fundamentally to inspire emulation—to inspire future great Americans to serve with pride, patriotism, and distinction. The Stolen Valor Act seeks to protect the value of those decorations simply by curtailing harmful, knowing lies.

The sacrifices of the Medal of Honor recipients, and of all of those for whom the Medal is worn, have safeguarded our individual freedoms under the Constitution, including the right to Free Speech. While the Congressional Medal of Honor Foundation abhors speech such as the desecration of the American flag and a protest at a funeral of a soldier, sailor, airman, or marine who has made the ultimate sacrifice for his or her country, the Foundation respects that the First Amendment protects such speech. However, it is unfathomable that our living heroes' uncommon valor, and the courage of every fallen hero, would shield from prosecution, under the guise of Free Speech, those who fraudulently appropriate for themselves the honors and approbation earned by the sacrifices of others. For that, our true military heroes—living and deceased—did not pledge their lives, their fortunes, or their sacred honor.

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

Respectfully submitted.

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## APPENDIX

### MEDAL OF HONOR CITATION

#### **BARFOOT, VAN T.**

*Rank and organization:* Second Lieutenant, U.S. Army, 157th Infantry, 45th Infantry Division. *Place and date:* Near Carano, Italy, 23 May 1944. *Entered service at:* Carthage, Miss. *Birth:* Edinburg, Miss. *G.O. No.:* 79, 4 October 1944. *Citation:* For conspicuous gallantry and intrepidity at the risk of life above and beyond the call of duty on 23 May 1944, near Carano, Italy. With his platoon heavily engaged during an assault against forces well entrenched on commanding ground, 2d Lt. Barfoot (then Tech. Sgt.) moved off alone upon the enemy left flank. He crawled to the proximity of 1 machinegun nest and made a direct hit on it with a hand grenade, killing 2 and wounding 3 Germans. He continued along the German defense line to another machinegun emplacement, and with his tommygun killed 2 and captured 3 soldiers. Members of another enemy machinegun crew then abandoned their position and gave themselves up to Sgt. Barfoot. Leaving the prisoners for his support squad to pick up, he proceeded to mop up positions in the immediate area, capturing more prisoners and bringing his total count to 17. Later that day, after he had reorganized his men and consolidated the newly captured ground, the enemy launched a fierce armored counterattack directly at his platoon positions. Securing a bazooka, Sgt. Barfoot took up an exposed position directly in front of 3 advancing Mark VI tanks. From a distance of 75 yards his first shot destroyed the track of the leading tank,

effectively disabling it, while the other 2 changed direction toward the flank. As the crew of the disabled tank dismounted, Sgt. Barfoot killed 3 of them with his tommygun. He continued onward into enemy terrain and destroyed a recently abandoned German fieldpiece with a demolition charge placed in the breach. While returning to his platoon position, Sgt. Barfoot, though greatly fatigued by his Herculean efforts, assisted 2 of his seriously wounded men 1,700 yards to a position of safety. Sgt. Barfoot's extraordinary heroism, demonstration of magnificent valor, and aggressive determination in the face of pointblank fire are a perpetual inspiration to his fellow soldiers.

#### **MEDAL OF HONOR CITATION**

##### **BARNUM, HARVEY C., JR.**

*Rank and organization:* Captain (then Lt.), U.S. Marine Corps, Company H, 2d Battalion, 9th Marines, 3d Marine Division (Rein). *Place and date:* Ky Phu in Quang Tin Province, Republic of Vietnam, 18 December 1965. *Entered service at:* Cheshire, Conn. *Born:* 21 July 1940, Cheshire, Conn. *Citation:* For conspicuous gallantry and intrepidity at the risk of his life above and beyond the call of duty. When the company was suddenly pinned down by a hail of extremely accurate enemy fire and was quickly separated from the remainder of the battalion by over 500 meters of open and fire-swept ground, and casualties mounted rapidly. Lt. Barnum quickly made a hazardous reconnaissance of the area, seeking targets for his artillery. Finding the rifle company commander mortally wounded and the radio operator killed, he, with complete disregard for

his safety, gave aid to the dying commander, then removed the radio from the dead operator and strapped it to himself. He immediately assumed command of the rifle company, and moving at once into the midst of the heavy fire, rallying and giving encouragement to all units, reorganized them to replace the loss of key personnel and led their attack on enemy positions from which deadly fire continued to come. His sound and swift decisions and his obvious calm served to stabilize the badly decimated units and his gallant example as he stood exposed repeatedly to point out targets served as an inspiration to all. Provided with 2 armed helicopters, he moved fearlessly through enemy fire to control the air attack against the firmly entrenched enemy while skillfully directing 1 platoon in a successful counterattack on the key enemy positions. Having thus cleared a small area, he requested and directed the landing of 2 transport helicopters for the evacuation of the dead and wounded. He then assisted in the mopping up and final seizure of the battalion's objective. His gallant initiative and heroic conduct reflected great credit upon himself and were in keeping with the highest traditions of the Marine Corps and the U.S. Naval Service.

#### **MEDAL OF HONOR CITATION**

##### **GIUNTA, SALVATORE**

*Rank and organization:* Specialist, U.S. Army, Company B, 2d Battalion (Airborne), 503d Infantry Regiment. *Place and date:* Korengal Valley, Afghanistan, 25 October 2007. *Entered service at:* Cedar Rapids, Iowa. *Birth:* Clinton, Iowa, 21 January 1985. *Citation:* Specialist Salvatore A.

Giunta distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty in action with an armed enemy in the Korengal Valley, Afghanistan, on October 25, 2007. While conducting a patrol as team leader with Company B, 2d Battalion (Airborne), 503d Infantry Regiment, Specialist Giunta and his team were navigating through harsh terrain when they were ambushed by a well-armed and well-coordinated insurgent force. While under heavy enemy fire, Specialist Giunta immediately sprinted towards cover and engaged the enemy. Seeing that his squad leader had fallen and believing that he had been injured, Specialist Giunta exposed himself to withering enemy fire and raced towards his squad leader, helped him to cover, and administered medical aid. While administering first aid, enemy fire struck Specialist Giunta's body armor and his secondary weapon. Without regard to the ongoing fire, Specialist Giunta engaged the enemy before prepping and throwing grenades, using the explosions for cover in order to conceal his position. Attempting to reach additional wounded fellow soldiers who were separated from the squad, Specialist Giunta and his team encountered a barrage of enemy fire that forced them to the ground. The team continued forward and upon reaching the wounded soldiers, Specialist Giunta realized that another soldier was still separated from the element. Specialist Giunta then advanced forward on his own initiative. As he crested the top of a hill, he observed two insurgents carrying away an American soldier. He immediately engaged the enemy, killing one and wounding the other. Upon

reaching the wounded soldier, he began to provide medical aid, as his squad caught up and provided security. Specialist Giunta's unwavering courage, selflessness, and decisive leadership while under extreme enemy fire were integral to his platoon's ability to defeat an enemy ambush and recover a fellow American soldier from the enemy. Specialist Salvatore A. Giunta's extraordinary heroism and selflessness above and beyond the call of duty are in keeping with the highest traditions of military service and reflect great credit upon himself, Company B, 2d Battalion (Airborne), 503d Infantry Regiment, and the United States Army.

#### **MEDAL OF HONOR CITATION**

##### **NORRIS, THOMAS R.**

*Rank and organization:* Lieutenant, U.S. Navy, SEAL Advisor, Strategic Technical Directorate Assistance Team, Headquarters, U.S. Military Assistance Command. *Place and date:* Quang Tri Province, Republic of Vietnam, 10 to 13 April 1972. *Entered service at:* Silver Spring, Md. *Born:* 14 January 1944, Jacksonville, Fla. *Citation:* Lt. Norris completed an unprecedented ground rescue of 2 downed pilots deep within heavily controlled enemy territory in Quang Tri Province. Lt. Norris, on the night of 10 April, led a 5-man patrol through 2,000 meters of heavily controlled enemy territory, located 1 of the downed pilots at daybreak, and returned to the Forward Operating Base (FOB). On 11 April, after a devastating mortar and rocket attack on the small FOB, Lt. Norris led a 3-man team on 2 unsuccessful rescue attempts for the second pilot. On the afternoon of the 12th, a forward

air controller located the pilot and notified Lt. Norris. Dressed in fishermen disguises and using a sampan, Lt. Norris and 1 Vietnamese traveled throughout that night and found the injured pilot at dawn. Covering the pilot with bamboo and vegetation, they began the return journey, successfully evading a North Vietnamese patrol. Approaching the FOB, they came under heavy machine-gun fire. Lt. Norris called in an air strike which provided suppression fire and a smokescreen, allowing the rescue party to reach the FOB. By his outstanding display of decisive leadership, undaunted courage, and selfless dedication in the face of extreme danger, Lt. Norris enhanced the finest traditions of the U.S. Naval Service.

#### **MEDAL OF HONOR CITATION**

##### **THORSNESS, LEO K.**

*Rank and organization:* Lieutenant Colonel (then Maj.), U.S. Air Force, 357th Tactical Fighter Squadron. *Place and date:* Over North Vietnam, 19 April 1967. *Entered service at:* Walnut Grove, Minn. *Born:* 14 February 1932, Walnut Grove, Minn. *Citation:* For conspicuous gallantry and intrepidity in action at the risk of his life above and beyond the call of duty. As pilot of an F-105 aircraft, Lt. Col. Thorsness was on a surface-to-air missile suppression mission over North Vietnam. Lt. Col. Thorsness and his wingman attacked and silenced a surface-to-air missile site with air-to-ground missiles, and then destroyed a second surface-to-air missile site with bombs. In the attack on the second missile site, Lt. Col. Thorsness' wingman was shot down by intensive anti-aircraft fire, and the 2 crewmembers abandoned

their aircraft. Lt. Col. Thorsness circled the descending parachutes to keep the crewmembers in sight and relay their position to the Search and Rescue Center. During this maneuver, a MIG-17 was sighted in the area. Lt. Col. Thorsness immediately initiated an attack and destroyed the MIG. Because his aircraft was low on fuel, he was forced to depart the area in search of a tanker. Upon being advised that 2 helicopters were orbiting over the downed crew's position and that there were hostile MIGs in the area posing a serious threat to the helicopters, Lt. Col. Thorsness, despite his low fuel condition, decided to return alone through a hostile environment of surface-to-air missile and anti-aircraft defenses to the downed crew's position. As he approached the area, he spotted 4 MIG-17 aircraft and immediately initiated an attack on the MIGs, damaging 1 and driving the others away from the rescue scene. When it became apparent that an aircraft in the area was critically low on fuel and the crew would have to abandon the aircraft unless they could reach a tanker, Lt. Col. Thorsness, although critically short on fuel himself, helped avert further possible loss of life and a friendly aircraft by recovering at a forward operating base, thus allowing the aircraft in emergency fuel condition to refuel safely. Lt. Col. Thorsness' extraordinary heroism, self-sacrifice, and personal bravery involving conspicuous risk of life were in the highest traditions of the military service, and have reflected great credit upon himself and the U.S. Air Force.

**MEDAL OF HONOR RECIPIENTS  
IN DIRECT SUPPORT OF *AMICUS CURIAE***

The following Medal of Honor Recipients have expressed a desire to be named in support of the *amicus curiae* brief of the Congressional Medal of Honor Foundation:

John F. Baker, Jr.;

Donald Ballard;

Colonel Van T. Barfoot, USA (Ret.);

Colonel Harvey C. Barnum Jr. USMC (Ret.);

SGT Gary B. Beikirch, CMH, 5th Special Forces,  
Vietnam;

Maj. Gen. Patrick H. Brady, USA (Ret.);

Paul W. Bucha;

Sergeant Major Jon R. Cavaiani, USA (Ret.);

Colonel Bruce P. Crandall, USA (Ret.);

SFC Sammy L. Davis;

Duane E. Dewey;

Drew Dix, USA;

Colonel Roger H.C. Donlon, USA (Ret.);

Walter D. Ehlers, USA;

Major Frederick E. Ferguson U.S.A.R. (Ret.);

Michael J. Fitzmaurice, USA;

Colonel James P. Fleming USAF (Ret.);

Wesley L. Fox, Colonel, USMC (Ret.);

Lieutenant Colonel Harold A. Fritz USA (Ret.);

Salvatore Giunta;  
Einar H. Ingman, United States Army;  
Robert R. Ingram HM-3, USN;  
Captain Arthur J. Jackson, USAR (Ret.);  
Joe M. Jackson, COL, USAF (Ret.);  
Joseph R. Kerrey;  
Lt. Colonel Howard V. Lee, USMC (Ret.);  
Peter C. Lemon;  
Major General James E. Livingston, USMC (Ret.);  
1 SG Allen James Lynch, Army (Ret.);  
Colonel Walter J. Marm, USA (Ret.);  
Robert D. Maxwell;  
Colonel Ola L. Mize, USA (Ret.);  
Colonel Robert J. Modrzejewski, USMC (Ret.);  
Thomas Norris;  
Corporal Robert E. O'Malley, USMC;  
Leroy A. Petry;  
MSgt. Richard A. Pittman, USMC (Ret.);  
Tibor Rubin;  
Robert E. Simanek, United States Marine Corps,  
(Ret.);  
Kenneth E. Stumpf;  
James A. Taylor, Major, USA (Ret.);  
Brian Thacker;

Michael E. Thornton;  
Leo Thorsness;  
Colonel Jay R. Vargas, USMC (Ret.);  
Gary G. Wetzel;  
Hershel W. Williams, USMC.

**MEMBERS OF THE CONGRESSIONAL  
MEDAL OF HONOR FOUNDATION IN DIRECT  
SUPPORT OF *AMICUS CURIAE***

The following Members of the Congressional Medal of Honor Foundation (but who have not received the Medal of Honor), have expressed a desire to be named in support of the *amicus curiae* brief of the Congressional Medal of Honor Foundation:

Tom Matthews, Board Co-Chairman, Congressional Medal of Honor Foundation;

Bruce Whitman, Board Co-Chairman, Congressional Medal of Honor Foundation;

Nick Kehoe, President, Congressional Medal of Honor Foundation; and

Jay E. Town, Executive Council Chairman, Congressional Medal of Honor Foundation.