No. 11-210

In the Supreme Court of the United States

UNITED STATES OF AMERICA, Petitioner,
—v.—
XAVIER ALVAREZ, Respondent..

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, ASSOCIATION OF AMERICAN PUBLISHERS, INC., COMIC BOOK LEGAL DEFENSE FUND, ENTERTAINMENT MERCHANTS ASSOCIATION, FREEDOM TO READ FOUNDATION, PEN AMERICAN CENTER, VILLAGE VOICE MEDIA HOLDINGS, LLC, AND WRITERS GUILD OF AMERICA, WEST, INC. AS *AMICI CURIÆ* IN SUPPORT OF RESPONDENT

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American Booksellers Foundation For Free Expression, American Federation of Television and Radio Artists, Association Of American Publishers, Inc., Comic Book Legal Defense Fund, Entertainment Merchants Association, Freedom to Read Foundation, PEN American Center, Village Voice Media Holdings, LLC, and Writers Guild of America, West, Inc., respectfully submit this brief as *amici curiæ* in support of Respondent.[1]

INTEREST OF *AMICI*

Amici's members (also referred to herein as "*Amici*") write, create, publish, produce, distribute, sell, advertise in, and manufacture books, magazines, videos, sound recordings, motion pictures, interactive games, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining.[2] Libraries and librarians whose interests are represented by *Amicus* Freedom to Read Foundation (FTRF) provide such materials to readers and viewers, whose First Amendment rights FTRF also

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiæ*, their members, their counsel, or Media Coalition Inc. (a 38-year old trade association of which some of the *amici* are members) made a monetary contribution to its preparation or submission.

The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

[2] A description of each of *Amici* is attached as Appendix A.

defends.

Amici have a significant interest in preventing the imposition of unconstitutional governmental limitations on the content of their First Amendment-protected communicative materials, whether textual or visual. *Amici* are particularly concerned with the chilling effect of any test that reverses the presumption of First Amendment protection for factually false speech other than fraud, defamation, perjury, and other limited, recognized exceptions to the First Amendment.

Many of the *Amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws that infringe First Amendment rights. *See, e.g., United States v. American Library Ass'n*, 539 U.S. 194 (2003); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Powell's Books v. Kroger*, 622 F.3d 1202 (9th Cir. 2010); *American Booksellers Found. v. Strickland* 601 F.3d 622 (6th Cir. 2010); *PSInet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001), *aff'd,* 362 F.3d 227 (4th Cir. 2004); *American Booksellers Found. v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002), *aff'd,* 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D. N.M. 1998), *aff'd,* 194 F.3d 1149 (10th Cir. 1999); *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008); *American Library Ass'n v. Pataki,* 969 F. Supp. 160 (S.D.N.Y. 1997); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

Amici also have filed a number of *amicus* briefs in this Court addressing First Amendment issues,

including the impact of speech regulations on mainstream creators, producers, distributors, retailers, and consumers. *See, e.g.*, *Brown v. Entertainment Software Ass'n,* 131 S. Ct. 2729 (2011); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *United States v. Stevens*, 130 S. Ct. 1577 (2010); *Beard v. Banks*, 542 U.S. 406 (2004); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 536 U.S. 921 (2002); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *Denver Area Educ. Telecomms. Consortium v. F.C.C.*, 518 U.S. 727 (1996); *United States v. X-Citement Video*, Inc., 513 U.S. 64 (1994).

SUMMARY OF ARGUMENT

All speech is presumptively protected by the First Amendment against content-based regulation, subject only to a limited number of traditional exceptions. *R.A.V. v. St. Paul,* 505 U.S. 377, 382 (1992). The Court has recognized exceptions to First Amendment protection for defamation, fraud, and a few other specific categories of speech, but not for non-defamatory and non-fraudulent false speech. To the contrary, this Court's "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth." *New York Times Co. v. Sullivan,* 376 U.S. 254, 271 (1964).

The "breathing room" test the Government derives through a distorted reading of *Sullivan* and other cases is disturbingly vague and sweeping in the authority it would accord Congress, state legislatures, and municipalities to regulate false

factual statements based on an asserted strong government interest.

The Government's defense of the Stolen Valor Act would, if accepted, open the door to government enforcement of the "truth," a concept smacking of authoritarianism that is antithetical to the core First Amendment principle that, as a general matter, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Fear of public exposure, rather than fear of criminal sanction, is the inducement to truth on which the Constitution requires us to rely outside of the traditional First Amendment exceptions.

On a practical level for the publisher *Amici*, if the Government's relaxed standard for restricting false factual statements were to take root, it could well make the fact-checking process excessively burdensome and fraught with risk by expanding the range of statements that would be subject to criminal sanction.

Even with respect to the Stolen Valor Act itself, the Government's rationale does not withstand scrutiny. The Government's assertion that the Act prohibits "a narrow category of known, objectively verifiable false representations about which a person is unlikely to be mistaken" is wrong as a matter of law and without basis in fact. The Act actually covers not only valor awards but also "any decoration or medal authorized by Congress for the Armed Forces of the United States" and "any of the service medals or badges awarded to the members of such forces." There are over 200 such medals and decorations and tens of millions of recipients.

Veterans are hardly immune from the human tendency—whether knowingly or not—to exaggerate one's accomplishments from earlier in life. This Court should not sustain Alvarez's conviction unless it also would be prepared to sustain the conviction of a veteran who falsely told a grandchild of having won the Navy Expert Rifleman Medal with a motive no more malicious than to interest the child in riflery. The First Amendment allows no such government intrusion on everyday discourse.

ARGUMENT

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THE STOLEN VALOR ACT VIOLATES THE FIRST AMENDMENT

I. All Speech Is Presumptively Protected Against Content-Based Regulation, Subject Only to "Historic and Traditional" Exceptions.

All speech is presumptively protected by the First Amendment against content-based regulation, subject only to specific historic exceptions. *R.A.V.,* 505 U.S. at 382; *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991). As the Court recently explained:

> From 1791 to the present, . . . [the First Amendment has] "permitted restrictions upon the content of speech in a few limited areas." [These] "historic and traditional categories long familiar to the bar[ ]"[ ] includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct . . .

United States v. Stevens, 130 S. Ct. 1577, 1584

(2010) (citations omitted). *See also R.A.V.*, 505 U.S. at 382-83.

Neither as written, nor as construed by the Government, does the Stolen Valor Act fit within any of the traditionally recognized and specifically enumerated categories of unprotected speech.

Although the Court has designated fraudulent speech as categorically unprotected, not every false statement is fraudulent. Fraud requires intent to deceive and to induce another to act on the false statement to his or her detriment. *Black's Law Dictionary* 731 (9th ed. 2009). By its terms, the Act imposes strict liability, requiring neither intent to deceive nor intent to induce another to act. The Congressional finding that "[f]raudulent claims surrounding the receipt" of military medals threatened their reputation, Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. 3266, uses "fraud" in a colloquial, rather than legal, sense. Xavier Alvarez was not accused of defrauding anyone. Nor does the Government contend that the Act should be construed as limited to cases of fraud.

In three recent First Amendment cases, the Court has made clear that it is reluctant, if not unwilling, to expand the categories of unprotected speech beyond the historic exceptions. In *Brown v. Entertainment Software Ass'n,* 131 S. Ct. 2729 (2011), the Court was urged to craft an exception for the sale of violent video games to minors; the Court declined to do so. In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court was urged to craft an exception for outrageous and upsetting speech in the vicinity of a private, military funeral; the Court declined to do so. And in *Stevens*, the Court was

urged to craft a new First Amendment exception for depictions of animal cruelty; the Court declined to do so.

Notably, the Government here does not urge the Court to recognize lies about military honors as a limited, *sui generis* new category of unprotected speech; rather, it advances the much more sweeping —even "startling and dangerous,"[3]—proposition that false factual statements are presumptively unprotected and may be restricted based on a strong government interest so long as "adequate breathing space" is left for protected speech. Gov't Br. at 19-20. This radical understanding of the First Amendment raises the very troubling prospect of the government acting as a roving truth commission – a concept alien to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270.

The Government invites the Court to encourage Congress, state legislatures, and municipalities to restrict any false factual speech in which the government can plausibly claim a "strong interest." *Amici* urge the Court to decline this invitation.

The First Amendment does not, for example, allow the government to make Holocaust denial a crime, as it is in some European countries.[4] It also

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[3] *Stevens,* 130 S. Ct. at 1585.

[4] *See, e.g.,* Law No. 90-615 of July 13, 1990, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 14, 1990, p. 8333; Verfassungsgesetz vom 8. Mai 1945 über das Verbot der NSDAP [Verbotsgesetz] [Prohibition of the National *(cont'd)*

bars laws that exist or have been proposed in other countries against denying or affirming other historical events. For example, Nobel Prize winner Orhan Pamuk was charged in 2005 of violating Turkish law by stating that Turkey committed genocide against Armenians,[5] while France is now considering a law that would make denial of the Armenian genocide a crime.[6] If the French law were enacted, then anyone publishing on that subject would likely violate the law of either France or Turkey. Such regulation of public discourse is alien to our conception of free speech.

In *Brown*, the Court underscored its aversion to expanding the list of carve-outs from the First Amendment, holding that

> without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the "judgment [of] the American people," embodied in the First Amendment, "that the benefits of its restrictions on the Government outweigh the costs."

131 S. Ct. at 2734 (quoting *Stevens*, 130 S. Ct. at 1585). Consistent with that constitutionally-

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Socialist German Worker's Party (NSDAP)] Staatsgesetzblatt [StGBl] No. 13/1945, as amended by Bundes-Verfassungsgesetz (B-VG) BGB1 III No. 148/1992 (Austria).

[5] Sarah Rainsford, *Author's trial set to test Turkey*, BBC NEWS, Dec. 14, 2005, http://news.bbc.co.uk/2/hi/ europe/4527318.stm.

[6] *See* Sebem Arsu, *Turkey Lashes Out Over French Bill About Genocide*, N.Y. TIMES, Dec. 23, 2011, at A9.

enshrined judgment in favor of free speech, the Court has understood the First Amendment to "create[] an open marketplace where ideas . . . may compete without government interference." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008).

The functioning of this free-speech "marketplace," in all its sometimes messy glory, would be seriously impaired if government were free to act as a truth police in whatever context it deemed the exercise of such power to be beneficial. The less-than-rigid demarcation between fact and opinion on subjects from evolution to climate change to health care would bring the Government's proposed test into collision with the principle of unfettered discourse that not only defines our society but distinguishes it from virtually every other.[7]

Surely if the Court held such a circumscribed understanding of the First Amendment, it would have identified "false statements of fact" (or, perhaps, "knowingly false statements of fact"), rather than the more limited traditional categories of fraud and defamation, as unprotected. That the Court has never done so requires it to reject the Government's theory of this case and to adhere to

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[7] *See* Greg Marx, *What the Fact-Checkers Get Wrong*, COLUM. JOURNALISM REV., Jan. 5, 2012, at http://www.cjr.org/campaign_desk/what_the_fact-checkers_get_wro.php?page=all ("A project that involves patrolling public discourse . . . would inevitably involve judgments not only about truth, but about what attacks are fair, what arguments are reasonable, what language is appropriate.").

the presumption in favor of constitutional protection. As the Court has cautioned concerning the dangers inherent in speech restrictions:

> "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Speiser v. Randall,* 357 U.S. 513, 525 (1958). Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society.

United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 817 (2000).

II. The Government's Argument That False Speech Is Presumptively Unprotected Is a Radical Departure from the Court's Precedents.

The Government begins its analysis with the position that there is no presumption of First Amendment protection for false statements of fact—even if the speaker does not believe or know the statement to be false. The Government bases this contention on dicta and quotations cobbled together out of context to suggest that this Court had held that false speech is presumptively unprotected. *See* Gov't Br. at 13, 18, 20, 22, 26-27 and 35. Worse, in several places the Government alters the Court's language, for example by changing the Court's statement that "false statements may be unprotected for their own sake," *BE&K Construction Co. v. NLRB,* 536 U.S. 516, 531 (2002), to "*false statements*

[are] unprotected for their own sake." Gov't Br. at 35 (italics added and "[are]" inserted by Government). *See also* Gov't Br. at 13, 18, 20.

Most of these quotations and citations upon which the Government relies come from cases involving defamation, an historic First Amendment exception that does not extend to false speech that is not defamatory. Neither *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), nor *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), on which the Government relies, stands for the proposition that false speech in general is presumptively unprotected.

In *Sullivan,* the issue was whether a subset of defamatory speech—false statements about a public official, relating to his or her official conduct—is protected by the First Amendment. The Court held that it is protected:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. at 279-80. The Court held that although factual errors are "inevitable" in free debate, they "must be protected" if free speech is to have adequate "breathing space." *Id.* at 271.

In *Gertz,* the Court revisited the fault standard for defamatory falsehoods and held that

> so long as they do not impose liability without fault, the States may define for

> themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach . . . recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent."

418 U.S. at 347-48.

Neither *Sullivan* nor *Gertz* held or even suggested that the analysis of First Amendment protection for false speech commences with a presumption that false speech is *per se* unprotected. To the contrary, in *Sullivan,* the Court held:

> Authoritative interpretations of the First Amendment guarantees have consistently *refused to recognize an exception for any test of truth*—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.

376 U.S. at 271 (emphasis added). Nor does any other decision of this Court establish a "falsehood" exception to the First Amendment, notwithstanding the Court's observation in several cases that false statements of fact have no constitutional value.

In *Stevens,* the Court firmly rejected a similar effort to exclude assertedly valueless speech from First Amendment protection:

> As the Government correctly notes, this Court has often described historically unprotected categories of speech as being "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V., supra* at 383 (quoting *Chaplinsky* [*v. New Hampshire,* 315 U.S. 568, 572 (1942)]). In *New York v. Ferber,* 458 U.S. 747 (1982), we noted that within these categories of unprotected speech, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required," because the balance of competing interests is clearly struck," *id.,* at 763-764. The Government derives its proposed test from these descriptions in our precedents….
>
> But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.

130 S. Ct. at 1585-86.

The Government argues that the Court's recognition of various speech-related torts demonstrates that its "breathing room" theory is compatible with the First Amendment. *See* Gov't Br. at 24-26. But with respect to each of those torts, the Court imposed First Amendment-based limits on a long-established state-law cause of action in order to

resolve the conflict between the tort and the First Amendment. Here, there is no underlying tort. The "breathing room" rationale therefore cannot justify this new proposed incursion on the First Amendment any more than the exceptions clause in the statute at issue in *Stevens* could save the ban on depictions of animal cruelty. *See* 130 S. Ct. at 1590-91.

III. The Government's Proposed "Breathing Room" Test Fails Scrutiny

Because of the reprehensible nature of Alvarez's conduct, the temptation may be strong to fashion a narrow exception to the First Amendment that would allow the Court to sustain the Act, focusing on (a) false statements (b) by a person about him or herself (c) when there is a high degree of certainty that the person knew that the statement was false, and (d) there is a strong governmental interest in discouraging such statements. But it is a different matter to recognize historic exceptions to the First Amendment than it is to craft new ones. And the Government's proposed new rule — that false statements are presumed unprotected and are spared from restriction "only to the extent needed" to ensure that the restriction does "not chill truthful and other fully protected speech" (Gov't Br. at 13, 20) —fails First Amendment scrutiny.

A. The Proposed Test Is Vague and Threatening.

Using the criminal law to enforce truth-telling smacks of authoritarian societies, especially in relation to government policies or actions—matters in which the government's interest in the "truth," and thus its incentive to restrict speech, is at its

zenith. A government "truth commission" would seem to stand on its head the principle that the First Amendment "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *Stevens*, 130 S. Ct. at 1585.

The open-ended nature of the Government's theory is alarming. What discernible limits are there to "supported by a strong governmental interest"? Is there a strong government interest in developing this country's natural resources and in energy independence that would justify criminalizing false statements about whether or not particular methods of gas and oil exploration harm the environment?

Surely, the nation has a compelling interest in the legitimacy of its President. But should that interest support making it unlawful to "falsely represent" that the President was born outside of the United States?

Can a state assert a strong state interest in maintaining the integrity of its university system and criminalize a false statement—made for any reason—that the speaker was a graduate of the state university?[8] Should a state be able to criminalize such a statement if made by a person about someone else?

As our troops were being sent into Iraq in 2003, the Government surely had a strong governmental interest in maintaining military morale by not

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[8] *See Strang v. Satz,* 884 F. Supp. 504 (S.D. Fla. 1995) (holding unconstitutional Florida statute making it a crime to falsely state that one had received a college degree).

having persons "falsely" claim that Iraq did not have weapons of mass destruction. If Congress had passed a law on the premise that such "false statements" were unprotected, those (in the media and others) who wished to argue that weapons of mass destruction were not present in Iraq, while the Government officially and repeatedly contended to the contrary,[9] would likely have been chilled by the prospect of criminal prosecution.

In November 1948, the Chicago Tribune published a false headline on a matter of the highest public interest — the outcome of the presidential election — with its now-famous headline "Dewey Beats Truman."[10] The Government's "breathing room" test could in theory be used to justify a viewpoint-neutral prohibition on the false reporting of presidential election results.

As easy as it is to ascribe non-trivial harm to lies about matters that implicate the public interest, we are, as a nation, better served by robust protection even for falsehoods concerning matters of public interest, based on the belief that the correction of error — and thus the bolstering of truth — through vigorous public dialogue is preferable to enforcement of truth by means of the criminal law. Matters that

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[9] Cent. Intelligence Agency, *Iraq's Weapons of Mass Destruction Programs* (2002), *available at* https://www.cia.gov/library/reports/general-reports-1/iraq_wmd/Iraq_Oct_2002.htm.

[10] Tim Jones, *Dewey defeats Truman: Well, everyone makes mistakes*, CHI. TRIB., http://www.chicagotribune.com/news/politics/chi-chicagodays-deweydefeatsstory,0,6484067.story (last visited Jan. 12, 2012).

implicate the public interest — such as whether, contrary to the conclusion of the Warren Commission, there was more than one person shooting at President Kennedy — are precisely the type of issues as to which a democracy should encourage robust discussion, even when there is a contrary official government position. In the words of Justice Brandeis,

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

Whitney, 274 U.S. at 377 (Brandeis, J., concurring).

The prospect of falsehood being exposed by news organizations, bloggers/citizen journalists, political opponents, the government itself, and others should serve as the primary check on any impulse to lie or simply get the facts wrong as well as the primary means by which the true facts are brought out. Indeed, as any regular cable news watcher well knows, exposure of errors in today's competitive market has become a staple of the contemporary media landscape.

Exposure of lies by the media and by ordinary citizens, whose powers of communication have been so dramatically enhanced by the Internet and other electronic media, both lessens any justification for government regulation and increases confidence in the truth that emerges from the collision with lies. Justice Holmes' famous dictum that "the best test of truth is the power of the thought to get itself

accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 620 (1919) (Holmes, J. dissenting), although stated with reference to opinions, should nevertheless guide the Court's approach to the far-reaching authority to enforce the "truth" that the Government seeks here.

Beyond those recognized categories of lies that cause real, direct harm, such as defamation, fraud, and perjury, there is societal value in allowing those who would lie to expose themselves and their erroneous views to public scrutiny, to appropriate condemnation, and, ideally, to correction.

It is healthy for us as a nation to know, for example, that some state (as an established fact, not as a matter of opinion) that climate change has been significantly caused by human activity, while others state (also as an established fact, not as a matter of opinion) that it has been caused only by natural forces, while still others state (also as an established fact, not as a matter of opinion) that there has been no climate change. The combination of information, assumption, conjecture, speculation, wishful thinking, and knowledge that may give rise to such views cannot be addressed if not revealed.

The foregoing principles cut strongly against the suggestion of Professors Volokh and Weinstein in their *amicus* brief that the Court should declare all false factual statements to be presumptively unprotected and then frame a series of exceptions to that rule. *See* Amicus Brief of Professors Eugene Volokh and James Weinstein at 22-31. The proposition that "when lawmakers think that a particular kind of lie is harmful enough, they should generally be free to prohibit it," *id.* at 29, is

frightening. Such a rule, with the litany of exceptions Professors Volokh and Weinstein admit would be required, would undoubtedly invite censorship pursuant to the government's view of the "truth" and its interpretation of what the professors concede are less than clearly delineated exceptions. *Amici's* concern is heightened by the possibility that states and other political entities could differ as to what the "truth" is.

As we next explain, such a scenario would be exceedingly problematic for content-providers whose businesses depend on the First Amendment.

B. The Proposed Test Poses a Significant Threat to *Amici*'s Free Speech Rights.

While the only *Amici* who could be prosecuted under the Act are individuals writing or speaking about themselves, if the Government's rationale for upholding the Act is accepted, all of *Amici*—writers, book publishers, newspapers, magazines, comic book publishers, retailers, and First Amendment advocacy organizations—would be adversely affected in two ways.

First, the authors and speakers whose work is disseminated by *Amici* could be prosecuted under the Act, and if the work of authors and writers is chilled, so is the work of those who publish and distribute their work.

Second, *Amici* are deeply concerned about the implications of reversing the presumption of First Amendment protection for assertedly false factual speech. To be sure, none of the *Amici* set out to spread falsehoods — quite the contrary. But misstatements of fact occur — through negligence, misunderstanding, mistake, inadequate fact-

checking resources, a desire to be the first to report an event, a fervent belief that blinds the speaker to the truth. *See Sullivan*, 376 U.S. at 271 ("erroneous statement is inevitable in free debate," but it "must be protected" if free speech is to have adequate "breathing space").

On a practical level, if the Court were to adopt the Government's test, it would invite Congress, state legislatures, and even municipalities to pass laws and ordinances imposing criminal or civil penalties for "false" speech — a development that would make the media's fact-checking (or "vetting") process far more burdensome. Publishers (especially book publishers) and other content-providers cannot check the accuracy of every fact they disseminate; doing so would be inordinately expensive and time-consuming. The level of fact-checking varies among the different types of media and from publisher to publisher. As a general matter, though, fact-checking to protect against legal liability is, not surprisingly, oriented primarily toward the historic First Amendment exceptions:

> Are there potentially damaging statements or depictions? Could they be deemed defamatory?
>
> Are there personally embarrassing statements or depictions? Do they invade privacy?
>
> Is there explicit sexual content? Is it obscene?

Although the Stolen Valor Act is limited to statements which the speaker has made about his or her own achievements, the Government's proposed test for unprotected false speech is not so limited.

Indeed, if the Court were to endorse the Government's sweeping "breathing room" rationale, it likely would prompt the passage of other federal, state, or local statutes criminalizing a potentially wide range of false statements. The consequent burden on—and risk to—content providers, fearful of being sued along with (or instead of) the source of a claimed falsehood, would become crushing and would lead to a chilling effect on protected speech.

If, for example, the Stolen Valor Act were extended to third-party publication of a veteran's receipt of a medal, then before publishing any story about a veteran, the publisher would have to independently verify whether the veteran had received a particular medal, or risk liability. Similarly, if a state were to criminalize publication of a false statement that an author (or another person) had graduated from a state university, a publisher would have to independently verify that information or risk a lawsuit. The vetting process—now concerned primarily with addressing the traditional First Amendment exceptions — would become prohibitively expensive and would, as a result, chill protected speech (*e.g.,* "Let's delete the statement in the obituary that he received the Purple Heart, because we don't have time to check.").[11]

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[11] Lawsuits against book publishers based on alleged false statements concerning, for example, (i) the author's life story (*see* Motoko Rich, *James Frey and His Publisher Settle Over Lies*, N.Y. TIMES, Sept. 7, 2006, http://www.nytimes.com/2006/09/07/arts/07frey.html); (ii) touted investment results (*see Keimer v. Buena Vista Books,* *(cont'd)*

In short, the door the Government would have the Court open in order to uphold the Stolen Valor Act could usher in a perilous array of new risks and challenges for content providers. These risks and challenges would inevitably bring about a reduction of protected speech and an undermining of the robust conception of the First Amendment the Court has recently (in *Stevens*, *Phelps*, *Brown,* and other cases) emphatically reinforced.

IV. The Government's Assertion That "Section 704(b) Prohibits a Narrow Category of Known, Objectively Verifiable False Representations About Which a Person Is Unlikely to be Mistaken" Is Contrary to Law and Likely Contrary to Fact.

Xavier Alvarez is not a poster child for the First Amendment. It is hard to imagine that he did not know that his claim to have won the Congressional Medal of Honor was false.

But the Government's leap from Alvarez's reprehensible conduct to the broad assertion that "Section 704(b) prohibits a narrow category of

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Inc., 75 Cal. App. 4th 1220 (Cal. Ct. App. 1999)); and (iii) the Middle East peace process as described by Jimmy Carter (*see* Stephen Lowman, *President Carter named in $5 million lawsuit over his "Palestine" book*, WASH. POST, Feb. 2, 2011, http://voices. washington post.com/political-bookworm/2011/02/president_carter _named_in_5_mi.html) while ill-founded in *Amici*'s view, suggest the potential danger to content providers if the Court were to declare false factual statements unprotected by the First Amendment.

known, objectively verifiable false representations about which a person is unlikely to be mistaken" is wrong as a matter of law and—dare one say—false. Gov't Br. at 15.

First, the name of "The Stolen Valor Act" is misleading. The Act is not limited to "valor awards" —that is, awards for a person's "gallantry and intrepidity at the risk of his life above and beyond the call of duty," 10 U.S.C. § 3741 (Medal of Honor) or "extraordinary heroism," 10 U.S.C. § 3742 (Distinguished-Service Cross). The Act also covers "any decoration or medal authorized by Congress for the Armed Forces of the United States" and "any of the service medals or badges awarded to the members of such forces." 18 U.S.C. § 704(b). There are over 200 medals, decorations and awards covered by the Act, including, for example, an award to members of the U.S. Army Reserve "for successful completion of annual training or active duty for training for a period not less than 10 consecutive duty days on foreign soil"[12]; there tens of millions of recipients of medals and decorations.[13] The Act thus

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[12] *See* Armed Forces Info. Serv., Dep't of Def., *Armed Forces Decorations and Awards* 18 (1992).

[13] While no definitive figures exist for the number of living medal recipients, statistics published by the United States Army Human Resources Command are instructive. From December 5, 2001 to October 31, 2011 the United States Army awarded at least 972,459 individual decorations. Awards and Decorations Branch, U.S. Army Human Res. Command, *Awards Statistics*, https://www.hrc.army.mil/site/active/tagd/awards/Awards_Statistics.htm (last visited Jan. 12, 2012).

This number does not include recipients of the far more

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does not cover "a narrow category … of false representations." Indeed, a more accurate title for the Act would be the Stolen Military Medals, Decorations and Awards Act.

Second, it may well be that mistaken claims to have received the Congressional Medal of Honor are rare. But mistaken claims to have received other medals, decorations and awards covered by the Act are probably quite common. Veterans are hardly immune from the human tendency, whether knowingly or not, to exaggerate accomplishments from earlier in life. Yet, innocuous as it may be, a veteran who tells a grandchild of having been awarded the Navy Expert Rifleman Medal when, in fact, the veteran was an expert marksman but never received any medal or ribbon or had merely received

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numerous military campaign and service awards or ribbons also covered by the Act, nor does it include any decorations or awards from the four other branches of the United States Armed Forces. For example, these figures do not account for awards like the National Defense Service Medal, for which every active service member qualifies during specified times of national emergency. Army Reg. 600-8-22 § 2-10 (Dec. 11, 2006). These times of national emergency include the Korean War, Vietnam War, Gulf War, and the current War on Terrorism, with potential recipients numbering over 18 million. Def. Manpower Data Ctr., Dept. of Def. ("DMDC"), *Korean War – Casualty Summary*, http://siadapp.dmdc.osd.mil/personnel/CASUALTY/korea.pdf (last visited Jan. 12, 2012); DMDC, *Vietnam Conflict – Casualty Summary*, http://siadapp.dmdc.osd.mil/personnel/CASUALTY/vietnam.pdf (last visited Jan. 12, 2012); DMDC, *Persian Gulf War – Casualty Summary*, http://siadapp.dmdc.osd.mil/personnel/CASUALTY/GWSUM.pdf (last visited Jan. 12, 2012); DMDC, *Armed Forces Strength Figures for October 31, 2011*, http://siadapp.dmdc.osd.mil/ personnel/MILITARY/ms0.pdf.

the Navy Rifle Marksmanship Ribbon, would technically violate the Act.

To be sure, one would expect the Department of Justice to have the good sense not to prosecute a veteran whose only offense was to try to impress a grandchild, whether or not the "false representation" was because of faulty memory or, on the other hand, was made with "scienter." But, as the Court stated in *Stevens,* the First Amendment

> protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

130 S. Ct. at 1591.

Unless veterans rely on *noblesse oblige*, this well-meaning but wrongheaded law will have a chilling effect *on veterans,* the very people the Act is intended to honor. A veteran who truthfully describes his service but falsely claims the receipt of a medal is subject to prosecution and imprisonment for six months. Veterans concerned that their memory of what medals they received might be faulty would be chilled from speaking on the subject; they would, indeed, be well advised not to describe their military honors at all. (Ironically, a person who never served in the military but who makes false claims of having done so (without claiming to have received medals)[14] would not violate the Act.)

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[14] The amicus brief filed by 24 veterans groups states that fake claims of military service are a common and serious problem. *(cont'd)*

Given the breadth of the Act and the Court's sensible refusal to trust the safeguarding of First Amendment rights to government discretion, the Court should not sustain Alvarez's conviction unless it also would be prepared to sustain the conviction of a veteran who falsely told a grandchild of having received the Navy Expert Rifleman Medal, with a motive no more malicious than to interest the young man or woman in riflery.

Also flawed is the Government's claim that the receipt of a medal is "objectively verifiable." Gov't Br. at 47. A 1973 fire at the National Personnel Records Center damaged or destroyed the Army and Air Force records of over 16 million veterans who served between 1912 and 1964.[15] While alternative records are sometimes available, for these veterans, the claim of receipt of a military medal may not, in fact, be objectively verifiable. In addition, even if records are available, the suggestion that a veteran should request his own military records, to ensure the accuracy of his memory of having received a medal, seems a poor way to honor military service.

The Government's defense of the statute based on the assumption that the covered statements are objectively verifiable is also troubling because the Government offers no basis for distinguishing between this Act and a hypothetical prohibition

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See Amicus Brief of Veterans of Foreign Wars of the U.S., *et. al.* at 13-15.

[15] Nat'l Pers. Records Ctr., Nat'l Archives, *1973 Fire*, http://www.archives.gov/st-louis/military-personnel/fire-1973.html (last visited Jan. 12, 2012).

against dissemination by a third party, such as a publisher, of false statements that a person had received a military medal (or, in fact, any other false statement). There is no method by which the media or members of the public can verify whether another has received a military medal. According to the National Archives, through FOIA requests, members of the public can obtain access to limited facts about another's military service, including eligibility for awards and decorations, but not whether awards or decorations were, in fact, received.[16],[17]

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[16] "The public has access to certain military service information without the veteran's authorization or that of the next-of-kin (the un-remarried widow or widower, son, daughter, father, mother, brother or sister) of deceased veterans. Examples of information which may be available from Federal (non-archival) Official Military Personnel Files (OMPF) without an unwarranted invasion of privacy include . . . Awards and decorations (eligibility only, not actual medals)." Nat'l Pers. Records Ctr., Nat'l Archives, *Freedom of Information Act (FOIA) and The Privacy Act*, http://www.archives.gov/st-louis/military-personnel/foia-info.html (last visited Jan. 12, 2012).

[17] Respondent Alvarez notes that there is a privately-assembled database listing recipients of "the top three levels of award (Medal of Honor, Distinguished Service Cross, Navy Cross, Air Force Cross, and Distinguished Service Medals" as well as Silver Stars. Resp. Br. at 25-26. However, that database, which states that it contains "96,902 valor award citations," does not profess to be comprehensive even as to those medals (inviting website visitors to submit documentation to "have a name added"). Mil. Times Hall of Valor, *Valor Awards*, http://militarytimes.com/citations-medals-awards/list. php?category=Awards (last visited Jan. 12, 2012). In addition, that database, while covering the highest levels of the medals, does not cover the Purple Heart and most other medals, and includes less than one-half of one percent of the *(cont'd)*

Amici would, of course, welcome having access to more information, and more reliable information, about medal recipients. But the use of such information should not be compelled by criminal sanctions.

Finally, the Government's interest in the Act falls short of what the First Amendment demands in terms of the requisite speech/harm nexus. Because fraud may be prosecuted without offending the First Amendment, the only interest assertedly protected solely by the Act is limited to the claimed harm to military morale said to flow from lying about (and thereby theoretically devaluing) military honors. This is a slender reed upon which to rest a new incursion on the First Amendment.

The Government contends that criminal penalties are required to protect the "integrity of the military award system." Gov't Br. at 54. But as *amicus* briefs in support of the Government amply document, false claims are regularly reported in the press, resulting in humiliation, shame, exhumation from Arlington National Cemetery, censure, and loss of employment.[18] It is telling that most of the citations to instances of exposure of false claims in the *amicus* briefs are to news stories—not to criminal prosecutions. For instance, the American Legion credits "[i]nvestigative journalists" with

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recipients of medals, awards, and decorations within the scope of the Act.

[18] Amicus Brief of Veterans of Foreign Wars of the U.S., *et. al.* at 13-16 (fn. 19, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33). Amicus Brief of The American Legion at 15-18.

exposing medals fraud.[19] The "integrity of the military award system" evidently relies more on a free press than on the threat of prosecution under the Act.

CONCLUSION

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

Dated: January 19, 2012

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[19] Amicus Brief of The American Legion at 16.

APPENDIX A

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AMICI CURIÆ

The following *amici curiæ* join this brief:

American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

American Federation of Television and Radio Artists ("AFTRA") represents the people who entertain and inform America. In 32 locals across the country, AFTRA represents actors, broadcast journalists, singers, dancers, announcers, hosts, comedians, disc jockeys and other performers who work in the entertainment and media industries. With over 70,000 professional performers, AFTRA members are working together to protect and improve their jobs, lives, and communities in the 21st century. From new art forms to new technology, AFTRA members embrace change in their work and craft to enhance American culture and society.

Association of American Publishers, Inc. ("AAP") is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover, paperback, and electronic books in every field, scholarly and professional journals, educational materials for the

elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Comic Book Legal Defense Fund ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has its principal place of business in New York, New York, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world.

Entertainment Merchants Association ("EMA"), a prevailing party in *Brown v. Entertainment Merchants Ass'n,* 131 S. Ct. 2729 (2011), is the not-for-profit international trade association dedicated to advancing the interests of the $34 billion home entertainment industry. EMA-member companies operate approximately 40,000 retail outlets in the U.S. and 50,000 around the world that sell and/or rent DVDs, computer and console video games, and digitally distributed versions of these products. Membership comprises the full spectrum of retailers (from single-store specialists to multi-line mass merchants, and both brick and mortar and online stores), distributors, the home video divisions of major and independent motion picture studios, video game publishers, and other related businesses that constitute and support the home entertainment industry.

Freedom to Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

PEN American Center ("PEN") is a human rights and literary association based in New York City. Committed to the advancement of literature and the unimpeded flow of ideas and information, PEN fights for freedom of expression; advocates on behalf of writers harassed, imprisoned, and sometimes killed for their views; and fosters international exchanges, dialogues, discussions, and debates.

Village Voice Media Holdings, LLC ("Village Voice Media") publishes thirteen newspapers and websites, including Village Voice (New York), LA Weekly (Los Angeles), Westword (Denver), New Times (Phoenix), Houston Press (Houston), Observer (Dallas). Riverfront Times (St. Louis), New Times (Miami), City Pages (Minneapolis), New Times (Broward), OC Weekly (Orange County), Seattle Weekly (Seattle), and SF Weekly (San Francisco). Village Voice Media prints 1.7 million copies of its publications each week; its websites receive 17 million page views per week.

Writers Guild of America, West, Inc. (WGAW) is

a labor organization and the collective bargaining representative of approximately 11,000 professional writers in the motion picture, television and new media industries. The WGAW's mission is to protect the economic and creative rights of the writers it represents.