No. 11-210

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

XAVIER ALVAREZ,
Respondent.

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

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TWENTY-THREE NEWS MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES AND LEGISLATION

STATE STATUTES

BOOKS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici, described in Appendix A, are The Reporters Committee for Freedom of the Press and twenty-three of the nation's leading news organizations – Advance Publications, Inc., The American Society of News Editors, The Associated Press, Cox Media Group, Inc., Daily News, L.P., Dow Jones & Company, Inc., The E.W. Scripps Company, Gannett Co., Inc., Magazine Publishers of America, The McClatchy Company, The Media Institute, The National Press Club, The National Press Photographers Association, The New York Times Company, The Newspaper Guild – CWA, NPR, Inc., ProPublica, The Online News Association, The Radio Television Digital News Association, The Society of Professional Journalists, Tribune Company, The Washington Post, and WNET.

Amici write to make clear that the issues in this case go far beyond the fate of a serial prevaricator like Xavier Alvarez and strike at the heart of press freedom. The Government's defense of the Stolen Valor Act recalls the time before *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Near v. Minnesota*, 283 U.S. 697 (1931), when newspapers were prosecuted for publishing what the government called "false reports." *Schaefer v. United States*, 251 U.S. 466 (1920). It proposes making broad exclusions from constitutional protection more the rule than the

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[1] Both parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

exception, thus reversing the basic presumption of the First Amendment.

Amici have extensive experience with effective ways to expose false claims of military honors that do not involve unraveling decades of constitutional jurisprudence. Honoring the principle that the best remedy for false speech is "more speech, not enforced silence," *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), the press has worked to discover and publicly shame people who claim false decorations – especially those, like Alvarez, in positions of public trust.

INTRODUCTION

This nation owes an extraordinary debt of gratitude to its military heroes – especially our fallen heroes – whose valor is symbolized by military decorations. Because of this, it may be tempting to weaken constitutional principles to permit prosecution of a scoundrel like Alvarez, who dishonors their service by falsely claiming to be one of them. But it would devalue military sacrifices even more to limit freedom for this reason, because failure to understand and apply core constitutional precepts in cases involving the least worthy among us inherently undermines principles needed to safeguard the most worthy.

It therefore is essential that the First Amendment protect even the "distasteful abuse of a privilege" in order to preserve "these fundamental social values." *Cohen v. California*, 403 U.S. 15, 25 (1971). This Court has explained that "the law of free expression is one of vindication in cases

involving speech that many citizens find shabby, offensive, or even ugly." *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 826 (2000). Thus, history has shown that "safeguards of liberty have often been forged in controversies involving not very nice people." *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009) (citation omitted), *aff'd*, 131 S. Ct. 1207 (2011). And so it is here.

Our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" means that the government cannot be the arbiter of truth. *New York Times*, 376 U.S. at 270. "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth" because, as James Madison wrote, "[s]ome degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." *Id.* at 271 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)). Consequently, First Amendment protection presumptively extends to "exaggeration . . . and even to false statement" except in rare and well-defined circumstances where limitations can be justified. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

SUMMARY OF ARGUMENT

I. The Stolen Valor Act is presumptively unconstitutional as a content-based regulation of pure speech. The government seeks to uphold the law by purporting to find a broad exception to First Amendment protection for any knowingly false

statement of fact. According to this argument, such statements are devoid of constitutional protection except as necessary to provide "strategic protection" to avoid chilling "fully protected speech." Brief of Petitioner United States of America ("Gov't Br.") at 20. This theory of the First Amendment would undermine press freedom by adopting an exclusion from protection as its central premise, thus reversing the basic presumption against official oversight of expression. The government's theory fails to grasp that this Court's First Amendment jurisprudence has consistently limited such exceptions, and its backward reasoning creates what this Court most recently rejected – "a free-floating test for First Amendment coverage" that is "startling and dangerous." *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

This expansive view of First Amendment exceptions ignores the key events that have defined press freedom. Were this Court to accept the government's premise, it would mark a return to constitutional doctrine amenable to such abuses as the Sedition Act prosecutions during the administration of John Adams and the World War I Espionage Act cases, in which the "bad tendency" of false speech to cause social ill was sufficient to support censorship. This also would open the door for broad new classes of unprotected speech in which the only limiting principle is whatever degree of "instrumental protection" the government believes is enough to protect "speech that matters."

II. The purposes of the Stolen Valor Act are better served by reliance on the marketplace of ideas

than by criminalizing pure speech. As Alvarez and others like him have learned to their peril, veterans groups, medal winners, and the press work tirelessly to expose false claims of heroism. These efforts have been aided of late by creation of online databases of legitimate winners such as the Hall of Valor operated by Gannett's MILITARY TIMES newspapers. These same groups also expose instances when the *government* itself is lying about medal winners.

Public policy nevertheless may play a constructive role. It can support and incentivize projects that expose fakes. It can keep better public records of medal winners, so that verifying claims requires something short of a Freedom of Information Act request. And it can beef up efforts to enforce laws against lying about military honors as part of a fraudulent scheme. What it *cannot* do is prohibit speech because, in the government's estimation, the speech lacks sufficient merit.

ARGUMENT

I. DENYING GOVERNMENT AUTHORITY TO PRESCRIBE TRUTH AND PUNISH FALSITY IS ESSENTIAL TO PRESS FREEDOM

A. The Stolen Valor Act Makes False Statements a Crime *Per Se*

Section 704(b) of the Stolen Valor Act imposes criminal penalties on any person who falsely represents, "verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States," including "any colorable imitation" thereof.

18 U.S.C. § 704(b). Enhanced penalties are imposed for violations involving certain medals, including the Medal of Honor. *Id.* § 704(c), (d). The law's purpose is to "protect the reputation and meaning of military decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), (3), 120 Stat. 3266, 3266 (2006).

The Ninth Circuit thus correctly characterized Section 704(b) as a content-based regulation of pure speech. The Stolen Valor Act "imposes a *criminal* penalty of up to a year of imprisonment, plus a fine, for the *mere utterance or writing* of what is, or may be perceived as, a false statement of fact – without anything more." *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010). The court of appeals found no 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," but the law requires no showing that the false statement was in fact publicized or had any actual victims. *Id.* at 1210.

Defending the law, the government asserts "Congress historically has acted to protect military awards from misappropriation" because "it is common sense that false representations have the tendency to dilute the value and meaning of military awards." Gov't Br. at 54. In this regard, the Stolen Valor Act revives the long-discredited "bad tendency" doctrine, under which the social harm of the speech Congress chose to prohibit simply is presumed. *See, e.g.*, *Gitlow v. New York*, 268 U.S. 652, 670 (1925).

That doctrine played a central role in the Espionage and Sedition Act prosecutions during World War I, prompting preeminent scholar Zechariah Chafee to observe that "revival of the doctrines of bad tendency and constructive intent always puts an end to genuine discussion of public matters." Zechariah Chafee, Jr., FREE SPEECH IN THE UNITED STATES 51 (1941). Accordingly, this Court has long since held the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969). As a consequence, the Stolen Valor Act is presumptively unconstitutional.

B. The Stolen Valor Act Reverses the First Amendment's Presumption and Makes the Government the Arbiter of Truth

1. The First Amendment Was Adopted to Deprive Government Authority Over "Truth"

The earliest lessons of our republic confirmed the government could neither be trusted to protect only "truth" nor empowered to punish "falsity." The Sedition Act of 1798 made it a crime to "write, print, utter or publish ... any false, scandalous and malicious writing or writings against the government" with the intent to defame Congress or the President. Sedition Act of 1798, 1 Stat. 596. Although the law permitted truth as a defense, it was used aggressively to punish political opponents of the Adams Administration.

The Sedition Act "was less a piece of legislation than an act of vengeance by federalist lawmakers who decided to strike back at the republican newspapers that they felt had been demonizing their intentions and slandering their character for far too long." Eric Burns, INFAMOUS SCRIBBLERS: THE FOUNDING FATHERS AND THE ROWDY BEGINNINGS OF AMERICAN JOURNALISM 356 (2006). Sedition Act prosecutions were instituted against editors of newspapers in major cities like Philadelphia, New York and Boston, as well as in smaller towns in Connecticut and Vermont. Philip I. Blumberg, REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC 101 (2010). Of the ten people convicted under the Act, seven were journalists, and one other editor was tried but acquitted. *Id.* *See also* Burns, *supra*, at 362. As a result, five republican papers were shuttered or ceased publication for at least some period during this time. Blumberg, *supra*, at 101.

Many of these prosecutions were prompted by partisan rants, but others were predicated on reports of "false" factual statements.[2] After all, the law on its face clearly permitted prosecution of "false state-

[2] William Duane, editor of the Philadelphia *Aurora*, was summoned before the Senate to answer Sedition Act charges because he published the details of a leaked draft of a federalist bill that would have effectively superseded the Electoral College, and, unfortunately, "got some of his facts wrong." Blumberg, *supra*, at 119-20. Charles Holt, editor of the *New London Bee*, defended against Sedition Act charges by arguing he had published only opinion protected by the Constitution. He nevertheless was convicted and the *Bee* ceased publication while Holt was imprisoned. *Id.* at 113.

ments," and, as Representative John Allen of Connecticut explained in advocating its passage, the Act was necessary to punish publication of "the most shameless falsehoods against the Representatives of the people of all denominations." Burns, *supra*, at 357.

These prosecutions illustrated vividly "how speedily an Act to protect national security at a time when an administration perceives the country to be on the brink of war can be used to suppress freedom of speech." Blumberg, *supra*, at 99. The experience prompted certain Framers, including Madison and Jefferson, to articulate a broad theory of freedom of expression to explain the meaning of the First Amendment. Leonard Levy, LEGACY OF SUPPRESSION 258-65 (1960). Such reactions exposed "the frailty of the argument that freedom of political expression implied freedom for 'truth' only." *Id.* at 263.

The Sedition Act expired by its own terms on the last day of the Adams Administration and was never tested in court, but the consensus of history is that it was fundamentally at odds with the First Amendment. As Thomas Jefferson put it as he pardoned and remitted the fines of those convicted under the law, "I considered ... that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." 4 JEFFERSON'S WORKS 555-56 (Washington ed.) (Letter to Abigail Adams, July 22, 1804). This experience with the federal government's initial effort to criminalize false speech "first crystallized a national awareness of the central meaning of the

First Amendment." *New York Times*, 376 U.S. at 273.

As it laid the foundation for modern First Amendment jurisprudence, this Court made clear that the government cannot be the arbiter of truth. In *Near*, 283 U.S. 697, it struck down a law that permitted the suppression of malicious, scandalous and defamatory newspapers, magazines or other periodicals. The case involved an injunction barring the publication of a "scandal sheet" called *The Saturday Press*, in which "[m]any of the statements are so highly improbable as to compel a finding that they are false," and "[i]n every edition slanderous and defamatory matter predominates to the practical exclusion of all else." *Id.* at 724 (Butler, J., dissenting).

The statutory scheme was deemed "the essence of censorship" despite the fact it permitted the publisher to defend challenged news stories as "true and ... published with good motives and for justifiable ends." *Id.* at 713. *Near* is remembered primarily as the leading authority for the constitutional restriction on prior restraint, but is not limited to that proposition. This Court explained that the First Amendment is more expansive than the Blackstonian conception of press freedom as merely the absence of prior restraint. *Id.* at 713-14. It quoted James Madison's statement reacting to the Sedition Act that "[s]ome degree of abuse is inseparable from the proper use of everything," and noted that the preliminary freedom from restraint "extends as well to the false as to the true." *Id.* at 714, 716 (citations omitted).

This theme was further developed in *New York Times Co. v. Sullivan* where this Court made clear that false statements, standing alone, do not lack constitutional protection. In that case, it was undisputed in the underlying defamation claim that defendants had published a number of false factual statements. 376 U.S. at 258-59. But this Court observed that it has consistently "refused to recognize an exception for any test of truth" because "erroneous statement is inevitable in free debate." *Id.* at 271. It acknowledged certain categories of speech may lack protection, but stated the government cannot claim "talismanic immunity" from constitutional limitations simply by asserting certain speech falls within a designated category. Instead, any such exception "must be measured by standards that satisfy the First Amendment." *Id.* at 268-69.

Applying these lessons, the Ninth Circuit correctly reasoned that "the right to speak and write whatever one chooses – including, to some degree, worthless, offensive, and demonstrable untruths – without cowering in fear of a powerful government is ... an essential component of the protection afforded by the First Amendment." *Alvarez*, 617 F.3d at 1205. Chief Judge Kozinski observed that criminalizing pure speech simply because it is false would leave "wide areas of public discourse to the mercies of the truth police," a prospect he aptly described as "terrifying." *United States v. Alvarez*, 638 F.3d 666, 673, 674 (9th Cir. 2011) (denying motion for rehearing and rehearing en banc) (Kozinski, C.J., concurring).

2. First Amendment Freedoms Must be Interpreted Broadly and Exceptions Construed Narrowly

From 1791 to the present, the First Amendment has permitted content restrictions on speech only in a few well-defined and narrowly limited classes of speech, and this Court recently disclaimed any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 130 S. Ct. at 1584, 1586. *See Brown v. Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011). In this case, the Ninth Circuit followed *Stevens* and held false factual speech is not a general category of unprotected speech unto itself. *Alvarez*, 617 F.3d at 1206.

Cognizant of this recent precedent, the government asserts "false statement of fact" is not a "new" category of unprotected expression, but instead is merely the generalized label for a broader category that includes traditional examples like fraud and defamation. Gov't Br. at 19-21. The government nods to *Stevens* and *Brown* and allows that "the broad general category of false factual statements has not historically been treated as completely unprotected by the First Amendment," but claims such speech is presumptively without constitutional immunity except for what it calls "limited instrumental protection" necessary for First Amendment "breathing space." *Id.*

The government reaches the wrong conclusion in this case because it begins with the wrong premise. It reasons not from the central command of the First Amendment, that "Congress shall make no law ...

abridging the freedom of speech, or of the press," but from what it believes to be a broad *exception* to that rule.

The government's theory ignores that the First Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges v. California*, 314 U.S. 252, 263 (1941). Its ability to restrict speech "is the exception rather than the rule" and "penalizing … utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government." *Herndon v. Lowry*, 301 U.S. 242, 258 (1937). This means "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges*, 314 U.S. at 263.

By generalizing and thereby expanding categories of unprotected speech, the government's approach contradicts both the logic and historical trend of this Court's First Amendment jurisprudence. Ever since a number of categories of unprotected speech first were listed in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), they have been progressively narrowed and limited as each subject area was "constitutionalized." This Court has since eliminated most "unprotected" categories articulated at the time of *Chaplinsky*. *See, e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (blasphemy); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (insulting polemical speech); *Cohen v. California*, 403 U.S. 15 (1971) (offensive or "profane" speech); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer*

Council, Inc., 425 U.S. 748 (1976) (commercial speech). For those few that remain, speech is presumptively protected unless the government can clear high constitutional hurdles to prove otherwise. *E.g.*, *New York Times*, 376 U.S. at 283-84; *Roth v. United States*, 354 U.S. 476, 487-88 (1957); *Brandenburg*, 395 U.S. at 447-49.

The government asks this Court to invert this process. It starts with a broad category of false speech that it claims is beyond the First Amendment's reach and then adds back some limited protections on an ad hoc basis. This is illustrated by the dissent's statement below that "the general rule is that false statements of fact are not protected by the First Amendment" but that some important exceptions must be recognized "to protect speech that matters." *Alvarez*, 617 F.3d at 1220-21 (Bybee, J., dissenting) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)). This theory cannot be reconciled with the uniform trend of this Court's rulings by which the unprotected categories of speech were rendered substantially narrower and more specific.

This reversal of the First Amendment's basic presumptions places the government in the position of defining not just what is "false," but also what speech has sufficient merit to be given "limited instrumental protection." Contrary to the government's inverted theory, the presumed value of speech cannot be a general precondition to First Amendment protection. This is because "[*m*]*ost* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or

artistic value' (let alone serious value), but it is still sheltered from government regulation." *Stevens*, 130 S. Ct. at 1591. The Ninth Circuit thus correctly rejected this theory as "turning customary First Amendment analysis on its head." *Alvarez*, 617 F.3d at 1204.

3. Exceptions to First Amendment Protection for Untruthful Speech Require Falsity "Plus"

The government's defense of the Stolen Valor Act is based largely on misreading dictum in *Gertz* that "there is no constitutional value in false statements of fact." *Gertz*, 418 U.S. at 340. Notwithstanding such language, restrictions on libelous statements as well as speech in other unprotected categories still "must be measured by standards that satisfy the First Amendment." *New York Times*, 376 U.S. at 268. As this Court more recently explained, statements of this sort "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." *Stevens*, 130 S. Ct. at 1586.

It is not enough for a statement to be false or even knowingly false to exclude it from First Amendment protection. This Court "has never held that a person can be liable for defamation merely for spreading knowingly false statements." *Alvarez*, 617 F.3d at 1209. First Amendment exceptions for untruthful speech, such as defamation or fraud, exist not just because the expression is false, but because of some demonstrable harm. *Id.* at 1206-09.

Gertz underscores this point. The Court stressed that the state interest underlying the law of libel "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz*, 418 U.S. at 341. The case involved no question of whether "false" speech is protected by the First Amendment, but addressed only whether the *New York Times* actual malice standard applies to defamation cases brought by persons who are neither public officials nor public figures. Even in that context, the Court made clear that proof of actual injury is necessary "to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment." *Id.* at 349. Thus, proof of personal injury is not just an element of the tort, it is constitutionally required.

This is true of all "unprotected" categories of speech. The First Amendment requires *all* elements of the relevant test to be met as a threshold matter *before* any speech may be relegated to an unprotected category. The government's "breathing space" theory gets it backwards by reasoning that certain types of speech are unprotected because they lack constitutional "value," but that "strategic protections" may be recognized for "speech that matters."

This approach hardly provides "breathing space."[3] For example, it would be incorrect to assert sexually

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[3] In every other case where this Court has construed the First Amendment as requiring "breathing space," it has expanded protections. *E.g.*, *New York Times*, 376 U.S. at 271-72; *NAACP v. Button*, 371 U.S. 415, 433 (1963). Here, the

explicit speech lacks First Amendment protection, but that, in order to provide "breathing space," case law requires the government to prove the work as a whole appeals to the prurient interest, that it violates contemporary community standards, and that it lacks serious literary, artistic, political, or scientific merit. *Miller v. California*, 413 U.S. 15, 24 (1973). Rather, the elements of the obscenity test are "specific prerequisites" to a prosecution. *Id.* at 27. As this Court has explained, "sex and obscenity are not synonymous" and the portrayal of sex alone "is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Roth*, 354 U.S. at 487. *See also Reno v. ACLU*, 521 U.S. 844, 873-74 (1997) (all three elements of obscenity test are essential to limit its "uncertain sweep").

Likewise, speech does not constitute "incitement" until the government proves advocacy was intended to provoke imminent lawless action *and* such imminent action is likely. *Brandenburg*, 395 U.S. at 447-49. Mere words of incitement are not enough.

For the same reason, falsity alone is insufficient to eliminate the presumption of First Amendment protection for pure speech. The government claims "the First Amendment permits false-statement restrictions in a variety of contexts," Gov't Br. at 21, but each of them, including fraud, intentional infliction of emotional distress, and false-light

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government tries to use the concept to shrink the First Amendment's presumptive reach.

invasion of privacy, requires proof of actual injury.[4] Likewise, laws about perjury or fraudulent administrative filings "require at a minimum that the misrepresentation be willful, material, and uttered under circumstances in which the misrepresentation is designed to cause an injury, either to the proper functioning of government ... or to the government's or a private person's economic interests." *Alvarez*, 617 F.3d at 1211.

The injury the Stolen Valor Act tries to remedy is of an entirely different nature. The law was passed "to protect the reputation and meaning of military decorations and medals," Stolen Valor Act, § 2, 120 Stat. 3266, but this asserted interest cannot justify restrictions on freedom of expression. While this Court has acknowledged the government may "create national symbols, promote them, and encourage their respectful treatment," it has also held that the First Amendment prohibits restricting speech to preserve their intended meanings. *United States v. Eichman*, 496 U.S. 310, 318 (1990). *See also Texas v. Johnson*, 491 U.S. 397, 417 (1989) ("We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents."); *Schacht v. United States,* 398 U.S. 58, 63 (1970). It therefore rejected the argument that

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[4] *See*, *e.g.*, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) ("False statement alone does not subject a [speaker] to fraud liability."); *Hustler Magazine v. Falwell*, 485 U.S. 46, 51-53 (1988) (constitutional limits on defamation also restrict claims for intentional infliction of emotional distress); *Time, Inc. v. Hill*, 385 U.S. 374, 394-96 (1967) (constitutional limits on damages articulated in defamation cases also apply to false light invasion of privacy).

"flag-burning as a mode of expression, like obscenity or 'fighting words,' does not enjoy the full protection of the First Amendment." *Eichman*, 496 U.S. at 315.

The same logic applies here. The government may have an undoubted interest in preserving the meaning of military honors, particularly within the military itself, but that does not mean that it may use criminal law to compel that result.[5] "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernable or defensible boundaries." *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1189-90 (D. Colo. 2010) (quoting *Johnson*, 491 U.S. at 2546-47). Thus, the type of false statements proscribed by the Stolen Valor Act do not qualify for exclusion from First Amendment protection.

C. The Government's Open-Ended Test for Punishing False Speech Would Eviscerate Press Freedom

Upholding the Stolen Valor Act under the government's "breathing space" theory would strike at the heart of press freedom by heralding a return to

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[5] *Johnson*, 491 U.S. at 418 ("To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest."). The government's interest, and the constitutionally permissible tools at its disposal, differ within the military command structure compared to civilian life. *E.g.*, *Parker v. Levy*, 417 U.S. 733, 758-61 (1974) (speech in the military environment does not receive full First Amendment scrutiny).

the early First Amendment jurisprudence of this Court's post-World War I Espionage Act cases. Newspaper publishers and others were convicted, and the convictions upheld prior to development of current constitutional doctrine, for publishing "false reports" that might have a tendency to impede the war effort. The government's expansive view of First Amendment exceptions not only would revive the potential for such prosecutions, it would pave the way for broad new classes of unprotected speech.

In 1920, this Court upheld the conviction of a German-language newspaper for violating an Espionage Act provision prohibiting willfully making and conveying "false reports and statements with intent to interfere with the military and naval operations and success of the United States and to promote the success of its enemies." *Schaefer v. United States*, 251 U.S. 466, 469 (1920). *See also Pierce v. United States*, 252 U.S. 239 (1920) (conviction upheld for false statements in anti-draft pamphlets).

The charge in *Schaefer* stemmed from a number of articles and editorials the government alleged contained statements that were "deliberate and willfully false" intended to represent "that the war was not demanded by the people but was the result of the machinations of executive power."[6] As with

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[6] *Schaefer*, 251 U.S. at 478, 481. The charge of making false statements rested primarily on errors or omissions in translating English language reports to German. In one instance, the newspaper translated a speech by Senator Robert La Follette as mentioning "brotriots" (bread riots) rather than

the Stolen Valor Act, it was unnecessary for the government to show any actual harm or adverse impact on the war effort – "the tendency of the articles and their efficacy were enough for offense." *Schaefer*, 251 U.S. at 479.

Justices Brandeis and Holmes in dissent wrote that such prosecutions for false news items were reminiscent of the days "when men were hanged for constructive treason" and will "doubtless discourage criticism of the policies of the Government." *Id.* at 493-94 (Brandeis, J., dissenting). They would have required the government to meet a more demanding First Amendment standard, requiring proof of a "clear and present danger" – a nascent form of strict scrutiny for its day. *Id.* at 486; *Pierce*, 252 U.S. at 271 (Brandeis, J., dissenting). Although neither *Schaefer* nor *Pierce* has been overruled formally, the principles of the Brandeis-Holmes dissent became controlling as First Amendment doctrine evolved. *Brandenburg*, 395 U.S. at 447-49.

The government's "breathing space" theory would not just halt such evolution, it would turn back the clock to a time when false reports were presumed to be outside the First Amendment's protective umbrella. Little would be left of press freedom if the government could again prosecute criticism of official policies to the extent news reports contain what the government alleges to be deliberate false statements of fact. The government's jaundiced conception of

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"brotreihen" (bread lines). *See id.* at 486-93 (Brandeis, J., dissenting).

"breathing space" paradoxically would suck all the oxygen from the marketplace of ideas.

The Solicitor General does not discuss the Espionage Act cases, but *amici* supporting the government suggest that cases like *Schaefer* "should ... come out in favor of First Amendment protection today." Brief of Professors Eugene Volokh and James Weinstein as *Amicus Curiae* in Support of Petitioner ("Professors' Br.") at 25. No doubt, such cases *should* come out differently than before. But it is possible to be confident they *would* only if this Court rejects the government's "breathing space" formulation as well as the various theories offered by supporting *amici*.[7]

What the government now labels "breathing space analysis" is every bit as "freewheeling" as the balancing test for unprotected speech proposed – and overwhelmingly rejected – in *Stevens*. Under this new theory, the government would be able to prohibit speech whenever: (1) "the government has a strong interest in restricting the false statements;" (2) the reviewing court considers whether "the restriction risks chilling protected speech;" and (3) the restriction extends no further than necessary to protect the government interest at stake. Gov't Br.

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[7] For example, *Amici* Professors argue First Amendment exemptions should be made "capacious" so as to forestall an increasing number of demands for new exceptions. Professors' Br. at 14-18. This odd "destroy the village in order to save it" theory of the First Amendment ignores that this Court has had no difficulty in seeing demands to create new exceptions for what they are, and soundly rejecting them. *Stevens*, 130 S. Ct. at 1584, 1586; *Brown*, 131 S. Ct. at 2734.

at 28. As in *Stevens*, this is "a free-floating test for First Amendment coverage" based on "ad hoc balancing of relative social costs and benefits." And, as before, it is "startling and dangerous." *Stevens*, 130 S. Ct. at 1585.

This test would not prevent prosecutions like those in *Schaefer* and *Pierce* since it begins with the presumption that all false statements are outside the First Amendment's protection. Gov't Br. 19-21, 35. Judge Bybee's dissent below sought to minimize the censorial impact of this approach by recognizing "certain limited exceptions" and "exceptions-to-exceptions," *Alvarez*, 617 F.3d at 1222 (Bybee, J., dissenting), but this is no more satisfactory than the statutory exceptions clause discounted in *Stevens*. This Court made clear that serious value cannot be made a "general precondition" to protecting speech that may otherwise fall into an unprotected category. *Stevens*, 130 S. Ct. at 1591.

Thus, the government's First Amendment theory lacks any meaningful limiting principle. The Ninth Circuit majority recognized such an approach "simply invites courts to complete an ever-expanding list" of false speech acts that lack First Amendment protection. *Alvarez*, 638 F.3d at 673. As Chief Judge Kozinski explained, "[e]xceptions to categorical rules, once created, are difficult to cabin; the logic of the new rule, like water, finds its own level, and it's hard to keep it from covering far more than anticipated." *Id.* at 677 (Kozinski, C.J., concurring in denial of rehearing).

The government has no serious response to the prospect that it will seek to create new subsets within "the larger category of false factual statements" whenever it perceives an interest in doing so. Gov't Br. at 28, 35. Indeed, *amici* supporting the government frankly admit that "when lawmakers think that a particular kind of lie is harmful enough, they should generally be free to prohibit it." Professors' Br. at 29. This inevitably would lead to what the Ninth Circuit described as a "Kafkaesque world" in which "the government can prosecute not only the man who tells tall tales of winning the Congressional Medal of Honor, but also the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a bit." *Alvarez*, 638 F.3d at 686; *id.* at 673 (Kozinski, C.J., concurring).

The government's supporting *amici* do not shrink from promoting what Chief Judge Kozinski dubbed an "ever-truthful utopia," *id.*, as they find no more First Amendment protection for "knowing falsehoods to get sex, friendship, votes, information, or even respect and attention" than for fraud. Professors' Br. at 20. But they argue the First Amendment is safe because "the political process can generally be trusted to prevent the imposition of criminal liability for casual social lies." *Id.* at 29. This overlooks that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Stevens*, 130 S. Ct. at 1591. The state cannot be trusted with broad power to restrict speech based on nothing more than the promise "to use it responsibly." *Id.*

The danger is not limited to the various "white lies, exaggerations, and deceptions" contained in Chief Judge Kozinski's seemingly whimsical examples. Making false speech presumptively unprotected places the burden on speakers to establish that their speech "matters" enough to qualify for "breathing space" protections. Such a constitutional regime undermines First Amendment protection for "wide areas of public discourse." *Alvarez*, 638 F.3d at 674 (Kozinski, C.J., concurring).

This concern is not theoretical. Minnesota adopted a "Fair Campaign Practices Act" that prohibits paid political advocacy about ballot issues "that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false." Minn. Stat. § 211B.06, subd. 1 (2008). The Eighth Circuit held that strict scrutiny applies, expressly following the reasoning of the Ninth Circuit in this case. *281 Care Comm. v. Arneson*, 638 F.3d 621, 634-36 (8th Cir. 2011), *petition for cert. pending*, No. 11-535 (filed Oct. 25, 2011). But Minnesota is seeking review by this Court, and it is not the only state to adopt such a law.[8] *Amici* supporting the government even argue the First Amendment should not prohibit laws

[8] Some such laws have been upheld, others struck down. *See*, *e.g.*, *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573 (6th Cir. 1991); *State v. Davis*, 499 N.E.2d 1255 (Ohio Ct. App. 1985) (upholding criminal sanctions for knowingly false statements in political campaigns). *But see State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 695 (Wash. 1998) (law violates First Amendment because it "presupposes the State possesses an independent right to determine truth and falsity in political debate").

against lying to get votes, Professors' Br. at 20, 26, and no doubt many more such laws would be enacted if this Court were to agree.

The possibility that politicians could be prosecuted for lying to voters conjures images of non-stop court sessions and overcrowded jails. But while the current level of political discourse is not always easy to defend, it is quite clear that allowing the government to police "truth" would be far worse.

The Solicitor General's attempt to distinguish regulation of political or historical "truth" from restrictions on false "factual" statements, Gov't Br. 53-54, fails to set forth a reliable test for distinguishing between them and simply ignores our history. The falsehoods at issue in cases like *Schaefer*, *New York Times*, and the state campaign cases are not statements of "false doctrine;" they typically involve nothing more than mundane facts that become weapons in the hands of the government when it is constitutionally empowered to punish "falsity."

For that reason, the First Amendment constrains "the collective authority of temporary political majorities to exercise their power by determining for everyone what is true and false, as well as what is right and wrong." *Arneson*, 638 F.3d at 636 (quoting Stephen G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 3 (2008)). Accordingly, this Court should reject the government's attempt to rewrite First Amendment doctrine.

II. THE STOLEN VALOR ACT'S PROHIBITION OF PURE SPEECH IS NOT NEEDED TO PROTECT MILITARY HONOR AND IT SIGNIFICANTLY UNDERMINES FIRST AMENDMENT DOCTRINE

A. The Act Fails to Account for the Marketplace of Ideas

The government's defense of Section 704(b) of the Stolen Valor Act erroneously assumes it is necessary to enact a federal law and fundamentally alter constitutional interpretation in order to safeguard the esteem in which this nation holds military heroes. This is wrong both because it presumes the impact of false claims of heroism and because it fails to take into account the responses such claims engender.

Although the government argues it is "common sense" to believe those who lie about having won medals will "tend" to undermine military morale and public gratitude, Gov't Br. at 54, the Ninth Circuit was correct to doubt that the reputation and meaning of medals is adversely affected by such tall tales. *Alvarez*, 617 F.3d at 1227. Justice Oliver Wendell Holmes believed "poor and puny anonymities" who published "silly leaflet[s]" should not be prosecuted under the Espionage Act, in part, because "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, 628-30 (1919) (Holmes, J., dissenting). This reasoning applies here in spades.

The "marketplace of ideas" theory presumes the value of free expression is not confined to any single statement of fact or opinion. Rather, it is determined by the process in which thoughts and claims are expressed, disputed, and either rejected or accepted. When a false statement is made in this process, it is not the occasion to call in the referee to rule on whether the statement is "in" or "out." As Justice Brandeis wrote, "[i]f 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." *Whitney v. California*, 274 U.S. at 377 (Brandeis, J., concurring).

The court below recognized this principle when it noted that, unlike defamatory statements – which are uniquely difficult to correct – "when someone falsely claims to have been awarded a Congressionally-authorized medal, and his or her false claims are exposed as self-aggrandizing lies, scandal results, and counter-speech can vindicate the truth in a way the law presumes rebuttal of defamatory falsehoods cannot." *Alvarez*, 617 F.3d at 1211. Indeed, "[t]he social approbation that attends those who would attempt to bask in the reflected glory of honors they have not earned" shows how "the people of this nation continue to revere our brave military men and women regardless of – or perhaps even more so because of – false and vainglorious attempts to appropriate such accolades." *Strandlof*, 746 F. Supp. 2d at 1191.

The Ninth Circuit correctly concluded that "[w]hen valueless false speech, even proscribable

speech, can best be checked with *more* speech, a law criminalizing the speech is inconsistent with the principles underlying the First Amendment." *Alvarez*, 617 F.3d at 1211. And, specifically with respect to the facts at issue here, it found that "Alvarez's lie, deliberate and despicable as it may have been, did not escape notice and correction in the marketplace." *Id.* at 1216.

B. More Speech Effectively Remedies Stolen Valor

Xavier Alvarez could be the poster child for the power of more speech. As the court below noted, "Alvarez was perceived as a phony even before the FBI began investigating him, and he has since been publicly humiliated in his community and in the press (one online article described him as an 'idiot,' and another post described him as a 'jerk')." *Id.* at 1211. This was just the beginning. Alvarez, formerly an obscure local official, was exposed worldwide as a liar. He found himself on the front page of numerous newspapers and had to dodge a "Nightline" camera crew seeking comment. David Allen, *Pomona shocker: Meeting ends in one hour,* INLAND VALLEY DAILY BULLETIN, Oct. 6, 2009, at 2, *available at* 2009 WLNR 19709506.

Alvarez's fellow water board commissioners denounced him as a "disgrace." Will Bigham, *Water District Rep Requests Alvarez Resign in Wake of False Medal Claim,* SAN BERNARDINO COUNTY SUN, May 21, 2008, at 1, *available at* 2008 WLNR 10055631. They "read from a lengthy list of Alvarez's lies and urged Alvarez to have the 'decency to resign [his] position.'" Approximately forty to fifty

veterans appeared before the commission seeking a public apology from Alvarez. Presumably due in part to this scrutiny, Alvarez was later investigated for misappropriating public funds and was sentenced to five years in state prison. *See People v. Alvarez*, 2010 WL 3964595 (Cal. Ct. App. Oct. 12, 2010) (unpublished).

His story is far from unique. Those who claim honors they have not earned cannot escape the public opprobrium that comes with exposure. For some, the shame of deceit has led their obituaries despite otherwise distinguished careers. For example, the obituary for one Illinois Judge and Navy veteran noted, in its second sentence, that he "resigned from the bench in 1995 rather than face possible criminal charges stemming from his acknowledged lie about having won the Medal of Honor."[9] And reports of the 1996 suicide of the Navy's highest ranking officer prominently referred to NEWSWEEK's investigation into whether "he wore two Vietnam War combat decorations that he had not earned."[10]

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[9] *See Memorial planned for former judge*, CHI. TRIB., Apr. 9, 2005, at 13, *available at* 2005 WLNR 23385102.

[10] Philip Shenon, *His Medals Questioned, Top Admiral Kills Himself*, N.Y. TIMES, May 17, 1996, *available at* 1996 WLNR 4362916. Even after his death, it was not clear whether Adm. Jeremy M. Boorda was authorized to wear the combat decorations at issue. *See* Steven Lee Myers, *Admiral, a Suicide, Wins Some Vindication on Combat Awards*, N.Y. TIMES, June 25, 1998, *available at* 1998 WLNR 2970637. This example undermines the claim that it is impossible to innocently but falsely claim to have been awarded a decoration.

Organized efforts of the press and private citizens routinely bring such cases to light. Outraged veterans and others have become "fraud hunters" on a mission to expose false claims of heroism.[11] The numerous news articles cited in the government's brief asserting a "'surge' in false claims" merely confirm the effectiveness of veterans groups and the press at exposing phonies like Alvarez. *See* Gov't Br. at 44 n.10.

As several of the government's *amici* have noted, a 2008 CHICAGO TRIBUNE investigation "used military records to unearth 84 bogus Medals of Honor, 119 Distinguished Service Crosses, 99 Navy Crosses, five Air Force Crosses and 96 Silver Stars" listed in biographies in the reference book WHO'S WHO. *See* John Crewdson, *False Courage: Claims for top military honors don't hold up*, CHI. TRIB., Oct. 26, 2008, *available at* 2008 WLNR 20423903. The article also noted the Pentagon has resisted Congressional efforts to create a national online

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[11] *See*, *e.g.*, Pam Belluck, *On a Sworn Mission Seeking Pretenders to Military Heroism*, N.Y. TIMES, Aug. 10, 2001, at A1, *available at* 2001 WLNR 3382421 ("Most fraud hunters are veterans motivated by outrage. Operating mostly through Web sites and on their own dime, they scrutinize claims in small-town newspaper articles and in membership rosters of veterans groups."); Editorial, *Making a Sham of Military Honors,* VIRGINIA-PILOT AND LEDGER-STAR, Aug. 9, 2004, *available at* 2004 WLNR 3452826; Tom Farmer, *Dishonorable Decoration; Marine's Unearned Medal Exposed*, BOS. HERALD, Feb. 10, 2004, *available at* 2004 WLNR 401638; *Man Held in Cole County on Old Warrant Charged for Wearing Fake Medal of Honor*, JEFFERSON CITY NEWS-TRIB., July 12, 2002, *available at* 2002 WLNR 15346628.

database naming all who have earned medals for valor, citing cost and other concerns. *Id.*

Efforts to ferret out false claims have been made even more effective in recent years by the creation of non-governmental online databases. One such website founded by a Vietnam veteran, stolenvalor.com, is dedicated to exposing imposters.[12] Veterans groups similarly ensure that frauds are never forgotten through websites like ReportStolenValor.org. This site, operated by AMVETS, is designed to "help facilitate the reporting of suspected Stolen Valor offenders to federal authorities and the news media."

The press has a particularly important role to play in this area. Gannett's MILITARY TIMES newspapers operate the Hall of Valor, a database with details on tens of thousands of medal recipients. *See* http://militarytimes.com/citations-medals-awards/. They also maintain the Hall of Stolen Valor, a site dedicated to unmasking imposters. *See* http://militarytimes.com/projects/hallofstolenvalor. Through these efforts, the names of 24 fake Medal of Honor recipients were scrubbed from the Library of Congress-funded Veterans History Project following an investigation by MILITARY TIMES. Mike Stuckey, *Error, fraud mar vets' oral histories, critics say*,

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[12] Even before Congress adopted Section 704(b), the founder of the site teamed with an investigative journalist to expose the problem of false claims of military decorations. *See* B.G. Burkett & Glenna Whitley, *Stolen Valor: How the Vietnam Generation Was Robbed of Its Heroes and Its History* (1998).

available at www.msnbc.msn.com/id/20853588/ns/us_news-military/.

The press also has exposed false claims about military valor made by the government. A recent investigation by McClatchy Newspapers, for example, found accounts of the exploits of a recent Medal of Honor recipient issued by the Marine Corps and the White House were "untrue, unsubstantiated or exaggerated." *See* Jonathan S. Landay, *Marines Promoted Inflated Story for Medal of Honor Recipient*, WASH. POST, Dec. 15, 2011, at A1, *available at* 2011 WLNR 25813809. The award came at a time when "senior Marine Corps officials conceded the pressure to award more medals, and to do it quickly." *Id.* Similarly, the press uncovered false official accounts of battlefield heroics in the cases of Pat Tillman and Jessica Lynch.[13] These instances reinforce both the power of a free press in the marketplace of ideas and the critical importance

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[13] *See, e.g.,* Scott Lindlaw & Martha Mendoza, *General's memo voiced doubts in Tillman's death*, Associated Press, Aug. 4, 2007, *available at* 2007 WLNR 14988150 (press FOIA requests revealed that "Lt. Gen. Stanley McChrystal acknowledged that he had suspected several days before approving the Silver Star citation on April 28, 2004, that Pat Tillman may have died by fratricide" rather than "devastating enemy fire" as noted in the citation); David D. Kirkpatrick, *After the War: the Rescue; Reports on Soldier's Capture Are Partly Discounted by Paper,* N.Y. TIMES, June 18, 2003, at A14, *available at* 2003 WLNR 5235265 (noting news reports "cast doubt on several aspects of the initial portrayals of her story, raising questions about whether the United States military manipulated the episode for propaganda purposes and about whether American news organizations were seduced by a gripping, patriotic tale").

of not empowering the government to be the arbiter of truth.

These collective responses are a better measure of the social impact of false assertions of military heroics than are the lies themselves. There is no basis for the government's assertion that, "[i]n the aggregate, false claims make the public skeptical of all claims to have received awards, and they inhibit the government's efforts to ensure that the armed services and the public perceive awards as going to only the most deserving few." Gov't Br. at 14. Quite to the contrary, the sharp reaction to false claims in the marketplace of ideas honors our heroes by discrediting the undeserving and refocusing acclaim where it belongs – on those who honestly earned their medals.

The honor symbolized by military decorations is not preserved by imprisoning those who lie about having won them, but by shining a light on their deceit. This Court made the same point about flag desecration in *Texas v. Johnson* finding that "[t]he way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." 491 U.S. at 419.

C. Public Policy Should Support the Marketplace of Ideas, Not Undermine It

To affirm the Ninth Circuit's holding that Section 704(b) is unconstitutional does not suggest there is no role for public policy in this area. As the court below noted, "[p]reserving the value of military decorations is unquestionably an appropriate and

worthy governmental objective that Congress may achieve through, for example, publicizing the names of legitimate recipients or false claimants, [or] creating educational programs…." *Alvarez*, 617 F.3d at 1210. Congress could create grants to support such efforts, or it could fund similar government efforts to recognize legitimate medal winners and expose the fakes. Such measures would support and enhance marketplace efforts by the press and others without distorting First Amendment doctrine.

There also is an appropriate role for law enforcement within existing constitutional bounds. In many cases, false claims of military honors are part of a fraudulent scheme and may be prosecuted without need to alter or expand First Amendment exceptions.[14] Recognizing that fact, the Ninth Circuit suggested "Congress could revisit the Act to modify it into a properly tailored fraud statute." *Alvarez*, 617 F.3d at 1212. One pending proposal to amend the Stolen Valor Act seeks to do just that.[15]

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[14] *See*, *e.g.*, *United States v. Perelman*, 658 F.3d 1134, 1135 (9th Cir. 2011) (defendant prosecuted for wearing Purple Heart he did not earn was also convicted of defrauding Veterans Administration of $180,000 in disability benefits); *United States v. Swisher*, 790 F. Supp. 2d 1219 (D. Idaho 2011) (defendant in Stolen Valor Act case also convicted of defrauding Veterans Administration); *Strandlof*, 746 F. Supp. 2d at 1188 (sponsors of Stolen Valor Act "were concerned that false claims regarding military awards would perpetuate fraud") (citing legislative history).

[15] The Stolen Valor Act of 2011, H.R. 1775 and S.1728, 112th Cong., would not prohibit all lying about medals, but would apply to anyone who "knowingly makes a

Such an approach would serve the interest of preventing the false claims about military honors as a vehicle for fraud. It could do so without requiring this Court to rewrite First Amendment doctrine by recognizing a broad new category of unprotected speech, followed by years of litigation to craft "exceptions to the exception." Military honor would best be preserved by measures that respect current constitutional limits and rely on the marketplace of ideas.

CONCLUSION

Our nation cannot honor the achievements of military heroes by constricting the freedoms for which they fought. For the same reason, in striking down a state law prohibiting flag desecration, this Court explained that "[w]e do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents." *Johnson*, 491 U.S. at 420. In the context presented here, those who pretend to be heroes should not be permitted to undo the work of those with real courage. As Zechariah Chafee observed of the Espionage Act cases, "[t]hose who gave their lives for freedom would be the last to thank us for throwing aside so lightly the great traditions" of our constitutional heritage. Chafee, *supra,* at 107.

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misrepresentation regarding his or her military service" only if made "with intent to obtain anything of value."

For the foregoing reasons, this Court should uphold the Ninth Circuit.

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APPENDIX A

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, daily newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns many internet sites and has interests in cable systems serving over 2.3 million subscribers.

With some 500 members, The American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Cox Media Group, Inc. is an integrated broadcasting, publishing, direct marketing and digital media company. Its operations include 15 broadcast television stations, a local cable channel, a leading direct marketing company, 85 radio stations, eight daily newspapers and more than a dozen non-daily print publications, and more than 100 digital services.

Daily News, L.P., publishes the New York Daily News, the fourth largest newspaper in the country.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, *WSJ.com*, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides realtime financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, and local news and information web sites. The company's portfolio of locally focused media properties includes: 19 TV stations (10 ABC affiliates, three NBC affiliates, one independent and five Azteca Spanish language stations); daily and community newspapers in 13 markets; and the Washington, D.C.-based Scripps

Media Center, home of the Scripps Howard News Service.

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including USA TODAY, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

Magazine Publishers of America is a national trade association including in its present membership more than 240 domestic magazine publishers that publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

The McClatchy Company publishes 31 daily newspapers and 46 non-daily newspapers throughout the country, including the Sacramento Bee, the Miami Herald, the Kansas City Star and the Charlotte Observer. The newspapers have a

combined average circulation of approximately 2.2 million daily and 2.8 million Sunday.

The Media Institute is an independent, nonprofit research organization located in Arlington, Virginia. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive communications industry, and journalistic excellence. The Institute has participated as an *amicus curiae* in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

The National Press Club is a membership organization dedicated to promoting excellence in journalism and protecting the First Amendment guarantees of freedom of speech and of press. Founded in 1908, it is the nation's largest journalism association.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to photojournalism.

The New York Times Company is a leading global multimedia media news and information company, which publishes The New York Times, the

International Herald Tribune, and The Boston Globe and operates NYTimes.com, BostonGlobe.com, Boston.com, About.com and related properties.

The Newspaper Guild - CWA is a labor organization that promotes and represents the interests of approximately 30,000 employees within newspapers, news magazines, new media web sites, news services and other media. The Guild's membership, particularly journalists, have a professional interest in government efforts to regulate speech.

NPR, Inc. is an award winning producer and distributor of noncommercial news programming. A privately supported, not for profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 268 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information. NPR has no parent company and does not issue stock.

The Online News Association ("ONA") is the premier U.S.-based organization of online journalists. ONA's members include reporters, news writers, editors, producers, designers, photographers and others who produce news for distribution over the Internet and through other digital media, as well as academics. ONA is dedicated to advancing the interests of online journalists and the public,

generally, by encouraging editorial integrity, editorial independence, journalistic excellence, freedom of expression and freedom of access.

ProPublica is an independent, non-profit newsroom that produces investigative journalism in the public interest. In 2010, it was the first online news organization to win a Pulitzer Prize. In 2011, ProPublica won the first Pulitzer awarded to a body of work that did not appear in print. ProPublica is supported primarily by philanthropy and provides the articles it produces, free of charge, both through its own website and to leading news organizations selected with an eye toward maximizing the impact of each article.

The Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the coverage and dissemination of news and entertainment programming. On the publishing side, Tribune publishes eight daily newspapers – Chicago Tribune, Hartford Courant, Los Angeles Times, Orlando Sentinel (Central Florida), The (Baltimore) Sun, The Daily Press (Hampton Roads, Virginia), The Morning Call (Allentown, Pa.), and South Florida Sun-Sentinel. On the broadcasting side, it owns 23 television stations, a radio station, a 24-hour regional cable news network and "Superstation" WGN America. Tribune Company is a privately held company.

The Washington Post publishes a daily and Sunday newspaper with the nation's fifth-largest print circulation, as well as a website (washingtonpost.com) that attracts more than 17 million unique visitors per month.

WNET is the parent company of THIRTEEN, WLIW21, Interactive Engagement Group and

Creative News Group and the producer of approximately one-third of all prime time programming seen on PBS nationwide. Locally, WNET serves the entire New York City metro area with unique on-air and online productions and innovative educational and cultural projects. Approximately five million viewers tune in to THIRTEEN and WLIW21 each month.