

No. 11-210

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**In the Supreme Court of the United States**

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UNITED STATES OF AMERICA, PETITIONER

*v.*

XAVIER ALVAREZ

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

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**PETITION FOR A WRIT OF CERTIORARI**

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### **QUESTION PRESENTED**

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

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

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## **PETITION FOR A WRIT OF CERTIORARI**

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### **OPINIONS BELOW**

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

### **JURISDICTION**

The judgment of the court of appeals was entered on August 17, 2010. A petition for rehearing was denied on March 21, 2011. On June 17, 2011, Justice Kennedy ex-

tended the time within which to file a petition for a writ of certiorari to and including July 19, 2011. On July 14, 2011, Justice Kennedy further extended the time to and including August 18, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

The First Amendment to the Constitution provides, in relevant part: “Congress shall make no law \* \* \* abridging the freedom of speech.” Section 704 of Title 18 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 145a-147a.

**STATEMENT**

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

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

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

Today, the United States government maintains a system of military decorations and honors that shares

its essential characteristics with the first awards authorized by General Washington. The highest military honors are established by statute or Executive Order, and they have rigorous eligibility criteria. For instance, the Medal of Honor, which occupies the highest position in the hierarchy and was first established during the Civil War in 1861, see Act of Dec. 21, 1861, 12 Stat. 329-330, is awarded by the President, in the name of Congress, to a person who “distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty” while engaged in certain armed conflicts. 10 U.S.C. 3741; see also, *e.g.*, 10 U.S.C. 3742 (Distinguished Service Cross, awarded for “extraordinary heroism not justifying the award of a medal of honor”); 10 U.S.C. 3746 (Silver Star); Exec. Order No. 11,046, 3 C.F.R. 630 (1959-1963 Comp.) (Bronze Star). See generally The Institute of Heraldry, Office of the Administrative Assistant to the Sec’y of the Army, *Military Decorations*, <http://www.tioh.hqda.pentagon.mil/awards/decorations.aspx> (Aug. 9, 2011).

The Department of Defense and the armed services branches have guidelines for the award of honors. See Dep’t of Defense, *Manual of Military Decorations and Awards*, No. 1348.33 (2010) (*Awards Manual*); see also, *e.g.*, Marine Corps Order 1650.19J (Feb. 5, 2001); SECNAV Instruction 1650.1H (Aug. 22, 2006); Army Reg. 600-8-22 (Dec. 11, 2006); Air Force Policy Directive (AFPD) 36-28 (Aug. 1, 1997). These guidelines specify the extensive criteria for an award; the number and necessary content of eyewitness statements; the standard of proof; and the necessary approvals that the recommendation must garner within the chain of command. See, *e.g.*, *Awards Manual* 31; SECNAV Instruction

1650.1H, §§ 2-5 to 2-8, 2-15; Marine Corps Order 1650.19J at para. 2.

The armed services have long held the view that the awards program performs crucial functions within the military. The conferral of awards is considered “an important aspect of command responsibility at all levels” because the “[p]rompt and judicious recognition of an individual’s achievement or service is a vital factor of morale.” Marine Corps Order 1650.19J at para. 2; see Army Reg. 600-8-22, ch. 1, § 1-1 (“The goal of the total Army awards program is to foster mission accomplishment by recognizing excellence of both military and civilian members of the force and motivating them to high levels of performance and service.”); SECNAV Instruction 1650.1H, § 3-1; AFPD 36-28, para. 2. “[R]ecognizing acts of valor, heroism, and exceptional duty and achievement” fosters pride in service and motivates individuals to higher achievement. *Examination of Criteria for Awards and Decorations: Hearing Before the Military Personnel Subcomm. of the House Comm. on Armed Services*, 109th Cong., 2d Sess. 24 (2006) (*Awards Hearing*) (statement of Lt. Gen. Roger A. Brady, Deputy Chief of Staff, Manpower and Personnel, Headquarters, U.S. Air Force). And military honors also confer prestige on recipients and express the Nation’s gratitude for heroic acts and military service. See S. Rep. No. 240, 64th Cong., 1st Sess. 3 (1916).

In view of the importance of the military honors program, Congress and the service branches have taken a number of steps to guard against dilution of the reputation and meaning of the medals. The highest military honors may not be awarded to someone whose subsequent conduct “has not been honorable,” see, *e.g.*, 10 U.S.C. 3744(c) and 6249, and medals may be revoked if

later-discovered facts would have prevented the award of the medal, see *Awards Manual* 4. Since the early twentieth century, Congress has also made efforts to prevent dilution, including false representations of having received a medal, by providing for the publication of the names of Medal of Honor recipients; patenting the medal's design in 1904 in order to prevent imitations; and establishing, in 1916, a committee to review previous Medal of Honor awards and rescind those that did not meet the standards codified in 10 U.S.C. 3741. See 38 U.S.C. 1560; *S. Comm. on Veterans' Affairs*, 93d Cong., 1st Sess., *Medal of Honor Recipients 1861-1973*, at 4-7 (Comm. Print 1973) (*Medal of Honor Report*) (explaining that false claims and other abuses necessitated various actions to "protect the dignity of the original medal"). In 1923, Congress prohibited knowingly wearing, manufacturing, or selling a military medal without authorization. See Act of Feb. 24, 1923, Pub. L. No. 67-438, 42 Stat. 1286. That provision, now codified at 18 U.S.C. 704(a), was enacted on the recommendation of the War Department, which had expressed concern that unauthorized imitations would "cheapen[] the decorations in question" and noted that "[i]f the decorations of honor \* \* \* awarded by the War Department are to continue to serve the high purpose for which they are intended, they are worthy of being protected." H. Rep. No. 1484, 67th Cong., 4th Sess. 1-2 (1923).

In 2006, Congress enacted the Stolen Valor Act in response to concern that the longstanding prohibition on the unauthorized wearing and sale of medals, see 18 U.S.C. 704(a), had proved insufficient to deter false claims to have been awarded a medal. See 151 Cong. Rec. S12,688 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad). Section 704(b), the provision at issue in this

case, makes it an offense when anyone “falsely represents himself or herself, \* \* \* verbally or in writing, to have been awarded” a military decoration or medal. Congress expressly declared that the purpose of the prohibition is “to protect the reputation and meaning of military decorations and medals.” Stolen Valor Act of 2005 (Stolen Valor Act), Pub. L. No. 109-437, § 2, 120 Stat. 3266. In passing the Act, Congress found that “[f]raudulent claims surrounding the receipt of [military decorations and medals] damage the reputation and meaning of such decorations and medals” and that “[l]egislative action is necessary to permit law enforcement officers to protect the reputation and meaning” of the medals.<sup>1</sup> *Ibid.*

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

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

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

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

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

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

3. a. The court of appeals reversed and remanded. App., *infra*, 1a-40a. The court first held, relying on *United States v. Stevens*, 130 S. Ct. 1577 (2010), that “false factual speech, as a general category unto itself,” does not fall within those “historical and traditional categories [of unprotected speech] long familiar to the bar.” App., *infra*, 15a (quoting 130 S. Ct. at 1584); see *id.* at 10a-15a. The court reasoned that *Stevens*, in discussing the historically recognized categories of unprotected speech, mentioned two subsets of false speech—defamation and fraud—without suggesting that false statements, as a general category, are unprotected. *Id.* at 7a. The court of appeals acknowledged that this Court has repeatedly stated that false speech is “not worthy of constitutional protection,” *id.* at 16a (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), and *Garrison*, 379 U.S. at 75), but it observed that the Court has never held “that the government may, through a criminal law, prohibit speech *simply* because it is knowingly factually false,” *id.* at 30a-31a. Indeed, the court of appeals found “affirmative constitutional value” in some knowingly false speech, such as “[s]atirical entertainment” and hyperbole. *Id.* at 31a.

The court of appeals next concluded that Section 704(b) cannot be characterized as a regulation of the unprotected categories of defamation or fraud. The court reasoned that Section 704(b) does not “fit[] into the defamation category” because it does not prohibit only speech that is made with actual malice or knowledge of falsity and that is “injurious to a private individual.” App., *infra*, 22a-23a (quoting *Gertz*, 418 U.S. at 347). The court explained that even if Congress had concluded that false representations to have been awarded a medal cause “presumptive harm” to the

meaning and effectiveness of military honors, the First Amendment does not permit the government to protect the reputation of “governmental institutions or symbols,” such as military awards, “by means of a pure speech regulation.” *Id.* at 24a, 25a. And the court held that the Act prohibits speech that does not constitute fraud because it reaches false statements without regard to scienter, materiality, or reliance, elements that might ensure that the regulated speech causes “bona fide harm.” *Id.* at 26a-30a.

Having concluded that the speech prohibited by Section 704(b) “does not fit neatly into any of those well-defined and narrowly limited classes of speech previously considered unprotected,” App., *infra*, 32a (internal quotation marks omitted), the court applied strict scrutiny, *id.* at 35a. The court acknowledged that “Congress certainly has an interest, even a compelling interest, in preserving the integrity of its system of honoring our military men and women.” *Id.* at 37a. But the court concluded that Section 704(b) is not narrowly tailored because “other means exist to achieve the interest of stopping such fraud, such as by using *more* speech, or redrafting the Act to target actual impersonation or fraud.” *Id.* at 39a.

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

spondent did not dispute that his statements were knowingly false. *Id.* at 68a-69a.

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

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

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

Judge O’Scannlain, joined by six other judges, dissented from denial of rehearing. App., *infra*, 116a-135a. Judge O’Scannlain argued that the panel opinion “runs counter to nearly 40 years of Supreme Court precedent,” including the Court’s decisions on defamation and baseless lawsuits. *Id.* at 116a (emphasis omitted); see *id.* at 118a-125a. That precedent, he explained, established that false statements of fact receive only the derivative protection necessary to ensure that “constitutionally protected non-false speech” is not inhibited. *Id.* at 119a. Judge O’Scannlain therefore argued that “restrictions upon false speech do not receive strict scrutiny,” but rather, they are evaluated to determine whether they provide sufficient breathing space for protected speech. *Id.* at 119a-120a. Judge O’Scannlain reasoned further that the panel majority had erred in concluding that the First Amendment required the criminal prosecution of false statements to be based on a showing of individualized harm, *id.* at 129a-131a, but in any event, all false claims of military awards contribute to the reputational and other harms that Congress identified in passing Section 704(b), *id.* at 132a-133a.

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

### REASONS FOR GRANTING THE PETITION

The court of appeals held facially unconstitutional an Act of Congress that plays a vital role in safeguarding the integrity and efficacy of the government's military honors system. Section 704(b) prohibits a narrow category of knowingly false factual representations that Congress has determined undermine the capacity of military awards to confer honor on their recipients and to foster morale and esprit de corps within the armed forces. The court of appeals erroneously subjected Section 704(b) to strict scrutiny, notwithstanding this Court's longstanding treatment of false factual statements as entitled, at most, only to limited First Amendment protection. In so doing, the court of appeals disregarded this Court's decisions upholding content-based false-speech restrictions that, like Section 704(b), are supported by an important government interest and provide adequate breathing space for fully protected speech. Even if the court of appeals was correct to apply strict scrutiny, Section 704(b) is valid under that standard because it is narrowly tailored to serve a compelling interest. Although the decision below is the first court of appeals decision to address Section 704(b)'s constitutionality, the question is currently pending in four other circuit courts. Review of the court of appeals' constitutional holding is therefore warranted.

#### I. THE COURT OF APPEALS' INVALIDATION OF AN IMPORTANT ACT OF CONGRESS WARRANTS THIS COURT'S REVIEW

This Court should grant review because the court of appeals has invalidated an important Act of Congress on its face. See App., *infra*, 39a ("As presently drafted, the Act is facially invalid under the First Amendment.").

This Court has often reviewed lower-court decisions holding that a federal law is unconstitutional, even in the absence of a circuit split. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *United States v. Stevens*, 130 S. Ct. 1577 (2010); *United States v. Williams*, 553 U.S. 285 (2008); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *United States v. Morrison*, 529 U.S. 598 (2000); *NEA v. Finley*, 524 U.S. 569 (1998); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). That practice is consistent with the Court’s recognition that judging the constitutionality of an Act of Congress is “the gravest and most delicate duty that this Court is called upon to perform.” *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)).

Although the decision in this case is the first from a court of appeals to address the constitutionality of Section 704(b), the issue is a substantial and recurring one. The Eighth, Tenth, and Eleventh Circuits are currently considering challenges to the Act’s constitutionality, and an appeal of a district court decision upholding the Act has recently been filed in the Fourth Circuit. See *United States v. Strandlof*, No. 10-1358 (10th Cir. argued May 12, 2011) (government’s appeal of district court’s dismissal of information charging defendant with five counts of violating Section 704(b), on the ground that the statute is facially unconstitutional); *United States v. Amster*, No. 10-12139 (11th Cir. filed May 11, 2010) (defendant’s appeal of district court’s denial of motion for judgment of acquittal on the ground that the Act was facially unconstitutional); *United States v. Kepler*, No. 11-2278 (8th Cir. filed June 10, 2011) (government’s appeal of district court’s dismissal of one count of

indictment on the ground that Section 704(b) and (d) are unconstitutionally overbroad); *United States v. Robbins*, No. 11-4757 (4th Cir. filed July 29, 2011) (appeal of decision upholding Section 704(b) against First Amendment challenge, see 759 F. Supp. 2d 815 (W.D. Va. 2011)).

This Court's review is particularly appropriate because Section 704(b) serves a vital function: protecting the integrity and effectiveness of the military honors system. That system has long been an integral element of the armed services' personnel and readiness efforts. Medals acknowledge acts of military heroism and sacrifice, and express the Nation's gratitude for the patriotism and courage of those who have acted heroically in the face of danger; they inform the public about acts of valor during armed conflicts; and within the armed services, they foster morale and core military values. False claims to have won a medal dilute the meaning of military awards, thereby undermining their ability to serve their intended purposes. See pp. 23-26, *infra*. The government has therefore regularly brought prosecutions under Section 704(b) to put a stop to long-running deceptions and to deter other false claims. See, e.g., Gov't C.A. Br. 3-4, *United States v. Strandlof* (10th Cir.) (No. 10-1358) (defendant falsely claimed, over the course of several years, that he had been awarded the Purple Heart and Silver Star medals in connection with fundraising for the veterans organization that he founded, despite never having served in the military); Gov't C.A. Br. 2-12, *United States v. Amster* (11th Cir.) (No. 10-12139) (defendant provided falsified military-service records showing that he had won a Medal of Honor to state and local officials and sought federal assistance to obtain a Medal of Honor that he falsely claimed had been awarded to him and lost in shipment). Because the

court of appeals' decision invalidates an important Act of Congress designed to protect the integrity of the Nation's military honors system, this Court's review is warranted.

## II. THE COURT OF APPEALS' DECISION IS INCORRECT

### A. Section 704(b) Prohibits Only Knowingly False Statements That Reasonably Can Be Understood As Assertions Of Fact

The “first step” in First Amendment analysis is “to construe the challenged statute.” *Williams*, 553 U.S. at 293. The court of appeals erroneously interpreted Section 704(b) to prohibit unknowing and satirical claims to have won a military medal. See App., *infra*, 24a-25a, 34a-35a; *id.* at 87a-90a (Bybee, J., dissenting). Properly construed, Section 704(b) prohibits a discrete and narrow category of factual statements: knowingly false representations that a reasonable observer would understand as a factual claim that the speaker has been awarded a military medal.

Although Section 704(b) does not use the term “knowing” or “knowingly,” its prohibition on “falsely represent[ing]” that one has received a military medal indicates that the provision requires knowledge of falsity. To “represent” something is to “[t]o place (a fact) clearly before another; to state or point out explicitly or seriously to one, with a view to influencing action or conduct.” See 13 *Oxford English Dictionary* 657 (2d ed. 1989); see also *Black's Law Dictionary* 1415 (9th ed. 2009) (a “representation” is made “to induce someone to act”). A “false representation,” also known as a “misrepresentation,” is “[t]he act of making a false or misleading statement about something, usu[ally] with the intent to deceive.” *Id.* at 1091. Thus, the phrase “falsely

represent” connotes making a factual assertion with the knowledge that it is false. See Stolen Valor Act § 2(1), 120 Stat. 3266 (congressional findings referring to “[f]raudulent claims surrounding the receipt” of medals). That interpretation is buttressed by the presumption that, absent contrary evidence of congressional intent not present here, criminal statutes contain a mens rea requirement even when the statute is silent on that issue. See, e.g., *Staples v. United States*, 511 U.S. 600, 605-606 (1994); *Morissette v. United States*, 342 U.S. 246, 250 (1952).

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

**B. This Court’s Decisions On False Factual Statements Demonstrate That Section 704(b) Is Constitutional**

The court of appeals erroneously held that because false factual statements do not constitute a historically recognized category of completely unprotected speech, Section 704(b) should be subjected to strict scrutiny. This Court has made clear that false statements of fact are entitled, at most, only to limited First Amendment protection that is derivative of the need to ensure that any false-speech restriction does not chill truthful and other fully protected speech. The Court has therefore upheld content-based regulations of false statements of fact that are supported by an important government interest and provide adequate “breathing space” for fully protected speech. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Considered under that framework, Section 704(b) is constitutional.

1. a. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), this Court explained that “[c]alculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas.” *Id.* at 75 (citation and internal quotation marks omitted). Since then, the Court has frequently reiterated the principle that false factual statements have no First Amendment value in themselves. See, e.g., *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (stating that “false statements [are] unprotected for their own sake”); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (*Hustler*) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas.”); *Herbert v. Lando*, 441 U.S. 153, 171 (1979) (“Spreading false information in and of itself carries no

First Amendment credentials.”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating that “there is no constitutional value in false statements of fact,” because such statements do not “materially advance[] society’s interest in uninhibited, robust, and wide-open debate on public issues”) (quoting *New York Times Co.*, 376 U.S. at 270).

Accordingly, this Court’s First Amendment decisions have long recognized that false factual statements “are not protected by the First Amendment in the same manner as truthful statements.” *Brown v. Hartlage*, 456 U.S. 45, 60-61 (1982) (citation omitted); see also, e.g., *BE&K Constr. Co.*, 536 U.S. at 531; *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1966) (“[T]he constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function.”). Although the broad general category of false factual statements is not one that historically has been treated as completely unprotected by the First Amendment, see *Brown v. Entertainment Merchs. Ass’n*, 131 S. Ct. 2729, 2734 (2011) (requiring a “long \* \* \* tradition of proscription” for a category of speech to be wholly unprotected); *Stevens*, 130 S. Ct. at 1584, the Court has repeatedly stated, in numerous contexts, that false factual statements do not receive First Amendment protection for their own sake. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (*Virginia State Bd.*) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”); see also *BE&K Constr. Co.*, 536 U.S. at 531 (stating that false statements are “unprotected for their own sake”). Rather, false statements of fact receive only “a measure of strategic protection,” in appropriate contexts, in order to

ensure that regulation of such statements does not unduly inhibit fully protected speech. *Gertz*, 418 U.S. at 342; see *id.* at 341.

The Court has therefore upheld content-based restrictions on false statements of fact that are supported by a government interest and that accommodate the government's interest and First Amendment concerns by providing adequate "breathing space" for fully protected speech. See *New York Times Co.*, 376 U.S. at 272 (citation omitted). The Court has followed this approach in a variety of contexts, including defamation, see *ibid.*; fraud, see *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); intentional infliction of emotional distress through false statements, see *Hustler*, 485 U.S. at 53, 56; false-light invasion of privacy, see *Hill*, 385 U.S. at 388-389; and liability for baseless lawsuits, see *BE&K Constr. Co.*, 536 U.S. at 531 (stating that baseless lawsuits have been analogized to false statements and that the Court has allowed regulation in a manner that is "consistent" with "'breathing space' principles").<sup>2</sup>

b. In the defamation context, for instance, the Court's decisions seek to "accommodat[e]" the "strong and legitimate state interest" in compensating individuals for injury to reputation with First Amendment concerns. *Gertz*, 418 U.S. at 342, 348. Absent that state interest, the Court noted, it would have "embraced long ago the view that publishers and broadcasters enjoy an unconditional and infeasible immunity from liability for defamation." *Id.* at 341; see *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976). "[T]he proper accommoda-

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<sup>2</sup> In addition, in the distinct context of commercial speech, the government may regulate not only false, but also deceptive and misleading, speech. See *Virginia State Bd.*, 425 U.S. at 771-772 & n.24.

tion,” the Court has held, is one that allows States to limit defamation through private tort actions while “assur[ing] to the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise.” *Gertz*, 418 U.S. at 342 (citation omitted); *New York Times Co.*, 376 U.S. at 272.

To provide the necessary “breathing space” for fully protected speech, the Court has imposed several limitations on defamation actions. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12-17 (1990). First and foremost, the Court has held that, because a scienter requirement generally cabins the chilling effect of a defamation action, such suits may be based on statements made with knowledge of falsity or actual malice. See *New York Times Co.*, 376 U.S. at 279-280; *Gertz*, 418 U.S. at 342, 347. Second, the defamation plaintiff must bear the burden of proving both falsity and fault by clear and convincing evidence. See *Milkovich*, 497 U.S. at 15-16. Third, because the analysis “attempt[s] to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment,” it is “appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved.” *Gertz*, 418 U.S. at 349; see *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986). In *Gertz*, therefore, the Court held that the state interest in compensating defamation-related injury did not justify remedies that were insufficiently related to that interest—including presumed and punitive damages for negligently false statements—because they would “unnecessarily exacerbate[]” the danger of chilling effects. 418 U.S. at 349-350; see also *Herbert*, 475 U.S. 169-170 (permitting discovery into editorial process because doing so furthered

interest in punishing knowing or reckless false statements without causing undue chill).

c. Similarly, in the fraud context, the Court has upheld content-based restrictions on false speech that serve a strong government interest—the interest in preventing and punishing fraud that “has always been recognized in this country and is firmly established,” *Donaldson v. Read Magazine*, 333 U.S. 178, 190 (1948)—where the restrictions “provide sufficient breathing room for protected speech.” *Telemarketing Assocs.*, 538 U.S. at 620. The necessary breathing room is supplied by elements such as scienter, materiality, and reliance. *Ibid.* These ensure that fraud prohibitions do not chill fully protected speech and “properly tailor[]” the limitations to serve the government’s interest in protecting the integrity of transactions and compensating injury. See *ibid.*; *Riley v. National Fed’n of the Blind*, 487 U.S. 781, 794-795, 800 (1988) (properly tailored fraud laws “are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored”).

d. The Court has applied essentially the same analysis to other restrictions on false factual statements. The Court has treated baseless lawsuits as “analogous to false statements,” *BE&K Constr. Co.*, 536 U.S. at 530-531 (internal quotation marks and citation omitted), and it has permitted regulation of objectively baseless suits motivated by an unlawful purpose in view of the “strong federal interest in vindicating the rights protected by the national labor laws,” *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743-744 (1983). That rule, the Court has noted, is “consistent with \* \* \* ‘breathing space’ principles.” *BE&K Constr. Co.*, 536 U.S. at

531. Similarly, the Court has held that false-light tort actions designed to prevent misappropriation of one's image are permissible if they contain a scienter requirement. See *Hill*, 385 U.S. at 390-391. And the Court has held that the "State's interest in preventing emotional harm" justifies permitting tort suits for intentional infliction of emotional distress based on false statements, so long as the action requires a showing of actual malice in order to provide "'breathing space' to the freedoms protected by the First Amendment." *Hustler*, 485 U.S. at 53, 56.

2. The court of appeals therefore erred in applying strict scrutiny simply because it concluded that the speech prohibited by Section 704(b) does not fall within a category of speech that historically has been completely unprotected by the First Amendment. Instead, the court of appeals should have followed the "breathing space" analysis that this Court has applied to restrictions on false factual statements in numerous contexts. Under that approach, Section 704(b) is constitutional. The government has a strong—indeed, compelling—interest in protecting the reputation and integrity of its military honor system against knowingly false claims, and the Act appropriately accommodates that interest and First Amendment concerns because it provides ample breathing room for protected speech.

a. The government has a "compelling interest \* \* \* in preserving the integrity of its system of honoring our military men and women." App., *infra*, 37a. The military honors program serves two vital interests, both of which are undermined by false claims to have won a medal.

*First*, military medals and decorations recognize and express gratitude for acts of heroism and sacrifice as

well as exemplary military service. The government intends that military honors should bestow a rare degree of prestige on their bearers and convey to the public the high regard in which the government holds the individuals who have sacrificed in service to the Nation. To that end, Congress and the armed services have developed rigorous standards and procedures for awards. See pp. 4-6, *supra*; *Awards Hearing* 21, 81 (statement of Michael L. Dominguez, Principal Deputy Undersecretary of Defense for Personnel and Readiness). Valor awards, such as the Medal of Honor, are conferred only on those who have committed extraordinary acts of heroism. Through those rigorous criteria, Congress and the armed services ensure that each award symbolizes gratitude and bestows honor only for the most deserving. See *Medal of Honor Report* 14 (“It is precisely *because* of these legalistic safeguards that the Medal of Honor is a symbol of such glorious tradition today.”).

A false claim to have been awarded a military medal misappropriates the prestige and honor associated with that medal. The cumulative effect of such claims is, as Congress found, to dilute and “damage the reputation and meaning of such decorations and medals.” Stolen Valor Act § 2(1), 120 Stat. 3266. In the aggregate, false representations threaten to make the public skeptical of any claim to have been awarded a medal. They also undercut the government’s screening to ensure that the award recipients, the conduct for which the honors are conferred, and the recipients’ subsequent military record are deserving of the government’s highest honors. See pp. 4-6, *supra*. These cumulative effects diminish the awards’ effectiveness in conferring prestige and honor on those who actually have been awarded medals. The government therefore has a compelling interest in

preventing and punishing the misappropriation of military honors. Cf. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (stating that the government has an interest in preventing misappropriation of the term “Olympics”).

*Second*, military awards, by “recognizing acts of valor, heroism, and exceptional duty and achievement,” serve vital purposes within the armed services. *Awards Hearing* 24 (statement of Lt. Gen. Roger A. Brady, Deputy Chief of Staff, Manpower and Personnel, Headquarters, U.S. Air Force). The military awards program “fosters morale, mission accomplishment and esprit de corps” among service members. *Ibid.*; see *id.* at 26 (statement of Brig. Gen. Richard P. Mills, Dir., Personnel Mgmt. Div., Manpower and Reserve Affairs, HQ, U.S. Marine Corps) (emphasizing the “importance of a viable and robust military combat awards system in maintaining morale, esprit de corps, and pride in [one’s] fellow Marines”); Marine Corps Order 1650.19J at para. 2; Army Reg. 600-8-22, ch. 1, § 1-1; SECNAV Instruction 1650.1H, § 3-1; ACPD 36-28, para. 2. The award of valor medals is particularly important during wartime; for instance, as General George C. Marshall wrote in describing his advocacy during World War II for the creation of the Bronze Star, the medal would be used to “sustain morale and fighting spirit in the face of continuous operations and severe losses.” Charles P. McDowell, *Military and Naval Decorations of the United States* 171 (1984). Indeed, the importance of medals in fostering these values among service members has been recognized since General Washington created a valor award to “cherish a virtuous ambition in his sol-

diers, as well as to foster and encourage every species of military merit.”<sup>3</sup> *General Orders* 35.

False claims to have received military awards undermine their important function within the armed services. In order to preserve the prestige and honor associated with military awards within the services, the military prosecutes active-duty service members who falsely claim or wear awards that they have not received under the Uniform Code of Military Justice. See 10 U.S.C. 934 (offense of “conduct of a nature to bring discredit upon the armed forces”); see also, *e.g.*, *United States v. Avila*, 47 M.J. 490 (1998) (defendant wore and used falsified documents to claim that he had won a Bronze Star). These efforts are undermined if false claims are rampant outside of the military.

b. Section 704(b) properly accommodates this compelling government interest and First Amendment concerns because it provides ample “breathing space” for fully protected speech. *New York Times Co.*, 376 U.S. at 272 (citation omitted).

Most importantly, Section 704(b) does not inhibit expression of opinion about military policy, the meaning of military awards, the values they represent, or any other topic of public concern. One can praise or criticize the military, its actions, or its award winners without restraint. The statute prohibits only knowing misrepre-

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<sup>3</sup> The court of appeals wrongly dismissed this established function of military awards as “unintentionally insulting” to service personnel. App., *infra*, 39a. It is common sense that those serving in the armed forces do not commit valorous acts purely in hopes of receiving a medal. But acknowledging that fact does not detract from the force of the armed forces’ longstanding view that military awards are a vital means of inspiring higher performance and maintaining the morale necessary for effective unit performance.

sentations, see pp. 16-17, *supra*, on a particular personal subject matter. This scienter requirement provides “an extremely powerful antidote to the inducement to \* \* \* self-censorship.” *Gertz*, 418 U.S. at 342; *Telemarketing Assocs.*, 538 U.S. at 620.

A number of the statute’s other characteristics reinforce the scienter requirement, making it virtually certain that no one would refrain from engaging in truthful speech about medals in order to avoid the possibility of prosecution. The statute prohibits only a discrete category of misrepresentations of fact about the speaker himself. A person is unlikely to be mistaken about whether he has received a military medal, and in all events, the accuracy of any such claim is objectively verifiable. As a result, there will rarely be uncertainty about the falsity of the representation or a dispute about the speaker’s knowledge, and thus there is little likelihood that people will refrain from truthful speech about military awards out of “doubt whether [truth or lack of knowledge] can be proved in court or fear of the expense of having to do so.” *New York Times Co.*, 376 U.S. at 279; cf. *Virginia State Bd.*, 425 U.S. at 772 n.24 (the verifiable nature of commercial assertions means that less breathing room is necessary to “insure that the flow of truthful and legitimate commercial information is unimpaired”). The government must, moreover, establish any disputed facts beyond a reasonable doubt. See *Telemarketing Assocs.*, 538 U.S. at 620 (“Exacting proof requirements” in fraud actions, where government must prove fraud by clear and convincing evidence, provide “sufficient breathing room for protected speech.”).

In addition, a speaker need not fear that a Stolen Valor Act prosecution will be used to punish disfavored speech. Because the line between a knowingly false

award-related claim and all other statements—about military service, valorous acts, military policy, or the like—is well-defined and objective, the government could not use Section 704(b) as a means of imposing its own view of “truth” or punishing criticism. Cf. *New York Times Co.*, 376 U.S. at 272. Indeed, the narrow category of statements prohibited by Section 704(b) has no intrinsic relation to criticism of government—one can falsely claim to have won a medal in the context of praising or criticizing official policy—or any other particular viewpoint.

Section 704(b)’s prohibition on all knowingly false claims to have won a military award also “reach[es] no farther than is necessary.” *Gertz*, 418 U.S. at 349. First, the provision targets only those representations that reasonably can be understood as factual claims to have won a medal—the type of misappropriation that dilutes the meaning and value of the medals. Second, although the court of appeals emphasized that Section 704(b) does not require that the misrepresentation at issue have caused particularized injury, App., *infra*, 30a-35a, its prohibition of all such misrepresentations is necessary because it is the cumulative effect of false claims that causes the harm that Congress sought to remedy. See pp. 29-30, *infra*; App., *infra*, 74a (Bybee, J., dissenting) (false claims give rise to the misimpression that honors are more frequently awarded than they actually are, thereby “dilut[ing] the select group of those who have earned the nation’s gratitude for their valor”).

**C. Section 704(b) Also Can Be Upheld Under Strict Scrutiny**

Even if the court of appeals was correct in subjecting Section 704(b) to strict scrutiny, the statute survives that test.

As the court acknowledged, the government has a compelling interest in protecting the integrity of its military award system against knowingly false claims that dilute the meaning of the awards. See App., *infra*, 37a; pp. 23-26, *supra*.

The court of appeals held that Section 704(b) is not narrowly tailored because it doubted that “criminally-punishing lies about having received Congressionally-awarded medals is the best and only way to ensure the integrity of the medals.” App., *infra*, 38a. The court suggested that it is speculative to conclude that the meaning of military awards is harmed by those who lie about having received one. *Ibid*. But it is common sense that false representations have the tendency to dilute the value and meaning of military awards. That is why Congress historically has acted to protect military awards from misappropriation. See *Medal of Honor Report* 4 (detailing protection efforts beginning in 1869).

The court also incorrectly assumed that the misrepresentations covered by Section 704(b) are easily discovered and refuted by the public. App., *infra*, 37a-38a. Some misrepresentations may be promptly investigated and exposed, but many others are not discovered for substantial amounts of time, if ever. See, *e.g.*, *United States v. Hinkson*, 585 F.3d 1247, 1254-1256 (9th Cir. 2009) (en banc) (witness used fraudulent military records to fool prosecutors, judge, and defense attorneys with false claim of having won Purple Heart, and district

court initially could not determine based on military records whether the claims were true or false). In addition, public refutation is necessarily an inadequate solution because some military records have been lost, rendering some claims unverifiable. See Office of the Undersec'y of Defense, *Report to the Senate and House Committees on a Searchable Military Valor Decorations Database* 5-8 (2009). Even if those particular false claims cannot be prosecuted as a result of lost records, Section 704(b) deters them in the first place. And because the medals' meaning is eroded by the aggregate effect of these false claims, including claims that are less susceptible to counterspeech, preventing that cumulative harm requires prosecuting the claims that are provably false in order to deter all knowingly false claims.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2011

**APPENDIX A**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 08-50345

UNITED STATES OF AMERICA,  
PLAINTIFF-APPELLEE

*v.*

XAVIER ALVAREZ, AKA JAVIER RGK-1 ALVAREZ,  
DEFENDANT-APPELLANT

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Filed: Aug. 17, 2010

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**OPINION**

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Before: T.G. NELSON, JAY S. BYBEE, and MILAN D.  
SMITH, JR., Circuit Judges.

M. SMITH, Circuit Judge.

Defendant-Appellant Xavier Alvarez conditionally pleaded guilty to one count of falsely verbally claiming to have received the Congressional Medal of Honor, in violation of the Stolen Valor Act (the Act), 18 U.S.C.

§ 704(b), (c),<sup>1</sup> reserving his right to appeal the Act’s constitutionality.

The Act, as presently drafted, applies to pure speech; it 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.

The Act therefore concerns us because of its potential for setting a precedent whereby the government may proscribe speech solely because it is a lie. While we agree with the dissent that most knowingly false factual speech is unworthy of constitutional protection and that, accordingly, many lies may be made the subject of a criminal law without creating a constitutional problem, we cannot adopt a rule as broad as the government and dissent advocate without trampling on the fundamental right to freedom of speech. *See* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1109 (2006) (“[A]ccepting unlimited government power to prohibit all deception in all circumstances would invade our rights of free expression and belief to an intolerable degree, including most notably—and however counterintuitively—our rights to personal and political self rule.”). Rather we hold that regulations of

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<sup>1</sup> Although predecessor versions have existed since 1948, the current form of the Act was passed in 2006. In that year, Congress found that “[f]raudulent claims surrounding the receipt of the Medal of Honor [and other Congressionally authorized military medals, decorations, and awards] damage the reputation and meaning of such decorations and medals,” and that “[l]egislative action is necessary to permit law enforcement officers 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).

false factual speech must, like other content-based speech restrictions, be subjected to strict scrutiny unless the statute is narrowly crafted to target the type of false factual speech previously held proscribable because it is not protected by the First Amendment.

The rule the government and dissent urge us to apply in order to uphold the Act would, if adopted, significantly enlarge the scope of existing categorical exceptions to First Amendment protection. All previous circumstances in which lies have been found proscribable involve not just knowing falsity, but additional elements that serve to narrow what speech may be punished. Indeed, if the Act is constitutional under the analysis proffered by Judge Bybee, then there would be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway. The sad fact is, most people lie about some aspects of their lives from time to time. Perhaps, in context, many of these lies are within the government's legitimate reach. But the government cannot decide that some lies may not be told without a reviewing court's undertaking a thoughtful analysis of the constitutional concerns raised by such government interference with speech.

Finding no appropriate way to avoid the First Amendment question Alvarez poses, we hold that the speech proscribed by the Act is not sufficiently confined to fit among the narrow categories of false speech previously held to be beyond the First Amendment's protective sweep. We then apply strict scrutiny review to the

Act, and hold it unconstitutional because it is not narrowly tailored to achieving a compelling governmental interest.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

Xavier Alvarez won a seat on the Three Valley Water District Board of Directors in 2007. On July 23, 2007, at a joint meeting with a neighboring water district board, newly-seated Director Alvarez arose and introduced himself, stating “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I’m still around.”

Alvarez has never been awarded the Congressional Medal of Honor, nor has he spent a single day as a marine or in the service of any other branch of the United States armed forces. In short, with the exception of “I’m still around,” his self-introduction was nothing but a series of bizarre lies.

Alvarez’s misrepresentations during the 2007 water district board meeting were only the latest in a long string of fabrications. Apparently, Alvarez makes a hobby of lying about himself to make people think he is “a psycho from the mental ward with Rambo stories.” The summer before his election to the water district board, a woman informed the FBI about Alvarez’s propensity for making false claims about his military past. Alvarez told her that he won the Medal of Honor for rescuing the American Ambassador during the Iranian hostage crisis, and that he had been shot in the back as he returned to the embassy to save the American flag. Alvarez reportedly told another woman that he was a Vietnam veteran helicopter pilot who had been shot

down but then, with the help of his buddies, was able to get the chopper back into the sky.

In addition to his lies about military service, Alvarez has claimed to have played hockey for the Detroit Red Wings, to have worked as a police officer (who was fired for using excessive force), and to have been secretly married to a Mexican starlet. As the district court observed, Alvarez “live[s] in a world, a make-believe world where [he] just make[s] up stories all the time . . . . [T]here’s no credibility in anything [he] say[s].”

After the FBI obtained a recording of the water district board meeting, Alvarez was indicted in the Central District of California on two counts of violating 18 U.S.C. § 704(b), (c)(1). Specifically, he was charged with “falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [he] knew, he had not received the Congressional Medal of Honor.” Alvarez appears to be the first person charged and convicted under the present version of the Act.

Alvarez moved to dismiss the indictment, claiming that the Act is unconstitutional both on its face and as applied to him. The district court denied the motion. Alvarez then pleaded guilty to the first count, reserving his right to appeal the First Amendment question. He was sentenced to pay a \$100 special assessment and a \$5,000 fine, to serve three years of probation, and to perform 416 hours of community service. This case addresses Alvarez’s timely appeal of the constitutional issue.

**JURISDICTION AND STANDARD OF REVIEW**

Alvarez brings both facial and as-applied<sup>2</sup> challenges to the validity of the Act under the First Amendment. We review the constitutional question de novo. *See Perry v. L.A. Police Dep't*, 121 F.3d 1365, 1367-68 (9th Cir. 1997).

We have jurisdiction pursuant to 28 U.S.C. § 1291.

**DISCUSSION**

The Act provides:

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

18 U.S.C. § 704(b). The prescribed prison term is enhanced to one year if the decoration involved is the Congressional Medal of Honor, a distinguished-service

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<sup>2</sup> Because, as described further *infra*, the Act is so broadly drafted, the government was not required to prove anything before the district court except that Alvarez made a false statement about his having received the Congressional Medal of Honor—to which Alvarez pleaded guilty. Accordingly, we know very little about what other evidence the government might have been able to introduce in order to prove that Alvarez's particular statements were unprotected. For instance, some evidence in the record suggests he might have made the false claim at issue, or similar misrepresentations, in order to fraudulently obtain certain benefits.

cross, a Navy cross, an Air Force cross, a silver star, or a Purple Heart. *Id.* § 704(c), (d).

## I

The Act proscribes false verbal or written representations about one’s being awarded Congressionally authorized military honors and decorations. The parties do not dispute that the Act “seek[s] to regulate ‘only . . . words.’” *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (quoting *Gooding v. Wilson*, 405 U.S. 518, 520, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972)). Moreover, the Act targets words about a specific subject: military honors. The Act is plainly a content-based regulation of speech.

Content-based speech restrictions ordinarily are subjected to strict scrutiny. *See United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). However, there is an exception to the ordinary rule for “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). As explained recently by the Supreme Court in *United States v. Stevens*:

“From 1791 to the present,” . . . the First Amendment has “permitted restrictions upon the content of speech in a few limited areas,” and has never “include[d] a freedom to disregard these traditional limitations.” These “historic and traditional categories long familiar to the bar[ ]” [ ] includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. . . .

— U.S. —, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010) (internal citations omitted); *see also Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766 (explaining that unprotected speech includes “the lewd and obscene, the profane,<sup>3</sup> the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (listing, in defamation case, other low value speech categories as including: “insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business” (footnotes omitted)).

The primary argument advanced by the government, and our dissenting colleague, is that the speech targeted by the Act—demonstrably false statements about having received military honors—fits within those “well-defined” and “narrowly limited” classes of speech that are historically unprotected by the First Amendment. The government and the dissent rely on *Gertz v. Robert Welch, Inc.* and its progeny for the proposition that “the erroneous statement of fact is not worthy of constitutional protection.” 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). In *Gertz*, the Court classified false statements of fact as “belong[ing] to that category of utterances” that “‘are 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.’” *Id.* at 340, 94 S. Ct. 2997 (quoting

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<sup>3</sup> Since *Chaplinsky*’s list is outdated, *see Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (holding profanity is protected by the First Amendment), we find the current list in *Stevens* to be the most pertinent.

*Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766). Thus, the government and the dissent conclude, regulations of false factual speech may be proscribed without constitutional problem—or even any constitutional scrutiny.

We disagree. *Gertz* does not stand for the absolute proposition advocated by the government and the dissent. See *Nike, Inc. v. Kasky*, 539 U.S. 654, 664, 123 S. Ct. 2554, 156 L. Ed. 2d 580 (2003) (Stevens, J., concurring in dismissal of writ as improvidently granted) (noting that the Court’s statement in *Gertz* that false statements of fact are unprotected speech is “perhaps overbroad[ ]”). Rather, *Gertz*’s statement that false factual speech is unprotected, considered in isolation, omits discussion of essential constitutional qualifications on that proposition.

It has long been clear that First Amendment protection does not hinge on the truth of the matter expressed, see *Sullivan*, 376 U.S. at 271, 84 S. Ct. 710 (“Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth. . . .”), nor does it hinge on the distinction between “facts” and “ideas,” see *Nike*, 539 U.S. at 678, 123 S. Ct. 2554 (Breyer, J., dissenting from dismissal of writ as improvidently granted) (“That the [document containing false statements] is factual in content does not argue against First Amendment protection, for facts, sometimes facts alone, will sway our views on issues of public policy.”). Although statements characterized by *both* falsity and factualness have never been protected “for [their] own sake,” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), the “First Amendment requires that we protect some falsehood in order

to protect speech that matters,” *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997. As eloquently explained in *Sullivan*,

[t]o persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and *even to false statement*. But the people of this nation have ordained in the light of history, that, *in spite of the probability of excesses and abuses*, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

. . . *[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space that they need to survive.*

376 U.S. at 271-72, 84 S. Ct. 710 (internal quotation marks and ellipsis omitted) (emphases added). Thus, while some false factual speech may be proscribable, the Supreme Court has shown that not all of it is. We next consider how the distinction is made.

## II

We begin by noting our rejection of the government’s suggestion that because “[f]alse statements of fact are particularly valueless,” *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988), “Congress may prohibit false statements of fact unless immunity has been carved out or should be carved out because the First Amendment requires protection of some falsehood in order to protect speech that matters.” In other words, the government contends that there is no protection for false statements of fact unless it can be shown, in a particular case, that there should be.

Contrary to the dissent's view, we cannot adopt the government's approach as the general rule for false factual speech without turning customary First Amendment analysis on its head.

First, under the government's proposed approach, it would effectively become the speaker's burden to prove that his false statement should be protected from criminal prosecution. That approach runs contrary to Supreme Court precedent. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986) ("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified."); *see also Sullivan*, 376 U.S. at 271, 84 S. Ct. 710 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . especially one that puts the burden of proving truth on the speaker.").

Second, the government's approach would give it license to interfere significantly with our private and public conversations. Placing the presumption in favor of regulation, as the government and dissent's proposed rule does, would steadily undermine the foundations of the First Amendment. In *Cohen v. California*, the Court rejected state regulation of profanity because "the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?" 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). This case is to that extent analogous. How, based on the principle proposed by the government, would one distinguish the relative value of

lies about one's receipt of a military decoration from the relative value of any other false statement of fact?<sup>4</sup> The government argues that the "protection of false claims of receipt of military honors is not necessary to a free press, to free political expression, or otherwise to promote the marketplace of ideas." But in nearly *every* case, an isolated demonstrably false statement will be not be considered "necessary" to promoting core First Amendment values, and will often be contrary to it. In nearly every case, the false statement will be outweighed by the perceived harm the lie inflicts on the truth-seeking function of the marketplace of ideas. Using such an approach, the government would almost always succeed. However, such an approach is inconsistent with the maintenance of a robust and uninhibited marketplace of ideas. *See Stevens*, 130 S. Ct. at 1585 (explaining that the government's suggestion that

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<sup>4</sup> One possible answer to this question is to use the mode of analysis outlined in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), which holds that even entirely unprotected content cannot be targeted on the basis of view-point. Even here, given that one could frame the Congressional intent behind the Act as intending to prevent telling lies that tend to disparage military, concerns about possible viewpoint discrimination may be legitimate. However, laws targeting false statements of *fact*, including this one, are unlikely to *directly* express or relate to an identifiable viewpoint, meaning that the exception in *R.A.V.* for cases in which "there is no realistic possibility that official suppression of *ideas* is afoot," *id.* at 390, 112 S. Ct. 2538 (emphasis added), would probably apply. Thus, given the difficulty of identifying the potential viewpoint discrimination afoot in laws targeting false statements about simple, demonstrable facts, we do not rely primarily on *R.A.V.* to sort between permissible and impermissible restrictions on speaking false statements of fact. We acknowledge, however, that *R.A.V.* might help us avoid plunging down a logical slippery slope.

“[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs” is “startling and dangerous”). “The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.” *Id.* The language from *Chaplinsky*, borrowed in *Gertz* to establish that false factual statements are “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,” *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766, “do[es] 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.<sup>5</sup>

Profanity and deliberately false statements of fact rarely contribute meaningfully to public debate over important issues, but

[t]he constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended *to remove governmental restraints* from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us. . . .

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<sup>5</sup> Although the dissent denies the proposed rule would result in ad hoc balancing, his own analysis shows that it does. *See* Dissent at p. 1233 (explaining that the Act does not cover speech that matters because “the harm from public officials outright lying to the public on matters of public record should be obvious” and that “our public discourse will not be worse for the loss” caused by chilling “false autobiographical claims by public officials such as Alvarez”).

. . . We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

*Cohen*, 403 U.S. at 24-25, 91 S. Ct. 1780 (emphasis added).

There is certainly no unbridled constitutional right to lie such that any regulation of lying must be subjected to strict scrutiny. However, 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, in our view, an essential component of the protection afforded by the First Amendment. The dissent accuses us of confusing rules with exceptions, but with due respect, we disagree with his postulate that we must commence our constitutional analysis with the understanding that all false factual speech is unprotected. The fundamental rule is found in the First Amendment itself: “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. Any rule that certain speech is not protected by this foundational principle is the exception, which may in turn be subject to other exceptions to protect against such exceptions swallowing the rule.

In other words, we presumptively protect *all* speech against government interference, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection (in this case, for some reason other than the mere fact that it is a lie). Though such an approach may

result in protection for a number of lies, which are often nothing more than the “distasteful abuse of [the First Amendment] privilege,” *Cohen*, 403 U.S. at 25, 91 S. Ct. 1780, it is constitutionally required because the general freedom from government interference with speech, and the general freedom to engage in public and private conversations without the government injecting itself into the discussion as the arbiter of truth, contribute to the “breathing space” the First Amendment needs to survive. See Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 Fla. St. U. L. Rev. 1, 21-22 (2008). “The First Amendment, said Judge Learned Hand, ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.’” *Sullivan*, 376 U.S. at 270, 84 S. Ct. 710 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). “The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.” *Stevens*, 130 S. Ct. at 1585.

### III

If the speech targeted by the Act is to be declared among those classes of speech which can be prohibited without any constitutional problem (the exceptions to the First Amendment), the speech must fit within those “historical and traditional categories long familiar to the bar.” *Id.* at 1584 (internal quotation marks omitted).

We find no authority holding that false factual speech, as a general category unto itself, is among them.<sup>6</sup>

## A

*Gertz* involved a libel action by a private citizen against a newspaper for the newspaper’s reckless printing of an accusation that the plaintiff was a Communist. 418 U.S. at 326-27, 94 S. Ct. 2997. The Court began with the “common ground” that “there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.” *Id.* at 339-340, 94 S. Ct. 2997 (quoting *Sullivan*, 376 U.S. at 270, 84 S. Ct. 710). But the Court did not end there. Rather, it emphasized that “[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate.” *Id.* at 340, 94 S. Ct. 2997. Therefore, “[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.” *Id.* at 341, 94 S. Ct. 2997. To distinguish between the falsehood related to a matter of public concern that is

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<sup>6</sup> Of course, in the area of commercial speech, the analysis that follows might be very different. Here, there is no suggestion that the Act targets commercial speech, and therefore we do not address commercial speech given the unique way in which it is treated under the First Amendment. However, we are additionally persuaded that upholding the Act would require a novel extension of *Gertz* by the fact that, *even in the context of commercial speech*, knowingly false factual speech about a matter of public concern is potentially entitled to heightened First Amendment scrutiny. *See Nike*, 539 U.S. 654, 123 S. Ct. 2554, 156 L. Ed. 2d 580 (dismissing—with a highly fractured Court—certiorari as improvidently granted in a case involving the question of whether false speech with both commercial and public interest aspects is entitled to a degree of First Amendment protection).

protected and that which is unprotected, *Gertz* held that there must be an element of fault. *Id.* at 347, 94 S. Ct. 2997. Indeed, the Court has consistently held that when a speaker publishes a false statement of fact about a matter of public concern, such a statement can be *punished* only upon some showing of *malice* (as opposed to mere negligence),<sup>7</sup> because the malice requirement avoids the potential for punishing speakers who simply make innocent errors. *See Sullivan*, 376 U.S. at 283, 84 S. Ct. 710. The First Amendment is concerned with preventing punishment of innocent mistakes because the prospect of punishment for such speech “runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.” *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997. Thus, many false factual statements are shielded by the First Amendment *even under Gertz*, regardless of how valueless they may be. This is emphasized in *Garrison v. Louisiana*, in which the Court clarified “the *knowingly* false statement . . . do[es] not enjoy constitutional protection.” 379 U.S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) (emphasis added); *see also Sullivan*, 376 U.S. at 283, 84 S. Ct. 710.

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<sup>7</sup> A false statement of fact can be punished upon a showing of mere negligence in the context of purely private defamation. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985). Because we take the statements at issue here to be of public concern, and because a violation of the Act calls for the imposition of a criminal penalty on the violator for speaking about a matter of public concern, an element of malice (*at least* reckless disregard for the truth or falsity of the statement) is necessary to its constitutionality, assuming defamation jurisprudence even governs this case.

Moreover, *Garrison's* clarification is not the only relevant refinement. In defamation jurisprudence, the question has never been simply whether the speech “forfeits [First Amendment] protection by the falsity of some of its factual statements.” *Sullivan*, 376 U.S. at 271, 84 S. Ct. 710. The question is always whether the speech forfeits its First Amendment protection as a result of its falsity “*and by its alleged defamation of [the plaintiff].*” *Id.* (emphasis added). In other words, in a defamation case, a threshold question is whether the false speech at issue is *defamatory*, meaning that the defamer’s false statement is the proximate cause of an irreparable<sup>8</sup> harm to another’s reputation. See *Gertz*,

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<sup>8</sup> On the importance of irreparability, see *infra* pp. 1207-11, 1216-17. The dissent argues at length that we have conjured up this harm element out of whole cloth, see Dissent at p. 1234, but it comes directly from several of the cases about “unprotected” speech. See, e.g., *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766 (identifying fighting words as “those which by their very utterance inflict *injury* or tend to incite an immediate breach of the peace”) (emphasis added); *Gertz*, 418 U.S. at 347, 94 S. Ct. 2997 (describing defamation as “injurious”). We do not mean to suggest, however, that harm is necessarily a required element for *all* unprotected speech regulations (although we find it interesting that it is present in many of them); rather, we note here only that it is a required element of defamation. Defamation, like every “unprotected” category, involves thoughtful and unique definitional analysis, see *infra* n.9. Even obscenity doctrine, which the dissent argues includes no harm element, still requires the statute to define “obscenity” in conformity with the constitutional rule. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973) (reaffirming that obscenity is unprotected, but holding the an anti-obscenity statute must be carefully drafted or construed to meet First Amendment standards). Thus, if defamation law supplies the rule to be applied in this case, we cannot ignore that the definition of defamation includes injury to reputation. See, e.g., *Gertz*, 418 U.S. at 347, 94 S. Ct. 2997; *Sullivan*, 376 U.S. at 271, 84 S. Ct. 710; *Dun & Bradstreet*, 472 U.S. at 762, 105 S. Ct. 2939.

418 U.S. at 327, 94 S. Ct. 2997 (holding that “so long as they do not impose liability without fault, the States may . . . [impose] liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual”).

Since the *Stevens* Court saw fit to name defamation specifically, rather than false statements of fact generally, as the historical category excluded from constitutional protection, we believe the historical category of unprotected speech identified in *Gertz* and related law is defamation, not all false factual speech. The dissent erroneously relies on *Gertz* for its statement that false factual speech is valueless and unprotected, while ignoring what *Gertz* actually *held*, and how the Court in *Gertz* framed the issues and carefully analyzed the First Amendment questions raised in the case. Our dissenting colleague does not, because he cannot, provide any citation to relevant authority that follows his suggested approach, in which the Court characterizes a law as targeting false factual speech under the language of *Gertz* and resolves the case in the government’s favor without engaging in any First Amendment analysis at all.<sup>9</sup> Unlike

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<sup>9</sup> If Judge Bybee is correct, the opinion in this case would need to be no more than a few paragraphs in length. *See* Dissent at pp. 1231-32. Starting with the premise that false statements are unprotected, he believes it therefore follows that the First Amendment presumptively does not apply. He takes one step back to consider briefly whether there is any need to protect the particular false statements targeted by the Act in order to ensure robust political speech, and seeing none, concludes there is no First Amendment issue. The opinion would end there.

Of course, the First Amendment requires more. That is why even in “unprotected” speech cases, the First Amendment analysis is nonethe-

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less rigorous. See *Sullivan*, 376 U.S. at 268, 84 S. Ct. 710 (“Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. *It must be measured by standards that satisfy the First Amendment.*”) (footnotes omitted) (emphasis added); see also *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (articulating First Amendment test for incitement); *Gooding*, 405 U.S. at 522, 92 S. Ct. 1103 (requiring fighting words restrictions to be “carefully drawn”); *Ill. ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 619, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003) (requiring fraud statute to be properly tailored); *Miller v. California*, 413 U.S. 15, 23-24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) (articulating “carefully limited” test for obscenity regulations); *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (engaging in First Amendment analysis to determine test for true threat regulations); *Va. State Bd. of Pharmacy*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (applying intermediate scrutiny to commercial speech). That is also why restrictions on “unprotected” speech are at times invalidated. See, e.g., *Cohen*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (rejecting, on First Amendment grounds, restrictions of profanity); *Gooding*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (striking down fighting words statute); *Hustler*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (prohibiting recovery for emotional distress in libel action); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (finding portions of Communications Decency Act invalid under the First Amendment). Thus, even if one agrees with the dissent that *Gertz* and its progeny requires the historical category of unprotected speech at issue here be defined as knowingly false factual speech per se, that is simply not enough to make the Act immune from First Amendment analysis. Judge Bybee’s approach excepting “some falsehood” when it is necessary to protecting speech that matters reintroduces some First Amendment scrutiny into it, but we believe that approach is not sufficiently speech-protective for the reasons explained *supra* pp. 1205-06. If Judge Bybee is correct, then, we will need an entirely new constitutional rule for false speech regulations. Rather than guess what rule the Court would adopt for this newly-broadened category of unprotected

our dissenting colleague, we are not eager to extend a statement (often quoted, but often qualified) made in the complicated area of defamation jurisprudence into a new context in order to justify an unprecedented and vast exception to First Amendment guarantees.<sup>10</sup> Indeed, *Stevens* instructs us not to do so: “Our decisions [following *Chaplinsky*] cannot be taken as establishing a free-wheeling authority to declare new categories of speech outside the scope of the First Amendment.” 130 S. Ct. at 1586.

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speech, we confine our review to previously defined unprotected categories.

<sup>10</sup> We are not persuaded that *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001), is anything more than a variation on defamation jurisprudence. *Hoffman* applied the actual malice standard from *Gertz-Garrison-Sullivan* in a case involving a magazine’s alleged creation of a false impression that a famous actor posed for a photograph. *Id.* at 1187; *cf. also Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967) (holding constitutional a state law imposing civil liability for malicious false statements that invade a private individual’s right of privacy). Although the asserted injury in *Hoffman* is not to reputation, but instead to a form of publicity rights, the interests at stake are sufficiently similar to defamation that the *Gertz-Garrison-Sullivan* framework can conceptually apply without a significant extension of the doctrine. When the only asserted injury is to the reputation of a *government institution*, the historical basis for finding that the “social interest in order and morality” outweighs the value of precluding government interference with speech is absent. *Chaplinsky*, 315 U.S. at 571-72, 62 S. Ct. 766; *see Gertz*, 418 U.S. at 341, 94 S. Ct. 2997 (“The need to avoid self-censorship by the news media is . . . not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and infeasible immunity from liability for defamation.” (emphasis added)).

With this constitutional background in mind, we next consider whether the Act fits into the defamation category. We assume that receipt of military decorations is a matter of public concern, as it primarily involves Congressional and military recognition of public service. The Act, however, does not require a malicious violation, nor does it contain any other requirement or element of scienter (collectively, a scienter requirement). Without a scienter requirement to limit the Act's application, the statute raises serious constitutional concerns under defamation jurisprudence because the First Amendment clearly prohibits criminally punishing negligent speech about matters of public concern. *See Gertz*, 418 U.S. at 340, 347, 94 S. Ct. 2997.

To avoid such a result, the government preemptively suggested at oral argument that a scienter requirement can be read into the Act. Adopting the government's suggestion (even though the Act presently includes no express scienter element) would require us to construe the Act to include a requirement that the government prove that the defendant spoke with malice. *See Staples v. United States*, 511 U.S. 600, 604-06, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994); *Osborne v. Ohio*, 495 U.S. 103, 115, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990). If a scienter requirement would save the statute, we would be obliged to read it in if possible. *See Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1568 (9th Cir. 1993). Such an approach might be reasonable since most people know the truth about themselves, thereby permitting us to construe the Act to require a knowing violation. Indeed, the government charged Alvarez with *knowingly* making the false statement.

But that is not enough. The Court has never held that a person can be liable for defamation merely for spreading knowingly false statements. The speech must also be “injurious to a private individual.” *Gertz*, 418 U.S. at 347, 94 S. Ct. 2997.

Of course, if we look beyond the text of the Act, there is a presumptive harm identified by Congress that might be analogized to the presumption of reputational harm made in defamation cases. Specifically, Congress made “Findings” that “fraudulent claims” about receipt of military honors “damage the reputation and meaning of such decorations and medals.” Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. at 3266; *see also* 151 Cong. Rec. S12684-01, S12688-99 (2005) (statement of Sen. Conrad). We do not believe the “Findings” make this a defamation statute.

First, while the “Findings” identify the injury the Act targets, they do not actually limit the *application* of the Act. There is no requirement in the Act that the government bear the burden to prove that the defendant’s speech or writing proximately caused damage to the reputation and meaning of military decorations and medals. Although common law traditions suggest that we can sometimes presume damage in defamation cases, *see Gertz*, 418 U.S. at 349-402, 94 S. Ct. 2997, there is no readily apparent reason for assuming, without specific proof, that the reputation and meaning of military decorations is harmed every time someone lies about having received one. To the contrary, the most obvious reason people lie about receiving military honors is because they believe that their being perceived as recipients of such honors brings them acclaim, suggesting that generally the integrity and reputation of such honors remain

unimpaired. And notably, even in defamation cases, a “publication” is required, ensuring that liability attaches only to those falsehoods spoken under circumstances in which the harm could result. In this case, however, we cannot ignore the fact that *nothing* in the Act requires a showing of either (1) publicity or (2) victims. Alvarez made his statement in a water district board meeting; it would have made no difference under the Act if he had he made the statement in the privacy of his home at a family dinner.

More importantly, even if it were justifiable to presume that harm to the meaning and reputation of military decorations occurs whenever a false claim concerning their receipt or possession is made, the government may not restrict speech as a means of self-preservation. The right against defamation belongs to natural persons, not to governmental institutions or symbols. *See Sullivan*, 376 U.S. at 291, 84 S. Ct. 710 (“[N]o court of last resort in this country has ever held, or even suggested, that prosecutions for libel *on government* have any place in the American system of jurisprudence.” (quoting *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86, 88 (1923)) (emphasis added)). Preserving 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,<sup>11</sup> creating educational programs, prohibiting the act of

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<sup>11</sup> Indeed, Congress and other organizations already make such lists publicly available. *See* Congressional Medal of Honor Society, Recipients, <http://www.cmohs.org> (last accessed Mar. 31, 2010); Congressional Medal of Honor Foundation, <http://www.cmohfoundation.org> (last accessed Mar. 31, 2010).

posing as a veteran to obtain certain benefits, or otherwise more carefully circumscribing what is required to violate the Act. But the First Amendment does not permit the government to pursue this sort of objective by means of a pure speech regulation like the one contained in the Act. *See Texas v. Johnson*, 491 U.S. 397, 418-20, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (“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.”); *see also Schacht v. United States*, 398 U.S. 58, 63, 90 S. Ct. 1555, 26 L. Ed. 2d 44 (1970) (“An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance. The last clause of [10 U.S.C. § 772(f)] denies this constitutional right to an actor who is wearing a military uniform by making it a crime for him to say things that tend to bring the military into discredit and disrepute.”).

Finally, even assuming the Act prevents a harm legitimately preventable by means of a speech or writing restriction, to say that the Act in its current form fits within defamation doctrine would require us to ignore the *nature* of the harm against which the defamation law is intended to protect. A victim’s right to recovery for defamation trumps the defamer’s First Amendment interests because, when it comes to *defamatory* falsehoods, “the truth rarely catches up with a lie” so the “opportunity for rebuttal seldom suffices to undo harm.” *Gertz*, 418 U.S. at 344 n.9, 94 S. Ct. 2997; *see also Hustler*, 485 U.S. at 52, 108 S. Ct. 876 (explaining that defamatory falsehoods “cause damage to an individual’s reputation that cannot easily be repaired by counter-

speech, however persuasive or effective”). The harm caused by defamation is thought to be *irreparable* even when the truth is brought to light. Here, in contrast, 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. Indeed, 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”). When 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. *See infra* pp. 1216-17.

Thus, the Act is not sufficiently analogous to an antidefamation law to bring it within the scope of the historical First Amendment exception for laws punishing defamation.

## B

Moving beyond defamation, there are other of the historical categories that may involve false factual speech-fraud and, to a certain extent, speech that is integral to criminal conduct. It is obvious, however, that these categories also include limiting characteristics to what speech may be proscribed beyond mere falsity, just as defamation law does.

Fraud statutes must be precisely crafted to target only specific false statements that are likely to cause a bona fide harm.

[I]n a properly tailored fraud action the State bears the full burden of proof. False statement alone does not subject a [speaker] to fraud liability. . . . [T]o prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so.

*Ill. ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003).

Even laws about perjury or fraudulent administrative filings—arguably the purest regulations of false statements of fact—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 (when one is under an affirmative obligation of honesty) or to the government’s or a private person’s economic interests. *See, e.g., United States v. Dunnigan*, 507 U.S. 87, 94, 113 S. Ct. 1111, 122 L. Ed. 2d 445 (1993) (“A witness testifying under oath or affirmation violates [the perjury statute, 18 U.S.C. § 1621] if she gives false testimony concerning a *material matter* with the *willful intent* to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” (emphases added)); 18 U.S.C. § 1035 (prohibiting *knowing and willful, material* false statements made *to obtain health care benefits*. (emphasis added)). Into this area of the law we would also place *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1262 (9th Cir. 1982) (holding

that the First Amendment does not protect *deliberately* misrepresenting facts *to an administrative body for anticompetitive purposes*).<sup>12</sup> Thus, falsity alone is not enough. The context must be well-defined.

In addition, impersonation statutes are drafted to apply narrowly to conduct performed in order to obtain, at a cost to another, a benefit to which one is not entitled. *See* 18 U.S.C. § 912 (“Whoever falsely *assumes or pretends* to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or *in such pretended character demands or obtains any money, paper, document, or thing of value*, shall be fined under this title or imprisoned not more than three years, or both.” (emphases added)).

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<sup>12</sup> *Clipper Express* supports the cautionary holding we reach today. In that case, we explained:

The first amendment has not been interpreted to preclude liability for false statements. For example, defamatory statements can be made the basis for liability. 18 U.S.C. § 1001 imposes criminal penalties for knowingly and wilfully concealing or misrepresenting material facts before any department or agency of the United States. Courts uniformly punish perjury. As the Supreme Court stated in [*Gertz*, 418 U.S. at 340, 94 S. Ct. 2997], “there is no constitutional value in false statements of fact.” Contrary to defendants’ assertions, there is simply no basis to hold that deliberately misrepresenting facts to an administrative body for anticompetitive purposes enjoys blanket first amendment protection.

690 F.2d at 1261-62. We read *Clipper Express* to explain, as we have done herein, that although false factual speech is not protected for its own sake such that the First Amendment precludes its prosecution, laws prohibiting it must nonetheless target well-defined subsets of speech like defamation or fraud or other clearly-defined criminal conduct.

Since Congress apparently intended the Act to be used to stop fraud, comparing the Act to fraud laws strikingly illustrates the Act's infirmities. In a "properly tailored fraud action" "[f]alse statement alone does not subject a [speaker] to fraud liability." *Ill. ex rel. Madigan*, 538 U.S. at 620, 123 S. Ct. 1829. Rather, there must be proof the false statement was (1) knowing and intended to mislead, (2) material, and (3) did mislead. *Id.* The Act, even were we to read a "knowingly" element into it, *see supra* p. 1209, still lacks the critical materiality, intent to defraud, and injury elements. Indeed, Alvarez pleaded guilty simply to making a knowingly false statement. The government was not required to allege that the statement was material, intended to mislead, or most critically, *did* mislead the listener. Rather, the record here shows, if anything, Alvarez has no credibility whatsoever and that no one detrimentally relied on his false statement. Although we believe that Congress could revisit the Act to modify it into a properly tailored fraud statute, we are not permitted to suggest how it could be done, since such would be a "serious invasion of the legislative domain." *Stevens*, 130 S. Ct. at 1592 (quoting *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 n.26, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995)). Accordingly, we cannot construe the Act as falling within the historical First Amendment exception for anti-fraud laws.

Somewhat relatedly, criminal conduct is not immunized "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949). Thus, laws focused on criminal conduct—like perjury or tax or administrative fraud or impersonating

an officer—raise no constitutional concerns even though they can be violated by means of speech. Unlike such uncontroversial criminal laws, however, the Act makes criminal the speech itself *regardless of any defining context* that assures us the law targets legitimately criminal conduct.<sup>13</sup> Here again, Alvarez was not prosecuted for impersonating a military officer, or lying under oath, or making false statements in order to unlawfully obtain benefits. There was not even a requirement the government prove he intended to mislead. He was prosecuted simply for saying something that was not true. Without any element requiring the speech to be related to criminal conduct, this historical exception from the First Amendment does not apply to the Act as drafted.

## C

In sum, our review of pertinent case law convinces us that the historical and traditional categories of unprotected false factual speech have thus far included only certain *subsets* of false factual statements, carefully defined to target behavior that is most properly characterized as fraudulent, dangerous, or injurious conduct, and not as pure speech. We are aware of no authority holding that the government may, through a criminal law,

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<sup>13</sup> While it may seem unlikely anything but the most egregious violations of the Act would be prosecuted, we do not determine the constitutionality of the Act based on our assumptions of how prosecutors will, in their discretion, enforce it. *See Stevens*, 130 S. Ct. at 1591 (“[T]he 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.”).

prohibit speech *simply* because it is knowingly factually false.

Precedent makes clear that knowing factual error is insufficient “to remove the constitutional shield from criticism of official conduct.” *Sullivan*, 376 U.S. at 273, 84 S. Ct. 710. Hence the historical rejection of the validity of the Alien and Sedition Act, which “made it a crime, punishable by a \$5,000 fine and five years in prison, ‘if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.’” *Id.* at 273-34, 84 S. Ct. 710 (quoting Sedition Act of 1798, 1 Stat. 596). Thus, even though some knowing false statements may be proscribed, that proscription cannot be universal.

Moreover, there can be no doubt that there is affirmative constitutional value in at least some knowingly false statements of fact. Satirical entertainment such as *The Onion*, *The Daily Show*, and *The Colbert Report* thrives on making deliberate false statements of fact. Such media outlets play a significant role in inviting citizens alienated by mainstream news media into meaningful public debate over economic, military, political and social issues. However, even if such satirical writings and shows did not invite attention to and comment about issues of “public importance,” would anyone with even a rudimentary knowledge of First Amendment law seriously argue that the satirical, false statements frequently contained in such writing and programming are cate-

gorically outside First Amendment protection? See *Sullivan*, 376 U.S. at 279 n.19, 84 S. Ct. 710 (“Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’” (quoting John Stuart Mill, *On Liberty* 15 (Oxford: Blackwell 1947))). Further, whether it be method actors getting into character, satirists being ironic or sarcastic, poets using hyperbole, or authors crafting a story, creative persons often make factual statements or assertions which, as they are fully aware, are entirely untrue. Such creative uses of knowingly false speech are highly protected. Cf. *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) (requiring obscenity statutes to apply only to works that “taken as a whole, do not have serious literary, artistic, political, or scientific value”).

Thus, false factual speech as a general category is not, and cannot be, proscribed under threat of criminal prosecution. Although certain subsets of false factual speech have been declared unprotected, such classes of speech were developed as the result of thoughtful constitutional analysis of what other characteristics the speech must have before it can be proscribed without clashing with First Amendment protections. The Act does not fit neatly into any of those “well-defined” and “narrowly limited” classes of speech previously considered unprotected, and we thus are required to apply the highest level of scrutiny in our analysis.

#### IV

Before performing the customary First Amendment analysis, however, we consider alternatively what may perhaps be better authority for the view that the mali-

ciously stated false factual speech is historically unprotected—not *Gertz* and the unique universe of defamation jurisprudence, or the law of fraud, but *Schenck v. United States*, as suggested by Alvarez in his appeal. There, Justice Holmes famously noted that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.” 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470 (1919). Although *Schenck* was concerned with seditious speech, it is particularly instructive here, given that the “clear and present danger” test emerged from the “fire in a theater” hypothetical, which is quintessentially about a false statement of fact.

Generalizing from the “fire in a theater” hypothetical, Justice Holmes went on to hold that “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.” *Id.* (emphasis added). To the extent we are even free to look beyond defamation and fraud for a more general rule concerning prohibition of false factual speech, we agree with Alvarez that the rule from *Schenck* might supply a helpful guideline for defining the relevant subset of false speech that is historically unprotected.<sup>14</sup> Indeed, *Schenck*’s re-

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<sup>14</sup> The “clear and present danger” rule has long been criticized as being insufficiently protective of First Amendment freedoms when it comes to seditious and some other forms of speech. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 910-12 (1963). Indeed, the holding of *Schenck* itself, in which the Court upheld a prosecution for discouraging military enlistment, was accompanied by a strong dissent. However, our purpose here is only to articulate minimum requirements that must be met before a

quirements that any restricted speech be uttered under circumstances likely to be the proximate cause of an imminent harm within the scope of Congress' legitimate reach are highly relevant to the classes of false factual speech we have already identified—defamation, fraud, and speech integral to criminal conduct—and other classes of speech historically held to be unworthy of constitutional protection. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is *directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*” (emphases added)); *Virginia v. Black*, 538 U.S. 343, 360, 363, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (permitting prohibition of “cross burnings done with the intent to intimidate” because “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker *directs a threat to a person . . . with the intent of placing the victim in fear of bodily harm or death*” (emphases added)); *Chaplinsky*, 315 U.S. at 573, 62 S. Ct. 766 (“It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, *the use in a public place of words likely to cause a breach of the peace.*” (emphasis added)).

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false statement of fact can be removed from First Amendment protection under existing precedents. Some false statements of fact made with scienter and likely to cause a real harm might nonetheless deserve constitutional protection, such as the sort of malicious false speech targeted by the Alien and Sedition Act, *see infra* pp. 1213-14. In such a case, additional First Amendment scrutiny would obviously be required.

Following *Schenck*, then, we might articulate the class of false factual speech unprotected by the First Amendment to be that false factual speech which creates a clear and present danger of a harm Congress has a right to prevent. Assuming that the “clear and present danger” test is the more appropriate rule, as Alvarez urges us to do, we agree with him that the Act fails the test for the same reasons the Act is not analogous to anti-defamation laws.

As explained in *Schenck*, the power of the government to punish such speech involves careful consideration of “proximity and degree” of the harm. For the reasons already substantially described *supra* in Part III.A, the speech targeted by the Act does not pose any immediate and irreparable harm; any harm it does cause can be remedied by more speech. Further, the harm the Act identifies—damage to the reputation and meaning of military honors—is not the sort of harm we are convinced Congress has a legitimate right to prevent by means of restricting speech.

## V

Having concluded that the Act does not fit within the traditional categories of speech excluded from First Amendment protection, we must subject it to strict scrutiny review. Indeed,

[e]ven as to [the narrowly limited classes of speech noted in *Chaplinsky*] . . . because the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn . . . the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom[.]

In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. Because First Amendment freedoms need breathing space to survive, government may regulate the area only with narrow specificity.

*Gooding*, 405 U.S. at 522, 92 S. Ct. 1103 (internal quotation marks and citations omitted) (emphases added); see also *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (explaining that the First Amendment requires that statutes targeting the content of speech must be drafted with “precision”). The Court has always carefully considered the contours of regulations purporting to target “unprotected” speech; here, being unconvinced the Act even targets such “unprotected” speech, we are even more mindful of our obligation to ensure the statute is narrowly drawn.

The strict scrutiny standard of review is familiar: the government must show that the law is narrowly tailored to achieve a compelling governmental interest. *Citizens United v. Fed. Election Comm’n*, — U.S. —, 130 S. Ct. 876, 898, — L. Ed. 2d — (2010). A law is not narrowly tailored when less speech-restrictive means exist to achieve the interest. See *Reno*, 521 U.S. at 874, 117 S. Ct. 2329 (holding that although adult content is unprotected as to children, it is protected as to adults, so a law imposing a “burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve”). Even the dissent agrees that the Act fails strict scrutiny. Dissent at n.10.

The asserted governmental interest at issue in the Act is to prevent “fraudulent claims” about receipt of military honors, such claims causing “damage the reputation and meaning of such decorations and medals.” Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. at 3266; *see also* 151 Cong. Rec. S12684-01, S12688-99 (2005) (statement of Sen. Conrad). The government argues that the referenced interest is important to motivating our military. Especially at a time in which our nation is engaged in the longest war in its history, Congress certainly has an interest, even a compelling interest, in preserving the integrity of its system of honoring our military men and women for their service and, at times, their sacrifice.

However, the government has not proven here that the speech restriction is a narrowly tailored means of achieving that noble interest. In *Brown v. Hartlage*, the Supreme Court explained,

Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech [or, in this case, the state interest in protecting the integrity of our national military decoration system] is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount. Whenever compatible with the underlying interests at stake, under the regime of that Amendment “we depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas.” In a political campaign, a candidate’s factual blunder is unlikely to escape the notice of, and correction by, the erring candidate’s political opponent. The preferred First

Amendment remedy of “more speech, not enforced silence,” thus has special force.

456 U.S. 45, 61, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982) (quoting *Gertz*, 418 U.S. at 339-404, 94 S. Ct. 2997, and *Whitney v. California*, 274 U.S. 357, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring)) (ellipses in original). Here, Alvarez’s lie, deliberate and despicable as it may have been, did not escape notice and correction in the marketplace. The preferred First Amendment remedy of “more speech” thus was available to repair any harm. *See also Johnson*, 491 U.S. at 419, 109 S. Ct. 2533 (“[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. 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.” (quoting *Whitney*, 274 U.S. at 377, 47 S. Ct. 641 (Brandeis, J., concurring))).

On this record it is speculative at best to conclude that criminally-punishing lies about having received Congressionally-awarded medals is the best and only way to ensure the integrity of such medals—after all, it seems just as likely that the reputation and meaning of such medals is wholly unaffected by those who lie about having received them. The greatest damage done seems to be to the reputations of the liars themselves. *See supra* pp. 1210-11; *see also United States v. Hinkson*, 611 F.3d 1098, 1114 (9th Cir. 2010) (W. Fletcher, J., dissenting from denial of en banc panel rehearing) (arguing that witness’ credibility would have been impeached had his lie about having received a Purple Heart been ex-

posed to the jury). Further, even assuming that there is general harm to the meaning of military honors caused by numerous imposters, other means exist to achieve the interest of stopping such fraud, such as by using *more* speech, or redrafting the Act to target actual impersonation or fraud. *See supra* pp. 1211-12.

Further, we agree with the reasoning of the District Court of Colorado that suggesting “that the battlefield heroism of our servicemen and women is motivated in any way . . . by considerations of whether a medal may be awarded simply defies . . . comprehension” and is “unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor.” *United States v. Strandlof*, No. 09-cr-00497-REB, 2010 WL 2802691 (D. Colo. Jul. 16, 2010). Even if we were to make the unfounded assumption that our troops perform their riskiest missions in the hope of receiving the Medal of Honor, there is no evidence—nor any reasonable basis for assuming—that some people’s false claims to have received the medal has a demotivating impact on our men and women in uniform.

In sum, honoring and motivating our troops are doubtless important governmental interests, but we fail to see how the Act is necessary to achieving either aim. Accordingly, we hold that the Act is not narrowly tailored to achieve a compelling governmental interest. As presently drafted, the Act is facially invalid under the First Amendment, and was unconstitutionally applied to make a criminal out of a man who was proven to be nothing more than a liar, without more.<sup>15</sup>

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<sup>15</sup> Judge Bybee emphasizes our failure to identify any other unconstitutional applications of the Act. Of course, we cannot identify other in-

We have no doubt that society would be better off if Alvarez would stop spreading worthless, ridiculous, and offensive untruths. But, given our historical skepticism of permitting the government to police the line between truth and falsity, and between valuable speech and drivel, we presumptively protect all speech, including false statements, in order that clearly protected speech may flower in the shelter of the First Amendment. The government has not rebutted that presumption here because the Act is not sufficiently analogous to traditional permissible restrictions on false speech.

### CONCLUSION

In order to advance Congress's praiseworthy efforts to stop fraudulent claims about having received Congressionally authorized military honors, the government would have us extend inapposite case law to create an unprecedented exception to First Amendment guarantees. We decline to follow such a course, and hold that the Act lacks the elements that would make it analogous to the other restrictions on false speech previously held to be proscribable without constitutional problem. Accordingly, we hold that the Act is not narrowly drawn to achieve a compelling governmental interest, and is unconstitutional.

REVERSED. The case is REMANDED to the district court for proceedings consistent with this opinion.

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valid applications because Alvarez's prosecution is the first case brought under the Act in its current form. The second prosecution we know of, *United States v. Strandlof*, No. 09-cr-00497-REB, 2010 WL 2802691, ended in the defendant's favor, with the district court holding the Act unconstitutional for substantially the same reasons we do.

BYBEE, Circuit Judge, dissenting:

Xavier Alvarez, a California public official, stood in a public meeting and announced that he was a retired Marine, a wounded veteran, and the recipient of the Congressional Medal of Honor. Alvarez was lying on all counts. He pleaded guilty to violating the Stolen Valor Act of 2005 (“Act”), which punishes a person who “falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.” 18 U.S.C. § 704(b). He now challenges his conviction on First Amendment grounds.

In its recent decision in *United States v. Stevens*, — U.S. —, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010), the Supreme Court reminded us that there are “categories of speech . . . fully outside the protection of the First Amendment.” *Id.* at 1586. As to these categories—which the Court labeled “historic and traditional categories long familiar to the bar”—“the First Amendment has permitted restrictions upon the content of speech.” *Id.* at 1584 (quotation marks omitted).

For more than six decades, the Court has recognized that “false statements of fact . . . belong to th[e] category of utterances which ‘are no essential part of any exposition of ideas, and are 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.’” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)). The Court has stated as plain as words permit that “the erroneous statement of fact is not worthy of constitutional protection.” *Id.*;

see also *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 531, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002) (“[F]alse statements [are] unprotected for their own sake.”); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas . . . .”); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) (false statements of fact have “no constitutional value” because they “harm both the subject of the falsehood *and* the readers of the statement” (quotation marks omitted)); *Bill Johnson’s Rests., Inc. v. N.L.R.B.*, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983) (“[F]alse statements are not immunized by the First Amendment right to freedom of speech.”); *Herbert v. Lando*, 441 U.S. 153, 171, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979) (“Spreading false information in and of itself carries no First Amendment credentials.”). False statements are unprotected by the First Amendment except in a limited set of contexts where such protection is necessary “to protect speech that matters,” *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997, such as “expression critical of the official conduct of public officials,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 268, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). And even in these special contexts, “the *knowingly* false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.” *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) (emphasis added).

Despite the clarity and consistency of the Supreme Court’s insistence that false statements of fact (or “false statements”) generally fall outside First Amendment protection, the majority somehow manages to “find *no*

*authority* holding that false factual speech, as a general category unto itself, is among [the historically unprotected classes of speech],” Maj. Op. at 1206 (emphasis added), and concludes that “we presumptively protect . . . false statements,” *id.* at 1217. The majority then moves from this faulty principle to an even more remarkable one: after repeating the Court’s statement in *Garrison* that “the *knowingly* false statement . . . do[es] not enjoy constitutional protection,” Maj. Op. at 1207 (alteration and ellipsis in original) (quoting *Garrison*, 379 U.S. at 75, 85 S. Ct. 209), the majority holds that Alvarez’s *knowingly* false statement of fact is entitled to *full* constitutional protection, and therefore that the court is “required to apply the highest level of scrutiny in [its] analysis” of the Act, *id.* at 37; *see also id.* at 3 (“[R]egulations of false factual speech must . . . be subjected to strict scrutiny. . . .”). Standing on these startling premises, the majority delivers its final blow: the Act fails strict scrutiny and is thus unconstitutional not only as applied to Alvarez, but in all its applications. *See id.* at 45-46.

I would hold that the Act is constitutional as applied to Alvarez and that the Act is not unconstitutionally overbroad. Because the majority has rewritten established First Amendment law, I respectfully dissent.

## I

Before turning to Alvarez’s as-applied and facial challenges and the majority’s errors with respect to the particular elements of this case, I am going to begin by discussing the First Amendment framework under which the Supreme Court analyzes false statements of fact, which involves a general rule and a series of exceptions. I then explain why I think the majority has mis-

read the cases and, in the process, turned the exceptions into the rule and the rule into an exception.

### A

The First Amendment states, in relevant part: “Congress shall make no law . . . abridging the freedom of speech. . . .” U.S. CONST. amend. I. “As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *United States v. Stevens*, — U.S. —, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010) (alteration and quotation marks omitted) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002)). A content-based restriction of constitutionally protected speech “can stand only if it satisfies strict scrutiny,” *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000), meaning that it “is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end,” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

But not all speech is entitled to First Amendment protection. Rather, “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem” because “such utterances are no essential part of any exposition of ideas, and are 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.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). Included among these “classes of speech” are “obscenity, defamation, fraud,

incitement, and speech integral to criminal conduct.” *Stevens*, 130 S. Ct. at 1584 (citations omitted); *see also* *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766.

“Defamation” as a class of speech falls within the unprotected category of speech that the Court has referred to as “false statements of fact.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). In *Gertz*, the Court explained the difference between false statements of fact and false ideas: “Under the First Amendment there is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact.” *Id.* at 339-40, 94 S. Ct. 2997. It then held that “the erroneous statement of fact is not worthy of constitutional protection.” *Id.* at 340, 94 S. Ct. 2997. The Supreme Court has regularly repeated, both inside and outside of the defamation context, that false statements of fact are valueless and generally not within the protection of the First Amendment. *See, e.g.,* *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 531, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002) (“[F]alse statements [are] unprotected for their own sake.”); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas. . . .”); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) (false statements of fact have “no constitutional value” because they “harm both the subject of the falsehood *and* the readers of the statement” (quotation marks omitted)); *Bill Johnson’s Rest., Inc. v. N.L.R.B.*, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983) (“[F]alse statements are not immunized by the First Amendment right to freedom of speech.”); *Herbert v. Lando*, 441 U.S. 153, 171, 99 S. Ct. 1635, 60

L. Ed. 2d 115 (1979) (“Spreading false information in and of itself carries no First Amendment credentials.”); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 499 n.3, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) (Powell, J., concurring) (“[T]he First Amendment affords no constitutional protection for false statements of fact.”). Because false statements of fact do not enjoy the protection of the First Amendment, such statements may ordinarily be regulated by the government. Congress, for example, has provided criminal penalties for any number of false statements of fact uttered in a variety of contexts. *See, e.g.*, 18 U.S.C. pt. I, ch. 47 *passim* (“Fraud and false statements”).

Thus, the general rule is that false statements of fact are not protected by the First Amendment.<sup>1</sup> There is,

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<sup>1</sup> The majority disagrees with my characterization of *Gertz*’s principle as a “general rule” and of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and its progeny as “exceptions.” The majority argues that “[t]he fundamental rule is found in the First Amendment itself: ‘Congress shall make no law . . . abridging the freedom of speech.’” Maj. Op. at 1205 (ellipsis in original) (quoting U.S. CONST. amend. I). Thus, the majority continues, “[a]ny rule that certain speech is not protected by this foundational principle is the exception, which may in turn be subject to other exceptions to protect against such exceptions swallowing the rule.” *Id.*

The majority has misunderstood the concept of unprotected speech. It is not true, as the majority states, that “we presumptively protect all speech against government interference.” *Id.* The First Amendment does not protect all “speech” but rather “the freedom of speech,” which *does not include* those categories of speech traditionally considered outside of First Amendment protection. *See* John Paul Stevens, *The Freedom of Speech*, 102 YALE L. J. 1293, 1296 (1993) (“I emphasize the word ‘the’ as used in the term ‘the freedom of speech’ because the definite article suggests that the draftsmen intended to immunize a *previously identified category or subset of speech*. That category could

however, an important exception to this principle: where protecting a false statement is necessary “in order to protect speech that matters.” *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997; *see also* *BE & K*, 536 U.S. at 531, 122 S. Ct. 2390 (“[W]hile false statements may be unprotected for their own sake, [t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.” (emphasis omitted) (second alteration in original) (quoting *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997)). In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the seminal case in this area, the Court extended limited First Amendment protection to libelous statements “critical of the official conduct of public officials.” *Id.* at 268, 84 S. Ct. 710. Because “erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive,’” the Court feared that permitting public officials to bring tort claims against their critics based on a false statement of fact would “lead[ ] to . . . ‘self-censorship,’” deterring such critics “from voicing their criticism[ ] even though it is believed to be true and even though it is in fact true.” *Id.* at 271-72, 279, 84 S. Ct. 710 (ellipsis omitted). In order to protect against such “self-censorship,” the Court adopted “a federal rule

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not have been coextensive with the category of oral communications that are commonly described as ‘speech’ in ordinary usage. . . . The Amendment has never been understood to protect all oral communication.” (emphasis added)). Thus, the lack of protection afforded false statements of fact is no more of an “exception” to the First Amendment than the lack of First Amendment protection afforded the pulling of a gun trigger. Neither of these activities is considered *part of* “the freedom of speech,” so neither should be characterized as an *exception* to the First Amendment.

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.” *Id.* at 279-80, 84 S. Ct. 710. The Court has extended the *New York Times* “actual malice” rule to “public figures” even if they are not “public officials,” *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), but has “refus[ed] to extend the *New York Times* privilege to defamation of private individuals,” even with respect to matters of public concern, *Gertz*, 418 U.S. at 351, 94 S. Ct. 2997.<sup>2</sup>

Consistent with the principle set forth in *New York Times*, the Court held, in *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964), that “the *knowingly* false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.” *Id.* at 75, 85 S. Ct. 209 (emphasis added); *see also id.* (“Calculated falsehood falls into that class of utterances which ‘are no essential part of any exposition of ideas. . . .’” (quoting *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766)). In *Gertz*, the Court confirmed that knowing lies are excluded from the limited First Amendment protection *New York Times* established for false statements of fact: “[T]he intentional lie . . . [does not] materially advance[ ] society’s interest in ‘uninhibited, robust, and wide-open’ debate on public

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<sup>2</sup> Although the Court in *Gertz* “allow[ed] the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*,” the Court held that damages are limited to “compensation for actual injury.” *Gertz*, 418 U.S. at 348-49, 94 S. Ct. 2997.

issues.” *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997 (quoting *New York Times*, 376 U.S. at 270, 84 S. Ct. 710). Although *Garrison* and *Gertz* both involved defamation, the Supreme Court and our court have extended *Garrison*’s rule beyond the defamation context, as will be discussed in Part I.B.2.

There is, however, an important caveat to the principle that knowingly false statements of fact are not entitled to constitutional protection. See Maj. Op. at 1213-14. The Court has recognized that some statements that, literally read, are technically “knowingly false” may be “no more than rhetorical hyperbole,” *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970), or “lusty and imaginative expression,” *Nat’l Ass’n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 286, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974), such as satire or fiction. In *Hustler*, the Supreme Court held that the First Amendment protects defamatory statements about a public figure “that could not reasonably have been interpreted as stating actual facts about the public figure involved.” 485 U.S. at 50, 108 S. Ct. 876. And in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), the Court clarified that such protection “provides assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation.” *Id.* at 20, 110 S. Ct. 2695 (quotation marks omitted); see also *Knievel v. ESPN*, 393 F.3d 1068, 1074 (9th Cir. 2005) (stating that “[t]he First Amendment protects statements that cannot reasonably [be] interpreted as stating actual facts about an individual” because of “the reality that exaggeration and non-literal commentary have become an integral part of so-

cial discourse” (quotation marks omitted) (second alteration in original)). In a sense, the Court has established that “lies” made in the context of satire and imaginative expression are not really lies at all and perhaps not really even statements of “fact,” because no reasonable listener could actually believe them to be stating actual facts.

In sum, the Supreme Court’s jurisprudence on false statements of fact involves a general rule with certain exceptions and exceptions-to-exceptions. In general, “there is no constitutional value in false statements of fact,” and so “the erroneous statement of fact is not worthy of constitutional protection.” *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997. However, this general principle is subject to certain limited exceptions where First Amendment protection is necessary “to protect speech that matters,” *id.* at 341, 94 S. Ct. 2997, and to ensure that the “freedoms of expression . . . have the ‘breathing space’ that they ‘need to survive,’” *New York Times*, 376 U.S. at 271-72, 84 S. Ct. 710 (alteration omitted). Accordingly, a defamatory false statement of fact made about a public figure is constitutionally protected if it is made without “knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 280, 84 S. Ct. 710. On the other hand, “the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.” *Garrison*, 379 U.S. at 75, 85 S. Ct. 209. The only qualifier to this rule is that statements that are technically “knowingly false” receive constitutional protection when they “c[an]not reasonably have been interpreted as stating actual facts.” *Hustler*, 485 U.S. at 50, 108 S. Ct. 876.

## B

Notwithstanding the Court's pronouncements on the unprotected status of false statements of fact, the majority "find[s] no authority holding that false factual speech, as a general category unto itself, is among [the historically unprotected classes of speech]," Maj. Op. at 1206, and concludes that "we presumptively protect . . . false statements," *id.* at 1217. The majority believes that, when the Supreme Court has said that "false statements of fact" are unprotected by the First Amendment, what the Court actually meant was that *defamation* is unprotected by the First Amendment. *See id.* at 1208 ("[W]e believe the historical category of unprotected speech identified in *Gertz* and related law is defamation, not all factual speech."). From this premise, and after refusing to "extend" the unprotected category of speech (defamation) to false statements generally, *id.* at 1208, the majority suggests that false statements of fact are generally entitled to *full* constitutional protection, even if they are *knowingly* false, unless they are defamatory, fraudulent, or integral to criminal conduct, *see id.* at 1211-13.

The majority has effectively overruled *Gertz* and inverted the whole scheme. The Supreme Court has told us consistently that the general rule is that false statements of fact are unprotected, and has carved out certain limited exceptions to this principle in certain contexts. The majority flips this framework around and suggests that false statements of fact are generally unprotected *only* in contexts like defamation and fraud, and that outside these contexts they are fully protected. *See id.* at 1213 ("[T]he historical and traditional categories of unprotected false factual speech have thus far

included only certain *subsets* of false factual statements. . . .”); *id.* at 1213 (finding that only “certain subsets of false factual speech have been declared unprotected,” and that “[t]he Act does not fit neatly into any of those . . . classes”). In other words, the majority limits the general rule to its exceptions. In my view, the majority is wrong for a number of reasons.

## 1

As a general matter, the majority’s principle rests on a line of reasoning that I cannot endorse: that our jurisprudence should rest on what we think the Supreme Court “means” rather than what it actually says, and thus, because the Supreme Court means “defamation” when it says “false statements of fact,” only the former represents an unprotected category of speech. The majority even considers it “erroneous[ ]” for me to “rel[y] on *Gertz* for its statement that false factual speech is valueless and unprotected.” *Id.* at 1203.

With all due respect, I believe that reliance on *Gertz*’s statement (and the Court’s numerous other statements to the same effect) is not only far from “erroneous[ ]” but *obligatory*. We do not have the authority as a lower court to limit the Court’s statements to what we believe they mean rather than what they actually say. *Gertz* could have used the terms “defamation” or “libel” rather than “false statements of fact” to describe the unprotected category of speech—it presumably knew what these terms mean—but it did not. Because the Court has told us unambiguously that “false statements of fact” are generally unprotected by the First Amendment, this principle should be the starting point

for our analysis, not the point for the majority's departure from the principle.<sup>3</sup>

## 2

Even if we had the authority to limit the Supreme Court's statements to what we think they mean rather than what they actually say, the Supreme Court *did* (and does) mean that "false statements of fact" are *generally* unprotected and that (non-satirical and non-theatrical) knowingly false statements of fact are *always* unprotected. Supreme Court precedent, Ninth Circuit precedent, and logic compel this conclusion.

The Supreme Court has used the same framework for analyzing false statements of fact in cases involving *neither* defamation *nor* fraud as it did in *New York Times*, *Garrison*, and *Gertz*; these cases demonstrate that the Court's statements regarding the general unprotected nature of "false statements of fact" and its even more conclusive statements regarding *knowingly* false statements of fact apply to cases outside the defamation/fraud context. In these cases involving neither defamation nor fraud, the Court began with the premise that false statements of fact are unprotected, and its entire analysis was directed toward deciding whether the application of *New York Times's* "actual malice"

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<sup>3</sup> The majority's reliance on Justice Stevens's opinion in *Nike, Inc. v. Kasky*, 539 U.S. 654, 123 S. Ct. 2554, 156 L. Ed. 2d 580 (2003), *see* Maj. Op. at 1202-03, gives away its true intentions. In that case, Justice Stevens concurred in the Court's *dismissal of the grant of certiorari* and, in a parenthetical, suggested that *Gertz's* statement that there is no constitutional value in false statements of fact was "(perhaps overbroad [ ])." *Id.* at 664, 123 S. Ct. 2554. Justice Stevens stopped far short of suggesting that *Gertz* should be overruled, but that is the implication the majority takes away.

standard was necessary in that case to protect speech that matters. Although the Court at times decided that the non-defamation case before it *was* such a case where *New York Times's* “actual standard” was necessary, it was careful to emphasize, consistent with *Garrison*, that false statements made *with* actual malice fall outside of First Amendment protection. In other words, the only reason that there was even a need for discussion was because the statement in question was arguably made *without* “actual malice”; if the statement in question had been clearly uttered with actual malice, the statement would be unprotected irrespective of whether *New York Times* applied.

In *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967), for example, the Court held that an award of damages under New York’s “right of privacy” law based on “allegations that [defendant] falsely reported that a new play portrayed an experience suffered by [plaintiff],” *id.* at 376-77, 87 S. Ct. 534, could not be sustained without “proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth,” *id.* at 388, 87 S. Ct. 534. After careful analysis, rather than “through blind application of *New York Times*,” *id.* at 390, 87 S. Ct. 534, the Court concluded that “sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising constitutional guarantees,” *id.* at 389, 87 S. Ct. 534. At the same time, the Court was careful to stress, relying on *Garrison*, that “[t]he use of *calculated* falsehood . . . would put a different cast on the constitutional question.” *Id.* at 390, 87 S. Ct. 534 (emphasis added) (quoting *Garrison*, 379 U.S. at 75, 85 S. Ct. 209). The Court declared that “the constitutional guarantees can tolerate sanctions

against calculated falsehood without significant impairment of their essential function.” *Id.* at 389, 85 S. Ct. 209; *see also id.* at 390, 85 S. Ct. 209 (“What we said in *Garrison* . . . is *equally applicable* [here].” (emphasis added)).

And in *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), the Court applied the *New York Times* framework to a case involving a teacher who claimed that his First Amendment rights were violated when he was terminated for sending to a local newspaper a letter containing false statements of fact critical of the district superintendent. *See id.* at 572-74, 88 S. Ct. 1731. As in *Time*, the Court in *Pickering* started from the premise that false statements of fact are unprotected, and the only question was whether the context it was dealing with was similar enough to defamation to merit the application of *New York Times*’s “actual malice” rule. *See id.* at 574, 88 S. Ct. 1731. The Court concluded that the potential for self-censorship was sufficient to warrant *New York Times*’s “actual malice” requirement, but made clear that the extent of constitutional protection was limited: “[I]n a case such as this, *absent* proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.” *Id.* (emphasis added) (footnote omitted).<sup>4</sup>

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<sup>4</sup> Although *BE & K* and *Bill Johnson*’s did not involve the freedom of speech *per se* but rather the First Amendment right to petition, these decisions are further examples of the Court’s reliance on *Gertz*’s principle outside of the defamation context. *See BE & K*, 536 U.S. at 531, 122 S. Ct. 2390 (“[F]alse statements [are] unprotected for their own sake. . . .” (citing *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997)); *Bill Johnson*’s, 461 U.S. at 743, 103 S. Ct. 2161 (“Just as false statements are not

Nothing in the Court’s recent decision in *Stevens* is to the contrary. The majority believes that, “[s]ince the *Stevens* Court saw fit to name defamation specifically, rather than false statements of fact generally, as the historical category excluded from constitutional protection, . . . the historical category of unprotected speech identified in *Gertz* and related law is defamation, not all factual speech.” Maj. Op. at 1223. But *Stevens*’s use of the word “defamation” is nothing new. As far back as *Chaplinsky*, the Court has frequently used the words “defamation” and “libel” to describe one of the categories of unprotected speech. *See* 315 U.S. at 572, 62 S. Ct. 766 (including among the unprotected “classes of speech” “the lewd and obscene, the profane, the *libelous*, and the insulting or ‘fighting’ words” (emphasis added)). Then, in *Gertz*, the Court used the broader term “false statements of fact” to describe this category. 418 U.S. at 340, 94 S. Ct. 2997; *see also* *BE & K*, 536 U.S. at 531, 122 S. Ct. 2390; *Hustler*, 485 U.S. at 52, 108 S. Ct. 876. Because most of the Court’s opinions in this historically unprotected category have dealt with defamation, and because the Court has used both the terms “defamation” and “false statements of fact” to describe speech within the unprotected category, there is nothing interesting about *Stevens*’s use of the term “defamation.” If *Stevens* truly stands for the proposition that only defamatory statements—and not false statements of fact generally—constitute the unprotected category, then *Stevens* overruled *sub silentio* every Supreme Court case using the general term “false statements of fact” and every case applying the *New York Times-Gertz-Garrison*

immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition.” (citations omitted) (citing *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997).

framework outside of the defamation context. I find this hard to believe.

Similar considerations demonstrate why the majority is misguided in relying upon *Stevens*'s statement that “[o]ur decisions [following *Chaplinsky*] cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.” Maj. Op. at 1209 (second alteration in original) (quoting *Stevens*, 130 S. Ct. at 1586); *see also id.* at 1207-08 (“Unlike our dissenting colleague, we are not eager to extend a statement (often quoted, but often qualified) made in the complicated area of defamation jurisprudence into a new context. . . .”). *Stevens* involved the potential creation of a truly “new” category of unprotected speech: “depictions of animal cruelty.” 130 S. Ct. at 1584. This case, in contrast, involves a *pre-existing* category of unprotected speech: false statements of fact. Thus, no “expansion” of First Amendment jurisprudence is necessary to hold that Alvarez’s false statements are not protected.

Our own cases are in accord with the principle that false statements of fact (not just defamatory or fraudulent false statements) are generally unprotected by the First Amendment, although we have recognized that “constitutional protection is afforded *some* false statements.” *Johnson v. Multnomah County*, 48 F.3d 420 (9th Cir. 1995) (emphasis added). We have often applied the *New York Times-Garrison-Gertz* framework outside of the defamation and fraud context.

In *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982), for example, we held that “[t]here is no first amendment protection for furnishing with predatory intent false informa-

tion to an administrative or adjudicatory body,” and thus the First Amendment did not shield the defendants from *antitrust* liability. *Id.* at 1261; *see also id.* (“The first amendment has not been interpreted to preclude liability for false statements. . . . ‘[T]here is no constitutional value in false statements of fact.’” (quoting *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997)). We “recogniz[ed] that under certain circumstances allowing the imposition of liability for statements can hamper debate, *see New York Times*,” which “*may* suggest that a court should adopt a stricter standard of proof,” but we determined that defendants’ statements were unprotected regardless of the correct standard of proof because “defendants *knew* the falsity of their statements.” *Id.* at 1262 (emphases added). In other words, the defendants’ knowledge of the falsity of their statements placed the defendants’ statements clearly outside of the First Amendment. Thus, unlike in *Time* and *Pickering*, there was no need for any further discussion of whether the *New York Times* “actual malice” requirement applied. *See id.*

More recently, in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001), we applied the *New York Times* framework to a case in which the plaintiff claimed that his common law right of publicity had been violated by the defendant’s publication of an altered photograph of the plaintiff’s name and likeness, *see id.* at 1183, which “create[d] a false impression in the minds of the public that they were seeing [the plaintiff’s] body,” *id.* at 1186 (quotation marks omitted). Regarding the defendant’s First Amendment defense, we determined that the question was whether the district court correctly held that the First Amendment did not protect the defendant’s publication because the defendant “pub-

lished that image *knowing* it was false and intending that the readers believe the falsehood.” *Id.* (emphasis added). Although we eventually concluded that the district court erred in finding that “actual malice” existed, *id.* at 1189, the important point is that a finding of knowledge as to falsity would have meant that the defendant’s publication was not protected by the First Amendment, irrespective of the fact that the purported falsehood was not defamatory or fraudulent.<sup>5</sup>

Under the majority’s view, the Supreme Court’s decisions in *Time* and *Pickering*, and our decisions in *Clipper Express* and *Hoffman*, are all disapproved, if not overruled. But even putting aside these precedents, I do not believe that the majority’s principle is logical. Given that the Court has clearly recognized defamation as one of the exceptional situations where protecting certain false statements is necessary to “protect speech that matters,” *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997, I cannot see how *Gertz* could have meant “defamation” when it said that “false statements of fact” are unprotected. If that were true, there would be nothing left of *Gertz*’s statement that false statements of fact fall outside of First Amendment protection. In other words, the majority interprets *Gertz* the following way: defamation is unprotected by the First Amendment, but it is necessary to protect defamation in order to protect speech that

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<sup>5</sup> The majority is “not persuaded that *Hoffman* . . . is anything more than a variation on defamation jurisprudence.” Maj. Op. at 1208-09 n.10. But although the false statements in *Hoffman* were arguably more like defamation than the false statements in Alvarez’s case, *Hoffman* and similar cases nevertheless demonstrate that “false statements of fact” means “*false statements of fact*,” not simply “defamation,” and that the former represents the historically unprotected category of speech, not the latter.

matters. Under the majority’s logic, *Gertz* is internally inconsistent, and the exception has swallowed up the rule.

## 3

Although I believe that it is clear that the Supreme Court’s statements regarding false statements of fact extend outside of the defamation and fraud context, I nevertheless find it necessary to respond to the majority’s misguided “bona fide harm” theory. The majority asserts that the Supreme Court has extended the *New York Times-Garrison-Gertz* framework only to false statements “likely to cause a bona fide harm,” such as those that constitute fraud. Maj. Op. at 1211. In other words, the majority suggests that a false statement loses First Amendment protection only if it is likely to cause a cognizable—indeed, “irreparable”—harm. *Id.* at 1207. Based on this premise, the majority might assert that the Court applied the *New York Times-Garrison-Gertz* framework in *Time*, *Pickering*, *Clipper Express*, and *Hoffman* because the false statements in those cases were likely to cause a cognizable harm, but the false statements punished by the Stolen Valor Act are fully protected because these statements do not generally produce what the majority considers to be a “bona fide harm.” *See id.* at 1212 n.12. I respectfully disagree.

## a

The likelihood of a “bona fide harm” has nothing to do with whether a category of speech loses First Amendment protection. *Stevens* rejected the notion that the First Amendment protection afforded a class of speech depends on a consideration of the “societal costs” of the class of speech. 130 S. Ct. at 1585. Rather, whether a

category of speech is constitutionally protected is a *historical* question that depends on whether a class of speech has traditionally been thought to be of low First Amendment *value*. As the Supreme Court reiterated in *Stevens*:

From 1791 to the present, . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these *traditional* limitations. These *historic* and *traditional* categories long familiar to the bar . . . are well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.

*Id.* at 1584 (emphases added) (quotation marks and citations omitted) (alteration in original); *see also id.* at 1586 (noting that the Court's First Amendment cases regarding speech outside First Amendment protection have "grounded[their] analysis in a *previously recognized, long-established* category of unprotected speech" (emphasis added)); *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766 (describing unprotected classes of speech as "utterances [that] are *no essential part of any exposition ideas*, and are 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" (emphases added)). Once again, decades of Supreme Court case law make clear that false statements of fact are one of those classes of speech that are generally considered to be of low First Amendment value and therefore have traditionally fallen outside First Amendment protection.

I agree with the majority that the Court’s statements in this regard cannot be interpreted as “absolute proposition[s],” Maj. Op. at 1202-03, because the Court has established that, although “false statements may be unprotected for their own sake,” *BE&K*, 536 U.S. at 531, 122 S. Ct. 2390, the Constitution “requires that we protect *some* falsehood in order to protect speech that matters,” *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997 (emphasis added). But the protection the Court has afforded for “*some* falsehood” has been limited to narrow subsets within the historically unprotected category—*certain* false statements of fact critical of public figures if made without “knowledge that [they are] false or with reckless disregard of whether [they are] false or not,” *New York Times*, 376 U.S. at 280, 84 S. Ct. 710; *certain* false statements of fact in contexts similar to defamation, such as intrusions on a public figure’s privacy, *see Time*, 385 U.S. at 376-77, 388, 87 S. Ct. 534, and criticisms of one’s superior, *see Pickering*, 391 U.S. at 572-74, 88 S. Ct. 1731; and *certain* false statements of fact that “c[annot] reasonably have been interpreted as stating actual facts,” *Hustler*, 485 U.S. at 50, 108 S. Ct. 876. The fact that the Supreme Court has extended limited constitutional protection to some false statements of fact in defamation and defamation-like cases and that these cases generally involve a cognizable harm to a particular party does not demonstrate that a cognizable harm is a *prerequisite* before a false statement of fact loses its First Amendment protection. Rather, the spheres of protection carved out in *New York Times*, *Hustler*, and like cases represent limited *exceptions* to the general rule that false statements of fact are *not protected* by the First Amendment, irrespective of a cognizable harm to a specific person. *See Keeton*, 465 U.S. at 776, 104 S. Ct.

1473 (false statements of fact have “no constitutional value” because they “harm *both* the subject of the falsehood *and* the readers of the statement” (first emphasis added) (quotation marks omitted)). If a false statement of fact does not fall within one of these exceptions, it falls within the general historically unprotected category of speech, and the absence of “harm” is irrelevant.

b

The Court’s obscenity jurisprudence is an embarrassment to the majority’s newly-minted “harm” requirement. The Court has long held that obscene speech is not protected by the First Amendment, *see Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766, because it is “utterly without redeeming social importance,” *Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), and not because the states have satisfied some “proof of harm” requirement. In *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), the Supreme Court defined works that are “obscene” and therefore fall outside the protection of the First Amendment, and “bona fide harm” is notably absent as a requirement under its definition. The Court stated:

[W]e now confine the permissible scope of [obscenity] regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

*Miller*, 413 U.S. at 24, 93 S. Ct. 2607 (footnote omitted).

We might say, of course, that obscenity is *generally* harmful, or that obscenity has traditionally been *thought* to be harmful given that obscenity regulations represent a legislative determination that obscene materials generally degrade our morals or endanger public safety. But the majority holds the Stolen Valor Act unconstitutional because it does not require *proof* that any particular statement causes harm. While acknowledging Congress’s finding that false claims like Alvarez’s “damage the reputation and meaning of [military] decorations and medals,” Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. 3266 (2005) (the “Findings”); Maj. Op. at 1209-10, the majority emphasizes that the Findings “do not actually limit the *application* of the Act” because “[t]here is no requirement in the Act that the government bear the burden to *prove* that the defendant’s speech or writing proximately caused damage to the reputation and meaning of military decorations and medals,” Maj. Op. at 1210 (second emphasis added).<sup>6</sup>

The problem is that this is true of obscenity regulations as well; although obscenity laws are generally targeted at some cognizable harm, they do not explicitly require that the government even *identify*, much less *prove*, a cognizable harm in every case. Indeed, it was of no concern to the Court that “there [wa]s no conclusive proof of a connection between antisocial behavior and obscene material,” because “[n]othing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there [wa]s no conclusive evidence or empirical data.” *Paris Adult*

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<sup>6</sup> I return to this point in Part II.C.

*Theatre I v. Slaton*, 413 U.S. 49, 60-61, 63, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973). Thus, the Court's obscenity jurisprudence demonstrates that a "harm" requirement simply does not exist in terms of the protection afforded a category of speech.

## c

The majority places great weight on the Court's decision in *Schenck v. United States*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919), in which the Court famously held that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52, 39 S. Ct. 247. The majority even suggests that the "clear and present danger" rule is the test "for defining the relevant subset of false speech that is historically unprotected." Maj. Op. at 1214; *see also id.* at 1215 ("Following *Schenck*, . . . we might articulate the class of false factual speech unprotected by the First Amendment to be that false factual speech which creates a clear and present danger of a harm Congress has a right to prevent.").

The majority is wrong. The Court has never used the "clear and present danger" test to determine whether a category of speech is protected in the first instance. Much to the contrary, the Court has specifically held that the existence of a "clear and present danger" of harm is irrelevant in the context of unprotected categories of speech. In *Beauharnais v. Illinois*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952), the Court stated:

Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, ei-

ther for us or for the State courts, to consider the issues behind the phrase “clear and present danger.” Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.

*Id.* at 266, 72 S. Ct. 725.

*Schenck* dealt with a content-based restriction of a category of speech that would now be considered *clearly* entitled to First Amendment protection—indeed, there are few categories of speech *more* valuable in terms of First Amendment principles than opinions critical of the government on matters of national security, such as military conscription. *See Schenck*, 249 U.S. at 51, 39 S. Ct. 247; *see also Brandenburg v. Ohio*, 395 U.S. 444, 448-49, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969); Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 39 (1992) (providing “seditious advocacy” as an example of “constitutionally *protected* speech” (emphasis added)). *Schenck* and cases like it did not consider whether a category of speech is *protected* by the First Amendment—again, that question depends on whether the speech has historically been considered of low First Amendment value. Rather, the question in those cases was whether the government’s interest in preventing lawless action—that is, in preventing the harm potentially produced by *protected* speech—was sufficient to *overcome* the First Amendment interests in a particular context, *see* Kagan, 1992 SUP. CT. REV. at 39 (“In deciding [a case involving seditious advocacy,] . . . the Court will ask . . . whether the government has a sufficient rea-

son to restrict the speech actually affected.”), which depended on whether the speech at issue “create[d] a clear and present danger,” *Schenck*, 249 U.S. at 52, 39 S. Ct. 247.

d

Finally, the majority’s reliance on statutes criminalizing fraud and similar crimes, *see* Maj. Op. at 1211-13, is both flawed and puzzling. Although fraud statutes generally require that the fraudulent statement cause an injury, and although the Supreme Court has held that fraudulent statements are not entitled to First Amendment protection, *see, e.g., Ill. ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003), it stretches logic to conclude from these holdings that a cognizable injury is *necessary* for a category of speech to fall outside First Amendment protection. That is, just because fraud statutes may require some proof of harm, and such statutes have been held constitutional, does not mean that in order for a statute such as the Stolen Valor Act to be constitutional, it too must require proof of harm.<sup>7</sup> To so hold is a formal error in logic. The notion that a regula-

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<sup>7</sup> Numerous statutes are called into question by the majority’s opinion. The following are just some of the statutes that punish false statements and do not appear to require proof of harm (including that the false statement be “material”): 18 U.S.C. § 1011 (punishing “any false statement . . . relating to the sale of any mortgage, to any Federal land bank”); 18 U.S.C. § 1015(a) (punishing “any false statement under oath, in any case, proceeding, or matter relating to . . . naturalization, citizenship, or registry of aliens”); 18 U.S.C. § 1026 (punishing “any false statement for the purpose of influencing in any way the action of the Secretary of Agriculture . . . in connection with . . . farm indebtedness”); 18 U.S.C. § 1027 (punishing “any false statement” made “in any document required by [ERISA]”).

tion of unprotected speech requires individualized proof of a cognizable harm is inconsistent with the Supreme Court’s First Amendment jurisprudence.

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In sum, the better interpretation of the Supreme Court’s cases and those of our court is that false statements of fact—as a general category—fall outside of First Amendment protection except in certain contexts where such protection is necessary “to protect speech that matters.” If a false statement does not fall within one of these exceptions, the general rule applies. And even in the exceptional contexts, a false statement that is neither satirical nor theatrical is unprotected if it is made with knowledge or reckless disregard of falsity.

## II

With these principles in mind, I now turn to Alvarez’s as-applied challenge.

### A

In a public meeting, Alvarez stated: “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I’m still around.” Alvarez does not deny that his statement that he received the Congressional Medal of Honor was a statement of fact, that this statement was false, and that he made the statement with full knowledge of the statement’s falsity. He does not attempt to defend his actions as hyperbole or imaginative expression, nor does he claim that he was misunderstood in context. Alvarez also knew when he uttered the statement that his claim to have been a Marine was false, that he had not served

in any branch of the armed forces for twenty-five years, and that no one had shot and wounded him while he was in the service of his country.

All things considered, Alvarez’s self-introduction was neither a slip of the tongue nor a theatrical performance; it was simply a lie. Under the rules announced in *Garrison* and its progeny, Alvarez’s knowingly false statement is *excluded*<sup>8</sup> from the limited spheres of protection carved out by the Supreme Court for false statements of fact necessary to protect speech that matters, and it is therefore not entitled to constitutional protection. See *Garrison*, 379 U.S. at 75, 85 S. Ct. 209 (“[T]he knowingly false statement . . . do[es] not enjoy constitutional protection.”); *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997 (“[T]he intentional lie . . . [does not] materially advance [ ] society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.” (quoting *New York Times*, 376 U.S. at 270, 84 S. Ct. 710)); *Time*, 385 U.S. at 389, 87 S. Ct. 534 (“[T]he constitutional guarantees can tolerate sanctions against calculated falsehood without

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<sup>8</sup> I emphasize the fact that the Supreme Court has *affirmatively excluded* knowingly false statements from First Amendment protection rather than simply *failed to include* them. The majority argues that, “even if one agrees with the dissent that *Gertz* and its progeny require[] the historical category of unprotected speech at issue here [to] be defined as knowingly false factual speech per se, that is simply not enough to make the [Stolen Valor] Act immune from First Amendment analysis,” and that we would need to “guess what rule the Court would adopt for [knowingly false statements].” Maj. Op. at 1208 n.9. The majority seems to suggest that the Supreme Court has not yet decided what degree of constitutional protection will be afforded knowingly false statements of fact. For the reasons I have explained above, I think the matter is quite to the contrary.

significant impairment of their essential function.”)<sup>9</sup> Thus, there is no need to apply strict scrutiny.<sup>10</sup>

## B

The Supreme Court’s clear rules are sufficient to doom Alvarez’s as-applied challenge,<sup>11</sup> but even apart

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<sup>9</sup> The majority is “concern[ed] . . . because of [the Act’s] potential for setting a precedent whereby the government may proscribe speech solely because it is a lie.” Maj. Op. at 1200. The majority fears that, under my interpretation, the government could “criminaliz[e] lying about one’s height, weight, age, or financial status on match.com or facebook, or falsely representing to one’s mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway.” Maj. Op. at 1200. Alvarez provides a similar parade of horribles, arguing that Congress could prohibit lying to one’s children about the existence of Santa Claus.

But the fact that we might find the majority’s and Alvarez’s hypothetical laws troubling from a policy perspective is irrelevant to the First Amendment question. *Garrison, Gertz*, and *Time* could not have been clearer: knowing lies are unprotected by the First Amendment. Until the Supreme Court tells us otherwise, the proper target for the majority’s concerns is the legislature, not this court.

<sup>10</sup> I agree with the majority that *if* the Stolen Valor Act were subjected to strict scrutiny, the Act would not satisfy this test. *See* Maj. Op. at 1215-17. I simply do not agree that the Act *should* be subjected to strict scrutiny.

<sup>11</sup> The majority points out that, if I am correct, “the opinion in this case would need be no more than a few paragraphs in length,” and asserts that “the First Amendment requires more.” Maj. Op. at 1208 n.9. The majority is correct that, in the Supreme Court’s cases involving false statements of fact, “the First Amendment analysis [wa]s . . . rigorous,” *id.*, in spite of the general unprotected nature of false statements of fact. But as discussed above, this “rigor” was necessary only to determine whether the Court was faced with one of the unique situations where New York Times’s “actual malice” standard was *necessary* in order to protect speech that matters. *See, e.g., Pickering*, 391 U.S. at 574, 88 S. Ct. 1731; *Time*, 385 U.S. at 389-90, 87 S. Ct. 534; *New*

from these rules, none of the concerns that animated *New York Times* and its progeny should shield Alvarez's statement. *New York Times* imposed an "actual malice" requirement on defamation suits brought by public figures trying to suppress *criticism* of them as public figures. See 376 U.S. at 282, 84 S. Ct. 710 ("We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against *critics of their official conduct*." (emphasis added)); *Gertz*, 418 U.S. at 334, 94 S. Ct. 2997 (discussing "a constitutional privilege intended to free *criticism of public officials* from the restraints imposed by the common law of defamation" (emphasis added)). In particular, the *New York Times* Court found that the "actual malice" standard was necessary to prevent defamation from being used by public officials as a civil substitute for criminal sedition: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel" because "damage awards . . . may be markedly more inhibiting than the fear of prosecution." 376 U.S. at 277, 84 S. Ct. 710 (footnote omitted). The Court was determined not to let public officials suppress or chill criticism of their official actions by threat of a lawsuit. And the Court was confident that public officials, because of their public position, would "have a . . . realistic opportunity to counteract false statements" due to their "significant[ ] . . . access to the channels of effective communication." *Gertz*, 418 U.S. at 344, 94 S. Ct. 2997.

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*York Times*, 376 U.S. at 271-72, 84 S. Ct. 710. Here, there is no need to consider whether *New York Times*'s standard applies because Alvarez indisputably *did* act with "actual malice."

The principles in *New York Times* do not extend to false self-promotion. Nor do these principles extend to false self-promotion by public officials—that is, to officials who portray themselves in a false but positive light. Public discourse requires that citizens are equally free to praise or to condemn their government and its officials, but I can see no value in false, self-aggrandizing statements by public servants. Indeed, the harm from public officials outright lying to the public on matters of public record should be obvious. If the Stolen Valor Act “chills” false autobiographical claims by public officials such as Alvarez, our public discourse will not be the worse for the loss.

## C

The majority provides two main reasons for why the Act is unconstitutional as applied to Alvarez. First, the majority reasons that the Act is unconstitutional because it “does not require a malicious violation, nor does it contain any other requirement or element of scienter. . . . Without a scienter requirement to limit the Act’s application, the statute raises serious constitutional concerns . . . because the First Amendment clearly prohibits criminally punishing negligent speech about matters of public concern.” Maj. Op. at 1209 (citing *Gertz*, 418 U.S. at 340, 347, 94 S. Ct. 2997).

For one thing, *Gertz* does not stand for this proposition; in *Gertz*, the Supreme Court “refus[ed] to extend the *New York Times* privilege to defamation of private individuals,” even though the subject matter was a matter of public concern. *Gertz*, 418 U.S. at 350, 94 S. Ct. 2997 (emphasis added). But even accepting that false statements of fact made about *oneself* can be punished only if they are made with “actual malice” (a principle

that is not clearly true), this requirement is irrelevant to Alvarez’s as-applied challenge because there is no dispute that Alvarez *did* make his false statement with “actual malice”—that is, knowingly.<sup>12</sup> If anything, the lack of a malice requirement is relevant only to Alvarez’s facial challenge, which I will discuss in Part III.<sup>13</sup>

Second, the majority holds that the Act is unconstitutional because it does not require that the false statement proximately cause an “*irreparable*” harm. Maj. Op. at 1207. As discussed above, the First Amendment contains no such requirement, *see* Part I.B.3, *supra*, and thus the Act’s failure to require harm is irrelevant to the determination of whether it is unconstitutional.

But even if the First Amendment demanded some proof of harm, the majority has supplied no reason to question Congress’s determination that “[f]raudulent claims surrounding the receipt of . . . [military] decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.” Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. 3266 (2006). When George Washington created the Badge of Military Merit, the predecessor to the Purple Heart, he wished to honor those who performed “singularly meritorious action” with “the figure of a heart in purple cloth.” Those who demonstrated “unusual gallantry, . . . extraordinary fidelity, and essential service

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<sup>12</sup> Unlike the government, I do not propose that a scienter requirement be read into the Act.

<sup>13</sup> Indeed, because the majority does not hold that the Stolen Valor Act is unconstitutionally overbroad, it is unclear what relevance the Act’s lack of a scienter requirement has even to the majority’s holding with respect to Alvarez’s facial challenge.

in any way, [would] meet with a due reward.” At the same time, he ordered that, “[s]hould any who are not entitled to the honors, have the insolence to assume the badges of them, they shall be severely punished.” GENERAL ORDERS OF GEORGE WASHINGTON ISSUED AT NEWBURGH ON THE HUDSON, 1782-1783, at 34-35 (Edward C. Boynton, ed., 1883) (reprint 1909) (Order of August 7, 1782). Such false representations not only dishonor the decorations and medals themselves, but dilute the select group of those who have earned the nation’s gratitude for their valor. Every nation needs to honor heroes, to thank them for their selflessness and to hold them out as an example worthy of emulation. The harm flowing from those who have crowned themselves unworthily is surely self-evident.

The majority finds Congress’s purpose inadequate because the Act is not expressly *limited* to statements that cause harm, *see* Maj. Op. at 1209-10 (“[W]hile the ‘Findings’ identify the injury the Act targets, they do not actually limit the *application* of the Act.”), and because “[t]here is no requirement in the Act that the government bear the burden to *prove* that the *defendant’s* speech or writing proximately caused damage to the reputation and meaning of military decorations and medals,” *id.* (emphases added). Because the majority finds “no readily apparent reason for assuming, without specific proof, that the reputation and meaning of military decorations is harmed *every time* someone lies about having received one,” the majority holds the Act unconstitutional. *Id.* (emphasis added).

But the government does not have to prove, on a case-by-case basis, that the statement of a *single defendant* damaged the reputation of a military award. The

obscenity cases are again instructive. In *Paris Adult Theatre I*, the Court rejected the cry for “scientific data . . . demonstrat[ing] that exposure to obscene material adversely affects men and women or their society.” 413 U.S. at 60, 93 S. Ct. 2628. Instead, the Court said that legislatures could rely on “various unprovable assumptions,” the same kinds of “assumptions [that] underlie much lawful state regulation of commercial and business affairs,” such as federal securities laws, antitrust laws, environmental laws, and a “host” of others. *Id.* at 61-62, 93 S. Ct. 2628. Even in areas touched by the First Amendment, “[t]he fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.” *Id.* at 62, 93 S. Ct. 2628. Given the impossibility of proving the kind of “reputational harm” demanded by the majority, it is no wonder that neither Congress nor the Constitution requires it.

What would Alvarez have had to say to satisfy the majority’s newfound harm standard? The majority itself concedes that Alvarez’s statement was a “deliberate and despicable [lie],” Maj. Op. at 1216, that it was a “worthless, ridiculous, and offensive untruth[],” and that Alvarez “was proven to be nothing more than a liar,” *id.* at 1217. He was indeed “more” than that. The hubris of Alvarez’s claim to have received the Congressional Medal of Honor in 1987 may not be apparent to ordinary Americans, and it may not have been obvious at the joint meeting of the water districts, but it would not have been lost on the men and women who are serving or have served in our armed forces. By his statement, Alvarez claimed status in a most select group: American servicemen who lived to receive the Congressional

Medal of Honor. No living soldier has received the Congressional Medal of Honor since the Vietnam War. Greg Jaffe and Craig Whitlock, *Pentagon Recommends Medal of Honor for a Living Soldier*, THE WASHINGTON POST, July 1, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/30/AR2010063005346.html>(last visited July 6, 2010). Indeed, no Congressional Medal of Honor was awarded to any soldier participating in the Gulf War, and for our conflicts over the past decade, only two were awarded for actions in Somalia, four for actions in Iraq, and two for actions in Afghanistan—all posthumously. *Id.* Alvarez’s statements dishonor every Congressional Medal of Honor winner, every service member who has been decorated in any way, and every American now serving. Such “insolence . . . [may] be . . . punished.”<sup>14</sup>

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Alvarez’s knowing lie is not entitled to constitutional protection. Thus, there is no need to subject the Stolen Valor Act to strict scrutiny. I would hold that the Stolen Valor Act is constitutional as applied to him. I turn now to Alvarez’s facial challenge.

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<sup>14</sup> The government might well be able to supply further evidence of the harm caused by false claims of military awards. The government did not brief this matter because Alvarez never argued that false statements of fact fall outside of First Amendment protection only if they produce a cognizable harm. Given the novelty of the majority’s holding, it is not surprising that the government did not anticipate it.

## III

The majority holds that the Act is “facially invalid under the First Amendment.” Maj. Op. at 1217. Some of the majority’s analysis sounds in the overbreadth doctrine, but because the majority does not actually apply this doctrine, its facial holding is presumably based on the reasoning “that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). This is not surprising given that the majority believes that the Act is unconstitutional as applied to Alvarez, who is perhaps the prototypical candidate for a constitutional application of the Act. Because I believe that the Act is constitutional as applied to Alvarez, my conclusion regarding the facial constitutionality of the Act necessarily rests on a discussion of Alvarez’s overbreadth challenge. I would hold that because any overbreadth of the Act can be eliminated by construction and is, in any event, far from “substantial,” *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), the Act is facially constitutional.

The overbreadth doctrine is, literally, an extraordinary doctrine, because it represents an exception to the usual rules of Article III standing. Ordinarily, “a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.” *Broadrick*, 413 U.S. at 610, 93 S. Ct. 2908. However, the Supreme Court has carved out an exception to this standing doctrine in the First Amendment area because “the First Amendment needs breathing space” and an overly broad statute can result in intolerable self-censorship.

*Id.* at 611, 93 S. Ct. 2908. Thus, the Court has “permitted [litigants] to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” *Id.* at 612, 93 S. Ct. 2908. “If such an overbreadth challenge succeeds, the prosecution fails regardless of the nature of the defendant’s own conduct,” *Wurtz v. Risley*, 719 F.2d 1438, 1440 (9th Cir. 1983), because a successful overbreadth challenge renders a statute unconstitutional and, therefore, “invalid in *all* its applications,” *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). Thus, the doctrine is employed “sparingly and only as a last resort.” *Broadrick*, 413 U.S. at 613, 93 S. Ct. 2908.

In *Broadrick*, the Court announced what has become the fundamental rule in the First Amendment overbreadth analysis: in order for a statute to be held unconstitutionally overbroad, “the overbreadth of [the] statute must not only be real, but *substantial* as well, judged in relation to the statute’s plainly legitimate sweep.” *Id.* at 615, 93 S. Ct. 2908 (emphasis added).<sup>15</sup>

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<sup>15</sup> *Broadrick* dealt with a regulation of activities that had a First Amendment component but that were not “pure speech.” 413 U.S. at 615, 93 S. Ct. 2908. In *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982), the Court extended *Broadrick*’s requirement of substantial overbreadth to cases involving “pure speech.” See *id.* at 772, 102 S. Ct. 3348 (reasoning that *Broadrick*’s rationale “appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech”); see also *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 n.12, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985) (“The Court of Appeals

“[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. . . . [T]here must be a realistic danger that the statute itself will *significantly* compromise recognized First Amendment protections . . . for it to be facially challenged on overbreadth grounds.” *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (emphasis added). The Court elaborated on the meaning of “substantial” overbreadth in *New York State Club Association v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988), and held that the party challenging the law must demonstrate not just from the text of the statute but also “*from actual fact* that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally.” *Id.* at 14, 108 S. Ct. 2225 (emphasis added). And in *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008), the Court suggested that *Broadrick*’s rule actually involves two requirements, namely that the statute’s overbreadth must be substantial (1) “in an absolute sense” and (2) “relative to the statute’s plainly legitimate sweep.” *Id.* at 292, 128 S. Ct. 1830 (“[W]e have vigorously enforced the requirement that a statute’s overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.”).

In sum, the party asserting the overbreadth challenge has a difficult burden to satisfy: he must demonstrate that the statute is substantially overbroad both in

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erred in holding that the *Broadrick* . . . substantial overbreadth requirement is inapplicable where pure speech rather than conduct is at issue. [*Ferber*] specifically held to the contrary.”).

an absolute sense and relative to the legitimate sweep of the statute, *id.*, and must make such a showing based both on the text of the statute and on actual fact, *N.Y. State Club*, 487 U.S. at 14, 108 S. Ct. 2225.

Although the majority opinion does not formally apply overbreadth analysis to the Stolen Valor Act, it does provide a number of examples of speech potentially reached by the Act that are not present in Alvarez's particular case. Thus, I will conduct my overbreadth analysis using these examples and those provided by Alvarez. Based on the majority's and Alvarez's examples, the Stolen Valor Act could arguably be held unconstitutionally overbroad for two main reasons: (1) the Act does not contain a scienter requirement and might, therefore, reach inadvertent violations of the Act; and (2) the Act could be applied to satire or imaginative expression. I address each of these potential applications of the Act in turn.

#### A

The majority proclaims that the Act is unconstitutional because it "does not require a malicious violation, nor does it contain any other requirement or element of scienter. . . . Without a scienter requirement to limit the Act's application, the statute raises serious constitutional concerns . . . because the First Amendment clearly prohibits criminally punishing negligent speech about matters of public concern." Maj. Op. at 1209 (citing *Gertz*, 418 U.S. at 340, 347, 94 S. Ct. 2997). It is not clear from the majority's opinion exactly what it means by a "negligent" false claim of military honor, but the only plausible instance of such negligence that I can conceive of is an ambiguous statement that is incorrectly understood to have claimed receipt of a military award,

when in fact the person did not actually make any such claim.<sup>16</sup> For example, one could imagine a person saying “I have a Medal of Honor” and someone mistakenly interpreting him to mean that he has been *awarded* the Congressional Medal of Honor, even though the speaker means only that he merely *possesses* it, perhaps as a family heirloom.

However, such mistaken false statements do not present a constitutional problem for the Act. First, the Act is amenable to a reasonable construction that precludes its application to these kinds of statements. Second, even if the Act could be interpreted to reach these kinds of mistaken false statements, and even if such statements were entitled to constitutional protection (which is not clear), this potential sweep of the Act does not even come close to “substantial” overbreadth.

## 1

The first step in the overbreadth analysis is to determine whether the Stolen Valor Act actually covers statements that can be mistakenly interpreted to be false claims of military awards. *See Williams*, 553 U.S. at 293, 128 S. Ct. 1830 (“The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.”). Crucially, the Supreme Court has established that “[f]acial overbreadth has not been invoked when a limiting construc-

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<sup>16</sup> Another conceivable “negligent” or “mistaken” claim is one in which the speaker mistakenly *believes* that he has won a military award, but I do not consider it realistic that a person (let alone a substantial number of people) would mistakenly believe that he has been awarded a “decoration or medal authorized by Congress for the Armed Forces of the United States.” 18 U.S.C. § 704(b).

tion has been *or could be* placed on the challenged statute.” *Broadrick*, 413 U.S. at 613, 93 S. Ct. 2908 (emphasis added); *see also Hooper v. California*, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L. Ed. 297 (1895) (“[E]very reasonable construction must be resorted to in order to save a statute from unconstitutionality.”). In other words, even if the Act could *possibly* be interpreted to reach some constitutionally protected speech, the Act will not be held unconstitutionally overbroad if it is *also* “‘readily susceptible’” to a construction that eliminates such overbreadth. *Stevens*, 130 S. Ct. at 1592 (quoting *Reno v. ACLU*, 521 U.S. 844, 884, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)).<sup>17</sup>

The Stolen Valor Act punishes a person who “falsely *represents* himself or herself” to have received a military award authorized by Congress. 18 U.S.C. § 704(b) (emphasis added). Webster’s first definition of the word “represent” is “[t]o bring clearly before the mind: [to] cause to be known . . . : [to] present esp. by description.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1926 (2002). Under this definition, an ambiguous statement that could conceivably be misinterpreted to claim receipt of a military award could not be punished under the Act because such a statement would not “bring clearly before the mind” of the listener that the speaker has described himself as having won the award, particularly when (as will almost always be the case) the

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<sup>17</sup> Although a reasonable limiting construction saves a statute from being held facially overbroad, the government’s promise of reasonable prosecutorial discretion does not. *See Stevens*, 130 S. Ct. at 1591 (“We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”).

context of the statement makes it obvious that the speaker is not making such a representation.

For example, Congress has made no attempt to preempt the use of the phrase “medal of honor,” and any number of universities and high schools award some kind of a “medal of honor.” The recipients may truthfully represent themselves as “medal of honor” winners, but no one should fear prosecution under the Stolen Valor Act. Congress was quite careful to define “decoration[s] or medal[s]” as those “authorized by Congress for the Armed Forces of the United States.” 18 U.S.C. § 704(b). And in the special case of the Medal of Honor, Congress described it as “a *Congressional* Medal of Honor”—presumably to distinguish it from other medals of honor—and defined it as “a medal of honor awarded under [10 U.S.C. §§ 3741, 6241, or 8741, or 14 U.S.C. § 491].” 18 U.S.C. § 704(c)(2)(A) (emphasis added). No one reading the Act should have any question that he or she may continue to use the term “medal of honor” to denote those medals of honor awarded by our nation’s educational institutions. The Stolen Valor Act reaches only those who claim to have received the Congressional Medal of Honor, as defined in the U.S. Code.

In sum, as long as the Act is correctly applied according to a reasonable interpretation of the word “represents,” it will not sweep in ambiguous statements that can merely be mistakenly interpreted as a false claim of a congressionally authorized military award. Thus, because a reasonable “limiting construction”—indeed, the most reasonable construction—can be placed on the word “represent” that precludes its application to such statements, the Act is not overbroad in this regard.

*Broadrick*, 413 U.S. at 613, 93 S. Ct. 2908; *see also Hooper*, 155 U.S. at 657, 15 S. Ct. 207.

## 2

Even if mistaken false statements were theoretically subject to punishment under the Stolen Valor Act, common sense tells us that such punishment will be extraordinarily rare if not nonexistent, both “in an absolute sense” and “relative to the statute’s plainly legitimate sweep.” *Williams*, 553 U.S. at 292, 128 S. Ct. 1830. In an absolute sense, Alvarez cannot (and has not even attempted to) demonstrate “from *actual fact*” that there is a “realistic danger” or that “a substantial number of instances exist in which” mistaken statements will be charged under the Act. *N.Y. State Club*, 487 U.S. at 11, 14, 108 S. Ct. 2225 (emphasis added); *Taxpayers for Vincent*, 466 U.S. at 801, 104 S. Ct. 2118. Both Alvarez and the majority have failed to identify a single instance in which the Act has been applied in a context other than Alvarez’s: a simple lie about receiving a military honor.

Any overbreadth of the Act is also far from substantial “relative to the statute’s plainly legitimate sweep,” *Williams*, 553 U.S. at 292, 128 S. Ct. 1830, because, “[i]n the vast majority of its applications, [the Act] raises no constitutional problems whatsoever,” *id.* at 303, 128 S. Ct. 1830. False claims of military valor have been increasing: “The FBI investigated 200 stolen valor cases last year and typically receives about 50 tips a month, triple the number that came in before the September 2001 terrorist attacks.” Christian Davenport, *One Man’s Database Helps Uncover Cases of Falsified Valor*, THE WASHINGTON POST, May 10, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/09/AR2010050903363.html?hpid=>

topnews (last visited July 6, 2010); *see also* Keith Rogers, *Prosecuting Fraud Cases: Military Imposters Targeted*, LAS VEGAS REVIEW-JOURNAL, June 25, 2010, available at <http://www.lvrj.com/news/military-imposters-targeted-97141054.html> (last visited July 6, 2010) (“The problem of [military imposters] is fast reaching epidemic proportions.” (quotation marks omitted)). And again, neither the majority nor Alvarez has pointed to even one case involving a person who was mistakenly interpreted to have claimed a military award. Thus, this seems to me “the paradigmatic case of a . . . statute whose legitimate reach dwarfs its arguably impermissible applications.” *New York v. Ferber*, 458 U.S. 747, 773, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); *see also Magill v. Lynch*, 560 F.2d 22, 30 (1st Cir. 1977) (“Some sensitivity to reality is needed; an invalid application that is far-fetched does not deserve as much weight as one that is probable.”).

This case falls far short of the level of overbreadth that the Supreme Court has found to be “substantial.” In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002), for example, the Court was faced with a federal statute that “extend[ed] the federal prohibition against child pornography to sexually explicit images that appear[ed] to depict minors but were produced without using any real children,” thus “proscrib[ing] a significant universe of speech” that fell within neither the unprotected category of obscenity under *Miller* nor the unprotected category of child pornography under *Ferber*. *Id.* at 239-40, 122 S. Ct. 1389. The Court held that the statute was “substantially overbroad and in violation of the First Amendment.” *Id.* at 258, 122 S. Ct. 1389. In so holding, the Court reasoned that “teenage sexual activity and the sexual abuse of

children[ ] have inspired *countless* literary works,” both ancient and contemporary, which “explore themes within the wide sweep of the statute’s prohibitions.” *Id.* at 247-48, 122 S. Ct. 1389 (emphasis added).

More recently, in *Stevens*, the Court addressed a statute establishing a criminal penalty for anyone who knowingly “create[d], s[old], or possesse[d] a depiction of animal cruelty,” where a “depiction of animal cruelty” was defined as one “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed.” 130 S. Ct. at 1582; 18 U.S.C. § 48(a), (c)(1). In holding that the statute was unconstitutionally overbroad, the Court “read § 48 to create a criminal prohibition of *alarming breadth*,” emphasizing that the language of the statute would sweep in the “*enormous national market* for hunting-related depictions in which a living animal is intentionally killed,” and that “[t]hose seeking to comply with the law [would] face a bewildering maze of regulations from at least 56 separate jurisdictions.” *Stevens*, 130 S. Ct. at 1588-89 (emphases added). “The demand for hunting depictions exceed[ed] the estimated demand” for depictions that Congress could legitimately proscribe. *Id.* at 1589; *see also, e.g., Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987) (invalidating an ordinance that, “by prohibiting *all* protected expression [at Los Angeles International Airport], purport[ed] to create a virtual ‘First Amendment Free Zone’ at [the airport],” potentially covering “virtually every individual who enter[ed] [the airport]”).

The statutes that we have held to be facially overbroad have also been significantly broader than the Stolen Valor Act. In *Wurtz*, for example, we addressed the

constitutionality of Montana’s “intimidation statute,” which punished both constitutionally proscribable threats and those protected by the First Amendment. 719 F.2d at 1439, 1441. We held that the statute was unconstitutionally overbroad because it would sweep in “*many* relatively harmless expressions,” including such common expressions as “[t]hreats of sit-ins, marches in the street, mass picketing and other such activities.” *Id.* at 1442 (emphasis added). We concluded that the statute “applie[d] so broadly to threats of minor infractions, to threats not reasonably likely to induce a belief that they will be carried out, and to threats unrelated to any induced or threatened action, that a *great deal* of protected speech [wa]s brought within the statute.” *Id.* (emphasis added).

These cases illustrate the kind of significant overbreadth that satisfies the *Broadrick* standard. If the requirement of *substantial* overbreadth is to have any meaning, it compels the conclusion that, because there is virtually no potential for punishment of mistaken claims of military awards, the Act is not unconstitutionally overbroad in this regard.

## B

Second, the majority argues that the Act might be applied to satire or other kinds of imaginative expression—such as a person who claims he has received a military decoration sarcastically, or while playing a role in a play or movie—and thus criminalizes even those statements that are plainly incredible and not worthy of actual belief. *See* Maj. Op. at 1213-14. The majority states: “[W]hether it be method actors getting into character, satirists being ironic or sarcastic, poets using hyperbole, or authors crafting a story, creative persons

often make factual statements or assertions which, as they are fully aware, are entirely untrue.” *Id.* at 1214. The majority presents examples of “[s]atirical entertainment such as *The Onion*, *The Daily Show*, and *The Colbert Report*.” *Id.* at 1213.

Although the Supreme Court has never so held, I am quite confident that satirical or theatrical statements claiming receipt of a military award are protected under the First Amendment. Provocative statements by satirists are not generally thought to come within the class of unprotected “false statements of fact” because these statements “could not reasonably [be] interpreted as stating actual facts.” *Hustler*, 485 U.S. at 50, 108 S. Ct. 876; *see also Milkovich*, 497 U.S. at 20, 110 S. Ct. 2695.

But claims about military decorations and medals made in an artistic context are not subject to prosecution under the most reasonable construction of the Act. Once again, “[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.” *Broadrick*, 413 U.S. at 613, 93 S. Ct. 2908. Since the first definition of the word “represent” is “[t]o bring clearly before the Mind,” WEBSTER’S at 1926, the Act can plausibly be interpreted to preclude its application to statements that cannot “reasonably [be] interpreted as stating actual facts,” *Hustler*, 485 U.S. at 50, 108 S. Ct. 876, because statements that cannot reasonably be interpreted to be true would not “bring clearly before the mind” of the listener that the speaker is stating actual facts about himself.

If, for example, Stephen Colbert mocked a president’s statement that he had “won” an ongoing war by proclaiming, sarcastically, “Right—and I won the Congressional Medal of Honor,” I doubt that anyone would

think that Colbert had “represented” himself as a Medal of Honor winner. Or, to take a second example, actor Tom Hanks “received” the Medal of Honor in the movie *Forrest Gump*. In fact, Lieutenant Dan could not have made it clearer in the movie that Forrest had received the Congressional Medal of Honor:

Lt. Dan: They gave you the Congressional Medal of Honor.

Forrest: Now that’s Lieutenant Dan. Lieutenant Dan!

Lt. Dan: They gave you the Congressional Medal of Honor!

Forrest: Yes sir, they sure did.

Lt. Dan: They gave you[,] an imbecile, a moron who goes on television and makes a fool out of himself in front of the whole damn country, the Congressional Medal of Honor.

Forrest: Yes sir.

*Forrest Gump* (1994), available at <http://www.generationterrorists.com/quotes/.html> (last visited July 6, 2010); see also *The Karate Kid* (1984) (representing that Mr. Miyagi, played by actor Pat Morita, had received the Congressional Medal of Honor for his heroism in World War II); *The Next Karate Kid* (1994) (showing Mr. Miyagi wearing the Congressional Medal of Honor). But we all understood the context: Tom Hanks *qua* Forrest Gump received the Medal of Honor. Forrest Gump cannot be charged with violating the Act and, so far as I am aware, Tom Hanks *qua* Tom Hanks has never “represented himself” as a Medal of Honor recipient. I do not believe it realistic that anyone would

think to accuse Colbert or Hanks of violating the Stolen Valor Act in these contexts. Assuming, as I must, that the Act will be applied with some modicum of common sense, it does not reach satire or imaginative expression.

\* \* \* \* \*

I would conclude that the Act is reasonably susceptible to a limiting construction that eliminates any potential overbreadth and, even if the Act did have some degree of overbreadth, this overbreadth is not “substantial.” I would hold that the Act is not overbroad and therefore facially constitutional.

#### IV

The majority’s opinion is provocative, to say the least. It effectively overrules *Gertz* and its progeny and holds that false statements of fact generally receive First Amendment protection. It effectively overrules *Garrison* by holding that even *knowingly* false statements of fact are protected. It holds that a false statement of fact must produce “irreparable harm” in order to lose First Amendment protection, thus wholly confusing the concept of unprotected speech and calling into question the Supreme Court’s obscenity jurisprudence. And it strikes down an act of Congress on its face despite the most important consideration to this case: no person has ever been subjected to an unconstitutional prosecution under the Stolen Valor Act and, under any reasonable interpretation of the Act, it is extremely unlikely that anyone ever will be.

I respectfully dissent.

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**APPENDIX B**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 08-50345

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

XAVIER ALVAREZ, AKA JAVIER ALVAREZ,  
DEFENDANT-APPELLANT

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Filed: Mar. 21, 2011

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**ORDER**

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Before: THOMAS G. NELSON, JAY S. BYBEE, and MILAN D. SMITH, JR., Circuit Judges.

Judges T.G. Nelson and M. Smith have voted to deny the petition for panel rehearing. Judge M. Smith has voted to deny the petition for rehearing en banc, and Judge T.G. Nelson has so recommended. Judge Bybee has voted to grant the petition for panel rehearing and rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is DENIED.

M. SMITH, Circuit Judge, with whom KOZINSKI, Chief Judge, joins, concurring in the denial of rehearing en banc:

I concur in the court's decision not to rehear this case en banc, and write to respond to the dissents from that decision.

This case presents two issues: (1) Does the government bear the burden of proof to show that speech forbidden by the Stolen Valor Act (the Act), 18 U.S.C. § 704(b), is unprotected by the First Amendment, or does a criminal defendant charged under the Act bear the burden of proof to show that the targeted speech is protected by the First Amendment? (2) Is the speech forbidden by the Act protected by the First Amendment, or does it fall into one of the “well-defined and narrowly limited classes of speech” that is unprotected by the First Amendment, *United States v. Stevens*, — U.S. —, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010) (internal quotation mark omitted)?

The Act provides:

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

18 U.S.C. § 704(b). The prescribed prison term is increased to one year if the decoration involved is the Medal of Honor, a distinguished-service cross, a Navy cross, an Air Force cross, a silver star, or a Purple Heart. *Id.* § 704(c), (d).

Xavier Alvarez won a seat on the Three Valley Water District Board of Directors in 2007. On July 23, 2007, at a joint meeting with a neighboring water district board, newly-seated Director Alvarez introduced himself, stating “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I’m still around.” With the exception of “I’m still around,” Alvarez’s statement was a series of bizarre lies, and Alvarez was indicted and convicted for falsely claiming that he had been awarded the Medal of Honor.

Although the majority and Judges O’Scannlain, Gould, and Bybee (sometimes referred to collectively as the Dissenters) disagree regarding the correct answers to the questions noted *supra*, we agree on several key underlying issues. First, we all agree that the Act “seek[s] to regulate ‘only . . . words,’” *Broadrick v.*

*Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (quoting *Gooding v. Wilson*, 405 U.S. 518, 520, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972)), that the Act targets words about a specific subject (military honors), and that the Act is plainly a content-based regulation of speech. See *United States v. Alvarez*, 617 F.3d 1198, 1218-19 (9th Cir. 2010) (Bybee, J., dissenting). Second, because the Act imposes a content-based restriction on speech, it is subjected to strict scrutiny, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000), unless the speech it criminalizes falls into one of the “well-defined and narrowly limited classes of speech” that is unprotected by the First Amendment, *Stevens*, 130 S. Ct. at 1584 (internal quotation mark omitted).

There is also no meaningful dispute between the majority and the Dissenters concerning whether the Act survives strict scrutiny if it does not fall into one of the *Stevens* subcategories of speech that is unprotected by the First Amendment. For example, Judge Bybee acknowledged that “if the Stolen Valor Act were subjected to strict scrutiny, the Act would not satisfy this test.” *Alvarez*, 617 F.3d at 1232 n.10 (Bybee, J., dissenting) (emphasis omitted). The majority and the Dissenters also agree that the Government neither proved, nor was required to prove, that Alvarez’s statements helped him to obtain tangible or intangible benefits, was part of a legal proceeding, involved certifying the truth of an official document, or caused harm to anyone else.

We also note that the majority opinion does not impugn the reputation of any of our brave men and women in uniform. On the contrary. The strict scrutiny analysis of the majority opinion affirms that our men and

women in uniform put themselves in harm's way because they are honorable and brave, and not because they seek to be awarded one or more of the medals covered by the Act.

### DISCUSSION

The first dispute between the majority and the Dissenters asks who bears the burden of proof in this case. The Dissenters, drawing almost entirely on defamation case law, suggest that we should invert the ordinary First Amendment burden in *all* cases involving false statements, even if criminal charges are involved. *Alvarez*, 617 F.3d at 1228-29, 1234 (Bybee, J., dissenting); O'Scannlain Dissent at 679-80, 681. But this approach inverts the burdens of proof and persuasion mandated by the Supreme Court by requiring criminal defendants to show that their speech covered by the Act falls into the categories of speech protected by the First Amendment, instead of requiring the government to prove that the targeted speech is not so protected. Ordinarily, “[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions,” and “the risk of nonpersuasion . . . must rest with the Government, not with the citizen.” *Playboy Entm't Grp.*, 529 U.S. at 816, 818, 120 S. Ct. 1878; *see also Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986) (“In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified.”). This general rule applies with even more force in criminal cases such as this one, because the Constitution “protects the accused against conviction except up-

on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

In addressing the second question, the Dissenters rely heavily on isolated comments made by Supreme Court Justices in First Amendment cases without examining the context in which those statements were made, or the actual holdings in those cases. In each of these opinions, the Court has made clear that false speech is *not* subject to a blanket exemption from constitutional protection.

Tellingly, the Dissenters’ discussion of Supreme Court case law begins with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), rather than *Gertz*’s predecessor, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). *Sullivan* held that libel laws are unconstitutional unless they include a scienter element. In reaching this conclusion, the Court asked whether speech “forfeits [First Amendment] protection by the falsity of some of its factual statements and by its alleged defamation of respondent,” and held, unequivocally, that it does not. *Id.* at 271, 84 S. Ct. 710. The Court explained:

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth. . . . The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered. As Madison said, “Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.” In *Cantwell v. Connecticut*,

310 U.S. 296, 310 [60 S. Ct. 900, 84 L. Ed. 1213] [ (1940) ], the Court declared: “In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”

*Id.* (citations omitted). The Court accordingly concluded that “[t]hat erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they need to survive.” *Id.* at 271-72, 84 S. Ct. 710 (internal quotation marks omitted). The Court added that “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’” *Id.* at 279 n.19, 84 S. Ct. 710 (quoting J.S. Mill, *On Liberty* 15 (Oxford: Blackwell, 1947)).

Rather than addressing *Sullivan*’s clear statement that “[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth,” *id.* at 271, 84 S. Ct. 710, the Dissenters rely heavily on the Court’s post-*Sullivan* case law. Yet none of these cases contradicts *Sullivan*’s holding that at least *some* false statements

are entitled to First Amendment protection. The Dissenters primarily rely on *Gertz* and its progeny for the proposition that “the erroneous statement of fact is not worthy of constitutional protection.” 418 U.S. at 340, 94 S. Ct. 2997. In *Gertz*, the Court classified false statements of fact as “belong[ing] to that category of utterances” that “‘are 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.’” *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)). Thus, the Dissenters conclude, regulations of false factual speech may be proscribed without constitutional problem—or even any constitutional scrutiny.

Like *Sullivan*, *Gertz* (the earliest of the post-*Sullivan* cases cited by the Dissenters) was a defamation case. Judge O’Scannlain’s Dissent repeatedly quotes *Gertz* for the proposition that “the erroneous statement of fact is not worthy of constitutional protection,” see O’Scannlain Dissent at 678, 682, but *Gertz* also explained that such untrue statements are “nevertheless inevitable in free debate.” 418 U.S. at 340, 94 S. Ct. 2997. The *Gertz* Court then added: “The First Amendment requires that we protect some falsehood in order to protect speech that matters.” *Id.* at 341, 94 S. Ct. 2997. Thus, recognizing this need to protect “speech that matters,” the Court endeavored to find a balance in defamation cases between the “legitimate state interest in compensating private individuals for wrongful injury to reputation,” and the First Amendment requirement of “shield[ing] the press and broadcast media from the rigors of strict liability for defamation.” *Id.* at 348, 94 S. Ct. 2997. The Court accordingly held that plaintiffs must show some level of fault by the defendant, and further held

that plaintiffs may only receive compensation for “actual injury” if it is “supported by competent evidence concerning the injury.” *Id.* at 350, 94 S. Ct. 2997.

In other words, although *Gertz* stated that false statements are not inherently worthy of First Amendment protection,<sup>1</sup> the Court did not hold that “‘false statements of fact’ are categorically unprotected.” O’Scannlain Dissent at 684 (quoting *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997). Rather, *Gertz* held that defamatory statements are unprotected if they are *made with a culpable state of mind and cause injury* to another person. This is exactly what it had held a decade earlier in *Sullivan and Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964), which only permitted defamation actions in which there is “an intent to inflict harm through falsehood.” *Id.* at 73, 85 S. Ct. 209. If *Gertz* stood for the proposition that false statements are *per se* unprotected (as the Dissenters suggest), then the *Gertz* majority’s reasoning would likely have looked much more like Justice White’s dissent. *Compare Gertz*, 418 U.S. at 347 n.10, 94 S. Ct. 2997 (majority opinion), *with id.* at 375-76, 94 S. Ct. 2997 (White, J., dissenting).

In sum, “*Gertz*’s statement that false factual speech is unprotected, considered in isolation, omits discussion of essential constitutional qualifications on that proposition.” *Alvarez*, 617 F.3d at 1203. Although the Court has stated that false statements of fact are *unworthy* of First Amendment protection, the Court has never held

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<sup>1</sup> *But see Sullivan*, 376 U.S. at 279 n.19, 84 S. Ct. 710 (“Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’” (quoting Mill, *supra*, at 669)).

that false speech is *per se*, or even *presumptively, unprotected* by the First Amendment. Indeed, one of the current members of the Court, while working as a law professor, recognized “[t]he near absolute protection given to false but nondefamatory statements of fact outside the commercial realm.” Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 477 (1996).

Consistent with this principle, the Court’s standard list of categorically exempt speech has *never* used the phrase “false statements of fact.” Instead, the Court has limited itself to using the words defamation (or libel) and fraud. Most recently, the Court wrote: “These historic and traditional categories [of unprotected speech] long familiar to the bar—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Stevens*, 130 S. Ct. at 1584 (citations and internal quotation marks omitted). Similar formulations have been used for at least six decades, and the Court has *never* included “false statements of fact” in its list.<sup>2</sup> As

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<sup>2</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (listing obscenity, defamation, and fighting words); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) (Kennedy, J., concurring) (listing “obscenity, defamation, incitement, or situations presenting some grave and imminent danger the government has the power to prevent” (citations omitted)); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) (“Libelous speech has been held to constitute one such category [of unprotected speech]; others that have been held to be

Judge O’Scannlain’s Dissent appears to acknowledge, *all* of the cases and statutes he relies upon either fit within one of the categories discussed in *Stevens* (or its predecessors) or were subjected to First Amendment scrutiny.<sup>3</sup>

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outside the scope of the freedom of speech are fighting words, incitement to riot, obscenity, and child pornography.” (citations omitted)); *New York v. Ferber*, 458 U.S. 747, 763, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (listing fighting words, libel, and obscenity); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 592-93, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (Rehnquist, J., dissenting) (listing fighting words, group libel, obscenity, and false and misleading commercial speech); *Sullivan*, 376 U.S. at 269, 84 S. Ct. 710 (listing “insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, [and] solicitation of legal business” (footnotes omitted)); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961) (listing “libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like”); *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766 (listing “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words”).

<sup>3</sup> Although Judge O’Scannlain is correct that “not *all* of the cases in this area deal with defamation,” O’Scannlain Dissent at 683 n.6, he is also correct that *many* of them *do*. O’Scannlain Dissent at 683. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984); *Herbert v. Lando*, 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979); *Gertz*, 418 U.S. 323, 94 S. Ct. 2997; *Sullivan*, 376 U.S. 254, 84 S. Ct. 710. Another case he cites involves fighting words, which also fit into the *Stevens* categories of First Amendment-exempt speech. *Chaplinsky*, 315 U.S. 568, 62 S. Ct. 766.

Judge O’Scannlain collects a number of federal and state laws prohibiting various forms of fraud and perjury. O’Scannlain Dissent at 684-85; see also Black’s Law Dictionary 1254 (9th ed. 2009) (defining “perjury” broadly as “[t]he act or an instance of a person’s deliberately making material false or misleading statements while under oath”). Fraud, of course, is covered by *Stevens*’s categories, and perjury is

To the extent the Court has articulated a test for determining whether a certain type of speech belongs on that list, the test is whether “[f]rom 1791 to the present,” that speech has been “historically unprotected.” *Stevens*, 130 S. Ct. at 1584-86. Usually, in cases involving such types of 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.” *Ferber*, 458 U.S. at 763-64, 102 S. Ct. 3348; *see also* *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766 (explaining that unprotected categories of speech “are 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”).

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included in a similar list in *Konigsberg*, 366 U.S. at 49 n. 10, 81 S. Ct. 997.

Judge O’Scannlain also cites a series of cases discussing anticompetitive “sham” litigation. *E.g.*, *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002); *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982). These cases stand for the narrow and uncontroversial proposition that “there is simply no basis to hold that deliberately misrepresenting facts to an administrative [or judicial] body for anticompetitive purposes enjoys blanket first amendment protection.” *Clipper Express*, 690 F.2d at 1262.

Finally, Judge O’Scannlain cites a pair of cases that *refused* to recognize new exceptions to the First Amendment. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) (“[T]he sort of expression involved in this case [intentional infliction of emotional distress] does not seem to us to be governed by any exception to the general First Amendment principles stated above.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) (“[C]ommercial speech, like other varieties, is protected. . . .”).

However, the Court has cautioned against reliance on a “freewheeling” “cost-benefit analysis.” *Stevens*, 130 S. Ct. at 1586. The Court has also explained that *Chaplinsky* and its successors “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.” *Id.* Instead, the exclusive test is whether the “categor[y] of speech . . . ha[s] been historically unprotected.” *Id.*<sup>4</sup> Tellingly, in *Stevens*, the Court found the government’s proposed “free-floating test for First Amendment coverage,” to be “startling and dangerous,” and went on to say that “[t]he First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that

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<sup>4</sup> Consistent with its historical test, the Court has collected authorities showing that all of the categories listed in *Stevens* have traditionally been regulated by Congress and the states. See *Roth v. United States*, 354 U.S. 476, 482-83, 485, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957) (obscenity and libel); *Beauharnais v. Illinois*, 343 U.S. 250, 254-55, 72 S. Ct. 725, 96 L. Ed. 919 (1952) (libel); *Donaldson v. Read Magazine*, 333 U.S. 178, 190-91, 68 S. Ct. 591, 92 L. Ed. 628 (1948) (fraud); *Chaplinsky*, 315 U.S. at 571 n.2, 62 S. Ct. 766 (cited in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949)) (speech integral to criminal conduct); see also *United States v. Small*, 236 U.S. 405, 408 & n.1, 35 S. Ct. 349, 59 L. Ed. 641 (1915) (cited in *United States v. Dunnigan*, 507 U.S. 87, 94-95, 113 S. Ct. 1111, 122 L. Ed. 2d 445 (1993)) (perjury).

judgment simply on the basis that some speech is not worth it.” *Id.* at 1585.<sup>5</sup>

The Dissenters fail to identify a body of historical authorities showing broad regulation of *false statements of fact*. They contend that “[t]he fact that one of the Court’s most recent statements on unprotected categories of speech did not expressly mention ‘false statements of fact’ sheds little, if any, light on the historical protection of such speech.” O’Scannlain Dissent at 684. True, but irrelevant. The Dissenters have not even attempted to trace their purported “false speech” exemption any further back than the 1960s.

In fact, the historical record regarding government regulation of false speech is problematic for the Dissenters.<sup>6</sup> Were they to identify historical support for such

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<sup>5</sup> Judge Gould’s proposed approach cannot be reconciled with the *Stevens* Court’s unequivocal rejection of ad hoc, case-by-case balancing tests. *See* Gould Dissent at 687-88.

<sup>6</sup> *See, e.g., Hale v. Everett*, 53 N.H. 9, 208 (1868) (“The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore, in any shape, is derogatory from sound morality, is not, however, taken notice of by our law unless it carries with it some public inconvenience, as spreading false news; or some social injury, as slander and malicious prosecution, for which a private recompense is given.”); Fred B. Hart, *Power of Government Over Speech and Press*, 29 *Yale L. J.* 410, 427 (1920) (“The constitutional liberty of speech and of the press as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing except so far as such publications, from their blasphemy, obscenity or scandalous character may be a public offense, or as by their falsehood and malice may injuriously affect the standing,

regulation, the clearest precedent would be the much-maligned Alien and Sedition Act of 1798. That infamous act “made it a crime, punishable by a \$5,000 fine and five years in prison, ‘if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States.’” *Sullivan*, 376 U.S. at 273-74, 84 S. Ct. 710 (quoting Sedition Act of 1798, 1 Stat. 596) (first four omissions in original). As explained in *Sullivan*, upon its passage this act “was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison.” *Id.* at 274, 84 S. Ct. 710. The Court explained that the historical record contained a great deal of criticism of the act, and accordingly concluded that “[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.” *Id.* at 276, 84 S. Ct. 710 (footnote omitted). I suspect that the Dissenters do not intend to resurrect the Alien and Sedition Act of 1798 as an exhibit in favor of their historical argument.

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reputation or pecuniary interests of individuals.” (quoting Thomas Cooley, *Constitutional Limitations* 604-05 (6th ed. 1890)).

To the extent that spreading false news was a crime at common law, prosecutions under such laws appear to have died out by the late seventeenth century. See Larry D. Eldridge, *Before Zenger: Truth and Seditious Speech in Colonial America, 1607-1700*, 39 Am. J. Legal Hist. 337, 356 (1995) (“Increasingly, as the century went on, colonial officials simply investigated rumors [of violations of false news laws] and did little except publicly declare them to be false in an effort ‘to quiet the minds of the people.’”).

That said, the Dissenters acknowledge that the Supreme Court's case law does not clearly and uniformly support their contention that false speech is *always* unprotected. But they counter that the First Amendment protects only *some* false speech "in order to protect speech that matters." *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997. But the Dissenters do not even attempt to identify the types of speech that "matter." The Dissenters' "speech that matters" approach simply invites courts to complete an ever-expanding list, which would increasingly resemble the Kafkaesque world so well portrayed in Chief Judge Kozinski's concurrence in this case. *See* Kozinski Concurrence at 674-75. It goes without saying that such an "ad hoc," "free-wheeling," "case-by-case" approach is contrary to the Supreme Court's teachings in *Stevens*, and might even be among those the Court finds "startling and dangerous." *Stevens*, 130 S. Ct. at 1585-86.

The Dissenters may be correct that Congress may someday be able to redress the "reputational harm to the military" caused by conduct like Alvarez's. O'Scannlain Dissent at 685; *see generally* Gould Dissent. But "[a]s presently drafted, the Act is facially invalid under the First Amendment, and was unconstitutionally applied to make a criminal out of a man who was proven to be nothing more than a liar, without more." *Alvarez*, 617 F.3d at 1217 (emphasis added).

The Dissenters rely on the unsupportable doctrinal premise that false speech is categorically subject to government regulation and prohibition. For the reasons outlined *supra* and in my majority opinion, I respectfully disagree.

Chief Judge KOZINSKI, concurring in the denial of rehearing en banc:

According to our dissenting colleagues, “non-satirical and non-theatrical [ ] knowingly false statements of fact are *always* unprotected” by the First Amendment. *United States v. Alvarez*, 617 F.3d 1198, 1224 (9th Cir. 2010) (Bybee, J., dissenting); *see also* O’Scannlain dissent at 677-78; *cf.* Gould dissent at 687. Not “often,” not “sometimes,” but always. Not “if the government has an important interest” nor “if someone’s harmed” nor “if it’s made in public,” but *always*. “Always” is a deliciously dangerous word, often eaten with a side of crow.

So what, exactly, does the dissenters’ ever-truthful utopia look like? In a word: terrifying. If false factual statements are unprotected, then 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. Phrases such as “I’m working late tonight, hunny,” “I got stuck in traffic” and “I didn’t inhale” could all be made into crimes. Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as “rational basis review.”

What the dissenters seem to forget is that Alvarez was convicted for pure speech. And when it comes to pure speech, truth is not the sine qua non of First Amendment protection. *See Meyer v. Grant*, 486 U.S. 414, 419, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988) (“The First Amendment is a value-free provision whose protection is not dependent on the truth, popularity or so-

cial utility of the ideas and beliefs which are offered.” (internal quotation marks omitted)). That the government can constitutionally regulate some narrow categories of false speech—such as false advertising, defamation and fraud—doesn’t mean that all such speech falls outside the First Amendment’s bounds. As the Supreme Court has cautioned, “In this field every person must be his own watchman for the truth, because the forefathers did not trust any government to separate the true from the false for us.” *Id.* at 419-20, 108 S. Ct. 1886 (internal quotation mark omitted); *Thomas v. Collins*, 323 U.S. 516, 545, 65 S. Ct. 315, 89 L. Ed. 430 (1945) (Jackson, J., concurring). Yet the regime the dissenters agitate for today—one that criminalizes pure speech simply because it’s false—leaves wide areas of public discourse to the mercies of the truth police.

Alvarez’s conviction is especially troubling because he is being punished for speaking about himself, the kind of speech that is intimately bound up with a particularly important First Amendment purpose: human self-expression. As Justice Marshall explained:

The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual’s self worth and dignity.

*Procunier v. Martinez*, 416 U.S. 396, 427, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974) (Marshall, J., concurring). Accordingly, the Court has recognized that “[o]ne fundamental concern of the First Amendment is to ‘protect the individual’s interest in self-expression.’” *Citizens*

*United v. FEC*, — U.S. —, 130 S. Ct. 876, 972, 175 L. Ed. 2d 753 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 534 n.2, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980)) (second alteration in original). Speaking about oneself is precisely when people are most likely to exaggerate, obfuscate, embellish, omit key facts or tell tall tales. Self-expression that risks prison if it strays from the monotonous reporting of strictly accurate facts about oneself is no expression at all.

Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy (“No, I don’t live around here”); to avoid hurt feelings (“Friday is my study night”); to make others feel better (“Gee you’ve gotten skinny”); to avoid recriminations (“I only lost \$10 at poker”); to prevent grief (“The doc says you’re getting better”); to maintain domestic tranquility (“She’s just a friend”); to avoid social stigma (“I just haven’t met the right woman”); for career advancement (“I’m sooo lucky to have a smart boss like you”); to avoid being lonely (“I love opera”); to eliminate a rival (“He has a boyfriend”); to achieve an objective (“But I love you so much”); to defeat an objective (“I’m allergic to latex”); to make an exit (“It’s not you, it’s me”); to delay the inevitable (“The check is in the mail”); to communicate displeasure (“There’s nothing wrong”); to get someone off your back (“I’ll call you about lunch”); to escape a nudnik (“My mother’s on the other line”); to namedrop (“We go way back”); to set up a surprise party (“I need help moving the piano”); to buy time (“I’m on my way”); to keep up appearances (“We’re not talking divorce”); to avoid taking out the trash (“My back hurts”); to duck an

obligation (“I’ve got a headache”); to maintain a public image (“I go to church every Sunday”); to make a point (“Ich bin ein Berliner”); to save face (“I had too much to drink”); to humor (“Correct as usual, King Friday”); to avoid embarrassment (“That wasn’t me”); to curry favor (“I’ve read all your books”); to get a clerkship (“You’re the greatest living jurist”); to save a dollar (“I gave at the office”); or to maintain innocence (“There are eight tiny reindeer on the rooftop”).

And we don’t just talk the talk, we walk the walk, as reflected by the popularity of plastic surgery, elevator shoes, wood veneer paneling, cubic zirconia, toupees, artificial turf and cross-dressing. Last year, Americans spent \$40 billion on cosmetics—an industry devoted almost entirely to helping people deceive each other about their appearance. It doesn’t matter whether we think that such lies are despicable or cause more harm than good. An important aspect of personal autonomy is the right to shape one’s public and private persona by choosing when to tell the truth about oneself, when to conceal and when to deceive. Of course, lies are often disbelieved or discovered, and that too is part of the pull and tug of social intercourse. But it’s critical to leave such interactions in private hands, so that we can make choices about who we are. How can you develop a reputation as a straight shooter if lying is not an option?

Even if untruthful speech were not valuable for its own sake, its protection is clearly required to give breathing room to truthful self-expression, which is unequivocally protected by the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Americans tell somewhere between two and fifty lies each day. *See*

Jochen Mecke, *Cultures of Lying* 8 (2007). If all untruthful speech is unprotected, as the dissenters claim, we could all be made into criminals, depending on which lies those making the laws find offensive. And we would have to censor our speech to avoid the risk of prosecution for saying something that turns out to be false. The First Amendment does not tolerate giving the government such power.

Judge O’Scannlain tells us not to worry, because to say “[t]hat false statements of fact are always *unprotected* in themselves is not to say that such statements are always *subject to prohibition*.” O’Scannlain dissent at 686. This is double talk. If a statement is “always unprotected” by the First Amendment then it’s presumptively subject to regulation. That it may enjoy derivative protection by osmosis from “other speech that matters” is cold comfort to those who have no way of knowing in advance whether two judges of this court will recognize that relationship in any particular instance.

But it gets worse. Confronted with some of the many ways in which false speech permeates our discourse, Judge O’Scannlain comes up with new categories of exceptions to his regime—“expressions of emotion or sensation,” “predictions or plans,” “exaggerations” and “playful fancy.” *Id.* at 686. “Such statements,” we are told, “are not even implicated” by the dissenters’ analysis because they are not “falsifiable.” *Id.* But this is patently not true. If you tell a girl you love her in the evening and then tell your roommate she’s a bimbo the next morning, and the two compare notes, someone’s going to call you a liar. And if you tell the Social Security Commissioner, “I have disabling back pain,” and are then discovered jogging, golfing and jet-skiing, it will be

no defense that you were merely expressing a “sensation” that is “non-falsifiable.” Judge O’Scannlain also turns a tin ear to the complexity of human communication. “I just haven’t met the right woman,” could be a statement of opinion, as my colleague suggests, but more likely is a false affirmation of heterosexuality. And where, exactly, is the dividing line between an “exaggeration”—which Judge O’Scannlain seems to think always gets constitutional protection—and a lie, which never does?

The dissent dismisses these difficulties by creating a doctrine that is so complex, ad hoc and subjective that no one but the author can say with assurance what side of the line particular speech falls on. This not only runs smack up against the Supreme Court’s admonition against taking an “‘ad hoc,’ ‘freewheeling,’ ‘case-by-case’ approach” in the First Amendment area, Smith concurrence at 673, but results in the “courts themselves . . . becom[ing] inadvertent censors.” *Snyder v. Phelps*, — U.S. —, 131 S. Ct. 1207, 1216, 179 L. Ed. 2d 172 (2011). And, as Judge Smith elegantly demonstrates, Judge O’Scannlain’s approach compounds the danger of arbitrariness by “invert[ing] the ordinary First Amendment burden” in requiring the *speaker*—even in the case of a criminal defendant—to prove that his speech deserves protection. Smith concurrence at 667. Free speech simply cannot survive the kind of subjective and unpredictable regime envisioned by the dissenters.

Judge O’Scannlain is right that the scenario I describe is “far removed from the one in which we actually live,” O’Scannlain dissent at 687, but only because the dissenters didn’t prevail. Had they done so, we may

very well have come to live in a world more like a Hollywood horror film than the country we know and adore.

Perhaps sensing the danger of the absolutist approach, Judge Gould proposes a narrower rule, one that would carve away First Amendment protections for speech concerning (1) some (2) military matters (3) where the interest of the speaker is low. Judge Gould's dissent illustrates the dangers of announcing a hypothetical rule without the need to apply it to a concrete case. As I show below, all three legs supporting Judge Gould's theory buckle as soon as weight is placed on them.

Before I get to that, however, let me point out just how wrong it would be to convene an en banc court in order to adopt a rule such as that proposed by our colleague. En bancs are generally appropriate to correct a conflict with the law of our own circuit, another circuit or the Supreme Court. The enterprise Judge Gould proposes would serve none of these purposes. Instead, he would have the en banc court adopt a rule no other court has ever adopted and the Supreme Court has never hinted at. This strikes me as an unwise use of en banc resources.

But on to the rule Judge Gould proposes. He first posits that "the power of Congress [in dealing with military matters] is necessarily strong," but Congress has strong powers in many areas, including immigration and naturalization, U.S. Const. art. I, § 8, cl. 4; foreign relations, *id.* cl. 3; copyright and patent, *id.* cl. 8; bankruptcy, *id.* cl. 4; interstate commerce, *id.* cl. 3; tax, *id.* cl. 1; Native Americans, *id.* cl. 3; and the District of Columbia, *id.* cl. 17. Judge Gould doesn't explain why congressional power vis-a-vis the military is so much more impor-

tant than these other strong congressional powers, so as to merit its own First Amendment hall pass. Or, perhaps Judge Gould means to suggest that there should be a similar exception for, say, lying about being an immigrant or a bankrupt—which would make his exception far broader than he acknowledges.

Second, as Judge Gould recognizes, not all speech concerning military matters is unprotected by the First Amendment, else Congress could pretty much have banned the entire Vietnam protest movement—and no doubt would have. Lying about being a military hero is despicable and may have some impact on the government's ability to recruit genuine heroes, but it's hard to understand why it's so much worse than burning an American flag, displaying a profane word in court, rubbing salt into the fresh wounds of the families of fallen war heroes, suggesting that a revered religious leader commits incest with his mother in an outhouse or publishing military secrets in time of war. *See New York Times Co. v. United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971); *cf.* Charlie Savage, *U.S. Prosecutors Study WikiLeaks Prosecution*, N.Y. Times, Dec. 8, 2010, at A10. Exceptions 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. Because Judge Gould is vague about the rule he proposes, he doesn't deal with this difficulty.

Finally, Judge Gould would limit his rule to situations where the speaker and society “lack [a] substantial interest” in the untruthful statement. But how are we to tell which statements do and which ones do not have social utility? The one guiding light of our First Amend-

ment law is that government officials, and courts in particular, are not allowed to make judgments about the value of speech. Pornography is an odd exception, but it's the only one I'm aware of, and even there judgments are made on a case-by-case basis. I am aware of no context where the legislature is allowed to decide that entire categories of speech can be banned because they are socially useless. This strikes me as an awesome power to confer on government officials, one quite antithetical to the core values of the First Amendment. Judge Gould does not explain why a rule such as the one he proposes would not sound the death knell for the First Amendment as we know it.

\* \* \*

Political and self expression lie at the very heart of the First Amendment. If the First Amendment is to mean anything at all, it must mean that people are free to speak about themselves and their country as they see fit without the heavy hand of government to keep them on the straight and narrow. The Stolen Valor Act was enacted with the noble goal of protecting the highest honors given to the men and women of our military, but the freedoms for which they fight include the freedom of speech. The ability to speak openly about yourself, your beliefs and your country is the hallmark of a free nation. Our decision not to rehear this case en banc ensures the First Amendment will retain its vitality for another day—and, hopefully, for always.

O'SCANNLAIN, Circuit Judge, joined by GOULD, BYBEE, CALLAHAN, BEA, IKUTA, and N.R. SMITH, Circuit Judges, dissenting from the denial of rehearing en banc:

In this case, our court invalidates the Stolen Valor Act of 2005—a federal statute that criminalizes the act of lying about having been awarded U.S. military decorations—concluding that the Act runs afoul of the First Amendment. This is the first Court of Appeals decision to consider the constitutionality of the Act, but the court's opinion is not merely unprecedented; rather, it runs *counter* to nearly forty years of Supreme Court precedent. Over such time, the Supreme Court has steadfastly instructed that false statements of fact are not protected by the First Amendment. Because neither the court's application of strict scrutiny nor its ultimate decision accords with Supreme Court guidance, I respectfully dissent from our court's regrettable denial of rehearing en banc.

## I

Shortly after winning election to a regional water district's board of directors, Xavier Alvarez stood in a public meeting and was asked to introduce himself. Before the assembled crowd, Alvarez proudly declared, "I'm a retired Marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around." *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010) (internal quotation marks omitted).

But Alvarez has never served in the Marines or in any other branch of the armed forces. He certainly has not been awarded the Medal of Honor, the nation's most

prestigious military decoration. “In short, with the exception of ‘I’m still around,’ his self-introduction was nothing but a series of bizarre lies.” *Id.* at 1201.

The FBI obtained a recording of the board meeting and Alvarez was indicted on two counts of falsely claiming to have received the Medal of Honor, in violation of the Stolen Valor Act, 18 U.S.C. §§ 704(b), (c)(1).<sup>1</sup> Alvarez moved to dismiss the indictment, claiming that the Act is unconstitutional, and the district court denied the motion. *Alvarez*, 617 F.3d at 1201. He then pleaded guilty to one count of “falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [he] knew, he had not received the Congressional Medal of Honor,” and reserved his right to appeal the First Amendment issue. *Id.* (internal quotation marks omitted) (alterations in original).

On appeal to this court, Alvarez claimed that the Act unconstitutionally restricts the freedom of speech. The court subjected the Act to strict scrutiny review, ultimately concluding that it failed to survive. The court then rendered the first and only Court of Appeals opin-

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<sup>1</sup> The Act provides:

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

18 U.S.C. § 704(b). The penalty is enhanced if the lie involved certain enumerated medals, including the Congressional Medal of Honor. *Id.* §§ 704(c)-(d).

ion to declare the Act unconstitutional—both as applied to Alvarez and on its face. Judge Bybee dissented.

## II

In giving strict scrutiny to the Stolen Valor Act, the majority ignored a straightforward aspect of First Amendment law: the right to lie is not a fundamental right under the Constitution. For nearly forty years, the Supreme Court has made this much abundantly clear. In cases concerning regulations of false speech, the Court regularly instructs that “the erroneous statement of fact is not worthy of constitutional protection.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). False statements are “particularly valueless,” *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988); are “not immunized by the First Amendment right to freedom of speech,” *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); “ha[ve] never been protected for [their] own sake,” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976); and “in and of [themselves] carr[y] no First Amendment credentials,” *Herbert v. Lando*, 441 U.S. 153, 171, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979).<sup>2</sup>

Under plain application of the Supreme Court’s guidance, the Stolen Valor Act—which criminalizes only false statements of fact—should not undergo the rigor

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<sup>2</sup> The Court’s instruction that false speech is not constitutionally protected is but a part of the more fundamental precept of First Amendment law that certain categories of speech are fully outside of that Amendment’s protections. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 & n.3, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

of strict scrutiny review. We reserve such intense scrutiny only for *constitutionally protected* speech. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986) (“[T]he government cannot limit *speech protected by the First Amendment* without bearing the burden of showing that its restriction is justified.” (emphasis added)). Yet, upon the novel theory that “we presumptively protect *all* speech, including false statements,” the majority erroneously subjects the Act to strict scrutiny, and in the process holds unconstitutional a plainly valid act of Congress. *Alvarez*, 617 F.3d at 1217.

## A

The notion that restrictions upon false speech do not receive strict scrutiny is borne out in the Supreme Court’s analysis in cases involving such speech. The Court routinely begins its review from the foundational premise that false speech “is not worthy of constitutional protection.” *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997. From there, the Court assesses whether *other* speech—i.e., constitutionally protected non-false speech—demands that the particular false statements in question be protected, too. Only then must restrictions on false speech pass heightened scrutiny.

## 1

Closer inspection of these cases buttresses the Court’s straightforward words. In *Gertz v. Robert Welch, Inc.*, for example, the Supreme Court began from the premise that “there is no constitutional value in false statements of fact.” 418 U.S. at 340, 94 S. Ct. 2997. The Court went on to consider whether *other* First Amend-

ment concerns required extending a heightened “actual malice” standard to defamation actions brought by private individuals.<sup>3</sup> *Id.* at 340-47, 94 S. Ct. 2997. Importantly, the Court concluded that free debate does *not* require such rigorous protection of private defamation, and instead gave states the broad authority to “define for themselves the appropriate standard of liability” for such actions, so long as “they do not impose liability without fault.” *Id.* at 347, 94 S. Ct. 2997. The baseline protection against strict liability was necessary, the Court explained, not because the First Amendment shields false statements as a general matter, but because such broad liability would threaten the operations of “*the press and broadcast media.*” *Id.* at 348, 94 S. Ct. 2997 (emphasis added). In other words, the Court determined that “speech that matters,” *id.* at 341, 94 S. Ct. 2997—the presence of robust and functional news media—required some minimal protection against liability for publishing erroneous facts.

This same method of analysis—beginning from the presumption that false speech is unprotected and then determining whether some protection is needed for other speech that matters—has been often repeated. For example, in *Hustler Magazine v. Falwell*, the Court began by noting that “[f]alse statements of fact are particularly valueless.” 485 U.S. at 52, 108 S. Ct. 876. From there, the Court considered whether the strong interest in public debate required some protection against intentional infliction of emotional distress claims

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<sup>3</sup> Specifically, the Court considered whether to extend the “actual malice” standard crafted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), for defamation actions brought by public officials. I discuss *Sullivan* *infra* Part II.A.2.

brought by public officials. *Id.* at 52-54, 108 S. Ct. 876. After an extensive analysis, the Court announced its “considered judgment” that the pivotal role played by satire in “public and political debate,” *id.* at 54, 108 S. Ct. 876, required the extension of an actual malice standard to such claims. *Id.* at 56-57, 108 S. Ct. 876. *See also BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002) (considering whether the freedom to bring unsuccessful lawsuits deserves “breathing space protection” under the First Amendment).

Our own court has followed the same pattern of analysis. Under the Supreme Court’s guidance, we recognize that “false statements are not deserving, in themselves, of constitutional protection,” and thus “constitutional protection is afforded [only] *some* false statements.” *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 424 (9th Cir. 1995) (emphasis added). Namely, we must consider “the interest in creating a ‘breathing space’” for constitutionally protected speech. *Id.*

For example, in *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, we began by recognizing that the “[F]irst [A]mendment has not been interpreted to preclude liability for false statements.” 690 F.2d 1240, 1261 (9th Cir. 1982). From there, we asked whether allowing antitrust liability for furnishing false information to an administrative body would impinge on other, constitutionally protected speech. Ultimately, we concluded that imposing such liability would not “hamper debate,” and therefore that no heightened First Amendment protections applied. *See id.* at 1261-62. Moreover, we made clear that even where a restriction on false statements *will* hamper debate, “this possibility

does not require that all such statements be immunized from liability.” *Id.* at 1262. Indeed, the protection of speech that matters may simply “suggest that a court should adopt a stricter standard of proof,” not even that the most exacting level of scrutiny should be applied. *Id.*

## 2

In this case, the majority implied that the Supreme Court’s long line of decisions applying the foregoing analysis is called into question by its earlier decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). *See Alvarez*, 617 F.3d at 1203, 1206-08. Nothing could be further from the truth. *Sullivan* does not suggest that false statements, in and of themselves, receive constitutional protection. Quite the opposite, in *Sullivan* the Court engaged in precisely the analysis described above.

In *Sullivan*, the Court considered whether an elected commissioner of Montgomery, Alabama could bring a civil libel suit for defamatory comments contained in a full-page political advertisement. *Id.* at 256-57, 84 S. Ct. 710. Of the advertisement’s ten paragraphs, only two contained statements that were allegedly false. *Id.* at 257, 84 S. Ct. 710. Rather than addressing whether false speech, as a category, is protected by the First Amendment, the Court asked whether the “*advertisement*, as an expression of grievance and protest on one of the major public issues of our time, . . . forfeits [First Amendment] protection by the falsity of *some of its factual statements*.” *Id.* at 271, 84 S. Ct. 710 (emphasis added). Ultimately, the Court concluded that the presence of some erroneous statements did not forfeit all

protections for the political advertisement as a whole. Because “erroneous statement is inevitable in free debate,” in certain circumstances, it “must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” *Id.* at 271-72, 84 S. Ct. 710 (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)) (ellipsis in original). The Court noted that this is especially true in the unique “climate in which public officials operate.” *Id.* at 273 n.14, 84 S. Ct. 710. Accordingly, the Court required a heightened “actual malice” scienter for public officials seeking to bring defamation actions against their critics, specifically to buttress our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Id.* at 270, 84 S. Ct. 710.

As described by the Supreme Court itself, *Sullivan* thus stands for the simple proposition that we must “protect *some falsehood* in order to protect *speech that matters*.” *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997 (emphasis added) (discussing *Sullivan*). This is a far cry from the majority’s opinion, which somehow concludes that “we presumptively protect all speech, including false statements.” *Alvarez*, 617 F.3d at 1217 (emphasis omitted). The Court in *Sullivan* did not address the question whether false statements, as a category, are protected by the First Amendment.<sup>4</sup> *Sullivan*’s holding does not

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<sup>4</sup> And the Court certainly did not address whether *all* speech is presumptively protected, as the majority opinion states. It is difficult to see how the majority could defend this more startling conclusion, given the multitude of Supreme Court cases stating emphatically that certain “categories of speech [are] *fully outside* the protection of the First Amendment.” *United States v. Stevens*, — U.S. —, 130 S. Ct. 1577,

even apply to defamation actions against private individuals, nor does it extend First Amendment protections to *any* knowingly false speech, *see Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) (“[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.”).

*Sullivan* is but one example of granting limited First Amendment protection to false statements *in order to* protect other, non-false speech that matters. *See BE & K Constr. Co.*, 536 U.S. at 531, 122 S. Ct. 2390 (describing *Sullivan* as “[a]n example of . . . ‘breathing space’ protection” for speech that matters). And *Sullivan* therefore does not establish any rule that calls into question the Court’s many subsequent statements that identify false speech as constitutionally unprotected.

## B

Altogether, upon consideration of both the Supreme Court’s plain statements and the Court’s underlying analysis, we are left with the conclusion that false statements of fact are not protected by the First Amendment, *unless it is shown* that other “speech that matters” requires such protection. Without more, restrictions upon false statements, as with other areas of unprotected speech, are simply not subject to strict scrutiny review. *See United States v. Stevens*, — U.S. —, 130 S. Ct. 1577, 1585-86, 176 L. Ed. 2d 435 (2010) (“[W]ithin [the] categories of unprotected speech . . . no process of case-by-case adjudication is required, because the balance of competing interests is clearly

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1586, 176 L. Ed. 2d 435 (2010) (emphasis added); *accord Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961).

struck.” (internal quotation marks omitted)). The majority never should have imposed such exacting standards upon the Stolen Valor Act.

### III

Despite such overwhelming precedent, the majority somehow proclaims to “find *no authority* holding that false factual speech, as a general category unto itself, is [unprotected by the First Amendment].” *Alvarez*, 617 F.3d at 1206 (emphasis added). With that remarkable conclusion, the majority dove into strict scrutiny analysis after determining that the government had not rebutted the majority’s self-imposed presumption of such scrutiny. The court never even considered whether the Stolen Valor Act will chill speech that matters, much less required Xavier Alvarez to demonstrate that it will.<sup>5</sup>

In so doing, the majority both rejected the Supreme Court’s settled method of analysis and ignored the Court’s clear language. As Judge Bybee put it, “[t]he majority . . . effectively overruled *Gertz* and inverted the whole scheme.” *Id.* at 1223 (Bybee, J., dissenting). And, ultimately, the majority imposed burdens upon the

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<sup>5</sup> In his post-opinion concurrence, Judge Smith insists that the government is required “to prove that the targeted speech is not . . . protected.” Smith Concurrence at 668. This is misleading. At most, the government bears the burden of showing that the speech targeted is *within a certain class* of unprotected speech; once that is shown, no further case-by-case analysis is needed, *see Stevens*, 130 S. Ct. at 1585-86. Here, there is no question that the Act criminalizes *only* false statements of fact. Such statements are categorically unprotected for their own sake—and it is then Alvarez’s burden to demonstrate whether other First Amendment concerns require protection of the false statements at issue.

Stolen Valor Act that are unsupported by, and are even directly contrary to, existing law.

A

1

Instead of recognizing that false speech is unprotected, the majority refused to give the Supreme Court's consistent and overwhelming precedent its full due. Instead, the majority "believe[s] the historical category of unprotected speech identified in *Gertz* and related law is *defamation*, not all false factual speech." *Alvarez*, 617 F.3d at 1207 (emphasis added). The majority thus analyzed the issue as whether it should "extend" this traditionally unprotected category of "defamation" to include false statements of fact more broadly. *Id.* at 1208.

But to accept the majority's reading of *Gertz* and its progeny, one must turn a deaf ear to the Supreme Court's language. Indeed, in the majority's view, each of the myriad times the Court referred to "false statements" generally, the Court misspoke. For instance, when the Court wrote that "the erroneous statement of fact is not worthy of constitutional protection," *Gertz*, 418 U.S. at 340, 418 U.S. 323, what it really meant (according to the majority) was "the erroneous statement of fact is not worthy of constitutional protection [only if it meets the traditional definition of defamation]." Or when the Court instructed that "false statements [are] unprotected for their own sake," *BE & K Constr. Co.*, 536 U.S. at 531, 122 S. Ct. 2390, it actually meant (according to the majority) that "[slander and libel are] unprotected for their own sake."

It is not our place to put words into the mouth of the Supreme Court. Worse yet, it is not our place to take

the Supreme Court’s actual words and reshape them to mean something entirely different. As Judge Bybee noted in dissent, the Supreme Court surely knows the difference between “defamation” and “false statements of fact.” *See Alvarez*, 617 F.3d at 1223 (Bybee, J., dissenting). If it meant the former, presumably it would have said so. I cannot assume that the Court would have blithely used “false statements” to mean “defamation” for four decades running.

## 2

In reaching its constrained reading of *Gertz* and its progeny, the majority relies heavily on the Supreme Court’s recent decision in *United States v. Stevens*. There, the Court considered whether graphic portrayals of violence to animals are entitled to protection under the First Amendment. Outlining the general framework for considering First Amendment challenges, the Court explained that certain “categories of speech [are] fully outside the protection of the First Amendment.” *Stevens*, 130 S. Ct. at 1586. By way of illustration, the Court noted that these categories “includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.” *Id.* at 1584 (citations omitted). The Court went on to reject the contention that depictions of animal cruelty were one such category, and thereafter to reject the argument that a new category for such depictions should be created.

The majority makes much of the fact that the Court in *Stevens* did not specifically name “false statements of fact” in its list of historically unprotected categories of speech. *See Alvarez*, 617 F.3d at 1208-09. The majority reads into that passage an implication that false state-

ments are *not* historically unprotected. But, by its own terms, the Court’s list of unprotected categories is not exhaustive. Even more, by stating that the categories of historically unprotected speech *include* the examples it named, the Court implied that other, unnamed classes of speech are unprotected as well. See *Burgess v. United States*, 553 U.S. 124, 131 n.3, 128 S. Ct. 1572, 170 L. Ed. 2d 478 (2008) (“[T]he word ‘includes’ is *usually a term of enlargement*, and not of limitation.” (emphasis added) (quoting 2A N. Singer & J. Singer, *Sutherland on Statutory Construction* § 47:7, at 305 (7th ed. 2007))). It is obvious that the Supreme Court’s brief, illustrative list was in no way intended to call into question its decades of precedent explicitly stating that false statements of fact do not receive First Amendment protection.

Moreover, it is little surprise that the Supreme Court at times refers specifically to “defamation” as an unprotected category, given that many of the cases in this area concern defamatory statements.<sup>6</sup> See, e.g., *Gertz*, 418 U.S. at 323, 94 S. Ct. 2997; *Chaplinsky*, 315 U.S. at 568, 62 S. Ct. 766. But the Court’s reference to the specific category of defamation in a given case has never been thought to refute the notion that the general category of false statements is unprotected. For example, in *Chaplinsky v. New Hampshire*, the Court listed the categories of historically unprotected speech as “the lewd and obscene, the profane, the *libelous*, and the insulting

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<sup>6</sup> Importantly, not *all* of the cases in this area deal with defamation—a point that cuts sharply against the majority’s reading of *Gertz*. See, e.g., *BE & K Constr. Co.*, 536 U.S. 516, 122 S. Ct. 2390 (retaliatory lawsuits); *Hustler Magazine*, 485 U.S. 46, 108 S. Ct. 876 (intentional infliction of emotional distress); see also *Alvarez*, 617 F.3d at 1224-27 (Bybee, J., dissenting) (collecting and discussing cases).

or ‘fighting’ words.” *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766 (emphasis added). But, directly quoting *Chaplinsky*, in *Gertz* the Court stated more broadly that “false statements of fact” are categorically unprotected. *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997. The fact that one of the Court’s most recent statements on unprotected categories of speech did not expressly mention “false statements of fact” sheds little, if any, light on the historical protection of such speech.

## B

After dodging the Supreme Court’s clear guidance, the majority mistakenly concludes that the only way for the Stolen Valor Act to survive is if it requires a scienter above negligence and a showing of individualized harm. *See Alvarez*, 617 F.3d at 1207-14. According to the majority, these requirements are derived from those imposed upon regulations of defamation and fraud—the two categories of unprotected speech that the majority admits deal in false statements. But upon closer look at current laws, the majority’s self-created requirements do not hold water. Moreover, even if we *were* to impose such requirements, the Stolen Valor Act still survives.

## 1

The litany of state and federal laws that prohibit false speech *without* a showing of individualized harm drastically undermine the majority’s insistence that all regulations of false speech must require such a showing.<sup>7</sup> For example, Chapter 47 of Title 18 (named

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<sup>7</sup> Moreover, the failure of these laws to comply with the majority’s self-created requirements suggests that prohibitions of false speech have not been constrained to traditional definitions of “fraud” or “def-

“Fraud and False Statements”), criminalizes a host of false statements, including many without any showing of harm (or even of “materiality”)—and some which do not even contain a scienter requirement. *See, e.g.*, 18 U.S.C. § 1005 (punishing “any false entry in any book, report, or statement” of a bank); *id.* § 1011 (punishing “any [knowingly] false statement . . . relating to the sale of any mortgage, to any Federal land bank”); *id.* § 1015(a) (punishing “any [knowingly] false statement under oath, in any case, proceeding, or matter relating to . . . naturalization, citizenship, or registry of aliens”); *id.* § 1027 (punishing “any [knowingly] false statement or representation of fact . . . required by [ERISA]”). The Supreme Court has rejected the contention that these statutes implicitly require a showing of materiality or harm—and yet the Court did not even consider whether the absence of such a requirement raised First Amendment concerns. *See United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997). And the federal government is far from alone; a quick survey of but a few states within our own circuit underscores just how prevalent prohibitions of false statements are, even without individual harm requirements. *See, e.g.*, Alaska Stat. § 11.56.800(a)(2) (punishing “false report[s] to a peace office that a crime has occurred or is about to occur”); Ariz. Rev. Stat. § 13-2907.03 (punishing a knowingly “false report of sexual assault involving a spouse”); Nev. Rev. Stat. § 199.145 (punishing any willful “unqualified statement of that which the person does not know to be true” made under oath); Rev. Code Wash. § 9A.60.070 (punishing knowingly false claims of “a cre-

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amation.” I certainly do not agree, as Judge Smith assumes, Smith Concurrence at 670, that these laws are constitutional only because they fit within such categories as listed in *Stevens*.

dential issued by an institution of higher education that is accredited,” in promotion of a business or with the intent to obtain employment).

It is thus neither out of the ordinary nor constitutionally significant that the Stolen Valor Act does not require a showing of individualized harm.

## 2

Even if we were to require the Stolen Valor Act to contain the majority’s self-created requirements, the Act would still stand. First, even accepting the need for some scienter above negligence, it is clearly met here.<sup>8</sup> Although the Act does not explicitly contain a scienter requirement, Alvarez readily admits that he knew his statement was a lie when he uttered it. *See Alvarez*, 617 F.3d at 1201. Thus, at least as-applied to Alvarez, the statute’s lack of a scienter requirement is of no moment. Moreover, in seemingly every case that would be prosecuted under the Act, the speaker will know the falsity of his statement. It is difficult to imagine a scenario in which a speaker honestly believes that he has been awarded a military honor that he has not actually received. To the extent that any such case would arise, it surely would be the rare exception. Thus, the lack of a scienter requirement carries no weight even under Alvarez’s facial challenge. That challenge may succeed only if “no set of circumstances exists under which the

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<sup>8</sup> Although the majority implied that, to survive, the Act must require a “malicious” or “knowingly false” scienter along the lines of *Sullivan*, *Alvarez*, 617 F.3d at 1209, it is difficult to understand why such a strict scienter would be required here, while it is not even required in defamation actions brought by non-public figures, *see Gertz*, 418 U.S. at 343-50, 94 S. Ct. 2997.

Act would be valid.”<sup>9</sup> *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

Second, even if it were necessary, a requirement that the Act criminalize only statements that effect some harm is easily satisfied. Indeed, Congress has identified the harm at issue: “[f]raudulent claims surrounding the receipt of . . . [military] decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.” Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. 3266 (2006). The majority admits that “Congress certainly has an interest, even a compelling interest” in preventing such harm. *Alvarez*, 617 F.3d at 1216. That the Act does not explicitly limit its scope only to those false statements that incur this congressionally identified harm is inconsequential; the underlying point is that *all* such statements contribute to the harm. *See also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) (“False statements of fact harm both the subject of the falsehood and the readers of the statement.” (emphasis removed)). “The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.” *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).

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<sup>9</sup> Similarly, the Act’s lack of a scienter requirement does not render the statute overbroad, which would require its unconstitutional sweep to be “*substantial* . . . [when] judged in relation to the statute’s plainly legitimate sweep.” *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (emphasis added).

It is difficult to see how reputational harm to the military even could be evaluated on an individual basis, and it is no surprise that the Act has not made such a showing an element of the offense. The Act's general harm provision is both sensible and sufficient. Neither the Constitution nor the Supreme Court has required anything more specific.<sup>10</sup>

#### IV

Finally, how should one address the bleak dystopia hypothesized by Chief Judge Kozinski? In his view, if we are to take the Supreme Court at its word that false statements of fact are unprotected by the First Amendment, then a variety of white lies, exaggerations, and cosmetic enhancements—and apparently the core of self-expression itself—must fall. See Kozinski Concurrence at 673-75. Such fears are wholly unfounded and miss the very crux of my disagreement with the majority.

As an initial matter, most of the “lies” that Chief Judge Kozinski postulates are not false statements of fact whatsoever. They are opinions (“Gee you’ve gotten skinny;” “She’s just a friend;” “I just haven’t met the right woman;” “I’m sooo lucky to have a smart boss like you;” “I had too much to drink;” “You’re the greatest

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<sup>10</sup> Indeed, 18 U.S.C. § 1001—the leading federal prohibition on false statements—was vastly expanded following the New Deal, out of Congress’s recognition that certain false statements would impair government functioning “*even though* the government would not be deprived of any property or money.” *Brogan v. United States*, 522 U.S. 398, 412, 118 S. Ct. 805, 139 L. Ed. 2d 830 (1998) (Ginsburg, J., concurring) (emphasis added). This, like the Stolen Valor Act, is but one example of Congress’s authority to prohibit false speech based upon general, perhaps unprovable, assumptions about public good.

living jurist”); expressions of emotion or sensation (“I love opera;” “But I love you so much;” “It’s not you, it’s me;” “My back hurts;” “I’ve got a headache”); predictions or plans (“[I]t won’t hurt a bit;” “I’ll call you about lunch”); exaggerations (“We go way back”); and playful fancy (“There are eight tiny reindeer on the rooftop”). Kozinski Concurrence at 673, 674-75. Even if these were to be described—under the loosest possible definition—as statements of fact, they would hardly be falsifiable. Such statements thus are not even implicated by the foregoing discussion of the protections afforded false statements of fact. *See generally Alvarez*, 617 F.3d at 1220-23 (Bybee, J., dissenting) (outlining the contours of false statements, as defined by the Supreme Court).

More importantly, Chief Judge Kozinski appears to have misunderstood my fundamental disagreement with the majority. That false statements of fact are always *unprotected* in themselves is not to say that such statements are always *subject to prohibition*. Quite to the contrary, as I have discussed at length, false statements may often *not* be prohibited, where it is shown that other, constitutionally protected speech will be stifled as well. For example, Chief Judge Kozinski identifies “[p]olitical and self expression” as “at the very heart of the First Amendment.” Kozinski Concurrence at 677. And false statements could not uniformly be prohibited without regard to the effect on such forms of expression. But the problem here—and the reason that this case deserves to be reheard en banc—is that the majority never even *asked* whether speech such as political or

self-expression would be harmed by the Stolen Valor Act before diving into strict scrutiny analysis.<sup>11</sup>

Like a Hollywood horror film, Chief Judge Kozinski describes a fictional world that may frighten, but which is far removed from the one in which we actually live.

## V

Because the majority has strayed from the Supreme Court’s clear guidance—and in the process has taken this court’s First Amendment jurisprudence along for the ride—I must respectfully dissent from our court’s regrettable failure to rehear this case en banc.

GOULD, Circuit Judge, dissenting from denial of rehearing en banc:

I respectfully dissent from denial of rehearing en banc. Although I agree with the suggestions of Judge O’Scannlain and Judge Bybee in their respective dissents that the majority in *Alvarez* is in tension with Supreme Court holdings in *Gertz* and *Garrison*, I would emphasize a different approach in my preferred form of analysis. I do not feel that sustaining Congress’s Stolen

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<sup>11</sup> Judge Smith now suggests that the need to protect “speech that matters” is an illusory restraint on the government. *See* Smith Concurrence at 673 (questioning what sorts of speech “matter” and suggesting that lies would be subject to “ever-expanding” prohibition). But, as has been discussed, the Supreme Court has indeed restricted the prohibition of some false statements in the interest of political expression and public debate. *See supra* Part II.A. Judge Kozinski’s “Kafkaesque world,” Smith Concurrence at 673, suggests that personal self-expression may require similar protection in some cases. In short, there are many areas of speech that matter which may require protection in a given case, but the court must actually *address* such areas in order to give the safeguard teeth.

Valor Act turns on the scope of a sentence from the Supreme Court in any one particular case, whether *Gertz*, or *Garrison*, or *Stevens*. Nor does it require that we say that all false statements are not deserving of First Amendment protection. Rather, I stress that the military context, in which the power of Congress is necessarily strong, together with the lack of any societal utility in tolerating false statements of military valor such as those made by Alvarez, which steal or dilute significant honors bestowed on military heroes, counsel that it's improper to apply strict scrutiny to invalidate this law on its face.

I do not doubt that some statements of the Supreme Court in other cases, read by the *Alvarez* majority to apply here, have contributed to the majority's reasoning. That is, of course, the common law method, and even dicta from the Supreme Court warrants respect. *See, e.g., Coeur D'Alene Tribe v. Hammond*, 384 F.3d 674, 683 (9th Cir. 2004) (stating that Supreme Court dicta is entitled to "great weight"); *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 561 (3d Cir. 2003) (en banc) ("Although . . . the Supreme Court's dicta are not binding on us, we do not view it lightly."). But here, both sides to the controversy can find sentences in prior opinions to use in aid of their theories of the case. Moreover, statements in prior opinions, regardless of potential utility in a current dispute, cannot properly be interpreted as absolutely binding in cases involving different types of facts not present in a previous case decided by the Supreme Court.

It remains open for the Supreme Court to clarify its First Amendment law in the context of Alvarez's chal-

lenge to the Stolen Valor Act. For my part, I would distinguish cases with language cutting a different way, while viewing the crux of the issue as this: A rational Congress might think that the quality of military service and instances of award winning heroism will be enhanced to the extent that there aren't false claims of entitlement to military honors. This interest is a powerful one that a federal court should hesitate to diminish by outlawing the controlling statute on its face. Conversely, Alvarez has no substantial personal interest in lying about his military record, nor is there any substantial societal interest served by letting Alvarez lie about earning awards that he did not receive. I would hold that Congress's criminalization of making false statements about receiving military honors is a "carefully defined" subset of false factual statements not meriting constitutional protection. *See United States v. Alvarez*, 617 F.3d 1198, 1213 (9th Cir. 2010). Stated another way, there should be no conclusion of unconstitutionality even on the standard framed by the majority opinion. To uphold this statute would not necessarily remove all false statements in all contexts from First Amendment scrutiny.

The interests of society at stake counsel us to apply a more permissive standard than the compelling state interest test when assessing the Stolen Valor Act and to uphold it in whole or part if possible. It would be too much to say that any speech by any person about military affairs would fall outside the First Amendment's purview, for that inescapably would lead us to approve sedition acts and criminal prosecutions of those who criticize wars or military conduct. However, Alvarez was not criticizing actions of the military, he was just lying about his military history. Given the military context

impelling Congress and the lack of substantial interest of Alvarez or society in his falsehood, the Stolen Valor Act should be sustained against Alvarez's First Amendment challenge. We could leave for another day whether an as applied challenge might be permissible on other facts.

Hence I respectfully dissent.

## APPENDIX C

## UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

## CRIMINAL MINUTES - GENERAL

Case No.: CR 07-1035(A)-RGK Date: Apr. 9, 2008Present: The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT COURT JUDGEInterpreter N/A

<u>Sharon L. Williams</u> <i>Deputy Clerk</i>	<u>Not Reported</u> <i>Court Reporter/ Recorder, Tape No.</i>	<u>Craig Missakian,</u> <u>Not Present</u> <i>Assistant U.S. Attorney</i>
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<u>U.S.A. v. Defendant(s):</u>	<u>Present</u>	<u>Cust.</u>	<u>Bond</u>
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Xavier Alvarez	N		X
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<u>Attorneys for Defendants:</u>	<u>Present</u>	<u>App.</u>	<u>Ret.</u>
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Brianna Fuller, DFPD	N	X	
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**Proceedings: (IN CHAMBERS) ORDER DENYING DEFENDANT'S MOTION TO DISMISS****I. INTRODUCTION**

On July 23, 2007, Defendant Xavier Alvarez ("Alvarez" or "Defendant") falsely claimed to have received the Congressional Medal of Honor. Defendant made the statement while introducing himself to the Walnut Valley Water District Board as a newly elected director. According to a digital recording of the meeting, he stated, among other things: "I'm a retired Marine of 25 years. I retired in the year 2001. Back in

1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around." (See Ex. B.)

On September 26, 2007, Defendant was indicted for violating 18 U.S.C. § 704(b), also known as the Stolen Valor Act of 2005, which makes it a crime to falsely claim receipt of military decorations or medals. Defendant now brings a Motion to Dismiss the Indictment against him, claiming that the statute violates his First Amendment right to free speech.

## **II. JUDICIAL STANDARD**

Defendant uses the label "Motion to Dismiss Indictment" for its present filing. Such a motion relates specifically to dismissal of a grand jury indictment on procedural grounds, which Defendant does not seek. Rather, it appears that Defendant intended to file his motion under Fed. R. Crim. Proc. 12(b)(2), which allows defendants to challenge the substantive basis for the charges against them.

Similar to Fed. R. Civ. Proc. 12(b)(2), in considering a motion to dismiss under Fed. R. Crim. Proc. 12(b)(2), the court must assume the plaintiff's allegations are true, and must construe the complaint in the light most favorable to the plaintiff. *See United States v. City of Redwood City*, 640 F.2d 963, 967 (9th Cir. 1981). However, in this case Defendant brings a constitutional challenge to the underlying law upon which he is being prosecuted. Therefore, the Court examines the validity of his arguments in the light most favorable to upholding the constitutionality of the law. *See Gray v. First Winthrop Corporation*, 989 F.2d 1564 (9th Cir. 1993).

### III. DISCUSSION

Defendant contends that the Stolen Valor Act of 2005 violates his First Amendment right to free speech, and is unconstitutional both facially and as applied in this case. Specifically, he argues that his statement, though false, was political in nature, and thus protected under the First Amendment. For the reasons set forth below, the Court disagrees.

Defendant cites several cases in support of his assertion that his false statement about having been awarded the Congressional Medal of Honor is protected speech under the First Amendment. These cases can generally be divided into two categories. First, Defendant cites cases that address defendants who make defamatory statements against others. *Gertz v. Welsh*, 418 U.S. 323 (1974) (Defendant's article about the plaintiff negligently accuses him of being a Communist); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (advertisement published by the New York Times negligently misrepresents that Montgomery, Alabama police officers took wrongful action against civil rights protesters). The second line of cases cited by Defendant address content- and/or viewpoint-based regulations. *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530 (1980) (upholding the distribution of pamphlets on matters of public policy by utility companies); *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334 (1995) (concerning the distribution of leaflets expressing political views of members of the public); and *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the defendant's act of flag burning, during a political demonstration, was protected speech under the First Amendment). These cases are all inapposite, as here Defen-

dant's false statement was made knowingly and intentionally, and not negligently; nor does Defendant claim that his statement about having received the Congressional Medal of Honor expressed a political message or viewpoint.

*Garrison v. State of Louisiana* is better authority. 379 U.S. 64 (1964). In *Garrison*, a District Attorney made defamatory statements about state court judges at a press conference, in violation of a Louisiana criminal defamation statute. *Id.* at 64-66. In its ruling, the U.S. Supreme Court expressly held that false statements made knowingly and intentionally are not protected under the First Amendment, even when political in nature:

That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected . . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

*Id.* at 75; see also *Pesttrak v. Ohio Elections Com'n*, 926 F.2d 573 (6th Cir. 1991) (upholding a statute prohibiting false statements during a campaign because "false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth."). Here, as in *Garrison*, there is no dispute that Defendant made his false statement knowingly and intentionally. Thus, this statement is not protected by the First Amendment.

As *Garrison* makes clear, the mere classification of speech as “political” does not afford a defendant First Amendment protections. However, even if the analysis turned on whether the speech at issue was political, the Court finds that Defendant’s statement was not political in nature. Where there is no threat to free and robust debate of public issues, no potential interference with a meaningful dialogue of ideas concerning self-government, and no threat of liability causing a reaction of self-censorship by the press, the First Amendment protection of matters of public concern is not implicated. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985), quoting *Harley-Davidson Motor-sports, Inc. v. Markley*, 279 Or. 361, 366 (1977).

Here, this Court is presented with a false statement of fact, made knowingly and intentionally by Defendant at a Municipal Water District Board meeting. The content of the speech itself does not portray a political message, nor does it deal with a matter of public debate. Rather, it appears to be merely a lie intended to impress others present at the meeting. Such lies are not protected by the Constitution.

As Defendant’s statement does not merit the protection of the First Amendment, the statute under which Defendant is being prosecuted, 18 U.S.C. § 704, cannot be deemed unconstitutional as applied in this case. Furthermore, a legislative act is facially unconstitutional only when no set of circumstances exist under which the act would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). In finding that the application of 18 U.S.C. § 704 is not unconstitutional as applied here,



**APPENDIX D**

18 U.S.C. 704 provides:

**Military medals or decorations**

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

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

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

(1) IN GENERAL.—If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

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

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

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

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

(d) ENHANCED PENALTY FOR OFFENSES INVOLVING CERTAIN OTHER MEDALS.—If a decoration or medal involved in an offense described in subsection (a) or (b) is a distinguished-service cross awarded under section 3742 of title 10, a Navy cross awarded under section 6242 of title 10, an Air Force cross awarded under section 8742 of section 10, a silver star awarded under section 3746, 6244, or 8746 of title 10, a Purple Heart awarded under section 1129 of title 10, or any replacement or duplicate medal for such medal as authorized by law, in lieu of the punishment provided in the applicable

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