

Medals of Dishonor?: Military, Free Speech and the Stolen Valor Act

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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.

- Xavier Alvarez, False Medal of Honor Claimant²

Should any who are not entitled to the honors, have the insolence to assume the badges of them, they shall be severely punished.

- George Washington³

INTRODUCTION

Americans with few attachments to the military might find its dedication to visual emblems out of place in the United States, a vestigial leftover from the Old World.⁴ Nevertheless, medals, awards,

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² United States v. Alvarez (*Alvarez I*), 617 F.3d 1198, 1200 (9th Cir. 2010) (quoting Alvarez's speech), *aff'd*, 132 S. Ct. 2537 (2012).

³ Major Edward C. Boynton, *Head-quarters. Newburgh, August 7, 1782*, in GENERAL ORDERS OF GEO. WASHINGTON, COMMANDER-IN-CHIEF OF THE ARMY OF THE REVOLUTION: ISSUED AT NEWBURGH ON THE HUDSON 1782-1783, at 34 (News Co. 1909), *available at* <http://archive.org/details/generalordersofg00unit>. Eighteenth century definitions of "badge" and "honour" can be found in Samuel Johnson's famous dictionary. SAMUEL JOHNSON ET AL., A DICTIONARY OF THE ENGLISH LANGUAGE (William Pickering, Chancery Lane, George Cowie & Co. Poultry 1827), *available at* <http://archive.org/details/adictionaryengl00jamegoog>. For instance, "badge" can be defined as "a token by which one is known." *Id.* at 55. Additionally, "honour" can be defined as "the title of a man of rank" or—perhaps more applicably—as "due veneration." *Id.* at 350.

⁴ See generally *What is Heraldry?*, INST. OF HERALDRY, <http://www.tioh.hqda.pentagon.mil/Heraldry/heraldry.aspx> (last visited Sept. 28, 2012) (providing a good historical overview of the

and other decorations⁵ hold an exalted place in the armed services, particularly since the turn of the twenty-first century.⁶ In an attempt to protect these honors and further their uses, Congress enacted the Stolen Valor Act of 2005 (“the Act”), which made it a crime to falsely claim to have been awarded a military decoration or medal.⁷ Despite

use of visual emblems). Indeed, such military heraldry originated from the knightly contests of the European battlefield. *Id.* The connection to Europe was so great that, following the American Revolution, there was, throughout society, a backlash against heraldry. *Id.* Even the Medal of Honor, which George Washington himself created, essentially fell into disuse until the Civil War. *Medal of Honor*, INST. OF HERALDRY, http://www.tioh.hqda.pentagon.mil/Awards/medal_of_honor.aspx (last visited Sept. 28, 2012). Not until 1918 did the President order the government to finally organize the plethora of insignias that had emerged in the military. *What is Heraldry?*, *supra*. See generally ROBERT E. WYLLIE, ORDERS, DECORATIONS AND INSIGNIA, MILITARY AND CIVIL (G. P. Putnam’s Sons 1921), available at <http://archive.org/details/ordersdecoration00wyll> (chronicling the early history of American medals and decorations).

⁵ This Article uses the terms “medal,” “decoration,” “award,” and “honor” interchangeably to refer to the tangible representations—conveyed by the military—that signify an accomplishment or feat. See generally HEADQUARTERS, DEP’T OF THE ARMY, PERSONNEL-GENERAL: MILITARY AWARDS, ARMY REGULATION 600-8-22 (rev. ed. Sept. 15, 2011), http://www.apd.army.mil/pdffiles/r600_8_22.pdf (providing guidelines on such representations).

⁶ See, e.g., *Examination of Criteria for Awards and Decorations: Hearing Before the Subcomm. on Military Pers. of the H. Comm. on Armed Servs.*, 109th Cong. 24 (2006) [hereinafter *Examination of Awards*] (statement of Lieutenant Gen. Roger A. Brady, Deputy Chief of Staff, Manpower and Pers., Headquarters, U.S. Air Force), available at <http://babel.hathitrust.org/cgi/pt?id=pst.000061500716> (“An integral part of taking care of our people is timely and appropriate recognition of our airmen. To that end, the Air Force awards program fosters morale, mission accomplishment and esprit de corps by recognizing acts of valor, heroism and exceptional duty and achievement . . .”). See generally *Petition for Writ of Certiorari, United States v. Alvarez*, No. 11-210 (Aug. 18, 2011), 2011 WL 3645396, at *3-7 (describing the value and goals of utilizing military medals); *infra* notes 408-21 and accompanying text (discussing the importance of medals and decorations).

⁷ Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266 (2006) (codified as amended at 18 U.S.C. § 704 (2006)). The Stolen Valor Act (“the Act”) states, in relevant part:

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

the popular⁸ and practical⁹ successes of the Act, scholarly opposition to the new law on freedom of speech¹⁰ grounds was widespread.¹¹ Many critics lambasted the Act as being an impermissible content-based restriction on pure speech.¹² In

(d) . . . If a decoration or medal involved in an offense . . . is a distinguished-service cross . . . a Navy cross . . . an Air Force cross . . . a silver star . . . [or] a Purple Heart . . . the offender shall be fined under this title, imprisoned not more than 1 year, or both.

Id. Congress found that fraudulent claims “damage the reputation and meaning of [military] decorations and medals.” *Id.* Congress also noted the apparent difficulty in federally prosecuting the offenders. *Id.* Under the Act, offenses involving the most prestigious decorations carry enhanced penalties. *Id.* The Congressional Medal of Honor may be awarded to a member of the military who “distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty.” 10 U.S.C. § 3741 (2006). In addition, a soldier who displays “extraordinary heroism” may be awarded a distinguished-service cross, *id.* § 3742, a Navy cross, *id.* § 6242, or an Air Force cross, *id.* § 8742. The Silver Star may be awarded for “gallantry.” *Id.* § 3746. Lastly, a Purple Heart may be awarded to a member of the military who was “killed or wounded.” *Id.* § 1131.

⁸ The bill was unanimously passed by Congress. Press Release, Kent Conrad, Senate Passes Conrad’s Stolen Valor Act (Sept. 8, 2006), *available at* <http://conrad.senate.gov/pressroom/record.cfm?id=276639>. Senator Conrad co-sponsored the bill in the Senate, and Representative John Salazar introduced the bill in the House of Representatives. *Id.*; see Anne C. Mulkern, *Rep. Salazar’s Bill on Falsely Claiming Medals Now a Law*, DENV. POST (Dec. 21, 2006, 1:00 AM), http://www.denverpost.com/nationworld/ci_4876210 (reporting on the bill’s passage); see also *infra* Part I.B (providing historical background on the Stolen Valor Act).

⁹ See Dan Frosch, *Fighting for the Right to Tell Lies*, N.Y. TIMES, May 20, 2011, at A10, http://www.nytimes.com/2011/05/21/us/21valor.html?_r=0 (reporting that, as of May 2011, there had been over sixty prosecutions); see also John Crewdson, *Claims of Medals Amount to Stolen Valor*, CHI. TRIB. (Oct. 26, 2008, 1:53 AM CDT), <http://www.chicagotribune.com/news/local/chi-valor-oct25,0,4301227.story> (reporting that, as of October 2008, there had been over forty prosecutions). Although most of these prosecutions ended with pleas, others did result in prison sentences. *Id.*

¹⁰ The oft-quoted language of the First Amendment orders that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I; see generally *The First Amendment in History*, ILLINOIS FIRST AMENDMENT CENTER, <http://www.illinoisfirstamendmentcenter.com/history.php> (last visited Sept. 28, 2012) (providing a history of the First Amendment).

¹¹ See David L. Hudson, Jr., *Rumors of War Medals*, 97-JUL A.B.A. J. 18, 19 (2011) (providing an overview of some of the opposition); see also *infra* Part II.B (examining the judicial critiques of the Stolen Valor Act).

¹² Hudson, *supra* note 11, at 19. No less a luminary than Erwin Chemerinsky criticized the Stolen Valor Act by stating the following: “[T]he law violates the First Amendment[.] This is a content-based restriction on speech. It does not fit into any of the categories of unprotected speech. Nor do I believe that the government has a compelling interest

recent years, as a passionate debate has raged over the Stolen Valor Act,¹³ federal district and appellate courts began hearing legal challenges to the Act's constitutionality.¹⁴ The culmination of the dispute occurred when the Supreme Court of the United States (Supreme Court or "Court") finally struck down the law in *United States v. Alvarez*.¹⁵

in punishing such speech." *Id.* at 19. For an overview of content-based restrictions, see *infra* Part I.A. "Pure speech" refers to expression that is not in the form of conduct. See *Cox v. Louisiana*, 379 U.S. 536, 555 (1965) ("We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct . . . as these amendments afford to those who communicate ideas by pure speech.").

¹³ See, e.g., Hudson, *supra* note 11 (describing the overall debate); Mark Seavey, *Lying to America: Stolen Valor Act Must Be Restored*, THE HILL'S CONGRESS BLOG (Aug. 18, 2010, 2:49 PM), <http://thehill.com/blogs/congress-blog/judicial/114871-lying-to-america-stolen-valor-act-must-be-restored> (defending the Stolen Valor Act).

¹⁴ For a thorough discussion of the Stolen Valor Act cases, see *infra* Part II.B. In the summer of 2011, the Government petitioned the Supreme Court of the United States (Supreme Court or "Court") to decide the issue. Petition for Writ of Certiorari, *supra* note 6. The Court eventually granted this petition and heard oral arguments on February 22, 2012. See Adam Liptak, *Justices Appear Open to Affirming Medal Law*, N.Y. TIMES, Feb. 23, 2012, at A13, <http://www.nytimes.com/2012/02/23/us/stolen-valor-act-argued-before-supreme-court.html> (reporting on the *Alvarez* oral arguments before the Court); see also David G. Savage, *Supreme Court to Rule on Law that Punishes Lies about Military Honors*, DENV. POST (Oct. 18, 2011, 2:29:09 AM), http://www.denverpost.com/nationworld/ci_19134230.

¹⁵ 132 S. Ct. 2537 (2012). On June 28, 2012, the Supreme Court held the Stolen Valor Act unconstitutional in a six-to-three decision. *Id.* Justice Kennedy penned the plurality opinion. *Id.* In addition, Justice Breyer wrote a concurrence, and Justice Alito wrote a dissent. *Id.* Reflecting the importance of the issue, the Supreme Court delayed issuing its decision until very late in the 2011/2012 term. See generally Peter Landers, *Supreme Court Saves Best for Last*, WALL ST. J. LAW BLOG (June 11, 2012, 11:56 AM), <http://blogs.wsj.com/law/2012/06/11/supreme-court-saves-best-for-last> (listing the case about the Stolen Valor Act as one of the "big cases" of the term); Debra Cassens Weiss, *Several Potential Blockbuster Cases Await Supreme Court Decision*, A.B.A. J. (June 12, 2012, 1:59 PM), http://www.abajournal.com/news/article/several_potential_blockbuster_cases_await_supreme_court_decision (calling *Alvarez* a "blockbuster case"). Coincidentally, the last month of the term proved to be particularly compelling. See Noah Feldman, *Supreme Court's Super Mondays Don't Serve Justice*, BLOOMBERG (June 17, 2012, 11:04 AM), <http://www.bloomberg.com/news/2012-06-17/supreme-court-s-super-mondays-don-t-serve-justice.html> ("With just two Mondays left on the U.S. Supreme Court's calendar to announce opinions . . . the five most important cases of the term all remain undecided.").

Given the venerable positions held by both free speech and the military throughout American history, the inevitable confrontation between the two touched upon the very heart of the national *zeitgeist*.¹⁶ This Article explores the freedom of speech issues implicated by the Stolen Valor Act and proposes that the Act was constitutional.¹⁷ The judicial determination of the Act's constitutionality depended upon a line of free speech cases, and Part I of this Article provides the necessary overview of this jurisprudence. To gain further insight into the Stolen Valor Act, Part I also examines the statute's legislative background and popular support. Part II then analyzes the Supreme Court free speech case of *United States v. Stevens*,¹⁸ a decision that factored heavily into every determination of the Stolen Valor Act's constitutionality. In addition, Part II discusses the Supreme Court's decision in *United States v. Alvarez*. Part II also examines the federal district and appellate court approaches to the Stolen Valor Act with particular focus on the various¹⁹ proffered rationales. Utilizing an analysis of both historical and recent case law, Part III considers the various arguments regarding the Act's constitutionality. Part III discusses whether false statements of fact *do* comprise a general category of unprotected speech. Further, Part III addresses whether the Stolen Valor Act constituted a proper defamation or fraud statute—two *recognized* categories of unprotected speech. Lastly, Part IV proposes that the Supreme Court should have utilized strict scrutiny analysis to uphold the Stolen Valor Act.²⁰

¹⁶ *Compare Freedom of Expression*, AM. CIVIL LIBERTIES UNION (Oct. 31, 2005), <http://www.aclu.org/free-speech/freedom-expression> (“Without [freedom of expression], other fundamental rights, like the right to vote, would wither and die.”), with Proclamation No. 8598, 75 Fed. Reg. 69,329 (Nov. 10, 2010) (“In an unbroken line of valor stretching across more than two centuries, our veterans have charged into harm’s way, sometimes making the ultimate sacrifice, to protect the freedoms that have blessed America.”).

¹⁷ See *infra* Part IV (proposing that the Stolen Valor Act is, in fact, constitutional when subjected to strict scrutiny analysis).

¹⁸ 130 S. Ct. 1577 (2010).

¹⁹ “Various” in both type and quality. See *infra* Parts II.B & III (examining these arguments).

²⁰ Strict scrutiny is the most exacting form of judicial review. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 797 (2006) (“[T]he majority of laws subjected to strict scrutiny fall . . .”). There are two components necessary to satisfy strict

I. BACKGROUND

This Part will provide necessary background on freedom of speech jurisprudence and the Stolen Valor Act. Part I.A will begin with a general look at content-based restrictions on speech, followed by an overview of certain speech categories that have traditionally not received full constitutional protection. Subsequently, Part I.B will explore the legislative and historical background of the Stolen Valor Act, as well as the former statute’s continued popular support.

A. Freedom of Speech Jurisprudence

The commandment of the First Amendment that Congress shall not pass a law prohibiting speech²¹ has not generally been thought of as being an absolute restriction.²² Of course, laws aimed at restricting the content of speech can be a particular source of evil.²³ As opposed to content-*neutral* restrictions, content-*based* restrictions are generally subjected to the seldom-deferential strict scrutiny analysis.²⁴ Nevertheless, the Supreme Court has

scrutiny: 1) the governmental objective behind the law must be compelling; and 2) the law must be narrowly tailored to achieve that compelling objective. *Id.* at 800. *See infra* Part IV (providing a more in-depth look at strict scrutiny analysis).

²¹ U.S. CONST. amend. I.

²² *See, e.g.,* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (“From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas . . .”).

²³ *See* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); *R.A.V.*, 505 U.S. at 382 (stating that content-based laws are “presumptively” unconstitutional). The Supreme Court cases reflect the Court’s view that the prohibition of content-based restrictions is at the “very core of the First Amendment.” ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 932 (3d ed. 2006).

²⁴ *Compare* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . .”) with *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 812–13 (2000) (finding that a law regulating only sexual speech was content-based and was subject to strict scrutiny analysis); *see infra* Part IV (applying strict scrutiny analysis to the Stolen Valor Act). *See generally* CHERMERINSKY, *supra* note 23, at 934 (discussing the difference between

carved out exceptions for certain categories of content, which have historically been thought of as existing outside the full protection of the Constitution.²⁵ Although certain types of speech—such as obscenity²⁶ and defamation²⁷—receive near-universal recognition as falling within this zone of exclusion, the exact number and nature of the categories have been debated.²⁸

Oliver Wendell Holmes’s venerable opinion in *Schenck v. United States*²⁹ cast a long shadow on later arguments that certain speech ought to be excluded from the First Amendment’s protective reach.³⁰ Holmes opined that even the First Amendment could never

content-neutral and content-based speech); Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2010 CATO SUP. CT. REV. 67, 77–78 (describing the Supreme Court’s approach to content-based restrictions).

²⁵ See CHEMERINSKY, *supra* note 23, at 986 (“The Supreme Court has identified some categories of unprotected speech that the government can prohibit and punish.”); Strossen, *supra* note 24, at 77 (“[T]he Court has recognized a series of content-based categorical exceptions to First Amendment coverage . . .”); see also Chelsea Norell, *Criminal Cookbooks: Proposing a New Categorical Exclusion for the First Amendment*, 84 S. CAL. L. REV. 933, 936 (2011) (“[T]he criteria for defining an exclusion represent a compromise between the state’s interest in suppressing certain speech and the speaker’s fundamental right to free speech.”).

²⁶ See BLACK’S LAW DICTIONARY 1182 (9th ed. 2009) (“[Obscene speech is] morally abhorrent or socially taboo, esp[ecially] as a result of referring to or depicting sexual or excretory functions.”).

²⁷ See *id.* at 479 (“[Defamation is a] false written or oral statement that damages another’s reputation.”).

²⁸ Compare *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (listing lewd and obscene speech, profanity, libel, and insulting or fighting words as unprotected speech), with *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (listing obscenity, defamation, fraud, incitement, and “speech integral to criminal conduct” as unprotected speech); see *infra* Part II.A (discussing *Stevens*, where the parties debated the nature of categorical exceptions).

²⁹ 249 U.S. 47 (1919). In *Schenck*, the defendant was convicted of violating the Espionage Act of 1917. *Id.* at 48–49. He was involved with mailing leaflets, which stated that the draft was analogous to slavery. *Id.* at 49–51. Specifically, the leaflets read: “Do not submit to intimidation If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.” *Id.* at 51. The Court rejected the defendant’s First Amendment arguments. *Id.* at 52; see *Debs v. United States*, 249 U.S. 211, 212, 216–17 (1919) (affirming the Espionage Act conviction of a defendant who had given a speech critical of the draft); *Frohwerk v. United States*, 249 U.S. 204, 205, 210 (1919) (affirming the Espionage Act conviction of a defendant who had published material critical of World War I).

³⁰ See CHEMERINSKY, *supra* note 23, at 987 (“[T]he doctrines articulated in [the area

allow someone to falsely shout “fire!” in a crowded theater.³¹ To Holmes, a false proclamation under these circumstances created a “clear and present danger,” and, as a result, the government had the right to restrict such speech.³² Later arguments that falsities should be beyond the scope of the First Amendment often depend on the *falseness* aspects of the uttered proclamation in Holmes’s example.³³

The Supreme Court, in *Chaplinsky v. New Hampshire*,³⁴ further solidified the doctrine that the First Amendment did not *absolutely* protect all speech.³⁵ In particular, the Court

of incitement] have been carried over to many other areas of First Amendment law.”); see also Clay Calvert & Rebekah Rich, *Low-Value Expression, Offensive Speech, and the Qualified First Amendment Right to Lie: From Crush Videos to Fabrications about Military Medals*, 42 U. Tol. L. Rev. 1, 31–32 (2010) (highlighting a connection between *Schenck* and the Stolen Valor Act cases).

³¹ *Schenck*, 249 U.S. at 52; see CHEMERINSKY, *supra* note 23, at 991 (“The famous analogy to shouting fire in a crowded theater invokes a situation where speech obviously poses a great likelihood of imminent substantial harm.”).

³² *Schenck*, 249 U.S. at 52. Justice Holmes indicated that determining whether something was a clear and present danger was “a question of proximity and degree.” *Id.* (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”). See generally Rodney A. Smolla, *Beginnings of the Clear and Present Danger Test—Early Holmes Opinions: “Bad Tendency” Concept in the Schenck Decision*, 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 10:4 (2012) (“[Clear and present danger is] a phrase that has been forever absorbed into our legal culture, and that remains important in modern thinking about freedom of speech.”).

³³ See Calvert & Rich, *supra* note 30, at 31–32 (explaining that Holmes’s test requires that the lie produce a harm before it can be punished); see also *Alvarez I*, 617 F.3d 1198, 1215 (9th Cir. 2010) (“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.”), *aff’d*, 132 S. Ct. 2537 (2012).

³⁴ 315 U.S. 568 (1942). In *Chaplinsky*, the defendant, a Jehovah’s Witness, was convicted under a New Hampshire statute because he yelled that another individual was “a God damned racketeer” and “a damned Fascist.” *Id.* at 569. The Court rejected his First Amendment arguments. *Id.* at 573. The kind of speech uttered by the defendant comprises the unprotected speech category of “fighting words.” *Id.*; see CHEMERINSKY, *supra* note 23, at 1001-02 (describing the two situations recognized in *Chaplinsky* as fighting words); Norell, *supra* note 25, at 949 (“In *Chaplinsky*, the bellwether case for the fighting words categorical exclusion, the Court attached a low value to the speech . . .”). *But cf.* *Street v. New York*, 394 U.S. 576, 592 (1969) (referring to the fighting words exception as a “small class” of speech).

³⁵ *Chaplinsky*, 315 U.S. at 571-72 (“Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech

determined that restrictions on “well-defined and narrowly limited” categories of speech were never historically thought to have drawn the ire of the Constitution.³⁶ Among the categories of speech the Court listed were libel and fighting words.³⁷ To the Court, such speech did not play any necessary or important role in society.³⁸ In language that was frequently cited by the later free speech cases, these categories of speech were “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.”³⁹ Seemingly, the Court based its reasoning upon a determination of the societal *worth* of the speech in question.⁴⁰

The Supreme Court further articulated *Chaplinsky’s* exception for “libelous” speech in the 1964 decisions of *New York Times Co. v. Sullivan*⁴¹ and *Garrison v. Louisiana*.⁴² In *New York*

is not absolute at all times and under all circumstances.”); Norell, *supra* note 25, at 949 (“Categorical exclusions [to First Amendment protection] were first recognized by the Supreme Court in *Chaplinsky v. New Hampshire* . . .”).

³⁶ *Chaplinsky*, 315 U.S. at 571–72; *see infra* Part III.A (applying this *Chaplinsky* reasoning to a potentially unprotected category comprised of false statements of fact).

³⁷ *Chaplinsky*, 315 U.S. at 572. The other types of speech were “the lewd and obscene” and “the profane.” *Id.* *But cf.* *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (tweaking and adding to the list of categorical exclusions).

³⁸ *Chaplinsky*, 315 U.S. at 572 (“It has been well observed that such utterances are no essential part of any exposition of ideas . . .”).

³⁹ *Id.* The Government’s argument in *Stevens* relied heavily on this quotation. Strossen, *supra* note 24, at 81; *see infra* Part II.A (examining *Stevens*).

⁴⁰ *See* Christopher M. Schultz, *Content-Based Restrictions on Free Expression: Reevaluating the High Versus Low Value Speech Distinction*, 41 ARIZ. L. REV. 573, 577 (1999) (“The ‘low value theory’ first appeared in *Chaplinsky v. New Hampshire* . . .”); Strossen, *supra* note 24, at 81 (“*Chaplinsky* invites the . . . argument . . . that the Court may now and in the future continue the process of recognizing potentially unlimited new categories of unprotected expression . . . so long as the Court deems the expression at issue to fail the open-ended, subjective balancing test . . .”); *see also* Calvert & Rich, *supra* note 30, at 12 (discussing the *Chaplinsky* Court’s focus on the value of the speech at issue). *But cf.* *Stevens*, 130 S. Ct. at 1585–86 (criticizing the Government’s advocacy of using a balancing test to determine whether speech is entitled to First Amendment protection).

⁴¹ 376 U.S. 254 (1964) (involving a civil libel action). In *New York Times*, an elected official sued the *New York Times* newspaper over an advertisement that was critical of the official’s police force. *Id.* at 256–58.

⁴² 379 U.S. 64 (1964) (involving a criminal defamation statute). The defendant in *Garrison* was a district attorney who had criticized several local judges during a press

Times, the Court—in striking down an Alabama libel statute—cautioned that the existence of false statements in a free society was unavoidable.⁴³ As such, falsities should be protected to the extent that First Amendment rights have adequate “breathing space.”⁴⁴ To facilitate this objective within the context of defamation jurisprudence, the Court formulated a requirement whereby, for a public official to recover in a defamation suit, the false statements at issue must have been made with “actual malice.”⁴⁵ Similarly, in *Garrison*, the Court extended the “actual malice” requirement to criminal defamation statutes.⁴⁶ Nevertheless, although the Court overturned the defamation conviction in *Garrison*, the Court also emphasized that a *calculated* lie obstructed democratic expression.⁴⁷ Referencing

conference. *Id.* at 64–66 (“The principal charges alleged to be defamatory were his attribution of a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of the judges . . .”). Technically, “libel” is merely defamation in written form. M. Linda Dragas, *Curing a Bad Reputation: Reforming Defamation Law*, 17 U. HAW. L. REV. 113, 125 (1995). Before *New York Times* and *Garrison*, defamation jurisprudence was mostly articulated by the states. *Id.* at 127. As a civil wrong under common law, defamation had been a strict liability offense. *Id.* at 125.

⁴³ *New York Times*, 376 U.S. at 271–72; see CHEMERINSKY, *supra* note 23, at 1045–46 (explaining that the Supreme Court was concerned about the chilling of speech). See generally *infra* Part III.A (analyzing whether false statements of fact comprise a general category of unprotected speech).

⁴⁴ *New York Times*, 376 U.S. at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); see Dragas, *supra* note 42, at 127 (“With *New York Times*, the Supreme Court began balancing the interests of preserving freedom of expression against protecting an individual’s reputation in light of constitutional policies.”).

⁴⁵ *New York Times*, 376 U.S. at 279–80. In other words, an allegedly defamatory statement must have been made “with knowledge that it was false or with reckless disregard” as to whether it was false. *Id.* at 280; CHEMERINSKY, *supra* note 23, at 1045 (“Actual malice means that the defendant knew that the statement was false or acted with reckless disregard of the truth.”).

⁴⁶ *Garrison*, 379 U.S. at 67 (“At the outset, we must decide whether, in view of the differing history and purposes of criminal libel, the *New York Times* rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials. We hold that it does.”); see Dragas, *supra* note 42, at 128 (“[In *Garrison*, the] Court then began to enunciate the standards it would apply in determining whether the statement at issue satisfied the *New York Times* rule.”).

⁴⁷ *Garrison*, 379 U.S. at 75 (“[T]he 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.”); see, e.g., *Alvarez I*, 617 F.3d 1198, 1219 (9th Cir. 2010) (Bybee, J., dissenting) (referencing *Garrison* approvingly to support the Stolen Valor Act’s constitutionality), *aff’d*, 132 S. Ct. 2537 (2012).

Chaplinsky's categorical approach to unprotected speech, the Court reasoned that an intentional lie had only a limited value to society.⁴⁸

Whereas both *New York Times* and *Garrison* involved the alleged defamation of *public* figures, *Gertz v. Robert Welch, Inc.*⁴⁹ dealt with lies about *private* individuals.⁵⁰ In *Gertz*, the Court refused to extend the “actual malice” requirement to such a situation.⁵¹ Nevertheless, the Court—in fateful dicta—reasoned that false statements were “not worthy of constitutional protection.”⁵² Although protecting “speech that matters” required protecting *some* false statements, the Court reasoned that neither the intentional nor the unintentional falsity significantly furthered democratic expression.⁵³ The Court again referenced the unprotected speech categories from *Chaplinsky*, suggesting

⁴⁸ *Garrison*, 379 U.S. at 75 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). The Court broadly noted that the “knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection.” *Id.* See generally *infra* Part III.A (analyzing whether the language in cases such as *Garrison* stands for the rule that false statements of fact are generally unprotected).

⁴⁹ 418 U.S. 323 (1974).

⁵⁰ *Id.* *Gertz* involved an attorney’s libel claim against a magazine publisher. *Id.* at 326-27. An article had stated that the attorney was—among other things—a Leninist and an official in an organization that advocated the violent overthrow of the government. *Id.* at 326. See generally CHEMERINSKY, *supra* note 23, at 1050–51 (providing an overview of the case).

⁵¹ *Gertz*, 418 U.S. at 345–46 (“[W]e conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the *New York Times* test . . . would abridge this legitimate state interest to a degree that we find unacceptable.”); see CHEMERINSKY, *supra* note 23, at 1051 (“A public figure can recover for defamation only by meeting the *New York Times* standard . . . a private figure can recover compensatory damages for defamation by proving falsity of the statement and negligence.”); cf. Dragas, *supra* note 42, at 129 (“In *Gertz*, the Court held that the states could not impose strict liability in defamation cases: some showing of fault was required.”).

⁵² *Gertz*, 418 U.S. at 340 (“[T]he erroneous statement of fact is not worthy of constitutional protection . . .”). This language would later form the basis of many arguments in favor of the Stolen Valor Act’s constitutionality. See Calvert & Rich, *supra* note 30, at 28–29 (outlining the *Gertz*-based argument that false statements of fact comprise an unprotected category of speech); *infra* Part II.B (discussing the Stolen Valor Act cases).

⁵³ *Gertz*, 418 U.S. at 340 (“Neither the intentional lie nor the careless error materially advances society’s interest in uninhibited, robust, and wide-open debate on public issues.” (internal quotation marks omitted)); see *infra* notes 182-88 and accompanying text (examining the subsequent arguments surrounding this language).

that lies escaped First Amendment protection because they did not have any social worth.⁵⁴ The meaning behind the Court's broad language in *Gertz*—particularly, whether the case truly stood for the general proposition that false statements received no constitutional protection—continued to be debated via the Stolen Valor Act cases.⁵⁵

Over a decade later, the Supreme Court decided *Texas v. Johnson*,⁵⁶ another free speech case that had implications for the constitutionality of the Stolen Valor Act.⁵⁷ At issue in *Johnson* was a Texas statute that prohibited the desecration of an American flag in a way intended to cause serious offense.⁵⁸ The burning of the flag constituted communicative conduct and thus fell within the scope of free speech jurisprudence.⁵⁹ However, the Court held that this type of expression did not fall within a constitutionally

⁵⁴ *Gertz*, 418 U.S. at 340 (“They belong to that 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.’” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))). *But see* Dragas, *supra* note 42, at 129 (“[T]he majority believed that important constitutional protections were also necessary.”).

⁵⁵ *See* Calvert & Rich, *supra* note 30, at 28 (“The government in *Alvarez* argued . . . that a single, simple 11-word statement from dicta in . . . *Gertz v. Robert Welch, Inc.* supported its position that lies lack any constitutional protection.” (footnotes omitted)); *infra* Part II.B (discussing these arguments); *see also* Julia K. Wood, *Truth, Lies, and Stolen Valor: A Case for Protecting False Statements of Fact under the First Amendment*, 61 DUKE L.J. 469, 472 (2011) (“[The Supreme Court] has never adequately explained the reasoning behind its blanket statement that false statements of fact have no constitutional value.”).
⁵⁶ 491 U.S. 397 (1989).

⁵⁷ *See, e.g.*, *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1189 (D. Colo. 2010) (“I find the Supreme Court’s decision in *Texas v. Johnson* highly instructive.” (citations omitted)); Wood, *supra* note 55, at 501 (“Both the *Alvarez* and *Strandlof* opinions relied on *Texas v. Johnson* . . .”).

⁵⁸ *Johnson*, 491 U.S. at 400. The defendant was convicted for burning the American flag during a public protest. *Id.* at 399–400. However, there was “no disturbance of the peace.” *Id.* at 408. *See generally* CHEMERINSKY, *supra* note 23, at 1067–68 (providing background on the *Johnson* case).

⁵⁹ *Johnson*, 491 U.S. at 404 (“[W]e have acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . . Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags.” (citations omitted) (internal quotation marks omitted)).

unprotected category of speech like incitement or fighting words.⁶⁰ The Court also rejected the government's claimed interest—preserving the flag as a national symbol—because the defendant's conviction was based upon the particularized, anti-flag viewpoint his actions expressed.⁶¹ Subjected to strict scrutiny, the Texas statute failed⁶² because the Court reasoned that a core tenet of the First Amendment was that the government could not prohibit certain speech merely because it was disagreeable.⁶³

In addition to the other unprotected categories of speech referred to in this Part, the Supreme Court has long held that fraudulent speech exists outside the full scope of First Amendment protection.⁶⁴ Although the precise meaning of

⁶⁰ *Id.* at 409 (“No reasonable onlooker would have regarded Johnson’s generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.”); see *Brandenburg v. Ohio*, 395 U.S. 444, 447 (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.”).

⁶¹ *Johnson*, 491 U.S. at 410; see CHEMERINSKY, *supra* note 23, at 1067 (“[T]he government’s interest was not unrelated to suppression of the message . . . the law’s purpose was to keep the flag from being used to communicate protest or dissent.”). The Court recognized that, under certain circumstances, the *burning* of an American flag can be required under federal law. *Johnson*, 491 U.S. at 411. Therefore, the Texas statute directly targeted the offensive nature of the expression. *Id.*; see CHEMERINSKY, *supra* note 23, at 1067 (“Texas law did not prevent all flag destruction, but rather applied only when there would be offense to others.”). See *generally infra* Part IV (differentiating this reasoning from that offered in support of the Stolen Valor Act).

⁶² *Johnson*, 491 U.S. at 412 (“We must therefore subject the State’s asserted interest in preserving the special symbolic character of the flag to the most exacting scrutiny.” (internal quotation marks omitted)); see *Strandlof*, 746 F. Supp. 2d at 1189-90 (utilizing *Johnson* in holding that the Stolen Valor Act failed strict scrutiny).

⁶³ *Johnson*, 491 U.S. at 414 (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”). Note, however, that the mere act of lying about one’s own military accomplishments is not an expression of a particularized, political viewpoint. See *infra* Part IV (analyzing the Stolen Valor Act under strict scrutiny).

⁶⁴ See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (listing “fraud” as an unprotected category of speech); *Donaldson v. Read Magazine*, 333 U.S. 178, 190 (1948) (“[The government’s power] to protect people against fraud . . . has always been

“fraud” is somewhat debated, the term can refer to a deception intended to cause the listener to act to the listener’s detriment.⁶⁵ In *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*,⁶⁶ the Supreme Court held that liability for fraud required a showing of the declarant’s fraudulent *intent* as well as proof of the *harm* that the fraud caused the listener.⁶⁷ Thus, First Amendment jurisprudence has recognized that fraud restrictions must allow breathing space for protected speech, just as proper defamation statutes allow.⁶⁸

recognized in this country and is firmly established.”); *Schneider v. Town of Irvington*, 308 U.S. 147, 164 (1939) (“Frauds may be denounced as offenses and punished by law.”); *Strandlof*, 746 F. Supp. 2d at 1187 (describing “fraud” as unprotected speech).

⁶⁵ 37 C.J.S. *Fraud* § 1 (2012) (“Fraud has also been defined as any cunning, deception, or artifice used to circumvent, cheat, or deceive another.”); see 37 AM. JUR. 2D *Fraud and Deceit* § 1 (2012) (“[T]here can be no all-embracing definition of ‘fraud.’”). Traditionally, the declarant’s deception must actually result in harm to the listener. 37 C.J.S. *Fraud* § 1.

⁶⁶ 538 U.S. 600 (2003).

⁶⁷ *Id.* at 620 (“False statement alone does not subject [the speech] 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.”); see, e.g., *Alvarez I*, 617 F.3d 1198, 1211 (9th Cir. 2010) (holding that fraud statutes require proof of “bona fide harm”), *aff’d*, 132 S. Ct. 2537 (2012).

⁶⁸ *Telemarketing Assocs.*, 538 U.S. at 620 (“Exacting proof requirements of this order, in other contexts, have been held to provide sufficient breathing room for protected speech.”); see *Alvarez I*, 617 F.3d at 1211 (analogizing the “limiting characteristics” of fraud to those of defamation); *Strandlof*, 746 F. Supp. 2d at 1188 (discussing the limiting characteristics present in common law fraud). Proponents of the Stolen Valor Act later debated the nature of fraud when they attempted to equate the Act with a proper fraud statute. See *infra* Part II.B (discussing the Stolen Valor Act cases).

B. The Stolen Valor Act of 2005

This section chronicles the origins of the Stolen Valor Act's passage.⁶⁹ In 1923, Congress adopted the earliest ancestor of the Act, which was a law that prohibited the unauthorized wearing, manufacturing, or selling of military decorations.⁷⁰ Since then, this law has remained essentially unchanged, and it is now codified at 18 U.S.C. § 704(a).⁷¹ Historically, there have been few prosecutions under this paragraph of § 704 due to the difficulty of acquiring enough evidence to achieve convictions.⁷²

Following the attacks of September 11, 2001, patriotism abounded, and the military enjoyed a surge in popularity.⁷³

⁶⁹ 18 U.S.C. § 704 (2006).

⁷⁰ Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286. The law was adopted amid the War Department's worries that unauthorized imitations would cheapen the decorations and erode their important purpose. *See* Petition for Writ of Certiorari, *supra* note 6, at *6.

⁷¹ Section 704(a) of Title 18 of the United States Code currently states, in relevant part:

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, barter, or exchanges for anything of value any decoration or medal authorized by Congress for the armed forces of the United States . . . except when authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both.

Id.; *see* United States v. Perelman, 737 F. Supp. 2d 1221, 1234-35 (D. Nev. 2010) (highlighting minor word changes over the years), *aff'd*, 658 F.3d 1134 (9th Cir. 2011). Paragraphs (c) and (d) of 18 U.S.C. § 704 describe enhanced penalties for particular medals.

⁷² John Crewdson, *Fake Claims of War Heroics a Federal Offense*, CHI. TRIB. (May 27, 2008, 11:09 PM), <http://www.chicagotribune.com/news/nationworld/chi-valormay28,0,4768252.story> (“Before the [Stolen Valor Act], however, prosecutions were difficult because a photograph of the alleged impostor wearing the medal was necessary for charges to be brought.”); *see* Perelman, 737 F. Supp. 2d at 1233 (noting that “scant case law has developed to illuminate the meaning of § 704(a)”). In-depth analysis of § 704(a) is beyond the scope of this Article.

⁷³ *See* Michael Kirkland, *Under the U.S. Supreme Court: Can U.S. Law Punish a Theft of Honor?*, UNITED PRESS INT'L (Sept. 11, 2011, 3:30 AM), http://www.upi.com/Top_News/US/2011/09/11/Under-the-US-Supreme-Court-Can-US-law-punish-a-theft-of-honor/UP-I-61691315726200/?spt=hs&or=tn (reporting that the terrorist attacks added “fuel to the fire” of the problem of military impostors); *see also* Justin Engel, *Fallout 9/11: Military Recruitment Ramped Up after Sept. 11 Attacks*, MLIVE.COM (Sept. 11, 2011, 9:44 PM), http://www.mlive.com/news/saginaw/index.ssf/2011/09/fallout_911_military_recruitme.html (describing the popularity of the military after September 11th).

John Salazar, a member of the House of Representatives and a veteran of the Vietnam War, proposed the bill that would eventually become the Stolen Valor Act.⁷⁴ Representative Salazar's actions were partially inspired by a term paper written by one of his constituents, university student Pam Sterner.⁷⁵ In her paper, Sterner had criticized the lack of a law criminalizing anything beyond the improper wearing or manufacturing of military decorations.⁷⁶ Representative Salazar was joined by Senator Kent Conrad, who proposed the bill in the Senate.⁷⁷ The proceedings in the two houses of Congress offered a telling glimpse into the legislative mood surrounding the Stolen Valor Act.⁷⁸ Prior to introducing the Act, Representative Salazar reiterated his desire to pay tribute to those in the armed services

⁷⁴ Mulkern, *supra* note 8; see Peter Roper, *High Court Will Settle Stolen Valor Fight*, PUEBLO CHIEFTAIN (Oct. 18, 2011, 12:00 AM), http://www.chieftain.com/news/local/high-court-will-settle-stolen-valor-fight/article_4ee6151a-f942-11e0-b713-001cc4c002e0.html (describing the history of the Stolen Valor Act).

⁷⁵ Pamla M. Sterner, *The Stolen Valor Act of 2005: Medal of Honor Legislative Changes – Title 18 (U.S.C.) (July 13, 2005)* (unpublished term paper, Colorado State University-Pueblo) (on file with author); see Mulkern, *supra* note 8 (reporting on the Act's origins). Pam Sterner herself had been inspired by the 1998 book *Stolen Valor: How the Vietnam Generation Was Robbed of its Heroes and its History*, by B.G. Burkett and Glenna Whitley. Calvert & Rich, *supra* note 30, at 15 (stating that Sterner sought a law that would prevent further dishonor). Additionally, her husband, Doug Sterner, was an activist and Veteran of the Vietnam War. *About HomeofHeroes.com*, HOMEOFHEROES.COM, http://www.homeofheroes.com/a_homepage/admin/aboutus.html (last visited Sept. 28, 2012). The Sterners continue to operate the Home of Heroes website, which provides information about various military medals. *Id.* During their work on the site, they have encountered several instances of fraudulent claims. See C. Douglas Sterner, *The Stolen Valor Act of 2005*, THE FAKE WARRIOR PROJECT, http://www.fakewarriors.org/phonies/stolen_valor_media_information_sheet.htm (last visited Sept. 28, 2012). In turn, the POW Network works to catalogue military imposters. See Tina Reed, *Bill Targets Military Phonies*, LAS VEGAS REV.-J., Dec. 7, 2006, http://www.reviewjournal.com/lvrj_home/2006/Dec-07-Thu-2006/news/11275601.html.

⁷⁶ Sterner, *supra* note 75, at 13 (“Ignoring the problem can only lead to increased numbers of what are commonly called ‘wannabe heroes’ speaking in our schools, marching in local parades, and providing role-models for our future heroes.”).

⁷⁷ Press Release, Kent Conrad, *supra* note 8; see Dale Wetzel, *Senator Decries Ruling in Stolen Valor Case*, NAVY TIMES (Aug. 19, 2010, 4:01:40 PM), <http://www.navytimes.com/news/2010/08/ap-stolen-valor-081910> (calling Senator Conrad the “primary Senate sponsor”).

⁷⁸ See 151 CONG. REC. H5643 (daily ed. July 12, 2005); 151 CONG. REC. S12,688 (daily ed. Nov. 10, 2005). The bill quickly gained bipartisan support. Roper, *supra* note 74.

and his worries over the potential diminishment of military medals.⁷⁹ As a result, he sought to enable the government to prosecute phony medal recipients more effectively.⁸⁰ Similarly, Senator Conrad lamented the limits of the existing § 704 provisions, which only outlawed the improper *wearing* of medals.⁸¹ On December 20, 2006, President George W. Bush signed the Stolen Valor Act into law after Congress had unanimously passed the bill.⁸²

False claims of military accolades constitute a surprisingly widespread phenomenon.⁸³ In 2008, the *Chicago Tribune* conducted an investigation into these claims.⁸⁴ Upon examining the reference service *Who's Who*,⁸⁵ the *Tribune* discovered 333 separate instances of individuals claiming to

⁷⁹ 151 CONG. REC. H5643 (daily ed. July 12, 2005) (statement of Rep. Salazar) (“I am outraged by the impostors who claim they have received this and other honors the military awards for deeds and actions of soldiers. These criminals not only dishonor themselves, but they dishonor the sacrifice that true recipients have made.”).

⁸⁰ *Id.* (“This piece of legislation will make it easier for Federal law enforcement officials to prosecute phonies and impostors and restore the true meaning of these illustrious awards.”).

⁸¹ 151 CONG. REC. S12, 688 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad) (“Currently, Federal law enforcement officials are only able to prosecute those who wear counterfeit medals.”). Senator Conrad also intended for the law to “honor the brave veterans of our Nation who have been awarded valorous medals for their service to our Nation.” *Id.* Additionally, he noted that those claiming to have won unearned decorations “diminish” those who legitimately did win them. *Id.*

⁸² Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266 (2006); Calvert & Rich, *supra* note 30, at 16; Press Release, Kent Conrad, *supra* note 8.

⁸³ *See, e.g.*, Calvert & Rich, *supra* note 30, at 17 (“[T]he bill addressed a real problem.”); Crewdson, *supra* note 9 (“A Tribune investigation has found that the fabrication of heroic war records is far more extensive than [one] might think.”).

⁸⁴ Crewdson, *supra* note 9.

⁸⁵ *See Our History*, MARQUIS WHO'S WHO, <http://www.marquiswhoswho.com/about-us> (last visited Sept. 28, 2012) (“The family of Marquis Who's Who publications presents unmatched coverage of the lives of today's leaders and achievers from both the United States and around the world, and from every significant field of endeavor. Librarians, students, researchers, corporate executives, journalists, personnel recruiters, and many others rely on Marquis Who's Who every day for in-depth biographical information they can use with confidence.”). *Who's Who* entries are comprised of information provided by the listed individuals themselves—although *Who's Who* solicits the individuals “on the basis of past achievement or future promise.” Crewdson, *supra* note 9.

have received a particular, venerated decoration.⁸⁶ However, one third of the claims were unsupported by military records.⁸⁷ Surprisingly, the list of false medal claimants included such notables as doctors, lawyers, politicians, and Chief Executive Officers.⁸⁸ In sum, after consulting original military records, the *Tribune* uncovered at least 400 false claims.⁸⁹

Once enacted, the Stolen Valor Act enjoyed many popular and practical successes.⁹⁰ As of May 2011, there had been over sixty prosecutions under the Act.⁹¹ Despite the growing constitutional objections, popular sentiment in support of the

⁸⁶ Crewdson, *supra* note 9.

⁸⁷ *Id.* In addition, the *Tribune* discovered two Medals of Honor that were falsely claimed via headstones in military cemeteries. *Id.* Obituaries also contained false claims. *Id.* Furthermore, after the *Tribune* contacted some of the *living* false claimants, the excuses given for the falsifications ranged from the romantic—“to make myself a hero to my wife, or something like that”—to the bizarre—“I did it for my own self-gratification”—to the spiteful—“I had been recommended for it, and I deserved it. And to tell you the truth, I’m still angry about it.” *Id.* What’s more, many of the *Who’s Who* claims were brazenly unbelievable. *See id.* For example, one individual claimed to have received a Silver Star due to his purported actions during the Tet Offensive—an event during which he was only fourteen years old. *Id.* Another’s biography boasted sixty-six awarded Silver Stars—despite the fact that the most Silver Stars *ever* awarded to an individual soldier is ten. *Id.*

⁸⁸ *Id.* For example, the long-time mayor of Springboro, Ohio, falsely claimed to have won the Silver Star, and he continued the deception even when the *Tribune* initially confronted him. *Id.*

⁸⁹ *Id.* Aside from checking military records, “there is no easy way to verify claims.” *Id.* Even so, military records are sometimes lost or incomplete. *See infra* Part IV.B (suggesting that the creation of “lists” of actual award recipients would not be an effective means of corroborating medal claims).

⁹⁰ *See, e.g.,* Robert Barnes, *Supreme Court to Review Free Speech Issue on Lying about Military Honors*, WASH. POST, Oct. 17, 2011, at A2, http://www.washingtonpost.com/politics/supreme-court-to-review-free-speech-issue-on-lying-about-military-honors/2011/10/17/gIQAFh0frL_story.html (calling the Act “politically popular”). According to Doug Sterner, who helped draft the language of the Stolen Valor Act, “‘Stolen Valor is not just lying: it is stealing an identity of a combat hero or a wounded soldier . . . Why should the Army give out a Silver Star to someone who performs heroically if anybody who wants one can buy a medal, print a citation and claim it with impunity?’” Frosch, *supra* note 9.

⁹¹ Frosch, *supra* note 9. There had been approximately forty prosecutions as of 2008. Calvert & Rich, *supra* note 30, at 17. Additionally, according to Doug Sterner, thousands of cases of false claims are reported every year. Frosch, *supra* note 9.

Act remained very strong.⁹² Additionally, many people discussed creating state laws that would be similar to the Stolen Valor Act.⁹³

II. DISCUSSION

This Part will discuss the First Amendment issues implicated by the Stolen Valor Act. Part II.A will examine *United States v. Stevens*,⁹⁴ a recent Supreme Court free speech case that was pertinent to the later Stolen Valor Act cases. Then,

⁹² See, e.g., Andrew Dao, *Stealing Valor: Should the Stolen Valor Act of 2005 Be Put Out to Pasture?*, LEGALMATCH LAW BLOG (Oct. 20, 2011), <http://lawblog.legalmatch.com/2011/10/20/stealing-valor-stolen-valor-act-2005-put-pasture> (anticipating “hate mail” and “angry mob[s]” in response to the author’s opinion that the Stolen Valor Act is unconstitutional); Seavey, *supra* note 13 (“In October 2008, The American Legion passed a resolution that urged Congress to make Stolen Valor Act crimes punishable as felonies—not misdemeanors”); Kevin A. Lehmann, *Xavier Alvarez Ruling a Disgrace to All US Military Personnel!*, CATCHKEVIN.COM, <http://catchkevin.com/xavier-alvarez-ruling-a-disgrace-to-all-us-military-personnel> (last visited Sept. 3, 2012) (passionately defending the Stolen Valor Act). Furthermore, many Americans reacted negatively to the Supreme Court’s invalidation of the Act. See James Dao, *Lying About Earning War Medals is Protected Speech, Justices Rule*, N.Y. TIMES, June 28, 2012, at A18, <http://www.nytimes.com/2012/06/29/us/justices-say-lying-about-military-honors-is-protected.html>; *Veterans Passionate about the Stolen Valor Act*, DAILY TRIB. (July 6, 2012, 6:01 PM), <http://www.dailytribune.com/article/20120706/NEWS01/120709664/veterans-passionate-about-the-stolen-valor-act>.

⁹³ See Paul Cook, *California Stolen Valor Act Heads to Governors Desk*, VOTE29.COM (June 23, 2011), <http://www.vote29.com/newmyblog/archives/22945> (“The bill will force elected officials to forfeit office if they are convicted under the California Stolen Valor Act.”); *Nevada Seeking State Counterpart of Stolen Valor Act*, LAVAN & NEIDENBERG, P.A. (June 7, 2010), <http://www.disabilitylawclaims.com/blog/nevada-seeking-state-counterpart-of-stolen-valor-act.cfm> (noting that the Nevada Veterans Services Commission began drafting legislation to give Nevada the ability to prosecute people violating the Stolen Valor Act); see also Farid Sharaby, *Chapter 93: Expanding the Stolen Valor Act within California*, 41 MCGEORGE L. REV. 619, 623–24 (2010) (supporting California’s efforts to adopt provisions of the Stolen Valor Act in California). Possibly, Sharaby oversimplifies the contentious issues involved. Cf. *id.* at 624 (“Predictably, Chapter 93 has no registered opposition. The lack of opposition is probably due to the high regard in which we hold veterans.”). Several states already have similar provisions. Nancy Lofholm, *Stolen Valor, Faking Military Duty Is Easy; Unmasking “Why” Is More Complex*, DENV. POST, June 7, 2009, at A22 (“[As of 2009] 13 states also prosecute military phonies.”); *Nevada Seeking State Counterpart of Stolen Valor Act*, *supra* (listing Connecticut, Illinois, Missouri, California, and Kentucky as states that have enacted laws similar to the Stolen Valor Act).

⁹⁴ 130 S. Ct. 1577 (2010).

Part II.B will examine *United States v. Strandlof*⁹⁵ and *United States v. Alvarez*,⁹⁶ two cases involving the Stolen Valor Act’s constitutionality.

A. *United States v. Stevens*, False Statements, and Free Speech Jurisprudence

The Supreme Court changed the landscape of future First Amendment cases with its landmark decision in *United States v. Stevens*.⁹⁷ Although *Stevens* involved the purported unconstitutionality of a federal statute outlawing depictions of animal cruelty,⁹⁸ the origins of that law bear some striking similarities to the legislative background of the Stolen Valor Act.⁹⁹ Congress enacted 18 U.S.C. § 48 to combat the proliferation of animal “crush videos”—highly controversial productions that had engendered a public outcry.¹⁰⁰ But the statute’s reach exceeded this limited purpose, and the law also criminalized the commercial creation, sale, and possession of most depictions of animal

⁹⁵ 746 F. Supp. 2d 1183 (D. Colo. 2010), *rev’d*, 667 F.3d 1146 (10th Cir. 2012).

⁹⁶ 617 F.3d 1200 (9th Cir. 2010), *aff’d*, 132 S. Ct. 2537 (2012).

⁹⁷ *Categorical Exclusions*, 124 HARV. L. REV. 239, 239 (2010) (“*Stevens* redefined how courts delineate categories of unprotected speech, making it harder to account for both social harms and First Amendment values in changing contemporary contexts.”); see J. Matthew Barnwell, *Taking a Bite Out of Speech Regulation: The Supreme Court Upholds First Amendment Protection for Depictions of Animal Cruelty in United States v. Stevens*, 62 MERCER L. REV. 1031, 1049 (2011) (“The case reveals the current Court’s development of a decidedly libertarian approach to content-based speech regulation.”). See generally Calvert & Rich, *supra* note 30 (discussing the future ramifications of *Stevens*); Strossen, *supra* note 24, at 67–69 (providing an overview of the consequences of the *Stevens* decision).

⁹⁸ *Stevens*, 130 S. Ct. at 1582.

⁹⁹ See *supra* Part I.B (describing the legislative history of the Stolen Valor Act).

¹⁰⁰ 18 U.S.C. § 48 (2006); see Calvert & Rich, *supra* note 30, at 5–9 (describing the origins of § 48). Crush videos are productions puriently showcasing the stomping and killing of various animals. Barnwell, *supra* note 97, at 1034 (“[L]awmakers were . . . intent on shutting down the growing market for crush videos, which are short films that show women crushing small animals to death, either with their bare feet or while wearing high-heeled shoes and speaking in a dominatrix fashion.”); Calvert & Rich, *supra* note 30, at 5. Popular support for § 48 was extensive enough to draw in celebrities such as Mickey Rooney and Loretta Swit. Calvert & Rich, *supra* note 30, at 8-9.

cruelty.¹⁰¹ Mirroring the later popularity of the Stolen Valor Act, the provisions of § 48 enjoyed bipartisan support in Congress, and the bill was signed into law in 1999.¹⁰²

Robert Stevens was convicted under § 48 for operating a business that sold videos depicting dogfights, animal deaths, and similar activities.¹⁰³ Stevens challenged the law as being facially unconstitutional under the First Amendment.¹⁰⁴ The Government defended on the ground that the outlawed depictions of animal cruelty were so socially valueless that they represented a *Chaplinsky*

¹⁰¹ See Strossen, *supra* note 24, at 72 (“Section 48 outlawed a much wider range of depictions than those on which its legislative history focused.”). At the time, § 48 stated, in relevant part:

(a) CREATION, SALE, OR POSSESSION.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) EXCEPTION.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

(c) . . . (1) . . . “[D]epiction of animal cruelty” means any visual or auditory depiction . . . of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place

18 U.S.C. § 48 (2006).

¹⁰² Compare Barnwell, *supra* note 97, at 1034; Calvert & Rich, *supra* note 30, at 10 (describing the bill’s passage); and Press Release, Elton Gallegly, Moran, Gallegly & 54 Others Respond to Supreme Court Ruling on Animal Cruelty (Apr. 21, 2010), available at <http://votesmart.org/public-statement/501771/moran-gallegly-54-others-respond-to-supreme-court-ruling-on-animal-cruelty> (stating that the Senate vote was unanimous in the bill’s favor, while the House vote was 372 to 42 in the bill’s favor); with *supra* Part I.B (describing the popularity of the Stolen Valor Act). Prior to the *Stevens* decision, the new law apparently did “shut down the crush video industry.” Press Release, Elton Gallegly, *supra*.

¹⁰³ *Stevens*, 130 S. Ct. at 1583. Some of the videos featured dogfights that were purportedly “legal” in Japan or in the United States in the 1960s and 1970s. *Id.* One video featured footage of pit bulls hunting and killing domestic pigs. *Id.*

¹⁰⁴ *Id.* at 1587 (“In the First Amendment context, however, this Court recognizes a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” (internal quotation marks omitted)). A facial challenge is a “claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally.” BLACK’S LAW DICTIONARY 261 (9th ed. 2009).

category of constitutionally unprotected speech.¹⁰⁵ To achieve this result, the Government advocated a balancing test, which would determine when a category of speech should be excluded from constitutional protection.¹⁰⁶ The proposed test balanced the value of the speech in question against its societal cost.¹⁰⁷

In rejecting the balancing test and the Government's arguments, the Court—in an opinion by Chief Justice Roberts—began by providing an overview of First Amendment jurisprudence.¹⁰⁸ As a preliminary matter, the Court agreed with the Government's assertion that the restriction of certain, distinct, historical categories of speech escaped a presumption of unconstitutionality.¹⁰⁹ Echoing *Chaplinsky*, the Court listed several of these categories, including defamation, fraud, incitement, speech integral to criminal conduct, and obscenity.¹¹⁰ However, the Supreme Court rejected the Government's

¹⁰⁵ *Stevens*, 130 S. Ct. at 1584-85; see Strossen, *supra* note 24, at 79 (“In the *Stevens* litigation, the government had relied on the broadest language in *Chaplinsky*'s pertinent passage to support its request that the Court carve out from the First Amendment a new category of unprotected expression.”); see also *supra* Part I.A (describing the seemingly “value-infused” language of *Chaplinsky*). Moreover, the Government contended that the prevention of animal cruelty had been a facet of American law since colonial times. *Stevens*, 130 S. Ct. at 1585. The Government also cited the executive branch's proclamation that it would enforce § 48 so that the law would only apply to “extreme” cruelty to animals. *Id.* at 1591. The Court found this idea unconvincing. *Id.* (“We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”).

¹⁰⁶ *Stevens*, 130 S. Ct. at 1585; see Strossen, *supra* note 24, at 79 (describing the Government's test).

¹⁰⁷ *Stevens*, 130 S. Ct. at 1585 (“The Government . . . proposes that a claim of categorical exclusion should be considered under a simple balancing test: ‘Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.’”).

¹⁰⁸ *Id.* at 1584; see Barnwell, *supra* note 97, at 1041 (detailing the Court's approach).

¹⁰⁹ *Stevens*, 130 S. Ct. at 1584 (“These [are] historic and traditional categories long familiar to the bar” (internal quotation marks omitted)); see Calvert & Rich, *supra* note 30, at 10 (“[T]he Court acknowledged that a few well-defined historic and traditional categories of speech have fallen outside the scope of First Amendment protection”).

¹¹⁰ *Stevens*, 130 S. Ct. at 1584; see *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (“There 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.”); *supra* Part I.A (examining *Chaplinsky*).

suggested balancing test because the test to determine whether a speech category was unprotected relied upon the “value” of the speech in question.¹¹¹ The Court reasoned that the test was too manipulable and that certain speech’s apparent lack of worth did not constitutionally justify the speech’s restriction.¹¹² Although in cases such as *Chaplinsky*, the Supreme Court historically *described* unprotected speech using “value,” such language did not invite a test that would allow restriction if the speech in question was considered worthless.¹¹³

The Supreme Court ultimately ruled that depictions of animal cruelty did not comprise a category of speech removed from First Amendment protection.¹¹⁴ The Court reasoned that, to be an unprotected category, the speech must be “historically unprotected.”¹¹⁵ Although animal cruelty itself had a history of being restricted, no such historical restrictions existed for

¹¹¹ *Stevens*, 130 S. Ct. at 1585 (“The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”); see *Categorical Exclusions*, *supra* note 97, at 242 (“[T]he Court repudiated the government’s argument that First Amendment protection for a category of speech depends on balancing the value of the speech against its societal costs.”).

¹¹² *Stevens*, 130 S. Ct. at 1585 (“As a free floating test for First Amendment coverage, [the Government’s proposal] is startling and dangerous. . . . Our Constitution forecloses any attempt to revise [free speech protections] simply on the basis that some speech is not worth it.”); see *Calvert & Rich*, *supra* note 30, at 11 (“[T]he fact that the value of speech is zero . . . is not determinative of whether the speech is protected.”).

¹¹³ *Stevens*, 130 S. Ct. at 1585–86 (“To be fair to the Government, its view did not emerge from a vacuum. . . . The Government derives its proposed test from . . . descriptions in our precedents. But such descriptions are just that—descriptive. They do not set forth a test that may be applied . . . to permit the Government to imprison any speaker . . . so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.” (citations omitted)); see *Strossen*, *supra* note 24, at 81 (“The *Stevens* Court went on to impose an important limitation on the significance of this language . . . by stressing that it was . . . merely describing [unprotected categories]. The *Stevens* Court emphatically rejected any reading of this language as normative” (footnote omitted)).

¹¹⁴ *Stevens*, 130 S. Ct. at 1586; see *Calvert & Rich*, *supra* note 30, at 10 (stating that the Supreme Court “resoundingly rejected” the idea that depictions of animal cruelty constituted unprotected expression).

¹¹⁵ *Stevens*, 130 S. Ct. at 1586; see *Strossen*, *supra* note 24, at 82 (arguing that history and tradition comprise a prerequisite to identifying an unprotected category of speech); see also *Categorical Exclusions*, *supra* note 97, at 246 (“*Stevens* thus introduced a new emphasis on historical vintage for the precise prohibition at issue.”).

depictions of animal cruelty.¹¹⁶ The Court also reinterpreted an earlier case, *New York v. Ferber*,¹¹⁷ explaining that “child pornography” had not been *newly* recognized as a category of unprotected speech in *Ferber*.¹¹⁸ Rather, the Court merely considered child pornography to be speech integral to criminal conduct—a previously articulated unprotected category of speech.¹¹⁹ Although the Court criticized the declaration of *new* unprotected categories, the Court also acknowledged the future possibility of *recognizing* historically unprotected categories that had yet to be so identified.¹²⁰

The Supreme Court’s decision in *Stevens* was notable for several reasons.¹²¹ First, the Court was highly critical of any assessment of the “value” of particular speech.¹²² Second, the Court emphasized the narrow classes of speech that were *historically* unprotected.¹²³ Thus, the Court in *Stevens* appeared to

¹¹⁶ *Stevens*, 130 S. Ct. at 1585; see Barnwell, *supra* note 97, at 1041 (“[T]he Court accepted that animal cruelty as an action in itself has been forbidden since the earliest settlers arrived in the colonies. Even so, the Court found no known tradition forcing depictions of such conduct outside of the First Amendment shelter.” (footnotes omitted)).
¹¹⁷ 458 U.S. 747 (1982) (upholding a statute that prohibited the distribution of child pornography).

¹¹⁸ *Stevens*, 130 S. Ct. at 1586; see Strossen, *supra* note 24, at 84–85 (suggesting that the Supreme Court “recast[.]” *Ferber*).

¹¹⁹ *Stevens*, 130 S. Ct. at 1586; see Barnwell, *supra* note 97, at 1042 (“[T]he analysis in *Ferber* was rooted in a previously recognized and long-established category of unprotected speech: that which is integral to criminal conduct.”).

¹²⁰ *Stevens*, 130 S. Ct. at 1586 (“We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.”); see Strossen, *supra* note 24, at 82 (“*Stevens* did not rule out the possibility that the Court could in the future recognize a category of [unprotected speech].”).

¹²¹ *But see* Calvert & Rich, *supra* note 30, at 11 (arguing that the Supreme Court did not formulate a clear rule for future cases).

¹²² See Barnwell, *supra* note 97, at 1050 (suggesting that “value” can no longer serve as the basis for recognizing an unprotected category of speech). For an extensive analysis of the Court’s criticism of value-based arguments, see Calvert & Rich, *supra* note 30, at 31–33. According to these authors, Justice Holmes’s oft-quoted retort—that even stringent free speech protections would not protect an individual’s right to falsely shout “fire” in a crowded theater—is based on a *harm*, rather than a value, analysis: “Surely one possesses the right to falsely shout fire in an otherwise empty theater.” *Id.* at 31. The authors interpret *Stevens* as utilizing a “[s]peech-[p]lus-[h]arm” analysis. *Id.*

¹²³ See Strossen, *supra* note 24, at 81–82 (detailing the Court’s reliance on history and

place more emphasis on *Chaplinsky*'s declaration that unprotected speech was historically "well-defined and narrowly limited" rather than on weighing the purported "slight social value" of the speech.¹²⁴

The Court's reasoning from *Stevens* was solidified in *Brown v. Entertainment Merchants Ass'n*,¹²⁵ a decision that reiterated the Court's refusal to create new categories of unprotected speech.¹²⁶ In *Brown*, the Court struck down a California statute that restricted the sale of violent video games to minors.¹²⁷ To the Court, there was no historical tradition of preventing minors from accessing depictions of violence.¹²⁸ Furthermore, as a type of speech, violent video games did not fit into a "well-defined and narrowly limited"¹²⁹ category of unprotected speech.¹³⁰

tradition); see also Calvert & Rich, *supra* note 30, at 12 (predicting that history and tradition will guide the Court in the future).

¹²⁴ *Stevens*, 130 S. Ct. at 1584-86; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); see Calvert & Rich, *supra* note 30, at 12 (examining the relationship between *Chaplinsky* and *Stevens*). See generally Strossen, *supra* note 24 (providing extensive commentary about the effect *Stevens* had on interpretations of *Chaplinsky*).

¹²⁵ 131 S. Ct. 2729 (2011).

¹²⁶ *Id.* at 2734 ("[I]n *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."). See generally Beatrice M. Hahn, *The More Things Change, the More They Stay the Same: Schwarzenegger v. Entertainment Merchants Association*, 6 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 111 (2011) (describing the analytical background of the case).

¹²⁷ *Brown*, 131 S. Ct. at 2742. See generally David G. Post, *Sex, Lies, and Videogames: Brown v. Entertainment Merchants Association*, 2011 CATO SUP. CT. REV. 27 (2011) (providing an overview of the case).

¹²⁸ *Brown*, 131 S. Ct. at 2736 ("Certainly the books we give children to read—or read to them when they are younger—contain no shortage of gore."). The Court also rejected California's attempt to shoehorn "violent speech" into the unprotected First Amendment category of obscenity. *Id.* at 2734 ("California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice."). See generally Post, *supra* note 127, at 38-44 (describing the Court's reasoning in *Brown*).

¹²⁹ *Chaplinsky*, 315 U.S. at 571.

¹³⁰ See *Brown*, 131 S. Ct. at 2734 (affirming the reasoning from *Stevens*). The Court held that "obscenity" was limited to depictions of sexual conduct, not "whatever a legislature finds shocking." *Id.*

B. The Stolen Valor Act Cases

The Stolen Valor Act was a content-based restriction of speech because it prohibited a certain topic of speech: false claims of military decorations.¹³¹ Therefore, for the Stolen Valor Act to have been found constitutional, the speech restricted by the Act would have needed to either fit within a category of constitutionally unprotected speech or survive strict scrutiny analysis.¹³² This section will discuss some court cases involving the Stolen Valor Act and the various approaches taken by these courts.

i. *United States v. Strandlof*¹³³

Spinning a complex web of deceit, Richard Glen Strandlof assumed the fake name of “Rick Duncan” and claimed that he was a wounded Marine Corps Veteran.¹³⁴ Among “Duncan’s” many accomplishments were graduating from the Naval Academy, serving three tours in Iraq, and winning both the Purple Heart and the Silver Star.¹³⁵ The outspoken Strandlof created his own organization, the Colorado Veterans Alliance,

¹³¹ See, e.g., *United States v. Strandlof (Strandlof I)*, 746 F. Supp. 2d 1183, 1188–89 (D. Colo. 2010) (“The government does not seriously contest that the Stolen Valor Act criminalizes speech on the basis of its content. . . . I therefore have little trouble in concluding that the Stolen Valor Act constitutes a content-based restriction on speech.”); *Alvarez I*, 617 F.3d 1198, 1202 (9th Cir. 2010) (“[T]he Act targets words about a specific subject: military honors. The Act is plainly a content-based regulation of speech.”), *aff’d*, 132 S. Ct. 2537 (2012).

¹³² See Strossen, *supra* note 24, at 77–78 (describing the First Amendment analytical framework); see also *Alvarez I*, 617 F.3d at 1200 (holding that restrictions of “false factual speech” must either fall within an unprotected category or pass strict scrutiny).

¹³³ 746 F. Supp. 2d 1183.

¹³⁴ See Kevin Simpson, *Many Faces of ‘Fake Vet’ Rick Strandlof Exposed*, DENV. POST (June 7, 2009, 2:03:38 PM), http://www.denverpost.com/commented/ci_12537680 (reporting on Strandlof’s deceit); Calvert & Rich, *supra* note 30, at 19 (“Strandlof. . . actually went so far as to create an alter persona called Rick Duncan. . . .”).

¹³⁵ Felisa Cardona, *Charge Dismissed in Fake Hero’s Case, Valor Act Ruled Unconstitutional*, DENV. POST (July 16, 2010, 11:56:08 AM), http://www.denverpost.com/commented/ci_15532591. Simpson, *supra* note 134.

and took up veterans' issues in the community.¹³⁶ On the back of his "war record," he participated in political campaigns, but he usually endorsed anti-war candidates.¹³⁷ After several years of deception, Rick Strandlof was finally uncovered and charged with several counts of violating the Stolen Valor Act.¹³⁸

In deciding *Strandlof*, the District Court for the District of Colorado rejected the Government's value-based argument that false statements inherently enjoyed no First Amendment protection.¹³⁹ District Judge Blackburn analogized this argument to the unsuccessful one proffered by the government in *United States v. Stevens*,¹⁴⁰ which had involved balancing the relative "value" of particular speech.¹⁴¹ Next, the court considered whether the speech restricted by the Stolen Valor Act fit within the "limited universe" of categorical exceptions to the First Amendment.¹⁴² The court rejected this idea, determining that the Act could not be considered a fraud statute because—although it restricted *potentially* fraudulent speech—it did not actually require a listener to have been deceived by a

¹³⁶ Simpson, *supra* note 134; see Calvert & Rich, *supra* note 30, at 19 (describing Strandlof's actions prior to his prosecution). At first, few questioned Strandlof's claims. See generally Simpson, *supra* note 134 ("It never occurred to [Army Spec. Garett] Reppenhagen, an infantry sniper who actually did a tour in Iraq, to dig deeper. Vets don't press other vets for combat details like that. 'You sort of feel like a jerk by even doubting someone,' he said." (quoting Reppenhagen)).

¹³⁷ Simpson, *supra* note 134.

¹³⁸ *Strandlof I*, 746 F. Supp. 2d at 1185–86.

¹³⁹ *Id.* at 1186 ("The government's argument, which invites it to determine what topics of speech 'matter' enough for the citizenry to hear, is troubling, as well as contrary, on multiple fronts, to well-established First Amendment doctrine."); see Calvert & Rich, *supra* note 30, at 21 ("Judge Blackburn squarely rejected the argument that [valueless] speech . . . goes bare, devoid of any constitutional safeguard." (footnote omitted)).

¹⁴⁰ *Strandlof I*, 746 F. Supp. 2d at 1186 ("[T]he United States Supreme Court recently has rejected, in the strongest possible terms, this precise argument.").

¹⁴¹ *Id.* at 1187 ("[T]he Court [in *Stevens*] noted that where speech has been found to enjoy no First Amendment protection, it is not because of its relative value . . ."); see *supra* Part II.A (describing the *Stevens* decision).

¹⁴² *Strandlof I*, 746 F. Supp. 2d at 1187 (citing *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010)).

false claim.¹⁴³ Because the Act lacked a harm requirement, the restricted false expression was simply too far removed from any underlying crime.¹⁴⁴

Having concluded that the Act did not fit within any categorical exclusion, the court subjected the statute to strict scrutiny.¹⁴⁵ The court did not find that the governmental interest in preserving the symbolism of military decorations was a compelling one.¹⁴⁶ The court paralleled this interest with the one proffered by a state government—years earlier in *Texas v. Johnson*—in defense of the state’s flag burning prohibition.¹⁴⁷ Judge Blackburn criticized at length the notion that the Government had a compelling interest in preventing the dilution of military decorations *because* decorations motivated members of the military.¹⁴⁸ He deplored the Government’s “unsubstantiated” suggestion that soldiers could be deterred from performing their duty *even if* someone could falsely

¹⁴³ *Id.* at 1188 (“[A]s written, the Act criminalizes the mere utterance of the false statement, regardless whether anyone is harmed thereby.”); see Calvert & Rich, *supra* note 30, at 22 (stating that fraud requires proof of harm); *supra* Part I.A (describing fraud as a category of unprotected speech).

¹⁴⁴ *Strandlof I*, 746 F. Supp. 2d at 1188 (“It is merely fraud in the air, untethered from any underlying crime at all. Given the clear language of *Stevens*, I cannot find such incipient and inchoate criminality completely beyond the purview of the First Amendment.”); *cf.* Calvert & Rich, *supra* note 30, at 22 (“[L]ies that directly harm a person are not protected by the First Amendment, but lies that injure no one are protected.”).

¹⁴⁵ *Strandlof I*, 746 F. Supp. 2d at 1189 (“[T]he universe of interests sufficiently compelling to justify content-based restrictions on pure speech is extraordinarily limited.”); see Calvert & Rich, *supra* note 30, at 23–25 (describing the court’s application of strict scrutiny).

¹⁴⁶ *Strandlof I*, 746 F. Supp. 2d at 1190.

¹⁴⁷ *Id.* (citing *Texas v. Johnson*, 491 U.S. 397, 416–17 (1989)) (“Following *Johnson*, I am hard pressed to find that the government’s interest in preserving the symbolic meaning of military awards is sufficiently compelling to withstand First Amendment scrutiny.”); see Calvert & Rich, *supra* note 30, at 23 (“Just as a military medal possesses symbolic meaning, so too does the American flag.”); Wood, *supra* note 55, at 501 (explaining how the *Strandlof I* court relied on *Johnson*); see also *supra* Part I.A (discussing the *Johnson* case).

¹⁴⁸ *Strandlof I*, 746 F. Supp. 2d at 1191 (“I have profound faith—a faith that appears to be questioned by the government here—that the reputation, honor, and dignity military decorations embody are not so tenuous or ephemeral as to be erased by the mere utterance of a false claim of entitlement.”); see Wood, *supra* note 55, at 502 (discussing the court’s criticism of the government’s argument). *But see infra* Part IV.A (proposing that the government *does* indeed have a compelling interest in preventing false claims).

claim to have received a medal.¹⁴⁹ In short, the court determined that American troops were not incentivized by the prospect of earning a military decoration.¹⁵⁰ Having identified no compelling governmental interest, the court held that the Stolen Valor Act failed strict scrutiny.¹⁵¹

The Government appealed this decision to the United States Court of Appeals for the Tenth Circuit (Tenth Circuit).¹⁵² In an opinion by Judge Tymkovich, the Tenth Circuit reversed the District Court on appeal.¹⁵³ To the Tenth Circuit, all the Constitution required was that speech restrictions provide sufficient *breathing room* for “core protected speech.”¹⁵⁴ In reaching its decision, the court interpreted the Stolen Valor Act as possessing several key limits.¹⁵⁵ First, the court reasoned that the Act criminalized only *knowingly* false statements.¹⁵⁶ Second, the court reasoned that the Act criminalized only those

¹⁴⁹ *Strandlof I*, 746 F. Supp. 2d at 1190 (“[The] assertion is, frankly, shocking, and indeed, unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor.”); see Wood, *supra* note 55, at 502 (“It is more likely that such medals are the byproducts of heroic acts in battle, not the goal of such acts.”).

¹⁵⁰ *Strandlof I*, 746 F. Supp. 2d at 1191 (stating that such motivations are “antithetical to the nature of their training”). *But see infra* Part IV.A (arguing that medals and decoration are a valuable tool in the military).

¹⁵¹ *Strandlof I*, 746 F. Supp. 2d at 1190; see Calvert & Rich, *supra* note 30, at 23 (noting that the Act failed strict scrutiny).

¹⁵² John Ingold, *Federal Appeals Court Hears Fake Veteran Case*, DENV. POST (May 12, 2011, 11:57:22 AM), http://www.denverpost.com/cj_18048724.

¹⁵³ *United States v. Strandlof (Strandlof II)*, 667 F.3d 1146, 1151 (10th Cir. 2012), *vacated*, 684 F.3d 962 (10th Cir. 2012). The United States Court of Appeals for the Tenth Circuit (Tenth Circuit) vacated its decision in light of the Supreme Court’s decision in *United States v. Alvarez*, 132 S. Ct. 2537 (2012). *Strandlof II*, 684 F.3d at 963; see *infra* Part II.B.ii (discussing the *Alvarez* case). As a result, the District Court’s order was affirmed. 684 F.3d at 963.

¹⁵⁴ *Strandlof II*, 667 F.3d at 1153 (“As the Supreme Court has repeatedly asserted, the Constitution does not foreclose laws criminalizing knowing falsehoods, so long as the laws allow ‘breathing space’ for core protected speech—as the Supreme Court calls it, ‘speech that matters.’”).

¹⁵⁵ *Id.* at 1155 (describing these limits).

¹⁵⁶ *Id.* (“This interpretation aligns with the presumption that criminal statutes contain an implied *mens rea* requirement. Thus, the Act does not punish unwitting lies about military awards.” (citations omitted)).

statements uttered with an intent to deceive; thus, theatrical proclamations, satirical boasts, and similar types of statements were not implicated by the law.¹⁵⁷ In short, the Stolen Valor Act only targeted blatant lies.¹⁵⁸

The Tenth Circuit then determined that knowingly false statements of fact were a category of speech that did not inherently receive “full” constitutional protection.¹⁵⁹ On the contrary, falsities were protected only to the extent that “constitutionally valuable speech” had sufficient breathing space.¹⁶⁰ Moreover, the Tenth Circuit reasoned that this “breathing space” principle applied *beyond* defamation cases like *New York Times, Garrison, and Gertz*.¹⁶¹ Indeed, it was the “default” approach to all restrictions of falsities, regardless of whether the targeted expression was historically unprotected or not.¹⁶²

Furthermore, the Tenth Circuit considered the effects of the Supreme Court’s decisions in *Stevens* and *Brown v. Entertainment Merchants Ass’n*.¹⁶³ Importantly, the majority did not believe that

¹⁵⁷ *Id.* (“The Act’s requirement that false statements be made with an intent to deceive . . . would not allow the government to prosecute individuals for making ironic or other artistically or politically motivated statements.”).

¹⁵⁸ *Id.* at 1156 (“Read with these two limitations, only outright lies—not ideas, opinions, artistic statements, or unwitting misstatements of fact—are punishable under the Act.”).

¹⁵⁹ *Id.* at 1157 (“Since the 1960s, the Supreme Court has repeatedly declared that knowingly false statements of fact, as a category of speech, are not generally entitled to full First Amendment protection.”).

¹⁶⁰ *Id.* at 1158. The Tenth Circuit went on to analyze the “breathing space” aspects to the Supreme Court’s opinions in *New York Times, Garrison, and Gertz*. *Id.* at 1158–60; see *supra* Part I.A (discussing these three cases). *But see supra* Part II.A (discussing *Stevens* and the Supreme Court’s criticism of value-based arguments).

¹⁶¹ *Strandlof II*, 667 F.3d at 1161–62 (reasoning that a “breathing space”-type inquiry was also utilized in cases involving fraud, false-light torts, perjury, baseless litigation, and intentional infliction of emotional distress).

¹⁶² *Id.* at 1162 (“[M]oreover, the Supreme Court has never suggested that breathing space analysis is appropriate only for historically unprotected categories of false speech.”). As an example, the Tenth Circuit cited *Time, Inc. v. Hill*, 385 U.S. 374 (1967), a false-light tort case. *Id.* at 1162. According to the Tenth Circuit, the false-light tort had no historical tradition, unlike a defamation action. *Id.*

¹⁶³ *Id.* at 1162-64; see *supra* Part II.A (discussing these two cases).

the *Stevens* list of unprotected speech categories was exhaustive, instead emphasizing that the Supreme Court had left open the possibility of recognizing other categories of historically unprotected speech.¹⁶⁴ Moreover, the Tenth Circuit also rejected the notion that “breathing space analysis” represented an arbitrary balancing test akin to the one the Supreme Court rejected in *Stevens*.¹⁶⁵

Applying this framework to the Stolen Valor Act, the Tenth Circuit held that the law provided sufficient breathing space for “valuable speech.”¹⁶⁶ The Act did not curtail the public’s ability to comment on issues of public importance or criticize the government.¹⁶⁷ Likewise, the court held that there was only a remote possibility that innocent people would overly restrict their own speech due to a fear of prosecution.¹⁶⁸ Lastly, the court emphasized the Government’s legitimate interest in protecting the military honors program.¹⁶⁹

In dissent, Judge Holmes rejected the majority’s use of breathing space analysis and reasoned that the Act was an unconstitutional restriction on speech.¹⁷⁰ Judge Holmes emphasized the Supreme Court’s inclusion of “fraud” and “defamation” and omission of “false factual statements” in the

¹⁶⁴ *Strandlof II*, 667 F.3d at 1163 (“[T]he Court has never voiced an intention to craft a comprehensive and inflexible list of unshielded utterances.”).

¹⁶⁵ *Id.* (“[T]his analysis is more aptly characterized as a specific method of review the Court uses to assess laws regulating false factual statements. Breathing space review is no more of a balancing test than strict scrutiny, intermediate scrutiny, or rational basis review.”).

¹⁶⁶ *Id.* at 1167 (“The Act prohibits only knowingly false statements of fact, it provides breathing space for valuable speech, and it reaches no farther than is necessary to protect the legitimate interest involved.” (internal quotation marks omitted)).

¹⁶⁷ *Id.* at 1168 (“No one is inhibited from criticizing the armed forces, opining about military actions and administration, stating political opinions, or reporting on governmental affairs.”).

¹⁶⁸ *Id.* at 1167 (“There is almost no danger anyone would suppress their speech to avoid punishment under the Act.”).

¹⁶⁹ *Id.* at 1169 (describing the importance of the system of military honors). For an in-depth look at the government’s interest in protecting the awards system, see *infra* Part IV.

¹⁷⁰ *Strandlof II*, 667 F.3d at 1170 (Holmes, J., dissenting).

Stevens list of unprotected categories of speech.¹⁷¹ To Judge Holmes, mere falsity by itself was not sufficient to kick certain expression out of the First Amendment sphere of protection.¹⁷² Furthermore, Holmes opined that the majority’s breathing space analysis *was*, in fact, a case-by-case balancing test of the sort that the Supreme Court had criticized in *Stevens*.¹⁷³ But the Act’s key problem, to Judge Holmes, was that prosecution under the Act did not require proving a “harm” that occurred as a result of a false medal claim.¹⁷⁴ Finally, Judge Holmes reasoned that the Act would fail strict scrutiny because the law was not narrowly tailored.¹⁷⁵

ii. *United States v. Alvarez*¹⁷⁶

Just like Richard Strandlof, Xavier Alvarez had a propensity for regaling others with fictitious tales of an illustrious military career.¹⁷⁷ In 2007, after winning a seat on his local water

¹⁷¹ *Id.* at 1176 (“If it is the false factual statement *generally* that is unprotected, then it is surely puzzling not only that the Court has never said so over the past four decades, but also that it has repeatedly taken pains to enumerate particular types of false factual statements rather than advert to a unitary unprotected category—false factual statements.”).

¹⁷² *Id.* at 1177 (“As the Court has reminded us often, *bare falsity* is not enough to strip a statement of constitutional protection.”).

¹⁷³ *Id.* at 1187 (“Perhaps worst of all, the majority’s rule invites a case-by-case consideration of the importance of speech only *after* the fact—specifically, only *after* the penal or prosecutorial forces of the State have arrayed against the speaker. . . . [The speaker] would be left to hope that a court would find a sufficient link between his ‘valueless’ false speech and some nebulous cluster of ‘important’ speech . . .”).

¹⁷⁴ *Id.* at 1189 (“The most glaring problem with the Stolen Valor Act is the absence of a nexus between the proscribed ‘false[] represent[ation]’ and any resulting injury.” (alteration in original)).

¹⁷⁵ *Id.* at 1198. See *generally infra* Part IV (arguing that the Stolen Valor Act passes strict scrutiny).

¹⁷⁶ 132 S. Ct. 2537 (2012). This Article discusses the *United States v. Alvarez* case as follows: “*Alvarez I*” refers to the original United States Court of Appeals for the Ninth Circuit (Ninth Circuit) decision. 617 F.3d 1198 (9th Cir. 2010), *aff’d*, 132 S. Ct. 2537 (2012). “*Alvarez II*” refers to the Ninth Circuit’s denial of rehearing en banc. 638 F.3d 666 (9th Cir. 2011). “*Alvarez III*” refers to the Supreme Court’s decision. 132 S. Ct. 2537.

¹⁷⁷ *Alvarez III*, 132 S. Ct. at 2542; *Alvarez I*, 617 F.3d at 1200; see Bill Mears, *Appeals Court Rules Stolen Valor Act Unconstitutional*, CNN (Aug. 18, 2010), http://articles.cnn.com/2010-08-18/justice/california.stolen.valor.ruling_1_appeals-court-stolen-valor-act-split-ruling (describing the background of the case). Remarkably, Alvarez’s boasts were even more brazen than Strandlof’s. Among his various claims were that he had won the

district Board of Directors, Alvarez introduced himself by stating that he had served in the Marines for twenty-five years and was a Medal of Honor winner.¹⁷⁸ Even before this charade occurred, some were suspicious of Alvarez's numerous boasts and alerted the FBI.¹⁷⁹ As a result of his untruths, Alvarez was charged with and convicted of two counts of violating the Stolen Valor Act.¹⁸⁰

In *Alvarez I*, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) held the Stolen Valor Act unconstitutional, rejecting the Government's primary contention that false statements of fact comprised a general category of unprotected speech.¹⁸¹ The Government relied upon language from *Gertz v. Robert Welch, Inc.*,¹⁸² stating that the "erroneous statement of fact is not worthy of constitutional protection."¹⁸³ Importantly, however, Judge Smith, writing for the majority, identified no basis for the conclusion that the general category of false factual

Medal of Honor after having rescued the American Ambassador from Iran, that he had been shot in the back while trying to save the American flag, and that he had been shot down while piloting a helicopter during the Vietnam War. *Alvarez I*, 617 F.3d at 1201.¹⁷⁸ *Alvarez I*, 617 F.3d at 1200–01 (opining that Alvarez's statement was "nothing but a series of bizarre lies"); see *Alvarez III*, 132 S. Ct. at 2542 ("For all the record shows, [Alvarez's] statements were but a pathetic attempt to gain respect that eluded him."); Calvert & Rich, *supra* note 30, at 25 (describing Alvarez's deception).

¹⁷⁹ *Alvarez I*, 617 F.3d at 1201. Nor were Alvarez's lies confined to a martial subject matter. *Id.* Indeed, he also falsely claimed that he had been a professional hockey player and that he had "secretly married . . . a Mexican starlet." *Id.*; see *Alvarez III*, 132 S. Ct. at 2542 ("Lying was his habit."); Editorial, *Xavier Alvarez Must Resign Now*, DAILYBULLETIN.COM (Jan. 3, 2008, 4:41:34 PM), http://www.dailybulletin.com/opinions/ci_7301687 ("Alvarez is an embarrassment to Three Valleys and to Pomona, which elected him to the water board seat last November.").

¹⁸⁰ *Alvarez I*, 617 F.3d at 1201; Mears, *supra* note 177. At the district court level, Alvarez conditionally pled guilty, reserving his right to appeal the constitutionality of the Stolen Valor Act. *Alvarez I*, 617 F.3d at 1199.

¹⁸¹ *Alvarez I*, 617 F.3d at 1200; see Wood, *supra* note 55, at 471 (explaining the Ninth Circuit's holding).

¹⁸² 418 U.S. 323, 340 (1974); see *supra* notes 49-54 and accompanying text (describing the *Gertz* case).

¹⁸³ *Alvarez I*, 617 F.3d at 1206 (quoting *Gertz*, 418 U.S. at 340); see Calvert & Rich, *supra* note 30, at 28 ("The government in *Alvarez* argued, however, that a single, simple 11-word statement from dicta in . . . *Gertz* . . . supported its position that lies lack any constitutional protection." (footnotes omitted)).

speech had a *history and tradition* of being unprotected.¹⁸⁴ If that were true, the government could theoretically have the authority to criminalize mundane lies involving a declarant’s own weight, for example.¹⁸⁵ Accordingly, the Supreme Court had not listed “false statements” as a general category of unprotected speech in its *Stevens*’s decision¹⁸⁶—the Court *had* listed defamation and fraud.¹⁸⁷ Therefore, the Ninth Circuit maintained that this isolated language from *Gertz* could not simply be plucked from that case’s defamation context.¹⁸⁸

As a result, the Ninth Circuit proceeded to analyze whether the Stolen Valor Act could fit into a recognized categorical exclusion.¹⁸⁹ As a defamation statute, however, the Act lacked a “scienter requirement.”¹⁹⁰ Furthermore, even if a scienter

¹⁸⁴ *Alvarez I*, 617 F.3d at 1206 (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010)); Calvert & Rich, *supra* note 30, at 26 (“In particular, the Ninth Circuit both cited and quoted *Stevens* [to support the court’s reasoning].”). Of course, *Stevens* emphasized that—to be a categorical exclusion—a proposed category must have a history and tradition of being unprotected. See *supra* Part II.A (discussing the *Stevens* holding); *infra* Part III.A (analyzing whether false statements of fact have a history and tradition of being unprotected).

¹⁸⁵ *Alvarez I*, 617 F.3d at 1200 (“[If all false statements were unprotected], then there would be no constitutional bar to criminalizing lying about one’s height, weight, age, or financial status on Match.com”).

¹⁸⁶ *Id.* at 1207–08.

¹⁸⁷ *Stevens*, 130 S. Ct. at 1584; see Calvert & Rich, *supra* note 30, at 10–11 (discussing the list in *Stevens*).

¹⁸⁸ *Alvarez I*, 617 F.3d at 1207–09 (“[W]e believe the historical category of unprotected speech identified in *Gertz* and related law is defamation, not all false factual speech. The dissent . . . ignor[ed] what *Gertz* actually held, and how the Court . . . framed the issues”); see Calvert & Rich, *supra* note 30, at 28–29 (explaining the court’s approach to *Gertz*).

¹⁸⁹ *Alvarez I*, 617 F.3d at 1209–15; see Calvert & Rich, *supra* note 30, at 29–32 (overviewing the court’s analysis of defamation, fraud, and other unprotected categories).

¹⁹⁰ *Alvarez I*, 617 F.3d at 1209 (“The Act, however, does not require a malicious violation, nor does it contain any other requirement or element of scienter”); see *infra* Part III (suggesting that the Act’s language does imply a scienter requirement). “Scienter” is knowledge that makes one legally responsible for the consequences of an action. BLACK’S LAW DICTIONARY 1463 (9th ed. 2009). In the context of defamation, scienter takes the form of “actual malice.” See Wood, *supra* note 55, at 482 (stating that, in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Supreme Court applied a “heightened scienter requirement[.]” similar to that required in *New York Times* and *Garrison*); see also *supra* Part I.A (discussing several defamation cases decided by the Supreme Court).

requirement could be read in,¹⁹¹ prosecutions under the Stolen Valor Act did not require proof of either harm or identifiable presumptive harm.¹⁹² The Ninth Circuit was not persuaded that the meaning of military decorations was damaged every time a false claim occurred.¹⁹³ Even so, the court reasoned that governmental institutions, as such, did not possess any right against defamation.¹⁹⁴ Further, the Ninth Circuit elucidated a fundamental difference between the Stolen Valor Act and a defamation statute, with regard to the nature of the harm restricted.¹⁹⁵ The harm of defamatory speech is “thought to be *irreparable*” even after the truth is revealed.¹⁹⁶ In contrast, the Ninth Circuit reasoned that public ridicule of a false medal claimant exposed the false claims and undid any damage caused by them.¹⁹⁷

Continuing on, the Ninth Circuit determined that the Act could not be construed as a proper fraud statute either.¹⁹⁸ Similar to the way it approached defamation, the court reasoned that the Act did not require the government to prove that a declarant

¹⁹¹ *Alvarez I*, 617 F.3d at 1209 (“If a scienter requirement would save the statute, we would be obliged to read it in if possible. 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.” (citations omitted)).

¹⁹² *Id.* at 1209–10; see Calvert & Rich, *supra* note 30, at 29 (stating that the Act punishes falsities regardless of whether there is any resulting harm). The Ninth Circuit was not persuaded by the congressional findings that such statements “damage the reputation and meaning of such decorations and medals.” *Alvarez I*, 617 F.3d at 1209 (internal quotation marks omitted).

¹⁹³ *Alvarez I*, 617 F.3d at 1210 (“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.”).

¹⁹⁴ *Id.* (“[T]he government may not restrict speech as a means of self-preservation.”); see Wood, *supra* note 55, at 481 (“[D]efamation actions generally require harm to an individual’s reputation.”).

¹⁹⁵ *Alvarez I*, 617 F.3d at 1211.

¹⁹⁶ *Id.*; Calvert & Rich, *supra* note 30, at 29–30.

¹⁹⁷ *Alvarez I*, 617 F.3d at 1211; see Bethany Hanson, *U.S. v. Alvarez*, 43 URB. LAW. 629, 630 (2011) (“[T]he speech of the defendant could be remedied with more speech . . .”).

¹⁹⁸ *Alvarez I*, 617 F.3d at 1212 (“[W]e cannot construe the Act as falling within the historical First Amendment exception for anti-fraud laws.”); see Hanson, *supra* note 197, at 630 (stating that the court did not find the Act to be sufficiently analogous to fraud statutes).

materially lied, intended to be deceptive, and was successful in deceiving a listener.¹⁹⁹ The Ninth Circuit did concede that Congress could theoretically rewrite elements of the Act into a proper fraud statute, but the court refused to suggest how.²⁰⁰

Having concluded that the Act restricted speech that was not categorically unprotected, the court then applied strict scrutiny analysis to the statute.²⁰¹ However, unlike the District Court of Colorado in *Strandlof I*, the Ninth Circuit *did* recognize a compelling governmental interest in protecting the reputation of military medals and decorations.²⁰² However, the Act failed the other component of strict scrutiny, as the court determined that the statute was not narrowly tailored to achieve the aforementioned interest.²⁰³ The court reiterated that lies about earning military medals could be remedied by public “notice and correction.”²⁰⁴ Regardless, the court postulated that the reputation of the medals might be completely unaffected by the lies involving them.²⁰⁵

¹⁹⁹ *Alvarez I*, 617 F.3d at 1212 (criticizing the lack of “injury elements”); Hanson, *supra* note 197, at 630 (“The Act also failed to fall within the fraud exception . . . because it did not require the prohibited misrepresentations be willful, material, or injurious.”).

²⁰⁰ *Alvarez I*, 617 F.3d at 1212 (refusing on separation of powers grounds); *see* Wood, *supra* note 55, at 505–06 (suggesting ways in which the Act could be redrafted).

²⁰¹ *Alvarez I*, 617 F.3d at 1215–18.

²⁰² *Compare id.* at 1216 (“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.” (emphasis added)), *with Strandlof I*, 746 F. Supp. 2d 1183, 1190 (D. Colo. 2010) (concluding that the Government’s interest in preserving the symbolic meaning of military awards was not compelling).

²⁰³ *Alvarez I*, 617 F.3d at 1216–17.

²⁰⁴ *Id.* at 1216; *see also* Calvert & Rich, *supra* note 30, at 29–30 (suggesting that the “marketplace of ideas” could rectify harms associated with speech).

²⁰⁵ *Alvarez I*, 617 F.3d at 1217. The Ninth Circuit’s argument mirrored that of the district court in *Strandlof I*. *See Alvarez I*, 617 F.3d at 1217 (“[T]here 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.”); *see also supra* Part II.B.i (discussing the *Strandlof I* reasoning).

In dissent, Judge Bybee lambasted the majority's reasoning, maintaining that false statements *were* categorically excluded from First Amendment protection.²⁰⁶ He opined that the types of speech recited by the Supreme Court in *Stevens* and *Chaplinsky*—such as defamation and fraud—were only examples, which together reflected a *general*, unprotected category of false speech.²⁰⁷ Bybee quoted phrases from a plethora of Supreme Court cases, which he believed suggested that false statements were historically unprotected.²⁰⁸ According to Bybee, constitutional protection of false statements existed only to the extent necessary to protect “speech that matters.”²⁰⁹ Further criticizing the majority, Bybee argued that the *Gertz* case was important because of what the Supreme Court “actually says.”²¹⁰ In other words, in *Gertz*, the Supreme Court denounced the “erroneous” statement of fact, and Bybee argued that the Ninth Circuit should not then reinterpret this language as referring only to “defamation.”²¹¹ Bybee conceded that, under his approach, the

²⁰⁶ *Alvarez I*, 617 F.3d at 1220 (Bybee, J., dissenting) (“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.”).

²⁰⁷ *See id.* (stating that defamation fell within a larger unprotected category); *supra* Part II.A (discussing the *Stevens* list of unprotected speech); *see also* Mark Tushnet, “Telling Me Lies”: *The Constitutionality of Regulating False Statements of Fact* 6 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 11-02, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737930 (“Judge Bybee argued that the Supreme Court had consistently held that false statements as such were unprotected . . .”). Judge Bybee believed the Court often used the term “defamation” because many of its cases dealing with false statements involved defamation. *Alvarez I*, 617 F.3d at 1225 (Bybee, J., dissenting).

²⁰⁸ *Alvarez I*, 617 F.3d at 1220 (Bybee, J., dissenting); *see* Tushnet, *supra* note 207, at 6 (“[Bybee began his dissent] by piling quotation upon quotation from Supreme Court decisions asserting, in varying words but constant content, that the erroneous statement of fact is not worthy of constitutional protection.” (internal quotation marks omitted)).

²⁰⁹ *Alvarez I*, 617 F.3d at 1221 (Bybee, J., dissenting) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)).

²¹⁰ *Id.* at 1223 (Bybee, J., dissenting); *see* Warren Richey, *Supreme Court to Decide Constitutionality of ‘Stolen Valor Act’*, ALASKA DISPATCH (Oct. 17, 2011), <http://www.alaskadispatch.com/article/supreme-court-decide-constitutionality-stolen-valor-act> (summarizing Bybee’s criticism of the majority).

²¹¹ *Alvarez I*, 617 F.3d at 1223 (Bybee, J., dissenting) (quoting *Gertz*, 418 U.S. at 340). Of course, *Gertz* was a defamation case. *See supra* Part I.A (discussing defamation

government could restrict trivial lies, but he maintained that this was an issue for the legislature to address.²¹²

Judge Bybee also criticized the majority’s assertion that false statements were unprotected only when a “bona fide harm” element was present.²¹³ He found parallels with the lack of a required, identifiable “harm” in obscenity jurisprudence.²¹⁴ Even so, Bybee concluded that false claims of military honors did harm the small group of legitimate medal recipients.²¹⁵

After the decision in *Alvarez I*, the Government petitioned for rehearing en banc.²¹⁶ The decision to deny the petition produced equally colorful arguments from the Ninth Circuit.²¹⁷ In concurrence, Judge Smith criticized the dissent for relying on isolated phrases from Supreme Court cases to support the assertion that false statements constituted a categorical exclusion.²¹⁸ Citing

jurisprudence). Additionally, Judge Bybee cautioned that the Ninth Circuit did not have the authority “to limit the [Supreme] Court’s statements to what we believe they mean rather than what they actually say.” *Alvarez I*, 617 F.3d at 1223 (Bybee, J., dissenting).

²¹² *Alvarez I*, 617 F.3d at 1232 n.9 (Bybee, J., dissenting).

²¹³ *Id.* at 1227 (internal quotation marks omitted) (citing *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010)) (“*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. Rather . . . [it] depends on whether a class of speech has traditionally been thought to be of low First Amendment *value*.” (citation omitted)).

²¹⁴ *Id.* at 1229 (“[T]he majority holds the Stolen Valor Act unconstitutional because it does not require *proof* that any particular statement causes harm. . . . The problem is that this is true of obscenity regulations as well . . . they do not explicitly require that the government even *identify* . . . a cognizable harm in every case.” (footnote omitted) (citation omitted)). In *Brown v. Entertainment Merchants Ass’n*, however, the Supreme Court was hesitant to expand obscenity reasoning beyond a very narrow context. 131 S. Ct. 2729, 2734 (2011); *supra* Part II.A (discussing *Brown* in relation to *Stevens*).

²¹⁵ *Alvarez I*, 617 F.3d at 1234 (Bybee, J., dissenting) (stating that the harm was “self-evident”). Judge Bybee broadly stated that “*Alvarez*’s statements dishonor every Congressional Medal of Honor winner, every service member who has been decorated in any way [sic], and every American now serving.” *Id.* at 1235.

²¹⁶ *Alvarez II*, 638 F.3d 666, 666 (9th Cir. 2011) (denying petition for rehearing en banc).

²¹⁷ *Id.* at 666-70 (Smith, J., concurring); see Petition for Writ of Certiorari, *supra* note 6, at *11-12 (summarizing the Ninth Circuit’s opinions).

²¹⁸ *Alvarez II*, 638 F.3d at 668 (Smith, J., concurring) (arguing that the dissenters examined neither the “context” nor the “holdings” of those cases). Furthermore, Judge Smith—who had written the majority opinion in *Alvarez I*—felt that any reliance on

Stevens and *Chaplinsky*, he was informed by the Supreme Court’s specific use of the words “defamation” and “fraud” to describe unprotected speech—not “false statements of fact.”²¹⁹ Echoing *Stevens*, Smith did not recognize a *historical* basis for the general regulation of false statements.²²⁰

In a separate concurrence, Chief Judge Kozinski urged against the view that false statements were “always” unprotected by the constitution.²²¹ He proceeded to paint a dystopian portrait,²²² in which the government could prohibit any number of innocuous lies, subjected only to a rational basis review.²²³

In dissent, Judge O’Scannlain mirrored the earlier argument of Judge Bybee, finding it inappropriate for the Ninth Circuit to diminish the many references to “false statements of fact” throughout the Supreme Court’s free speech jurisprudence.²²⁴

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), for the prospect that false statements generally enjoyed no constitutional protection, was misplaced and distorted. *Id.* at 669-70 (reiterating that *Gertz* was a defamation case).

²¹⁹ *Id.* at 670 (“[T]he Court has *never* included ‘false statements of fact’ in its list.”); *see, e.g.*, *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (listing categories of unprotected speech).

²²⁰ *Alvarez II*, 638 F.3d at 672 (Smith, J., concurring). In *Stevens*, the Supreme Court emphasized the importance of history and tradition in the recognition of an unprotected category of speech. 130 S. Ct. at 1586; *see supra* Part II.A (discussing *Stevens*); *infra* Part III (analyzing the likely effects of *Stevens* on free speech jurisprudence).

²²¹ *Alvarez II*, 638 F.3d at 673 (Kozinski, C.J., concurring) (“‘Always’ is a deliciously dangerous word, often eaten with a side of crow.”); *see* Petition for Writ of Certiorari, *supra* note 6, at *11 (summarizing Kozinski’s concurrence).

²²² *Alvarez II*, 638 F.3d at 673 (Kozinski, C.J., concurring) (calling such a reality “terrifying”).

²²³ *Id.* (“If false factual statements are unprotected, then the government can prosecute . . . the JDater who falsely claims he’s Jewish or the dentist who assures you it won’t hurt a bit.”); *see* Petition for Writ of Certiorari, *supra* note 6, at *11 (“Kozinski . . . noted that lies about oneself are commonplace in day-to-day social interactions”). *See generally* Tony Mauro, *Stolen Valor Case: False Speech May Leave Some Justices Cold*, FIRST AMENDMENT CENTER (Oct. 18, 2011), <http://www.firstamendmentcenter.org/stolen-valor-case-false-speech-may-leave-some-justices-cold> (describing the “colorful” language of Chief Judge Kozinski).

²²⁴ *Alvarez II*, 638 F.3d at 678–83 (O’Scannlain, J., dissenting); *id.* at 683 (“I cannot assume that the Court would have blithely used ‘false statements’ to mean ‘defamation’ for four decades running.”); *see* Petition for Writ of Certiorari, *supra* note 6, at *12 (stating that O’Scannlain believed the majority’s approach ran counter to Supreme Court precedent).

Turning to *Stevens*, O’Scannlain did not view the Supreme Court’s inclusion of “defamation” and “fraud” and omission of “false statements of fact” to be important.²²⁵ Even so, O’Scannlain criticized the majority’s assertion that the validity of the Stolen Valor Act as a fraud or defamation statute depended upon a scienter requirement and a showing of harm.²²⁶ But O’Scannlain nevertheless believed that reputational harm to the military—alluded to in the congressional “Findings” section of the Act—was adequate harm.²²⁷

Also dissenting, Judge Gould suggested a different approach to finding the Stolen Valor Act constitutional, an approach based on Congress’s power and responsibility over the proper functioning of the military.²²⁸ Therefore, given the important societal interest involved, he felt that a more “permissive” standard than strict scrutiny should be applied to the Act.²²⁹

²²⁵ *Alvarez II*, 638 F.3d at 683 (O’Scannlain, J., dissenting) (“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.”); see Mauro, *supra* note 223 (summarizing O’Scannlain’s reliance on historical Supreme Court cases).

²²⁶ *Alvarez II*, 638 F.3d at 684 (O’Scannlain, J., dissenting) (“But upon closer look at current laws, the majority’s self-created requirements do not hold water.”); see Petition for Writ of Certiorari, *supra* note 6, at *12 (“O’Scannlain reasoned further that the panel majority had erred in concluding that the First Amendment required . . . a showing of individualized harm . . .”). Moreover, even accepting a scienter requirement, O’Scannlain could not envision a situation where someone would honestly—yet incorrectly—believe that he or she had received a military decoration. *Alvarez II*, 638 F.3d at 685 (O’Scannlain, J., dissenting).

²²⁷ *Alvarez II*, 638 F.3d at 685 (O’Scannlain, J., dissenting) (“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 Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266, § 2 (2006) (describing the congressional findings).

²²⁸ *Alvarez II*, 638 F.3d at 687 (Gould, J., dissenting) (“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 . . . 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.”); see Petition for Writ of Certiorari, *supra* note 6, at *12 (summarizing Judge Gould’s dissent).

²²⁹ *Alvarez II*, 638 F.3d at 687-88 (Gould, J., dissenting) (“A rational Congress might think that the quality of military service and instances of award winning heroism

Subsequently, Xavier Alvarez appealed to the Supreme Court, and oral arguments were heard in early 2012.²³⁰ The Court's decision was delayed until the last day of the term, perhaps signifying the importance of a decision to uphold or invalidate the Stolen Valor Act.²³¹ By this point, the federal courts had split on the Act's constitutionality.²³²

will be enhanced to the extent that there aren't false claims of entitlement to military honors."); Petition for Writ of Certiorari, *supra* note 6, at *12. Judge Gould did not go so far as to say that *any* speech regarding the military would not be protected by the Constitution. *Alvarez II*, 638 F.3d at 688 (Gould, J., dissenting). In his concurrence, Chief Judge Kozinski disagreed with Gould's approach, calling it "vague" as to how much otherwise protected speech could be restricted. *Alvarez II*, 638 F.3d at 676–77 (Kozinski, C.J., concurring). Kozinski also cautioned that, if all speech about the military were unprotected by the First Amendment, "Congress could pretty much have banned the entire Vietnam protest movement . . ." *Id.* at 676; *cf. infra* Part IV.A (discussing congressional interest in preserving the value of military medals).

²³⁰ See David G. Savage, *Supreme Court Hears Medal of Honor Case, Ponders Political Lies*, L.A. TIMES (Feb. 23, 2012), <http://articles.latimes.com/print/2012/feb/23/nation/la-na-court-lies-20120223>. At oral argument, most of the justices appeared to side with the government. *Id.* ("With the exception of Justice Sonia Sotomayor, none of the justices sounded as though they were convinced by a lawyer for Xavier Alvarez that the law should be struck down on 1st Amendment grounds.")

²³¹ See Doug Mataconis, *Congress Looks to Rewrite Stolen Valor Act*, OUTSIDE THE BELTWAY (July 11, 2012), <http://www.outsidethebeltway.com/congress-looks-to-rewrite-stolen-valor-act/> ("Lost amid all the attention that was paid on the last day of the Supreme Court's term to the Court's ruling on the constitutionality of the Affordable Care Act was the equally interesting decision in *United States v. Alvarez* . . ."). See generally Nina Totenberg, *Supreme Court Has a Term to Remember*, 89.3 KPCC (July 6, 2012), <http://www.scpr.org/news/2012/07/06/33131/supreme-court-has-a-term-to-remember> (describing the "historic" Supreme Court term).

²³² See *supra* discussion of the Tenth Circuit's decision in *United States v. Strandlof* and the Ninth Circuit's decision in *United States v. Alvarez*. Various district courts were also divided about the Act's constitutionality. For example, in *United States v. Robbins*, the District Court for the Western District of Virginia held that the Stolen Valor Act was constitutional. 759 F. Supp. 2d 815, 822 (W.D. Va. 2011). The court proffered a rationale similar to that of the *Alvarez I* and *II* dissenters: that false statements of fact—not merely defamation and fraud—were categorically excluded from First Amendment protection. *Id.* at 817-18; see David L. Hudson, Jr., *Federal Judge Upholds Stolen Valor Act*, FIRST AMENDMENT CENTER (Jan. 6, 2011), <http://www.firstamendmentcenter.org/federal-judge-upholds-stolen-valor-act/> (describing the court's ruling). The court reasoned that the Stolen Valor Act neither chilled protected speech nor led to overly protective self-censoring because the false claims necessarily described the declarant and were thus "easily verifiable." *Robbins*, 759 F. Supp. 2d at 820 ("There is no risk of stifling opinions or true statements."). Furthermore, in contrast to those falsities that bolstered a legitimate, underlying truth in the marketplace, the Act restricted lies far removed from political, cultural, historical, and scientific viewpoints. *Id.*

On June 28, 2012, the Supreme Court struck down the Stolen Valor Act, affirming the Ninth Circuit in a six-to-three decision.²³³ Writing for a four-justice plurality, Justice Kennedy began by examining First Amendment jurisprudence.²³⁴ In so doing, the plurality reiterated principles that were previously articulated in *United States v. Stevens*: one, that *ad hoc*, cost/benefit balancing tests could not be used to determine when speech was restricted;²³⁵ and two, that content-based speech restrictions were only permissible for certain recognized, “historic and traditional” categories of expression.²³⁶ Just as the Supreme Court had previously done in *Chaplinsky* and *Stevens*, the plurality listed several examples of unprotected speech.²³⁷ Among these examples were fraud, defamation, speech integral to criminal conduct, and obscenity.²³⁸ The plurality emphasized that there was no *general* unprotected category of “false statements.”²³⁹

²³³ *Alvarez III*, 132 S. Ct. 2537, 2539 (2012); see Eugene Volokh, *Freedom of Speech and Knowing Falsehoods*, THE VOLOKH CONSPIRACY (June 28, 2012, 5:19 PM), <http://www.volokh.com/2012/06/28/freedom-of-speech-and-knowing-falsehoods> (“[T]he Court held, 6-3, that the Stolen Valor Act . . . violated the First Amendment. But lurking behind this was a more complicated 4-2-3 split that was in some ways a 5-4 split in favor of treating lies as generally less constitutionally protected.”).

²³⁴ See *Alvarez III*, 132 S. Ct. at 2543-45. Justice Kennedy was joined by Justice Ginsburg, Justice Sotomayor, and Chief Justice Roberts. *Id.* at 2542.

²³⁵ *Id.* at 2544 (citing *United States v. Stevens*, 130 S. Ct. 1577 (2010)).

²³⁶ *Id.* (“[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few ‘historic and traditional categories . . . long familiar to the bar.’”).

²³⁷ *Id.*; see Volokh, *supra* note 233 (describing the Court’s list of examples); see also *supra* Part II.A (discussing *Stevens*).

²³⁸ *Alvarez III*, 132 S. Ct. at 2544 (“Among these categories [of unprotected speech] are advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called ‘fighting words’; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain.” (citations omitted)).

²³⁹ *Id.* (“This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation”); Tejinder Singh, *Opinion Analysis: Stolen Valor Act Violates the First Amendment*, SCOTUSBLOG (June 28, 2012, 2:47 PM), <http://www.scotusblog.com/2012/06/opinion-recap-stolen-valor-act-violates-the-first-amendment> (“The plurality held that false statements of fact do not fall within a historically recognized exception, and so the Stolen Valor Act can survive only if it is narrowly tailored to a compelling government interest”); see Volokh, *supra* note 233 (discussing the Supreme Court decision).

Like the Ninth Circuit panel in *Alvarez I*, the plurality found unpersuasive the Government's citation to isolated sentences, plucked from different Supreme Court cases, that indicated "'there is no constitutional value in false statements of fact.'"²⁴⁰ On the contrary, in those cases, the false statements at issue were directly associated with some type of resulting harm, such as defamation or fraud.²⁴¹ To the plurality, however, the Act outlawed false statements that were *not* associated with a "legally cognizable harm."²⁴² The plurality then addressed three types of speech restrictions, which, the Government argued, never drew the ire of the First Amendment: laws restricting false statements to government officials, laws forbidding perjury, and laws preventing an individual from falsely claiming that he or she was speaking on behalf of the government.²⁴³ But again, to the plurality, these laws targeted a specific "harm" that resulted from the false speech.²⁴⁴ As a result, such prohibitions were constitutional "to the extent that they implicate[d] fraud or speech integral to criminal conduct."²⁴⁵

²⁴⁰ *Alvarez III*, 132 S. Ct. at 2545 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)); *id.* at 2544-45 ("These isolated statements in some earlier decisions do not support the Government's submission that false statements, as a general rule, are beyond constitutional protection.").

²⁴¹ *Id.* at 2545 ("These quotations all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation. . . . The Court has never endorsed the categorical rule . . . that false statements receive no First Amendment protection.").

²⁴² *Id.* ("Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.").

²⁴³ *Id.* at 2545-46.

²⁴⁴ *Id.* at 2546 ("These restrictions, however, do not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny."). For example, both false statements to government officials and false statements that one is speaking on behalf of the government directly interfere with government processes. *Id.* In addition, perjury erodes the operation of judiciary. *Id.* ("It is not simply because perjured statements are false that they lack First Amendment protection. . . . Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system." (citation omitted)).

²⁴⁵ *Id.* It is unclear whether the plurality meant to imply that these types of laws were constitutional *only* to the extent that they were proper restrictions on "fraud" or "speech integral to criminal conduct." *Cf. id.* at 2546-47 ("This opinion does not imply that any of these targeted prohibitions are somehow vulnerable. But it also rejects the notion that false speech should be in a general category that is presumptively unprotected.").

Turning to the Stolen Valor Act specifically, the plurality criticized the law's breadth.²⁴⁶ Theoretically, an individual could violate the Act by making a false medal claim within the confines of the individual's home and without any intention of attaining something of value.²⁴⁷ To the plurality, permitting this type of restriction on false speech would invite the government to restrict false statements about any number of other subjects.²⁴⁸

The plurality further reasoned that the Act failed strict scrutiny.²⁴⁹ As a preliminary matter, the plurality found the Government's interest in recognizing military valor to be compelling.²⁵⁰ Moreover, protecting military honors played an important role in achieving the Government's interest.²⁵¹ But the plurality reasoned that the Act was not necessary to realize that interest.²⁵² The Government presented no evidence that public sentiment about military medals was eroded by the false claims involving them.²⁵³ Furthermore, the plurality reasoned

²⁴⁶ *Id.* at 2547 (“The probable, and adverse, effect of the Act . . . illustrates . . . the reasons for the Law’s distrust of content-based speech prohibitions. The Act by its plain terms applies to a false statement made at any time, in any place, to any person.”).

²⁴⁷ *Id.* (“[T]he statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.”).

²⁴⁸ *Id.* (“That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth. Were this law to be sustained, there could be an endless list of subjects the [government] could single out.” (citation omitted)); see Singh, *supra* note 239 (analyzing the plurality opinion).

²⁴⁹ *Alvarez III*, 132 S. Ct. at 2548 (“Although the objectives the Government seeks to further by the statute are not without significance . . . the Act does not satisfy exacting scrutiny.”); see Singh, *supra* note 239.

²⁵⁰ See *Alvarez III*, 132 S. Ct. at 2549 (labeling the Government’s interest as “compelling”).

²⁵¹ *Id.* at 2548 (“These interests are related to the integrity of the military honors system in general, and the Congressional Medal of Honor in particular.”). The plurality also emphasized the fact that the Medal of Honor had only been bestowed on 3,476 occasions. *Id.*

²⁵² *Id.* at 2549 (“The link between the Government’s interest in protecting the integrity of the military honors system and the Act’s restriction on the false claims of liars . . . has not been shown.”).

²⁵³ *Id.*; see Singh, *supra* note 239 (“[The plurality] noted that the government had not provided evidence that the significance of medals had been diluted . . .”).

that both the “refutation” of false claims and the ridicule of false claimants achieved the same purposes as a criminal statute.²⁵⁴

Additionally, the plurality reasoned that even if governmental intervention was necessary to facilitate the compelling interest, the Act was not the least restrictive means of doing so.²⁵⁵ As an alternative, the plurality suggested that the government could create a verifiable database of rightful medal recipients.²⁵⁶

Justice Breyer wrote a concurrence, which was joined by Justice Kagan.²⁵⁷ He also concluded that the Act was unconstitutional, but he rejected the “strict categorical” approach used by the plurality.²⁵⁸ To Breyer, the First Amendment analysis required addressing whether the Act harmed protected expression in a way disproportionate to the Act’s justifications.²⁵⁹ In his concurrence, Breyer called this approach “intermediate scrutiny” or “proportionality.”²⁶⁰ He reasoned that such a test was necessary in situations where, although a speech restriction did not suppress important ideas, it nevertheless adversely affected First Amendment rights.²⁶¹

²⁵⁴ *Alvarez III*, 132 S. Ct. at 2550 (“[O]utrage and contempt expressed for . . . lies can serve to reawaken and reinforce the public’s respect for the Medal, its recipients, and its high purpose.”). The plurality refers to such expression as “counterspeech.” *Id.* at 2549. The plurality noted that the Government was unable to show that refutation of false medal claims would be unsuccessful. *Id.*

²⁵⁵ *Id.* at 2551 (“There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system.”).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 2551-56 (Breyer, J., concurring); see Singh, *supra* note 239 (analyzing Justice Breyer’s concurring opinion).

²⁵⁸ *Alvarez III*, 132 S. Ct. at 2551 (Breyer, J., concurring) (“I base that conclusion upon the fact that the statute works First Amendment harm, while the Government can achieve its legitimate objectives in less restrictive ways.”).

²⁵⁹ *Id.* (“[T]his Court has often found it appropriate to examine the fit between statutory ends and means.”); see Singh, *supra* note 239 (“Under this test . . . courts ask whether restrictions on speech are proportional to the corresponding government interest.”).

²⁶⁰ *Alvarez III*, 132 S. Ct. at 2552 (Breyer, J., concurring) (“Regardless of the label, some such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation . . . nor near-automatic approval . . .”).

²⁶¹ *Id.* at 2552; see Singh, *supra* note 239 (“The concurring Justices argued that intermediate scrutiny should apply here because the Government should have some

Accordingly, Justice Breyer believed that false statements of fact did receive a *small* amount of First Amendment protection.²⁶² After all, people often used lies for beneficial purposes in society.²⁶³ Furthermore, mirroring Chief Judge Kozinski's worry in *Alvarez II*, Breyer argued that false statements were far too pervasive in society to enable the government to widely restrict them.²⁶⁴ Such restrictions could also dissuade speakers from engaging in truthful speech for fear of over-zealous prosecution.²⁶⁵

Therefore, Justice Breyer reasoned that a statute restricting a type of false statement must possess characteristics that limit the scope of the restriction.²⁶⁶ Breyer then listed several examples, such as the requirements that a fraud prosecution involve proof of detrimental reliance and that a defamation statute only target reputational harm.²⁶⁷ To Breyer, these limitations ensured that

ability to regulate false statements of fact.”). Important ideas would be those involving “philosophy, religion, history, the social sciences, [and] the arts.” *Alvarez III*, 132 S. Ct. at 2552 (Breyer, J., concurring). Justice Breyer believed that laws targeting this type of speech *would* be subjected to strict scrutiny in many cases. *Id.*

²⁶² *Alvarez III*, 132 S. Ct. at 2553 (Breyer, J., concurring) (“[T]his Court has frequently said or implied that false factual statements enjoy little First Amendment protection. . . . But these judicial statements cannot be read to mean ‘no protection at all.’” (citations omitted)).

²⁶³ *Id.* (“False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child’s innocence; in public contexts, where they may stop a panic . . . and even in technical, philosophical, and scientific contexts, where . . . examination of a false statement . . . can promote a form of thought that ultimately helps realize the truth.”).

²⁶⁴ *Id.* (“[T]he pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more.”).

²⁶⁵ *Id.* (stating that a speech restriction must allow sufficient “breathing room” for “more valuable” expression).

²⁶⁶ *Id.* at 2553-54 (“I . . . must concede that many statutes . . . make the utterance of certain kinds of false statements unlawful. Those prohibitions, however, tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm.”).

²⁶⁷ *Id.* at 2554. In addition, Justice Breyer also discussed perjury statutes, statutes prohibiting false claims of terrorist attacks, impersonation of a public official, and trademark infringement. *Id.*

protected speech had sufficient breathing space.²⁶⁸ But Breyer concluded that the Stolen Valor Act did not have adequate limits, as it applied even in purely private settings, such as false medal claims made within an individual's home.²⁶⁹ Breyer did believe, though, that a more narrowly tailored version of the Act could pass constitutional muster.²⁷⁰ As an example, he suggested a statute that targeted only those false claims that resulted in a material harm.²⁷¹

In dissent, Justice Alito, joined by Justices Scalia and Thomas, reasoned that the Act was constitutional.²⁷² Justice Alito argued that false statements of fact comprised a general category of unprotected expression.²⁷³ He noted that fraud and defamation statutes were historically constitutional.²⁷⁴ But, in addition, he believed that the Court had approved of false-speech restrictions that had not been recognized when the First Amendment was enacted.²⁷⁵ Among Alito's examples was the "modern" false-light invasion of privacy tort.²⁷⁶

²⁶⁸ *Id.* at 2555 ("The limitations help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.").

²⁶⁹ *Id.*; see Singh, *supra* note 239 ("[The concurring Justices found that the Act] creates too significant a burden on protected speech.").

²⁷⁰ *Alvarez III*, 132 S. Ct. at 2555 (Breyer, J., concurring) ("We must therefore ask whether it is possible substantially to achieve the Government's objective in less burdensome ways. In my view, the answer to this question is 'yes.'"); see Dao, *supra* note 92 (noting that Justice Breyer provided ideas for rewriting the Act).

²⁷¹ *Alvarez III*, 132 S. Ct. at 2556 (Breyer, J., concurring); see Dao, *supra* note 92.

²⁷² *Alvarez III*, 132 S. Ct. at 2556-65 (Alito, J., dissenting); see Volokh, *supra* note 233 (briefly describing Alito's dissent). See generally Dao, *supra* note 92 (calling Alito's dissent "sharply worded").

²⁷³ *Alvarez III*, 132 S. Ct. at 2557 (Alito, J., dissenting) ("By holding that the First Amendment . . . shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."); see Volokh, *supra* note 233 ("Three Justices . . . took the view that lies are basically categorically unprotected by the First Amendment . . .").

²⁷⁴ *Alvarez III*, 132 S. Ct. at 2561 (Alito, J., dissenting) ("Laws prohibiting fraud, perjury, and defamation, for example, were in existence when the First Amendment was adopted, and their constitutionality is now beyond question.").

²⁷⁵ *Id.* ("We have also described as falling outside the First Amendment's protective shield certain false factual statements that were neither illegal nor tortious at the time of the Amendment's adoption.").

²⁷⁶ *Id.* Alito's examples also included the tort of "intentional infliction of emotional

Importantly, Alito reasoned that false statements of fact were only constitutionally protected to the extent necessary to provide “breathing space” for protected, truthful speech.²⁷⁷ Accordingly, the First Amendment protected false statements about religion, science, art, and philosophy—all matters of public concern.²⁷⁸ On these subjects, Alito believed that it would be “perilous” for the government to be the “arbiter of truth.”²⁷⁹

However, Justice Alito argued that the Stolen Valor Act did not stifle any of this “valuable” expression at all.²⁸⁰ Lies about military medals were both worthless and incapable of furthering any quintessential First Amendment purpose.²⁸¹

distress by means of a false statement” and statutes that made it a crime to falsely represent that an individual was speaking on behalf of the federal government. *Id.*²⁷⁷ *Id.* at 2563; see Singh, *supra* note 239 (“The dissenters recognized that false statements may be protected when laws restricting them might chill otherwise protected speech”); see also Volokh, *supra* note 233 (summarizing Alito’s reasoning). Alito referred to the “actual malice” requirement articulated in *New York Times Co. v. Sullivan* and *Garrison v. Louisiana*. *Alvarez III*, 132 S. Ct. at 2563 (Alito, J., dissenting). See generally *supra* Part I.A (discussing the “actual malice” requirement in First Amendment jurisprudence).

²⁷⁸ *Alvarez III*, 132 S. Ct. at 2564 (Alito, J., dissenting) (stating that government restriction of false statements in these areas would present a “grave and unacceptable danger of suppressing truthful speech”).

²⁷⁹ *Id.*

²⁸⁰ *Id.* (“In stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters, the Stolen Valor Act presents no risk at all that valuable speech will be suppressed.”); see Singh, *supra* note 239 (“[T]he subject matter of the lies [targeted by the Stolen Valor Act] does not relate to any protected expression.”).

²⁸¹ *Alvarez III*, 132 S. Ct. at 2564 (Alito, J., dissenting) (“The speech punished by the Act is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect.”).

Moreover, Justice Alito believed that the reach of the Act was limited in several key respects.²⁸² For example, the law was viewpoint neutral,²⁸³ and a conviction under the Act required proof beyond a reasonable doubt that the declarant intentionally uttered a false fact.²⁸⁴ Additionally, Alito argued that the Act targeted a real harm because false medal claims both devalued military honors²⁸⁵ and caused offense to legitimate recipients.²⁸⁶ He also attacked the plurality's assertion that less restrictive alternatives to the Act would be effective.²⁸⁷ Alito cited evidence suggesting that any verifiable database of actual medal recipients would be incomplete.²⁸⁸ Furthermore, he believed that, if Congress were to enact a narrower version of the Act—such as a version that only targeted those false claims made to attain a financial benefit—unprosecuted lies about military decorations would still cause great harm.²⁸⁹

²⁸² *Id.* at 2557 (“Properly construed, this statute is limited in five significant respects. First, the Act applies to only a narrow category of false representations about objective facts that can almost always be proved or disproved with near certainty. Second, the Act concerns facts that are squarely within the speaker’s personal knowledge. Third . . . a conviction under the Act requires proof beyond a reasonable doubt that the speaker actually knew that the representation was false. Fourth, the Act applies only to statements that could reasonably be interpreted as communicating actual facts Finally, the Act is strictly viewpoint neutral.” (footnotes omitted)).

²⁸³ *Id.* (“[T]he Act applies equally to all false statements, whether they tend to disparage or commend the Government, the military, or the system of military honors.”).

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 2558-59. Justice Alito analogized the Stolen Valor Act to trademark law. *Id.* at 2559 (“In much the same way, the proliferation of false claims about military awards blurs the signal given out by the actual awards by making them seem more common than they really are, and this diluting effect harms the military by hampering its efforts to foster morale and esprit de corps.”).

²⁸⁶ *Id.* at 2559 (“[L]egitimate award recipients and their families have expressed the harm they endure when an imposter takes credit for heroic actions that he never performed.”).

²⁸⁷ *Id.* (“Congress had ample reason to believe that alternative approaches would not be adequate.”).

²⁸⁸ *Id.* (citing a Department of Defense report, which stated that a database would only be accurate as to medals awarded since 2001).

²⁸⁹ *Id.* at 2560 (“[M]uch damage is caused, both to real award recipients and to the system of military honors, by false statements that are not linked to any financial or other tangible reward.”).

Justice Alito concluded by stating that, even if upholding the Act invited the state to restrict lies on a plethora of subjects, this was not a constitutional problem.²⁹⁰ Rather, the democratic process would prevent such “foolish” laws from being enacted.²⁹¹ After all, the Act itself was enthusiastically passed by a democratically elected legislature.²⁹²

III. ANALYSIS

The Court in *United States v. Stevens* placed limits on devising new categories of unprotected speech;²⁹³ as a result, such a task appears to be a difficult one in the future.²⁹⁴ Moreover, in *United States v. Alvarez*, a plurality of the Court endorsed the *Stevens* approach and seemingly analyzed the Stolen Valor Act under the *Stevens* framework.²⁹⁵

Upon this foundation, this Part will analyze whether the Act could have been construed as a constitutional restriction on speech. To begin, Part III.A will consider whether “false statements of fact” comprise a general category excluded from First Amendment

²⁹⁰ *Id.* at 2565 (“[T]he plurality’s concern . . . falls outside the purview of the First Amendment.”); see Volokh, *supra* note 233 (“[T]he First Amendment leaves laws that ban these sorts of lies to the political process, not to judicial evaluation.”).

²⁹¹ *Alvarez III*, 132 S. Ct. at 2565 (Alito, J., dissenting) (“The safeguard against such laws is democracy, not the First Amendment. Not every foolish law is unconstitutional.”).

²⁹² *Id.* (“The Stolen Valor Act represents the judgment of the people’s elected representatives that false statements about military awards are very different from false statements about civilian awards.”). See generally *supra* Part I.B (describing the popular support for the Stolen Valor Act).

²⁹³ See Strossen, *supra* note 24, at 104 (“In sum, the *Stevens* litigation generated analysis and holdings that should significantly reinforce the general ban on content-based regulations of expression.”); *supra* Part II.A (discussing the *Stevens* case).

²⁹⁴ See Strossen, *supra* note 24, at 82–83 (“If these requirements are enforced strictly, it is hard to imagine any future expansion of the list of unprotected speech categories beyond those the Court has previously recognized.”); Barnwell, *supra* note 97, at 1050 (“[T]hrough *Stevens* the Court has cast doubt on the idea that there still exist any categories of speech that may be pushed outside First Amendment protection for this reason.”).

²⁹⁵ *Alvarez III*, 132 S. Ct. at 2544 (citing *Stevens* with approval). Of note, Chief Justice Roberts, who authored the majority opinion in *Stevens*, see *supra* Part II.A, joined with the plurality in *Alvarez*.

protection. Subsequently, Part III.B will determine whether the Act could have been construed as constitutional under well-recognized categorical exclusions, such as defamation or fraud.

A. False Statements of Fact Do Not Comprise a Distinct Categorical Exclusion

The Supreme Court in *Stevens* held that categories of unprotected speech must be “well-defined and narrowly limited.”²⁹⁶ Additionally, a law restricting a particular unprotected category must have some historical basis.²⁹⁷ However, the category of “false statements of fact” is not “narrowly limited”—on the contrary, it is extremely broad.²⁹⁸ As Justice Breyer and Chief Judge Kozinski articulated in each of their court’s *Alvarez* opinions, individuals lie for many different mundane reasons every day.²⁹⁹ For instance, so-called “white lies” are typically innocuous, and these falsities are often expected when one engages in polite discourse.³⁰⁰

²⁹⁶ *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)); Strossen, *supra* note 24, at 83 (stating that the Supreme Court quoted *Chaplinsky* “approvingly”).

²⁹⁷ *Stevens*, 130 S. Ct. at 1585-86; Strossen, *supra* note 24, at 82.

²⁹⁸ False statements are a “common staple of human existence.” Rodney A. Smolla, *Attempting to Criminalize Mere “Lies”-The Stolen Valor Act Example*, 1 LAW OF DEFAMATION § 4:70.50 (2d ed.) (2011); see Hudson, *supra* note 11, at 19 (describing scholars’ reactions to the Stolen Valor Act).

²⁹⁹ *Alvarez III*, 132 S. Ct. at 2553 (Breyer, J., concurring) (stating that false statements are “pervasive[]” in society); *Alvarez II*, 638 F.3d 666, 674 (9th Cir. 2011) (denying petition for rehearing en banc) (Kozinski, C.J., concurring) (“Saints may always tell the truth, but for mortals living means lying.”). Numerical estimates of an average person’s lies range anywhere from two to three lies told every ten minutes to one lie told every day. Ulrich Boser, *We’re All Lying Liars: Why People Tell Lies, and Why White Lies Can Be OK*, U.S. NEWS & WORLD REP. (May 18, 2009), <http://health.usnews.com/health-news/family-health/brain-and-behavior/articles/2009/05/18/were-all-lying-liars-why-people-tell-lies-and-why-white-lies-can-be-ok>.

³⁰⁰ See Victoria Talwar et al., *White Lie-Telling in Children for Politeness Purposes*, INT’L J. BEHAVIORAL. DEV. 1, 1 (2007), available at <http://www.talwarresearch.com/images/prosocial%20ijbd.pdf> (“To spare the feelings of the recipient and foster amicable social relations, prosocial lies are expected.”). Lying under certain circumstances was even supported by several Catholic theologians. See KNIGHTS OF COLUMBUS, THE CATHOLIC ENCYCLOPEDIA 469 (Charles G. Herbermann et al. eds., 1910), available at <http://archive.org/details/catholicencyclo00unkngoog> (“St. John Chrysostom held that it is lawful to

Even at a young age,³⁰¹ parents urge their children to withhold the blunt truth in certain social situations.³⁰² Accordingly, a presumption that every lie is subject to government restriction is a “terrifying” and unwieldy prospect.³⁰³ The dissenters in the various *Alvarez* decisions combated this issue by arguing that a democratically elected government would never *practically* choose to regulate innocuous and trivial lies.³⁰⁴ But this solution is both unsatisfactory and similar to the Government’s failed “prosecutorial restraint” argument, raised in *Stevens*.³⁰⁵ The First Amendment serves precisely to *protect* certain fundamental rights from abrogation at the hands of a democratic legislature.³⁰⁶

deceive others for their benefit, and Cassian taught that we may sometimes lie as we take medicine, driven to it by sheer necessity.”).

³⁰¹ Most children begin lying at age three. Boser, *supra* note 299. At age six, most children lie a few times in a given day. *Id.*

³⁰² Talwar et al., *supra* note 300, at 8 (“The present study revealed that children from 3- to 11-years-old are able to tell white lies . . . when receiving an undesirable gift. In addition, parental coaching had a significant impact on these children’s white lie-telling behavior.”); see Boser, *supra* note 299 (“[P]arents sometimes explicitly encourage children to tell lies.”).

³⁰³ *Alvarez II*, 638 F.3d at 673 (Kozinski, C.J., concurring) (“So what, exactly, does the dissenters’ ever-truthful utopia look like? In a word: terrifying.”). Such a presumption would also run counter to Supreme Court precedent with regard to criminal prosecutions. *Alvarez I*, 617 F.3d 1198, 1204 (9th Cir. 2010), *aff’d*, 132 S. Ct. 2537 (2012); see *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (“[I]t 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.”); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816 (2000) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”). Essentially, the declarant of a false statement would then carry the burden of proving that his or her words are protected. *Alvarez I*, 617 F.3d at 1204.

³⁰⁴ *Alvarez III*, 132 S. Ct. at 2565 (Alito, J., dissenting); see *Alvarez I*, 617 F.3d at 1232 n.9 (Bybee, J., dissenting) (“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. . . . [T]he proper target for the majority’s concerns is the legislature, not this court.”); *supra* Part II.B.ii (discussing *Alvarez*).

³⁰⁵ *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) (holding that the government’s assurances that it would use the law responsibly were not enough to uphold an otherwise unconstitutional statute); see Strossen, *supra* note 24, at 76 (examining the government’s “trust us” argument in *Stevens*).

³⁰⁶ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to

Furthermore, under the dissenters' approach, individuals might not even know, in advance of speaking, whether a particular "lie" was subject to prosecution or not.³⁰⁷

Moreover, a theoretical, general category of "false statements of fact" is not particularly well-defined.³⁰⁸ For example, the meaning of *Gertz*'s "erroneous statement of fact" language itself³⁰⁹ has been debated vigorously—even in cases unrelated to the Stolen Valor Act.³¹⁰ Certainly, falsity is a component of fraud and defamation.³¹¹ However, throughout Supreme Court jurisprudence, the Court has extensively articulated the requirements governing fraud and defamation

free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

³⁰⁷ See *Alvarez II*, 638 F.3d at 675 (Kozinski, C.J., concurring) ("[W]e 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."); see also Wood, *supra* note 55, at 508-09 (describing concerns that, if all falsities were unprotected, the "chilling" of protected speech would occur).

³⁰⁸ See generally Strossen, *supra* note 24, at 83 ("[An unprotected category] would have to be demonstrated at a narrow level of specificity, rather than at a higher level of abstraction."). Construing the "well-defined and narrowly limited" requirement, the Supreme Court in *Brown v. Entertainment Merchants Ass'n* rejected California's attempt to equate violent video games with obscenity. 131 S. Ct. 2729, 2734 (2011) ("Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of sexual conduct." (internal quotation marks omitted)); see *supra* Part II.A (providing a brief summary of *Brown*).

³⁰⁹ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]he erroneous statement of fact is not worthy of constitutional protection . . ."); *supra* Part I.A (describing *Gertz* and other defamation cases).

³¹⁰ Compare *Nike, Inc. v. Kasky*, 539 U.S. 654, 664 (2003) (Stevens, J., concurring) (conceding that the Court's language in *Gertz* was "perhaps overbroad[]"), with *Time, Inc. v. Firestone*, 424 U.S. 448, 482 (1976) (White, J., dissenting) ("[N]o one seriously disputes, that, regardless of fault, there is no constitutional value in false statements of fact." (emphasis added) (internal quotation marks omitted)). See Lyrissa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1091 (2008) ("False factual information has no First Amendment value, and yet the United States Supreme Court has accorded lies a measure of First Amendment protection." (footnote omitted)).

³¹¹ See, e.g., *Alvarez I*, 617 F.3d 1198, 1211 (9th Cir. 2010) (reasoning that fraud and defamation involved falsities), *aff'd*, 132 S. Ct. 2537 (2012); Tushnet, *supra* note 207, at 15 (indicating that defamation and fraud are "particular categories of lies").

prohibitions.³¹² For example, a defamation action involving a *public* figure requires that the declarant possessed “actual malice” when speaking³¹³ while a defamation action involving a strictly *private* matter requires a lesser standard.³¹⁴ Similarly, the Supreme Court has described the components of a properly constructed fraud statute and the “clear and convincing” evidentiary requirements.³¹⁵

In contrast, the Court has never created a methodical set of rules, tests, or analytical approaches to apply to a theoretical restriction on “false statements of fact”—apart from the approaches that govern the other, specific categorical exclusions.³¹⁶ Thus, the Stolen Valor Act’s supporters relied upon *Gertz* and other cases that all involved defamation, fraud or other restrictions with well-established analyses.³¹⁷

³¹² See *supra* Part I.A (describing judicially-imposed defamation and fraud requirements).

³¹³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (extending the *New York Times* rule to criminal libel).

³¹⁴ See, e.g., *Gertz*, 418 U.S. at 347 (“We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”); *supra* Part I.A (examining defamation jurisprudence).

³¹⁵ See *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) (“[T]o prove a defendant liable for fraud . . . the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so.”); *supra* Part I.A (briefly describing the Supreme Court’s approach to fraud).

³¹⁶ Chemerinsky’s constitutional law treatise devotes nearly 140 pages to unprotected and less protected speech. CHEMERINSKY, *supra* note 23, at 986–1123. What’s more, his overview of each categorical exception is extensive. For instance, twenty-eight pages are devoted to sexually-oriented speech, while ten pages are devoted to defamation alone. *Id.* at 1016–44 (discussing sexually-oriented speech); *id.* at 1045–55 (discussing defamation). In contrast, “false statements of fact” do not comprise an explicit section in the treatise. See *generally id.* at 986–1123. In *Alvarez I*, Judge Smith cited the meticulous First Amendment analysis that is required when a statute targets any category of unprotected speech. *Alvarez I*, 617 F.3d at 1208 n.9 (listing the respective rules for a variety of categorical exceptions). Furthermore, Smith extrapolated that a “new” category comprised of false statements would similarly require rigorous analysis. *Id.* (“If [dissenting] Judge Bybee is correct, then, we will need an *entirely new constitutional rule* for false speech regulations.” (emphasis added)). However, Smith refused to “guess” as to what a new rule might look like. *Id.*
³¹⁷ See *Alvarez II*, 638 F.3d 666, 667 (9th Cir. 2011) (denying petition for rehearing en banc) (Smith, J., concurring) (“The Dissenters draw[] almost entirely on defamation case law . . .”). In *Alvarez III*, the plurality described these types of statutes. 132 S. Ct. 2537,

Tellingly, those who argue that “false statements of fact” comprise a distinct category often acknowledge the lack of any analytical framework by implicitly *creating* such a framework.³¹⁸ In response to the litany of trivial lies whose prohibition was worrisome to his fellow judges, Judge O’Scannlain attempted to define “false statements of fact” in a way that would exclude “opinions . . . expressions of emotion or sensation . . . predictions or plans . . . exaggerations . . . and playful fancy.”³¹⁹ But these types of grammatical carve-outs were merely arbitrary and inaccurate.³²⁰

Furthermore, in line with *Stevens*, “false statements of fact” have no historical basis for being generally restricted—apart from being *components* of unprotected speech such as fraud or defamation.³²¹ Instead, falsities are analogous to “depictions

2544 (2012); see *supra* Part II.B.ii. In his *Alvarez I* dissent, Judge Bybee cited many cases to support his position that false speech is categorically excluded. *Alvarez I*, 617 F.3d at 1218–27 (Bybee, J., dissenting). These cases included *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Garrison v. Louisiana*, 379 U.S. 64 (1964), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which involved defamation. See *supra* Part I.A (discussing these cases). Judge Bybee also discussed other defamation cases, including *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), *Herbert v. Lando*, 441 U.S. 153 (1979), *National Ass’n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264 (1974), *Greenbelt Cooperative Publishing Ass’n v. Bresler*, 398 U.S. 6 (1970), *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Knievel v. ESPN*, 393 F.3d 1068 (9th Cir. 2005). *Alvarez I*, 617 F.3d at 1218–23 (Bybee, J., dissenting).

³¹⁸ See *Alvarez II*, 638 F.3d at 676 (Kozinski, C.J., concurring) (“The dissent . . . creat[es] 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.”).

³¹⁹ *Alvarez II*, 638 F.3d at 686 (O’Scannlain, J., dissenting) (quoting Chief Judge Kozinski’s concurrence). To O’Scannlain, these statements were not false statements of fact whatsoever. *Id.* However, to “exaggerate” means to “represent (something) as being larger, greater, better, or worse than it really is.” OXFORD DICTIONARIES ONLINE, http://oxforddictionaries.com/definition/american_english/exaggerate?region=us (last visited Sept. 30, 2012) (emphasis added).

³²⁰ See *Alvarez II*, 638 F.3d at 675–76 (Kozinski, C.J., concurring) (“Judge O’Scannlain also turns a tin ear to the complexity of human communication. . . . 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?”).

³²¹ *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010); Strossen, *supra* note 24, at 82; see, e.g., *Alvarez I*, 617 F.3d at 1200 (“All previous circumstances in which lies have been found proscribable involve not just knowing falsity, but additional elements . . .”); Hanson, *supra* note 197, at 630 (discussing the holding in *Alvarez I*).

of animal cruelty” from *Stevens*: newly minted categories of speech that have not been historically restricted since 1791.³²² The Government, and the dissenters in *Alvarez* plucked isolated sentences from Supreme Court cases, which implied that false statements were generally unprotected.³²³ Justice Alito himself cited several recognized speech restrictions—such as the torts of false light invasion of privacy and intentional infliction of emotional distress—which, he argued, did not have a lengthy historical pedigree.³²⁴

But the Government and the various *Alvarez* dissenters did not view the Court’s statements in the context of each respective case.³²⁵ Most cases cited—in support of the argument that all false statements were historically unprotected—were clearly defamation cases.³²⁶ However, even the cases “beyond the defamation context”³²⁷ were arguably rooted in the historical jurisprudence of defamation, fraud, and other recognized categories.³²⁸ As a result,

³²² See *Strandlof I*, 746 F. Supp. 2d 1183, 1186 (D. Colo. 2010) (“The government’s primary argument in *Stevens* closely tracks that advanced in support of the Stolen Valor Act here”); Wood, *supra* note 55, at 480 (discussing the *Stevens*’s Court’s emphasis on a speech category’s necessary historical regulation); *supra* Part II.A (discussing the *Stevens* case).

³²³ For example, Judge Bybee quoted the defamation case *Herbert v. Lando*, 441 U.S. 153, 171 (1979): “Spreading false information in and of itself carries no First Amendment credentials.” *Alvarez I*, 617 F.3d at 1218 (Bybee, J., dissenting); see *supra* Part II.B (discussing several judges’ reliance on isolated language from Supreme Court cases).

³²⁴ *Alvarez III*, 132 S. Ct. 2537, 2561 (2012) (Alito, J., dissenting).

³²⁵ In *Robbins*, the district court conceded that the *Gertz* language had been both “recognized as dicta” and “made without citation.” *United States v. Robbins*, 759 F. Supp. 2d 815, 818 (W.D. Va. 2011); see Calvert & Rich, *supra* note 30, at 28–29 (stating that the *Gertz* language has been taken out of context).

³²⁶ For a list of many of these cases, see generally *supra* note 317. See also Calvert & Rich, *supra* note 30, at 28–29 (describing the *Alvarez I* majority’s analysis of defamation jurisprudence).

³²⁷ *Alvarez I*, 617 F.3d at 1222 (Bybee, J., dissenting).

³²⁸ See Brief for Respondent at 46-50, *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (No. 11-210), 2012 WL 160227 at *46-50; *id.* at 50 (“While false light, [intentional infliction of emotional distress], and defamation are often said to cover slightly different interests—an objective interest in one’s reputation as opposed to a subjective interest in avoiding injury to one’s emotional sensibilities—the difference is illusory in most cases. . . . While hornbook law is that the speech underlying a false light tort or

statements from *Gertz* and the other cases were always “qualified,” dicta, and integral to the (mostly) defamation contexts of the respective cases.³²⁹

The dissenters in the Ninth Circuit’s *Alvarez* cases put much stock into what the Supreme Court *said* in *Gertz*—as opposed to contemplating what the Court *meant*.³³⁰ Curiously, the Ninth Circuit dissenters inverted this interpretative argument when they were required to consider the obvious omission of “false statements of facts” from the *Stevens* and *Chaplinsky* lists of unprotected categories.³³¹ In *Alvarez II*, for instance, Judge O’Scannlain thought it was inappropriate to alter the meaning of the Supreme Court’s actual words since the Court “knows the difference between defamation and false statements of fact.”³³² At the same time, O’Scannlain

intentional infliction of emotional distress need not be defamatory, the similarities in these torts counsel in favor of permitting false light claims and [intentional infliction of emotional distress] to lay claim to defamation’s historical pedigree for the purposes presented here.” (citations omitted)). Specifically, *Time, Inc. v. Hill* involved a false light action against a magazine publisher. 385 U.S. 374, 389–90 (1967) (“We held in *New York Times* that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct. Similarly, calculated falsehood should enjoy no immunity in the situation here presented us.”).

³²⁹ In *Alvarez II*, even the dissenting Judge Gould recognized the problem of removing isolated sentences from the different cases. 638 F.3d 666, 687 (9th Cir. 2011) (denying petition for rehearing en banc) (Gould, J., dissenting) (“[B]oth 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 . . . cannot properly be interpreted as absolutely binding in cases involving different types of facts not present in a previous case . . .”). See generally *supra* Part II.B (discussing the Stolen Valor Act cases).

³³⁰ See, e.g., *Alvarez I*, 617 F.3d at 1223 (Bybee, J., dissenting) (“[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.”); *Alvarez II*, 638 F.3d at 682 (O’Scannlain, J., dissenting) (“It is not our place to put words into the mouth of the Supreme Court.”).

³³¹ See *Alvarez II*, 638 F.3d at 670 (Smith, J., concurring) (discussing the dissenters’ opinions and stating that “the Court has *never* included ‘false statements of fact’ in its list”); see also *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (providing lists of unprotected categories); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (same).

³³² *Alvarez II*, 638 F.3d at 682–83 (O’Scannlain, J., dissenting) (internal quotation marks omitted).

apparently found nothing paradoxical about *adding* “false statements of fact” to the *Stevens* list of categories.³³³

Likewise, Judge Bybee argued that the Supreme Court merely used the term “defamation” out of convenience because the Court had ruled in numerous defamation cases—not because the Court intended to limit the excluded category to defamation.³³⁴ But this type of analysis is reminiscent of the very approach—“rest[ing] on what we think the Supreme Court ‘means’ rather than what it actually says”—of which Judge Bybee had earlier disapproved.³³⁵ Thus, borrowing the logic of the dissenters, the fact that the Supreme Court in *Stevens* said “defamation” and “fraud” should obviate the need to consider whether the Court *meant* to include “false statements of fact.”³³⁶ Importantly, in *Alvarez*, the Supreme Court *again* had the opportunity to list “false statements of fact” as an unprotected category of speech and *again* chose not to do so.³³⁷

Before departing from this consideration of whether “false statements of fact” comprise a distinct category of unprotected speech, it is worth addressing a general argument—raised by many of the Act’s supporters—that most false statements are historically unprotected because of the low “value” traditionally afforded them.³³⁸ As described in Part I.A, dicta in *Gertz* stated that there

³³³ See *id.* at 683 (“[B]y 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.” (emphasis omitted)); see *supra* notes 224-27 and accompanying text (examining O’Scannlain’s dissent).

³³⁴ *Alvarez I*, 617 F.3d at 1225 (Bybee, J., dissenting) (noting that there was “nothing interesting” about the Court’s use of the term “defamation”).

³³⁵ *Id.* at 1223; see *supra* notes 206-15 and accompanying text (examining Bybee’s dissent).

³³⁶ As Judge Bybee stated, the Supreme Court “presumably [knows] what these terms mean.” *Alvarez I*, 617 F.3d at 1223 (Bybee, J., dissenting).

³³⁷ See *Alvarez III*, 132 S. Ct. 2537, 2546-47 (2012); *supra* Part II.B.ii.

³³⁸ See *United States v. Robbins*, 759 F. Supp. 2d 815, 818 (W.D. Va. 2011) (“[T]he relevant rule in this case is that false statements of fact are generally unprotected, aside from the protection for speech that matters.” (internal quotation marks omitted)); *Alvarez I*, 617 F.3d at 1233 (Bybee, J., dissenting) (“I can see no value in false, self-aggrandizing statements by public servants. . . . If the Stolen Valor Act

was no “value” in falsities.³³⁹ And *Chaplinsky* referred to the “slight social value” of unprotected speech.³⁴⁰ The “breathing space” analysis of the Tenth Circuit in *United States v. Strandlof* and the “intermediate scrutiny” analysis of Justice Breyer’s *Alvarez* concurrence also invoked value-infused language.³⁴¹

Nevertheless, any value-based argument seemingly runs afoul of the *Stevens* rebuke of an “ad hoc calculus of costs and benefits” that would determine whether speech is unnecessary.³⁴² In *Stevens*, the Supreme Court held that its use of the language of “value” was merely descriptive and did not invite the weighing of speech’s societal worth.³⁴³ Accordingly, in his *Strandlof II* dissent, Judge Holmes criticized “breathing space” analysis as a type of case-by-case balancing test.³⁴⁴ In short, the low “value” of particular false speech is not what removes it from constitutional protection.³⁴⁵

‘chills’ false autobiographical claims by public officials such as Alvarez, our public discourse will not be the worse for the loss.”).

³³⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

³⁴⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); see *supra* Part I.A (discussing *Chaplinsky*).

³⁴¹ See *Alvarez III*, 132 S. Ct. at 2552 (Breyer, J., concurring) (advocating a different analysis—other than strict scrutiny—for situations that do not involve the suppression of “valuable ideas” (emphasis added)); *Strandlof II*, 667 F.3d 1146, 1157 (10th Cir. 2012) (“As the [Supreme] Court recently confirmed, protection of false statements is derivative of the need to ensure that false-speech restrictions do not chill *valuable* speech.” (emphasis added)), *vacated*, 684 F.3d 962 (10th Cir. 2012).

³⁴² *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010); see, e.g., *Alvarez II*, 638 F.3d 666, 673 (9th Cir. 2011) (Smith, J., concurring) (“[T]he Dissenters’ ‘speech that matters’ approach simply invites courts to complete an ever-expanding list”); *Strandlof I*, 746 F. Supp. 2d 1183, 1186 (D. Colo. 2010) (“The government’s argument, which invites it to determine what topics of speech ‘matter’ enough for the citizenry to hear, is troubling, as well as contrary . . . to well-established First Amendment doctrine.”).

³⁴³ *Stevens*, 130 S. Ct. at 1586; see Strossen, *supra* note 24, at 81–82 (discussing the *Stevens* rebuke of a value-based balancing test).

³⁴⁴ *Strandlof II*, 667 F.3d at 1185–86 (“Our nation ratified the First Amendment precisely *because* we do not trust ourselves to strike the balance appropriately on a case-by-case basis. . . . [T]he unacceptable risk of case-by-case balancing is reconstituted in the majority’s newly minted breathing space analysis.” (citations omitted)).

³⁴⁵ Barnwell, *supra* note 97, at 1050 (“[*Stevens*] effectively closes the door to just about any new categorical exemption of speech based solely on its lack of value to society”); see Calvert & Rich, *supra* note 30, at 32 (“[T]he bridle that harnesses in the right to lie is measured by the lie’s harm, *not its value-devoid nature*.” (emphasis added)); *supra* Part II.A

B. The Stolen Valor Act Was Neither a Fraud nor a Defamation Statute

Although false statements of fact do not comprise a category of speech unprotected by the First Amendment, the Stolen Valor Act could still have avoided strict scrutiny analysis if it were construed as a proper defamation or fraud statute.³⁴⁶ Of course, fraud and defamation are types of speech long recognized as unprotected.³⁴⁷ Some of the courts adjudicating the constitutionality of the Act attempted to fit the Act within one of these categories.³⁴⁸ However, the Act's prohibition on falsely claiming the receipt of military decorations did not analogize well to traditional defamation or fraud restrictions.

Defamation involves the harming of another's reputation via false statements.³⁴⁹ As used here, "defamation" includes both libel and slander.³⁵⁰ Defamation laws can either be civil or criminal in nature, although there has been a recent trend away from criminal defamation laws.³⁵¹ As a criminal sanction, the Stolen Valor Act restricted speech that was of public concern—the purported receipt of military decorations.³⁵² A constitutional

(discussing the *Stevens* holding).

³⁴⁶ See *supra* Part I.A (discussing categorical exclusions); see also Hanson, *supra* note 197, at 630 (describing the *Alvarez I* analysis of whether the Stolen Valor Act worked as a fraud or defamation provision).

³⁴⁷ See *supra* Part I.A (examining fraud and defamation as categorical exclusions).

³⁴⁸ See *supra* Part II.B (examining the Stolen Valor Act cases).

³⁴⁹ 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 1 (2012); see BLACK'S LAW DICTIONARY 479 (9th ed. 2009) (defining "defamation").

³⁵⁰ Charles E. Torcia, *Libel*, 4 WHARTON'S CRIMINAL LAW § 561 (15th ed. 2011). "Libel" is written defamation, and "slander" is oral defamation. *Id.*

³⁵¹ *Id.* As an example, New Hampshire's criminal defamation law is, in relevant part:

I. A person is guilty of a class B misdemeanor if he purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule.

N.H. REV. STAT. ANN. § 644:11 (2012).

³⁵² *Alvarez I*, 617 F.3d 1198, 1209 (9th Cir. 2010) ("We assume that receipt of military decorations is a matter of public concern . . ."), *aff'd*, 132 S. Ct. 2537 (2012); *United States v. Robbins*, 759 F. Supp. 2d 815, 819 (W.D. Va. 2011) ("Here, the speech arguably

defamation restriction must require that the declarant made the statement with actual malice—*knowledge* that the statement was untrue.³⁵³ Reasonably construed, the Act was limited to malicious violations due to the Act’s language that one “falsely represent[] himself or herself.”³⁵⁴ An interpretation of the words “falsely represent” could easily satisfy the constitutional standard.³⁵⁵ To falsely represent is to *misrepresent*,³⁵⁶ where a declarant makes a “false or misleading assertion about something, usu[ally] with the intent to deceive.”³⁵⁷ Furthermore, Justice Breyer in his *Alvarez* concurrence, several of the *Alvarez* dissenters, and the Tenth Circuit in *Strandlof* all read a scienter requirement into the statute.³⁵⁸ Even the majority in *Alvarez I* determined that this interpretation of the

addresses a matter of public concern”); see CHEMERINSKY, *supra* note 23, at 1052 (“‘Matter of public concern’ has never been defined, but generally it refers to issues in which the public has a legitimate interest.”).

³⁵³ See *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (“[O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of . . . criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government.”); 50 AM. JUR. 2d *Libel and Slander* § 508 (2011) (“The government must prove actual malice in a criminal defamation prosecution”); see also *Alvarez I*, 617 F.3d at 1206 (“[T]he 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” (emphasis omitted) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964))).

³⁵⁴ 18 U.S.C. § 704(b) (2006); see Tushnet, *supra* note 207, at 7 n.32 (explaining that the term “represents” can be interpreted to require a mental element).

³⁵⁵ See Petition for Writ of Certiorari, *supra* note 6, at *16-17 (“[T]he phrase ‘falsely represent’ connotes making a factual assertion with the knowledge that it is false.”); Tushnet, *supra* note 207, at 7 n.32.

³⁵⁶ See BLACK’S LAW DICTIONARY 1091 (9th ed. 2009).

³⁵⁷ *Id.*

³⁵⁸ *Alvarez III*, 132 S. Ct. 2537, 2552-53 (2012) (Breyer, J., concurring) (“I would read the statute favorably to the Government as criminalizing only false factual statements made with knowledge of their falsity and with the intent that they be taken as true.”); *Alvarez I*, 617 F.3d at 1237 (Bybee, J., dissenting); *Alvarez II*, 638 F.3d 666, 685 (9th Cir. 2011) (denying petition for rehearing en banc) (O’Scannlain, J., dissenting) (“[E]ven accepting the need for some scienter above negligence, it is clearly met here.”); *Strandlof II*, 667 F.3d 1146, 1155 (10th Cir. 2012) (“[W]e find [the Stolen Valor Act] contains a scienter element, which operates to criminalize only knowingly false statements about receiving military awards.”), *vacated*, 684 F.3d 962 (10th Cir. 2012).

Act’s language was “reasonable.”³⁵⁹ In any event, courts are to interpret statutes as constitutional if such an interpretation is possible.³⁶⁰

However, the Stolen Valor Act did not target the same type of “harm” as a typical defamation statute.³⁶¹ Traditionally, defamation involves harm to a “private individual”³⁶² as a result of statements made “of and concerning” such a person.³⁶³ Accordingly, the government as an institution and military medals as things would not seem to possess a right against defamation.³⁶⁴ Generally, this limiting characteristic aims to prevent the prohibition of political speech—content that is at the very heart of the First Amendment.³⁶⁵ As the *Alvarez I* majority noted, “the government may not restrict speech as a means of self-preservation.”³⁶⁶

³⁵⁹ *Alvarez I*, 617 F.3d at 1209.

³⁶⁰ See *Comme’ns Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988) (“It is, of course, true that federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid.”); see also Tushnet, *supra* note 207, at 7 (suggesting that the Act should be construed to require some mental element).

³⁶¹ Wood, *supra* note 55, at 499; see, e.g., N.H. REV. STAT. ANN. § 644:11 (2012) (referencing harm to a “living person”).

³⁶² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

³⁶³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964); see *Calvert & Rich*, *supra* note 30, at 29 (“False statements of fact are punished in defamation law only to the extent they are ‘of and concerning’ a specific person and to the extent they harm that same person’s reputation.”); 50 AM. JUR. 2d *Libel and Slander* § 28 (2012) (outlining the nature of defamation).

³⁶⁴ See *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601 (1923) (“[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.”); Wood, *supra* note 55, at 501.

³⁶⁵ See *New York Times*, 376 U.S. at 270 (“[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system.”).

³⁶⁶ *Alvarez I*, 617 F.3d 1198, 1210 (9th Cir. 2010); see *Calvert & Rich*, *supra* note 30, at 29 (describing the *Alvarez* majority’s approach to defamation).

Furthermore, to constitute defamation, false statements are typically told regarding another individual.³⁶⁷ But for one to violate the Stolen Valor Act, one must have uttered a false statement about *oneself*.³⁶⁸ Further, in his *Alvarez I* dissent, Judge Bybee reasoned that false claims of receiving military decorations dishonored and harmed the rightful medal recipients as well as all members of the military.³⁶⁹ Although this is a valid understanding of the nature of the harm,³⁷⁰ the Constitution does not typically permit this type of *group* defamation.³⁷¹ Therefore, the nature of the harm targeted by the Act is not sufficiently similar to that targeted by defamation statutes.³⁷²

Similarly, the Stolen Valor Act as written did not equate to a proper fraud statute.³⁷³ Even if a scienter and “intent to defraud” element could have been read into the Act in the same way as an “actual malice” element,³⁷⁴ fraud prohibitions must at least include

³⁶⁷ See Calvert & Rich, *supra* note 30, at 29 (examining aspects of defamation); see, e.g., N.H. REV. STAT. ANN. § 644:11 (2012) (referencing harm to “any *other*” person (emphasis added)).

³⁶⁸ 18 U.S.C. § 704(b) (2006); Calvert & Rich, *supra* note 30, at 29.

³⁶⁹ *Alvarez I*, 617 F.3d at 1235 (Bybee, J., dissenting); *supra* notes 206-15 and accompanying text (examining Bybee’s dissent).

³⁷⁰ See *infra* Part IV (discussing this harm in the context of strict scrutiny analysis).

³⁷¹ 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 37 (2011) (“[T]he general rule is that defamation of a group does not allow an individual member of that group to maintain an action”); see Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992) (“[T]he First Amendment precludes punishment for generalized public frauds” (internal quotation marks omitted)).

³⁷² See Calvert & Rich, *supra* note 30, at 29 (“[T]he Stolen Valor Act . . . punishes false statements of fact that are not about another person (they are, instead, about the speaker himself) and regardless of whether they harm anyone.”); Wood, *supra* note 55, at 501 (“There is no cause of action for libel on the government”).

³⁷³ See Calvert & Rich, *supra* note 30, at 33; Wood, *supra* note 55, at 503. An example of a federal fraud statute—dealing with “[f]alse pretenses on high seas and other waters”—is, in relevant part:

Whoever, upon any waters or vessel within the special maritime and territorial jurisdiction of the United States, by any fraud, or false pretense, obtains from any person anything of value . . . shall be fined under this title or imprisoned not more than five years, or both

18 U.S.C. § 1025 (2006).

³⁷⁴ See generally *supra* Part I.A, for a brief discussion of fraud jurisprudence.

a harm element.³⁷⁵ However, a prosecution under the Act did not require that a listener be deceived by a declarant’s false medal claim.³⁷⁶ Nor did prosecution under the Act require that a listener detrimentally rely on the false statement.³⁷⁷ As discussed within the context of defamation, the harm targeted by the Stolen Valor Act involved harm to military decorations and the function they serve as part of the armed services.³⁷⁸ But fraud statutes typically target the *economic* harm that occurs as a result of detrimental reliance.³⁷⁹ As stated in Part II.B, Justice Breyer in his *Alvarez* concurrence and the Ninth Circuit in *Alvarez I* reasoned that the Stolen Valor Act could be redrafted into a proper fraud statute.³⁸⁰ But, as written, the Act was not sufficiently analogous to either fraud or defamation statutes.³⁸¹

³⁷⁵ Illinois *ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); see *Strandlof I*, 746 F. Supp. 2d 1183, 1188 (D. Colo. 2010) (“To survive constitutional scrutiny, a common law cause of action for fraud requires proof of harm or detrimental reliance.”); Wood, *supra* note 55, at 503 (suggesting that fraud statutes require a showing of bona fide harm).

³⁷⁶ 18 U.S.C. § 704(b) (2006); see, e.g., *Strandlof I*, 746 F. Supp. 2d at 1188 (“[T]he Act criminalizes the mere utterance of the false statement . . .”).

³⁷⁷ 18 U.S.C. § 704(b); cf. *Alvarez I*, 617 F.3d at 1211 (holding that—in a fraud statute—relevant false statements must cause a “bona fide harm”).

³⁷⁸ See Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266 (2006) (describing the Congressional “findings”). See text accompanying notes 352–59 for an analysis of the Stolen Valor Act’s language with regard to defamation.

³⁷⁹ E.g., 18 U.S.C. § 1025. One of this statute’s elements is that the declarant obtains “anything of value” from the listener. *Id.*; see Calvert & Rich, *supra* note 30, at 34 (arguing that—to be a proper fraud statute—the Stolen Valor Act would need to anticipate an economic harm—not simply “emotional anguish and embarrassment”—suffered as a result of hearing the false claims).

³⁸⁰ *Alvarez III*, 132 S. Ct. 2537, 2555-56 (2012) (Breyer, J., concurring); *Alvarez I*, 617 F.3d at 1212; Calvert & Rich, *supra* note 30, at 33.

³⁸¹ Cf. Calvert & Rich, *supra* note 30, at 33-34 (suggesting that the Act could be rewritten into a proper fraud statute); *infra* Part IV.B (discussing the utility of altering the Act so that it only targets fraudulent speech).

IV. PROPOSAL

This Article suggests that the Supreme Court should have utilized strict scrutiny to uphold the Stolen Valor Act. The Court's holding in *Alvarez III* was extremely unpopular among the American people—particularly among veterans.³⁸² Furthermore, thanks to the Court's four to two to three split, the constitutionality of false statements of fact continues to be unclear.³⁸³

Because false statements of fact do not comprise a general category of unprotected speech³⁸⁴ and because the Act did not conform to traditional defamation and fraud statutes,³⁸⁵ the constitutionality of the Act hinged upon surviving strict scrutiny analysis.³⁸⁶ As previously described in Part II.B, the Act failed strict scrutiny in every court that held the statute unconstitutional.³⁸⁷ Even Judge Bybee in his *Alvarez I* dissent conceded that the Act would

³⁸² See Dao, *supra* note 92 (“[M]any veterans organizations expressed dismay [with the Court’s ruling], saying that criminal prosecution was the only way to deter false claims about military awards. The act called for fines and imprisonment of up to one year.”); *Veterans Passionate about the Stolen Valor Act*, *supra* note 92 (“Shortly after the news broke, Veterans of Foreign Wars of the United States Commander Richard DeNoyer issued a statement that the VFW was very disappointed that the court overturned the act.”); *supra* Part I.B (describing the popular support of the Stolen Valor Act).

³⁸³ See Hudson, *supra* note 11, at 18 (stating that the Supreme Court must likely deal with the various interpretations of the dicta in *Gertz*); *supra* Part II.B. See generally *supra* Part III.A (highlighting the confusion surrounding false statements of fact as a categorical exclusion).

³⁸⁴ See *supra* Part III.A (examining whether false statements of fact constitute a distinct categorical exception).

³⁸⁵ See *supra* Part III.B (examining whether the Stolen Valor Act can be considered as a defamation or fraud prohibition).

³⁸⁶ See Strossen, *supra* note 24, at 77–78 (stating that even speech that is not within an unprotected category can still be regulated if strict judicial scrutiny is satisfied). See generally Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006) (offering a good historical examination of strict scrutiny’s origins in the twentieth century). According to Professor Siegel, the Supreme Court has articulated two purposes for strict scrutiny analysis. *Id.* at 393 (“It is, first of all, a device to smoke out illicit governmental motive. . . . In addition, strict scrutiny is a tool to determine whether there is a cost-benefit justification for governmental action that burdens interests for which the Constitution demands unusually high protection.” (internal quotation marks omitted)).

³⁸⁷ The Stolen Valor Act was subjected to and failed strict scrutiny in *Alvarez III*, *Alvarez I*, and *Strandlof I*. See *supra* Part II.B.

fail the review.³⁸⁸ However, despite the widely held perception that strict scrutiny is typically fatal to a statute,³⁸⁹ this is not always the case.³⁹⁰

Upon close inspection, the Act should have *survived* strict scrutiny analysis as well.³⁹¹ Specifically, as this section will show, the Act’s prohibition on false claims of receiving military decorations served a compelling governmental interest, and the Act was a narrowly tailored means of effectively achieving this interest.

³⁸⁸ *Alvarez I*, 617 F.3d 1198, 1232 n.10 (9th Cir. 2010) (Bybee, J., dissenting), *aff’d*, 132 S. Ct. 2537 (2012).

³⁸⁹ The view that strict scrutiny is “strict in theory, fatal in fact” pervades, particularly with regard to free speech cases. See Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography?: Protecting Children from “Indecent” Speech*, 11 WM. & MARY BILL RTS. J. 671, 673 (2003) (“[Strict scrutiny] is extremely difficult to satisfy and was once famously described as “strict” in theory and fatal in fact.” (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972))).

³⁹⁰ Satisfying strict scrutiny is difficult but not impossible. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“[W]e wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact.” (internal quotation marks omitted)); Winkler, *supra* note 20, at 797 (“[L]aws can (and do) survive strict scrutiny with considerable frequency.”). Moreover, strict scrutiny is ambiguous in its application. See Matthew D. Bunker et al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 350 (2011) (“Strict scrutiny’s verbal formulation suggests precision and certainty, but its operation in practice is highly impressionistic and, at times, seemingly indeterminate.”). According to these authors, in certain contexts, strict scrutiny can be a mere balancing test. *Id.* at 351-52. Furthermore, according to research conducted by Professor Adam Winkler, thirty percent of statutes subjected to strict scrutiny in recent years have survived. Winkler, *supra* note 20, at 812–13. Professor Winkler’s data was based upon 459 separate instances of strict scrutiny analysis from 1990 through 2003. *Id.* at 809-10, 812. Even though free speech restrictions were the least likely to survive, Winkler nonetheless found that twenty-two percent of these laws did survive. *Id.* at 815. Moreover, nearly fifty percent of Congressional laws survived. *Id.* at 818. Winkler’s findings have been cited approvingly. See, e.g., Bunker, et al., *supra*, at 351 (“[E]mpirical evidence suggests strict scrutiny is not as fatal as once advertised.”).

³⁹¹ In its petition for Writ of Certiorari in the *Alvarez* case, the Government argued—among other things—that the Act is constitutional even after applying strict scrutiny. Petition for Writ of Certiorari, *supra* note 6, at *29-30.

A. The Government Has a Compelling Interest in Preventing False Claims

First, the Stolen Valor Act furthered a compelling governmental objective.³⁹² As with every element of strict scrutiny analysis, the nature of what exactly constitutes a “compelling interest” is shrouded in confusion and ambiguity.³⁹³ Although the district court in *Strandlof I* failed to identify a compelling interest for the Stolen Valor Act,³⁹⁴ the Supreme Court plurality in *Alvarez III* and the Ninth Circuit majority in *Alvarez I* conceded such an interest.³⁹⁵

As a preliminary matter, it is worth noting that the judiciary has traditionally afforded Congress a degree of deference with regard to the military.³⁹⁶ Article I of the Constitution grants

³⁹² See Winkler, *supra* note 20, at 800 (stating that a compelling governmental end involves “the most pressing circumstances”); see, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (reasoning that such an interest must be “of the highest order”).

³⁹³ See Bunker, et al., *supra* note 390, at 364 (“Case law actually suggests there is no bright-line standard for resolving what a compelling state interest looks like—no definitive criterion, no operational definition.”). Bunker noted that even Justice Harry Blackmun was uncertain as to the meaning of this component. *Id.* As Bunker observed, the “exact nature of a compelling interest has perplexed even the finest legal minds.” *Id.* Furthermore, a compelling interest can sometimes be readily found. *Id.* at 368; see Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 *LOY. L.A. L. REV.* 449, 475 (1988) (“Increasingly, the Justices add new interests to the list in a casual, off-hand manner suggesting that they believe that almost any significant government interest is sufficiently compelling to satisfy strict scrutiny.”).

³⁹⁴ *Strandlof I*, 746 F. Supp. 2d 1183, 1189 (D. Colo. 2010) (“I find that no such compelling interest pertains here . . .”).

³⁹⁵ *Alvarez III*, 132 S. Ct. 2537, 2549 (2012) (calling the government’s interest “compelling”); *Alvarez I*, 617 F.3d 1198, 1216 (9th Cir. 2010) (“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.”), *aff’d*, 132 S. Ct. 2537 (2012); see Bunker, et al., *supra* note 390, at 350 (providing a brief overview of the strict scrutiny reasoning of *Strandlof I* and *Alvarez I*).

³⁹⁶ See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (“[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”); Amy E. Crawford, *Under Siege: Freedom of Choice and the Statutory Ban on Abortions on Military Bases*, 71 *U. CHI. L. REV.* 1549, 1558–61 (2004) (describing the nature of this deference); Kelly E. Henriksen, *Gays, the Military, and Judicial Deference: When the Courts*

Congress a wide range of military powers³⁹⁷ from the ability to declare war³⁹⁸ to the ability to raise and maintain troops³⁹⁹, as well as the responsibility of making rules for the military's governance and regulation.⁴⁰⁰ It also provides Congress the ability to make all laws "necessary and proper" to carrying out its military powers.⁴⁰¹ Indeed, the courts have acquiesced to Congress's military decisions on many issues.⁴⁰² Although the Stolen Valor Act ostensibly

Must Reclaim Equal Protection as Their Area of Expertise, 9 ADMIN. L.J. AM. U. 1273, 1276–79 (1996) (providing the historical justification of the deference).

³⁹⁷ *E.g.*, *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) ("It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment . . ."). As Amy Crawford noted in her article about a statutory ban on abortions on military bases, "courts will often bend over backward to uphold decisions made by, and with regard to, the military." Crawford, *supra* note 396, at 1561.

³⁹⁸ U.S. CONST. art. I, § 8, cl. 11.

³⁹⁹ *Id.* § 8, cls. 12–13.

⁴⁰⁰ *Id.* § 8, cl. 14.

⁴⁰¹ *Id.* § 8, cl. 18; *see* 16 C.J.S. *Constitutional Law* § 100 (2012) ("The provision permits a choice of means and includes, in general, all powers or means which are appropriate for the accomplishment of a constitutional purpose and not forbidden by the letter or spirit of the Constitution.").

⁴⁰² For example, the courts have long recognized that members of the military do not receive the full extent of First Amendment rights typically afforded civilians. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 758 (1974) (citing *United States v. Priest*, 21 U.S.C.M.A. 564, 570 (1972)) (holding that "[s]peech that is protected in the civil population may nonetheless undermine the effectiveness of response to command"); Katherine C. Den Bleyker, *The First Amendment Versus Operational Security: Where Should the Milblogging Balance Lie?*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 401, 418 (2006) ("From the beginning of American history, military servicemembers have had limited First Amendment rights."). In addition, the courts have never found fault with the existence of a draft, despite reasonable concerns as to its constitutionality. *See, e.g.*, *Arver v. United States*, 245 U.S. 366, 390 (1918) (rejecting an attack on the draft that was based on the Thirteenth Amendment's prohibition of involuntary servitude); Jason Britt, *Unwilling Warriors: An Examination of the Power to Conscript in Peacetime*, 4 NW. J.L. & SOC. POL'Y 400, 408 (2009) ("[During the Vietnam conflict], the issue of a draft in the absence of a declared war was present, and again the Supreme Court declined to hear any cases that would clarify the issue."). Moreover, courts have held that even civilians do not have an unfettered right to exercise their First Amendment rights on military installations. *See Greer v. Spock*, 424 U.S. 828, 840 (1976) ("There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command."); *see also Brown v. Glines*, 444 U.S. 348, 354 (1980) (upholding the reasoning from *Greer*).

involved *civilian* issues, the Act evoked this congressional *military* prerogative.⁴⁰³ The importance of—and Congress’s role in—the military formed the basis of Judge Gould’s dissent in *Alvarez II*.⁴⁰⁴ To Gould, the Act’s regulation of speech was permissive precisely due to the military context.⁴⁰⁵

The Stolen Valor Act helped preserve the intrinsic value of military medals because such value emanates from the medals’ selective nature.⁴⁰⁶ In the aggregate, false claims create the public perception that there are more medals in existence than were ever actually awarded.⁴⁰⁷ Moreover, the duplicitous personalities of

⁴⁰³ In another example of this concept, civilians—during times of war—have been subjected to military law in courts martial. See John F. O’Connor, *Contractors and Courts-Martial*, 77 TENN. L. REV. 751, 793 (2010) (“[H]istorical practice suggests that there are some circumstances that would support the constitutional subjection of civilians to trial by court-martial”); Kara M. Sacilotto, *Jumping the (Un)Constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 PUB. CONT. L.J. 179, 188 (2008) (“[T]he Supreme Court . . . has suggested that exercise of [Uniform Code of Military Justice] jurisdiction in ‘time of war’ would be appropriate”).

⁴⁰⁴ See *Alvarez II*, 638 F.3d 666, 687–88 (9th Cir. 2011) (denying petition for rehearing en banc) (Gould, J., dissenting) (“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.”).

⁴⁰⁵ *Id.*

⁴⁰⁶ See, e.g., DEP’T OF DEF., NO. 1348.33, MANUAL OF MILITARY DECORATIONS AND AWARDS 81 (2010) (describing the criteria of achievement awards and noting that the impact awards or awards for outstanding achievement are rare and intended “to recognize a single specific act or accomplishment, separate and distinct from regularly assigned duties, such as a special project”); *Examination of Awards*, *supra* note 6, at 77 (statement of Michael L. Dominguez, Principal Deputy Undersecretary of Defense for Personnel and Readiness) (“The award adjudication process is exacting, as no award of a Medal of Honor should ever be open to criticism—we must get it right the first time. Medal of Honor recommendations are thoroughly scrutinized to ensure the event upon which the recommendation is based fully meets the high standards for the Nation’s highest military honor.”); DEP’T OF THE NAVY, SECNAV INSTRUCTION 1650.1H, 1-3 (Aug. 22, 2006), available at <https://www.marines.mil/news/publications/Documents/SecNavinst%201650.1H.pdf> (“An award should only be recommended in cases where the circumstances clearly merit special recognition of the actions or service.” (emphasis omitted)); see also *Petition for Writ of Certiorari*, *supra* note 6, at *24 (“The government intends that military honors should bestow a *rare degree of prestige* on their bearers” (emphasis added)). Even the issuance of example Medals of Honor for public *display* purposes is strictly regulated. DEP’T OF THE NAVY, SECNAV INSTRUCTION 1650.1H, 1-12 (Aug. 22, 2006).

⁴⁰⁷ For example, as of August 28, 2012, there were only eighty-one living Medal of

those individuals who falsely claim the medals can foster—in an unwitting listener—a diminished view of both the medals and legitimate medal recipients.⁴⁰⁸

Medals and decorations form an integral thread in the tapestry of military life.⁴⁰⁹ As such, they are vitally important—especially during a time when the armed forces are engaged in several unpopular international wars.⁴¹⁰ Medals are awarded for and represent heroic

Honor recipients. CONG. MEDAL OF HONOR SOCIETY, <http://www.cmohs.org> (last visited Sept. 30, 2012). Moreover, the first living member of the military to receive a Medal of Honor since the Vietnam War was Salvatore Giunta in 2010. Helene Cooper, *Rare Honor for a Living Service Member*, N.Y. TIMES, Nov. 17, 2010, at A21, available at <http://www.nytimes.com/2010/11/17/us/politics/17medal.html>. See generally Petition for Writ of Certiorari, *supra* note 6, at *24 (“[F]alse representations threaten to make the public skeptical of any claim to have been awarded a medal.”).

⁴⁰⁸ See, e.g., Simpson, *supra* note 134 (reporting on the many lies of Rick Strandlof); *supra* Part II.B (discussing the lies of Strandlof and Alvarez).

⁴⁰⁹ See, e.g., *Examination of Awards*, *supra* note 6, at 25-26 (statement of Brig. Gen. Richard P. Mills, Director, Personnel Management Division, Manpower and Reserve Affairs, HQ, U.S. Marine Corps) (“[W]e use military awards to recognize the courageous and selfless achievements of those brave men and women of your Marine Corps whose heroism sets them apart from their peers. . . . Marine leaders [who determine who receives a given award] take their responsibilities for leadership and recognition of exceptional performance in combat very seriously. They all know the importance of a viable and robust military combat awards system”); U.S. MARINE CORPS, ORDER 1650.19J Encl. 1, at 3, Encl. 2, at 1 (Feb. 5, 2001), available at <http://www.marines.mil/news/publications/Documents/MCO%201650.19J.pdf> (“Awards are an important aspect of command responsibility at all levels. . . . Recognizing Marines for their superior performance . . . will significantly benefit the Marine Corps as well as the Marine recommended.”); see also Petition for Writ of Certiorari, *supra* note 6, at *5 (“The armed services have long held the view that the awards program performs crucial functions within the military.”).

⁴¹⁰ According to recent polls—as of October 28, 2011—the popularity of the war in Afghanistan had reached all time lows. *CNN Poll: Support for Afghanistan War at All Time Low*, CNN POLITICAL TICKER (Oct. 28, 2011, 11:44 AM), <http://politicalticker.blogs.cnn.com/2011/10/28/cnn-poll-support-for-afghanistan-war-at-all-time-low>. Only thirty-four percent of the American public supported the war, and fifty-eight percent believed that the situation has similarities to the war in Vietnam. *Id.* Moreover, one third of post-September 11th veterans believed that the wars in Iraq and Afghanistan were not worth starting. Robert Burns, *A Third of Vets Sees Iraq, Afghan Wars as Wastes*, *Poll Says*, HOUS. CHRON. (Oct. 5, 2011, 7:04 AM), <http://www.chron.com/news/politics/article/A-third-of-vets-sees-Iraq-Afghan-wars-as-wastes-2203397.php>. Furthermore, half of post-September 11th veterans believed that deployment has adversely affected their family relationships. *Id.* (“Asked for a single word to describe their experiences, the war veterans offered a mixed picture: ‘rewarding,’ ‘nightmare,’ ‘eye opening,’ ‘lousy.’”).

behavior, sacrificial acts, and otherwise noble virtues.⁴¹¹ Although the District Court in *Strandlof I* criticized the notion that—while performing in the field—servicemen and women could be motivated by the possibility of subsequently receiving medals,⁴¹² courts are ill-suited to the task of assessing military personnel and activities.⁴¹³ Military leadership has repeatedly recognized the incentivizing power of these honors.⁴¹⁴ Moreover, civilians should not be considered knowledgeable arbiters about the nature of military life.⁴¹⁵

⁴¹¹ See, e.g., AIR FORCE, POLICY DIRECTIVE 36-28, AWARDS AND DECORATIONS PROGRAMS (July 30, 2012), available at <http://www.af.mil/shared/media/epubs/AFP36-28.pdf> (“[The awards program] will recognize acts of bravery, outstanding achievements, or periods of meritorious service.”); DEP’T OF THE ARMY, *supra* note 5, at 2 (“The objective of the Department of the Army Military Awards Program is to provide tangible recognition for acts of valor, exceptional service or achievement, special skills or qualifications, and acts of heroism not involving actual combat.”); DEP’T OF THE NAVY, SECNAV INSTRUCTION 1650.1H, 1–2 (Aug. 22, 2006) (“Awards are important symbols of public recognition for rewarding heroism or valor, exceptionally meritorious service, or outstanding achievement and other acts or services which are above and beyond what is normally expected . . .”).

⁴¹² *Strandlof I*, 746 F. Supp. 2d 1183, 1190 (D. Colo. 2010) (reasoning that soldiers are not motivated in any way by considerations of whether they will receive a medal).

⁴¹³ See Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962) (“[C]ourts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.”); see also Henriksen, *supra* note 396, 1279 (“The professional judgment and experience of those familiar with the military is the primary source for determining the climate of obedience and discipline necessary to sustain an effective fighting force. Traditionally, courts have deemed themselves unable to master these complexities.”).

⁴¹⁴ See, e.g., DEP’T OF THE ARMY, *supra* note 5, at 1 (“The goal of the total Army awards program is to *foster mission accomplishment* by recognizing excellence of . . . military . . . members of the force and *motivating them* to high levels of performance and service.” (emphasis added)); *Examination of Awards*, *supra* note 6, at 24 (statement of Lt. Gen. Brady, Deputy Chief of Staff, Manpower and Personnel, Headquarters, U.S. Air Force) (describing medals’ effect on airmen).

⁴¹⁵ See Burns, *supra* note 410, for recent poll results. A study found that many Americans respected the military, but only twenty-seven percent of civilians and twenty-one percent of veterans believed the public even understands the problems faced by military personnel. *Id.* (“The survey . . . reflected what many view as a troublesome cultural gap between the military and the general public.”).

Additionally, the military has made it clear that these medals foster both *esprit de corps*⁴¹⁶ and morale among servicemen and women.⁴¹⁷ And, as evidenced by the prominent placement of medals on recruiters' uniforms, the perceived prestige of medals plays a critical role in military recruitment⁴¹⁸—thereby implicating Congress's constitutional stake in raising troops.⁴¹⁹ So important are these honors to the military, that the various chains of command have promulgated regulations concerning every aspect of each medal's usage—from the criteria required for earning a given medal⁴²⁰ to the appropriate standards of a

⁴¹⁶ *Esprit de corps* can be defined as “a feeling of pride, fellowship, and common loyalty shared by the members of a particular group.” OXFORD DICTIONARIES ONLINE, http://oxforddictionaries.com/definition/american_english/esprit%2Bde%2Bcorps?region=us&q=esprit+de+corps (last visited Sept. 30, 2012).

⁴¹⁷ See, e.g., AIR FORCE, POLICY DIRECTIVE 36-28, AWARDS AND DECORATIONS PROGRAMS (July 30, 2012) (“The Air Force will have an awards and decorations program to serve as an incentive, and to foster morale and spirit de corps.”); *Examination of Awards*, *supra* note 6, at 72 (statement of Michael L. Dominguez) (“[Decorations and awards] serve[] to foster high morale, esprit de corps, motivation of others to do like deeds, and public acknowledgment of our Service member’s actions, achievements and sacrifices.”).

⁴¹⁸ For example, the Marine Corps “Dress Blues” uniform is one of the most recognizable uniforms in the armed services. *Uniforms of the Marine Corps*, JONATHAN FIELD COLLECTION, http://www.jonathanfieldcollection.com/military/Marines_uniforms.htm (last visited Sept. 30, 2012). Moreover, the full range of a Marine’s earned medals and decorations adorn his or her dress uniform. See *id.* As a result, the uniform and accompanying medals are often the focal point in Marine recruiting efforts. See Meredith Brown, *Dress Blues Mandatory October 1*, ROTOVUE (Sept. 14, 2011, 12:00 AM), http://www.camplejeuneglobe.com/rotovue/news/around_the_corps/article_f164859a-de14-11e0-87fb-001cc4c002e0.html (“[A Marine recruiter] wore his dress blues out in town while serving on recruiting duty. They served as a walking billboard for those who wanted to go above and beyond, he said.”); Tony Perry, *Marines Want Dark Tone Out of Dress Blues*, L.A. TIMES (Mar. 20, 2005), <http://articles.latimes.com/2005/mar/20/nation/na-blues20> (“[D]ress blues are also featured in Marine Corps recruiting advertisements.”).

⁴¹⁹ U.S. CONST. art. I, § 8, cls. 12–13; see *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 58 (2006) (“Congress has broad authority to legislate on matters of military recruiting . . .”).

⁴²⁰ For instance, the Navy’s requirements to receive a Medal of Honor are strict. See DEP’T OF THE NAVY, SECNAV INSTRUCTION 1650.1H, 2–22 (Aug. 22, 2006) (“To justify the decoration, the individual’s service must clearly be rendered conspicuous above his or her comrades by an act so outstanding that it clearly distinguishes his or her gallantry beyond the call of duty from lesser forms of bravery; and it must be the type of deed which if not done would not subject the individual to any justified criticism.”). Likewise, the Army has outlined several criteria to determine when a Purple Heart is not warranted. See DEP’T OF THE ARMY, *supra* note 5, at 20 (listing—among other conditions—battle fatigue, heat stroke, posttraumatic stress disorder, and food poisoning).

medal's wear on the uniform.⁴²¹ Thus, although the Stolen Valor Act regulated civilian speech, Congress's constitutionally granted military responsibilities were directly implicated.⁴²²

Finally, the Stolen Valor Act cases were also distinguishable from *Texas v. Johnson*, where the Supreme Court held that a state law banning the offensive burning of an American flag failed strict scrutiny.⁴²³ Although in *Strandlof I*, the District Court of Colorado relied upon the *Johnson* reasoning in holding that the Act failed strict scrutiny,⁴²⁴ the two circumstances differed.⁴²⁵ Importantly, the Act did not target a *particular* political viewpoint or opinion on the military.⁴²⁶ In contrast, the flag-burning provisions targeted anti-government

⁴²¹ See, e.g., DEP'T OF THE ARMY, ARMY REGULATION 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA 271 (May 11, 2012), available at http://www.apd.army.mil/pdffiles/r670_1.pdf ("Personnel wear all full-size decorations . . . in the order of precedence from the wearer's right to left, in one or more rows, with 1/8-inch space between rows. Second and subsequent rows will not contain more medals than the row below."); see also DEP'T OF THE AIR FORCE, INSTRUCTION 36-2903, DRESS AND PERSONAL APPEARANCE OF AIR FORCE PERSONNEL 137-41, at 144 (June 1, 2012), available at <http://www.af.mil/shared/media/epubs/afi36-2903.pdf> (describing medal placement on the Air Force dress uniform).

⁴²² Blurring the distinction even further is that—although rare—civilians can be awarded military medals. DEP'T OF THE NAVY, SECNAV INSTRUCTION 1650.1H, 1-7 (Aug. 22, 2006) (listing the Navy decorations for which civilians could be eligible).

⁴²³ See *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (overturning, on First Amendment grounds, a conviction for flag desecration); *supra* Part I.B (providing commentary on *Johnson*).

⁴²⁴ *Strandlof I*, 746 F. Supp. 2d 1183, 1189–90 (D. Colo. 2010) ("I find the Supreme Court's decision in *Texas v. Johnson* highly instructive." (citation omitted)); see *Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *supra* Part I.A (discussing *Johnson*).

⁴²⁵ See Petition for Writ of Certiorari, *supra* note 6, at *26 ("[The Stolen Valor Act] 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.").

⁴²⁶ See *Alvarez III*, 132 S. Ct. 2537, 2557 (2012) (Alito, J., dissenting) ("[T]he Act is strictly viewpoint neutral."); Eugene Volokh, *Amicus Curiae Brief: Boundaries of the First Amendment's "False Statements of Fact" Exception*, 6 STAN. J. CIV. RTS. & CIV. LIBERTIES 343, 354 (2010) ("False claims of military honors are not limited to any particular viewpoints, or even particular topics of debate. They can equally be raised by people who are anti-war, who are pro-war, or who are just trying to get themselves elected to an office that is entirely unrelated to the military."); see also Petition for Writ of Certiorari, *supra* note 6, at *28 ("[T]he government could not use [the Stolen Valor Act] as a means of imposing its own view of 'truth' or punishing criticism.").

viewpoints and political speech—speech at the heart of First Amendment rights.⁴²⁷

B. The Stolen Valor Act Was Narrowly Tailored

Second, the Stolen Valor Act was narrowly tailored to achieve its compelling objective.⁴²⁸ As with the nature of the “compelling interest” prong of strict scrutiny analysis, the meaning of “narrow tailoring” is likewise interpretable.⁴²⁹ However, the Act’s prohibition on all false claims of receiving military medals was the least restrictive means of preventing the harm caused by those false claims.⁴³⁰ Specifically, public lists featuring the names of actual medal recipients are either not

⁴²⁷ See Keith A. Darling, *Flag Burning: Johnson, Eichman and Beyond*, 3 APPALACHIAN J.L. 101, 105 (2004) (“[T]he government remains unable to mandate that the flag (as a national symbol) be used only to portray one view to the exclusion of all others.”); see also *United States v. Eichman*, 496 U.S. 310, 312 (1990) (holding unconstitutional the Flag Protection Act of 1989). In *Eichman*, the Government attempted to distinguish *Johnson* by arguing that the Flag Protection Act did not target a particular message. *Id.* at 315. The Supreme Court rejected this argument, reasoning that the Government’s interest was ultimately related to suppressing a particular viewpoint. *Id.* at 317 (“The [Flag Protection] Act criminalizes the conduct of anyone who knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag. Each of the specified terms—with the possible exception of ‘burns’—unmistakably connotes disrespectful treatment of the flag” (emphasis added) (citation omitted) (internal quotation marks omitted)).

⁴²⁸ This prong of strict scrutiny can also be articulated as requiring that the law in question be the least restrictive means available to achieve the compelling governmental interest. Winkler, *supra* note 20, at 800-01 (citing *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981)). Narrow tailoring has also been described as having three components—each of which may or may not be utilized in a particular case. See Bunker et al., *supra* note 390, at 372–73 (“First, narrow tailoring asks whether the regulation is overinclusive Second, narrow tailoring explores whether the regulation is underinclusive Finally, narrow tailoring analysis in strict scrutiny asks whether the least restrictive means have been chosen to achieve the stated interest.” (internal quotation marks omitted)).

⁴²⁹ See Bunker et al., *supra* note 390, at 373–77 (describing the deficiencies of “narrow tailoring” analysis).

⁴³⁰ See *Petition for Writ of Certiorari*, *supra* note 6, at *29-30 (arguing that the Stolen Valor Act is narrowly tailored). Of course, in the courts where the Stolen Valor Act failed strict scrutiny, the statute was not held to be narrowly tailored. See *supra* Part II.B (discussing the Stolen Valor Act cases).

readily available⁴³¹ or inadequate.⁴³² Theoretically, public lists could provide a listener a verifiable resource for corroborating a declarant's medal claims.⁴³³ But even if accurate lists could be consulted, an unsuspecting listener—upon hearing a false claim—would have every reason to simply accept the claim without any attempt to verify its authenticity.⁴³⁴ The factual

⁴³¹ An official list of awarded Medals of Honor does exist. CONG MEDAL OF HONOR SOC'Y, *supra* note 407. However, no official analogues exist for the other medals. See Crewdson, *supra* note 9 (“[A]t the moment the only official compilation is for recipients of the Medal of Honor, maintained online by the Congressional Medal of Honor Society”). Moreover, the Stolen Valor Act's sponsor, Representative John Salazar, introduced a bill that would have created a searchable database of all awarded medals. Military Valor Roll of Honor Act, H.R. 666, 111th Cong. (1st Sess. 2009); see Bea Karnes & Greg Boyce, *Rep. Salazar Seeks Database of Medal Recipients*, KOAA.COM (Sept. 20, 2010, 6:44 PM), <http://www.koaa.com/news/rep-salazar-seeks-database-of-medal-winners>. However, the bill did not become law. Calvert & Rich, *supra* note 30, at 30 n.239. Furthermore, the Department of Defense conducted research to determine the feasibility of creating medal databases. OFFICE OF THE UNDERSEC'Y OF DEF., REPORT TO THE SENATE AND HOUSE ARMED SERVICES COMMITTEES ON A SEARCHABLE MILITARY VALOR DECORATIONS DATABASE 1 (2009), available at <http://www.reportstolenvvalor.org/pdf/DoD-DB-Report-04-02-2009.pdf>. The Department found that a database would be ineffective because social security numbers and birthdays—two pieces of information necessary for specific identifications—could not be included due to privacy laws. *Id.* at 2 (“This limitation is especially true for those valor award recipients who have common surnames.”).

⁴³² For example, several unofficial databases exist, but they are incomplete and rely on public participation. See *Alphabetical Index of Recipients of Major U.S. Military Awards*, HOMEOFHEROES.COM, *supra* note 75 (stating that the site's database for a medal could be as little as 70% complete); *Welcome to the Military Times Hall of Valor*, MILITARYTIMES.COM, <http://militarytimes.com/citations-medals-awards/about.php> (last visited Sept. 30, 2012) (“For [many of the] awards, absence of a name should not be considered evidence that an individual did not receive an award.”). See generally Seavey, *supra* note 13 (criticizing the *Alvarez I* court's majority's reasoning that publicizing false claimants is the proper remedy). As Seavey stated, “[a]s someone who has been engaged in the cottage industry of tracking down these fakers, I can attest to the fact that we will need a lot more people to adequately accomplish such a feat.” *Id.*

⁴³³ See Editorial, *False Claims of Military Valor are Hardly Criminal*, DENV. POST (Jan. 24, 2010, 1:00 AM), http://www.denverpost.com/opinion/ci_14244052 (“[I]t would be easy to check someone out.”); Editorial, *Public Shame is the Best Remedy*, VIRGINIAN-PILOT (July 23, 2010), <http://hamptonroads.com/2010/07/public-shame-best-remedy> (“[T]here is only one appropriate arbiter for just punishment: the court of public opinion.”).

⁴³⁴ See, e.g., Simpson, *supra* note 134 (reporting that Rick Strandlof's deception carried on for several years); Petition for Writ of Certiorari, *supra* note 6, at *29 (“Some misrepresentations . . . are not discovered for substantial amounts of time, if ever.”). It is unlikely that the average listener would spend the time and exert the effort to verify every medal claimant he or she encountered.

backgrounds of the Stolen Valor Act cases suggest that false claimants typically continue their intricate deceptions for long periods of time before *any* adverse repercussions befall them.⁴³⁵ Indeed, many veterans find it disrespectful to question others' war stories.⁴³⁶ Furthermore, many military records have been lost or destroyed, and, therefore, a verifiable public list would be incomplete and misleading.⁴³⁷ However, the Stolen Valor Act *deterred* the false claims from occurring altogether—even if the number of successful prosecutions under the Act remained low.⁴³⁸

In addition, the Act was not overinclusive, because it did not inhibit otherwise protected speech beyond a narrow context.⁴³⁹ As mentioned in Part III.B and according to the Act's

⁴³⁵ See *supra* Part II.B (analyzing the Stolen Valor Act cases). Thus, enough time often passes for a given false claim to be heard or received by many other people. The lie has spread even if *every* false claimant is eventually uncovered by the public. *But cf.* Calvert & Rich, *supra* note 30, at 29–30 (implying that false claims are “defeated” by public shame).

⁴³⁶ See Simpson, *supra* note 134; Robert J. Juge, III, *Heroism, Valor, and Deceit: False Claims of Military Awards and the First Amendment*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 267, 293 (2012) (“Who would have the knowledge or arrogance to stop a purported Purple Heart recipient and demand to know how he was injured in battle or to see his wound? The very question would insult and offend a legitimate recipient, whose emotional well-being and reputation could then come under fire.”); see also JAMES MUNROE, TRANSITIONING WAR ZONE SKILLS: INFORMATION FOR VETERANS AND THOSE WHO CARE 17, available at http://www.nami.org/Content/Microsites191/NAMI_Oklahoma/Home178/Veterans3/Veterans_Articles/15VetandFamilyInformationBooklet.pdf (“It is sometimes very difficult to talk about the events of war.”).

⁴³⁷ See OFFICE OF THE UNDERSEC'Y OF DEF., *supra* note 431, at 5 (“Utilizing official personnel records to populate such a database is not possible for certain time periods, as there was a major fire at the National Personnel Records Center . . . in 1973 that destroyed approximately 16 to 18 million official military personnel records”); Petition for Writ of Certiorari, *supra* note 6, at *30 (arguing that the destruction of records undermines the potential effectiveness of any “public refutation” of false claimants). Thus, a public list might adversely affect legitimate recipients. OFFICE OF THE UNDERSEC'Y OF DEF., *supra* note 431, at 7 (“An unintended consequence of establishing such a database would be that the integrity of bona fide award recipients could be called into question if their names are not included in the database.”).

⁴³⁸ See Petition for Writ of Certiorari, *supra* note 6, at *30 (arguing for the Stolen Valor Act as a deterrent); see also Crewdson, *supra* note 9 (reporting that there had been forty prosecutions as of 2008).

⁴³⁹ See Petition for Writ of Certiorari, *supra* note 6, at *28 (“[The Act] targets only those representations that reasonably can be understood as factual claims to have won a medal”). See generally Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would

language, a violation required that a declarant “falsely represent” him or herself as having been awarded a decoration or medal.⁴⁴⁰ “Misrepresentation” evokes an intention to deceive and requires more than the mere utterance of the words.⁴⁴¹ Therefore, the Act could not reasonably have been construed as reaching scenarios such as the mentally-ill declarant who utters the words without truly “representing” himself,⁴⁴² or the actor who portrays a military officer.⁴⁴³

Some, such as Justice Breyer, have suggested that the proper course of action is for the Stolen Valor Act to be rewritten into a constitutional fraud statute.⁴⁴⁴ A narrower version of the Act could theoretically penalize false claims in situations where

raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

⁴⁴⁰ 10 U.S.C. § 704(b) (2006); see *supra* Part III.B (analyzing the Stolen Valor Act in terms of defamation and fraud); see also Petition for Writ of Certiorari, *supra* note 6, at *16–17 (“[T]he phrase ‘falsely represent’ connotes making a factual assertion with the knowledge that it is false.”).

⁴⁴¹ See BLACK’S LAW DICTIONARY 1091 (9th ed. 2009) (defining “misrepresentation”). In *Strandlof I*, the District Court described the speech (regulated by the Stolen Valor Act) as “misrepresentations.” *Strandlof I*, 746 F. Supp. 2d 1183, 1188 (D. Colo. 2010); Tushnet, *supra* note 207, at 7 n.32 (“Textually, the term ‘represents’ can fairly be read to require some mental element associated with the representation.”); see also Petition for Writ of Certiorari, *supra* note 6, at *16 (“Properly construed, [the Stolen Valor Act] prohibits . . . knowingly false representations that a reasonable observer would understand as a factual claim that the speaker has been awarded a military medal.”).

⁴⁴² Cf. Tushnet, *supra* note 207, at 7 n.33 (“I would hope that [insanity and similar] defenses would protect such persons against conviction under a statute imposing liability for making false statements. The possibility that there are such people should not affect First Amendment analysis . . .”).

⁴⁴³ See Tushnet, *supra* note 207, at 2 n.8 (“I believe that an audience-oriented component is presupposed in any statute imposing liability for false statements.”); see also *Alvarez I*, 617 F.3d 1198, 1240 (9th Cir. 2010) (Bybee, J., dissenting) (“[C]laims about military decorations and medals made in an artistic context are not subject to prosecution under the most reasonable construction of the Act.”); Petition for Writ of Certiorari, *supra* note 6, at *17 (“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.”).

⁴⁴⁴ See, e.g., *Alvarez III*, 132 S. Ct. 2537, 2555-56 (2012) (Breyer, J., concurring); Calvert & Rich, *supra* note 30, at 34 (“The most basic way to cure the Act would apparently be to meld or blend in elements from fraud . . .”); see also *Alvarez I*, 617 F.3d at 1212 (“[W]e believe that Congress could revisit the Act to modify it into a properly tailored fraud statute . . .”).

the lies resulted in some type of economic harm.⁴⁴⁵ Along these lines, bills were introduced during the 112th session of Congress that would revise and narrow the Stolen Valor Act and incorporate aspects of fraud.⁴⁴⁶ However, a revised Stolen Valor Act would still be ineffective because many types of false medal claims—those with no economic harm threatened—would escape punishment.⁴⁴⁷ In the aggregate, even the allowable false claims would still dilute the medals’ meaning, erode the medals’ perceived selectivity, and interfere with the medals’ important function in the military.⁴⁴⁸

⁴⁴⁵ See *supra* Part III.B (discussing the Stolen Valor Act’s relation to fraud); see also Calvert & Rich, *supra* note 30, at 34 (recommending that, if the Act were to be rewritten into a fraud statute, a listener’s detrimental reliance should involve “monetary” harm).

⁴⁴⁶ A bill in the House was introduced on May 5, 2011 by Representative Joseph Heck and passed the House on September 13, 2012. Stolen Valor Act of 2011, H.R. 1775, 112th Cong. (1st Sess. 2011); *H.R. 1775: Stolen Valor Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr1775> (last visited Nov. 19, 2012). Its counterpart in the Senate was introduced on October 18, 2011 by Senator Scott Brown. Stolen Valor Act of 2011, S. 1728, 112th Cong. (1st Sess. 2011). Each bill was substantively the same and stated that “Whoever, with intent to obtain anything of value, knowingly makes a misrepresentation regarding his or her military service” faces criminal penalties. H.R. 1775; S. 1728. See generally Michael Doyle, *Does Constitution Allow Lying about Military Heroism? Supreme Court to Decide*, McCLATCHY (Oct. 17, 2011), <http://www.mcclatchydc.com/2011/10/17/127462/does-constitution-allow-lying.html> (reporting on the House bill); Frosch, *supra* note 9 (“It’s not O.K. to misrepresent yourself as a physician and practice medicine. . . . It’s not O.K. to misrepresent yourself as a police officer. Why should you be able to misrepresent yourself as [a] member of the military, specifically if you’re trying to gain something of value?” (quoting Rep. Joseph Heck)). The Supreme Court’s ruling in *Alvarez III* hastened efforts to revise the Stolen Valor Act. Bill Mears, *Lawmakers Promote Revised ‘Stolen Valor’ Law*, CNN POLITICS (July 10, 2012, 5:23 PM), <http://www.cnn.com/2012/07/10/politics/congress-stolen-valor-law/index.html>. However, neither bill was enacted prior to the close of the 112th Congress. These bills have been reintroduced in the 113th Congress as H.R. 258 and S. 210. H.R. 258: *Stolen Valor Act of 2013*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/113/hr258> (last visited Feb. 18, 2013).

⁴⁴⁷ Cf. Calvert & Rich, *supra* note 30, at 34 (suggesting that “emotional anguish and embarrassment” is not sufficient harm for a revised Stolen Valor Act). In addition, the bills currently pending in Congress specify “intent” to cause a specific harm, but do not expressly require that the specific harm result. H.R. 258; S. 210. Nevertheless, it is unclear what “anything of value” means. See *NV Rep’s Proposed Stolen Valor Act Changes*, THIS AIN’T HELL (May 6, 2011), <http://thisainthell.us/blog/?p=23251> (“I think the ‘obtain anything of value’ is arbitrary. What is value?”).

⁴⁴⁸ See *Alvarez III*, 132 S. Ct. 2557, 2558-59 (2012) (Alito, J., dissenting); Hudson, *supra* note 11, at 19 (“Because some lie about their military honors, everyone becomes suspect and everyone else is a little less credible.” (quoting John D. Hutson, dean emeritus of

Thus, the Supreme Court should have upheld the Act under strict scrutiny. This declaration would not have led to a “slippery slope”⁴⁴⁹ of increasing regulation, although such a fear is common in response to any proposed speech restriction.⁴⁵⁰ Nevertheless, because the Stolen Valor Act implicated Congress’s vast military authority⁴⁵¹ and because only a relatively narrow category of speech—false claims of receiving military medals—was restricted,⁴⁵² the Act was constitutional.⁴⁵³

University of New Hampshire School of Law)); *see also supra* Part III.A (describing the negative consequences of false medal claims).

⁴⁴⁹ *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1030 (2003) (“I think the most useful definition of a slippery slope is one that covers all situations where decision A, which you might find appealing, ends up materially increasing the probability that others will bring about decision B, which you oppose.”); *see also* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 382 (1985) (“Many slippery slope claims, whether in law or in popular discourse, are wildly exaggerated.”).

⁴⁵⁰ *See* Tushnet, *supra* note 207, at 16 (“[T]he argument is that legislatures that adopt apparently well-justified bans on *particular* forms of lying such as the Stolen Valor Act will somehow become accustomed to banning lying more generally . . .”). According to Professor Lyrissa, the occurrence of a “slippery slope” is not certain even if the government were to ban, for instance, speech that denied the holocaust. Lidsky, *supra* note 310, at 1098-99 (“[T]he European experience [in prohibiting such hate speech] provides little evidence that punishment of Holocaust denial is the first step on the slippery slope to tyranny . . .”). Still, Professor Lidsky concedes that punishing holocaust denial is likely a poor decision for “pragmatic” reasons because government restriction has the effect of fueling existing conspiracy theories. *Id.* at 1099-1100. In contrast, falsely stating that one has earned a military medal is not bound up in a broader conspiracy theory—this speech does not even have a particular viewpoint. *See* text accompanying footnotes 423–27 for a discussion on the nature of the speech.

⁴⁵¹ U.S. CONST. art. I, § 8, cls. 11-14, 18.

⁴⁵² *See* Petition for Writ of Certiorari, *supra* note 6, at *27 (“The statute prohibits only a discrete category of misrepresentations of fact about the speaker himself.”).

⁴⁵³ Given the limited, military context of both the Act and any Supreme Court case holding it constitutional, Chief Judge Kozinski’s “terrifying” world of rampant lie-regulation is unlikely. *See generally Alvarez II*, 638 F.3d 666, 673 (9th Cir. 2011) (denying petition for rehearing en banc) (Kozinski, C.J., concurring) (listing examples of trivial lies potentially subject to regulation under the dissenters’ approach).

CONCLUSION

The Stolen Valor Act was both supported and attacked on a wide array of constitutional grounds. Perhaps the strong views elicited by this federal statute were not surprising. After all, advocating for or against the Act's constitutionality necessitated a debate about cherished First Amendment values and about how these values conflicted with an integral part of military life. The *United States v. Alvarez* case presented the Supreme Court with the opportunity to vindicate the Stolen Valor Act and the importance of military medals once and for all. True, many of the arguments proffered in support of the Act were not persuasive. False statements of fact do not comprise a distinct category of unprotected speech, and the Act was not sufficiently analogous to defamation or fraud statutes. Nevertheless, the Act should have passed strict scrutiny, as it was a narrowly tailored means of achieving a compelling governmental objective. Accordingly, the Supreme Court erred in striking down the Stolen Valor Act. It remains to be seen how adversely this decision will affect the rightful medal recipients of this nation.