

UNITED STATES V. ALVAREZ: WHAT RESTRICTIONS DOES THE FIRST AMENDMENT IMPOSE ON LAWMAKERS WHO WISH TO REGULATE FALSE FACTUAL SPEECH?

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INTRODUCTION

Xavier Alvarez was a newly elected member of the Three Valleys Municipal Water District Board of Directors when, during his introductory remarks at a public meeting in July of 2007, Alvarez boasted that he was a retired Marine and a recipient of the Medal of Honor.¹ Both claims were false.² Two months later, the United States Attorney for the Central District of California filed a single-count information alleging that Alvarez violated the Stolen Valor Act, codified at 18 U.S.C. § 704.³ The following year, Alvarez entered into a conditional plea agreement in which he pleaded guilty to one count of falsely claiming to have received the Congressional Medal of Honor, in violation of 18 U.S.C. § 704(b).⁴

When Congress first set out to criminalize false claims of military honors, it began by forbidding only the unauthorized replication of medals. “As originally enacted, [§] 704 criminalized the wearing, manufacture, or sale of unauthorized military awards. Congress, however, [subsequently] felt that this statute was inadequate to protect ‘the reputation and meaning of military decorations and medals.’”⁵ Passage of the Stolen Valor Act in 2006 broadened the scope of § 704 to punish pure speech. The Stolen Valor Act makes it a crime to falsely claim—either verbally or in writing—receipt of congressionally authorized military honors and service decorations.⁶ As counsel for one defendant pointed out:

The law does not require proof of fraud, or that the false statement was made in order to obtain some benefit. It does not require any showing

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1. Opening Brief for Petitioner-Appellant at 3, *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010) [hereinafter Opening Brief], *reh’g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

2. *Id.* at 3-4.

3. *Id.* at 3.

4. *Id.* Alvarez was fined \$5,000 and his sentence included 416 hours of community service at a V.A. hospital. *Divided 9th Circuit Strikes Down Stolen Valor Act*, FIRST AMENDMENT CENTER (Aug. 18, 2010), <http://www.firstamendmentcenter.com/news.aspx?id=23278> [hereinafter *Divided 9th Circuit*].

5. *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1185 (D. Colo. 2010) (citing 18 U.S.C. § 704(a) and quoting Pub. L. No. 109-437 § 2, 120 Stat. 3266, 3266 (2006)).

6. 18 U.S.C. § 704(b) (2000 & Supp. 2011).

that the statement caused reliance or was material. It does not even require that [the defendant] knew . . . his statement was false. It simply criminalizes the incorrect claim to certain military decorations in every context.⁷

False claims are punishable by a fine and/or a period of imprisonment not to exceed six months.⁸ Lying about being awarded top honors—such as the Medal of Honor—triggers an enhanced penalty of up to one year in prison.⁹

As part of his plea agreement, Alvarez expressly reserved the right to challenge the constitutionality of the Stolen Valor Act.¹⁰ A three-judge panel from the Ninth Circuit Court of Appeals heard Alvarez's challenge.¹¹ In a split decision that was released on August 17, 2010, the Ninth Circuit struck down Alvarez's criminal conviction and ruled that the Stolen Valor Act was unconstitutional because it violated the Free Speech Clause of the First Amendment.¹²

Writing for the Ninth Circuit panel majority, Judge Milan D. Smith, Jr. stressed that the Stolen Valor Act “imposes a *criminal* penalty of up to a year of imprisonment, plus a fine, for the *mere utterance or writing* of what is, or may be perceived as, a false statement of fact—without anything more.”¹³ After espousing concern that the statute would set “a precedent whereby the government may proscribe speech solely because it is a lie,” the majority held that the government must show a compelling need in order to regulate false factual speech¹⁴—just the same as it must for other content-based speech restrictions¹⁵—“unless the statute is narrowly crafted to target the type of false factual speech previously held proscribable because it is not protected by the First Amendment.”¹⁶

Stated somewhat differently, the Ninth Circuit held that restrictions on false factual speech are subject to strict scrutiny—unless the speech at issue falls into certain discrete categories that the Supreme Court previously held lie outside the

7. Motion to Dismiss Information at 2, *United States v. Strandlof*, 746 F. Supp. 2d 1183 (D. Colo. 2010) (No. 09-cr-00497-REB).

8. 18 U.S.C. § 704(b).

9. *Id.* § 704(c)-(d).

10. Opening Brief, *supra* note 1, at 3.

11. *Divided 9th Circuit*, *supra* note 4.

12. *United States v. Alvarez*, 617 F.3d 1198, 1218 (9th Cir. 2010), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

13. *Id.* at 1200. Judge Thomas Nelson was the other member of the majority. Judge Jay Bybee authored a dissenting opinion.

14. *Id.*

15. A content-based restriction is “[a] restraint on the substance of a particular type of speech. This type of restriction is presumptively invalid but can survive a constitutional challenge if it is based on a compelling state interest and its measures are narrowly drawn to accomplish that end.” BLACK’S LAW DICTIONARY: POCKET EDITION 141 (3d ed. 2006).

16. *Alvarez*, 617 F.3d at 1200.

protection afforded by the First Amendment.¹⁷ Those proscribable categories of speech include obscenity, fighting words,¹⁸ true threats,¹⁹ fraud, and illegal incitement to violence.²⁰ If a content-based restriction falls into one of the discrete categories, then the First Amendment analysis normally need proceed no further.²¹ If, on the other hand, a content-based restriction is outside the recognized exceptions to the Free Speech Clause, then the law in question is subject to First Amendment analysis.²²

The threshold issue in *United States v. Alvarez* is whether false statements of fact are a constitutionally unprotected category of speech like obscenity, fighting words, true threats, fraud, and illegal incitement to violence. The *Alvarez* majority held that the Stolen Valor Act is not completely beyond the purview of the First Amendment;²³ and for the time being, that position is clearly ascendant.²⁴

That said, the counterargument—namely, that the First Amendment does not protect false statements made knowingly and intentionally—is still worthy of thoughtful consideration.²⁵ One reason to examine the counterargument is the

17. *Id.*

18. Fighting words are those words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (footnote omitted). “Such words are presumed to play little or no part in the exposition of ideas and are, therefore, deemed to be a type of speech that falls outside the First Amendment umbrella.” ALLAN IDES & CHRISTOPHER N. MAY, *CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS* 356 (5th ed. 2010) (citing *Chaplinsky*, 315 U.S. at 572).

19. True threats are “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992)).

20. JEROME A. BARRON & C. THOMAS DIENES, *FIRST AMENDMENT LAW* 20 (4th ed. 2008).

21. *Id.* at 20-21.

22. *Id.*

23. *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010), *reh’g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

24. The Ninth Circuit is the only United States Court of Appeals that has ruled on the matter of whether the Stolen Valor Act is constitutional. *United States v. Strandlof* is now on appeal before the Tenth Circuit. David L. Hudson, Jr., *Federal Judge Upholds Stolen Valor Act*, *FIRST AMENDMENT CENTER* (Jan. 6, 2011), <http://www.firstamendmentcenter.com/analysis.aspx?id=23756>. The district court in that case ruled that the law violated the First Amendment. *United States v. Strandlof*, 746 F. Supp. 2d 1183 (D. Colo. 2010). Additionally, on January 3, 2011, Judge James P. Jones of the United States District Court for the Western District of Virginia upheld the Stolen Valor Act. Hudson, *supra*. He rejected a motion to quash an indictment challenged on First Amendment grounds. *Id.*

25. On its face, the Stolen Valor Act appears to apply even in instances where the accused does not make his false statement knowingly (i.e., in cases where the accused does not recognize that his statement is false). Such an interpretation makes the law more difficult to defend. In upholding the Stolen Valor Act, Judge Jones of the United States District Court for the Western District of Virginia interpreted the law as applying only to “outright lies” made knowingly with

simple fact that the Supreme Court has made a series of conflicting comments concerning whether false statements, by themselves, lack constitutional protection.²⁶ This fact is illustrated in Part I's discussion of seven decades of Court precedent. Another reason to examine the counterargument is because the Supreme Court recently announced that it has chosen to weigh in on the question of what restrictions the First Amendment imposes on lawmakers who wish to regulate false factual speech.²⁷

Part I of this Note further describes the Stolen Valor Act and the discrete categories of content-based speech restrictions that the Supreme Court has previously held are constitutionally unprotected. Part II examines the arguments for and against adding deliberate false statements of fact to that list of categories entirely outside the protection of the First Amendment. Because the majority in *Alvarez* found that the Stolen Valor Act is subject to First Amendment analysis, this Note also surveys the arguments for and against finding both a compelling government interest and narrow tailoring. Part III briefly examines the consequences that might result if a different court were to hold that the Stolen Valor Act does not violate the First Amendment.

I. THE STOLEN VALOR ACT AND CONTENT-BASED SPEECH RESTRICTIONS OUTSIDE THE PROTECTION AFFORDED BY THE FIRST AMENDMENT

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech"²⁸ Despite this seemingly absolute proscription, "it is well understood that the right of free speech is not absolute at all times and under all circumstances."²⁹ The Supreme Court has asserted on numerous occasions that "as a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"³⁰ However, it has long been said that the framers of the Constitution recognized from the beginning that there would be exceptions: "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."³¹ These "historic and traditional categories long

intent to deceive. Hudson, *supra* note 24.

26. Lyle Denniston, *Another Test of First Amendment*, SCOTUSBLOG (Oct. 17, 2011, 12:29 PM), <http://www.scotusblog.com/?p=129780>.

27. The federal government's petition for certiorari was granted by the Supreme Court on October 17, 2011 (just as this Note was going to press). *See id.* At the time this Note was published, oral arguments in the case of *United States v. Alvarez* (docket 11-210) had not yet been scheduled. *Id.*

28. U.S. CONST. amend. I.

29. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (footnote omitted).

30. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

31. *Chaplinsky*, 315 U.S. at 571-72.

familiar to the bar”³² include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.³³

Content-based speech restrictions are arguably the most serious type of infringement on the freedom of speech because of the concern that the force of law is being used to distort the public debate, either by suppressing those messages perceived as objectionable, or by favoring some particular messages.³⁴ Consequently, the first principle of the Free Speech Clause is that government restrictions must be content neutral; the general rule is that content-based speech restrictions are ordinarily subjected to strict scrutiny.³⁵ The various exceptions to that rule—the “historic and traditional categories long familiar to the bar”³⁶—are justified in large measure on the ground that the types of content being regulated are merely examples of so-called “low value speech.”³⁷ The central issue in *Alvarez* is whether false statements of fact are likewise of such little value that they fall outside the protection afforded by the First Amendment. It should be noted that there can be little doubt as to whether the Stolen Valor Act is a content-based speech restriction. The Act provides that:

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 . . . or both.³⁸

The Act is clearly a content-based regulation of speech since the statute takes aim at words that are about a specific subject—namely, the awarding of military medals.³⁹

On its face, the Stolen Valor Act does not require any awareness on the part of the transgressor that he has made a statement that is false.⁴⁰ The statute criminalizes any false claim of military honor, regardless of whether the defendant knew that his statement was false.⁴¹ Admittedly, a real-life scenario in

32. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991).

33. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (citations omitted).

34. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (explaining that regulations unrelated to the content of speech “pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue”).

35. *See United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

36. *See supra* note 32 and accompanying text.

37. *See BARRON & DIENES, supra* note 20, at 83.

38. 18 U.S.C. § 704(b) (2000 & Supp. 2011).

39. *United States v. Alvarez*, 617 F.3d 1198, 1202 (9th Cir. 2010), *reh’g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

40. *See* 18 U.S.C. § 704(b).

41. *See id.*

which a defendant is not cognizant of the fact that he is making a false claim appears unlikely. It is not impossible to construct a hypothetical scenario in which a defendant violates the Stolen Valor Act without knowledge that his claim is false. However, a case such as that is far more likely to appear on a law school exam than in a federal courthouse. In the real world, the vast majority of people can be expected to know whether they were awarded a military medal or decoration. As the government argued in the *Alvarez* case, “The Act would not tend to reach the innocent because it prohibits only falsity by a person about himself”⁴²

A. *The Dissent’s Position*

In cases such as *Alvarez*, the defendant’s false statements of fact are made knowingly and intentionally. They are, in other words, deliberate lies. If one accepts the notion that “the right to freedom of speech, press, assembly, and petition [are] vital to the process of discovering *truth*, through exposure to all the facts, open discussion, and testing of opinions,”⁴³ then it is not hard to see why some might argue that “restraining deceptive communication furthers rather than disrupts enlightenment of the populace—by promoting *truth*.”⁴⁴ In their defense of the Stolen Valor Act, the government and Judge Bybee (from here on, collectively referred to as the dissent) rely on this reasoning and a long line of Supreme Court cases supporting it.⁴⁵ *Chaplinsky v. New Hampshire*⁴⁶—the 1942 decision that spawned the “fighting words” doctrine—may be said to be the first case in this line, as it is usually the first case that is cited when the Supreme Court notes that some categories of speech are not protected by the First Amendment.⁴⁷ The *Chaplinsky* court observed that:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no

42. Government’s Answering Brief at 14, *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010) [hereinafter Gov’t Answering Brief], *reh’g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

43. Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 740 (1977) (emphasis added).

44. Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1108 (2006) (discussing MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT (1984)) (emphasis added).

45. Gov’t Answering Brief, *supra* note 42; *see also Alvarez*, 617 F.3d at 1218-41 (Bybee, J., dissenting).

46. 315 U.S. 568 (1942).

47. *See, e.g., United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

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.⁴⁸

In short, the *Chaplinsky* court held that inflammatory speech which might incite a violent response does not promote a meaningful discourse or contribute to the search for truth.⁴⁹ However, “[w]hile *Chaplinsky* [compiled] a variety of categories of expression that did not merit First Amendment protection, more recent Supreme Court decisions have taken a more flexible—and more imprecise—approach to categorical analysis.”⁵⁰

Chaplinsky is the traditional starting point. It is not, however, the case that does the heavy lifting when the Supreme Court wants to make the point that some categories of speech are unprotected under the First Amendment. That case is *Gertz v. Robert Welch, Inc.*⁵¹ *Gertz* is helpful because it explains the dichotomy between the First Amendment’s absolute protection of ideas and the lesser protection afforded to false factual speech.⁵² It also clearly states that false factual speech is “not worthy of constitutional protection.”⁵³

Writing for the majority, Justice Lewis Powell’s declaration of “common ground” begins with the unqualified assertion that “[u]nder the First Amendment there is no such thing as a false idea.”⁵⁴ Powell explains that “[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”⁵⁵ In the view of the *Gertz* court, false ideas and false statements are very different.⁵⁶ Unlike false ideas—which may contribute to the enlightenment function of free expression—false statements of fact have no constitutional value.⁵⁷ Quoting *Chaplinsky*, as well as the famous libel case *New York Times Co. v. Sullivan*,⁵⁸ Powell states:

Neither the intentional lie nor the careless error materially advances society’s interest in “uninhibited, robust, and wide-open” debate on public issues. 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

48. *Chaplinsky*, 315 U.S. at 572-73 (footnotes omitted).

49. *Id.* at 573.

50. BARRON & DIENES, *supra* note 20, at 20.

51. 418 U.S. 323 (1974).

52. See Varat, *supra* note 44, at 1110-11.

53. *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010) (quoting *Gertz*, 418 U.S. at 340), *reh’g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

54. *Gertz*, 418 U.S. at 339.

55. *Id.* at 339-40 (footnote omitted).

56. *Id.* at 340.

57. *Id.*

58. 376 U.S. 254, 270 (1964).

clearly outweighed by the social interest in order and morality.”⁵⁹

The distinction between false facts and false ideas is not one that is overlooked by the dissent.⁶⁰ As the prosecutors in the *Alvarez* case were quick to point out, the Stolen Valor Act targets the former rather than the latter.⁶¹ And while the government is willing to concede that the First Amendment protects false speech in some instances, it steadfastly maintains that the First Amendment does not protect false speech in instances where such speech is made with knowledge of falsity or reckless disregard of the truth.⁶² Not surprisingly, both the government and Judge Bybee cite *Gertz* and its progeny in support of their contention that “false factual speech may be proscribed without constitutional problem—or even any constitutional scrutiny.”⁶³

The dissent’s position is not that false factual speech falls neatly into one of the categorical exceptions explicitly named in *Chaplinsky*—“the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words.”⁶⁴ Rather, the dissent argues that “false speech need not fall into any of the foregoing categories in order to lack protection.”⁶⁵ The dissent does not argue that the defendant’s false claim in *Alvarez*—that he was awarded a military medal—is obscene or libelous.⁶⁶ Instead, the argument is that false factual speech, like obscene or libelous speech, has no constitutional value because it does not contribute to the enlightenment function of free expression.⁶⁷ In other words, in the dissent’s view, false factual speech is another discrete category of speech that the Supreme Court has already held is entirely outside the protection afforded by the First Amendment. The government states this plainly in its response brief,⁶⁸ and Judge Bybee offers a more expansive argument for it in his dissenting opinion.⁶⁹

Judge Bybee argues that defamation is a subset of a larger unprotected category—namely, false statements of fact.⁷⁰ Judge Bybee writes: “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

59. *Gertz*, 418 U.S. at 340 (citations omitted).

60. *United States v. Alvarez*, 617 F.3d 1198, 1220 (9th Cir. 2010) (Bybee, J., dissenting), *reh’g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

61. Gov’t Answering Brief, *supra* note 42, at 5-6.

62. *Id.*

63. *Alvarez*, 617 F.3d at 1203.

64. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (footnote omitted).

65. *See* Gov’t Answering Brief, *supra* note 42, at 12.

66. *See Alvarez*, 617 F.3d at 1221-23 (Bybee, J., dissenting).

67. *Id.*

68. Gov’t Answering Brief, *supra* note 42, at 8-12.

69. *Alvarez*, 617 F.3d at 1221-23 (Bybee, J., dissenting).

70. *Id.* at 1220.

of the First Amendment.”⁷¹ Thus, in the dissent’s view, “the general rule is that false statements of fact are not protected by the First Amendment.”⁷² The matter is made somewhat more complicated, however, by the dissent’s concession that there is an exception to Judge Bybee’s “general rule.”

Judge Bybee acknowledges that some false factual speech is protected by the First Amendment.⁷³ In its “landmark” decision in *Sullivan*, the Supreme Court held that the First Amendment protects the publication of false statements concerning public officials—where such statements are not knowingly false or made in reckless disregard of the truth.⁷⁴ Writing for the Court, Justice William Brennan explained that the First Amendment “prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁷⁵

The reason for this relatively high hurdle is concern about the potential chilling effect of defamation lawsuits.⁷⁶ The *Sullivan* Court feared that the press might exercise excessive self-censorship out of concern that public officials would sue to recover damages for false statements.⁷⁷ With this in mind, the Court in *Sullivan* held that the First Amendment protects some false factual speech in order not to stifle constitutionally valuable speech that is deemed necessary for democratic governance.⁷⁸ In the Court’s words, the First Amendment represents “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁷⁹

The dissent concedes that there is a need to protect untrue statements that are not knowingly false, but it draws the line at deliberate false statements of fact noting that defamatory statements made with actual malice are not protected under the First Amendment.⁸⁰ Therefore, in the dissent’s view, the general rule is that false statements of fact are not protected by the First Amendment, but there

71. *Id.* (citation omitted).

72. *Id.* (footnote omitted).

73. *Id.* at 1220-21.

74. See IDES & MAY, *supra* note 18, at 358-59. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was a famous libel case which established the actual malice standard. Under this standard, a public official can recover damages only if he proves by clear and convincing evidence that a false statement was made with knowledge that it was: (1) false or (2) made with reckless disregard of whether the statement was true or false. *Id.* at 279-80. *Sullivan* is an important decision supporting the freedom of the press.

75. *Sullivan*, 376 U.S. at 279-80.

76. IDES & MAY, *supra* note 18, at 358-59.

77. *Sullivan*, 376 U.S. at 271-72, 279.

78. See IDES & MAY, *supra* note 18, at 358-59.

79. *Sullivan*, 376 U.S. at 270.

80. *United States v. Alvarez*, 617 F.3d 1198, 1220-24 (9th Cir. 2010) (Bybee, J., dissenting), *reh’g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

is an exception for some false factual speech that is not deliberate.⁸¹

Here again, the *Gertz* Court provides helpful language. Writing for the majority, Justice Powell explained that “[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate.”⁸² Because punishment of error “runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press,”⁸³ it is sometimes necessary to protect false factual speech in order to give the freedoms of speech and press the “breathing space that they need to survive.”⁸⁴ Justice Powell summarized the argument in this way: “The First Amendment requires that we protect some falsehood in order to protect speech that matters.”⁸⁵

To recap, in the dissent’s view, the general rule should be that false statements of fact are not protected by the First Amendment, but there is an exception for some false factual speech—namely, that which is not deliberate.⁸⁶ Interestingly, Judge Bybee also acknowledged that there is an exception to the exception.⁸⁷ Though it has no direct bearing on the *Alvarez* case, Judge Bybee made room in his dissent for “an important caveat” to the rule that deliberate false statements of fact are not protected by the First Amendment⁸⁸:

The [Supreme] Court has recognized that some statements that, literally read, are technically “knowingly false” may be “no more than rhetorical hyperbole” . . . such as satire or fiction. In *Hustler [Magazine, Inc. v. Falwell]*, the Supreme Court held that the First Amendment protects defamatory statements about a public figure “that could not reasonably have been interpreted as stating actual facts about the public figure involved.”⁸⁹

Judge Bybee explains that the rationale for protecting deliberate false statements of facts that take the form of satire (and its equivalent) is very much like the basis for protecting some false factual speech without actual malice.⁹⁰ Quoting *Milkovich v. Lorain Journal Co.*, Judge Bybee asserts that such protection “provides assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation.”⁹¹ Judge Bybee concludes:

81. *Id.* at 1218-21.

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

83. *Id.*

84. *Sullivan*, 376 U.S. at 272 (citation omitted).

85. *Gertz*, 418 U.S. at 341.

86. *Alvarez*, 617 F.3d at 1218-21 (Bybee, J., dissenting).

87. *Id.* at 1222.

88. *Id.*

89. *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

90. *Id.* at 1222-23.

91. *Id.* at 1222 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

In a sense, the Court has established that “lies” made in the context of satire and imaginative expression are not really lies at all and perhaps not really even statements of “fact,” because no reasonable listener could actually believe them to be stating actual facts

. . . In sum, the Supreme Court’s jurisprudence on false statements of fact involves a general rule with certain exceptions and exceptions-to-exceptions.⁹²

Judge Bybee could have characterized his “exceptions-to-exceptions” as definitional details offered merely to clarify the general rule. His decision to approach the matter differently was fortuitous in at least once sense, however. This is the case because the “exceptions-to-exceptions” framework puts the differences between the court’s opinion and Judge Bybee’s dissenting opinion in more stark relief. As the next section makes clear, the majority and the dissent have very different ideas about what the general rule should be when assessing the extent to which the First Amendment imposes restrictions on lawmakers who wish to regulate false factual speech.

B. *The Majority’s Position*

The “marketplace of ideas” is a concept widely used as a rationale for freedom of speech.⁹³ The concept draws on both the legitimacy and the explanatory power of liberal economic theory. The underlying premise is the belief that free market theories are as applicable to ideas as they are to traditional economic categories like capital and labor.⁹⁴ As explained by Justice Oliver Wendell Holmes, the marketplace of ideas theory is the notion that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁹⁵ According to this theory, authoritatively imposed truth is inferior to truth discovered through competition with falsehood.⁹⁶

To at least some degree, both the dissent and the majority pay homage to the notion of a marketplace of ideas. The dissent pays tribute to the marketplace of ideas theory in an implicit fashion—through its discussion of the *Sullivan* decision, and through its related explanation of the potential chilling effect of defamation lawsuits.⁹⁷ The Ninth Circuit panel majority, on the other hand, goes

92. *Id.*

93. *See, e.g.,* *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 896 (2010); *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1301 (1993); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978).

94. *See* JEROME A. BARRON & C. THOMAS DIENES, *CONSTITUTIONAL LAW* 40 (8th ed. 2010) (“Government must not prevent the free exchange of ideas in the marketplace. Free competition is the best test of an idea’s worth.”).

95. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion).

96. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 6 (1984).

97. *See supra* text accompanying notes 76-81.

further—explicitly endorsing the marketplace of ideas theory, and even going so far as to quote John Stuart Mill’s treatise *On Liberty* (via a footnote in the Supreme Court’s decision in *Sullivan*).⁹⁸

The British philosopher John Stuart Mill is strongly associated with the right to freedom of speech—that is, the freedom to communicate ideas and opinions without government intervention.⁹⁹ He is also widely recognized as a leading advocate of the marketplace of ideas theory.¹⁰⁰ In his writings, Mill was highly critical of government censorship.¹⁰¹ He theorized that repression inhibits the truth in one of three ways:

[F]irst, if the censored opinion contains truth, its silencing will lessen the chance of our discovering that truth; secondly, if the conflicting opinions each contain part of the truth, the clash between them is the only method of discovering the contribution of each toward the whole of the truth; finally, even if the censored view is wholly false and the upheld opinion wholly true, challenging the accepted opinion must be allowed if people are to hold that accepted view as something other than dogma and prejudice; if they do not, its meaning will be lost or enfeebled.¹⁰²

Consequently, Mill was of the opinion that “those who considered clashes among competing views unnecessary wrongly presumed the infallibility of their own opinions.”¹⁰³ Along these same lines, the majority in *Alvarez* wrote, “the right to speak and write whatever one chooses—including, to some degree, worthless, offensive, and demonstrable untruths—without cowering in fear of a powerful government is, in our view, an essential component of the protection afforded by the First Amendment.”¹⁰⁴

Mindful of the valuable role that the marketplace of ideas plays in democratic society, the majority in *Alvarez* surveyed the Supreme Court’s decisions concerning the First Amendment and reached a very different conclusion from the dissent.¹⁰⁵ Where the dissent found support for a general rule that false factual speech is constitutionally unprotected—with “certain exceptions and exceptions-

98. *United States v. Alvarez*, 617 F.3d 1198, 1214 (9th Cir. 2010) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (quoting JOHN STUART MILL, *ON LIBERTY* 15 (Oxford: Blackwell, 1947))), *reh’g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

99. Kent Greenawalt, *Books*, 69 COLUM. L. REV. 920, 920 (1969) (reviewing AMERICAN CIVIL LIBERTIES UNION, *THE PRICE OF LIBERTY: PERSPECTIVES ON CIVIL LIBERTIES BY MEMBERS OF THE ACLU* (Alan Reitman ed., 1968)).

100. *Id.*

101. *See generally*, JOHN STUART MILL, *ON LIBERTY* 91-113 (Currin V. Shields ed., Liberal Arts Press, Inc. 1956).

102. Ingber, *supra* note 96, at 6.

103. *Id.*

104. *United States v. Alvarez*, 617 F.3d 1198, 1205 (9th Cir. 2010), *reh’g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

105. *Id.* at 1200.

to-exceptions”¹⁰⁶—the majority found support for its holding that “[t]he fundamental rule is found in the First Amendment itself.”¹⁰⁷ In the majority’s view, all government restrictions on speech are initially presumed to be covered by the First Amendment.

In other words, we presumptively protect *all* speech against government interference, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection (in this case, for some reason other than the mere fact that it is a lie).¹⁰⁸

Both sides think that the other has confused the general rule with the exception. As the majority explains it: “The dissent accuses us of confusing rules with exceptions, but with due respect, we disagree with [Judge Bybee’s] postulate that we must commence our constitutional analysis with the understanding that all false factual speech is unprotected.”¹⁰⁹ Instead, the majority holds that all speech—including knowingly false statements—is presumptively protected by the First Amendment in order to ensure that the marketplace of ideas continues to function properly.

Like the dissent, the majority finds that *Gertz* is a helpful case from which to draw material for a discussion of the exceptions to a general rule; but not surprisingly, the majority disagrees with the dissent’s interpretation of the case.¹¹⁰ While the dissent relies on *Gertz* and its progeny to support the absolute proposition that “the erroneous statement of fact is not worthy of constitutional protection,” the majority views the holding more narrowly.¹¹¹ The majority asserts that “*Gertz*’s statement that false factual speech is unprotected, considered in isolation, omits discussion of essential constitutional qualifications on that proposition.”¹¹²

To support its interpretation, the majority emphasizes the conditional language in *Gertz* rather than the unqualified phrases that the dissent quotes in isolation.¹¹³ The majority points out that the *Gertz* court recognized the inevitability of false factual speech and the need to protect it, not for its own sake, but rather in order to “protect speech that matters.”¹¹⁴ Just as importantly, the majority stresses that “[t]o distinguish between the falsehood related to a matter of public concern that is protected and that which is unprotected, *Gertz* held that there must be an element of fault.”¹¹⁵ Judge Smith writes:

106. *Id.* at 1222 (Bybee, J., dissenting).

107. *Id.* at 1205 (majority opinion).

108. *Id.*

109. *Id.*

110. *Id.* at 1202-03.

111. *Id.* at 1202.

112. *Id.* at 1203.

113. *Id.* at 1206.

114. *Id.* (citation omitted).

115. *Id.* (citation omitted).

The First Amendment is concerned with preventing punishment of innocent mistakes because the prospect of punishment for such speech “runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.” Thus, many false factual statements are shielded by the First Amendment *even under Gertz*, regardless of how valueless they may be.¹¹⁶

In addition to *Gertz*—and the long line of cases that followed it—the majority also relies heavily on *Sullivan* and its progeny to buttress its conclusion that in many circumstances the First Amendment does in fact protect false statements.¹¹⁷ In *Sullivan*, the Court held that actual malice (i.e., proof of the requisite state of mind) must be proven even in instances where officials seek to recover damages for statements of fact that are shown to be false.¹¹⁸ In other words, the “actual malice standard” established in *Sullivan* provides a qualified privilege to publish.¹¹⁹ Likewise, in *Garrison v. Louisiana*, the Court held that “calculated falsehood” must be proven.¹²⁰ In these and other cases involving defamation, false statements of fact alone are not enough to deny constitutional protection. Instead, there must be “additional elements that serve to narrow what speech may be punished.”¹²¹

All of the cases that the dissent cites to support its inverted general rule are defamation or commercial-speech cases.¹²² But as the majority interprets these decisions, they are not evidence that false statements are simply outside the protection of the First Amendment. Rather, the majority points out that in all of these cases, false factual speech may be proscribed only when other essential constitutional qualifications are also present.¹²³ In other words, all of the Court’s past assertions that false factual speech is unprotected relied on the existence of a false statement *plus* an established and proven injury “either to the reputation or other protected interests of the victim or to the rights of consumers to be free from false or deceptive advertising.”¹²⁴

It is important to understand that in the majority’s view, the cases cited by the dissent are not anomalous. None of the constitutionally unprotected categories of speech (e.g., fighting words, true threats, fraud, and illegal incitement to violence) involve false statements proscribed merely because they are false,

116. *Id.* at 1207 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

117. *Id.* at 1206-07.

118. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

119. *See* *IDES & MAY*, *supra* note 18, at 358-59.

120. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

121. *Rickhoff v. Willing*, No. SA-10-CA-140-XR, 2010 U.S. Dist. LEXIS 96557, at *18 (W.D. Tex. Sept. 14, 2010), *summary judgment granted in part, case dismissed by* 2010 U.S. Dist. LEXIS 109607 (W.D. Tex. Oct. 14, 2010).

122. *Alvarez*, 617 F.3d at 1218-22 (Bybee, J., dissenting).

123. *Rickhoff*, 2010 U.S. Dist. LEXIS 96557, at *17-19 & n.4.

124. Answer Brief at 24, *United States v. Strandlof*, No. 09-cr-00497-REB (10th Cir. argued May 12, 2011) [hereinafter Answer Brief].

without anything more. Rather, in the majority's own words: "All previous circumstances in which lies have been found proscribable involve not just knowing falsity, but [also] additional elements that serve to narrow what speech may be punished."¹²⁵

Having shown that the long line of cases cited by the dissent do not stand for the simple rule that false factual speech is constitutionally unprotected, the majority next considers whether the Stolen Valor Act fits into the defamation category.¹²⁶ To be fair, the dissent never claims that the Stolen Valor Act belongs in the defamation category, and both sides recognize that the category is one of a list that the Supreme Court previously articulated lie outside the protection afforded by the First Amendment.¹²⁷ The majority proceeds with this analysis, therefore, simply for pedagogical reasons.

Analyzing the Stolen Valor Act in light of Court precedent, the majority quickly concludes that the Act does not fit this particular exception because, as previously noted, § 704(b) "does not require a malicious violation, nor does it contain any other requirement or element of scienter (collectively, a scienter requirement)."¹²⁸ The majority goes on to note, however, that a scienter requirement would not be enough to save the statute.¹²⁹ This is the case because the Stolen Valor Act also includes no requirement that the accused speech or writing proximately damage the reputation and meaning of a decoration or medal.¹³⁰

The majority concludes that all of the Court's previous defamation decisions demonstrate that in the absence of the requisite state of mind on the part of speaker/writer, government restrictions on speech are initially presumed to be covered by the First Amendment. As the majority points out:

Even laws about perjury or fraudulent administrative filings—arguably the purest regulations of false statements of fact—require at a minimum that the misrepresentation be willful, material, and uttered under circumstances in which the misrepresentation is designed to cause an injury, either to the proper functioning of government (when one is under an affirmative obligation of honesty) or to the government's or a private person's economic interests.¹³¹

Applying this logic to the Stolen Valor Act, the Ninth Circuit panel majority holds that because the Act does not require proof of fraud or evidence that the

125. *Alvarez*, 617 F.3d at 1200.

126. *Id.*

127. *See id.* at 1202 (majority opinion), 1220 (Bybee, J., dissenting).

128. *Id.* at 1209. Scienter is defined as "[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act's having been done knowingly, esp. as a ground for civil damages or criminal punishment." BLACK'S LAW DICTIONARY: POCKET EDITION, *supra* note 15, at 635.

129. *Alvarez*, 617 F.3d at 1209.

130. *Id.*

131. *Id.* at 1211 (citation omitted).

false claim was made in order to obtain some benefit, “its reach is not limited to the very narrow category of unprotected speech identified in [*Sullivan*] and its progeny.”¹³² To be clear, the dissent posits that defamation is but a subset of a larger unprotected category—namely, false statements of fact—but all of its arguments are drawn from defamation or commercial-speech cases.¹³³

In the end, while both sides pay homage to the notion of a marketplace of ideas—only the majority is willing to follow the concept to its logical conclusion. Where the majority views the right to speak and write knowingly false statements as an essential component of the protection afforded by the First Amendment, the dissent believes the inverse is true. It asserts that the “protection of lies is not necessary to promote an uninhibited marketplace of ideas.”¹³⁴ More specifically, in the dissent’s view, the Stolen Valor Act does not inhibit open debate on matters essential to the people’s ability to actively participate in governing.¹³⁵ This is the case from the dissent’s perspective because “protection of false claims . . . is not necessary to a free press, to free political expression, or otherwise to promote the marketplace of ideas.”¹³⁶ From the dissent’s perspective, falsely claiming receipt of military honors can never be equated with an attempt to persuade others to adopt a viewpoint on a matter of public concern.¹³⁷

At first blush, the dissent’s arguments sound persuasive. Knowingly false statements do not engender a lot of sympathy until one remembers Mill’s warning that repression inhibits the truth even if the censored view is wholly false. Because falsehood spurs the search for truth, knowingly false statements are presumptively protected by the First Amendment in order to ensure that the marketplace of ideas continues to function properly.

II. THE APPLICATION OF STRICT SCRUTINY

The threshold question in *Alvarez* was whether the First Amendment protects false factual speech, and if so, why. “Having concluded that the [Stolen Valor] Act does not fit within the traditional categories of speech excluded from First Amendment protection,” the Ninth Circuit panel majority held that that Act’s constitutionality had to be measured by an ad hoc balancing test to determine whether the government could prove that the law was narrowly tailored to achieve a compelling state interest.¹³⁸ The strict scrutiny test should be familiar to most readers, but for the uninitiated it should suffice to say that the test has both an ends and a means component.¹³⁹ The end that the restriction seeks to

132. *Rickert v. Wash. Pub. Disclosure Comm’n*, 168 P.3d 826, 829 (Wash. 2007).

133. *Alvarez*, 617 F.3d at 1218-22 (Bybee, J., dissenting).

134. Gov’t Answering Brief, *supra* note 42, at 11.

135. *See id.*

136. *Id.* at 12.

137. *See id.* at 11-12.

138. *Alvarez*, 617 F.3d at 1215-16.

139. *See* WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 345 (4th ed. 2006); IDES & MAY, *supra* note 18, at 83-86.

bring about must be very important, and the means that the government chooses to employ to achieve that end “must be one that involves the least possible burden.”¹⁴⁰

A. Compelling Government Interest

In this case, there is some question as to what exactly the Stolen Valor Act was designed to achieve. As originally enacted, the law criminalized the wearing, manufacture, or sale of unauthorized military awards, but not false verbal and written claims of having received military honors.¹⁴¹ Passage of the Stolen Valor Act in 2006 broadened the scope of § 704 to punish pure speech—that is to say, § 704 now punishes false statements merely because they are false, without anything more.¹⁴² According to the legislative history, Congress felt that the original language was inadequate to protect “the reputation and meaning of military decorations and medals.”¹⁴³ Congress made the following findings:

- (1) Fraudulent claims surrounding the receipt of the Medal of Honor, the distinguished-service cross, the Navy cross, the Air Force cross, the Purple Heart, and other decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.
- (2) Federal law enforcement officers have limited ability to prosecute fraudulent claims of receipt of military decorations and medals.
- (3) Legislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals.¹⁴⁴

According to the record, the clear purpose of the Stolen Valor Act is the protection of the reputation and meaning of the military decorations and medals themselves, rather than the reputation of the men and women upon whom these honors are bestowed. The issue has been framed somewhat differently, however, by some proponents of the Stolen Valor Act. In the Government’s Answering Brief, U.S. Attorney Thomas P. O’Brian argues that the Stolen Valor Act serves the state’s interest in “safeguarding the honor of the nation’s war heroes.”¹⁴⁵ In the government’s words:

War heroes make up an important part of our national treasure. Protecting that treasure includes protecting the worth and value of the nation’s highest military award. That award, given to a handful of men and one woman over the years, is a national symbol of heroism and self-

140. BURNHAM, *supra* note 139, at 345.

141. *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1185 (D. Colo. 2010).

142. *See id.* at 1185-86.

143. Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266, 3266 (2006).

144. *Id.*

145. Gov’t Answering Brief, *supra* note 42, at 6.

sacrifice for the common good and the values upon which this country was founded. Congress can and should protect its meaning and worth from erosion by false claims.¹⁴⁶

It would seem, therefore, that while the reputation and meaning of the decorations and medals are ostensibly the subject of the Stolen Valor Act, it can be argued that protecting them is but an indirect means of shielding the men and women who have been awarded these honors. John Salazar, a Democratic Congressman from Colorado and the bill's author, made essentially the same point when he defended the Stolen Valor Act following the Ninth Circuit's *Alvarez* decision in 2010. Representative Salazar was quoted as saying: "You go out and you sacrifice and you earn these awards because of heroism. If somebody comes and tries to act like a hero, it kind of degrades what they did. It's defending their honor, as I see it."¹⁴⁷

Protecting the reputation and meaning of the decorations and medals may have a second derivative purpose as well. According to the government, the stated interest is also a factor motivating the performance of the men and women of the U.S. Armed Forces.¹⁴⁸ In other words, "[p]rotection of the meaning and worth of military honors . . . is important to encourage heroism."¹⁴⁹ In summary, the stated goal of protecting "the reputation and meaning of military decorations and medals" is thought to serve two purposes derived from the stated goal. First, protection of the reputation and meaning of the decorations and medals upholds the honor of the heroes who earn them. Second, protection of the meaning and worth of military honors encourages heroism.

While they disagreed on many things, the three judges of the panel that heard *Alvarez* agreed that the Stolen Valor Act serves a compelling state interest.¹⁵⁰ Writing for the majority, Judge Smith concedes: "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."¹⁵¹ This has not stopped others, however, from questioning whether the government can prove the existence of a compelling state interest. UCLA law professor Eugene Volokh has questioned whether the false claims covered by the Stolen Valor Act harm genuine heroes—and by extension, he questions whether protecting the meaning and worth of military honors is necessary to encourage

146. *Id.* at 18-19.

147. Dan Elliott, *Law Punishing Fake Heroes May Go to Supreme Court*, ABC NEWS (Oct. 11, 2010), <http://abcnews.go.com/US/wireStory?id=11847574> [hereinafter, *Law Punishing Fake Heroes*].

148. *United States v. Alvarez*, 617 F.3d 1198, 1216 (9th Cir. 2010), *reh'g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210); Gov't Answering Brief, *supra* note 42, at 19.

149. Gov't Answering Brief, *supra* note 42, at 19.

150. *Alvarez*, 617 F.3d at 1216.

151. *Id.*

heroism.¹⁵² In an interview with the Associated Press, Volokh said: “I don’t think that anybody’s going to stop being a brave soldier, or be a less brave soldier, or have less respect for a brave soldier, because some number of people lie about it.”¹⁵³

Judge Robert E. Blackburn of the United States District Court for the District of Colorado reached a similar conclusion in a case that is currently before the Tenth Circuit Court of Appeals.¹⁵⁴ In the case of *United States v. Strandlof*, the defendant was charged with falsely claiming to have been awarded a Purple Heart and a Silver Star.¹⁵⁵ In reply to an amicus brief of the Rutherford Institute, the government filed a response suggesting that “soldiers may well lose incentive to risk their lives” in order to earn medals such as those falsely claimed by the defendant.¹⁵⁶ In his order granting the defendant’s motion to dismiss the information, Judge Blackburn wrote:

This wholly unsubstantiated assertion is, frankly, shocking, and indeed, unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor. To suggest that the battlefield heroism of our servicemen and women is motivated in any way, let alone in a compelling way, by considerations of whether a medal may be awarded simply defies my comprehension. Indeed, the qualities of character that the medals recognize specifically refute the notion that any such motivation is at play. I find it incredible to suggest that, in the heat of battle, our servicemen and women stop to consider whether they will be awarded a medal before deciding how to respond to an emerging crisis. That is antithetical to the nature of their training, and of their characters.¹⁵⁷

Judge Blackburn also rejected the stated goal of protecting the reputation and meaning of military decorations and medals.¹⁵⁸ Blackburn noted that courts have struck down restrictions on speech where the compelling state interest proffered by the government is merely symbolic:

Clearly, the Act is intended to preserve the symbolic significance of military medals, but the question whether such an interest is compelling is not at all as manifest as the government’s *ipse dixit* implies. Although the analogy is not completely on all fours, I find the Supreme Court’s

152. Nathan Koppel, *Legal Battle Over Stolen Valor Act Heats Up*, WALL ST. J. L. BLOG (Oct. 11, 2010, 11:13 AM), <http://blogs.wsj.com/law/2010/10/11/legal-battle-over-stolen-valor-act-heats-up/> [hereinafter *Legal Battle Over Stolen Valor Act*].

153. *Id.*

154. *See United States v. Strandlof*, 746 F. Supp. 2d 1183 (D. Colo. 2010).

155. *Id.* at 1185.

156. *Id.* at 1190.

157. *Id.* at 1190-91.

158. *Id.* at 1189-91.

decision in *Texas v. Johnson* (S. Ct. 1989), highly instructive.¹⁵⁹

In *Johnson*, the defendant was convicted under a state statute for burning a U.S. flag.¹⁶⁰ Texas phrased its interest as “preserving the flag as a symbol of nationhood and national unity.”¹⁶¹ Because the Supreme Court found that Texas’s interest was directly related to the expressive element of the restricted conduct (i.e., because the harm Texas sought to combat “blossom[s] only when a person’s treatment of the flag communicates some message”),¹⁶² the Court concluded that the law was content-based, and subsequently, that the State’s interest was insufficiently compelling to withstand First Amendment scrutiny.¹⁶³ Likewise, the Stolen Valor Act is a content-based speech restriction with the express purpose of preserving symbolic meaning; and in Judge Blackburn’s view, it too is insufficiently compelling to withstand First Amendment scrutiny.¹⁶⁴

B. Narrow Tailoring

The trial court’s decision in *Strandlof* shows that the federal government’s efforts to prove the existence of a compelling state interest are not invulnerable to attack—even after the Ninth Circuit’s concession on this point. But that is not the real problem for proponents of the Stolen Valor Act. As is so often the case when strict scrutiny is applied, the more serious hurdle is the test for narrow tailoring.

It can be difficult to prove that there is not a less restrictive alternative that serves the government’s purpose. Often, the best the government’s lawyers can hope to do is undermine the alternatives that are suggested by the other side. In the Government’s Answering Brief in the *Alvarez* case, U.S. Attorney O’Brian simply asserts that the Stolen Valor Act is “as narrowly tailored as possible to prevent false statements about military medals and decorations.”¹⁶⁵ Judge Bybee, for his part, all but ignores the matter after concluding that the Stolen Valor Act is not subject to First Amendment protection.¹⁶⁶

Several arguments support the assertion that the Stolen Valor Act is not narrowly tailored. Writing for the majority, Judge Smith returns to the concept of a marketplace of ideas as he notes that “Alvarez’s lie, deliberate and despicable as it may have been, did not escape notice and correction in the marketplace.”¹⁶⁷ Thus, one arguably less restrictive alternative to this particular content-based

159. *Id.* at 1189 (citation omitted).

160. *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

161. *Id.* at 413.

162. *Id.* at 410.

163. *Strandlof*, 746 F. Supp. 2d at 1189.

164. *Id.* at 1190-92.

165. Gov’t Answering Brief, *supra* note 42, at 21.

166. *United States v. Alvarez*, 617 F.3d 1198, 1218-41 (9th Cir. 2010) (Bybee, J., dissenting), *reh’g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

167. *Id.* at 1216 (majority opinion).

speech restriction is simply “more speech.”¹⁶⁸

Ultimately, the majority finds that the Stolen Valor Act is not narrowly tailored for precisely this reason.¹⁶⁹ It concludes that the law’s intended purpose—namely, to honor and motivate the members of the armed services—can be accomplished without restricting speech. Judge Smith writes:

[I]t is speculative at best to conclude that criminally-punishing lies about having received Congressionally-awarded medals is the best and only way to ensure the integrity of such medals The greatest damage done seems to be to the reputations of the liars themselves Further, even assuming that there is general harm to the meaning of military honors caused by numerous imposters, other means exist to achieve the interest of stopping such fraud, such as by using *more* speech, or redrafting the Act to target actual impersonation or fraud.¹⁷⁰

A strong case can be made for the notion that there was little need for the Stolen Valor Act in an environment where false claims of military honors already drew the ire of the general public. This much is evident from the media coverage that these cases generate. Professor Jonathan Turley, a constitutional scholar at George Washington University School of Law, asserts that the Stolen Valor Act “answers no real legal need and was written merely for political reasons.”¹⁷¹ Turley states that: “There’s already a considerable deterrent for people who are engaged in this kind of conduct.”¹⁷² If public attention is generally enough to curb the sort of behavior where fraud charges are not available, then the restrictions in § 704(b) are not the least restrictive alternative that might serve the government’s purpose.

A related, but perhaps simpler argument, is to suggest that the previous version of § 704 (i.e., the existing law before the passage of the Stolen Valor Act) was already adequate to protect the reputation and meaning of military decorations and medals. This argument dovetails nicely with the fact that existing fraud laws cover cases where false claims are made in order to obtain some benefit. As Professor Turley points out, “Many of [the] people [who make false claims] are charged with fraud.”¹⁷³ With this in mind, it is not hard to see why some constitutional scholars contend that the Stolen Valor Act is simply redundant.

It is also worth noting that in enacting the Stolen Valor Act, Congress overlooked a twenty-first century solution to the problem it sought to address. Julie Hilden, a First Amendment scholar and media legal commentator, has suggested another less restrictive alternative that serves the government’s purpose. She argues that the Stolen Valor Act is not narrowly tailored because

168. *Id.*

169. *Id.* at 1216-17.

170. *Id.* at 1217 (citation omitted).

171. *Legal Battle Over Stolen Valor Act*, *supra* note 152.

172. *Id.*

173. *Id.*

a “consolidated, searchable online government database of the names and ages of all true U.S. medal recipients” could support private efforts to establish the truth¹⁷⁴:

Until the government creates such a database . . . it is hard to credit its claim that it needs to invoke the criminal law to punish medal liars. The government should have started with the easy online-database solution, and then asked for the [Stolen Valor Act] solution only if it proved truly necessary.¹⁷⁵

Hilden’s proposal is not just less restrictive, it is also relatively simple to implement. After all, the government knows who has been awarded military honors, and it already publishes a list of those awarded the Congressional Medal of Honor.¹⁷⁶

At a time when the number of Internet-enabled smartphones and tablet computers is growing rapidly,¹⁷⁷ the appeal of Hilden’s proposal is readily apparent. If an online database of medal winners was available, skeptical audience members at future public meetings could verify statements like the ones Alvarez made on the spot. The availability and use of such a database would presumably deter most people from improperly appropriating society’s accolades by way of deceit; but even where the underserving were not initially deterred, the ire of the general public would serve the government’s purpose equally as well as, if not more effectively than, the Stolen Valor Act.

The fact that it is so easy to identify less restrictive alternatives to the Stolen Valor Act lends credibility to Turley’s assertion that the statute was written primarily for political reasons. As defense counsel in a similar case explained, “[i]n all likelihood, the Act was actually born of Congress’s disgust at people publicly claiming entitlement to military medals they have not earned.”¹⁷⁸ What Congress and supporters of the Stolen Valor Act appear to have overlooked, however, is the fact that the Supreme Court has unequivocally held that “[t]he fact that society may find speech offensive is not a sufficient reason for

174. Julie Hilden, *Litigating the Stolen Valor Act: Do False Claims of Heroism in Battle Harm Genuine Heroes?*, FINDLAW LEGAL COMMENTARY (Nov. 22, 2010), <http://writ.news.findlaw.com/hilden/20101122.html>.

175. *Id.*

176. See U.S. Army Ctr. of Military History, *Medal of Honor*, U.S. ARMY (Dec. 3, 2010), <http://www.history.army.mil/moh.html>.

177. See Paul Miller, Combined Sales of Smartphones and Tablets to Surpass the Humble PC in 18 Months, Says IDC, ENGADGET (Dec. 7, 2010, 12:44 PM), <http://www.engadget.com/2010/12/07/combined-sales-of-smartphones-and-tablets-to-surpass-the-humble/>; Lance Whitney, *Cell Phone, Smartphone Sales Surge*, CNET NEWS (May 19, 2010, 10:01 AM), http://news.cnet.com/8301-1035_3-20005359-94.html.

178. Answer Brief, *supra* note 124 at 60.

suppressing it.”¹⁷⁹ Recent decisions like *United States v. Stevens*¹⁸⁰ and *Snyder v. Phelps*¹⁸¹ suggest that the current Supreme Court is not likely to reverse direction in the event that the *Alvarez* decision reaches the Court, but a discussion of this case would not be complete without briefly considering the potential consequences of a decision to uphold the Stolen Valor Act.

III. CONSEQUENCES AND CONCLUSIONS

The Ninth Circuit’s decision in *Alvarez* has already garnered the attention of constitutional scholars.¹⁸² It has also attracted a fair amount of attention in the popular media¹⁸³—including a significant amount of negative commentary.¹⁸⁴ The fact that the *Alvarez* decision generated consternation in some quarters should come as no surprise. After all, the same circumstances that gave rise to the Stolen Valor Act in 2005 (i.e., shooting wars abroad and cultural wars at home)¹⁸⁵ are still largely a factor in 2011.

Arguably, what should concern society most is not the fate of the Stolen Valor Act, but rather, as the Ninth Circuit panel majority warned, the precedent the Act might establish were it to survive the current constitutional challenge. The majority cautions:

[I]f the Act is constitutional under the analysis proffered by Judge Bybee, then there would be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway. The sad fact is, most people lie about some aspects of their lives from time to time. Perhaps, in context, many of these lies are within the government's legitimate reach. But the government cannot decide that some lies may not be told without a reviewing court’s undertaking a thoughtful analysis of the constitutional

179. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988); *see also* *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 396 (1992) (striking down regulation on “reprehensible” speech).

180. 130 S. Ct. 1577 (2010) (holding that a statute criminalizing the sale of videos depicting animal cruelty violates the First Amendment).

181. 131 S. Ct. 1207 (2011) (concluding that funeral protestors’ statements were in this case entitled to First Amendment protection).

182. *See, e.g.*, Hilden, *supra* note 174; Ken Paulson, *The Truth about Lies and the First Amendment*, FIRST AMENDMENT CTR. (Sept. 9, 2010), <http://www.firstamendmentcenter.com/commentary.aspx?id=23355>.

183. *See, e.g.*, *Law Punishing Fake Heroes*, *supra* note 147; *Legal Battle Over Stolen Valor Act*, *supra* note 152.

184. *Id.*

185. At the time the author was writing this Note, the United States had combat troops fighting wars in Afghanistan and Iraq; the two houses of Congress were bitterly divided; the Tea Party movement was in ascendance within the Republican Party.

concerns raised by such government interference with speech.¹⁸⁶

As this excerpt makes clear, the ways in which people lie—and the matters about which they lie—are virtually endless. Xavier Alvarez is a perfect example. His imagination was not limited to stories about military heroics. In his imagination, Alvarez also had careers as a hockey player for the Detroit Redwings and as a police officer.¹⁸⁷ He also claimed to have “been secretly married to a Mexican starlet.”¹⁸⁸

One would be hard-pressed to find a less sympathetic character on which to base a case against the Stolen Valor Act. Alvarez’s behavior is so disturbing that it is almost comical. The majority describes his penchant for deliberate lies this way: “Alvarez makes a hobby of lying about himself to make people think he is ‘a psycho from the mental ward with Rambo stories.’”¹⁸⁹ In short, Alvarez can be safely labeled a pathological liar.

Because of the extreme nature of Alvarez’s lies, it is possible to feel detached both from Alvarez’s predicament, and the legal implications should the Ninth Circuit’s decision be overturned. Many people are guilty of embellishing at a high school reunion, exaggerating during a conversation at a bar, or posting misleading statements and photos online.¹⁹⁰ But because most of those people do not see themselves as having crossed the same line that Alvarez transgressed, they likely assume that government intervention in their lives/lies is extremely unlikely. Such complacency is unwise. Past efforts to enact content-based speech restrictions illustrate that, even when such laws are targeted at minority expression, in aggregate, they can potentially impinge on the breathing space that is essential to the open debate that makes possible the participatory democracy shared by all. In short, content-based speech restrictions should be everybody’s concern.

With regard to the *Alvarez* case, a decision to uphold the Stolen Valor Act would significantly enlarge the scope of the categorical exceptions to the First Amendment.¹⁹¹ Were the Supreme Court to reverse the Ninth Circuit Court of Appeals decision, the states and the federal government would arguably be free to restrict most false factual speech simply because a statement of fact was known to be untrue. As Julie Hilden (the First Amendment scholar whose idea for an online database was discussed earlier) warns, “[t]he specter of the government’s defining what is truth and what is falsity in marginal cases . . . is a troubling one.”¹⁹²

To understand what is potentially at stake in this case, it is helpful to consider

186. *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010), *reh’g denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, 2011 WL 3626544 (U.S. Oct. 17, 2011) (No. 11-210).

187. *Id.* at 1201.

188. *Id.*

189. *Id.*

190. *See Paulson*, *supra* note 182.

191. *Alvarez*, 617 F.3d at 1200.

192. Hilden, *supra* note 174.

a scenario that Hilden theorizes could easily pass from fiction to reality in the not too distant future.¹⁹³ Hilden imagines a world where the Supreme Court decides that the Stolen Valor Act is constitutional.¹⁹⁴ In the wake of such a decision, she envisions a statute similar to the Stolen Valor Act being “applied to public school teachers who are deemed to be telling ‘lies’ about American history.”¹⁹⁵ Admittedly, a statute that criminalized lies of this sort could not be enacted without at least some popular support. But while support for such a measure might sound far-fetched to some, the enactment of a law such as this one would not likely come as a surprise to anyone living in one of the communities where efforts by school districts to revise textbooks have already become the central issue in school board elections.¹⁹⁶

John Stuart Mill understood that the problem is not necessarily which statements are proscribed, but rather the fact that government censorship inhibits the truth regardless of whether the censored statement contains the truth, part of the truth, or none of the truth whatsoever.¹⁹⁷ Because falsehood spurs the search for truth, the First Amendment imposes restrictions on lawmakers who seek to regulate false factual speech. Knowingly false statements are presumptively protected by the First Amendment; and in this case, the analysis required by the First Amendment reveals that the Stolen Valor Act cannot survive strict scrutiny. This is true because the government may not have demonstrated a compelling interest, and because the Act is clearly not narrowly tailored. The decision in this case stands for the principle that the regulation of false factual speech is constitutionally suspect when that regulation has the consequence of deterring other types of speech as well. All speech, including false statements, must be presumptively protected by the First Amendment if society wants to ensure that the marketplace of ideas continues to function properly.

193. *Id.*

194. *Id.*

195. *Id.*

196. For an account of the Texas State Board of Education’s recent efforts to change the curriculum in that state, see Russell Shorto, *How Christian Were the Founders*, N.Y. TIMES MAG., Feb. 11, 2010, at MM32, available at <http://www.russellshorto.com/article/christian-founders-2>.

197. See generally, MILL, *supra* note 101, at 91-113.