Hey! That’s My Valor: The Stolen Valor Act and Government Regulation of False Speech Under the First Amendment

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abstract: the stolen valor act criminalizes lies about receiving military decorations. through the stolen valor act, the government seeks to protect the honor associated with receiving a military decoration from people who falsely claim to have received one. some courts have held that the false statements proscribed by the stolen valor act fall outside of first amendment protection. other courts, most notably the u.s. court of appeals for the ninth circuit, in the 2010 decision united states v. alvarez, held that lies about military decorations are protected speech and that the stolen valor act is unconstitutional because it does not meet strict scrutiny. this note argues that the first amendment protects false statements. section 704(b) of the stolen valor act does not fall into any category of unprotected speech, does not meet the strict scrutiny test for government regulation of protected speech, and therefore is an unconstitutional restriction of protected speech.

introduction

on july 23, 2007, at a meeting of the three valley water district board of directors in suburban los angeles, newly elected director xavier alvarez introduced himself: “i’m a retired marine of twenty-five 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.”1 apart from the last sentence, alvarez’s introduction was a series of lies.2 alvarez never served a day in any branch of the u.s.

1 united states v. alvarez, 617 f.3d 1198, 1200 (9th cir. 2010), cert. granted, 80 u.s.l.w. 3098 (u.s. oct. 17, 2011) (no. 11-210). the congressional medal of honor is the highest award for valor in action against an enemy force. the medal of honor, cong. medal of honor soc’y, http://www.cmohs.org (last visited mar. 12, 2012). the congressional medal of honor is generally presented by the president of the united states of america in the name of congress to individuals serving in the armed services of the united states. id. the first medal of honor was presented march 25, 1863 to private jacob parrott and there have been 3454 congressional medal of honor recipients since. archive statistics, cong. medal of honor soc’y, http://www.cmohs.org/medal-statistics.php (last visited mar. 12, 2012). only eighty-five congressional medal of honor recipients are still alive. id.

2 alvarez, 617 f.3d at 1201.
armed forces and certainly was never awarded the Congressional Medal of Honor.\(^3\)

Even prior to Alvarez’s lies at the water district meeting, he was known for his tall tales.\(^4\) In addition to lying about military service and decorations, Alvarez had claimed to be a professional hockey player, a former police officer, and the former husband of a Mexican starlet.\(^5\) The district court observed that Alvarez seemed to live in a make-believe world.\(^6\)

Alvarez was prosecuted under § 704(b) of the Stolen Valor Act in the District Court for the Central District of California for his false claim that he was awarded the Congressional Medal of Honor.\(^7\) The Stolen Valor Act makes it a crime to lie about receiving military decorations and carries an enhanced penalty for lying about receipt of the Congressional Medal of Honor.\(^8\) The Congressional Medal of Honor is the nation’s highest military honor, awarded to members of the U.S. armed forces for exceptional heroism and bravery in combat.\(^9\) Alvarez entered a conditional guilty plea and reserved his right to challenge the Act’s constitutionality.\(^10\) Alvarez was sentenced to three years probation, a $5000 fine, and 416 hours of community service.\(^11\)

The Stolen Valor Act is controversial because it imposes a fine and a criminal penalty of up to a year in prison simply for making a false statement about receiving a military decoration, either verbally or by wearing a medal.\(^12\) The First Amendment protects a speaker’s right to

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\(^3\) Id. at 1200–01.

\(^4\) Id. at 1201.


\(^6\) Alvarez, 617 F.3d at 1201. During sentencing, the district court indicated that Alvarez’s stories lacked credibility and suggested that they may be related to a psychological or alcohol problem. Appellant’s Opening Brief at 20 n.5, Alvarez, 617 F.3d 1198 (No. 08-50345).

\(^7\) Alvarez, 617 F.3d at 1201; see 18 U.S.C. § 704(b), (c) (2006). Specifically, Alvarez was charged with “falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [he] knew, he had not received the Congressional Medal of Honor.” Alvarez, 617 F.3d at 1201.

\(^8\) 18 U.S.C. § 704(a), (b), (c).

\(^9\) See 32 C.F.R. § 578.4 (2008) (“The deed performed must have been one of personal bravery or self-sacrifice so conspicuous as to clearly distinguish the individual above his comrades and must have involved risk of life.”), reserved by 73 Fed. Reg. 66754 (Nov. 12, 2008); Full Archive, CONG. MEDAL OF HONOR SOC’Y, http://www.cmo hs.org/recipient-archive.php (last visited Mar. 12, 2012).

\(^10\) Appellant’s Opening Brief, supra note 6, at 2.

\(^11\) Alvarez, 617 F.3d at 1201.

\(^12\) See id. at 1200.
express ideas, even false ideas or lies, without government interference.\textsuperscript{13} Except in limited categories defined by the U.S. Supreme Court as obscenity, defamation, fraud, incitement, or speech integral to criminal conduct, speech is presumptively protected by the First Amendment.\textsuperscript{14} The government must meet strict scrutiny in order to regulate speech protected under the First Amendment.\textsuperscript{15} The government has historically regulated false speech that causes harm, such as defamation, by allowing lawsuits with potential \textit{civil} damages, but not criminal penalties.\textsuperscript{16} The Stolen Valor Act, which carries potential criminal sanctions, has been challenged by several defendants with varying success as an unconstitutional speech restriction.\textsuperscript{17}

The Stolen Valor Act seeks to address the perceived harm to veterans’ honor and to the government caused by a person lying about receiving a military decoration.\textsuperscript{18} Through the Stolen Valor Act, the government attempts to preserve the honor of military decorations, in part to motivate military personnel to high levels of achievement.\textsuperscript{19} According to the government, the Stolen Valor Act is necessary to prevent the proliferation of false medals and false claims concerning military service.\textsuperscript{20}

\textsuperscript{13} See U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . .”).

\textsuperscript{14} United States v. Stevens, 130 S. Ct. 1577, 1584 (2010).

\textsuperscript{15} \textit{Alvarez}, 617 F.3d at 1200. Strict scrutiny is the most stringent standard of judicial review. See John T. Haggerty, Note, \textit{Begging and the Public Forum Doctrine in the First Amendment}, 34 B.C. L. Rev. 1121, 1126 (1993). Under strict scrutiny, the court will determine whether the restriction on a fundamental right is necessary to the furtherance of a compelling state interest and narrowly tailored to serve that interest. \textit{Id}.

\textsuperscript{16} See \textit{N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256, 283 (1964)}.

\textsuperscript{17} See United States v. Perelman (\textit{Perelman II}), 658 F.3d 1134, 1140 (9th Cir. 2011) (holding § 704(a) of the Stolen Valor Act unconstitutional); \textit{Alvarez}, 617 F.3d at 1200 (holding § 704(b) of the Stolen Valor Act unconstitutional); United States v. Lawless, No. 11-cr-475-PJM/11-mj-173-TMD, slip op. at 9 (D. Md. Aug. 29, 2011) (holding § 704(b) of the Stolen Valor Act unconstitutional); United States v. Robbins, 759 F. Supp. 2d 815, 822 (W.D. Va. 2011) (holding § 704(a) of the Stolen Valor Act unconstitutional); United States v. Strandlof, 447 F. Supp. 2d 1183, 1185 (D. Colo. 2010) (holding § 704(b) of the Stolen Valor Act unconstitutional). \textit{But see United States v. McGuinn, No. 07 Cr. 471(KNF), 2007 WL 3050502, at *3 (S.D.N.Y. Oct. 18, 2007) (holding § 704(a) of the Stolen Valor Act unconstitutional)}.

\textsuperscript{18} Government’s Answering Brief at 6, \textit{Alvarez}, 617 F.3d 1198 (No. 08-50345). In its brief the government states that its interest is in “safeguarding the honor of the nation’s war heroes.” \textit{Id}.

\textsuperscript{19} United States v. Perelman (\textit{Perelman I}), 737 F. Supp. 2d 1221, 1237 (D. Nev. 2010), aff’d, 658 F.3d 1134 (9th Cir. 2011).

\textsuperscript{20} See \textit{id}.
In the 2010 case *United States v. Alvarez*, the U.S. Court of Appeals for the Ninth Circuit reversed Alvarez’s district court conviction and held that the Stolen Valor Act is facially invalid under the First Amendment.\(^{21}\) The Ninth Circuit in *Alvarez* held that § 704(b) of the Stolen Valor Act regulates protected speech, does not meet strict scrutiny, is not narrowly drawn to achieve a compelling government interest, and is therefore unconstitutional.\(^{22}\) The Ninth Circuit worried about the Act’s potential to set a precedent whereby the government may proscribe speech simply because it is false.\(^{23}\) On October 17, 2011, the Supreme Court granted certiorari to review the Ninth Circuit’s decision in *Alvarez*.\(^{24}\)

In contrast to its decision in *Alvarez* that § 704(b) of the Stolen Valor Act warrants strict scrutiny, in the 2011 case *United States v. Perelman (Perelman II)*, the Ninth Circuit held that § 704(a) of the Stolen Valor Act, regulating falsely wearing a medal, warrants intermediate scrutiny.\(^{25}\) The court reasoned that intermediate scrutiny was sufficient because the section regulates conduct as opposed to speech.\(^{26}\) The Ninth Circuit held that § 704(a) meets the intermediate scrutiny test because there is a substantial government interest unrelated to the suppression of expression and because the restriction imposed on First Amendment freedoms by the Stolen Valor Act is no greater than necessary to further this government interest.\(^{27}\)

Part I of this Note describes the history of the Stolen Valor Act and the *Alvarez* case, highlighting the central question of whether the speech proscribed under the Stolen Valor Act warrants strict scrutiny review.\(^{28}\) Part II presents the framework for analyzing whether the First Amendment protects certain classes of speech, namely false speech.\(^{29}\) It then describes the strict scrutiny standard of review that determines whether the government can permissibly regulate protected speech.\(^{30}\) Finally, Part III argues that § 704(b) of the Stolen Valor Act is an un-

\(^{21}\) *Alvarez*, 617 F.3d at 1217.

\(^{22}\) See id.

\(^{23}\) Id. at 1200.


\(^{25}\) *Perelman II*, 658 F.3d at 1139.

\(^{26}\) Id.

\(^{27}\) Id. at 1139–40.

\(^{28}\) See infra notes 32–62 and accompanying text.

\(^{29}\) See infra notes 63–118 and accompanying text.

\(^{30}\) See infra notes 119–170 and accompanying text.
constitutional restriction of speech protected under the First Amend-
ment.31

I. THE STOLEN VALOR ACT AND THE ALVAREZ DECISION

A. History and Text of the Stolen Valor Act

False claims of military decoration have been a concern since the
founding of the United States.32 In 1782, General George Washington
created the Military Merit Badge, designed in the shape of a purple
heart, to be awarded to privates and noncommissioned officers who
demonstrated unusual gallantry, extraordinary fidelity, or essential ser-
vice.33 Even from the advent of military decorations, General Washing-
ton was concerned that imposters may claim to be Military Merit Badge
recipients.34 Thus, Washington admonished, “[S]hould any who are
not entitled to these honors have the insolence to assume the badges of
them, they shall be severely punished.”35

The Stolen Valor Act puts General Washington’s admonition into
effect by making it a crime to knowingly wear, purchase, or sell any of
the service medals or badges awarded to members of the armed forc-
es.36 The Act also proscribes false verbal or written claims to have re-

31 See infra notes 171–262 and accompanying text.
33 Id. at 488.

The General ever desirous to cherish virtuous ambition in his soldiers, as well
as to foster and encourage every species of Military merit, directs that when-
ever any singularly meritorious action is performed, the author of it shall be
permitted to wear on his facings over the left breast, the figure of a heart in
purple cloth, or silk, edged with narrow lace or binding.

Id.

34 See id. at 487–88.
35 Id. at 487.
Act is:

(a) In general. Whoever knowingly wears, purchases, attempts to purchase,
solicits for purchase, mails, ships, imports, exports, produces blank certifi-
cates 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, or any of
the service medals or badges awarded to the members of such forces, or the
ribbon, button, or rosette of any such badge, decoration or medal, or any
colorable imitation thereof, except when authorized under regulations made
pursuant to law, shall be fined under this title or imprisoned not more than
six months, or both. (b) False claims about receipt of military decorations or
ceived military decorations or medals. The Stolen Valor Act was enacted in 1923, but the current version broadens the historical scope of the Act. The 1923 Act criminalized the unauthorized wearing, manufacture, or sale of medals and badges. The current version, passed in 2006, has been expanded to prohibit verbal claims about receiving military awards and other activities, including purchasing, mailing, and importing medals or badges. The 2006 Act was passed in response to a congressional finding that fraudulent claims regarding the receipt of the Medal of Honor and other military decorations damage their reputation and meaning, and that legislative action was necessary to allow law enforcement to prevent false claims of receiving military decorations.

The government has an interest in maintaining the honor associated with military awards. The purpose of the medals program, according to the government, is to foster military accomplishment by recognizing excellence in the armed forces. Accordingly, a violation of the Stolen Valor Act carries a prison term of six months, a fine, or both. The prison term is enhanced from six months to one year if the
decoration involved is the Congressional Medal of Honor, a Distinguished Service Cross, a Navy Cross, an Air Force Cross, a Silver Star, or a Purple Heart.\textsuperscript{45}

B. The Ninth Circuit’s United States v. Alvarez Decision

In 2010 in \textit{Alvarez}, the Ninth Circuit sitting en banc held two-to-one that § 704(b) of the Stolen Valor Act is an unconstitutional restriction of speech protected by the First Amendment because it is not narrowly tailored to achieve a compelling government interest.\textsuperscript{46} The majority held that the speech proscribed by the Stolen Valor Act is not analogous to the narrow categories of speech that fall outside of First Amendment protection: obscenity, defamation, fraud, incitement, or speech integral to criminal conduct.\textsuperscript{47} Because the speech proscribed by the Stolen Valor Act receives full First Amendment protection, any regulation must meet strict scrutiny.\textsuperscript{48} The majority held that, because the Act is not narrowly tailored to achieve a compelling government interest, it does not meet strict scrutiny and is therefore unconstitutional.\textsuperscript{49}

\textsuperscript{45} Id. § 704(c), (d); see \textit{Alvarez}, 617 F.3d at 1202. The Distinguished Service Cross and the Air Force Cross are military honors one step below the Congressional Medal of Honor and can be awarded to a member of the United States Army or Air Force, respectively, for extraordinary heroism while engaged in action against an enemy of the United States, military operations involving conflict with an opposing foreign force, or while serving with friendly foreign forces engaged in an armed conflict against an opposing armed force in which the United States is not a belligerent party. See 10 U.S.C. §§ 3742, 8742 (2006). The Navy Cross is a similar award for members of the Navy, it is the highest medal awarded by the United States Navy and can be awarded for both combat heroism and other distinguished service. \textit{See The Navy Cross, NAVAL HIST. & HERITAGE COMMAND}, http://www.history.navy.mil/medals/navcross.htm (last visited Mar. 12, 2012). The Silver Star is currently awarded by all branches of the armed forces to any person who, while serving in any capacity, is cited for gallantry in action against an enemy of the United States. \textit{Factsheet: Silver Star, AIR FORCE PERSONNEL CTR.}, http://www.afpc.randolph.af.mil/library/factsheets/factsheet.asp?id=7729 (last visited Mar. 12, 2012). Finally, the Purple Heart is an honor awarded to a member of the armed forces who is killed or wounded in action. \textit{See} 10 U.S.C. § 1129 (2006).

\textsuperscript{46} 617 F.3d at 1200.

\textsuperscript{47} Id. at 1202 (quoting \textit{Stevens}, 130 S. Ct. at 1584); see infra notes 92–118 and accompanying text (discussing defamation).

\textsuperscript{48} \textit{Alvarez}, 617 F.3d at 1200. Strict scrutiny is the most stringent standard of judicial review. \textit{See} Haggerty, supra note 15, at 1126. Under strict scrutiny, a court will determine whether the restriction on a fundamental right is necessary to the furtherance of a compelling state interest and narrowly tailored to serve that interest. \textit{Id}.

\textsuperscript{49} \textit{Alvarez}, 617 F.3d at 1200.
Both the majority and dissent in *Alvarez* agreed that the Stolen Valor Act did not meet strict scrutiny. They disagreed, however, on whether the speech proscribed by the Stolen Valor Act is protected under the First Amendment and is therefore deserving of strict scrutiny review in the event that it is proscribed. The Stolen Valor Act, both the majority and dissent agreed, did not meet strict scrutiny because the government was unable to show that it is narrowly tailored to achieve a compelling government interest.

The asserted government interest in the Stolen Valor Act is to prevent false claims about receipt of military honors that damage the reputation of such decorations. The Ninth Circuit suggested that this is not a compelling government interest. The court reasoned that embellished war stories are easily detectable falsehoods and that lies about military decorations only harm the reputation of the liars; thus, the court concluded that such lies pose no real threat to the honor associated with military decorations. Further, according to the Ninth Circuit, the Stolen Valor Act is not narrowly tailored to achieve the government interest because there are less speech-restrictive ways to protect the honor associated with military decorations. The harm caused by false claims about military decorations can be easily corrected in the marketplace of ideas by publishing lists of true award recipients.

The fundamental disagreement between the majority and the dissent in *Alvarez* is whether statements regulated by the Stolen Valor Act, and false statements of fact generally, warrant strict scrutiny or whether they fall completely outside of First Amendment protection.

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50 See id. at 1215–17. In their petition for certiorari to the Supreme Court, the government argues that § 704(b) of the Stolen Valor Act would pass strict scrutiny because the Act is narrowly tailored to satisfy a compelling government interest. Petition for Writ of Certiorari at 29, *Alvarez*, 617 F.3d 1198 (2010) (No. 11-210), 2011 WL 3645396 at 6–29.

51 See *Alvarez*, 617 F.3d at 1232 n.10 (Bybee, J., dissenting).

52 Id. at 1216 (majority opinion); id. at 1232 n.10 (Bybee, J., dissenting).

53 Id. at 1216 (majority opinion).

54 See id. at 1217.

55 See id.

56 Id.


58 See *Alvarez*, 617 F.3d at 1216–17; id at 1232 n.10 (Bybee, J., dissenting).
sent in *Alvarez* argued that the false statements of fact proscribed by the Stolen Valor Act are not protected by the First Amendment and thus can be regulated without meeting strict scrutiny.\(^{59}\) The dissent started from the premise that false statements of fact are not, and were never, protected under the First Amendment.\(^{60}\) The dissent relied on a 1974 Supreme Court decision, *Gertz v. Robert Welch, Inc.*, for the proposition that a false statement of fact is not worthy of constitutional protection.\(^{61}\) Therefore, according to the dissent, because false statements of fact like those the Stolen Valor Act prohibits are not protected under the First Amendment, they may be constitutionally proscribed without passing the strict scrutiny test.\(^{62}\)

## II. THE STOLEN VALOR ACT AND FIRST AMENDMENT FRAMEWORK

This Part discusses the First Amendment framework for determining when and how the government may regulate speech, including the false speech criminalized by the Stolen Valor Act.\(^{63}\) Section A discusses the presumption of First Amendment protection for all speech, including false speech.\(^{64}\) Section B then addresses these categories of speech that the Supreme Court has held fall outside of First Amendment protection.\(^{65}\) Section C explains that the government must satisfy strict scrutiny to regulate protected speech, including false verbal claims about military decorations.\(^{66}\) It further contrasts the requisite strict scrutiny review of proscribed, protected speech with the intermediate review standard used to analyze regulated communicative conduct.\(^{67}\) Finally, Section D addresses constitutional challenges on overbreadth grounds, but concludes that the Stolen Valor Act’s constitutional infirmity is likely not overbreadth.\(^{68}\)

\(^{59}\) See *id.* at 1218–19, 1231.

\(^{60}\) *Id.* at 1220 n.1.


\(^{62}\) *Alvarez*, 617 F.3d at 1223 (Bybee, J., dissenting). The dissent agrees with the majority that if the Stolen Valor Act were subject to strict scrutiny, it would not satisfy the test. *Id.* at 1232.

\(^{63}\) See *infra* notes 64–170 and accompanying text.

\(^{64}\) See *infra* notes 69–91 and accompanying text.

\(^{65}\) See *infra* notes 92–118 and accompanying text.

\(^{66}\) See *infra* notes 119–149 and accompanying text.

\(^{67}\) See *infra* notes 119–149 and accompanying text.

\(^{68}\) See *infra* notes 150–170 and accompanying text.
A. The First Amendment Protects False Speech

One scholar has suggested that understanding the relationship between deception and free speech is central to understanding the First Amendment.69 Although the First Amendment prevents the government from regulating speech simply because the government or society finds the idea worthless or offensive—content-based speech restrictions—the prevention and punishment of certain well-defined and narrow classes of speech does not raise any constitutional problems.70 Nonetheless, the First Amendment imposes a presumption against government interference with public discourse.71

The U.S. Supreme Court has a strong tradition of protecting even unpopular ideas and controversial beliefs.72 The Supreme Court has explained, however, that the First Amendment does not protect all types of speech.73 Some false speech, such as defamation or shouting “fire” in a crowded theatre without cause, is carved out and afforded less or no First Amendment protection.74 In such cases, the false speech is unprotected because it causes harm by violating a private right or because it creates a clear and present danger or “substantive evil[] that Congress has a right to prevent.”75

Constitutional protection, however, does not turn on the truth, popularity, or social utility of the ideas and beliefs expressed.76 In 1964 in New York Times Co. v. Sullivan, the Supreme Court held that a news-

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70 Chaplinsky v. State of N.H., 315 U.S. 568, 571–72 (1942). In United States v. Robbins, the District Court for the Western District of Virginia did not follow Chaplinsky, holding that false statements of fact are generally unprotected and that protection is only afforded to “speech that matters.” See 759 F. Supp. 2d 815, 818 (W.D. Va. 2011).
71 Lyrissa Barnett Lidsky, Where’s the Harm?: Free Speech and the Regulation of Lies, 65 Wash. & Lee L. Rev. 1091, 1091–92 (2008); see United States v. Alvarez, 617 F.3d 1198, 1205 (9th Cir. 2010), cert. granted, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210) (“[W]e 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.”).
73 Chaplinsky, 315 U.S. at 571–72.
paper advertisement does not forfeit First Amendment protection because some included statements were false and allegedly defamatory.\(^\text{77}\)

The Supreme Court recently reaffirmed this presumption of protection by rejecting a balancing test for determining when a false statement receives First Amendment protection.\(^\text{78}\) The government, according to the Court, cannot proscribe false speech simply because it is deemed valueless or unnecessary following an ad hoc balancing of its values against its harms.\(^\text{79}\)

Despite the constitutional presumption of protection for speech, courts that have upheld the Stolen Valor Act as constitutional question whether knowingly false statements of fact, such as lying about military decorations, truly add value to public discourse and dialogue.\(^\text{80}\) There is Supreme Court support for the proposition that there is no value to knowingly false speech.\(^\text{81}\) In the 1942 case of \textit{Chaplinsky v. State of New Hampshire}, the Supreme Court said that false speech has “no essential part of any exposition of ideas” and provides “slight social value as a step to truth.”\(^\text{82}\) In 1974, the Supreme Court, in \textit{Gertz v. Robert Welch, Inc.}, also stated that false statements of fact do not hold any constitutional value.\(^\text{83}\) The dissent in the 2010 U.S. Court of Appeals for the Ninth Circuit case \textit{United States v. Alvarez} and other courts that have

\begin{itemize}
  \item \(^\text{77}\) \textit{Id.} at 271.
  \item \(^\text{78}\) \textit{See} \textit{Stevens}, 130 S. Ct. at 1585.
  \item \(^\text{79}\) \textit{Id.; United States v. Strandlof}, 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, on multiple fronts, to well-established First Amendment doctrine.”). In 2010, in \textit{United States v. Stevens}, the Supreme Court held that a 1999 federal law criminalizing the commercial creation, sale, or possession of depictions of animal cruelty was substantially overbroad, and thus, facially invalid. \textit{Stevens}, 130 S. Ct. at 1592. The statute was designed to address “crush videos,” videos showing people killing small animals by stomping on them or other cruel methods. \textit{See} \textit{id.} at 1583.
  \item \(^\text{80}\) \textit{See} \textit{United States v. Perelman (Perelman II)}, 658 F.3d 1134, 1137 (9th Cir. 2011); \textit{Robbins}, 759 F. Supp. 2d at 819.
  \item \(^\text{82}\) 315 U.S. at 572.
  \item \(^\text{83}\) 418 U.S. at 340. The Court wrote:

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

held the Stolen Valor Act constitutional have relied on Gertz for the proposition that knowingly false statements of fact fall outside of First Amendment protection.\textsuperscript{84}

Even though knowingly false statements of fact may have little inherent value, they are inevitable in free debate and must be tolerated to avoid chilling vigorous debate and exchange of ideas.\textsuperscript{85} A rule compelling a person to guarantee the truth of all factual assertions could lead to self-censorship.\textsuperscript{86} Punishing false statements would risk making people overly cautious in the exercise of their freedoms of speech and press.\textsuperscript{87} Erroneous statements must therefore be protected for freedom of expression to have the breathing space needed to survive.\textsuperscript{88} Perhaps it was this concern about the chilling effects of withholding constitutional protection for knowingly false statements that led the Supreme Court in Gertz, to also state that there is no such thing as a false idea (as opposed to a false statement of fact) under the First Amendment.\textsuperscript{89} The Court said that the marketplace of ideas, through public debate and discourse, was the proper forum to correct falsehood, not the judicial system or the government.\textsuperscript{90} Mistaken beliefs, according to the Court, hold value in the marketplace of ideas because they offer contrast and thus create a clearer perception of the truth.\textsuperscript{91}

B. Narrow Categories of False Speech That Fall Outside of First Amendment Protection and Defamation Analysis

The First Amendment presumptively protects all speech from government regulation; however, there are limitations to this protection.\textsuperscript{92} If the government demonstrates a compelling need to regulate speech or if the speech is in a category of speech historically held outside of

\textsuperscript{84} See Alvarez, 617 F.3d at 1218 (Bybee, J., dissenting); Robbins, 759 F. Supp. 2d at 819.
\textsuperscript{85} Gertz, 418 U.S. at 340.
\textsuperscript{86} N.Y. Times, 376 U.S. at 279.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 271–72; NAACP v. Button, 371 U.S. 415, 433 (1963) (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”); see also Brown v. Hartlage, 456 U.S. 45, 60–61 (1982).
\textsuperscript{89} Gertz, 418 U.S. at 339–40 (“Under the First Amendment there is no such thing as a false idea. However 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.”).
\textsuperscript{90} Id.
First Amendment protection, then the speech may be constitutionally restricted.\textsuperscript{93} Certain narrow categories of false speech have been carved out and afforded less First Amendment protection, such as defamation, false commercial speech, and fraud.\textsuperscript{94}

Of the categories of speech that are afforded less First Amendment protection, false statements prohibited by the Stolen Valor Act are most like defamatory statements.\textsuperscript{95} Defamation is the act of harming the reputation of another by making a false statement to a third person.\textsuperscript{96} It is regulated through civil suits brought when such false statements cause individualized harm.\textsuperscript{97} As such, the Stolen Valor Act is akin to defamation only if the reputation of an individual decorated veteran is harmed by a speaker’s false claim about valor.\textsuperscript{98}

Defamation law is justified by the government interest in compensating individual victims of defamatory falsehoods.\textsuperscript{99} It is designed to protect an individual’s property interest in his or her good name.\textsuperscript{100} In a defamation case, the court balances the government interest in compensating defamation plaintiffs for reputational harm against the speaker-defendant’s First Amendment freedom of speech.\textsuperscript{101} To achieve this balance, the court has developed a series of rules based on the identity of the plaintiff (whether the plaintiff is a private or public figure) and the nature of the subject matter (whether it is a matter of public concern).\textsuperscript{102} When a defamation plaintiff is a public figure and the speaker is criticizing public conduct or speaking on a matter of public concern, the court is willing to afford the speaker more First Amendment protection.\textsuperscript{103} This is, in part, because public figures are better able to engage in effective counterspeech.\textsuperscript{104} False statements

\textsuperscript{93} Stevens, 130 S. Ct. at 1584; Alvarez, 617 F.3d at 1205. The dissent in Alvarez stated that false statements are unprotected by the First Amendment, except in narrow categories where protection is necessary to protect speech that matters. 617 F.3d at 1218–19 (Bybee, J., dissenting).

\textsuperscript{94} See Stevens, 130 S. Ct. at 1584; Alvarez, 617 F.3d at 1205.

\textsuperscript{95} See Stevens, 130 S. Ct. at 1584; Alvarez, 617 F.3d at 1205.

\textsuperscript{96} Black’s Law Dictionary 479–80 (9th ed. 2009).


\textsuperscript{98} See 119 Vote No!, 957 P.2d at 697.

\textsuperscript{99} See id.

\textsuperscript{100} Id.

\textsuperscript{101} See Gertz, 418 U.S. at 341; N.Y. Times, 376 U.S. at 254.


\textsuperscript{103} See Gertz, 418 U.S. at 344; N.Y. Times, 376 U.S. at 256.

\textsuperscript{104} See Gertz, 418 U.S. at 344.
regarding private persons in a matter of private concern, however, receive less protection.\textsuperscript{105}

The Supreme Court first addressed defamation of a public official in \textit{New York Times Co. v. Sullivan} in 1964 and limited the circumstances under which a public official may recover for defamation.\textsuperscript{106} In \textit{New York Times}, a city commissioner brought a libel claim against the newspaper for printing an advertisement critical of his official conduct.\textsuperscript{107} The advertisement included false factual statements that reflected poorly on the City Commissioner.\textsuperscript{108} The Supreme Court held that the advertisement was entitled to First Amendment protection despite the false statements.\textsuperscript{109} According to the Court, erroneous statements are inevitable in free debate and must be protected if freedom of expression is to have the breathing space necessary to survive.\textsuperscript{110} A public official may only recover for defamation if the plaintiff can show that the statement was made with actual malice, meaning that the speaker intended to cause harm and either had knowledge that the statement was false or acted with reckless disregard for the truth.\textsuperscript{111}

Ten years after \textit{New York Times}, in \textit{Gertz}, the Supreme Court addressed defamation of a private individual regarding a matter of public concern.\textsuperscript{112} In \textit{Gertz}, the Supreme Court distinguished between public and private figures and described why different standards apply to each.\textsuperscript{113} Public figures tend to enjoy greater access to the channels of effective communication and have a more realistic opportunity to counteract false statements than private individuals.\textsuperscript{114} Moreover, public figures have made the choice to be in the public eye and thus volun-

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} See 376 U.S. at 256.

\textsuperscript{107} \textit{Id.} Libel is written defamation. \textit{Black’s Law Dictionary}, \textit{supra} note 96, at 999.

\textsuperscript{108} \textit{N.Y. Times}, 376 U.S. at 257–58. Statements included:

In Montgomery, Alabama, after students sang “My Country, 'Tis of Thee” on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

\textit{Id.}

\textsuperscript{109} \textit{Id.} at 292.

\textsuperscript{110} \textit{Id.} at 271–72.

\textsuperscript{111} \textit{Id.} at 279–80.

\textsuperscript{112} \textit{Gertz}, 418 U.S. at 332.

\textsuperscript{113} \textit{Id.} at 323.

\textsuperscript{114} \textit{Id.} at 344.
tarily exposed themselves to increased risk of injury from defamatory falsehoods.115

In sum, the First Amendment provides significantly less protection for speech that falls within several limited categories, such as fraudulent and defamatory speech.116 Within these categories, there are gradations of First Amendment protection.117 For example, although fraudulent speech receives absolutely no First Amendment protection, courts are less willing to proscribe defamatory speech against a public official because public officials have greater opportunities for effective counterspeech than private individuals.118

C. The Court Must Apply Strict Scrutiny to Determine When the Government May Regulate Protected Speech and Intermediate Scrutiny to Determine When the Government May Regulate Communicative Conduct

1. Courts Review Regulation of Protected Speech Under a Strict Scrutiny Standard

Both the majority and the dissent in Alvarez agreed that § 704(b) of the Stolen Valor Act is a content- or subject-matter-based speech restriction because it regulates false verbal or written representations about a particular topic—receiving military honors.119 Content-based restrictions regulate speech based on the topic of the speech.120 Content-based speech restrictions, like section 704(b) of the Stolen Valor Act, are particularly dangerous for free speech because the government can target particular messages and control ideas by regulating speech on a specific topic.121 If the government regulates particular views or

115 Id. at 345.
116 See Stevens, 130 S. Ct. at 1584.
117 See Gertz, 418 U.S. at 344; N.Y. Times, 376 U.S. at 256.
118 See Gertz, 418 U.S. at 344; N.Y. Times, 376 U.S. at 256.
119 United States v. Alvarez, 638 F.3d 666, 667 (9th Cir. 2011) (denying petition for panel rehearing and rehearing en banc); Alvarez, 617 F.3d at 1202, 1218–19 (Bybee, J., dissenting). For the purposes of this Note, this category of speech restrictions is referred to as “content-based” restrictions.
120 Chemerinsky, supra note 102, at 934. An example of a law that restricts speech based on the subject matter is a Chicago ordinance prohibiting all picketing in residential neighborhoods except labor picketing. See Carey v. Brown, 447 U.S. 455, 459–60 (1980). In the 1980 case Carey v. Brown, the Supreme Court held that the Chicago ordinance was unconstitutional because it allowed speech on the topic of labor but not other speech and therefore was not subject matter neutral. Id. at 456. Similarly, the Stolen Valor Act restricts lies about a specific topic. See id.
subjects, it silences speakers who express views on disfavored subjects. 122 Thus, content-based speech restrictions distort the marketplace of ideas and seriously impede free discussion and debate. 123

Viewpoint discrimination is a particularly egregious form of content-based restriction that discriminates based on a speaker’s position on a topic. 124 Section 704(b) of the Stolen Valor Act may be considered viewpoint discrimination because the Act prevents people from telling lies that disparage military honors. 125 In the District Court for the District of Nevada, in the 2010 case United States v. Perelman, attorneys for Perelman argued that the Stolen Valor Act impermissibly gives the government discretion to engage in viewpoint-based regulation of speech by allowing some people, but not others, to wear military medals based on their purpose for wearing the medal. 126 The district court, however, held that the Stolen Valor Act is not impermissible because military regulations provide an across-the-board prohibition on the unauthorized wearing of medals with the intent to deceive and do not allow the government any discretion to decide who can and cannot wear medals on a case-by-case basis. 127 Even though the court was not persuaded by Perelman’s claim of viewpoint-based discrimination, the Stolen Valor Act is still a content-based restriction and thus presumptively invalid due to the dangers discussed above. 128

Content-based speech restrictions are presumptively invalid and subject to strict scrutiny unless the restriction falls into a narrow category of speech that is unprotected by the First Amendment. 129 Thus, if

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123 Chemerinsky, supra note 102, at 934. The marketplace of ideas is a metaphor for freedom of speech and is basically a forum where ideas can compete for acceptance without government regulation. Black’s Law Dictionary, supra note 96, at 1058.
124 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995); Chemerinsky, supra note 102, at 934. For example, the Supreme Court declared a District of Columbia ordinance that prohibited the display of signs critical of another government within 500 feet of that government’s embassy to be an unconstitutional viewpoint-based regulation. See Boos v. Berry, 485 U.S. 312, 334 (1988).
125 See Perelman II, 658 F.3d at 1204 n.4.
126 United States v. Perelman (Perelman I), 737 F. Supp. 2d 1221, 1232 (D. Nev. 2010), aff’d, 658 F.3d 1134 (9th Cir. 2011). A licensing scheme or a prior restraint is a scheme that requires permission from the government before one may engage in constitutionally protected expression. Id. at 1237. Attorneys for Perelman argued that under the Act, the government could permit an actor in a patriotic theatrical production to wear a medal, but deny a war protester’s request to wear the same medal. Id. at 1232.
127 Id. at 1232–33.
128 See Alvarez, 617 F.3d at 1202; Perelman I, 737 F. Supp. 2d at 1232–33.
129 See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (“[T]he First Amendment, subject only to narrow and well understood exceptions, does not countenance gov-
the Stolen Valor Act regulates speech protected under the First Amendment, the government must meet strict scrutiny for the Act to be constitutional.\textsuperscript{130} Strict scrutiny requires the government to show that there is a compelling government interest for the regulation of speech and that the regulation is narrowly tailored to serve that interest.\textsuperscript{131}

2. Courts Apply Intermediate Scrutiny to Regulations of Communicative Conduct

In contrast to making a statement, wearing a medal is communicative conduct; therefore, § 704(a) of the Stolen Valor Act, which makes it a crime to wear a military decoration without authorization, is subject to intermediate scrutiny.\textsuperscript{132}

The Supreme Court has long afforded First Amendment protection to communicative conduct because it often functions as symbolic speech.\textsuperscript{133} The government can regulate communicative conduct if the regulation meets the intermediate scrutiny test laid out by the Supreme Court in 1969 in \textit{United States v. O'Brien}.\textsuperscript{134}

In \textit{Perelman}, for example, the court distinguished Perelman’s prosecution under § 704(a), which criminalizes the unauthorized wear of a military decoration, from Alvarez’s prosecution under § 704(b), which prohibits verbal or written false claims about military decorations.\textsuperscript{135} The Ninth Circuit held that § 704(a) targets legitimately criminal conduct and therefore that section of the Stolen Valor Act is constitu-
The Ninth Circuit also noted that § 704(b), in contrast, targets pure speech and is therefore distinguishable.\textsuperscript{137}

Conduct can be communicative when there is intent to convey a particular message and a substantial likelihood that the message will be understood by those who view it.\textsuperscript{138} Communicative conduct, such as wearing a medal, can be regarded as expressive or symbolic speech.\textsuperscript{139} For instance, in the 1969 case \textit{Tinker v. Des Moines Independent Community School District}, the Supreme Court held that wearing a black armband to protest the Vietnam War was symbolic speech because the black armband was worn to communicate a message and people viewing the black armband in 1965 would understand that the speaker intended to protest the Vietnam War.\textsuperscript{140} Similarly, wearing a military medal is symbolic speech because the person wearing the medal intends to convey a message (i.e., of having received a military decoration, of patriotism, etc.) and, based on the context of the communication, there is a substantial likelihood that the speaker’s message will be understood by viewers.\textsuperscript{141}

Communicative conduct (expressive or symbolic speech) can be regulated if the regulation meets the \textit{O’Brian} intermediate scrutiny test.\textsuperscript{142} Under the \textit{O’Brien} test, the government can regulate communicative conduct when: (1) there is an important government interest in regulating the speech unrelated to the suppression of the message and (2) the regulation’s impact on First Amendment freedoms is no greater than what is essential to achieve the government interest.\textsuperscript{143} In \textit{O’Brien}, the Supreme Court held that a statute prohibiting the burning of draft cards was not an unconstitutional restriction of First Amendment speech because the government had an important interest, unrelated to the regulation of speech, in the administration of the draft and that draft cards were necessary to achieve that government interest.\textsuperscript{144}

To satisfy intermediate scrutiny and regulate communicative conduct, the law cannot be hostile to speech.\textsuperscript{145} By requiring the government interest to be unrelated to the suppression of speech, the \textit{O’Brien}
test ensures that the speaker is not sanctioned for communicating, but instead is convicted for the non-communicative aspect of the conduct.\textsuperscript{146} This prevents the government from suppressing communicative conduct simply because it disagrees with the message.\textsuperscript{147}

The Ninth Circuit in \textit{Perelman} held that § 704(a) of the Stolen Valor Act, which makes it a crime to wear a military decoration without authorization, is a constitutional restriction on communicative conduct because it meets the \textit{O'Brien} test.\textsuperscript{148} The Ninth Circuit also held that the government has a compelling interest in preventing intentionally deceptive medal-wearing and that this interest is unrelated to the suppression of speech because § 704(a) does not prevent the expression of any particular message or viewpoint.\textsuperscript{149}

\section*{D. Challenges on Overbreadth Grounds}

In an area in which the government may permissibly regulate speech, such as incitement or defamation, a statute that regulates more expression than the Constitution allows may be unconstitutionally overbroad.\textsuperscript{150} For instance, if the court were to find the Stolen Valor Act constitutional as applied to an individual litigant, the Act may still be vulnerable to an overbreadth challenge because it may have unconstitutional applications on its face.\textsuperscript{151}

The party asserting an overbreadth challenge must show that a substantial number of a statute’s applications are unconstitutional in relation to the statute’s plainly legitimate sweep.\textsuperscript{152} An overbroad statute is unconstitutional even if the government exercises prosecutorial discretion and uses the statute only for its constitutional applications.\textsuperscript{153} The overbreadth doctrine allows a speaker to whom the statute may be constitutionally applied to challenge the statute on grounds that it violates the First Amendment rights of someone else.\textsuperscript{154} Thus, the over-

\begin{footnotesize}
\begin{enumerate}
\item[146] See id. at 382.
\item[147] See id.; see also Stromberg, 283 U.S. at 369 (striking down a statute that punished people who expressed opposition to organized government by displaying a flag).
\item[148] \textit{Perelman II}, 658 F.3d at 1140.
\item[149] Id. at 1139–40.
\item[150] See \textit{Chemerinsky, supra} note 102, at 943.
\item[154] \textit{Stevens}, 130 S. Ct. at 1593; see \textit{Broadrick v. Oklahoma}, 413 U.S. 601, 610, 615–16 (1973); \textit{Chemerinsky, supra} note 102, at 943–46.
\end{enumerate}
\end{footnotesize}
breadth doctrine is an exception to the rule against third-party standing.\textsuperscript{155} It has been described as “strong medicine” and is used sparingly.\textsuperscript{156} The doctrine will only apply if the court finds that a statute was constitutionally applied to an individual litigant because, otherwise, the litigant would not have to rely on the overbreadth doctrine.\textsuperscript{157}

The Stolen Valor Act, if found constitutionally applied to a particular litigant, may be found facially overbroad because of potential unconstitutional applications of the statute.\textsuperscript{158} For instance, the Stolen Valor Act could be applied to a speaker who knowingly makes false statements about military decorations to send an anti-government or anti-military political message.\textsuperscript{159} Military decorations may also be worn to honor a loved one or for satirical purposes.\textsuperscript{160} Courts may find it difficult to determine whether someone is wearing military decorations to deceive or for a proper purpose.\textsuperscript{161}

The Stolen Valor Act may also be considered overbroad because it does not contain a scienter requirement.\textsuperscript{162} Consequently, someone who has no intent to deceive may unknowingly violate the Act.\textsuperscript{163} For example, someone who says, “I have a Congressional Medal of Honor,” but simply means that they possess a Congressional Medal of Honor as a family heirloom, may technically violate the Act.\textsuperscript{164}

The Stolen Valor Act will not be considered facially overbroad if it is readily susceptible to a construction that eliminates the overbreadth.\textsuperscript{165} A scienter requirement is presumptively read into criminal statutes even

\textsuperscript{155} Alvarez, 617 F.3d at 1235 (Bybee, J., dissenting); Chemerinsky, supra note 102, at 946.

\textsuperscript{156} Broadrick, 413 U.S. at 613.

\textsuperscript{157} See Stevens, 130 S. Ct. at 1593; Alvarez, 617 F.3d at 1235 (Bybee, J., dissenting).

\textsuperscript{158} See McGuinn, 2007 WL 3050502, at *1–3.

\textsuperscript{159} See id. Speech made for political purposes or other matters of public concern is traditionally entitled to increased First Amendment deference. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

\textsuperscript{160} Alvarez, 617 F.3d at 1236–37 (Bybee, J., dissenting).

\textsuperscript{161} Dane Schiller, \textit{Fake General: It Was Free Speech, Not Fraud: Man Faces Charges After Sporting Medals at Mayor’s Party}, Hous. Chron., Sept. 27, 2010, at B1. For example, in 2009, Michael McManus wore an Army brigadier general’s uniform and an array of medals and Distinguished Service Crosses to a party for Houston’s first openly gay mayor. \textit{Id.} McManus is now being prosecuted under the Stolen Valor Act and claims that he never meant to suggest that he was a true war hero, but instead wore the medals in order to make a political commentary about the military’s policy on gays. \textit{Id.}

\textsuperscript{162} Alvarez, 617 F.3d at 1237 (Bybee, J., dissenting).

\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} Id.
if not explicitly expressed in the statute.\footnote{166} In United States v. Robbins, for example, the District Court for the Western District of Virginia read a scienter requirement into the Stolen Valor Act and found the Act constitutional.\footnote{167}

The Stolen Valor Act will probably not be considered facially overbroad because courts could read a scienter requirement into the statute.\footnote{168} Therefore, the remainder of this Note will focus on the tension between the Stolen Valor Act and the First Amendment.\footnote{169} The next Part argues that § 704(b) of the Stolen Valor Act is an unconstitutional violation of the First Amendment because it impermissibly proscribes protected speech, which warrants a strict scrutiny review that it cannot satisfy.\footnote{170}

III. THE STOLEN VALOR ACT UNCONSTITUTIONALLY Restricts Speech in Violation of the First Amendment

This Part argues that § 704(b) of the Stolen Valor Act is unconstitutional.\footnote{171} It begins, in Section A, by demonstrating that the Stolen Valor Act regulates speech protected by the First Amendment.\footnote{172} It establishes that there is no categorical exception to First Amendment protection for lies, that the Stolen Valor Act is not analogous to any category of unprotected speech, and that no new category should be created to cover lies about valor.\footnote{173} Section B contends that prohibiting lies under the Stolen Valor Act constitutes a content-based restriction, an impermissible effort to restrict speech on grounds that it lacks value.\footnote{174} Thus, strict scrutiny must be applied to verbal lies about military decorations.\footnote{175} Finally, Section C argues that § 704(b) of the Stolen Valor Act does not satisfy strict scrutiny for three reasons: (1) the government interests in the Stolen Valor Act are merely symbolic, (2) lies

\footnote{167} 759 F. Supp. 2d at 819.
\footnote{168} See id. The Heck Amendment attempts to address the constitutionality of the Stolen Valor Act by adding an explicit intent requirement to the statute. Stolen Valor Act of 2011, H.R. 1775, 112th Cong. (2011). The bill has been referred to the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, but no hearings have been scheduled and no comparable legislation has been introduced in the Senate. Reply Brief for the United States at 6, Alvarez, 617 F.3d 1198 (No. 08-50345).
\footnote{169} See infra notes 170–262 and accompanying text.
\footnote{170} See infra notes 171–262 and accompanying text.
\footnote{171} See infra notes 172–262 and accompanying text.
\footnote{172} See infra notes 177–202 and accompanying text.
\footnote{173} See infra notes 177–202 and accompanying text.
\footnote{174} See infra notes 203–219 and accompanying text.
\footnote{175} See infra notes 203–219 and accompanying text.
about military decorations do not harm any individual, and (3) there are less speech-restrictive means to achieve the government objective, most notably counterspeech about truly decorated veterans.¹⁷⁶

A. The Stolen Valor Act Regulates Protected Speech

Lies are protected speech under the First Amendment.¹⁷⁷ The First Amendment permits speech restrictions based on the content of the speech only in well-defined and limited areas, such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.¹⁷⁸ Thus, Gertz v. Robert Welch, Inc., in which the U.S. Supreme Court in 1974 held that false statements of fact are not inherently worthy of First Amendment protection, does not stand for the proposition that all false statements fall outside of First Amendment protection.¹⁷⁹ Indeed, only narrow categories, such as defamation, have been carved out from First Amendment protection.¹⁸⁰

Lies prohibited under the Stolen Valor Act do not fall into any of the categories that receive less First Amendment protection.¹⁸¹ The Sto-

¹⁷⁶ See infra notes 220–262 and accompanying text.
¹⁸⁰ See Stevens, 130 S. Ct. at 1581; Alvarez, 617 F.3d at 1206–07; see also Chaplinsky, 315 U.S. at 571–72 (“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.”). First Amendment exceptions must be narrowly tailored in order to protect First Amendment rights. See Chaplinsky, 315 U.S. at 571–72.

Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy (“No, I don’t live around here”); to avoid hurt feelings (“Friday is my study night”); to make others feel better (“Gee you’ve gotten skinny”); to avoid recriminations (“I only lost $10 at poker”); to prevent grief (“The doc says you’re getting better”); to maintain domestic tranquility (“She’s just . . . a friend”); to avoid social stigma (“I just haven’t met the right woman”); for career advancement (“I’m sooo lucky to have a smart boss like you”); to avoid being lonely (“I love opera”); to eliminate a rival (“He has a boyfriend”); to achieve an objective (“But I love you so much”); to defeat an objective (“I’m allergic to latex”); to make an exit (“It’s not you, it’s me”); to delay the inevitable (“The check is in the mail”); to communicate displeasure (“There’s nothing wrong”); to get someone off your back (“I’ll call you about
The Stolen Valor Act and Government Regulation of False Speech

The Stolen Valor Act differs in significant respects from false and misleading consumer speech, fraudulent speech, and defamation, for example—categories of speech that do not receive First Amendment protection. Lies under the Stolen Valor Act are not false and misleading commercial speech, for example, because they are not intended to make a profit. Likewise, lies criminalized by the Stolen Valor Act are not necessarily fraudulent because the Act does not require a person to act in reliance on the lie or for the lie to cause individual harm. And unlike defamation, false statements covered under the Act need not be targeted nor must they have caused individualized harm to another person. Instead, the Stolen Valor Act broadly criminalizes all lies about military decorations without first establishing individualized harm. Because of these distinctions, lies the Stolen Valor Act prohibits are not analogous to and thus are not included in one of the well-defined and

References


183 See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976). The regulation of false and misleading commercial speech has been justified because (1) consumers are not in a position to discriminate between false and true commercial speech, (2) the truth and falsity of commercial speech is objective and well suited for verification, and (3) commercial speech is considered particularly resilient to regulation, and thus there is less of a concern for chilling speech. See id. False and deceptive advertisements distort the marketplace of ideas and may be less likely than non-commercial speech to be corrected by the marketplace of ideas. See id.

184 See 18 U.S.C. § 704 (2006); BLACK’S LAW DICTIONARY, supra note 96, at 731. If Strandlof lied to steal money from the veterans group, it would be fraud; there is no need for a separate statute preventing people from using false claims of valor to prevent fraud. Felisa Cardona, Stolen Valor Act Unconstitutional, Federal Judge Rules, DENVER POST, July 17, 2010, at A1.

185 119 Vote No! Committee, 957 P.2d at 697.

narrow categories of speech that receives less First Amendment protection.\textsuperscript{187}

Furthermore, false statements regarding military decorations do not fit into one of the narrow categories of speech lacking First Amendment protection because lies can be important parts of speech.\textsuperscript{188} The First Amendment reflects the belief that the government must not be able to restrict speech simply because it determines that some speech is not worthwhile.\textsuperscript{189} Society must tolerate the expression of unpopular ideas or topics.\textsuperscript{190} In a democracy, citizens should be prepared to challenge what they hear and to engage in vigorous public debate.\textsuperscript{191} Public discourse must not be at the mercy of the government acting as “the truth police.”\textsuperscript{192} Allowing the government, or even a jury, to decide what is true and what is false and permitting speech restrictions on that basis would prevent free expression and the marketplace of ideas from flourishing.\textsuperscript{193}

In addition, a new category of unprotected speech should not be created to cover the speech regulated by the Stolen Valor Act.\textsuperscript{194} The Supreme Court has refused to carve out categorical exceptions to First Amendment protection in several notable cases and should continue to do so in the Stolen Valor Act.\textsuperscript{195} The Supreme Court has recently refused to carve out categorical First Amendment exceptions for animal cruelty, protests at military funerals, and violent video games.\textsuperscript{196} Although animal cruelty, protests at funerals, and violent videogames, like lies about military decorations, are repugnant types of speech, the First

\textsuperscript{187} See Stevens, 130 S. Ct. at 1585.
\textsuperscript{189} See Stevens, 130 S. Ct. at 1585. The Court wrote:

The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

\textit{Id.}
\textsuperscript{190} Id.
\textsuperscript{191} See \textit{id.}
\textsuperscript{192} Alvarez, 638 F.3d at 674 (Kozinski, C.J., concurring).
\textsuperscript{193} See Gertz, 418 U.S. at 339–40.
\textsuperscript{194} See Stevens, 130 S. Ct. at 1585.
\textsuperscript{195} See Brown v. Entm’t Merch. Ass’n, 131 S. Ct. 2729, 2734 (2011); Snyder v. Phelps, 131 S. Ct. 1207, 1215 n.3 (2011); Stevens, 130 S. Ct. at 1585.
\textsuperscript{196} See Brown, 131 S. Ct. at 2734; Snyder, 131 S. Ct. at 1215 n.3; Stevens, 130 S. Ct. at 1585.
Amendment reflects a belief that loathsome speech must be tolerated to protect freedom of speech and to encourage full and vigorous debate.\(^{197}\)

New categories of unprotected speech should only be created in the most extreme circumstances.\(^{198}\) For example, in 1982 in *New York v. Ferber*, the Supreme Court created a new category of unprotected speech for child pornography because the market for child pornography was intrinsically related to the underlying child abuse; the distribution of material depicting sex acts with children was thought to promote the performance of such acts.\(^{199}\) Thus, the creation of a new category of unprotected speech was necessary because the creation of child pornography is inextricably linked to the act of harming children.\(^{200}\) Lies prohibited by the Stolen Valor Act, in contrast, do not cause any physical harm or abuse and thus do not rise to the level of the child pornography in *Ferber*.\(^{201}\) Accordingly, creating a new category of unprotected speech for falsely claiming receipt of military decorations is unjustified.\(^{202}\)

**B. Section 704(b) of the Stolen Valor Act Is a Content-Based Speech Restriction and, Therefore, Is Subject to Strict Scrutiny**

Section 704(b) of the Stolen Valor Act is a content-based speech restriction because the government specifically regulates false speech about military honors.\(^{203}\) The government, in other words, singles out certain liars for criminal punishment based on the content of their lies: those that lie about military decorations may be criminally sanctioned,

\(^{197}\) See *Brown*, 131 S. Ct. at 2734; *Snyder*, 131 S. Ct. at 1215 n.3; *Stevens*, 130 S. Ct. at 1585.


\(^{201}\) See 458 U.S. at 759.

\(^{202}\) See *Stevens*, 130 S. Ct. at 1586.

but those that lie about other topics may not be.\textsuperscript{204} For example, a lie about saving thousands of lives as a brain surgeon would go unpunished, but a similar lie about saving lives in war and becoming a decorated military veteran might not.\textsuperscript{205}

Whether a statement is protected under the First Amendment is not subject to an ad hoc balancing of the relative social costs and benefits of the speech.\textsuperscript{206} Instead the First Amendment presumptively protects all speech, including false statements.\textsuperscript{207} Granted, and as the U.S. Court of Appeals for the Ninth Circuit recognized in \textit{United States v. Alvarez} in 2010, there is very little value to false claims of military decorations.\textsuperscript{208} But the majority in \textit{Alvarez} was concerned about setting a precedent for government regulation of speech simply because it is a lie.\textsuperscript{209} This concern is valid, particularly because upholding the Stolen Valor Act would permit content-based speech regulation and allow the government to make judgments about which topics to restrict.\textsuperscript{210}

The government must not decide what speech is particularly intolerable and proscribe it on that ground.\textsuperscript{211} The First Amendment, does not tolerate government regulation that hinges on content-based discrimination.\textsuperscript{212} Therefore, courts must apply strict scrutiny and prevent government regulation of stolen valor lies; otherwise, there is little stopping the government from criminalizing other types of lies, such as lying about age on a first date, about financial status on Facebook, or about drinking, smoking, or sex in a conversation with a parent.\textsuperscript{213} It is

\textsuperscript{204} See 18 U.S.C. § 704; R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) (stating that the concern with content-based discrimination is that the government will drive certain ideas or viewpoints from the marketplace).
\textsuperscript{205} See R.A.V., 505 U.S. at 387.
\textsuperscript{206} See R.A.V., 505 U.S. at 387.
\textsuperscript{207} See Stevens, 130 S. Ct. at 1585 (explaining that such a balancing test would be “startling and dangerous”).
\textsuperscript{208} See \textit{Alvarez}, 617 F.3d at 1205 (“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.”).
\textsuperscript{209} See \textit{id.} at 1217 (“We have no doubt that society would be better off if Mr. Alvarez would stop spreading worthless, ridiculous and offensive untruths.”).
\textsuperscript{210} See \textit{id.} at 1200.
\textsuperscript{211} See \textit{id.}
\textsuperscript{212} See Snyder, 131 S. Ct. at 1219; Stevens, 130 S. Ct. at 1585.
\textsuperscript{213} See Snyder, 131 S. Ct. at 1219; \textit{Johnson}, 491 U.S. at 414.
\textsuperscript{213} See \textit{Alvarez}, 617 F.3d at 1200.

[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 bev-
a dangerous precedent to allow the government to decide that certain lies are particularly troublesome and thus to ban them from public discourse.\footnote{See Stevens, 130 S. Ct. at 1585.}

Content-based speech restrictions are presumptively invalid, unless the speech falls into a narrow and well-defined category of unprotected speech.\footnote{Chaplinsky, 315 U.S. at 571–72; see Cohen v. California, 403 U.S. 15, 25 (1971) (“We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.”).} Moreover, the government has the burden of rebutting the presumption of unconstitutionality.\footnote{Stevens, 130 S. Ct. at 1580; United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 817 (2000).} As discussed in Section A, § 704(b) of the Stolen Valor Act does not fit into any category of false factual speech that is outside of First Amendment protection.\footnote{Alvarez, 617 F.3d at 1200.} Therefore, the government must meet strict scrutiny to restrict this speech.\footnote{United States v. Perelman (Perelman I), 737 F. Supp. 2d 1221, 1238 (D. Nev. 2010), aff’d, 658 F.3d 1134 (9th Cir. 2011). Under strict scrutiny, the most stringent form of judicial review, the court will determine whether the restriction on a fundamental right is necessary to the furtherance of a compelling state interest and narrowly tailored to serve that interest. Haggerty, supra note 15, at 1126.} And, as will be discussed in Section C, this section of the Stolen Valor Act does not meet strict scrutiny because it is not narrowly tailored to meet a compelling government interest.\footnote{See Alvarez, 617 F.3d at 1200.}

C. \textit{Strict Scrutiny Analysis: Government Interests in the Stolen Valor Act Do Not Warrant a Speech Restriction}

This Section argues that the government interests protected by the Stolen Valor Act are symbolic and, at most, prevent a generalized public harm.\footnote{See infra notes 223–230 and accompanying text.} These interests are not sufficient to satisfy strict scrutiny and justify a restriction of First Amendment freedoms.\footnote{See infra notes 231–249 and accompanying text.} Furthermore, any harm associated with lies about military decorations can be addressed effectively by government counterspeech publicizing true medal recipients.\footnote{See infra notes 250–262 and accompanying text.}

\textit{Id.}
1. Symbolic Government Interests Do Not Justify Restricting First Amendment Freedoms

Symbolic interests are not sufficient to justify a restriction of First Amendment rights. In 1989 in *Texas v. Johnson*, the Supreme Court invalidated statutes enforced in forty-eight states that prohibited flag desecration. In *Johnson*, the State of Texas argued that there is a compelling state interest in preserving the American flag as a symbol of national unity and, additionally, that statutes prohibiting flag desecration prevent breaches of the peace. The Supreme Court in *Johnson* rejected both of the government’s arguments and invalidated the state statutes. The Court held that symbolic interests, such as the government interest in maintaining the American flag as a symbol of national unity, are not sufficient to justify a restriction of First Amendment freedoms.

Like statutes prohibiting flag burning, the Stolen Valor Act seeks to protect the dignity and sanctity of a government symbol against people who, according to the government, desecrate or misuse that symbol. Through the Stolen Valor Act, the government also seeks to maintain the honor associated with military service medals. This interest in preserving the message or meaning associated with a government symbol, however, is insufficient to justify a restriction of First Amendment rights.

2. No Individual Is Harmed by Lies Regarding Military Decorations

The First Amendment precludes punishment for generalized public frauds, deceptions, and defamation. Said differently, the First Amendment does not allow the regulation of false speech simply on the grounds that it poses a general threat of harm to a group of individuals. Consequently, the government generally does not regulate false speech unless there is a showing of individualized harm, as in the def-

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223 *Johnson*, 491 U.S. at 401; Appellant’s Opening Brief, *supra* note 6, at 22.
224 *Johnson*, 491 U.S. at 406.
225 Id. at 400.
226 See id. at 406.
227 See id.
228 See id. at 400; *Alvarez*, 617 F.3d at 1216.
229 See *Johnson*, 491 U.S. at 405–06; Appellant’s Opening Brief, *supra* note 6, at 22.
230 Fried, *supra* note 75, at 238.
amation or fraud contexts.\textsuperscript{233} The law, in other words, does not punish liars simply for lying, but instead relies on the marketplace of ideas for the truth to come to light and the liar to suffer public disapproval and loss of trust.\textsuperscript{234}

Holocaust denial is an example of a type of speech that harms a general class of citizens but not one individual in particular.\textsuperscript{235} Because it only inflicts generalized harm, there is no law prohibiting Holocaust denial in the United States.\textsuperscript{236} Though there has not been a Supreme Court case on the issue, prosecutions for Holocaust denial would likely violate the First Amendment.\textsuperscript{237}

Unlike speech that causes generalized harm, speech that causes demonstrable harm to a particular individual can be limited without running afoul of the Constitution.\textsuperscript{238} For example, defamation law allows plaintiffs to recover monetary damages in a civil suit in order to protect an individual property interest in reputation.\textsuperscript{239}

Like Holocaust denial and unlike defamation, there are no particular plaintiffs harmed by the lies covered under the Stolen Valor Act.\textsuperscript{240} Instead, the harm is a generalized harm to the honor of the government and all veterans who have received honors.\textsuperscript{241} In addition, and unlike in a defamation case, there is no individual plaintiff or identifi-
able victim in a criminal prosecution under the Stolen Valor Act.\(^2\)\(^{42}\) Instead, the criminal prosecution proceeds in the name of the government and the general public; there is no private right of action for individual veterans who claim they were harmed by a person’s lie about military decorations.\(^2\)\(^{43}\) Therefore, because there is a difference between civil defamation suits, which seek to remedy private harm, and the Stolen Valor Act, which punishes a speaker for causing generalized, public harm, § 704(b) of the Stolen Valor Act is unconstitutional.\(^2\)\(^{44}\)

Certainly, lying about military service is a particularly egregious lie, but it may not have the dire impact on the honor of military decorations as the government suggested in *Alvarez*.\(^2\)\(^{45}\) First, service people’s heroism in combat is not motivated simply by the hopes of receiving military decorations.\(^2\)\(^{46}\) Service people are motivated by loftier goals, such as a duty to serve their country and fellow service people.\(^2\)\(^{47}\) Regardless of the severity of even the generalized harm, whether the lies regarding military decorations cause any particularized harm to individual veterans honored by military decorations is questionable.\(^2\)\(^{48}\)

In sum, the Stolen Valor Act is designed to prevent a generalized, public harm, the government interests in the Act are symbolic, and therefore do not justify a restriction of First Amendment freedoms.\(^2\)\(^{49}\)

3. Effective Counterspeech Could Address the Government’s Concerns About Stolen Valor

Another reason the harm from lies covered under § 704(b) of the Stolen Valor Act is not sufficient to meet strict scrutiny is because there


\(^{243}\) See *Alvarez*, 617 F.3d at 1200; *Strandlof*, 2010 WL 4235395, at *1; *Perelman I*, 737 F. Supp. 2d at 1238.

\(^{244}\) Fried, supra note 75, at 238 (distinguishing defamation from political campaigns where “the grossest misstatements, deceptions, and defamations are immune from legal sanction unless individuals are harmed”). “Group libels” have been recognized in some cases where there is proof that a particular member of a group is the subject of a defamatory statement. See Weatherhead v. Globe Int’l, Inc., 832 F.2d 1226, 1228 (10th Cir. 1987). This is inapplicable here because a particular member of the group is not the subject of a defamatory statement. Id.; see *Strandlof*, 2010 WL 4235395, at *6–7 n.7.

\(^{245}\) See 617 F.3d at 1219.

\(^{246}\) *Strandlof*, 2010 WL 4235395, at *5 (“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.”).

\(^{247}\) See id.

\(^{248}\) *Alvarez*, 617 F.3d at 1200 (comparing lies about military decorations to lying on dating websites).

\(^{249}\) *Strandlof*, 2010 WL 4235395, at *4.
are ample ways for the government to engage in effective counter-
speech, especially by publicizing the names of true award recipients.\(^\text{250}\)

In a democracy and in the marketplace of ideas, it is the public’s
prerogative to question what they hear, and the best remedy for false
speech is counterspeech.\(^\text{251}\) This is one reason false commercial speech
falls outside First Amendment protection—consumers are not in a
good position to determine the truth about advertised products.\(^\text{252}\)
There is an imbalance of power between the consumer and the adver-
tiser.\(^\text{253}\) Likewise, one of the key considerations in a defamation suit is
whether the plaintiff is a public figure.\(^\text{254}\) It is more difficult for public
figures to recover for defamation-based harms because they are better
able than the average nonpublic individual to engage in effective coun-
terspeech.\(^\text{255}\)

An imbalance of power similar to that in false commercial speech
or defamation of a nonpublic figure does not exist between the person
who lies about military decorations and the public.\(^\text{256}\) Members of the
general public are fit to discriminate between liars and truly decorated
veterans by educating themselves on who has and who has not received
particular military decorations.\(^\text{257}\) For instance, the United States has
created websites where the general public can access a database of
Congressional Medal of Honor recipients.\(^\text{258}\) In addition, online groups
have organized to track down and publicize names of people who have
falsely claimed to be decorated veterans of the military.\(^\text{259}\) Similar web-

\(^{250}\) See Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (stat-
ing that the appropriate “remedy to be applied” to objectionable speech “is more speech,
not enforced silence”).

\(^{251}\) See id.; see also Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)
(“[E]very person must be his own watchman for truth, because the forefathers did not
trust any government to separate the true from the false for us.”).

\(^{252}\) See Whitney, 274 U.S. at 377.

\(^{253}\) See id.

\(^{254}\) See Gertz, 418 U.S. at 344; N.Y. Times, 376 U.S. at 256.

\(^{255}\) Gertz, 418 U.S. at 344.

\(^{256}\) See, e.g., The Epidemic of Military Imposters—Are These Individuals Heroes or Villains?,
POW NETWORK, http://www.pownetwork.org/phonies/phonies.htm (last visited Mar. 12,
2012) [hereinafter The Epidemic of Military Imposters] (including pictures posted for people
to identify imposters); Recipients, CONG. MEDAL OF HONOR SOC’Y, http://www.cmohs.org/

\(^{257}\) Strandlof, 2010 WL 4235395, at *6; see, e.g., Whitney, 274 U.S. at 377 (Brandeis, J.,
concurring); The Epidemic of Military Imposters, supra note 256; Recipients, supra note 256. As
the old saying goes, “Believe nothing of what you hear, and only half of what you see.” THE
OXFORD DICTIONARY OF PROVERBS 17 (Jennifer Speake ed., 2009).

\(^{258}\) See Recipients, supra note 256.

\(^{259}\) See, e.g., The Epidemic of Military Imposters, supra note 256; Recipients, supra note 256.
Note that it may be beneficial for the public to know who has stolen valor so they can be
sites should be set up for all of the military decorations covered by the
Stolen Valor Act.\textsuperscript{260}

Online databases are effective and efficient ways to publicize the
names of true medal recipients, alert the public to the issue of stolen
valor, and provide an easy way for citizens to determine if people really
received honors.\textsuperscript{261} The existence of such databases also indicates that
the marketplace of ideas already identifies and makes public the people
who lie about receiving military decorations; thus, they are effective
counterspeech.\textsuperscript{262}

\textbf{Conclusion}

Categories of speech that fall outside of First Amendment protec-
tion must be narrowly defined to protect First Amendment freedoms.
Section 704(b) of the Stolen Valor Act does not fit into any category of
false factual speech that is unprotected by the First Amendment. This
section of the Stolen Valor Act is a content-based speech restriction be-
because the government seeks to regulate speech on a particular sub-
ject—false speech about military honors. Because the speech pro-
scribed is not covered under any category of unprotected speech, a new
category of unprotected speech should not be created, and because the
law imposes content-based restrictions, the government must meet
strict scrutiny in order for § 704(b) of the Stolen Valor Act to pass con-
stitutional muster. The Stolen Valor Act does not meet strict scrutiny
because it is not narrowly tailored to meet a compelling government
interest. It is therefore unconstitutional.

\textbf{Kathryn Smith}

aware that the person is a liar and not trust other statements they may make. \textit{See The Epidemic of Military Imposters, supra note 256.}

\textsuperscript{260} See \textit{The Epidemic of Military Imposters, supra note 256; Recipients, supra note 256.}

\textsuperscript{261} See \textit{The Epidemic of Military Imposters, supra note 256; Recipients, supra note 256.}

\textsuperscript{262} See, e.g., \textit{The Epidemic of Military Imposters, supra note 256; Recipients, supra note 256.}