

A STATUTE TOO FAR: THE OVERREACH OF THE STOLEN VALOR ACT OF 2013

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INTRODUCTION

Consider the following hypothetical: Allen’s grandfather Tom served heroically during the Vietnam War. Due to his bravery in combat, Tom was awarded the Medal of Honor, the highest military decoration for valor that can be awarded to an individual serving with the United States Armed Forces. Following Tom’s

death in 2013, Allen's grandmother kept Tom's Medal of Honor for its sentimental value. Allen decided to honor his grandfather by creating a shadow box filled with his many military decorations. Unable to use the original Medal of Honor, Allen purchased a replica from a local dealer in military items. While Allen simply wished to honor his grandfather, he could be arrested and charged with violating a federal statute known as the Stolen Valor Act. If convicted, he will face a fine and potential imprisonment of up to one year.¹

Was Allen's purchase the type of activity that Congress sought to discourage by creating the Stolen Valor Act? Congress' stated purpose in enacting the Stolen Valor Act of 2005 was to "enhance protections relating to the reputation and meaning of the Medal of Honor and other military decorations and awards" along with "other purposes."² While most Americans agree that the valor of military members should be protected and that those falsely claiming to have won medals or awards should be punished, the current Stolen Valor Act infringes on individuals' First Amendment rights and creates unintended results.

The Stolen Valor Act of 2005 prohibited an individual from claiming to have won an unearned medal or wearing an unearned medal. In 2012, the Supreme Court addressed a constitutional challenge to the prohibition on speech in which an individual claims to have won an unearned medal in *United States v. Alvarez*.³ In striking down the Act's speech prohibition, the Court held that false statements of fact with the intent to deceive, but not defraud, are protected under the First Amendment.⁴ The plurality explained that the prohibition would have a chilling effect on the First Amendment that could not stand if "free speech, thought, and discourse are to remain a foundation of our freedom."⁵

In *Alvarez*, only the dissenting opinion discussed the Stolen Valor Act's prohibition on the wearing of unearned medals.⁶

¹ 18 U.S.C. § 704 (2012).

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

³ *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012).

⁴ *Id.* at 2547.

⁵ *Id.* at 2548.

⁶ *Id.* at 2558 (Alito, J., dissenting).

However, two federal circuit courts took up the constitutionality of that prohibition in *Hamilton* and *Perelman*.⁷ Recognizing that the statute was potentially overbroad, the courts gave the statute a narrowing construction and held that the prohibition on wearing unearned medals applied only to cases when the wearer intended to deceive.⁸

In 2013, Congress amended the Stolen Valor Act by removing the word “wears” from the subsection prohibiting the wearing of unearned medals and revising the subsection struck down in *Alvarez* that prohibited an individual from falsely claiming to have won a medal. While these amendments are an improvement in terms of constitutionality, another constitutional issue with the statute remains. The current language of the statute still prohibits the purchase, manufacture, or sale of medals or imitations thereof.⁹ This prohibition seeks to prevent the acquisition of a symbol, which is protected under the First Amendment. While the current language of the statute does not prohibit the wearing of medals, it simply takes a step back and prohibits the acquisition of the medals by those who did not earn them.

This Comment, in Part I.A, examines the background of the Stolen Valor Act and discusses the constitutional challenges to the Act. Part I.B discusses the Court’s holding in *Alvarez* that false statements of fact with the intent to deceive but not defraud are protected by the First Amendment. Part I.C examines why *Perelman* and *Hamilton* were wrongly decided and why the wearing of medals falls under the same First Amendment protection as statements in which an individual falsely claims to have won a medal. Finally, Part II explains why the acquisition of symbols like medals is also protected by the First Amendment. While protecting the valor of American military personnel is extremely important to most Americans, it must be done in a way that does not infringe upon the very constitutional rights that military personnel are working to defend.

⁷ *United States v. Hamilton*, 699 F.3d 356, 373 (4th Cir. 2012); *United States v. Perelman*, 695 F.3d 866, 870 (9th Cir. 2012).

⁸ *Perelman*, 695 F.3d at 870; *Hamilton*, 699 F.3d at 368.

⁹ 18 U.S.C. § 704 (2012), amended by Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448.

I. BACKGROUND

A. The Stolen Valor Act of 2005

In 1923, Congress passed the forerunner to the Stolen Valor Act, which prohibited the unauthorized wearing, selling, or manufacturing of military decorations.¹⁰ The Act, which became codified as 18 U.S.C. § 704, underwent few changes until the enactment of the Stolen Valor Act of 2005.¹¹ Congress, seeing a need to take further measures to protect the valor of U.S. soldiers returning from the wars in Iraq and Afghanistan, unanimously passed the Act, which President George W. Bush signed into law in 2006.¹² The Stolen Valor Act of 2005 built on the previous language of § 704 by punishing individuals for “falsely represent[ing] 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.”¹³

¹⁰ Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286.

¹¹ 18 U.S.C. § 704 (2006).

¹² Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266 (2006).

Congress found that “[f]raudulent claims surrounding the receipt of the Medal of Honor [and other Congressionally authorized military medals, decorations, and awards] damage the reputation and meaning of such decorations and medals,” and that “[l]egislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals.”

United States v. Alvarez, 617 F.3d 1198, 1199 n.1 (2010) (quoting Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266 (2006)); *see also* 151 CONG. REC. S12688 (daily ed. Nov. 10, 2005) (statement of Sen. Kent Conrad).

¹³ 18 U.S.C. § 704 (2006). Sen. Kent Conrad justified the Act’s prohibition on false statements in his own statement:

Recipients of the Medal of Honor, Distinguished Service Awards, Silver Star, or Purple Heart have made incredible sacrifices for our country. They deserve our thanks and respect. Unfortunately, however, there are some individuals who diminish the accomplishments of award recipients by using medals they have not earned. These imposters use fake medals—or claim to have medals that they have not earned—to gain credibility in their communities. These fraudulent acts can often lead to the perpetration of very serious crimes. Currently, Federal law enforcement officials are only able to prosecute those who wear counterfeit medals. The statute does not apply to individuals who claim to be award recipients, either verbally or in writing, or to those who display fake medals in their offices or homes.

151 CONG. REC. S12688 (daily ed. Nov. 10, 2005) (statement of Sen. Kent Conrad).

The Stolen Valor Act of 2005 contained two prohibitions.¹⁴ Section 704(a) punished individuals for, inter alia, wearing, purchasing, or selling a medal or imitation medal.¹⁵ Section 704(b) punished individuals for falsely representing “verbally or in writing” to have been awarded a decoration or medal authorized by Congress for the armed forces.¹⁶ While subsections (a) and (b) outlined the punishment as up to six months imprisonment, subsections (c) and (d) increased the punishment to up to a year of imprisonment if the medal or decoration involved was a Congressional Medal of Honor, a Distinguished Service Cross, a Navy Cross, an Air Force Cross, a Silver Star, or a Purple Heart.¹⁷

B. United States v. Alvarez: The Invalidation of the Prohibition on False Statements

In 2012, the Supreme Court addressed the constitutionality of the Stolen Valor Act’s prohibition on false written or oral statements regarding the earning of a medal in the case of *United States v. Alvarez*.¹⁸ In 2007, Xavier Alvarez attended a public meeting as a member of the Three Valley Water District Board in California.¹⁹ While introducing himself, Alvarez falsely claimed to have been awarded the Congressional Medal of Honor in 1987.²⁰ In actuality, Alvarez had never been awarded the Congressional Medal of Honor, or even spent a single day in any branch of the United States armed forces.²¹ While Alvarez made the statement

¹⁴ 18 U.S.C. § 704 (2006).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 132 S. Ct. 2537 (2012).

¹⁹ *Id.* at 2542. The board is a governmental entity headquartered in Claremont, California. *Id.* The meeting was Alvarez’s first as a recently elected member of the board. *Id.*

²⁰ *Id.* (citing *United States v. Alvarez*, 617 F.3d 1198, 1201-02 (9th Cir. 2010)). Alvarez “introduced himself as follows: ‘I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy.’” *Id.*

²¹ *Alvarez*, 617 F.3d at 1200-01. Alvarez became known for his elaborate misrepresentations, including that he “played hockey for the Detroit Red Wings,” “worked as a police officer,” and had “been secretly married to a Mexican starlet.” *Id.* at 1201.

with the intent to deceive the listeners, he did not intend to defraud.²²

Federal law enforcement officials indicted Alvarez “under the Stolen Valor Act for lying about [winning] the Congressional Medal of Honor at the meeting.”²³ “The United States District Court for the Central District of California rejected [Alvarez’s] claim that the statute [was] invalid under the First Amendment.”²⁴ Alvarez pleaded guilty, “reserving the right to appeal on his First Amendment claim.”²⁵ “[T]he Ninth Circuit, in a decision by a divided panel, found the Act invalid under the First Amendment and reversed [Alvarez’s] conviction.”²⁶ The Supreme Court granted certiorari in 2011.²⁷

1. Justice Kennedy and the Plurality Opinion

In a six-to-three decision, the Supreme Court struck Subsection 704(b) of the Stolen Valor Act, affirming the Ninth Circuit.²⁸ Justice Kennedy, writing for the four-justice plurality, began by reviewing First Amendment jurisprudence.²⁹ The plurality reaffirmed the protections of the First Amendment, holding 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 The plurality listed the recognized categories of speech unprotected by the First Amendment, including incitement, fraud, obscenity, defamation, “speech integral to criminal conduct,” and child pornography.³¹ Absent from these categories, as the plurality

²² *Alvarez*, 132 S. Ct. at 2542.

²³ *Id.*

²⁴ *Id.*; see also *United States v. Alvarez*, No. CR 07-01035(A)-RGK, 2008 WL 8683050 (C.D. Cal., July 21, 2008).

²⁵ *Alvarez*, 132 S. Ct. at 2542.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 2551.

²⁹ *Id.* at 2543.

³⁰ *Id.* (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)) (internal quotation marks omitted).

³¹ *Id.* at 2544 (“Among these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called ‘fighting words,’ child pornography, fraud, true threats, and speech presenting

pointed out, “is any general exception to the First Amendment for false statements.”³²

The Government argued that false statements have little or no value, citing several cases to support its view.³³ The plurality rejected the Government’s argument, finding that the cases all put forth by the Government to support its argument discussed “defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation.”³⁴ Additionally, the Government pointed to “the criminal prohibition of a false statement made to a Government official, . . . laws punishing perjury[,] and . . . prohibitions on the false representation that one is speaking as a Government official or on behalf of the Government” to “establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny.”³⁵ The plurality also rejected this argument in declining to create a new category of unprotected speech for false statements.³⁶

The plurality also expressed its concern with the breadth of the Stolen Valor Act of 2005, pointing out that “[t]he Act by its plain terms applies to a false statement made at any time, in any place, to any person.”³⁷ While the lie was made in a public place by Alvarez, the plurality was concerned with the statute’s ability to reach into the home and private conversations.³⁸ The plurality noted the distinction between false statements made with the intent to deceive and those made with the intent to defraud,

some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain.”) (citations omitted).

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 2545.

³⁵ *Id.* at 2545-46.

³⁶ *Id.* at 2547.

³⁷ *Id.*

³⁸ *Id.* The plurality further stated that “[p]ermitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable.” *Id.*

affirming “that fraudulent speech generally falls outside the protections of the First Amendment.”³⁹

Applying strict scrutiny, the plurality recognized the Government’s compelling interest in protecting the valor of soldiers.⁴⁰ They failed, however, to see the link between the Government’s interest and the Act’s restriction on false claims by individuals like Alvarez.⁴¹ Counterspeech, or true speech, the plurality determined, could overcome the lies told by individuals falsely claiming to have been awarded a medal.⁴² Even if a link had been established by the Government, the plurality did not think that the Act was narrowly tailored.⁴³ A less speech-restrictive means, they concluded, would be a Government-created database that listed Congressional Medal of Honor winners.⁴⁴

2. Justice Breyer and the Concurring Opinion

Justice Breyer wrote a concurring opinion, joined by Justice Kagan.⁴⁵ Also finding the Stolen Valor Act unconstitutional, he rejected the plurality’s “strict categorical analysis.”⁴⁶ Instead, he argued that the Court should apply “intermediate scrutiny” or a “‘proportionality’ review.”⁴⁷ Justice Breyer, too, believed that value could be found in false statements, such as to “prevent embarrassment, protect privacy, shield a person from prejudice,

³⁹ *Id.* (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

⁴⁰ *Id.* at 2548. “In periods of war and peace alike public recognition of valor and noble sacrifice by men and women in uniform reinforces the pride and national resolve that the military relies upon to fulfill its mission.” *Id.*

⁴¹ *Id.* at 2549.

⁴² *Id.*

⁴³ *Id.* at 2551. “There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system.” *Id.*

⁴⁴ *Id.* “Were a database accessible through the Internet, it would be easy to verify and expose false claims.” *Id.*

⁴⁵ *Id.* at 2551-56 (Breyer, J., concurring).

⁴⁶ *Id.* at 2551.

⁴⁷ *Id.* “[S]ome such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as ‘strict scrutiny’ implies) nor near-automatic approval (as is implicit in ‘rational basis’ review).” *Id.* at 2552.

provide the sick with comfort,” etc.⁴⁸ In his view, the “pervasiveness of false statements, . . . made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more.”⁴⁹ The threat of retribution from this weapon, he reasoned, could prevent individuals from exercising their free speech rights.⁵⁰

Justice Breyer recognized that “many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful.”⁵¹ These statutes and common-law doctrines, however, require more than false statements alone and are narrower than the Stolen Valor Act.⁵² Declaring the Act overbroad since it applied in “family, social, or other private contexts, where lies will often cause little harm,” Justice Breyer found that the Act had a chilling effect on the First Amendment.⁵³ Still, Justice Breyer recognized that the Government had “substantial justification” in passing the Stolen Valor Act.⁵⁴ He concluded that a more “finely tailored statute” could serve that interest and not violate the First Amendment like the Stolen Valor Act of 2005.⁵⁵

3. Justice Alito and the Dissenting Opinion

Justice Alito authored the dissent, joined by Justice Scalia and Justice Thomas.⁵⁶ He argued that the Stolen Valor Act was created in a narrowed form that “presents no threat to the freedom of speech.”⁵⁷ In his view, lies told by individuals falsely claiming to have been awarded a medal “have no value in and of

⁴⁸ *Id.* at 2553.

⁴⁹ *Id.*

⁵⁰ *Id.* “[T]hose who are unpopular may fear that the government will use that weapon selectively, say by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims.” *Id.*

⁵¹ *Id.* at 2553-54.

⁵² *Id.* at 2554.

⁵³ *Id.* at 2555.

⁵⁴ *Id.*

⁵⁵ *Id.* at 2556.

⁵⁶ *Id.* at 2556-65 (Alito, J., dissenting).

⁵⁷ *Id.* at 2556.

themselves,” and the Act did not chill speech.⁵⁸ Justice Alito determined that the Act was “limited in five significant respects”: it “applies to only a narrow category of false representations about objective facts that can almost always be proved or disproved with near certainty”; it “concerns facts that are squarely within the speaker’s personal knowledge”; it “requires proof beyond a reasonable doubt that the speaker actually knew that the representation was false”; it “applies only to statements that could reasonably be interpreted as communicating actual facts”; and it “is strictly viewpoint neutral.”⁵⁹

Legitimate award recipients and their families, in his view, endured harm when an imposter falsely claimed to be the recipient of a medal for valor.⁶⁰ Justice Alito likened the effect of a “proliferation of false claims” to trademark law and how “the proliferation of cheap imitations of luxury goods blurs the ‘signal’ given out by the purchasers of the originals.”⁶¹ He rejected the viability of the creation of a database, “[b]ecause a sufficiently comprehensive database is not practicable.”⁶² That impracticability, he reasoned, means that the problem of stolen valor could not be remedied by “counterspeech.”⁶³ Justice Alito rejected the plurality’s and concurrence’s suggestion that the Stolen Valor Act applies only to certain cases, such as fraud.⁶⁴ In his view, damage is caused whether the statement is made with the intent to defraud or with the intent to deceive.⁶⁵

⁵⁸ *Id.* at 2557. Justice Alito further argued that the Court broke “sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest.” *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 2559.

⁶¹ *Id.* (quoting William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 308 (1987)) (internal quotation marks omitted). Justice Alito further stated that “this diluting effect harms the military by hampering its efforts to foster morale and esprit de corps.” *Id.*

⁶² *Id.* at 2560.

⁶³ *Id.*

⁶⁴ *Id.* “The plurality and concurrence also suggest that Congress could protect the system of military honors by enacting a narrower statute. The plurality recommends a law that would apply only to lies that are intended to secure moneys or other valuable considerations.” *Id.* (internal quotation marks omitted).

⁶⁵ *Id.* Justice Alito explained:

[M]uch damage is caused, both to real award recipients and to the system of military honors, by false statements that are not linked to any financial or

*C. Perelman & Hamilton: A Prohibition on the Wearing of
Unearned Medals Is Valid in Cases Where the Wearer Intends
to Deceive*

While *Alvarez* struck down the prohibition on false statements contained in § 704(b), two circuit courts in *Perelman* and *Hamilton* ruled on the constitutionality of § 704(a)'s prohibition on an individual wearing an unearned medal.⁶⁶ Congress added this prohibition, like the prohibition on false statements about the earning of a medal or decoration, through the Stolen Valor Act of 2005.⁶⁷ In *Perelman*, the defendant “fraudulently obtained a Purple Heart and wore it in public.”⁶⁸ Though Perelman served in Vietnam for three months, he used an accidental self-inflicted wound to the thigh to defraud both the United States Air Force and the Veterans Administration to receive a Purple Heart and disability benefits.⁶⁹ After discovering the fraud, the Government indicted the defendant for wearing the Purple Heart in violation of the Stolen Valor Act.⁷⁰

Perelman, after pleading guilty, appealed to the Ninth Circuit, bringing “a facial First Amendment challenge” to the Act.⁷¹ Perelman did not argue that the statute did not apply to his fraudulent obtaining of the medal.⁷² Perelman argued that the statute would apply to situations in which punishing the wearing would be undesirable and unintended, such as actors wearing military medals, children wearing medals given to them by soldiers, or grieving spouses or parents wearing medals at

other tangible reward. Unless even a small financial loss—say, a dollar given to a homeless man falsely claiming to be a decorated veteran—is more important in the eyes of the First Amendment than the damage caused to the very integrity of the military awards system, there is no basis for distinguishing between the Stolen Valor Act and the alternative statutes that the plurality and concurrence appear willing to sustain.

Id.

⁶⁶ See *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *United States v. Perelman*, 695 F.3d 866 (9th Cir. 2012); *United States v. Hamilton*, 699 F.3d 356 (4th Cir. 2012).

⁶⁷ 18 U.S.C. § 704 (2006).

⁶⁸ *Perelman*, 695 F.3d at 868.

⁶⁹ *Id.*

⁷⁰ *Id.* The government also charged Perelman for “obtaining disability benefits under false pretenses, in violation of 18 U.S.C. § 641.” *Id.*

⁷¹ *Id.* at 869.

⁷² *Id.*

military funerals.⁷³ The Ninth Circuit agreed that a broad reading of the statute “might raise serious constitutional concerns.”⁷⁴ Rather than declare the statute unconstitutional, the court chose to narrow the statute to cases in which the wearer intends to deceive.⁷⁵

The Ninth Circuit distinguished the prohibition on false statements in § 704(b) as a content-based restriction while § 704(a), in its view, criminalized conduct, not pure speech.⁷⁶ The prohibition on conduct contained in § 704(a), the court reasoned, applied “to a narrow range of conduct similar to that prohibited by impersonation statutes.”⁷⁷ In *Alvarez*, the Court held that false statements made with the intent to deceive but not defraud are protected.⁷⁸ The court in *Perelman* read the prohibition on wearing unearned medals in § 704(a) by attempting to distinguish between speech and the expressive conduct of an individual wearing a medal, despite the potentially identical content.⁷⁹

Section 704(a), in the court’s view, “criminalizes certain specified activities limited by a scienter requirement.”⁸⁰ Not finding a constitutional issue with the statute, the Ninth Circuit reaffirmed the compelling interest of the government in “preserving the integrity of its system of honoring our military men and women for their service and, at times, their sacrifice” and “preventing the intentionally deceptive wearing of medals.”⁸¹ The court concluded that the statute passed the *O’Brien* test and promoted a “substantial governmental interest,” therefore meeting intermediate scrutiny.⁸²

⁷³ *Id.* at 870.

⁷⁴ *Id.*

⁷⁵ *Id.* “In our view, Congress intended to criminalize the unauthorized wearing of medals only when the wearer *intends to deceive.*” *Id.*

⁷⁶ *Id.* at 871. The Ninth Circuit further explained, “The use of a physical object goes beyond mere speech and suggests that the wearer has proof of the lie, or government endorsement of it.” *Id.*

⁷⁷ *Id.*

⁷⁸ *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012).

⁷⁹ *Perelman*, 695 F.3d at 871.

⁸⁰ *Id.* (footnote omitted).

⁸¹ *Id.* at 872 (quoting *United States v. Alvarez*, 617 F.3d 1198, 1216 (9th Cir. 2010)).

⁸² *Id.* at 872-73 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

In 2012, the Fourth Circuit addressed an identical argument in *Hamilton*.⁸³ A jury convicted Hamilton for wearing military medals without authorization under § 704(a).⁸⁴ He too argued that the statute was “facially unconstitutional.”⁸⁵ Observing the Ninth Circuit’s holding in *Perelman*, the Fourth Circuit similarly held that the criminal offense prohibiting the wearing of medals only applied when the wearer had the intent to deceive.⁸⁶ While the Ninth Circuit in *Perelman* applied intermediate scrutiny, the Fourth Circuit in *Hamilton* chose not to address the appropriate level of scrutiny to apply.⁸⁷ The court found that the Stolen Valor Act could “withstand a facial challenge under even ‘the most exacting scrutiny.’”⁸⁸

D. The Stolen Valor Act of 2013

Congress overwhelmingly passed an amended Stolen Valor Act that President Barack Obama signed into law in June of 2013.⁸⁹ In response to the Court’s decision in *Alvarez*, Congress changed § 704(b) to apply to cases when an individual attempts to use an unearned medal or other decoration to defraud.⁹⁰ Additionally, Congress removed the word “wears” from § 704(a), the language that *Hamilton* and *Perelman* upheld as read to apply

Under *O’Brien*, “a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”

Id.

⁸³ *United States v. Hamilton*, 699 F.3d 356 (4th Cir. 2012).

⁸⁴ *Id.* at 358. The jury convicted Hamilton of four charges, all based on “misrepresentations he made concerning his service in the United States Marine Corps.” *Id.* Hamilton provided false information to collect VA benefits and wore unearned medals and rank to a Vietnam Veterans’ Recognition Ceremony. *Id.*

⁸⁵ *Id.* at 366.

⁸⁶ *Id.* at 368.

⁸⁷ *Id.* at 371.

⁸⁸ *Id.*

⁸⁹ See *Heck Statement on Stolen Valor Act of 2013 Being Signed into Law*, JOE HECK (June 3, 2013), <http://heck.house.gov/press-release/heck-statement-stolen-valor-act-2013-being-signed-law>.

⁹⁰ Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448.

beyond fraudulent speech to deceptive speech.⁹¹ However, a problem with the statute remains, as Congress chose to keep the language punishing an individual who “knowingly purchases, attempts to purchase, solicits for purchase, . . . manufactures, sells, [or] attempts to sell . . . any decoration or medal authorized by Congress for the armed forces of the United States . . . or any colorable imitation thereof.”⁹² As discussed in Part II.C below, this language creates an additional First Amendment issue.

Several state statutes, passed around the same time as the Stolen Valor Act of 2005, include similar language that infringes on individuals’ First Amendment rights. As discussed in Part II.D below, states should amend these statutes in order to prevent constitutional challenges.

II. ARGUMENT

A. Under Alvarez, False Statements of Fact Made with the Intent to Deceive but not Defraud Are Protected Under the First Amendment

In *United States v. Alvarez*, the Supreme Court addressed a case in which an individual falsely claimed to be the recipient of a medal with the intent to deceive, but not the intent to defraud.⁹³ The Court held that the false statements made by Alvarez in order to deceive, along with similar false statements, are protected under the First Amendment.⁹⁴ Because those false statements are protected, the Government had to show adequate justification for the statute.⁹⁵ Within the majority, the Justices disagreed on the proper level of scrutiny to apply to these false statements, with the plurality choosing “exacting” scrutiny⁹⁶ and the concurrence applying “intermediate” scrutiny.⁹⁷ While the plurality found that

⁹¹ Compare Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448, with 18 U.S.C. § 704(a) (2006). See *United States v. Perelman*, 695 F.3d 866 (9th Cir. 2012); *United States v. Hamilton*, 699 F.3d 356 (4th Cir. 2012).

⁹² 18 U.S.C. § 704 (a) (2012), amended by Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448.

⁹³ *United States v. Alvarez*, 132 S. Ct. 2537, 2542 (2012).

⁹⁴ *Id.* at 2547-48.

⁹⁵ *Id.* at 2551.

⁹⁶ *Id.* at 2548.

⁹⁷ *Id.* at 2551 (Breyer, J., concurring).

the Government had a compelling state interest in protecting “the integrity of the military honors system in general”⁹⁸ and the concurrence found a “substantial justification” in protecting “the interests of those who have sacrificed their health and life for their country,”⁹⁹ both groups held that the Stolen Valor Act was not narrowly tailored enough.¹⁰⁰ As a result, the Court struck down § 704(b) of the Stolen Valor Act that prohibited an individual from falsely claiming to have won a medal.¹⁰¹

The Stolen Valor Act of 2005 constituted a content-based restriction on pure speech; therefore, the government had the burden of proving that its interests overcame the protections afforded by the First Amendment.¹⁰² These First Amendment protections mean that the government cannot “restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁰³ The government’s restriction of an individual purchasing, selling, or creating medals or imitations is an attempt to limit an individual’s ability to convey a message or idea, whether true or false. When the government attempts to create a content-based restriction on speech, it is “presumptively invalid,” and the Government bears the burden of showing its constitutionality.¹⁰⁴ The Court has rejected a “free-floating” test based on “an ad hoc balancing of relative social costs and benefits” in determining whether speech is protected by the First Amendment as “startling and dangerous.”¹⁰⁵

The Government’s main argument in support of the Stolen Valor Act, as articulated in *Alvarez*, was that false statements have no value; therefore, they have no First Amendment protection.¹⁰⁶ This argument was dismissed by the plurality and concurrence, as the cases cited by the Government to support their

⁹⁸ *Id.* at 2548-49 (plurality opinion).

⁹⁹ *Id.* at 2555 (Breyer, J., concurring).

¹⁰⁰ *Id.* at 2549 (plurality opinion); *id.* at 2555 (Breyer, J., concurring).

¹⁰¹ *Id.* at 2551 (plurality opinion); *id.* at 2556 (Breyer, J., concurring).

¹⁰² *Id.* at 2543 (plurality opinion).

¹⁰³ *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983)) (internal quotation marks omitted).

¹⁰⁴ *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 817 (2000)) (internal quotation marks omitted).

¹⁰⁵ *Id.* at 470.

¹⁰⁶ *Alvarez*, 132 S. Ct. at 2545.

argument discussed “defamation, fraud, or some other legally cognizable harm associated with a false statement.”¹⁰⁷ *Alvarez* can be distinguished from prior decisions dealing with false statements in that the Stolen Valor Act targets statements solely because of their falsity.¹⁰⁸ Falsity alone is insufficient to bring speech outside the protections of the First Amendment.¹⁰⁹

While disagreement exists about the amount of protection that false statements should receive, they are at least entitled to some heightened First Amendment protection.¹¹⁰ There are situations when false factual statements can be useful to an individual, such as when they prevent embarrassment or protect privacy.¹¹¹ A restriction on this right to make false statements can “inhibit the speaker from making true statements, thereby ‘chilling’ . . . speech.”¹¹² By prohibiting the buying, selling, or creation of medals or even imitation medals, the Government is chilling lawful, protected speech by individuals through the expressive conduct of wearing unearned medals. Additionally, due to “the pervasiveness of false statements,” a restriction by the Government on false statements of certain types could lead to punishment being applied in a selective manner, such as being used to target political enemies or undesirables.¹¹³ While most Americans would probably agree that false speech by a person claiming to have earned a medal is undesirable, the Government may not regulate speech simply because of its undesirability when that speech is protected by the First Amendment absent the restriction passing a heightened level of scrutiny.

Fraudulent speech is one of the few historic categories of speech that the Government has the power to prevent.¹¹⁴ In *Stevens*, the Court listed the recognized categories of speech—including obscenity, defamation, fraud, incitement and “speech integral to criminal conduct”—that have historically been

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2553 (Breyer, J., concurring).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 2547 (plurality opinion).

restricted without raising constitutional problems.¹¹⁵ Today, fraudulent speech still may be restricted without conflicting with First Amendment rights.¹¹⁶ Still, even when considering instances of defamation or fraud, the Court has held that the false statements “must be . . . knowing or reckless falsehood[s].”¹¹⁷ The Stolen Valor Act of 2005, however, was not restricted to the prohibition of speech made when the speaker intended to defraud.¹¹⁸ Perhaps recognizing that a statute punishing statements made with the intent to defraud instead of a mere intent to deceive would be subject to less judicial scrutiny, Congress drafted subsection (b) of the Stolen Valor Act of 2013 to punish an individual who “fraudulently holds oneself out to be a recipient of a decoration or medal.”¹¹⁹

B. The Wearing of Medals Is Communicative Conduct that Falls Under the Same First Amendment Protections Established in Alvarez

Subsection (a) of the Stolen Valor Act of 2005 prohibited an individual from wearing an unearned medal.¹²⁰ This prohibition served the purpose of discouraging individuals from falsely communicating to others that they earned medals by engaging in the conduct of wearing a medal. The wearing of a medal is communicative conduct, which, like false statements, is entitled to First Amendment protection.¹²¹

In order to determine whether communicative conduct should be classified as symbolic, the Court in *Spence v. Washington* looked to whether the actor “inten[ded] to convey a particularized

¹¹⁵ *United States v. Stevens*, 559 U.S. 460, 468 (2010).

¹¹⁶ *Alvarez*, 132 S. Ct. at 2547.

¹¹⁷ *Id.* at 2545.

¹¹⁸ 18 U.S.C. § 704 (2006).

¹¹⁹ 18 U.S.C. § 704(b) (2012), *amended by* Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448.

¹²⁰ 18 U.S.C. § 704(a) (2006). While Congress removed the language of the Stolen Valor Act prohibiting an individual from wearing an unearned medal in 2013, several state statutes still have similar language in their statutes. *See* CONN. GEN. STAT. ANN. § 53-378 (2007); 720 ILL. COMP. STAT. ANN. 5/17-2(e) (West 2014); MO. ANN. STAT. § 578.510 (West 2011); N.J. STAT. ANN. § 38A:14-5 (West 2010); OKLA. STAT. ANN. tit. 72, § 6-1 (West 2011); TENN. CODE ANN. § 58-1-118 (2013); UTAH CODE ANN. § 76-9-706 (LexisNexis 2008).

¹²¹ *See Texas v. Johnson*, 491 U.S. 397, 405-06 (1989).

message” and whether, “in the surrounding circumstances,” there was a great likelihood “that the message would be understood by those who viewed it.”¹²² Wearing a medal is symbolic speech since the wearer intends to convey a particular message by displaying the medal and there is a great likelihood that the message will be understood by those that view the medal. Restrictions on symbolic speech, or restrictions which infringe on the ability to make symbolic speech, are subject to a heightened level of scrutiny.

A restriction on conduct rather than an oral or written statement generally does not change the outcome of the restriction in terms of constitutionality. The Court has “long recognized” that the First Amendment’s protection “does not end at the spoken or written word.”¹²³ In *Spence*, the appellant improperly displayed a modified United States flag, another revered American symbol, from the window of his apartment.¹²⁴ The Court found that, though the American flag is a “symbol of patriotism” and pride to most Americans, the flag means different things to different individuals.¹²⁵ The Court invalidated Spence’s conviction.¹²⁶ In *Johnson*, the respondent was convicted under a Texas anti-flag desecration statute after burning a flag outside the Republican National Convention.¹²⁷ The Court held that Johnson’s burning of a U.S. flag was expressive conduct under the *Spence* test; therefore, it was entitled to First Amendment protection.¹²⁸ Similarly, in *Eichman*, the Court struck down a federal statute banning the burning of a U.S. flag.¹²⁹ In *Tinker*, the Court found that the First Amendment also protected students’ expression through the wearing of black armbands to protest American military involvement in Vietnam.¹³⁰

In those cases, the actor intended to convey a political message. Specifically, in *Spence*, *Eichman*, and *Johnson*, the actor sought to convey a political message by using a government

¹²² *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

¹²³ *Johnson*, 491 U.S. at 404.

¹²⁴ *Spence*, 418 U.S. at 406.

¹²⁵ *Id.* at 413.

¹²⁶ *Id.* at 415.

¹²⁷ *Johnson*, 491 U.S. at 399.

¹²⁸ *Id.* at 420.

¹²⁹ *United States v. Eichman*, 496 U.S. 310, 317-19 (1990).

¹³⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513-14 (1969).

symbol.¹³¹ The government sought to restrict the display and use of the symbols to uses that it viewed as acceptable. The statutes were struck down since allowing the government to “permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries.”¹³² An outright ban on the wearing of unearned medals, or a limit on the means of acquiring a medal or imitation medal, seeks to prevent government symbols being used by individuals to communicate a message that the government views as undesirable.

Perelman and *Hamilton* ruled incorrectly on the Stolen Valor Act’s prohibition of an individual wearing unearned medals since the wearing of a medal is expressive conduct that is akin to an oral or written statement. In *Perelman*, the Ninth Circuit sought to distinguish the subsection of the Stolen Valor Act at issue in the case from *Alvarez*.¹³³ The court held that an “expressive element” in the intentional wearing of a medal created a distinction between the case and the criminalization of “pure speech” addressed in *Alvarez*.¹³⁴ The court failed to take into account that expressive conduct can be akin to “pure speech.” Perhaps to make the Stolen Valor Act’s restriction of expressive conduct meet a prong of the *O’Brien* test, the court found that the compelling state interest in preventing the deceptive wearing of medals was “unrelated to the suppression of free speech expression” because the statute “does not prevent the expression of any particular message or viewpoint.”¹³⁵ In *Hamilton*, the Fourth Circuit similarly held that § 704(a) could be distinguished from § 704(b) in that it did not regulate pure speech.¹³⁶

Assuming that the Stolen Valor Act of 2005 actually was content-neutral, the *O’Brien* test would apply to determine whether the statute placed an incidental burden on expressive conduct.¹³⁷ However, the language in a statute called the “Stolen

¹³¹ See generally *Spence v. Washington*, 418 U.S. 405 (1974); *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

¹³² *Johnson*, 491 U.S. at 417.

¹³³ *United States v. Perelman*, 695 F.3d 866, 871 (9th Cir. 2012).

¹³⁴ *Id.*

¹³⁵ *Id.* at 872.

¹³⁶ *United States v. Hamilton*, 699 F.3d 356, 369 (4th Cir. 2012).

¹³⁷ *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

Valor Act” prohibiting the wearing of unearned medals is undoubtedly related to preventing the expression of a particular message or viewpoint—an individual falsely saying, “I earned a medal,” whether through a statement or through the wearing of a medal. Because the Act aimed to prohibit and prevent a particular message or viewpoint, its restriction was content-based. In *Alvarez*, the Court found the Stolen Valor Act to be content-based.¹³⁸ In *Hamilton*, the Fourth Circuit declined to designate a level of scrutiny to apply.¹³⁹ The distinction between a content-based and content-neutral restriction is important because it will determine whether the reviewing court applies the heightened scrutiny like the Court in *Johnson*¹⁴⁰ or the “relatively lenient” standard used in *O’Brien*.¹⁴¹

Though both circuit courts found that the governmental interest in the prohibition on the wearing of unearned medals was sufficient to pass what they deemed to be the appropriate level of scrutiny, they recognized that an overbroad reading could be given to the statute.¹⁴² To counter this overbroad reading, the courts gave a narrowing construction to the Act and held that it applied only to situations in which the wearer intended to deceive.¹⁴³ While the circuit courts viewed this narrowing construction as sufficient to maintain the constitutionality of that section of the Stolen Valor Act, the courts should have narrowed the statute to apply only to situations in which the wearer intends to commit fraud, or struck down the statute completely. The holding of *Alvarez* is clear: false statements of fact made with the intent to deceive but not with the intent to defraud fall under the protections of the First Amendment¹⁴⁴ while a law prohibiting fraudulent statements simply must be rationally related to a legitimate government interest.

¹³⁸ *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012).

¹³⁹ *Hamilton*, 699 F.3d at 371.

¹⁴⁰ *Id.* at 370.

¹⁴¹ *Id.*

¹⁴² *United States v. Perelman*, 695 F.3d 866, 870 (9th Cir. 2012); *Hamilton*, 699 F.3d at 367-68.

¹⁴³ *Perelman*, 695 F.3d at 870; *Hamilton*, 699 F.3d at 368.

¹⁴⁴ *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012).

C. Americans Have a Constitutional Right to Acquire Symbols Like Medals

Congress amended the Stolen Valor Act in 2013, requiring that the oral or written misrepresentations under § 704(b) be fraudulent.¹⁴⁵ Congress removed the prohibition on wearing medals found in § 704(a).¹⁴⁶ A constitutional issue remains, however, with § 704(a). That section states that an individual will be punished for purchasing, manufacturing, selling, attempting to purchase or sell, importing or exporting “any decoration or medal authorized by Congress for the armed forces of the United States” or an imitation thereof.¹⁴⁷

If an individual can wear an unearned medal even with the intent to deceive, or make a statement that they won the medal so long as it is not made with the intent to commit fraud, that individual should be able to purchase, sell, or manufacture a medal or replica medal in order to engage in protected expression. Many individuals attempting to purchase a medal, like Allen in the hypothetical, do so without the intent to make false claims. Others might purchase or create medals to use while engaging in political speech, like protesting a war. The Ninth Circuit, in *Perelman*, recognized that medals are “physical objects sanctioned by the government.”¹⁴⁸ This makes medals comparable to flags, which are also physical objects sanctioned by the government. Flags have not been placed off-limits and could not be without undermining the holdings of cases such as *Texas v. Johnson*. Placing medals off-limits makes particular types of expression impossible.¹⁴⁹

Imagine the effect on free speech if the government placed flags off-limits except only to certain individuals who it felt would not engage in undesirable speech. The government does not restrict the purchase, sale, or creation of flags or imitations like

¹⁴⁵ 18 U.S.C. § 704 (2012), amended by Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Perelman*, 695 F.3d at 870.

¹⁴⁹ See generally Douglas W. Kmiec, *In the Aftermath of Johnson and Eichman: The Constitution Need Not Be Mutilated to Preserve the Government's Speech and Property Interests in the Flag*, 1990 BYU L. REV. 577.

the Stolen Valor Act does on medals. The government allows individuals to obtain or create flags that express a viewpoint nearly all Americans abhor, like the Nazi flag. The transfer of medals cannot be limited simply because nearly all Americans abhor false claims by individuals claiming to have earned a medal. Actual or imitation medals, like flags, can be used for expressive purposes, so placing them off-limits makes it impossible for an individual who is not an actual recipient of a medal to engage in constitutionally protected expression.

One argument in support of limiting the right of transfer or acquisition of legitimate medals, as discussed in *Hamilton*, is that the deceptive wearing of military uniforms and medals threatens to “diminish the symbolic value of these items.”¹⁵⁰ The argument that the misuse of government symbols diminished their value emerged in the Court’s decisions in *Johnson* and *Eichman*.¹⁵¹ Justice Alito, in the dissenting opinion of *Alvarez*, compared the proliferation of medals to “cheap imitations of luxury goods,” in that false claims “blur[] the signal given out by the actual awards by making them seem more common than they really are.”¹⁵² At least one legal scholar has suggested that the unique design of symbols, like flags or medals, warrants the government protecting the design through copyright law.¹⁵³ Proponents of this approach argue that the symbol need not be available to be used for expressive conduct if the government is considered its copyright holder.¹⁵⁴

However, this approach is not without its problems. Government property is usually not copyrightable under the Copyright Act.¹⁵⁵ Additionally, copyright law serves the purpose of “creat[ing] economic incentives for development,” while the government’s purpose in copyrighting a symbol would be noneconomic.¹⁵⁶ The First Amendment protects the right of expression from government restrictions if those restrictions are

¹⁵⁰ *United States v. Hamilton*, 699 F.3d 356, 371 (4th Cir. 2012).

¹⁵¹ *Kmiec*, *supra* note 149, at 600.

¹⁵² *United States v. Alvarez*, 132 S. Ct. 2537, 2559 (2012) (Alito, J., dissenting).

¹⁵³ *Kmiec*, *supra* note 149, at 617.

¹⁵⁴ *Id.* at 618-19.

¹⁵⁵ *Id.* at 620. Section 105 of the Copyright Act states that protection “is not available for any work of the United States Government.” 17 U.S.C. § 105 (2012).

¹⁵⁶ *Kmiec*, *supra* note 149, at 620.

adopted “because of its message, its ideas, its subject matter, or its content.”¹⁵⁷ The government would have to amend § 105 of the Copyright Act and reconcile the changes to the copyright law with the First Amendment in order for this approach to be successfully implemented.

Medals—as public symbols—can be analogized to the public forum doctrine. Public symbols, like public fora, are for public use.¹⁵⁸ Traditional public fora are places like public streets and parks which “by long tradition or by government fiat have been devoted to assembly and debate.”¹⁵⁹ The government can only exclude speakers from traditional public fora through a content-based restriction when “the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.”¹⁶⁰ The Stolen Valor Act constitutes a content-based restriction, and the Court in *Alvarez* found that the law could be more narrowly tailored. An individual should have the right to purchase or create a medal to engage in protected speech in a public environment that is protected through the public forum doctrine.

Another argument is that the government prohibits the possession of fake identification cards and counterfeit money, which are imitations of government issued items the same as medals. The argument can be made that this means the government has the right to ban the possession of replica or imitation medals. The distinction is that fake identification cards and counterfeit money are almost solely used to engage in criminal conduct, especially fraud. They are less likely serve as symbols to express a particular message like medals. Imitation medals are worn in plays and movies, put in shadow boxes, or even worn on Halloween costumes by children.

“The Government may not suppress lawful speech as [a] means to suppress unlawful speech.”¹⁶¹ The Government can take measures to stop fraud, but it cannot limit non-fraudulent speech

¹⁵⁷ *Alvarez*, 132 S. Ct. at 2543 (plurality opinion) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

¹⁵⁸ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985).

¹⁵⁹ *Id.* at 802 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

¹⁶⁰ *Id.* at 800.

¹⁶¹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).

due to the protections of the First Amendment. The Stolen Valor Act's prohibition on buying, selling, or manufacturing medals or imitations thereof limits non-fraudulent speech. An analogous case is *Ashcroft v. Free Speech Coalition*, in which the Supreme Court addressed the constitutionality of an anti-child pornography statute.¹⁶² The statute in that case applied "to sexually explicit images that appear[ed] to depict minors but were [actually] produced without using any real children."¹⁶³ Like an individual "stealing" the valor of service members, the Court recognized that the sexual abuse of a child is an act that society abhors.¹⁶⁴ Still the Court struck down the statute as being overbroad since it covered materials beyond the previously established categories and limited the freedom of speech.¹⁶⁵

Congress should remove § 704(a) since it suppresses lawful speech.¹⁶⁶ Section 704(b) prohibits an individual from committing fraud through the use of an unearned medal,¹⁶⁷ which seeks to prevent individuals from receiving benefits that should be reserved for individuals who rightfully earn medals or awards through their service to the United States. Section 704(a), on the other hand, seeks to prevent individuals from purchasing, manufacturing, or selling unearned medals, which makes the statute overbroad. The only conceivable purpose of this language is to keep medals out of the hands of individuals who did not earn them, in the fear that they will wear the medals and steal the valor of American service members.

Even without a statute that punished individuals for actions relating to medals, there are three alternative solutions. The first solution is counterspeech, which in this situation is "outrage and contempt" expressed towards lies about winning medals.¹⁶⁸ Justice Louis Brandeis first articulated the premise of counterspeech in his concurring opinion in *Whitney v.*

¹⁶² *Id.* at 239.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 244.

¹⁶⁵ *Id.* at 256.

¹⁶⁶ See 18 U.S.C. § 704(a) (2012), amended by Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448.

¹⁶⁷ See *id.* § 704(b), amended by Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448.

¹⁶⁸ *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012).

California.¹⁶⁹ He wrote that “the remedy to be applied is more speech, not enforced silence.”¹⁷⁰ In the case of Xavier Alvarez, “he was ridiculed online,” “reported [on] in the press,” and had “a fellow board member call[] for his resignation” even before authorities charged him with violating the Stolen Valor Act.¹⁷¹

A second solution is to let true speech win out in the marketplace of ideas. The Court cites its theory in *Alvarez* that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”¹⁷² Many groups have online pages designed to check military records and expose individuals from around the United States who claim to have earned a medal.¹⁷³ Finally, another solution is to create an online database of high-level medal winners that would allow an individual who suspects that another individual is lying about winning a medal to quickly determine whether the claim is being falsely made.¹⁷⁴

D. Remaining Problems with State Stolen Valor Statutes

Following the enactment of the federal Stolen Valor Act, several states passed laws, still in effect at the time of this Comment, that are similarly aimed at curtailing the problem of stolen valor.¹⁷⁵ These statutes vary in language and scope; however, many have not been amended to prevent challenges to their constitutionality after *Alvarez*. For example, Connecticut’s statute tracks the language of § 704(b), which presents a

¹⁶⁹ Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech*, 2000 BYU L. REV. 553 (citing *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring)).

¹⁷⁰ *Whitney*, 274 U.S. at 377.

¹⁷¹ *Alvarez*, 132 S. Ct. at 2549.

¹⁷² *Id.* at 2550 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

¹⁷³ See, e.g., STOLEN VALOR (Mar. 23, 2015), <http://www.stolenvalor.com>. One section of the website explains how to request records to check claims regarding the earning of military medals and awards, while another includes names, photos, and cities of individuals making false claims. *Id.*

¹⁷⁴ *Alvarez*, 132 S. Ct. at 2551.

¹⁷⁵ See CONN. GEN. STAT. ANN. § 53-378 (2007); 720 ILL. COMP. STAT. ANN. 5/17-2(e) (West 2014); MO. ANN. STAT. § 578.510 (West 2011); N.J. STAT. ANN. § 38A:14-5 (West 2010); OKLA. STAT. ANN. tit. 72, § 6-1 (West 2011); TENN. CODE ANN. § 58-1-118 (2013); UTAH CODE ANN. § 76-9-706 (LexisNexis 2008).

constitutional problem following *Alvarez*.¹⁷⁶ Other states like Missouri have statutes that track the language of the Stolen Valor Act of 2005 almost exactly.¹⁷⁷ California's statute, known as the "California Stolen Valor Act," correctly punishes individuals for their use of medals to defraud.¹⁷⁸ While constitutional challenges, citing *Alvarez*, to state statutes tracking the language of § 704(b) of the Stolen Valor Act of 2005 will result in the statute being struck down, state legislatures should be proactive by amending these statutes.

CONCLUSION

The Stolen Valor Act's restriction on the purchase, sale, or creation of medals or imitation medals constitutes an unlawful content-based restriction. The government's aim in preventing individuals from acquiring unearned medals is to prevent those individuals from making false claims. In *Alvarez*, the Court held that the First Amendment protected the speech of individuals who falsely claim to have earned a medal. False claims can be made through oral or written statements or through expressive conduct like the wearing of a medal. Because the Stolen Valor Act limits an individual's right to free speech, it should be amended to allow medals to be purchased, sold, or created while still punishing individuals who use them to commit fraud.

*Ty Scott**

¹⁷⁶ See CONN. GEN. STAT. ANN. § 53-378 (2007).

¹⁷⁷ See MO. ANN. STAT. § 578.510 (West 2011). This statute is known as the "Stolen Valor Act of 2007." *Id.*

¹⁷⁸ CAL. PENAL CODE § 532b (West 2011).

* J.D., The University of Mississippi School of Law, 2014; B.A., Mississippi State University, 2010. The author wishes to thank his wife, Hannah Beth, for her love and support and Professor Jack Wade Nowlin for his guidance in writing this Comment.