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United States v. Alvarez: Defaming the Medal of Honor Through Lies, Deceit, and the First Amendment

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Case Comment

UNITED STATES V. ALVAREZ: DEFAMING THE MEDAL OF HONOR THROUGH LIES, DECEIT, AND THE FIRST AMENDMENT†

"[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."[1]

I. INTRODUCTION

Within the ambit of the First Amendment lies one of America's most cherished freedoms—the right to free speech.[2] It is because of this right that government does not have the power to restrict expression simply because of its message, ideas, subject matter, or content.[3] As a result, there is a presumption of invalidity regarding content-based restrictions on speech, and the burden is on the government to prove that the statute is the least restrictive means to achieve the government's interest.[4] This freedom, however, is not limitless, and the courts have upheld some content-based restrictions when limited to well-known "historic and traditional" categories.[5]

Since the courts have carved out these exceptions, numerous cases have raised the issue of whether "false" statements are included within the categories of speech that fall outside of the Constitution's protection.[6]

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1 Hustler Magazine v. Falwell, 485 U.S. 46, 50–51 (1988) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503–04 (1984)).

2 U.S. CONST. amend. I. Specifically, the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

3 United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) (plurality opinion) (citing Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002)).

4 *Ashcroft*, 535 U.S. at 660. *See generally* 16A AM. JUR. 2D *Constitutional Law* § 476 (2009) (summarizing the Courts' jurisprudence in analyzing content-based restrictions on speech).

5 *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (explaining that the Court does not give constitutional protection to certain categories of speech, such as "'fighting' words"); *see also infra* notes 26–27 and accompanying text (listing several categories of speech that the Court has held fall outside the First Amendment's reach).

6 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (declaring that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake"); *see also* Kenneth E. Biggins, *Clarifying Commercial Speech:*

In 2012, the Supreme Court granted certiorari in *United States v. Alvarez* to determine whether the Stolen Valor Act of 2005 was a content-based restriction on free speech and thus violated the First Amendment.[7] In a departure from a long line of cases that recognize the right to free speech does not protect false factual statements, the court struck down the Stolen Valor Act.[8]

In analyzing the Court's decision in *Alvarez*, this Comment contemplates whether the Supreme Court should have carved out an exception for false statements of fact regarding the receipt of military honors.[9] With this in mind, this Comment first discusses the facts present in *United States v. Alvarez*.[10] Second, it reviews the legal background of the First Amendment's protection of free speech by placing great emphasis on the Court's previous rulings involving false statements of fact.[11] Last, this Comment analyzes the Supreme Court's holding in *Alvarez* by first arguing that, although the Court did not frame its analysis under the overbreadth doctrine, the Court applied those principles with an incorrect result; and, second, although the court

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Restructuring and Redefining the Zauderer *and* Central Hudson *Standards in Light of the Family Smoking Prevention and Tobacco Control Act*, 48 VAL. U. L. REV. xxx, xxx (2014) (explaining the non-misleading requirement for commercial speech). *But see* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) (holding that the "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'" (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))). Additionally, most cases involving false statements of fact include a valuation of whether those statements have any real constitutional value. *See, e.g.*, *Hustler Magazine*, 485 U.S. at 52 ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas . . . ."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("There is no constitutional value in false statements of fact.").

7 *See Alvarez*, 132 S. Ct. at 2537, 2542–43 (plurality opinion) (stating that it granted certiorari and that content-based restrictions must be judged by First Amendment principles); *see also* 18 U.S.C. § 704(b) (2012) (providing that "[w]hoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both"). Section 704(c)(1) recognizes that "[i]f a decoration or medal involved in an offense under section (a) or (b) is a Congressional Medal of Honor, . . . the punishment" is enhanced to a fine, "imprison[ment] [of] not more than 1 year, or both." *Id.* § 704(c)(1).

8 *See Alvarez*, 132 S. Ct. at 2551 (plurality opinion) ("The Stolen Valor Act infringes upon speech protected by the First Amendment.").

9 *See infra* Parts II–IV (considering whether the Court should have established an exception for false statements concerning military honors).

10 *See infra* Part II (stating the facts in *United States v. Alvarez*).

11 *See infra* Part III (reviewing, briefly, the evolution of the Supreme Court's position regarding the protection of false statements of fact over the past seventy years).

correctly concluded that the Stolen Valor Act was a content-based restriction requiring strict scrutiny review, the result was incorrect.[12]

II. STATEMENT OF FACTS IN *UNITED STATES V. ALVAREZ*

In July 2007, after obtaining a seat on the Three Valley Water District Board of Directors, Xavier Alvarez ("Alvarez") introduced himself at a joint meeting with a neighboring water district board.[13] Upon standing, Alvarez asserted that he was a retired marine of twenty-five years and had received the Congressional Medal of Honor after surviving several wounds from the same person.[14] Unknown to Alvarez, before his election to the water district board, a woman had contacted the FBI and informed them that Alvarez was making false claims about his military past.[15] Specifically, the woman alleged that Alvarez had told her that he had "won the Medal of Honor for rescuing the American Ambassador during the Iranian hostage crisis, and that he had been shot in the back as he returned to the embassy to save the American flag."[16] Later, it was discovered that all of Alvarez's claims of previous military service and awards were complete fabrications.[17]

Ultimately, "[a]fter the FBI obtained a recording of the water district board meeting" as evidence, "Alvarez was indicted in the Central District of California on two counts of violating 18 U.S.C. § 704(b), (c)(1)" and "was charged with 'falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor" when he knew, in truth, that he had never received the medal.[18] Alvarez moved to dismiss the indictment on constitutional grounds, asserting that the Act violated his right to free speech, but the district court denied the motion.[19]

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12 *See infra* Part IV (providing a critical analysis of why the Supreme Court's decision in *United States v. Alvarez* was incorrect).

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

14 *Id.*

15 *Id.* at 1201.

16 *Id.*

17 *See id.* at 1200–01 (stating that most of these statements were lies). In general, Alvarez was notorious for making up stories about who he was and what he had accomplished throughout his lifetime. *See id.* at 1201 (explaining other situations in which Alvarez had lied).

18 *Id.*; *see supra* note 7 (providing the text of 18 U.S.C. § 704(b), (c)(1)).

19 *Alvarez*, 617 F.3d at 1201. At the time this case was reviewed, "Alvarez appear[ed] to be the first person charged and convicted under the . . . [Stolen Valor] Act." *Id.*

Subsequently, Alvarez pleaded guilty to the first count and reserved "his right to appeal the First Amendment question."[20]

On appeal, Alvarez argued that the Act was unconstitutional on its face and as it applied to him.[21] The United States Court of Appeals for the Ninth Circuit agreed and reversed Alvarez's conviction, holding that the Act did not fall under any other previously permitted restrictions on false speech and was not narrowly tailored to achieve a compelling government interest.[22] After a request for a rehearing en banc was denied, the Supreme Court granted certiorari to consider the constitutionality of the Act's reach.[23]

III. LEGAL BACKGROUND OF *UNITED STATES V. ALVAREZ*

The First Amendment of the U.S. Constitution prohibits Congress from passing laws that abridge the freedom of speech.[24] However, in 1942, in *Chaplinsky v. New Hampshire*, the Court limited this freedom when it declared that the right to free speech was not absolute.[25] Consequently, the Supreme Court held that some content-based restrictions on speech were permissible when limited to the few "'historic and traditional categories long familiar to the bar.'"[26] The Court established these categories to include incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and grave and imminent threats that the government has the power to prevent.[27] Notably absent from this list

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[20] *Id.* The district court sentenced Alvarez "to pay a $100 special assessment and a $5,000 fine, to serve three years of probation, and to perform 416 hours of community service." *Id.*

[21] *Id.*

[22] *Id.* at 1218; *see id.* at 1220–41 (Bybee, J., dissenting) (stating that false statements of fact have traditionally not been protected under the First Amendment and providing a history of free speech jurisprudence).

[23] *See* United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012) (plurality opinion) (questioning the Act's validity after the Tenth Circuit deemed it constitutional, while the Ninth Circuit held it was unconstitutional). Seven judges in the Ninth Circuit dissented on the rehearing denial. *Id.*

[24] U.S. CONST. amend. I; *see supra* note 2 (providing the text of the First Amendment of the U.S. Constitution).

[25] 315 U.S. 568, 571 (1942) (citing Cantwell v. Connecticut, 310 U.S. 296 (1940); Herndon v. Lowry, 301 U.S. 242 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937); Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931); Whitney v. California, 274 U.S. 357, 371 (1927) (Brandeis, J., concurring); Schenck v. United States, 249 U.S. 47 (1919)).

[26] United States v. Stevens, 599 U.S. 460, 468 (2010) (quoting Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

[27] *See Alvarez*, 132 S. Ct. at 2544 (plurality opinion) (outlining the "historic and traditional categories" that are long familiar to the bar); *Chaplinsky*, 315 U.S. at 571–72

is any explicit exception for false statements.[28] Although some of these unprotected categories involve the use of false speech, the courts have continued to disagree as to how much constitutional protection, if any, false statements should receive.[29]

In the following cases, the Court continually held that false speech had little value, but nevertheless was constitutionally protected, and could be regulated as long as there was proof that the false statement was made knowingly.[30] For example, in *N.Y. Times Co. v. Sullivan*, after establishing that the protection of the First Amendment does not turn on truth, the Court held that in a defamation suit a public official must demonstrate that the defamatory falsehood was made with knowledge of its falsity or "with reckless disregard of whether it was false or not."[31]

Later, in *Gertz v. Robert Welch, Inc*., the Court took the *N.Y. Times Co*. standard even further by holding that the state may punish defamatory falsehoods about private individuals regarding matters of public concern, if they were less-than recklessly made and caused actual injury

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(defining the categories to include obscenity, defamation, fighting words, and incitement); *see also* Shelbie J. Byers, Note, *Untangling the World Wide Weblog: A Proposal for Blogging, Employment-at-Will, and Lifestyle Discrimination Statutes*, 42 VAL. U. L. REV. 245, 251–52 (2007) (explaining that First Amendment freedom of speech is not absolute and listing several exceptions). Also, public service employees do not have unfettered free speech rights. *See* Lumturije Akiti, Note, *Facebook Off Limits? Protecting Teachers' Private Speech on Social Networking Sites*, 47 VAL. U. L. REV. 119, 140–41 (2012) (laying out the Court's test for determining whether public employees' speech is protected).

28 *Alvarez*, 132 S. Ct. at 2544 (plurality opinion).

29 *See id*. at 2545 (providing a list of cases that have commented on the First Amendment's protection of false statements). However, this position is inherently confusing because of the different standards depending on the type of speech. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."). *But see* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) (establishing that First Amendment protection does not turn on the "'truth, popularity, or social utility'" of expressed ideas and beliefs and that the "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" (quoting NAACP v. Button, 371 U.S. 415, 433, 445 (1963))).

30 *See, e.g*., Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988) (holding that although false speech is "particularly valueless," it is protected under the First Amendment except when spoken about a public figure with knowledge of its falsity or reckless disregard for the truth); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974) (concluding that states have "substantial latitude" in fashioning legal remedies for private individuals whose reputations are injured by defamatory falsehoods); *N.Y. Times Co.*, 376 U.S. at 279–80 (determining that defamatory falsehoods about a public official's official conduct are protected unless "the statement was made with 'actual malice'").

31 376 U.S. at 271, 279–80. The court emphasized that false speech is also protected but then proceeded to carve out a rule that hinged on the truth or falsity of the statement at issue. *Id.* at 271, 279–80. By doing this, the Court arguably opened the door to future debate within the case law.

to reputation.[32] Additionally, in *Hustler Magazine v. Falwell*, the Court declared that false statements were valueless and interfered with the "truth-seeking function of the marketplace of ideas."[33] The Court then held that public officials may "recover for the tort of intentional infliction of emotional distress" only upon a showing that the defamatory publication contained a false statement of fact made with reckless disregard for whether it was true or not or with knowledge of its falsity.[34]

After these rulings, and to settle some debate, the Court next distinguished perjury statutes from those attempting to restrict pure false statements of fact.[35] In *United States v. Dunnigan*, the Court proclaimed that the constitutionality of perjury statutes must be left unquestioned, as they are necessary "[t]o uphold the integrity of our trial system."[36] Concluding that perjury statutes are distinctly different from pure false speech, the Court emphasized that testimony under oath puts the witness on notice of the penalties if his or her statements are false.[37] Thus, the Court held that the government could prohibit perjury as long as it concerned a material matter and was made with willful intent to deliver false testimony.[38]

Further, courts have also upheld statutes criminalizing the making of false statements to government officials in communications involving official matters.[39] In *Minnesota v. Crawley*, the Minnesota Supreme Court applied the overbreadth doctrine but upheld a statute that criminalized making a false report that an officer had committed an act of police misconduct.[40] Using the overbreadth doctrine to analyze the issue, and providing a narrow interpretation of the statutory language, marked a new direction for courts to take when determining whether a false

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32 418 U.S. at 348–49; *see* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (acknowledging that, in defamation cases, there is no constitutional protection for false statements made knowingly or those made with reckless disregard for the truth).

33 485 U.S. at 52.

34 *Id.* at 56.

35 *See* United States v. Alvarez, 132 S. Ct. 2537, 2546 (2012) (plurality opinion) (recognizing that "[p]erjured testimony 'is at war with justice' because it can cause" a judgment to be rendered that does not rest on truth (quoting *In re* Michael, 326 U.S. 224, 227 (1945))).

36 507 U.S. 87, 97 (1993) (citing Nix v. Whiteside, 475 U.S. 157, 173–74 (1986); United States v. Havens, 446 U.S. 620, 626–27 (1980); United States v. Grayson, 438 U.S. 41, 54 (1978)).

37 *Dunnigan*, 507 U.S. at 97.

38 *Id.* at 94, 97.

39 *See, e.g.*, *Alvarez*, 132 S. Ct. at 2545 (plurality opinion) (citing 18 U.S.C. § 1001 (2012) as a permissible regulation on false speech).

40 819 N.W.2d 94, 97–98, 105 (Minn. 2012).

statement of fact could be narrowly construed as falling under one of the already unprotected categories of speech.[41]

Accordingly, all of the above cases denote the tension within the courts regarding how to draw the line between regulating pure false speech and false statements of fact containing an added element.[42] In more recent decisions, the courts have revisited this First Amendment question repeatedly, which in turn, has led to further discord over how to regulate false speech.[43] Thus, in an attempt to clarify First Amendment jurisprudence on the false speech issue, in 2012, the Supreme Court granted certiorari in *Alvarez* to determine the constitutionality of the Stolen Valor Act, which made it a crime for a person to falsely represent themselves as being the recipient of any military awards or medals.[44]

IV. ANALYSIS OF *UNITED STATES V. ALVAREZ*

A. The Alvarez *Opinion*

When the Supreme Court granted certiorari in *Alvarez*, there was still much discord in the case law regarding the level of protection false statements should receive and whether they fell under one of the traditionally unprotected categories.[45] In the plurality opinion, written by Justice Kennedy, the Court struck down the Stolen Valor Act as an unconstitutional content-based restriction on free speech.[46] The Court

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41 *Cf. id.* (holding that when possible, the court will narrowly construe a law subject to overbreadth, "so as to limit its scope to conduct that falls outside first amendment protection" (citing *In re* Welfare of R.A.V., 464 N.W. 2d 507, 509 (Minn. 1991))).

42 *See supra* notes 30–41 (discussing the constitutional protection afforded to false statements in various contexts).

43 *See, e.g.*, United States v. Hamilton, 699 F.3d 356, 368–69 (4th Cir. 2012) (distinguishing pure speech from expressive conduct and upholding an insignia statute that made it a crime to wear a military uniform or to wear military or imitation medals without authorization and with the intent to deceive); United States v. Williams, 690 F.3d 1056, 1062–64 (8th Cir. 2012) (applying an overbreadth analysis to uphold a statute that prohibits the knowing, willful, and malicious conveyance of false information in an attempt to do any act that would be a crime); United States v. Amster, 484 Fed. App'x. 338, 344 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 628 (2012) (striking down the Stolen Valor Act as facially unconstitutional post-*Alvarez*).

44 *Alvarez*, 132 S. Ct. at 2542–43 (plurality opinion); *see* 18 U.S.C. § 704 (2012) (outlining the language of the Stolen Valor Act at issue in *Alvarez*); *supra* note 7 (providing the text of the Stolen Valor Act).

45 *See supra* note 6 and accompanying text (providing case examples that illustrate the Court's view of false speech).

46 *See Alvarez*, 132 S. Ct. at 2551 (plurality opinion) (striking down the Stolen Valor Act as unconstitutional and reasoning that even false speech should receive protection). Chief Justice Roberts and Justices Ginsburg and Sotomayor joined the plurality opinion; Justice

first declared that false statements of fact alone are not enough to render them outside the protection of the First Amendment and declined to create a novel category that would render them presumptively unprotected.[47] Second, the Court concluded that the statute had a sweeping effect rendering it overbroad and facially invalid.[48] Finally, the Court held that the Act did not satisfy strict scrutiny, as it was not the least speech-restrictive means available.[49] This Part examines each of these three central holdings in turn.

Writing for the plurality, Justice Kennedy, joined by three other members of the court, first discussed the history of the Court's treatment of false speech.[50] Disagreeing with the dissenters that false statements of fact are generally unprotected by the First Amendment, the Court found it necessary to distinguish between previously upheld statutes regulating false speech and the Stolen Valor Act.[51] The plurality thus found that the central distinction was that the Stolen Valor Act simply regulated false speech alone, while all of the other statutes regulated false speech that fell in one of three categories: (1) false statement to a government official; (2) perjury; or (3) "false representation that one is speaking as a [g]overnment official or on behalf of the [g]overnment."[52] The Court

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Breyer filed an opinion concurring in the judgment in which Justice Kagan joined; and Justice Alito filed a lengthy dissenting opinion in which Justices Scalia and Thomas joined. *Id.* at 2541.

47 *See id.* at 2544 (stating that there are only a few categorical exceptions under the First Amendment but that false speech alone is not encompassed within one of the exceptions); *supra* text accompanying note 27 (outlining the various exceptions to the prohibition of content-based regulations on speech).

48 *See Alvarez*, 132 S. Ct. at 2547–48 (expressing concern over the Stolen Valor Act's lack of a limiting principle).

49 *Id.* at 2551.

50 *Id.* at 2544–47.

51 *Compare id.* (explaining that certain federal false statement statutes are valid and inapplicable in the context of the *Alvarez* case), *with id.* at 2562 (Alito, J., dissenting) (using valid false statement restrictions to further support the view that false statements are not protected under the First Amendment).

52 *Id.* at 2545–46 (plurality opinion). The dissent asserted that the speech prohibited under the Stolen Valor Act did cause significant harm. *Id.* at 2558–59 (Alito, J., dissenting). In his opinion, Justice Alito pointed out that the individuals who falsely represent themselves as award recipients usually do so for some material gain, such as government benefits. *See, e.g.*, *id.* (stating that in one region of the United States, "12 men had defrauded the Department of Veterans Affairs out of more than $1.4 million in veteran's benefits"). Additionally, Justice Alito noted that there is a less tangible harm that involves the debasement of the distinctive honor of the award along with the "'slap in the face'" the legitimate recipients feel. *Id.* at 2559. Justice Alito even went so far as to compare the Act with trademark statutes, which are enacted for the sole reason of preventing a diluting effect of brands. *Id.* He concluded that "preserving the integrity of our country's top military honors is at least as worthy as that of protecting the prestige associated with fancy watches and designer handbags." *Id.*

further emphasized that, while there is no "'freewheeling authority to declare new categories of speech outside the scope of the First Amendment,'" upon "'persuasive evidence'" that a category of speech has traditionally been prohibited, even if formerly unrecognized, the Court may so declare the speech unprotected.[53] The Court then held that in this instance, the government did not provide such evidence to show "that false statements generally should constitute a new category of unprotected speech."[54]

After determining that the prohibited speech in the Act was constitutionally protected, the Court expressed that the Act would have a sweeping effect, in that it would apply to all false statements on this subject whether made in public or in whispered conversations within the home.[55] The Court further noted that because there was no limiting instruction within the statute, if it were upheld, the government could create an "endless list" of subjects to single out and, thus, chill other protected speech.[56] As a result, the Court held that the statute was overbroad and unconstitutional.[57]

Finally, the Court addressed Alvarez's challenge that the Act was unconstitutional as applied to him.[58] After an in-depth inquiry, Justice Kennedy concluded that the government's interest in protecting the

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[53] *Id.* at 2547 (plurality opinion). *But see id*. at 2560–61 (Alito, J., dissenting) (collecting cases that support the assertion that the Court has traditionally prohibited many kinds of false statements of fact). Justice Alito further pointed out that over 100 statutes punish false statements made in connection with areas of federal agency concern. *Id*. at 2562 (citing to, as an example, 18 U.S.C. § 1001, "which makes it a crime to 'knowingly and willfully' make any 'materially false, fictitious, or fraudulent statement or representation' in 'any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States").

[54] *Id*. at 2547 (plurality opinion). Disagreeing with the plurality, Justice Alito stated that there was a long tradition of Congress protecting the country's military honor system. *Id.* at 2557 (Alito, J., dissenting).

[55] *Id.* at 2547 (plurality opinion).

[56] *Id.*; *see* Minnesota v. Crawley, 819 N.W.2d 94, 104–05 (2012) (stating that the overbreadth doctrine is "strong medicine" and should only be used to facially invalidate laws when there is not a limiting construction present and the statute's sweep prohibits a substantial amount of protected speech along with unprotected speech).

[57] *Alvarez*, 132 S. Ct. at 2548 (plurality opinion). Dissenting, Justice Alito stated that the plurality did not show that the statute was substantially overbroad. *Id.* at 2565 (Alito, J., dissenting). Justice Alito further emphasized his disagreement by proclaiming that the statute was in fact limited in five ways: (1) it applied to a narrow category of false speech that could almost always be proved or disproved; (2) "it concerned facts that are squarely within the speaker's personal knowledge"; (3) a conviction would require proof beyond a reasonable doubt that the speaker knew the statement was false; (4) it applied only to statements that could be inferred as communicating actual facts, not satire or parody; and (5) it was viewpoint neutral in that the false statements would not likely be associated "with any particular political or ideological message." *Id.* at 2557.

[58] *Id*. at 2548 (plurality opinion).

integrity of the Medal of Honor was sufficiently compelling.[59] Despite this finding, the Court concluded that there was no causal link between the government's interest and Alvarez's false claim.[60] The Court reasoned that there was no evidence to support a finding that the public's general perception of military awards was diluted, and thus, the Act was not "actually necessary" to achieve the government's interest.[61] In further support, Justice Kennedy stressed that there were other means, such as counterspeech, that could have overcome the lie.[62] For these reasons, the Court ultimately concluded that the Stolen Valor Act did not pass strict scrutiny.[63]

B. Alvarez*'s Meaning for First Amendment Jurisprudence*

At the outset of the Court's analysis, Justice Kennedy refused to carve out a new category of unprotected speech based on the assertions that the false speech at issue in the Stolen Valor Act did not have an element of cognizable harm and that there was little evidence to support a long tradition of prohibiting such speech.[64] Justice Kennedy, however, based these assertions on an incomplete analysis. First, he stated that the Act targeted "falsity and nothing more," but this contention disregards much evidence to the contrary.[65] The Act's legislative history indicates that Congress had in fact identified that these types of "fraudulent claims" not only damage the reputation and esteem of military medals but also debase the meaning and honor surrounding such decorations.[66]

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[59] *Id.* at 2549. In its inquiry, the Court indicated that the Medal of Honor was so esteemed that since 1861 it had been awarded only 3476 times. *Id.* at 2548. The court also pointedly noted that "[t]he [g]overnment's interest in protecting the integrity of the Medal of Honor is beyond question." *Id.* at 2549. Providing the backdrop to the legislature's decision to enact the statute, the dissent pointed out that "in a single year, *more than 600* Virginia residents falsely claimed to have won the Medal of Honor." *Id.* at 2558 (Alito, J., dissenting).

[60] *Id.* at 2549 (plurality opinion).

[61] *Id.*

[62] *Id.* at 2550. The court also noted that a comprehensive list or database of actual medal recipients could be used as a means of protecting the Medal of Honor's integrity. *Id.* at 2551. On the other hand, the dissent asserted that the Department of Defense indicated any database of medal recipients could only go back to recipients since 2001. *Id.* at 2559 (Alito, J., dissenting). Further, Justice Alito contradicted Justice Kennedy's counter speech argument by noting that publicly speaking out against imposters would likely increase the public's skepticism rather than remedy the lie. *Id.* at 2560.

[63] *Id.* at 2551 (plurality opinion).

[64] *Id.* at 2544–45; *see supra* note 53 and accompanying text (discussing the Court's ability to declare some categories of speech outside the protection of the First Amendment).

[65] *Alvarez*, 132 S. Ct. at 2545 (plurality opinion).

[66] United States v. Alvarez, 638 F.3d 666, 685 (2011) (O'Scannlain, J., dissenting) (citing Stolen Valor Act of 2005, Pub. L. No. 109–437, § 2(1), 120 Stat. 3266, 3266 (2006)), *aff'd*, 132 S.

Further, elements of both fraud and material gain are present in the prohibited speech. As the dissent indicates, many individuals who falsely hold themselves out as receiving the award do so with the intention of obtaining financial rewards, such as government benefits.[67] For those reasons, the plurality incorrectly concluded that there was not a cognizable harm present in the false speech the Act aimed to prohibit.

Moreover, in the second part of his analysis, Justice Kennedy rejected the government's evidence that supported there was a history and tradition in First Amendment jurisprudence of not protecting false statements of fact.[68] Justice Kennedy concluded this despite providing a long collection of cases that supported the notion that false speech was generally unprotected.[69] Even further, like defamation and fraud, which Justice Kennedy highlighted, the speech in the Act concerns speech that is knowingly false as the claimant knows that he has not received the medal.[70] Therefore, under Justice Kennedy's assertion that knowledge or reckless disregard for truth or falsity traditionally brings false speech outside the reach of the First Amendment, the Court should have also found a fraudulent representation about receipt of military decorations or medals—made with knowledge or reckless disregard for its falsity—outside constitutional protection.[71]

Ct. 2537; *see supra* note 52 and accompanying text (recognizing that, although less tangible, debasement of the distinctive honor of the award and the "slap in the face" actual recipients feel are cognizable harms).

67 *Alvarez*, 132 S. Ct. at 2558–59 (Alito, J., dissenting) (citing Thomas Zambito, *War Crime: FBI Targets Fake Heroes*, N.Y. DAILY NEWS (May 6, 2007, 4:00 AM), http://www.nydailynews.com/news/crime.war-crime-fbi-targets-fake-heroes-article-1.249168); *see id*. at 2559 (reporting on the defrauding of $1.4 million in veteran's benefits by individuals who falsely claimed to receive military awards (citing U.S. Dept. of Justice, *Northwest Crackdown on Fake Veterans in "Operation Stolen Valor,"* U.S. DEPARTMENT JUST.: U.S. ATTY'S OFF. WESTERN DISTRICT WASH. (Sept. 21, 2007), http://www.justice.gov/usao/waw/press/2007/sep/operationstolenvalor.html)); *supra* note 52 and accompanying text (providing the dissent's further elaboration on the cognizable harms caused by the speech prohibited under the Stolen Valor Act).

68 *See Alvarez*, 132 S. Ct. at 2545 (plurality opinion) ("Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.").

69 *Supra* note 29 and accompanying text; *see Alvarez*, 132 S. Ct. at 2545 (plurality opinion) ("'False statements of fact are particularly valueless [] [because] they interfere with the truth-seeking function of the marketplace of ideas. . . .'" (quoting Hustler Mag. v. Falwell, 485 U.S. 46, 52 (1988))). Further, additional precedent has established that "'[s]preading false information in and of itself carries no First Amendment credentials.'" *Id*. (quoting Herbert v. Lando, 441 U.S. 153, 171 (1979)).

70 *See* 18 U.S.C. § 704(a)–(b) (2012) (setting forth speech prohibited under the Stolen Valor Act).

71 *See, e.g.*, *Alvarez*, 132 S. Ct. at 2545–46 (plurality opinion) (pointing to several examples provided by the government of permissible regulations on false speech); *see also* Illinois *ex rel*. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 (2003) (holding that the Constitution precludes attaching adverse consequences to fundraising speech except those

Next, although the Court did not explicitly frame its analysis under the overbreadth doctrine, it relied on those principles when Justice Kennedy struck down the statute as overbroad.[72] However, in applying those principles, the plurality failed to determine whether the Act's reach was "substantial[ly]" overbroad.[73] Instead, Justice Kennedy placed his emphasis on the fact that the Act would reach both public and private settings.[74] However, he improperly emphasized this fact because other statutes that protect the country's military honors also reach into public and private settings but have not been struck down as overbroad.[75] Therefore, it is an obvious contradiction to say that one statute's reach is legitimate while another's, though virtually identical, is not.

Additionally, Justice Kennedy asserted that the Act was overbroad because it did not have a limiting instruction.[76] He reached this conclusion even though First Amendment jurisprudence generally requires that the court applying the overbreadth analysis construe the statute narrowly to avoid constitutional issues if the statute is subject to such limiting construction.[77] Indeed, the Stolen Valor Act is subject to

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statements made about a material fact, with knowledge of its falsehood, intent to mislead the listener, and success in doing so); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (stressing that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection"); N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964) (asserting that the false statement must be a knowingly false statement or a statement made with reckless disregard for its falsity).

72 *See supra* notes 55–57 and accompanying text (showing the extent to which the Stolen Valor Act could apply).

73 *See* Minnesota v. Crawley, 819 N.W.2d 94, 104–05 (Minn. 2012) (providing a brief summary of the overbreadth doctrine); *supra* note 56 (outlining the overbreadth doctrine as discussed in *Minnesota v. Crawley*); *see also supra* note 57 (providing the dissent's evaluation of the statute under the overbreadth doctrine).

74 *See Alvarez*, 132 S. Ct. at 2547 (plurality opinion) (noting that while the Stolen Valor Act in this case applied to a public lie, the prohibition would extend to include a lie made in the privacy of one's home).

75 *See, e.g.*, 18 U.S.C. § 912 (2012) (making it a criminal offense to "falsely assume[] or pretend[] to be an officer or employee acting under the authority of the United States or any department, agency or officer"); *id.* § 1038 (making it a criminal offense to "make[] a false statement, with intent to convey false or misleading information, about the death, injury, capture, or disappearance of a member of the Armed Forces"); *see also* United States v. Lepowitch, 318 U.S. 702, 704 (1943) (upholding a statute that criminalized impersonating a government official because it was enacted "'to maintain the general good repute and dignity of the [government] service itself'" (quoting United States v. Barnow, 239 U.S. 74 (1915))).

76 *See Alvarez*, 132 S. Ct. at 2547 (plurality opinion) (distinguishing the Stolen Valor Act from other statutes because it did not have a limiting principle).

77 *See, e.g.*, United States v. Stevens, 559 U.S. 460, 486 (2010) ("'When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.'" (quoting New York v. Ferber, 458 U.S. 747, 769 n.24 (1982))); *see also id.*

such instruction. According to the dissent, there are at least five inherent limiting instructions in the Act.[78] For example, the category of false speech the Stolen Valor Act aims to encompass only applies to misrepresentations about military awards and could almost always be proved or disproved.[79] Under this example alone, the plurality could have narrowly construed the statute and upheld its constitutionality. However, by not considering all reasonable constructions of the Act in an attempt to save the statute, Justice Kennedy incorrectly applied the overbreadth analysis and, thus, reached an inaccurate result.

Lastly, in the final part of the Court's analysis, Justice Kennedy concluded that the Stolen Valor Act did not pass strict scrutiny because there was no causal link between the harm and the speech, and it was not the least restrictive means to accomplish the government's compelling interest.[80] These findings, however, are unfounded. First, they ignored the Stolen Valor Act's legislative history, which indicated that these types of fraudulent claims do in fact cause "damage [to] the reputation and meaning of such decorations and medals."[81] Further, empirical data revealed that false medal recipient claims contributed to the swindling of over $1.4 million in veteran's benefits.[82]

Further, the plurality incorrectly compared the evidence in *Alvarez* to the findings in *Brown v. Entertainment Merchants Association*.[83] In *Brown*, the state's research findings consisted of a few psychologists who found an unreliable correlation between violent video games and minors'

("'[T]o the extent the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters.'" (quoting United States v. Williams, 553 U.S. 285, 307 (2008) (Stevens, J., concurring))); Minnesota v. Crawley, 819 N.W.2d 94, 105 (Minn. 2012) (discussing the role of limiting instructions when applying the overbreadth doctrine).

78 *See supra* note 57 and accompanying text (providing the dissent's list of limiting constructions).

79 *See Alvarez*, 132 S. Ct. at 2564 (Alito, J., dissenting) ("The speech punished by the Act is . . . varifiably false.").

80 *Id.* at 2549 (plurality opinion); *see* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) (highlighting the need to demonstrate a "direct causal link" between the targeted speech and the actual harm a statute aims to prevent, in order to pass strict scrutiny).

81 *Alvarez*, 132 S. Ct. at 2559 (Alito, J., dissenting) (quoting Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. 3266, 3266 (2006) (codified as amended at 18 U.S.C. § 704 (2012))).

82 *See id.* at 2558–59 (citing U.S. Dept. of Justice, *Northwest Crackdown on Fake Veterans in "Operation Stolen Valor,"* U.S. DEPARTMENT JUST. (Sept. 21, 2007), http://www.justice.gov/usao/waw/press/2007/sep/operationstolenvalor.html).

83 *Compare Brown*, 131 S. Ct. 2729, 2738–39 (2011) (holding that research findings by psychologists did not demonstrate a causal link between violent video games and harmful effects on children), *with Alvarez*, 132 S. Ct. at 2549 (plurality opinion) (citing *Brown* for the proposition that "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented").

aggression.[84] Conversely, in *Alvarez*, the Department of Justice established a causal link that false claimants used these lies to receive government benefits.[85] Based on these facts alone, Justice Kennedy's conclusion was unjustified as there was a demonstrable causal link between the harm and the speech at issue.

Moreover, Justice Kennedy concluded his analysis by insisting that counter speech would be a better, less speech-restrictive method of remedying the lies referred to in the Act.[86] This emphasis, however, is misplaced as it neglects the idea that counter speech would likely have a converse effect and increase the public's skepticism by, in effect, publicly calling into question anyone who has ever claimed to have received the medal.[87] Therefore, the Act was undoubtedly the least restrictive means to protect the government's interest in preserving the reputation of military honorees and the Court should have upheld the validity of the Stolen Valor Act.

V. CONCLUSION

The Court's ruling in *Alvarez* threatens the integrity of previous court holdings, which have held that there was little to no protection under the First Amendment for false statements of fact. By refusing to officially carve out a new category of unprotected speech for false statements or to narrowly construe the Act's speech to fit within one of the preceding unprotected categories, the Court starkly departed from a long line of cases that traditionally prohibited such speech. This broad ruling circumvents the principles behind other unprotected false speech, such as defamation and false statements to government officials, which also aim to protect integrity, reputation, and esteem.

Further, by construing the Stolen Valor Act as broadly applying to false statements of fact alone, the plurality ignores the clear limiting instructions inherent within the Act's language. Moreover, to hold that the Act did not pass strict scrutiny completely disregards the fact that there was an actual causal link between the diminished reputation of the military awards and the false speech at issue, and fails to acknowledge that counter speech would cause more harm than benefit to the

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84 *Brown*, 131 S. Ct. at 2739.

85 *See supra* note 67 and accompanying text (reporting an example of $1.4 million in government benefits that individuals fraudulently stole by claiming to be a medal recipient).

86 *Alvarez*, 132 S. Ct. at 2550 (plurality opinion).

87 *See id.* at 2560 (Alito, J., dissenting) (explaining how counterspeech would actually exacerbate the harm caused); *see also supra* note 62 (discussing the dissent's evaluation of the alternative methods stressed by the plurality).

Congressional Medal of Honor's integrity. Ultimately, the effect of the Court's ruling is not only that imposters will continue to defame the Congressional Medal of Honor but also that future efforts to seek protection from false statements of fact will likely be met with a closed door.

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* J.D. Candidate, Valparaiso University Law School (2014). I would like to specially thank my husband, Brian, who has unconditionally supported, loved, and encouraged me throughout this journey. To my daughters, Lily and Emma, who have taught me more about life than I could possibly learn from a book, I love you more than the universe. Finally, to my in-laws, Tana and Fred, and the rest of my family and friends, none of this would have been possible without you. Thank you all for keeping me on track and supporting my dream.