No. 11-210

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER ALVAREZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT COALITION IN SUPPORT OF RESPONDENT

GARY L. BOSTWICK
JEAN-PAUL JASSY*
KEVIN L. VICK
BOSTWICK & JASSY LLP
12400 Wilshire Blvd., Suite 400
Los Angeles, CA 90025
(310) 979-6059
jpjassy@bostwickjassy.com

Counsel for Amicus Curiae First Amendment Coalition

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

INTEREST OF *AMICUS CURIAE*[1]

The First Amendment Coalition, formerly known as the California First Amendment Coalition, is a nonprofit organization (incorporated under California's nonprofit law and tax exempt under Section 501(c)(3) of the Internal Revenue Code) that is dedicated to freedom of expression, resisting censorship of all kinds, and to promotion of the "people's right to know" about their government so that they may hold it accountable. The Coalition is supported mainly by grants from foundations and individuals, but receives some of its funding from for-profit news media, law firms organized as corporations, and other for-profit companies.

SUMMARY OF ARGUMENT

This Court has recognized only two categories of proscribable false speech: (1) false speech that causes harm to a person; and (2) false speech that harms the functioning of the government's processes. The Stolen Valor Act, 18 U.S.C. § 704(b) (the "Act"), proscribes false speech that fits in neither category. Petitioner proposes creating a new, virtually limitless category of unconstitutional false speech and a new test for

[1] The parties have consented to the filing of this *amicus curiae* brief, and their respective consent letters are submitted to the Clerk concurrently with this brief. The accompanying brief was not written in whole or in part by counsel for any party, and no persons other than *Amicus* have made any monetary contribution to the preparation or submission of this brief.

regulating false speech under the First Amendment. Petitioner's proposal should be rejected.

There is no limiting principle to Petitioner's proposed approach to proscribing false speech. Petitioner's approach would allow the government to criminalize false speech anywhere, by anyone, to anyone, regarding any subject, regardless of whether the speech caused any tangible harm, so long as the prohibition purportedly serves an "important" government interest that leaves "adequate breathing space." Petitioner's proposal requires an *ad hoc* balancing that this Court has repeatedly rejected and the First Amendment cannot countenance.

ARGUMENT

I. THERE IS NO PRECEDENT FOR CREATING A NEW CATEGORY OF PROSCRIBED FALSE SPEECH

"From 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations." *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010) (internal quotation marks and brackets omitted). "These historic and traditional categories long familiar to the bar . . . are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any

Constitutional problem." *Id.* (citations and internal quotation marks omitted).

This Court has recognized only two types of false speech that may give rise to civil or criminal liability. The first type is false speech that causes harm to a person – *e.g.*, defamation, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); false light invasion of privacy, *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 248 n.2 (1974); intentional infliction of emotional distress by knowing falsehoods, *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988); fraud, *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 617 (2003); and false speech causing a panic, *Schenck v. United States*, 249 U.S. 47, 52 (1919). The second type is false speech that harms the functioning of the government's processes – *e.g.*, perjury, *Konigsberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961), and impersonation of an officer with intent to defraud, *United States v. Lepowitch*, 318 U.S. 702, 703-704 (1943). What Petitioner proposes here is an entirely new type of proscribed false speech where no person needs to show harm and the government does not need to show any harm to the functioning of its processes.

II. THERE IS NO LIMITING PRINCIPLE TO PETITIONER'S PROPOSED APPROACH TO PROSCRIBING FALSE SPEECH

Petitioner asks the Court to uphold the Act based on a proposed legal framework that is dangerous to freedom of expression. That danger should not be

obscured by the relatively modest range of criminal prohibitions on speech contained in the Stolen Valor Act itself, or by the distastefulness of Xavier Alvarez's individual speech. Petitioner's soothing-sounding "breathing space analysis" is a misnomer, falsely suggesting that its focus is on protecting free speech rights and circumscribing governmental power. In truth, Petitioner's proposed framework is the opposite. That framework would lay the groundwork for a radical expansion of the government's ability to criminalize speech.

Petitioner's proposed approach to criminalizing speech lacks any real limiting principles that might constrain future attempts to criminalize other unpopular categories of false speech. Under Petitioner's proposed approach, the government could criminalize false speech uttered *anywhere*, *by anyone*, *to anyone*, *regarding any subject*, *regardless of whether the speech caused any tangible harm*, so long as the criminal prohibition serves an "important" government interest and a judge later makes an *ad hoc* determination that it leaves "adequate breathing space." The Government would have the power to criminalize false speech made:

- *Anywhere*. The Stolen Valor Act applies to statements made in any setting, no matter how private or insignificant. Unlike other statutes that forbid lying on the witness stand or on government forms, or imposing liability for defamatory statements that are "published," the Act contains no limitations

regarding setting or situation. Nor does Petitioner's proposed approach to proscribing false speech admit any such limitations. Upholding the Stolen Valor Act means the government may punish false speech not only in government meetings or public forums, but in private settings, living rooms and dinner tables across the country.

- *By anyone*. Although the Act is being applied here against Xavier Alvarez, an aspiring politician with an apparent history of fabrications, the Act is not limited to people who tell lies in order to increase their political popularity or obtain some other concrete advantage related to matters of public or even private interest. On its face, the Act – and the Petitioner's proposed approach to false speech – apply equally to the drunk on a bar stool telling tall tales at closing time, to a homeless person with a sign by the side of the freeway hoping to gain drivers' sympathy and dollar bills, or to an 18-year-old in his parent's basement making unwarranted boasts in an Internet forum.

- *To anyone*. The Act does not require that the false statement be made to an audience for whom the speech potentially matters. Some statutes criminalize false speech made to the government, to a judge and jury, and to lenders (*e.g.*, bank fraud, wire fraud) and investors (*e.g.*, securities fraud). In the defamation context, a statement must be published to a third party, ensuring that a federal case is not made about false speech that cannot possibly

do any harm to someone's reputation. With fraud claims, speech must be made to someone who actually relied on the misrepresentation (in the case of civil fraud) or from whom the speaker seeks something of value. The Act and Petitioner's proposed approach contain none of these limitations. The government may prosecute someone for violating the Act even if that person only made a false statement to one other individual who was not deceived and knew the speaker was lying all along.

- *Regarding any subject*. Although the Act criminalizes falsehoods regarding military decorations and medals, Petitioner's approach to proscribing false speech gives the government the ability to target false speech regarding *any* subject. This fact was not lost on Judge Smith, *Alvarez*, 617 F.3d at 1200, or Chief Judge Kozinski, *Alvarez*, 638 F.3d at 673-675 (concurring in denial of rehearing *en banc*). *See infra*.

- *Regardless of whether the speech caused any tangible harm*. Defamation and other speech-related torts all require that a plaintiff has been harmed personally. Perjury interferes with the functioning of the judiciary. The Act contains no such limitation, and applies even to speech that deceives no one and causes no tangible harm.

Judge Smith and Chief Judge Kozinski both expressed concern at the limitless reach of Petitioner's proposed approach to proscribing false speech. *See*

United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010) (*Alvarez I*); *United States v. Alvarez*, 638 F.3d 666, 673-675 (9th Cir. 2011) (*Alvarez II*) (Kozinski, J., concurring in denial of rehearing *en banc*). As Chief Judge Kozinski succinctly put it: "If all untruthful speech is unprotected . . . we could all be made into criminals, depending on which lies those making the laws find offensive." *Alvarez*, 638 F.3d at 675. In response to these concerns, the Petitioner's Brief says virtually nothing. Petitioner ignores the import of Judge Smith's and Chief Judge Kozinski's arguments and focuses only on the Act itself, which the Government characterizes as prohibiting a "discrete category of false misrepresentations . . . [that] bears little resemblance to the false statements" about which Judge Smith and Chief Judge Kozinski express concern. Brief for Petitioner United States of America (hereinafter "Pet. Br.") at 52.

That lack of resemblance misses the point. In defending the Act, Petitioner is advocating an open-ended regime that would give federal, state and local governments the presumptive power to criminalize *any* false speech, not just certain statements about military honors or medals. Petitioner's approach contains no limitations that would prevent governments from punishing precisely the sort of speech about which Judge Smith and Chief Judge Kozinski express concerns. In a very telling omission, Petitioner fails to explain why the potential prohibitions that disturb Judge Smith and Chief Judge Kozinski could not be

upheld under Petitioner's proposed framework for criminalizing false speech.

The only limitations Petitioner's proposed framework admits are that a statute criminalizing false speech must serve an "important" government interest, and there must remain sufficient "breathing space" for other fully-protected speech. Pet. Br. at 13-14. However, neither limitation provides any real protection. Clever lawmakers and government attorneys can always find some connection, real or imagined, between a particular prohibition and a broadly stated government interest that may or may not, in fact, lie behind the prohibition, and that is invariably described as "important." (Indeed, if the Government has ever characterized a Congressional purpose as unimportant, we are unaware of it.) In this case, Petitioner has shown remarkable creativity in arguing that the Act's prohibition is not motivated by moral outrage at pretenders claiming military honors, but by an asserted interest in some amorphous *esprit de corps* that Petitioner dubiously claims the Xavier Alvarezes of the world will undermine unless silenced by criminal sanctions. Pet. Br. at 14.

The "breathing space" limitation is even more deficient in safeguarding First Amendment interests. Petitioner starts with the presumption that criminalization of false speech is permissible, and places the burden on criminal defendants to prove that their speech should receive some unspecified "measure of strategic protection" in order to ensure that adequate breathing space exists for other fully-protected speech.

Id. at 20. As the Ninth Circuit held below, placing the burden on the defendant to prove that, on balance, the "pros" of protecting his speech outweigh the "cons" "runs contrary to Supreme Court precedent." *Alvarez I*, 617 F.3d at 1204. In *New York Times v. Sullivan*, 376 U.S. 254, 271-272 (1964), this Court held that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space that they need to survive." In *Stevens*, 130 S.Ct. at 1585, this Court held that it is "startling and dangerous" to suggest that "whether a category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."

This Court – not to mention the Founding Fathers – had good reason to distrust the effectiveness of leaving the safeguarding of free speech rights to a "free-floating" case-by-case balancing of the value and costs of particular speech. *Id.* As the Ninth Circuit held below, "in nearly every case, an isolated demonstrated false statement will not be considered 'necessary' to promoting core First Amendment values" and "will be outweighed by the perceived harm" it creates. *Alvarez I*, 617 F.3d at 1204. Thus, the likely net result of Petitioner's proposed approach would be that virtually all criminal prohibitions against false speech would be upheld.

Chief Judge Kozinski identifies another constitutional infirmity in Petitioner's "breathing space" approach: it is extraordinarily vague and, therefore,

fails to provide speakers with notice of what speech is criminal while conferring on government prosecutors discretion to target speakers whose views they do not like. Under Petitioner's approach, speakers "have no way of knowing in advance whether" the courts will determine "in any particular instance" that certain false speech must be protected to prevent chilling other fully-protected speech. *Alvarez II*, 638 F.3d at 675. Petitioner's approach is so "ad hoc and subjective that no one . . . can say with assurance what side of the line particular speech falls on." *Id.* at 676. "Free speech simply cannot survive the kind of subjective and unpredictable regime envisioned by" Petitioner. *Id.*

III. PETITIONER PROPOSES NOTHING MORE THAN THE *AD HOC* BALANCING ANALYSIS OF SOCIAL COSTS AND BENEFITS PROSCRIBED BY THIS COURT'S EARLIER DECISIONS, MOST RECENTLY IN *UNITED STATES v. STEVENS*

The heart of Petitioner's argument is the assertion that the Stolen Valor Act is very important to protect the integrity – a term of less-than-scientific precision – of the "Military Honors System." Pet. Br. at 37-39. That is the starting point: "It is important to protect the integrity of a law."

Petitioner then attempts to convince the Court that the importance stems from two facts: "military medals and decorations serve the important public function of recognizing and expressing gratitude for

acts of heroism and sacrifice in military service"; and "[t]he extent to which the military honors program serves these critical goals depends on the government's ability to safeguard the program's integrity." Pet. Br. at 38. In other words, it is important to protect the integrity of the Military Honors System because the United States says it is. That tautology having been recited, Alvarez must be jailed.

This Court rejected that facile analysis recently in *Stevens* as "an ad hoc balancing of relative social costs and benefits." 130 S.Ct. at 1585. The Court there stated, "[o]ur Constitution forecloses any attempt to revise [the] judgment [that the benefits of the First Amendment outweigh its costs] simply on the basis that some speech is not worth it. The Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'" *Id.*

The fallacy in Petitioner's argument is that the mere pronouncement that some category of speech is important and must be controlled is sufficient to justify the finding of a compelling interest for proscribing that speech. Why does the First Amendment state that "Congress shall make no law," merely to cede that point upon any occasion when elected officials decide it is *important* to do so? That type of thinking – balancing the goring of one person's ox against that of another's – is not permitted, as this Court recently and rightly held.

"When we have identified categories of speech as fully outside the protection of the First Amendment,

it has not been on the basis of a simple cost-benefit analysis." *Stevens*, 130 S.Ct. at 1586. As an example of sounder reasoning, in the child pornography context, this Court's decision did not rest on the "balance of competing interests alone." *New York v. Ferber*, 458 U.S. 747, 764 (1982). Yet that is what Petitioner urges here.

Petitioner ignores this Court's warning in *Stevens* that its decisions

> cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.

Stevens, 130 S.Ct. at 1586.

"Manipulable" is an apt adjective to apply to Petitioner's suggested analysis here. It is an analysis that can be urged by anyone in the future at any time to stop any type of false speech that the lawmaker finds distasteful. This frightening characteristic justifies the use of the words "truth police" in Judge Kozinski's opinion in the Ninth Circuit. *Alvarez II*, 638 F.3d at 674 (Kozinski, J., concurring in the denial of rehearing

en banc). The manipulable test proposed by Petitioner resembles the reasoning relied upon by closed, autocratic regimes of the former Eastern Bloc and many regimes today (North Korea, Iran, and Singapore, just to name a few). The manipulable test is: The law is justified because an icon, set upon its pedestal by those in power, must not be diminished or demeaned by speech that the regime says is false.

Petitioner's attempted justification of the law in question provides a perfect stencil for re-enactment of the infamous Sedition Act of 1798, which forbade "any person" to:

> write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States.

New York Times v. Sullivan, 376 U.S. 254, 273-274 (1964) (quoting Sedition Act of 1798, 1 Stat. 596) (first four omissions in original). This Court held that, "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history," due to a "broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *New York Times*, 376 U.S. at 276 (footnote omitted).

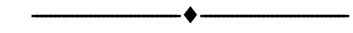
The law in question here criminalizes speech because Petitioner says it brings the government of the United States, *i.e.*, the integrity of its "Military Honors System," into contempt or disrepute. For a short period in our nation's early history, that type of thinking had some sway. But it died more than two centuries ago. *See New York Times*, 376 U.S. at 291 ("no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence") (internal quotation marks omitted); *see also Alvarez II*, 638 F.3d at 672-673.

Of course, we are not suggesting that Petitioner's arguments imply approval of the Sedition Act, a statute condemned by history as anathema to First Amendment principles. However, we are suggesting that if the Sedition Act could pass muster under Petitioner's proposed test for laws criminalizing false speech, there must be something very seriously wrong with Petitioner's test. Would a Sedition Act indictment meet Petitioner's proposed test limiting false speech prosecutions to laws that advance an "important" government interest? Yes. What could be more important than protecting the integrity and good standing of the institutions of the United States government? Indeed, that is essentially the same interest Petitioner advances to justify the Stolen Valor Act. Would a Sedition Act prosecution satisfy Petitioner's requirement that a prohibition of false speech must leave "adequate breathing space" for true speech that is constitutionally protected? The answer here is a bit

less certain, but prosecutors could argue forcefully that sufficient breathing room was provided by the Sedition Act's limitation to cases of *knowingly* false statements (implied by the statutory requirement of an "intent to defame").

The Stolen Valor Act cannot be sustained without doing serious damage to First Amendment freedoms. This Court's decisions over many years have erected a constitutional firewall requiring, in effect, that the Government stay completely out of the business of policing the accuracy of expression about government or governmental interests. Petitioner's arguments would lower this wall to a dangerous degree.

The inevitable consequence of adopting Petitioner's argument is unacceptable to a free society. A chillingly simple procedure robs us of our freedom: First, the government erects a program, hanging a label of "vital" (the label applied here), "in the interests of national security", "a government objective of surpassing importance", "necessary to protect privacy by preventing the intrusion into the home of unwelcome views", or one of multiple other formulations upon the program. Then it is deemed to be a criminal act to bring contempt or disrepute upon that scheme in any way that the current vogue finds fashionable. This analysis is so *ad hoc* and dependent upon subjective views of the moment, to whims and tides of public opinion and the political ambition of lawmakers, that it cannot survive when exposed to First Amendment scrutiny.



CONCLUSION

The Stolen Valor Act, the justifications for that law and Petitioner's proposed "breathing space" test cannot withstand scrutiny under the First Amendment.

Respectfully submitted,

GARY L. BOSTWICK
JEAN-PAUL JASSY*
KEVIN L. VICK
BOSTWICK & JASSY LLP
12400 Wilshire Blvd., Suite 400
Los Angeles, CA 90025
(310) 979-6059

Counsel for Amicus Curiae
First Amendment Coalition

**Counsel of Record*

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