No. 11-210

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER ALVAREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Stolen Valor Act, 18 U.S.C. 704(b), is the latest in a century-long line of congressional efforts to safeguard the vital functions of the military honors program. In Section 704(b) Congress prohibited a narrow category of knowing misrepresentations that, in the aggregate, threaten to dilute the honors' effectiveness in conferring prestige upon true recipients and fostering morale within the military. Because Section 704(b) prohibits only knowingly false, harmful factual statements, serves a compelling government interest, and does not chill any protected speech, it is constitutional.

Respondent does not contend that Section 704(b), properly construed to prohibit knowing factual misrepresentations, prohibits or chills any truthful statements, expressions of opinions and beliefs, or any other fully protected speech. Rather, respondent argues that upholding Section 704(b) would necessarily mean that the government may

prohibit a wide range of speech that is wholly unlike the verifiable, harmful knowing misrepresentations prohibited by Section 704(b)—including statements that respondent characterizes as "false" but that are actually ideas, opinions, and other unverifiable assertions. Respondent's concerns are unfounded. Upholding Section 704(b) would not suggest that the government could arbitrate truth, punish criticism under the guise of restricting "falsehoods," or prohibit everyday lies. Section 704(b)'s narrow prohibition falls squarely within the Court's decisions holding that knowing falsehoods have no intrinsic constitutional value. And the compelling interest that Section 704(b) serves is supported by a long tradition of statutory prohibitions on knowing misrepresentations that threaten the integrity of government programs.

I. RESTRICTIONS ON KNOWINGLY FALSE FACTUAL STATEMENTS ARE CONSTITUTIONAL IF THEY SERVE AN IMPORTANT GOVERNMENT INTEREST AND PROVIDE ADEQUATE BREATHING SPACE TO FULLY PROTECTED SPEECH

Over the past 50 years, the Court has developed a unified approach to knowingly false statements of fact. That analysis begins with two critical premises: "false statements are not immunized by the First Amendment * * * for their own sake" but the Amendment "requires that we protect some false speech in order to protect *speech that matters*." *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 530-531 (2002) (internal quotation marks omitted). That approach permits restrictions that serve an important government interest and provide breathing space for protected speech. Respondent argues that the Court's false-statement cases all involve variants of defamation and other historically unprotected categories of speech, but that view

cannot be squared with the Court's own reasoning. Nor is respondent correct that the breathing-space analysis conflicts with the principle that the First Amendment does not recognize a "test of truth." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964). The Court has applied that principle to "ideas and beliefs," *ibid.* (citation omitted), while permitting appropriately tailored restrictions on verifiably false, knowing statements of fact. The breathing-space analysis thus ensures that restrictions on false factual statements do not punish ideas, beliefs, or viewpoints, or cause an undue chilling effect.

A. The Court Has Consistently Applied The Breathing-Space Analysis To Restrictions On False Factual Statements

1. a. In every context in which the Court has evaluated false-statement restrictions, it has reasoned from the premise that knowingly false statements are entitled only to limited derivative First Amendment protection. See, *e.g.*, *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964) ("[c]alculated falsehood" is "no essential part of any exposition of ideas") (citing *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942)); see also *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003); *BE&K*, 536 U.S. at 531; *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 18 (1990); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 52 (1988) (*Hustler*); *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 743-744 (1983) (*Bill Johnson's*); *Brown* v. *Hartlage*, 456 U.S. 45, 60-61 (1982); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340–341 (1974); *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967).

Respondent attempts to minimize these repeated assertions as nothing more than "passing statements" (Br. 36-37) that bear no weight in the Court's decisions. In respon-

dent's view, the Court has applied the breathing-space analysis only to restrictions on defamation and fraud—categories that historically have been treated as completely unprotected. Br. 46-52. But although the Court first developed the approach to explain why it was applying First Amendment limitations to defamation law, see *New York Times*, 376 U.S. at 272, it soon extended the approach to permit restrictions on other categories of knowingly false statements—namely, false-light invasion of privacy, intentional infliction of emotional distress, false campaign promises, and baseless lawsuits. In each case, the Court began with the proposition that "calculated falsehood," *Hill*, 385 U.S. at 389, is entitled only to limited First Amendment protection.

In *Hartlage*, for instance, the Court applied the approach to a state statute that had been construed to prohibit candidates from promising to lower their salaries when doing so was against state law. 456 U.S. at 49-50 & nn. 5-6. Although respondent argues that *Hartlage* concerned the unprotected category of "speech integral to illegal conduct," Br. 51, the Court *rejected* the contention that the statements could be characterized as "solicitation[] historically recognized as unprotected by the First Amendment." 456 U.S. at 57. Having so concluded, the Court then considered whether the statute could be upheld as a false-statement regulation, as "demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements," *id.* at 60 (citing *Gertz*, 418 U.S. at 340). The Court held that although "State[s] ha[ve] a legitimate interest in upholding the integrity of their electoral processes," *id.* at 52, the statute did "not afford[] the requisite 'breathing space'" to protected speech because it lacked a scienter requirement, *id.* at 60-61.

The Court similarly extended the breathing-space approach to false-light invasion of privacy in *Hill* on the ground that "calculated falsehood enjoy[s] no immunity in the case of alleged defamation" and "[s]imilarly, calculated falsehood should enjoy no immunity in the situation here presented us." 385 U.S. at 389-390. Despite the Court's reliance on the lack of protection accorded to "calculated falsehood," *ibid.*, respondent argues that false-light actions should be viewed as sharing "defamation's historical pedigree" because some States have since concluded that the two torts overlap. Br. 50. But the Court itself did not share respondent's view, as it emphasized that unlike defamation, the false-light tort did *not* have a long historical pedigree. *Hill*, 385 U.S. at 383 n.7. And the two torts protect different interests: while false-light actions address the "mental distress from having been exposed to public view" from nondefamatory false statements, in "libel cases * * * the primary harm being compensated is damage to reputation," *id.* at 385 n.9; see *Gertz*, 418 U.S. at 335 n.6 ("nondefamatory factual errors" at issue in false-light are a "'discrete context'") (quoting *Hill*, 383 U.S. at 390-391).

Similarly, in holding that intentional infliction of emotional distress actions may be based on knowingly false statements, the Court stated that the tort sought to prevent "severe emotional distress" rather than "reputational damage." *Hustler*, 485 U.S. at 52-53. Indeed, many knowingly false statements that cause distress may not be defamatory, such as falsely stating that someone's child has died. Respondent's argument that this tort is "more similar to defamation than different" (Br. 49) obscures the Court's expansion of breathing-space analysis to new types of false-statement actions.

Finally, in explaining why baseless lawsuits may be prohibited consistently with the First Amendment, the Court

analogized to false statements: baseless lawsuits are unprotected "[j]ust as false statements are not immunized by the First Amendment right to freedom of speech." *Bill Johnson's*, 461 U.S. at 743. Drawing on *Gertz*, the Court explained that its imposition of additional requirements, including scienter, before such suits could be the basis for liability, was "consistent with these 'breathing space' principles." *BE&K*, 536 U.S. at 531. These decisions reaffirm the Court's general approach to false factual statements—they are entitled to breathing-space protection—and its willingness to apply that reasoning to new types of false factual statements.

b. The breathing-space analysis developed in these decisions does not, as respondent suggests (Br. 53), permit restrictions on "falsity in the air," without more—if that were so, then all knowing falsehoods would be entirely unprotected. Rather, the Court has in each case emphasized that the restriction was justified by the government's interest in preventing the *particular harm caused* by the misrepresentations at issue. See, *e.g.*, *Gertz*, 418 U.S. at 341; see also *Hustler*, 485 U.S. at 53. That interest must be sufficiently important to justify any chilling effect on protected speech that might realistically result from the restriction. See *Gertz*, 418 U.S. at 341. And the restriction must minimize any chill by including elements such as scienter and, if the restriction does chill any protected speech, by extending no further than necessary. Gov't Br. 28.

Nor would it be correct (see Resp. Br. 23-24) to suggest that "counter-speech" in the form of "public refutation of false claims" is generally "adequate[] [to] protect the government's interest." Perjury, fraud, and defamation statutes all attest to the existence of harms from false speech that cannot be remedied in the marketplace for speech and ideas. For example, the Court has recognized in the defa-

mation context that "an opportunity for rebuttal seldom suffices to undo [the] harm"; while the efficacy of counterspeech can be relevant to the strength of the government's interest, it alone "is inadequate" to obviate the need for defamation actions. *Gertz*, 418 U.S. at 344 n.9.

2. The Court's consistent application of the breathing-space approach to false factual statements that do not fall into any category of historically unprotected speech refutes respondent's suggestion that the government is "attempt[ing] to sidestep" *United States* v. *Stevens*, 130 S. Ct. 1577 (2010). Br. 35. Unlike the novel categories of entirely unprotected speech proposed in *Stevens*, 130 S. Ct. at 1584, and *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011), false factual statements have long been subject to restriction under this Court's decisions because they have long been understood to lack intrinsic value. *Stevens* had no occasion to address this distinct category of speech, which is accorded *limited* protection, because *Stevens* concerned whether to declare a new category of *unprotected* speech. And while *Stevens*'s references to defamation and fraud reflected those categories' roots as historically unprotected, the Court has conceived of those categories as specific types of knowing misrepresentations, applied a limited degree of strategic protection, and extended that approach to other false statements. See *New York Times*, 376 U.S. at 269; Gov't Br. 21-27. *Stevens* did not silently overrule the Court's numerous false-statement decisions applying that limited form of protection.

Respondent's argument (Br. 12-16) that *Stevens* mandates strict scrutiny for all false-statement prohibitions (outside of the historically unprotected categories) is particularly misplaced in view of Congress's longstanding prohibition of a range of false statements that do not constitute fraud, defamation, or solicitation and cannot possibly be

characterized as sharing their historical pedigree. Gov't Br. 29-33; see, *e.g.*, 18 U.S.C. 1001 (enacted in 1918); 18 U.S.C. 1015, 1027. The Court has never suggested that these statutes raise First Amendment concerns, let alone require strict scrutiny. See, *e.g.*, *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941). Respondent dismisses (Br. 52) these numerous statutes because they have not been subject to First Amendment challenge in this Court—but that fact simply underscores the universal understanding that the government may prohibit factual misrepresentations that are harmful but not fraudulent.

B. Restricting Knowingly False Factual Statements Is Consistent With Protecting Ideas, Beliefs, And Viewpoints

Respondent next contends that false-statement restrictions must be subject to strict scrutiny because there are "myriad reasons why false statements are valuable." Br. 37. In so arguing, respondent conflates the narrow category of knowingly false, harmful factual representations that may be restricted under this Court's precedents—and that are at issue in this case, see pp. 14-20, *infra*—and expressions of opinions, beliefs, and ideas. But it is the "common premise" of the Court's decisions "that while the Constitution requires that false ideas be corrected only by the competitive impact of other ideas, the First Amendment affords no constitutional protection for false statements of fact." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 499 n.3 (1975) (Powell, J., concurring).

1. Respondent contends that applying anything less than strict scrutiny would "significantly undervalue[] false speech," because such speech contributes to public debate and promotes personal autonomy. Br. 36-44. But what respondent describes as "false speech" in making this argument does not consist of false factual statements at all, but

rather, expressions of ideas, opinions, or beliefs. See Br. 36-39, 43-45 (citing, *e.g.*, John Stuart Mill, *On Liberty*, in 18 *The Collected Works of John Stuart Mill* 213, 229-235 (John M. Robson ed. 1977) (1859); Thomas Cooper, *A Treatise on the Law of Libel and the Liberty of the Press; Showing the Origin, Use and Abuse of the Law of Libel* 54 (New York, G.F. Hopkins & Son 1830); *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-504 (1984); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 Calif. L. Rev. 1159, 1164-1165 (1982); *Cohen* v. *California*, 403 U.S. 15, 21-25 (1971)).

To be sure, the government may not declare an idea, belief, or viewpoint to be "false" and sanctionable simply because the government—or a majority of the population—believes that idea to be valueless. See, *e.g.*, *New York Times*, 376 U.S. at 271 ("constitutional protection does not turn upon the truth, popularity, or social utility of the *ideas* and *beliefs* which are offered") (emphasis added; internal quotation marks omitted); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992). Nor may the government attempt to arbitrate "truth" by permitting juries to decide whether unverifiable assertions or arguments are false. *Milkovich*, 497 U.S. at 19-20. And as a corollary to these principles, the government may never place the burden of demonstrating truth on the speaker, as that would unacceptably chill criticism of government and expression of unpopular viewpoints. *New York Times*, 376 U.S. at 279.

But as *New York Times* itself demonstrates, these principles are entirely consistent with restrictions on objectively verifiable, knowingly false claims of fact like those at issue in this case. Such statements, even those made in the context of criticizing public officials on matters of public concern, may constitutionally be restricted. 376 U.S. at

279-280. That is because verifiably false statements of fact are distinguishable from opinions and ideas, lack intrinsic constitutional value, and can cause harms that the government has a legitimate interest in preventing, even when the statements consist of criticism of government officials or their conduct. *Gertz*, 418 U.S. at 341-342; *New York Times*, 376 U.S. at 283. The Court's requirement of "breathing space" limitations on false-statement prohibitions ensures that such restrictions affect only verifiably false factual statements and are not used to label expressions of opinion, viewpoints, or beliefs as "falsehoods." See *Milkovich*, 497 U.S. at 19-21 (breathing-space protections ensure that statements "which do[] not contain a provably false factual connotation will receive full constitutional protection").

2. For similar reasons, respondent's contention (Br. 41-44) that upholding Section 704(b) would suggest that the government could prohibit a wide range of purportedly false speech—including assertions about scientific and historical facts, political opponents, and one's state of mind—is unfounded. Those statements bear no resemblance to the narrow category of verifiably false claims at issue in this case.

For example, respondent argues (Br. 43) that the government could prohibit false claims of historical or scientific "facts," but what respondent labels "facts" are more aptly characterized as propositions that experts in the field would accept as truth. Restrictions on these claims would be invalid as improper attempts to prohibit statements of belief. While certain aspects of science and history are today viewed as beyond reasonable debate, as a class, the body of scientific and historical knowledge is not purely "factual," but instead represents the prevailing consensus. "False" claims may simply challenge the majority view. To permit juries to determine the "truth" of these claims would im-

properly make the government the arbiter of historical or scientific truth, chilling expressions of belief and hindering the evolution of thought and scholarly inquiry. And because demonstrably false claims like Holocaust denial are generally inseparably intertwined with ideological or political viewpoints, attempts to prohibit them would likely be viewpoint discrimination. See *R.A.V.*, 505 U.S. at 388.

Similarly, restrictions on political campaign statements, such as false claims about a political opponent's positions or the substance of a ballot initiative (Resp. Br. 42), will almost invariably be struck down because they target statements that raise matters of interpretation and argument rather than demonstrable falsehoods. Such laws may also create an intolerable chilling effect on political speech because the government and juries are not "capable of correctly and consistently negotiating the thin line between fact and opinion in political speech." *Rickert* v. *State Pub. Disclosure Comm'n*, 168 P.3d 826, 842 (Wash. 2007). The chilling effect arising from such restrictions may be particularly unjustifiable in light of the reality that political false-statement prohibitions would almost certainly extend further than necessary to achieve a legitimate aim, see *Gertz*, 418 U.S. at 349, because in the campaign context, a "candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent," *Hartlage*, 456 U.S. 61.

Finally, upholding Section 704(b) would not suggest that the government may regulate what respondent describes as "socially useful" lies that everyone tells (Resp. Br. 40). Most of respondent's examples—representations about one's state of mind (such as assuring someone that his outfit is flattering, Br. 40), self-characterizations, Br. 41, and portrayals of "different personae," Br. 39—are unverifiable assertions that are no more susceptible to being labeled

"false" than opinions or beliefs. And it is extremely unlikely that the government would be able to demonstrate an important interest in restricting misrepresentations about one's intimate or everyday conduct, since, as respondent argues (Br. 42), such lies have long been ubiquitous and may often have offsetting social benefits. Such restrictions also would often not provide adequate breathing space for protected speech. The fear of the government intrusions into one's private life that enforcing many such restrictions would entail might in many cases significantly chill fully protected, non-false speech, as people attempt to avoid entirely the topics covered by the restriction.

II. SECTION 704(B) IS A VALID RESTRICTION ON KNOWINGLY FALSE REPRESENTATIONS THAT HARM A COMPELLING GOVERNMENT INTEREST

Under the breathing-space analysis, Section 704(b) is constitutional. The government has a strong—indeed, compelling—interest in protecting the integrity of its military honors system against knowingly false claims, and the narrow prohibition poses no risk of chilling any protected speech. See *United States* v. *Strandlof*, No. 10-1358, 2012 WL 247995, at *16-*18 (10th Cir. Jan. 27, 2012) (upholding Section 704(b)).

A. The Government Has A Compelling Interest In Protecting The Integrity Of The Military Honors System

1. As the court of appeals concluded, the government has a compelling interest "in preserving the integrity of its system of honoring our military men and women." Pet. App. 37a. That system serves the vital purposes of conveying to the public the government's gratitude towards those who have sacrificed for the country and fostering morale and valorous conduct within the military. Respondent, relying solely on the since-reversed district-court decision in

United States v. *Strandlof*, 746 F. Supp. 2d 1183, 1190-1191 (D. Colo. 2010), rev'd, No. 10-1358, *supra*, expresses skepticism about these purposes. Br. 18. But the historical understanding of military honors refutes that skepticism. In 1782, when General Washington announced the first medals, he stressed that they would confer public honor on their recipients and also "cherish a virtuous ambition" in soldiers. *General Orders of George Washington Issued at Newburgh on the Hudson, 1782-1783*, at 35 (Edward C. Boynton ed., 1883; reprint 1909). In 1861, when Congress created the modern Medal of Honor, it did so to encourage valorous acts. Cong. Globe, 37th Cong., 2d Sess. 72. Today, the armed services continue to view these purposes as animating the honors system. Gov't Br. 5-6.

Respondent next argues (Br. 19) that false claims to have received a military honor do not damage the public's opinion of the awards themselves or "stain the[] honor" of true recipients. But Section 704(b) aims to prevent harm to the functioning of the government's military honors system, not harm to medal recipients' reputation or honor. The government employs military honors to convey a message to the public that the recipient has been endorsed by the government as part of a select group. S. Comm. on Veterans' Affairs, *Medal of Honor Recipients 1861-1973*, at 2-4 (Comm. Print 1973) (*Medal of Honor Report*); Gov't Br. 37-39. The aggregate effect of false claims undermines that purpose, not by harming public opinion of the awards or true recipients, but by diluting the medals' message of prestige and honor. By creating the misimpression that the claimant has received a medal for fictitious conduct that likely bears no relation to the government's standards for awarding each medal, false claims undermine the government's efforts to maintain selectivity and to convey information about recipients' conduct. And because misappro-

priation may make the public skeptical of *all* claims, allowing false claims to go unchecked could cause actual recipients to face unjustified doubts and harmful consequences if their records are not readily discoverable through private research. See Office of the Under Sec'y of Defense, Personnel and Readiness, *Report to the Senate and House Armed Services Committees on a Searchable Military Valor Decorations Database* 4 (2009) (*Decorations Database*).

Respondent also argues (Br. 19-20) that false claims do not undermine the awards program's ability to foster morale within the military because the armed services provide numerous benefits to actual recipients. But the benefits given to actual recipients do not prevent or even address the harm caused by false claims. In order to ensure that singling out particular individuals for commendation is inspiring rather than divisive, the military's criteria for awarding medals must be perceived as transparent and fair. High-profile misrepresentations may create doubts among service members about those standards. Public skepticism may also make military awards less effective in promoting morale. See *Examination of Criteria for Awards and Decorations: Hearing Before the Military Pers. Subcomm. of the H. Comm. on Armed Services*, 109th Cong., 2d Sess. 22 (2006) (statement of Lt. Gen. Michael D. Rochelle, Deputy Chief of Staff, G-1, U.S. Army).

Finally, respondent contends (Br. 18-19) that these rationales are "newly proffered" and unsupported by congressional findings. To the contrary, Congress found that "[f]raudulent claims * * * damage the reputation and meaning of such decorations and medals." Stolen Valor Act, § 2, 120 Stat. 3266. That conclusion draws on Congress's century-old understanding that the awards' ability to serve their intended purposes is harmed by "confusion as

to who earned and who did not earn" particular medals and by dilution of the select group of recipients. *Medal of Honor Report* 4. Congress has repeatedly enacted protections for military awards based on this understanding and the armed services' concurrence in it. In 1916, for instance, concerned that too many Medals of Honor had been awarded using unduly lax standards, Congress provided for the rescission of wrongly awarded medals—and made it a crime to dilute the government's message of endorsement by continuing to wear a rescinded medal. *Id.* at 9-10; Act of June 3, 1916, Pub. L. No. 64-85, § 122, 39 Stat. 166, 214. In 1923, at the urging of the Secretary of War, Congress made it an offense for anyone to wear a medal without authorization, on the ground that "[i]f the decorations of honor * * * awarded by the War Department are to continue to serve the high purpose for which they are intended," they should be protected against dilution. H.R. Rep. No. 1484, 67th Cong., 4th Sess. 1-2 (1923). Thus, Congress and the armed services have long understood that dilution and misappropriation undermine the program's ability to achieve its intended purposes, and Congress has legislated to prevent that harm. Section 704(b) is simply the latest such effort.[1]

2. Respondent contends (Br. 54-57) that the interests furthered by Section 704(b) are not legitimate because the government may not restrict false statements of fact except upon a showing of individualized harm in specific cases. But Congress may conclude that certain statements are presumptively harmful and that a showing of harm in individual cases is unnecessary. Such a conclusion does not automatically prevent a restriction from serving an impor-

[1] The history of medals legislation also conclusively refutes respondent's speculation (Br. 21) that the "true" purpose of the statute is to "avoid the offense that is experienced by real medal winners."

tant interest or being adequately tailored for First Amendment purposes. See, *e.g.*, *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 535-540 (1987). Indeed, numerous statutes prohibit false statements without requiring a showing of case-specific harm. See, *e.g.*, 18 U.S.C. 1001; 18 U.S.C. 1014; Gov't Br. 29-30. Here, Congress's conclusion that all false claims are harmful because of their aggregate effect of undermining the medals program does not render the government's interest any less compelling or cause Section 704(b) to chill any protected speech. See pp. 17-20, *infra*.

Nor is respondent correct that the government may not restrict knowingly false statements without showing that the statements caused harm to individuals, as opposed to government programs. If that were true, the government would be powerless to safeguard regulatory operations from misrepresentations. Innumerable false-statement statutes are premised on harm to regulatory or law-enforcement functions, 18 U.S.C. 1001; *Gilliland*, 312 U.S. at 93; Gov't Br. 30 & n.6 (citing statutes), or harm to a tribunal's administration of its proceedings, 18 U.S.C. 1623 (perjury); *Brogan* v. *United States*, 522 U.S. 398, 402 & n.1 (1998). And Congress has prohibited various false claims of federal endorsement because they presumptively interfere with the government's ability to function. See, *e.g.*, 18 U.S.C. 912; *United States* v. *Barnow*, 239 U.S. 74, 76-77 (1915); *United Seniors Ass'n, Inc.* v. *SSA*, 423 F.3d 397, 407 (2005), cert. denied, 547 U.S. 1162 (2006). Section 704(b) is of a piece with these statutes: Congress has concluded that a false representation to have the government's endorsement in the form of a military honor threatens the awards program's ability to serve its purposes.

3. Respondent also argues (Br. 57-58) that Section 704(b)'s true purpose is, like the flag-burning prohibition

invalidated in *Texas* v. *Johnson*, 491 U.S. 397 (1989), to suppress criticism of government by enforcing the viewpoint that military awards are "too important" to be disrespected. That argument is meritless. The restriction at issue in *Johnson* prohibited a form of symbolic speech that tended to denigrate or criticize a government symbol. Section 704(b) does something entirely different. It narrowly prohibits misrepresentations of government endorsement.[2] Its purpose is not to impose any particular view of the medals themselves but rather to prevent dilution-based harms that interfere with the awards program's ability to serve its purposes. A person who wants to express the viewpoint that "military awards are [not] sacrosanct," Resp. Br. 58, or that they do not actually symbolize honor and valor, is free to do so directly. See *San Francisco Arts*, 483 U.S. at 536 & n.14.

B. Section 704(b) Does Not Chill Any Protected Speech

1. The narrow and discrete nature of the knowingly false representations prohibited by Section 704(b) provides a unique degree of assurance that the provision chills no fully protected speech. Unlike many of the hypothetical restrictions on "false speech" that respondent canvasses (Br. 28-32), see pp. 8-12, *supra*, Section 704(b) ensures that the government may prosecute someone only when the falsity of the representation is objectively verifiable, such as through extant military records; otherwise, the government will be unable to prove falsity beyond a reasonable doubt.[3] A person is unlikely to be uncertain or mistaken

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[2] For this reason, amicus's analogy to the Sedition Act of 1798, ch. 74, 1 Stat. 596, is misplaced. Reporters Comm. for Freedom of the Press et al. Amicus Br. 7-10.

[3] Because this limitation is intrinsic to the statute, respondent's assertion (Br. 22 n.4) that the government is relying on "noblesse

about whether he has received a medal, and in any event, the statute's knowledge requirement protects mistaken statements. And again unlike respondent's hypotheticals, Section 704(b) operates only on misrepresentations that are not intertwined with any particular viewpoint. The line between a knowingly false award-related claim and all other expressions of facts, ideas, or opinions is well-defined and objective. Section 704(b) could not be used to impose orthodoxy or punish criticism, and it creates no risk that people will refrain from truthful speech about any topic for fear of prosecution. *New York Times*, 376 U.S. at 279; *R.A.V.*, 505 U.S. at 388; cf. *Meyer* v. *Grant*, 486 U.S. 414, 419 (1988).

2. Respondent does not claim that Section 704(b), properly construed to prohibit only knowing misrepresentations of fact, chills any protected speech. Instead, respondent attempts to generate the potential for chilling effect by distorting the meaning of the statute. Although respondent rightly acknowledges that Section 704(b) is best read to require knowledge of falsity, he erroneously contends that Section 704(b) prohibits not only statements that reasonably can be understood as factual claims, but also hyperbole and satire. Br. 29-31.

That strained interpretation should be rejected. Section 704(b) prohibits "falsely represent[ing]" oneself to have received a medal. The term "represent" means to "place *(a fact)* clearly before another." 13 *Oxford English Dictionary* 657 (2d ed. 1989) (emphasis added) (*OED*); *id.* at 659 ("representation" (definition 4.a) is "[t]he action of placing a fact, etc., before another").[4] *Black's Law Dictionary* rein-

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oblige" to narrow the statute is misplaced.

[4] Contrary to respondent's argument (Br. 29-30), the second edition of the *OED*, which was current when Section 704(b) was enacted,

forces the point, defining "representation" as a "presentation of fact." *Black's Law Dictionary* 1415 (9th ed. 2009) (*Black's*). And the use of the adverb "falsely" to modify "represent[]" removes any doubt. The *OED* defines a "false representation" as a "misrepresentation[] made to convey a false impression" and indicates that the phrase uses the form of "representation" that connotes conveying a fact—not the artistic and symbolic senses of the word on which respondent relies (Br. 29-30).[5] 5 *OED* 698 ("false" definition 8.b and usage examples); *Black's* 1091, 1415 ("misrepresentation" is a "false assertion of fact") (quoting Restatement (Second) of Contracts § 159, comment. (a) (1979)).

Respondent's construction is also not reconcilable with Congress's stated purpose of preventing "[f]raudulent claims surrounding the receipt" of military medals. See Stolen Valor Act § 2(1), 120 Stat. 3266. Respondent suggests no reason to conclude that despite this focus, Congress would have extended Section 704(b) to statements that reasonable observers would not interpret as claims of fact. See *Deal* v. *United States*, 508 U.S. 129, 131-132 (1993). And if there were any doubt about the statute's scope—there is not—the provision should be construed to

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remains the current complete edition. A similar definition of "represent" appears in the uncompleted third edition. See *OED* (3d ed. Dec. 2009) (definition 12.b-d and usage examples); online version Dec. 2011, http://www.oed.com/view/Entry/162991.

[5] Congress has repeatedly used the phrase "falsely represents" in contexts that similarly leave no doubt that Congress did not intend to capture satire. See, *e.g.*, 12 U.S.C. 2277a-14(a)(2)(A) (prohibiting "falsely represent[ing]" oneself as insured); 8 U.S.C. 1227(a)(3)(D) ("Any alien who falsely represents * * * himself to be a citizen is deportable"); 18 U.S.C. 499 (prohibiting "falsely represent[ing]" oneself as having a military permit).

avoid the First Amendment concerns that prohibiting satire would raise.[6] See *Watts* v. *United States*, 394 U.S. 705, 705, 708 (1969) (per curiam).

C. Section 704(b) Extends No Further Than Necessary

Because Section 704(b) furthers a strong government interest and does not deter any protected speech, it provides adequate breathing space and should be upheld. Even assuming that Section 704(b) did chill some speech, however, the provision is constitutional because any chill would be minimal and no greater than necessary to further the government's interest. *Gertz*, 418 U.S. at 349.

Respondent contends (Br. 22-28) that Section 704(b) is unnecessary because private individuals may effectively detect and reveal false claims. But the prevalence of false claims that concerned Congress in 2005, Gov't Br. 44, demonstrates that private refutation had been ineffective in deterring such claims, much less remedying their aggregate dilutive effect. Stolen Valor Act § 2(3), 120 Stat. 3266. Moreover, many misrepresentations elude private detection. Even assuming that a significant proportion of observers would be motivated to attempt to verify such claims, public records are often insufficient or not readily available. See Am. Legion Amicus Br. 18-19. Although the Department of Defense at Congress's request evaluated the feasibility of creating a public database, the Department concluded that compiling a sufficiently complete database was impracticable and that an incomplete database could

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[6] Respondent's suggestion (Br. 31 & n.9) that even "if satire is excepted" people might be chilled from engaging in it is inconsistent with this Court's recognition that limiting a restriction to statements that "reasonably [can be] interpreted as stating actual facts" provides adequate breathing space for satire. *Milkovich*, 497 U.S. at 17 (quoting *Hustler*, 485 U.S. at 50).

inadvertently cast doubt on legitimate recipients. *Decorations Database* 4-8. In attempting to undermine that conclusion, respondent relies exclusively (Br. 25-27) on a private citizen's counter-report, but that speculative criticism of the Department's analysis of its own records and the feasibility of creating a database is unpersuasive.

Respondent's remaining arguments boil down to the assertion (Br. 23) that the government could use existing fraud statutes to capture some who lie about receiving medals. Respondent's own conduct, however, demonstrates that fraud statutes will not capture many of the misrepresentations with which Congress was concerned. Prosecuting only those false claimants who happen to commit other frauds—and therefore could be prosecuted whether or not they made false claims about military awards—would not address the aggregate dilutive effect of false claims.[7]

D. Section 704(b) Also Can Be Upheld Under Strict Scrutiny

For the same reasons, Section 704(b) would survive strict scrutiny. The government has a compelling interest in protecting the integrity of its military award system against knowingly false claims that dilute the meaning of the awards, and Section 704(b) is the least restrictive means necessary to protect the government's compelling interest. *Burson* v. *Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion). Respondent contends that, viewed through the

[7] Respondent argues in passing (Br. 59-61) that Section 704(b)'s application to him is unconstitutional because his misrepresentations were "political speech." But even assuming that respondent's speech was political—it was not, see Gov't Br. 52-54—Section 704(b) is distinct from generalized prohibitions on false statements about candidates or positions, see *Rickert*, *supra*, because its narrowly targeted prohibition on a specific verifiable misrepresentation does not raise concerns about the government acting as an arbiter of truth, discriminating based on viewpoint, or chilling truthful speech in *any* context.

lens of strict scrutiny, Congress did not muster adequate evidence that false claims harm the awards program and that Section 704(b) is necessary. But Congress was entitled to rely on its hundred-year history of restricting misappropriation based on its understanding that doing so was necessary to protect the honors' ability to serve their purposes; the armed services' concurrence, beginning with General Washington's command, in the need for such restrictions; and Congress's conclusion that existing protections were insufficient to address the problem of verbal misrepresentations. See *id.* at 206.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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Solicitor General

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