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 THE FIRST AMENDMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*

Amicus First Amendment Lawyers Association is composed of attorneys whose practices substantially involve free expression matters ranging from those involving political speech to issues surrounding sexually oriented expression. Both the Association and its members are vitally interested in the sound development, articulation, and application of First Amendment law. The First Amendment Lawyers Association is a nationwide membership organization, and its Board of Officers has authorized the filing of this brief.[1]

CONSENT OF THE PARTIES

All of the parties to this proceeding have consented to the filing of this brief, and the written consents thereof have been filed herewith. Rule 37.3(a).

ARGUMENT IN SUPPORT OF RESPONDENT

I. First Amendment Analysis, as this Court Has Articulated It for Decades, Is Properly Hostile to the Sort of Approach Which The Government Urges Here.

This Court is likely to receive many briefs in this case which turn their attention directly to the particulars of the instant case. But because of the deep interest of the *amicus* First Amendment Lawyers Association in the sound development, articulation, and

[1] No counsel for any party authored this brief in whole or in part, and no one other than the instant *amicus* and its counsel and members made any monetary contribution to the preparation or submission of this brief. *Cf.* Rule 37.6.

application of First Amendment law, this brief begins with an assessment of some of the most basic features of the freedom of expression, as this Court has formulated it for many decades. It then draws upon several aspects of established First Amendment analysis in order to bring to this Court's attention just how startling is the position urged by the Government here and adopted by the dissent below.

A. *Chaplinsky's* Categorical Approach to Speech Protection Questions Has Served the First Amendment Well Principally Because this Court Has Wisely Kept the "Exceptions" Individually Small and Collectively Few.

Most expression is immune from content-based government regulation unless the restriction in question can withstand strict scrutiny. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 118 (1991). In contrast, some expression can be regulated precisely *because* of its content. Indeed, speech can be *categorized by content*, for constitutional purposes, and a few narrow speech categories are considered constitutionally unprotected while most fall fully within "the freedom of speech, or of the press," U.S. Const. Amend 1 cl. 3, 4, and are thus protected. *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2733-34 (2011); *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010); *State of Virginia v. Black*, 538 U.S. 343, 358-60 (2003). Beginning with *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942), this Court noted that:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72 (footnotes and quotation marks omitted).

Set as it is against the backdrop of a firm presumption that expression is protected by the First Amendment, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816-17 (2000), *Chaplisnky's* so-called "two-level" approach to speech protection, *cf.* H. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 S. Ct. Rev. 1, 10, has served the First Amendment well.

Two essential characteristics of that approach have stood the test of time and remain critical to the very substantial protection which the Constitution affords to expression. First, as just noted, the *Chaplinsky* approach is universally understood to stand against a prior and more fundamental presumption that *all* expression is protected by the First Amendment. *E.g. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000). Among other things, this means that the burden is

always on the government (or other party urging that expression is unprotected) to demonstrate, by the appropriate quantum of proof and under the applicable constitutional standard, that particular expression falls within a constitutionally unprotected class of expression. *Id.* at 816. The second critical feature is that the question of full constitutional protection *vel non* is assessed and answered categorically in the sense that if the precise expression at issue falls on the protected side of the constitutional line, even by just a bit, it remains *fully* protected on the same terms and by the same constitutional standards as even the most clearly protected expression. *Free Speech Coalition*, 535 U.S. at 240, 251.[2]

These features of the *Chaplinsky* approach remain valuable bulwarks against the potential erosion of constitutional protections which would arise if the level of speech protection were assessed on a case-by-case balancing basis against a spectrum of expression. In other words, it is critical that all expression is presumed to be on the broad protected constitu-

[2] A third characteristic of *Chaplinsky's* categorical approach has recently received some well-deserved attention from this Court. As this Court has now expressly recognized, *Chaplinsky* does *not*, after all, mean that certain classes of expression are *altogether* unprotected by the First Amendment. The proposition that a certain category of expression can be suppressed without raising "any Constitutional problem," *Chaplinsky* at 572, ultimately entails nothing more than a recognition that there is *at least one* constitutionally acceptable reason for suppressing it; it does not necessarily mean that *any* reason will do. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992). This aspect of *Chaplinsky*—while warranting this Court's close continued attention—is not at issue in this case.

tional plateau rather than within a narrow unprotected hole and, further, that the boundaries between the vast plateau and rare holes are constitutional cliffs, not broad and gentle downhill slopes.

B. Most of *Chaplinsky's* "Exceptions" Arise from Free Expression Principles Themselves, Not Because Other Considerations Overcome Such Constitutional Concerns.

In assessing whether any particular category of expression is "unprotected"[3] under the First Amendment, it is important to understand exactly how the *Chaplinssky* categories relate to the rest of First Amendment jurisprudence. That is, it is critical to examine *why* the so-called unprotected classes of expression have been recognized as such—whether as a purely historical matter or otherwise. At first blush, one might assume that a speech category could only be unprotected because some *non*expression-related concern has somehow "trumped" the principles underlying the First Amendment's general protection of expression. But this is not the situation in most cases. Far more often, a category has been recognized as unprotected under *Chaplinsky* pre-

[3] Again, it is critical to keep in mind that an "unprotected" *Chaplinsky* category may retain considerable protection against impermissibly motivated regulation, *cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992), and also that, as with so-called "fighting words," *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 573 (1942)("words and expressions which...when said without a disarming smile...ordinary men know[] are likely to cause a fight" (first ellipses added, some punctuation altered)), context is almost always critical to determining whether particular expression is unprotected at all.

cisely because the underlying free expression principles *themselves* apply to that expression, in its unprotected context, in unusual ways which call for the different treatment.

Incitement provides an illustrative example. Though not originally formulated within the *Chaplinsky* framework at all, *cf. Brandenburg v. State of Ohio*, 395 U.S. 444 (1969); *Schenck v. United States*, 249 U.S. 47 (1919), incitement now routinely appears in this Court's listings of the *Chaplinsky* categories, *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2733 (2011); *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010); *State of Virginia v. Black*, 538 U.S. 343, 359 (2003). Under the First Amendment, the government may punish incitement to serious lawlessness if, but *only* if, it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* at 447 (footnote omitted). But this is not a result of some outside government interest—in law and order, perhaps—outweighing or otherwise vitiating free expression principles. It is a result of the natural application of the free expression principles themselves.

The First Amendment derives a great deal of its force in protecting expression against censorship from the understanding—famously articulated by Justice Brandeis' in his now-vindicated concurrence in *Whitney v. State of California*, 274 U.S. 357, 372 (1927)(Brandeis, J., concurring)—that "a fundamental principle of American government," *id*. at 375, demands that:

> ...no danger flowing from speech can be deemed clear and present, unless the incid-

> ence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

Id. at 377 (footnote omitted). Since "discussion affords ordinarily adequate protection against the dissemination of noxious doctrine," *id.* at 375, the *nearly* universal rule under the First Amendment is that "the fitting remedy for evil counsels is good ones," *ibid.* But our fundamental free expression principles recognize that there are very rare situations—the lynch mob or the riot, for instance—where full discussion has no chance to persuade and where the ordinary deterrent value of criminal sanctions against unlawful *behavior* may temporarily be lost in the fray. *Cf. Hess v. State of Indiana*, 414 U.S. 105, 108 (1973)(reversing incitement conviction arising from *near*-riot situation). And it is in just these situations that the incitement category comes to the fore. Its recognition thus *furthers* the most basic free expression principles; it does not limit them.

Very similar observations apply to such categories as true threats, *Watts v. United States*, 394 U.S. 705, 708 (1969), and criminal solicitation and conspiracy, *Giboney v. Empire Storage & Ice. Co.*, 336 U.S. 490, 498 (1949), when those categories are properly limited by general First Amendment considerations. They would also apply, if this Court were ever con-

fronted with the matter, to a claim that military or paramilitary orders—in the context of a pre-established, operating disciplinary regime under which such orders clearly function as "triggers to action" rather than "keys to persuasion," *cf. Masses Publishing Co., v. Patten*, 244 F. 535, 540 (1917)(L. Hand, J.), *rev'd* 246 F. 24 (1917)—ought to be afforded substantial First Amendment protection.

More immediately, though, the same can also be said of another major *Chaplinsky* category: defamation. Defamation, as a category recognized by *Chaplinsky* and sharply limited by *New York Times Co, v. Sullivan*, 376 U.S. 254 (1964), and its progeny, reflects far, far more than a recognition that false statements of fact are less valuable—as expression—than true ones. If that were the only operative consideration, Justice Brandeis' observation that "the fitting remedy for evil counsels is good ones," *Whitney* at 375, need only be adjusted ever so slightly: the fitting remedy for false speech is true speech.

But defamation, of course, requires much more than mere falsity. It requires *disparaging* falsity directed against an individual or entity.[4] And it requires that the the falsity result from the speaker's

[4] For almost sixty years, this Court has found no occasion to reapply the precise holding of *Beauharnais v. State of Illinois*, 343 U.S. 250 (1952), to uphold a criminal conviction under a so-called "group libel" law. Indeed, criminal libel convictions—of any sort— are now quite rare, for many good reasons. In a civil context, thorny standing issues would arise if a group libel cause of action were brought seeking money damages. But beyond these considerations and whatever else may be said of *Beuaharnais*' more general observations, it is difficult to find much continuing vitality in its precise holding concerning group defamation.

fault. Modern defamation law cannot even realistically assume that an audience believes everything it hears. The modern marketplace of ideas, *cf. Abrams v. United States*, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting), is wide open to the targets of disparaging falsehoods, and it provides them a full opportunity to vindicate their reputations and their honor. But it is precisely that necessary link between this market process and the speaker's fault which justifies imposing liability upon the speaker. In a *Sullivan* context, the speaker has knowingly or recklessly, *Sullivan* at 280, imposed upon those (s)he has falsely disparaged the *cost* of entering the into marketplace of ideas in order to speak the truth. Those costs may be small or they may be large depending on the nature of the falsehood. But it is *because* the disparaging falsehood is so closely connected with the reputation of the targeted individual or entity that the law reasonably expects the defamation target to take up the issue and respond. This is why our most basic free expression principles—ordinarily relying on "more speech" in "the marketplace of ideas"—permit civil liability when, through a speaker's fault, a targeted disparaging falsehood has effectively *forced* a defamation victim into the marketplace of ideas.[5]

This understanding shows that, once again, a *Chaplinsky* category arises directly from underlying free expression principles, not from a conflict where

[5] This reasoning applies even more obviously to sanctions imposed for objectively baseless lawsuits, *cf. BE&K Construction Co. v. N.L.R.B.*, 536 U.S. 516, 531 (2002), where, by definition,,the plaintiff has at least negligently forced the defendant to bear quite substantial speech-related costs and burdens.

those principles yield to others of a different sort. But this understanding also shows the limits of the exception: where falsity does not involve the disparagement of particular persons or entities, there is no reason to suspect that particular persons will be drawn unwillingly into the fray of the marketplace of ideas. Where even the clearest false statement of fact is broadcast without specifically targeting anyone in particular, our tradition and our law leave the false statement—as we leave the false counsel—to the marketplace of ideas where, happily, there is no shortage of volunteers who are eager to rise to challenge statements seen as foolish or false.

C. This Court Should Remain Most Reluctant to Identify *Chaplinsky* "Exceptions" Which Do Not Arise From Fundamental Free Expression Principles Themselves.

This Court has recently been confronted with a number of requests by governments to recognize additional categories of expression as "unprotected" under *Chaplinsky*. *E.g. Brown v. Entertainment Merchants Ass'n,* 131 S.Ct. 2729, (2011)(violent video games directed at children); *United States v. Stevens,* 130 S.Ct. 1577 (2010)(videos depicting unlawful and gratuitous animal cruelty); *Ashcroft v. Free Speech Coalition*, 353 U.S. 234(1994)(virtual or apparent, but not actual, child pornography); *Hudnut v. American Booksellers Ass'n, Inc.*, 475 U.S. 1001 (1986) *summarily aff'g* 771 F.2d 323 (7th Cir. 1985)(expression demeaning and dehumanizing women). As it happens, these speech categories have differed sharply from those discussed *supra* in that

the free expression principles underlying the First Amendment were and are perfectly consistent with affording the expression in these proffered categories the usual full measure of First Amendment protection. In other words, the governments in those cases argued, not that free expression principles themselves called for unusual treatment of a particular category in particular circumstances, but that entirely *unrelated* or even *contrary* considerations called for regulation. These are very different claims under *Chaplinsky*, and this Court has wisely rejected each of them in recent years. Where the claim is that some category of expression must yield to governmental concerns unrelated to the expression—or related only in the sense that the government worries that the speech will have bad effects if believed by its audience—this Court has demanded the strictest justification and engaged in a searching historical quest for precedent. It has quite properly found each recent claim for a new *Chaplinsky* category to be wanting—most often seriously so.

Once again, a government comes before this Court claiming that expression should be suppressed—not because of some failure of the marketplace of ideas—but because that expression *might be believed* and if so, the resulting beliefs might dilute the quality of military honors and awards and, somehow too, the honor of those who have legitimately received such honors. It is difficult to understand the latter suggestion upon thinking it through. If an individual's false claim to have earned a military honor or award is believed, then the believers are likely to honor the liar just as they do others who legitimately deserved the award. That honor would be improper in the particu-

lar case, but it would not meaningfully taint the honor directed to others. If, on the other hand, the audience has reason to doubt the liar's claim, then no more harm will have been done to the military honors or to their legitimate recipients than that which results from the ravings of a madman claiming to be the rightful heir to the throne of Great Britain. But there are two even more serious particulars which must give this Court serious pause here.

The first is that the concern raised by the government here bears an uncanny resemblance to the governmental interests forcefully rejected not only in *New York Times v. Sullivan*, 376 U.S. 254 (1964), but also in *State of Texas v. Johnson*, 491 U.S. 397, 413-18 (1989), and *United States v. Eichmann*, 496 U.S. 310, 318 (1990)("Government may create national symbols, promote them, and encourage their respectful treatment. But…criminally proscribing expressive conduct because of its likely communicative impact" remains unconstitutional). *Sullivan* articulated the principle—long before established by our political culture—that a democracy cannot defend its reputation against the opinion of its citizens by force of law. And the flag desecration cases continued to make it unmistakably clear that such matters as government honor and respect—symbolized by the national flag every bit as much as by military medals—are not to be snatched away from the marketplace of ideas upon which we rely so centrally to discern the truth from "a multitude of tongues." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 512 (1969); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), *quoting United States v. Associated Press*, 54 F. Supp. 362, 372 (S.D. N.Y.

1943)(L. Hand, J.)("the interest protected by the First Amendment...presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all"), *aff'd* 326 U.S. 1 (1945).

But even more obviously, the government's claim for another categorical exclusion of a category of speech from First Amendment protection—or, equivalently, the assertion that a compelling government interest must trump the expression in this case—must fail because there is simply *no need* for it. General free expression principles provide a ready answer for the government. The remedy prescribed by Justice Brandeis so long ago—"more speech"—fully suffices here. The United States makes no secret of who receives military honors and awards. On the contrary, the many purposes underlying the system of military honors and awards are best served by *publicizing* both the awarded honors and the actions which warranted them. And if it ever appears to the United States that it is not enough to have the absence of expected newspaper articles and other press coverage refute a false claim about military honors, the United States has the simple and extraordinarily inexpensive alternative of establishing and publicizing a World Wide Web site disseminating authoritative information about military awards and their legitimate recipients. The United States would even be free to add its own voice to such a website and criticize by name those found to have made false claims with respect to military honors. It seems a dramatic constitutional understatement to observe that this is

a less speech-restrictive alternative. Such an easy and readily available "more speech" alternative—fully serving the government's legitimate needs—is reason enough to reject any request in this case that a flat-out lie about a military honor should be subject to constitutionally legitimate criminal sanction.

II. This Case Presents No Occasion to Modify the First Amendment's Protection of Expression or the Analysis Historically Applied to Free Speech Challenges.

In light of the foregoing considerations, established constitutional principles fully serve the government's interest here—except for the improper insistence on criminally punishing expression which might, if believed, tarnish a sacrosanct government domain. There is simply no need in this case to alter the analysis which this Court has long applied to challenges to statutes which criminalize speech. In particular, there is no need to alter or limit the historical understanding that all expression is presumptively protected under the First Amendment. There is no proper basis for treating some expression—while it may well be, in some sense, less important in its own right—as constitutionally protected only insofar as necessary to safeguard other, more important expression. While that may indeed be one reason to protect objectively false statements of fact, the government and the dissent below err in assuming that it is the *only* reason and, thus, that in its absence false speech may be freely criminalized by government.

A. This Court Should Reject the Proposition that a False Statement of Fact, Without More, Is Unprotected by the First Amendment.

The government and the dissent below predicate their entire constitutional analysis on the proposition that a false statement of fact is *ipso facto* unprotected by the First Amendment. This is not the law under our Constitution, nor should it be. In the first place, what this Court has actually *said* in the past, with perhaps one passing exception, is that a false statement of fact *lacks any value* under the First Amendment. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)("there is no constitutional value in false statements of fact"). Even here, this Court has been careful to vary, and sometimes weaken its language in the past. *Compare Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988)("particularly valueless") *with*, *Herbert v. Lando*, 441 U.S. 153, 171 (1979)("no First Amendment credentials"). Nevertheless, it was perhaps possible until recently to make the logical leap from a lack of value to a lack of constitutional protection, and even this Court may have once done just that in passing. *BE&K Construction Co. v. N.L.R.B.*, 536 U.S. 516, 531 (2002)(baseless, retaliatory lawsuits are unprotected against unfair labor practice determination). But this Court has very recently made it unmistakably clear that lack of value does not, standing alone, suffice to remove expression from the First Amendment's protection. *United States v. Stevens*, 130 S.Ct. 1577, 1586 (2010) (First Amendment law "do[es] not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as

his speech is deemed valueless or unnecessary, or so long as an *ad hoc* calculus of costs and benefits tilts in a statute's favor"). So in light of this Court's most recent decisions, the necessary logical bridge from worthlessness to non-protection collapses, and the government's constitutional case never really gets off the ground.

Beyond this, this Court would be wise to avoid resting any holding solely upon the proposition that false statements of fact have no First Amendment value. The contrary views of many thoughtful philosophers alone should give this Court considerable pause. To take but a single leading example, John Stuart Mill famously devoted Chapter 2 of *On Liberty* to the "Liberty of Thought and Discussion." In the first half of that chapter, he advances the skeptical argument—later echoed by Justice Holmes in his now-vindicated dissent in *Abrams v. United States*, 250 U.S. 616, 629 (1919)(Holmes, J., dissenting)("time has upset many fighting faiths")—that it is wrong to suppress falsity because fallible human beings can never know for certain that the matter being suppressed is indeed false. J.S. Mill, *On Liberty* 17-34 (Appleton-Century-Crofts 1947). But he devotes the second half of his chapter to showing why even indubitably and objectively false statements do indeed have value for those who confront them. *Id*. at 34-45.

An everyday example may illustrate many of the salient points, particularly those advanced by Mill on the second branch of his argument. Many adults make factual statements to children about Santa Claus—statements which are as objectively false as the lie which began this case. Those false statements

may indeed have some temporary value in fostering the fantasy world which children enjoy. But their deeper and more lasting value may well lie in their *falsity itself*: allowing children to discover the truth for themselves, each in his or her own time and own way. In so doing, a child gains a confidence about his or her understanding of the world which could never result from even the most robust diet of regulated, spoon-fed truth. And for adults as well, substantial First Amendment value often lies in seeing just how and just why even an objectively false statement of fact is wrong. *On Liberty* at 37-38:

> mankind ought to have a rational assurance that all objections have been satisfactorily answered; and how are they to be answered if that which requires to be answered is not spoken? or how can the answer be known to be satisfactory, if the objectors have no opportunity of showing that it is unsatisfactory?"

B. This Court Should Reject the "Breathing Space" Approach as an Independent or Sufficient Constitutional Test for Laws Criminalizing False Statements of Fact.

1. "Breathing Space" Is Not an Analytical Standard, but Instead, One Justification for Maintaining Constitutional Protection for False statements.

The government argues that this "Court has consistently applied the *breathing space approach* to vari-

ous restrictions on false factual statements." Pet. Br. at 20 (emphasis added). But the government's so-called "breathing space" approach is not a separate First Amendment analysis articulated by this Court. It is rather *one* justification which this Court has often advanced for affording constitutional protection even to false statements of fact. *New York Times v. Sullivan*, 376 U.S. 254, 271-272 (1964)(*citing N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"). The government would thus transform one reason for protecting false statements of fact into the *only* reason for doing so, and then use that logical leap to radically alter the analysis applied to statutes which criminalize false expression. On the other hand, the approach taken by the Ninth Circuit below is fully consistent with this Court's analysis of the freedom of speech under the First Amendment:

> In other words, we presumptively protect all speech against government interference, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection (in this case, for some reason other than the mere fact that it is a lie). Though such an approach may result in protection for a number of lies, which are often nothing more than the "distasteful abuse of [the First Amendment] privilege," *Cohen*, 403 U.S. at 25, 91 S.Ct. 1780, it is constitutionally required because the general free-

> dom from government interference with speech, and the general freedom to engage in public and private conversations without the government injecting itself into the discussion as the arbiter of truth, contribute to the "breathing space" the First Amendment needs to survive.

United States v. Alvarez, 617 F.3d 1198, 1205-1206 (2010), *quoting Cohen v. California,* 403 U.S. 15, 25 (1971).

The government's novel "breathing space" analysis —articulated as an independent constitutional test— runs, in fact, directly counter to this Court's jurisprudence, because it is predicated upon the incorrect proposition that expression is presumptively unprotected by the First Amendment unless it is true. The corollary to the government's false premise is, of course, the proposition that false statements of fact are presumptively *un*protected unless, perhaps, it can be shown that they are of high enough value to be allowed First Amendment protection or, more likely that they relate in a certain way to statements which lie at the core of protected expression. Pet. Br. at 20-21 ("Rather, [this Court] has approved content-based restrictions on false factual statements outside the commercial context when the restriction in question is supported by a strong government interest and provides adequate 'breathing space' for fully protected speech" (footnote omitted)).

2. The Government's Brief Illustrates the Traditional First Amendment Approach that Requires an Additional Element of Harm, Before even False Statements Lose Presumptive First Amendment Protection.

None of the government's cited cases supports its "breathing space" approach as an independent and adequate constitutional test for proscriptions criminalizing false statements of fact. In fact, each of the cases underscores the Court of Appeals' proper conclusion that the constitutional permissible criminalization of an objectively false statement of fact requires "some reason other than the mere fact that it is a lie." 617 F.3d 1204. As noted *supra*, this Court has offered the need for "breathing space" as a primary rationale for constitutional protection of false statements in public discourse. *New York Times v. Sullivan*, 376 U.S. 271-72. Yet the language of Sullivan itself clearly belies the government's argument that such statements are presumptively unprotected unless it can be shown that a false statement's contributes to "breathing space." *Sullivan*, 376 U.S. at 271 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth-whether administered by judges, juries, or administrative officials...")

The government essentially predicates its entire argument on the premise that "false factual statements have no First Amendment value in themselves." Pet. Br. at 18. Yet in each of the legal areas raised by the government, *proscribable* false state-

ments require something more than mere falsity in order to overcome the general constitutional presumption protecting expression.

The government discusses defamation. Pet. Br. at 21-23. Yet, within that realm, even the clearest proof of falsity alone is insufficient without a demonstration of additional elements—one of which is the injury which follows from a *disparaging* falsehood *directed at* the plaintiff. *See supra* at 9. "[T]he private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Gertz v. Robert Welch, Inc*. 418 U.S. 323, 350 (1974).

While reputational injuries are most commonly associated with defamation actions, other types of injury may also be subject to compensation. *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976)("Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.") False light invasion of privacy, *cf*. Pet. Br. at 24-25, similarly requires a showing of harm. *Time v. Hill*, 385 U.S. 374 (1967).

> Although not usually thought of in terms of 'right of privacy,' all libel cases concern public exposure by false matter, but the primary harm being compensated is damage to reputation. In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage.

385 U.S. at 385.

The government's assertion, Pet. Br. at 25, that *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), "extended the 'breathing space' approach to public figure actions for intentional infliction of emotional distress based on false factual statements," misinterprets this Court's ruling in that case. The tort of intentional infliction of emotional distress, obviously implicates a particular sort of injury. Moreover, no claim was made in that the outrageous parody contained in the magazine was a factual rendition of events that actually occurred. On the contrary, this Court ruled in favor of the magazine based on its acceptance of the jury finding that the parody would not be viewed as a factual assertion by any reasonable reader.

> The jury found against respondent on his libel claim when it decided that the *Hustler* ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a

> caricature such as the ad parody involved here.

485 U.S. at 57 (internal citations omitted)

Contrary to the government's assertion that this Court applied an independent "breathing space" analysis, it straightforwardly applied the *New York Times* standard, which requires considerably more than a showing of a false statement of fact.

> We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the New York Times standard, *see Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967), it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

485 U.S. at 56. Thus this Court viewed the concept of "breathing space" not as an independent and sufficient First Amendment analysis, as the government suggests, but rather one justification for treating all speech as presumptively protected, subject to proscription *only* if a combination of elements, including a specific sort of harm, are present.

The government's invocation of fraud as an example of "breathing space" analysis, Pet. Br. at 26, is

clearly misplaced, as no one would argue that merely making a false statement is equivalent to fraud. As the government's cited case demonstrate, fraud necessarily involves an element of harm separate from the meaning of the false words used. *Donaldson v. Read Magazine, Inc.,* 333 U.S. 178, 184 (1948) ("The purpose of mail fraud orders is not punishment, but prevention of future injury to the public . . ."); *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003).

> *False statement alone does not subject a fundraiser to fraud liability.* As restated in Illinois case law, to prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so.

538 U.S. at 620 (emphasis added). This is another circumstance where this Court's reference to "breathing room" refers not to an independent method of analysis, but rather to one component of the rationale for requiring a narrowly tailored fraudulent fundraising statute which places the burden on the state to show every element of the particularized offense. *Id*., at 620.

Moreover, fraud *is* one of the "historic and traditional categories" which this Court has recognized as a "well-defined and narrowly limited classes of speech, the prevention and punishment of which ha[s] never been thought to raise any Constitutional problem." *United States v. Stevens*, 130 S.Ct. 1577,

1584 (2010), *quoting Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

The government also cites, Pet. Br. at 26-27, *Brown v. Hartlage*, 456 U.S. 45 (1982), a case where the issue involved "whether the First Amendment, as applied to the States through the Fourteenth Amendment, prohibits a State from declaring an election void because the victorious candidate had announced to the voters during his campaign that he intended to serve at a salary less than that 'fixed by law.'" *Id.*, at 46. While the campaign promise was false in the sense that it was one that would be beyond the authority of the speaker to implement, even if elected to the county commissioner position he was seeking, there was nothing in the record to suggest that he was aware of this limitation. *Id.,* at 61-62. Furthermore, the Court noted that in the context of political campaigns, restrictions on candidates' speech to the voters must "be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression." *Id.,* at 53-54.

It is important to note that *Hartlage* did not involve a facial challenge to a statute, but instead involved the application of a Kentucky statute prohibiting a candidate from either offering material benefit to voters in order to receive their votes or receiving such consideration from voters. *Id.*, at 54. The statute itself did not address speech as such, but rather corruption—whether involving true statements, false statements, or no statements at all. It statute did not require any element of falsity, as the *quid pro quo* of a bribe requires no false statements.

Thus the statute in question concerned a harm distinct from the possibility that an audience might believe a politician's speech. The distinct element of political corruption was clear and tangible. But even then, because of more general First Amendment concerns, the statute could not constitutionally be applied to that candidate's general campaign promises —even those which *could not* have been carried out. *Id.,* at 56-57.

Despite the government's reference to cases involving liability for baseless lawsuits, Pet. Br. at 27-28, that line of cases actually contradicts the premise that mere falsity in statements alone is sufficient to strip that expression of constitutional protection. In *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983), this Court analogized the filing of baseless lawsuits with making false statements. *BE&K Const. V. N.L.R.B.*, 536 U.S. 526 (2002), clarified this analogy by stating that both instances require something more than just falsity or baselessness in order to lose presumptive constitutional protection.

> We have never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no First Amendment interests of their own. ... [O]ur holdings limited regulation to suits that were both objectively baseless and subjectively motivated by an unlawful purpose.

536 U.S. at 531. Again, the concept of "breathing space" for public discourse is *one* reason for the requirement for showing something more than mere falsity be required. But the defendant's obvious cost

in and other burdens in responding to a baseless lawsuit provide the obvious falsity-plus factor permitted sanctions against frivolous litigation behavior.

Other examples used by the government are equally unavailing. 18 U.S.C. § 1001(a) criminalizes making fraudulent statements or representations of material facts "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." The government cites, Pet. Br. at 30, *United States v. Gilliland*, 312 U.S. 86 (1941), for the purpose of the statute, and the basis for the 1934 amendment, defining more broadly the types of harm from which Congress intended to protect the federal government.

> The amendment eliminated the words "cheating and swindling" and broadened the provision so as to leave no adequate basis for the limited construction which had previously obtained. The statute was made to embrace false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits "in any matter within the jurisdiction of any department or agency of the United States." In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.

312 U.S. at 93.

Thus, there was a clear element of specific harm contemplated by the statute. Moreover, a false statement or representation must be material and made to the federal government only within specified contexts. Unlike 18 U.S.C. § 704(b), 18 U.S.C. § 1001's reach does not extend beyond protection from clear harm that occurs from the making of false statements and representations of material fact. Here again, falsity alone is not enough.

The same element of materiality (of a falsehood) is also a requisite element for the federal offense of perjury. *See*, 18 U.S.C. § 1623(a); *Johnson v. United States*, 520 U.S. 461, 465 (1997)("There is no doubt that materiality is an element of perjury under § 1623"). Moreover, perjury involves the palpable and obvious harm of interference with the administration of justice. *In re Michael*, 326 U.S. 224, 227-28 (1945). It also threatens the structure of the integrity of the judicial system. *United States v. Dunnigan*, 507 U.S. 87 (1993).

> To uphold the integrity of our trial system, we have said that the constitutionality of perjury statutes is unquestioned. The requirement of sworn testimony, backed by punishment for perjury, is as much a protection for the accused as it is a threat. All testimony, from third-party witnesses and the accused, has greater value because of the witness' oath and the obligations or penalties attendant to it.

507 U.S. at 97. Once again, falsity alone proves insufficient for the criminalization of speech. There must be another element or elements.

3. Even Impersonation Statutes, Which Most Closely Resemble the Stolen Valor Act, Still Require a Separate Overt Act, for a False Statement to Lose Constitutional Protection.

The same is true for impersonation. *See* 18 U.S.C. § 912.

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.

Id. The offense has two necessary elements: 1) falsely pretending to be an officer or employee of the United States, and 2) acting "as such". *United States. v. Rosser*, 528 F.2d 652, 656 (D.C. Cir. 1976). It is insufficient for a person to merely state or pretend that he or she is "an officer or employee acting under the authority of the United States or any department agency or officer thereof." *Id*., at 657. Some further overt act under the color of the authority inherent in the falsely claimed position is also required. *Id*. Thus, once again a false statement or representation standing alone and without more, is insufficient to constitute a violation of statute.

The impersonation statutes are the most analogous to the Stolen Valor Act in that claiming to have been the recipient of a military medal or decoration

can be seen as a form of impersonation. One difference between the statutes, however, is that a violation of 18 U.S.C. § 704(b) requires nothing more than the false representation, while impersonating a federal officer and acting " as such" is likely to influence the person deceived into engaging in behavior prompted by the purported yet false, actions of the impersonator. In other words, impersonation involves an immediate and on-going lie. As such, it poses imminent dangers of the sort threatened by constitutionally unprotected incitement. In this respect, impersonation is materially different from the lie told in this case concerning the fixed and comparatively distant past. Situations under the Stolen Valor Act may involve undeserved prestige, but they are unlikely to involve the pretense of authority over others. Those which do can be reached by other statutes, including some on which the government relies here.

The government has thus failed to show any area of law where the mere fact of making a false statement—in any and all contexts—is altogether beyond constitutional protection from a criminal statute. In each of the areas raised, there are substantial and necessary additional elements or considerations *beyond* mere factual falsity. In none of the foregoing situations does false speech involving nothing more than mere boasting, puffery, or self-aggrandizement lose its constitutional protection. Without any real harm or damage beyond the fact that hearers might believe a liar's words, there is no place for another *Chaplinsky* exception to the First Amendment's protection.

The government argues that the Stolen Valor Act should be analyzed under "breathing space" standards rather than the strict scrutiny traditionally utilized for content-based restrictions on noncommercial speech. Pet. Br. at 28 ("The Court has consistently the applied breathing space analysis—rather than strict scrutiny—to content-based restrictions on specific types of false factual statements"). In reality, however, an independent and sufficient "breathing space" analysis is a creature of the government's own invention. On the contrary, a concern for maintaining the necessary "breathing space" for public discourse is one—and *only* one—of the reasons why the most exacting scrutiny is applied to content-based regulations.

As noted *supra*, a concern for "breathing space" as one factor among many relevant to constitutional analysis is in no way incompatible with strict scrutiny. This Court has often raised the consideration is cases applying strict scrutiny and requiring compelling governmental interests (almost invariably absent). *E.g. Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010)(invalidating statutes preventing a nonprofit corporation from airing a video article concerning a political candidate within 30 days of a primary election. *Id.,* at 887, quoting *Federal Election Commission v. Wisconsin Right to Life, Inc.* (WRTL), 551 U.S. 449, 468-469 (2007) ("First Amendment freedoms need breathing space to survive"). The *Citizen's United* Court employed strict scrutiny—requiring a compelling governmental interest and narrowly tailored means. 130 S.Ct. at 898, *citing* WRTL, 551 U.S. at 464. It found nothing inconsistent between a concern for "breathing space"

and strict First Amendment scrutiny. So clearly, a concern for "breathing space" is neither incompatible with strict scrutiny, nor a separate, independently sufficient alternate or lesser level of constitutional analysis.

Both the Court of Appeals majority and dissent acknowledged the need for "breathing space" to insure open and unfettered discourse. But neither adopted the concept as an exclusive method of analysis. On the contrary, the majority flatly rejected the government's approach because it would create an new and unprecedented rule placing the burden of showing constitutional protection on the speaker.

> "Congress may prohibit false statements of fact unless immunity has been carved out or should be carved out because the First Amendment requires protection of some falsehood in order to protect speech that matters." In other words, the government contends that there is no protection for false statements of fact unless it can be shown, in a particular case, that there should be.

617 F.3d at 1203. Such approach would render any false statement of fact, no matter how trivial or immaterial presumptively unprotected.

The government never really suggests just how its "breathing space" analysis would actually operate as an independent constitutional test—except to assert, predictably, that it will not protect the lie at issue here. It would require a case-by-case analysis without standards or any meaningful analytical framework. And thus, most ironically, the test would impose a serious chilling effect of its own: If the government can require each "false" statement to be jus-

tified on the basis of promoting some greater good, self-censorship would be the inevitable result among speakers venturing into unsettled and perhaps unpopular areas of discussion.

4. The "Breathing Space Approach" Suggested by the Government Would Require a Case-by-Case Analysis Devoid of Analytical Standards.

The Stolen Valor Act was not designed to protect against harm to individuals in the way that defamation and false light privacy laws do. It does not require fraud. Nor does it prevent interference with government processes, as do perjury laws. While false claims to be a recipient of a military medal are common and, in some ways, similar to impersonating a federal officer, the latter is aimed at the harm created from the listener acting in a way that he or she otherwise would not but for the purported "authority" claimed by the perpetrator. This is why, unlike the Stolen Valor Act, impersonation statutes require more than then the mere false representation, but also include a requirement that an overt act commensurate with the falsely asserted position be committed.

The stated harm that 18 U.S.C. § 704(b) purports to prevent is of a qualitatively different sort. The current version of this provision was signed into law on December 20, 2006, under the title of the Stolen Valor Act of 2005, Pub. L. No. 109-437 § 1998, 120 Stat. 3226 (2006). The stated purpose and legislative findings, contained in Section 2(1) are limited to protecting "the reputation and meaning of military

decorations and medals," not protecting people from fraud or other injury, or even protecting the proper functioning of government.

The fact that the focus is upon the medals themselves rather than the functioning of the Armed Forces is shown by the penalty structure for violation of the Act. Under subsection (b) violators "shall be fined under this title, imprisoned not more than six months, or both." But section (c) doubles the potential time of incarceration if the claim involves the Congressional Medal of Honor; and section (d) contains an enhanced penalty is for false claims of receipt of other medals, such as a distinguished-service cross, a Navy cross, an Air Force cross a silver star or a Purple Heart.

No explanation is given for this discrepancy in punishments. While penalties for defamation or fraud are based on the amount of harm inflicted, here the presumed rationale is that the reputation and meaning of certain medals is considered more important than others. This strongly suggests that the crucial, yet unstated basis of the Act is the offensiveness of these false claims. The protection of the reputation and meaning of these items arises no more rises to the level of a compelling governmental interest than the protection of the national flag. To be sure, this illustrates the dilemma embodied in our strong tradition of legal protection for individual expression. It comes with a hefty price tag, where the societal costs of particular expression may outweigh its benefits. *United States v. Stevens*, 130 S.Ct. 1577 (2010).

> The First Amendment's guarantee of free speech does not extend only to categories of

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

Id. at 1586.

Here, this Court is asked to create a new paradigm of First Amendment analysis based on nothing more than just that balancing test. Under this proposed new paradigm, the presumption of constitutionality is replaced by a presumption of unconstitutionality of utterances that are deemed false. Because of this new presumption such statements may only fall under the protection of the Constitution if the speaker can show some benefit (presumed to be nonexistent, by definition, for false statements) extrinsic to the speech itself. What the government proposes is not even a tradition balancing test, as no showing of harm at all is required.

Even the language of the Sedition Act of 1798 was narrower and more targeted to actual arms and threats to the security of the nation than the statute now before the Court. It encompassed only "false, scandalous and malicious writing or writings against the government of the United States, or either House of the Congress of the United States, or the President of the United States, *with intent to defame*..." Sedition Act of 1798, 1 Stat. 596, § II (emphasis added).

Not surprisingly, the *Stevens* Court omitted mention of the Sedition Act of 1798 in its litany of cat-

egories of historically unprotected expression. However, under the approach urged by government here, the false statements criminalized under the Sedition Act would likely still be presumptively unprotected and illegal unless the speaker could meet the burden of demonstrating the existence of some unspecified greater value stemming from his or her expression. This, of course, severely limits speech and cannot help but create a chilling effect.

Under traditional standards, there is a presumption of constitutionality for all speech. Therefore, the burden must rest with the government to present evidence—going beyond mere falsity itself—that a proposed restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). Such a showing has not been made here.

CONCLUSION

All of the foregoing First Amendment considerations present serious reasons—in addition to those asserted by the Respondent here—why a showing of falsity alone is insufficient, under the First Amendment—to permit criminal prosecution of one who utters an objectionable statement. The remedy against false claims to have received a military honor is simply more speech—by the government or by others. The attempt to protect sacrosanct military honor by laws prohibiting expression must always fail under our system of government.

Respectfully submitted,

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