1	IN THE SUPREME COURT OF THE UNITED STATES
2	x
3	UNITED STATES, :
4	Petitioner : No. 11-210
5	v. :
6	XAVIER ALVAREZ. :
7	x
8	Washington, D.C.
9	Wednesday, February 22, 2012
10	
11	The above-entitled matter came on for oral
12	argument before the Supreme Court of the United States
13	at 10:21 a.m.
14	APPEARANCES:
15	DONALD B. VERRILLI, JR., ESQ., Solicitor General,
16	Department of Justice, Washington, D.C.; for
L7	Petitioner.
18	JONATHAN D. LIBBY, ESQ., Deputy Federal Public Defender,
L9	Los Angeles, California; for Respondent.
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1	PROCEEDINGS
2	(10:21 a.m.)
3	CHIEF JUSTICE ROBERTS: We'll hear argument
4	first this morning in Case 11-210, United States v.
5	Alvarez.
6	General Verrilli.
7	ORAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.,
8	ON BEHALF OF THE PETITIONER
9	GENERAL VERRILLI: Mr. Chief Justice, and
_0	may it please the Court:
.1	Military honors play a vital role in
_2	inculcating and sustaining the core values of our
_3	nation's armed forces. The military applies exacting
_4	criteria in awarding honors, and Congress has a long
_5	tradition of legislating to protect the integrity of the
_6	honors system.
_7	The Stolen Valor Act continues that
_8	tradition by prohibiting knowingly false statements that
_9	one has been awarded a military honor. It regulates a
20	carefully limited and narrowly drawn category of
21	calculated factual falsehoods. It advances a legitimate
22	substantial, and, indeed, compelling governmental
23	interest, and it chills no protected speech.
24	This Court has recognized
25	JUSTICE SOTOMAYOR: General, may I pose a

- 1 hypothetical? During the Vietnam War, a protester holds
- 2 up a sign that says I won a Purple Heart -- for killing
- 3 babies.
- 4 Knowing statement. He didn't win the Purple
- 5 Heart. As a reader, I can't be sure whether he did and
- 6 is a combat veteran who opposes the war or whether he's
- 7 a citizen protesting the war.
- 8 Is that person -- if he's not a veteran
- 9 having received a medal, is he liable under this Act?
- 10 GENERAL VERRILLI: I think, Your Honor, it
- 11 would depend on whether that was -- that expression was
- 12 reasonably understood by the audience as a statement of
- 13 fact or as an exercise in political theater. If it's
- 14 the latter, it's not within the scope of the statute --
- 15 JUSTICE SOTOMAYOR: Somewhat dangerous,
- 16 isn't it --
- 17 GENERAL VERRILLI: -- and it wouldn't be
- 18 subject to liability.
- JUSTICE SOTOMAYOR: -- to subject speech to
- 20 the absolute rule of no protection? Which is what
- 21 you're advocating, I understand.
- 22 GENERAL VERRILLI: Well, Your Honor --
- JUSTICE SOTOMAYOR: That there are no
- 24 circumstances in which this speech has value. I -- I
- 25 believe that's your bottom line.

1	GENERAL VERRILLI: Well, what what I
2	would say with respect to that, Your Honor, is that this
3	Court has said in numerous contexts, numerous contexts,
4	that the calculated factual falsehood has no First
5	Amendment value for its own sake.
6	JUSTICE SOTOMAYOR: Well, that's not
7	JUSTICE KENNEDY: Well, I'm I'm not sure
8	that that's quite correct. It has said it often but
9	always in context where it is well understood that
LO	speech can injure. Defamation, Gertz page 12 of your
L1	brief, you make this point, and it's what Justice
L2	Sotomayor is indicating. You think there's no value to
13	falsity.
L4	But I I simply can't find that in our
L5	cases, and I I think it's a sweeping proposition to
L6	say that there's no value to falsity. Falsity is a way
L7	in which we contrast what is false and what is true.
18	GENERAL VERRILLI: I want to be
19	JUSTICE KENNEDY: And
20	GENERAL VERRILLI: I want to respond with
21	precision, Justice Kennedy, that the I think what
22	this Court and Gertz is a good example has done is
23	to draw a line, and that line and I think it is Gertz
24	itself that contains this Court's statement that false

statements of fact have no First Amendment value. That

- 1 doesn't automatically mean that a false statement of
- 2 fact lacks First Amendment protection.
- JUSTICE KENNEDY: But that's in the context
- 4 of a defamation case.
- 5 GENERAL VERRILLI: Yes.
- 6 JUSTICE KENNEDY: And you want to take the
- 7 Gertz case, where it's well understood that defamation
- 8 is actionable, and say that as a general matter, that
- 9 the government can inveigh against what's false.
- 10 GENERAL VERRILLI: The -- no, I'm trying to
- 11 say something much narrower than that, Justice Kennedy,
- 12 that, with respect to factually false statements, the
- 13 government has the authority, if it can meet the
- 14 "breathing space" principles that this Court's cases
- 15 have articulated, along with the recognition that
- 16 factually false statements have no intrinsic First
- 17 Amendment value. Those are substantial constraints, but
- 18 they are substantial constraints that are satisfied in
- 19 this case because the Stolen Valor Act regulates a very
- 20 narrowly drawn and specific category of calculated
- 21 factual falsehood, a verifiably false claim that an
- 22 individual has won a military honor, and that's
- 23 information that is within you, and only punishes speech
- 24 about yourself. So, it is speech that's uniquely within
- 25 the knowledge of the individual speaker.

1	JUSTICE	GINSBURG:	Suppose		suppose,
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- 2 General Verrilli, that the decorations were left out and
- 3 Congress had said we don't like people saying that they
- 4 were in the Marine Corps for 25 years when they never
- 5 served for a single day in any armed force. So, they
- 6 have a statute just like this one, but it is directed to
- 7 the false claim that one has served in the armed forces.
- I don't see in your argument that there's
- 9 something special about the decorations.
- 10 GENERAL VERRILLI: Well, I do think the
- 11 decorations matter, Justice Ginsburg. We -- we think
- 12 that that kind of a statute would be a harder case and,
- 13 under the Court's "breathing space" principles, closer
- 14 to the line because the category is much broader, much
- 15 harder to define, and it would depend on the interest.
- 16 JUSTICE SCALIA: Why is it much harder to
- 17 define? I don't -- why does the broadness have anything
- 18 to do with the breathing space? I mean, I suppose your
- 19 argument here is that there is harm; it's not just
- 20 falsehood, but it's falsehood conjoined with harm, just
- 21 as libel is.
- 22 GENERAL VERRILLI: That's -- that's exactly
- 23 our argument, Justice Scalia.
- JUSTICE SCALIA: Okay. So -- and in the
- 25 example that Justice Ginsburg just gave -- in your case

- 1 there's harm to those courageous men and women who
- 2 receive the decorations. In the -- in the example that
- 3 Justice Ginsburg gave, there's harm to the people who
- 4 honorably served in the armed forces.
- 5 GENERAL VERRILLI: Yes, and --
- 6 JUSTICE SCALIA: Well, why isn't that just
- 7 as --
- 8 GENERAL VERRILLI: And if that's the -- and
- 9 if that is the -- that's what I was trying to get to,
- 10 Justice Scalia, is that --
- 11 JUSTICE SCALIA: Their service is demeaned
- 12 when everybody says I served in the armed forces.
- 13 GENERAL VERRILLI: Congress -- under this
- 14 Court's "breathing space" principles, Congress would
- 15 need to articulate a substantial interest. We think
- 16 that would likely qualify. We just think that's
- 17 a harder case to make.
- 18 CHIEF JUSTICE ROBERTS: Well, where do you
- 19 stop? I mean, there are many things that people know
- 20 about themselves that are objectively verifiable where
- 21 Congress would have an interest in protecting. High
- 22 school diploma. It is a crime to state that you have a
- 23 high school diploma if you know that you don't. That's
- 24 something you can check pretty easily. And Congress can
- 25 say: We want people to finish high school. It's a big

- 1 thing to have a high school diploma. So, we want to
- 2 make sure nobody goes around saying they do when they
- 3 don't.
- 4 What about that case?
- 5 GENERAL VERRILLI: I think that that case,
- 6 Your Honor, I think if it's an objectively verifiable
- 7 fact -- it would seem more likely that a State
- 8 legislature might enact a law like that. If it were an
- 9 objectively verifiable fact and the State could
- 10 articulate a substantial interest of the kind that Your
- 11 Honor identified, States --
- 12 CHIEF JUSTICE ROBERTS: The substantial
- interest is the one that I've just said.
- 14 GENERAL VERRILLI: States -- States do have
- 15 laws, some States do have laws respecting false claims
- 16 to have received a diploma from a public university.
- JUSTICE KENNEDY: But that's -- that's for
- 18 submitting résumés. That's -- when -- that's fraud.
- 19 GENERAL VERRILLI: I do -- if I could get
- 20 back to Your Honor's point about the nature of the harm,
- 21 it is true that in Gertz you had the particularized
- 22 harm, but this Court -- the common characteristic that
- 23 allowed this Court to move from defamation to
- 24 false-light privacy, to intentional infliction of
- 25 emotional distress in the Falwell case, then to baseless

- 1 lawsuits, the sham exception in Noerr-Pennington, the
- 2 sham exception under the National Labor Relations Act,
- 3 the common characteristic was not an analogy to the
- 4 particularized harm that existed in defamation contexts.
- 5 The common characteristic that this Court's opinions
- 6 identify is the calculated factual falsehood.
- 7 It is true that the harm here is different.
- 8 It's a --
- 9 JUSTICE KENNEDY: They were -- they were in
- 10 a context, though, of recognized torts, intentional
- 11 infliction for emotional distress. Here it does seem to
- 12 me that you can argue that this is something like a -- a
- 13 trademark, a medal in which this -- the government and
- 14 the armed forces have a particular interest, and we
- 15 could carve out a narrow exception for that. I think
- 16 we'd have to do that.
- But just to say that the cases you mentioned
- 18 say that there's no value to false speech, I just simply
- 19 cannot agree that they stand for that broad proposition.
- 20 They do in the particular context of a recognized tort
- 21 like intentional infliction of emotional distress.
- 22 GENERAL VERRILLI: That -- that is true.
- 23 And this -- this is a case in which the -- one of the
- 24 harms that justifies this statute is the
- 25 misappropriation of the government-conferred honor and

- 1 esteem, and that is a real harm and a significant harm.
- 2 And there is also the particularized harm of the erosion
- 3 of the -- of the value of the military honors confirmed
- 4 -- conferred by our government; and those are
- 5 particularized harms that are real. And the kind of
- 6 speech that this statute regulates are a genuine threat
- 7 to those harms in a way that, looking backwards, looking
- 8 and anchoring this argument in the tradition of this
- 9 Court's precedents, this is a type of calculated factual
- 10 falsehood that
- 11 has --
- 12 JUSTICE SOTOMAYOR: Harms -- General, I
- 13 spent a lot of time going through the multiple cases
- 14 that you cited in your brief defining the various
- 15 statutes that basically impose penalties for
- 16 impersonation of some sort or another. And virtually in
- 17 every one of them, except perhaps one, there was either
- 18 an economic interest that was harmed by the
- 19 impersonation, either by the face of the -- by the very
- 20 face of the statute or by the nature of the claim, a
- 21 dilution of a trademark by taking on someone else's
- 22 valuable property rights.
- 23 And so, I went back reading our cases, and
- 24 Justice Story many, many years ago said, look,
- 25 falsehoods have no value as such, but the "breathing

- 1 space" concept is defined by those falsehoods which
- 2 cause injury to rights that people possess, to pecuniary
- 3 -- to pecuniary interests that they have, or to the
- 4 reputation of others. And almost every statute where
- 5 we've approved a harm concept as being permissible for
- 6 recovery has affected one of those three things.
- 7 So, please tell me what's wrong with
- 8 Justice Story's view, number one; and, number two, how
- 9 does the definition of harm fit in that? What's the
- 10 harm here that fits within that descriptor?
- 11 GENERAL VERRILLI: Well, I think three
- 12 points. First, if I could just make a general point in
- 13 response to Your Honor's question. I think that one
- 14 reality here is that, as I read this Court's cases, this
- 15 Court has never held or even suggested in any context
- 16 when the government wants to regulate a properly defined
- 17 category of calculated factual falsehood, that it has to
- 18 meet strict scrutiny. That would be a real break and a
- 19 -- and a real change in the law that would subject --
- JUSTICE SOTOMAYOR: I didn't mention --
- 21 neither did Justice Story.
- 22 GENERAL VERRILLI: And -- but -- and
- 23 again -- but --
- 24 JUSTICE SOTOMAYOR: He said if you want to
- 25 regulate a falsehood, it has to cause a harm in this

- 1 way.
- 2 GENERAL VERRILLI: And that's why I want to
- 3 get to -- that's why -- but I think it's relevant, Your
- 4 Honor, to the point about Justice Story in the following
- 5 way: The -- the -- there are a series of statutes, 18
- 6 U.S.C. 1001, 18 U.S.C. 962, the impersonating a Federal
- 7 officer statute; 1001 being the false statement statute;
- 8 perjury statutes. Those are designed to protect the
- 9 integrity of the government processes. There isn't --
- 10 JUSTICE SOTOMAYOR: Not really. They're
- intended to protect the right of the government to
- 12 secure truthful information.
- 13 GENERAL VERRILLI: Rights --
- JUSTICE SOTOMAYOR: The government has a
- 15 right to subpoena you at trial, subject you to oath, and
- 16 force you to tell the truth.
- 17 GENERAL VERRILLI: Statute --
- 18 JUSTICE SOTOMAYOR: So, if you -- that's a
- 19 right. That fits within Story's definition.
- 20 GENERAL VERRILLI: But not a -- as -- as I
- 21 read what Justice Story is talking about, he was talking
- 22 about the rights of private citizens, and what I'm
- 23 saying is there is an additional category of
- 24 long-recognized, well-accepted government regulation of
- 25 -- of factual -- calculated factual falsehood that

- 1 serves systemic interests. And, of course, with respect
- 2 to the Stolen Valor Act, the -- Congress -- Congress is
- 3 building the Stolen Valor Act on a statute that Congress
- 4 enacted in 1923 which prohibited the -- the wearing of
- 5 medals without justification to wear the medals.
- And, of course, one of the reasons Congress
- 7 acted in 1923 to do that was out of concern that the
- 8 misappropriation of the government conferral of esteem
- 9 was going to cause substantial harm. That's been on the
- 10 books for the better part --
- 11 JUSTICE ALITO: Is your --
- 12 JUSTICE KAGAN: General --
- 13 GENERAL VERRILLI: -- of a century --
- 14 JUSTICE ALITO: Is your argument limited to
- 15 statements that a person makes about himself or herself?
- 16 GENERAL VERRILLI: Yes. It is. That's the
- 17 category that the statute regulates. That is -- and it
- 18 seems to me in a situation in which the statute is
- 19 limited to factually verifiable information, the person
- 20 is speaking about himself or herself, and the category
- 21 of what's prescribed is clear --
- JUSTICE ALITO: What's the principal reason
- 23 for drawing the line there? Suppose the statute also
- 24 made it a crime to represent falsely that someone else
- 25 was the recipient of a military medal, so that if

- 1 someone said falsely and knowingly that a spouse or a
- 2 parent or a child was a medal recipient, that would also
- 3 be covered.
- 4 GENERAL VERRILLI: I think --
- 5 JUSTICE ALITO: That would be protected by
- 6 the First Amendment?
- 7 GENERAL VERRILLI: I think that would be a
- 8 -- that would be a case in which under the "breathing
- 9 space" principles that this Court applies when we're
- 10 talking about calculated factual falsehood, you'd have
- 11 to answer a question, which is, how much risk is there
- 12 of chilling constitutionally protected speech, because
- 13 when you're talking about somebody else --
- JUSTICE SCALIA: I don't see any difference
- 15 as far as that risk goes. I hope that in your earlier
- 16 colloquy with Justice Kennedy, you -- you were not
- 17 retreating from what our cases have repeatedly said,
- 18 that there is no First Amendment value in falsehood.
- 19 GENERAL VERRILLI: And that only -- and
- 20 that --
- 21 JUSTICE SCALIA: Now, this doesn't mean that
- 22 every falsehood can be punished, because in -- in
- 23 punishing some falsehoods you -- you risk deterring --
- 24 deterring truth.
- 25 GENERAL VERRILLI: And that's -- that was

- 1 what I was trying to say in response to Justice Alito's
- 2 question. You have --
- JUSTICE SCALIA: I believe that there's no
- 4 First Amendment value in -- in falsehood.
- 5 GENERAL VERRILLI: You have to answer the
- 6 question in that case of whether there was a material
- 7 risk of deterring expression that's truthful because
- 8 what -- who knows whether your grandfather was telling
- 9 the truth when he -- when he said he won the medal. And
- 10 so, you -- it may be a more difficult case. But under
- 11 the Court's "breathing space" principles, that's the
- 12 question that one would have to answer.
- 13 JUSTICE KAGAN: General, is that --
- JUSTICE GINSBURG: Well, the assumption --
- 15 the assumption is that it's false. That was -- and that
- 16 it's not so hard to find out if somebody claims to have
- 17 the Medal of Honor and he doesn't. So that -- first,
- 18 you answered yes, that it's only self, and now you said,
- 19 no, it's -- it can be -- or at least I think you said --
- 20 making a false statement of fact. And the concern is --
- 21 and I gave you the question of just in service, leaving
- 22 out the -- the decorations -- other statements of fact,
- 23 false statements like "I deny that the Holocaust ever
- 24 occurred." That's a statement -- a false statement of
- 25 fact, isn't it?

- 1 GENERAL VERRILLI: It could be. I think a
- 2 statute seeking to regulate that, Justice Ginsburg,
- 3 would have viewpoint discrimination problems of the kind
- 4 that the Court identified in R.A.V., and I think also
- 5 under the Court's "breathing space" analysis you
- 6 would -- you'd have to look long and hard and have
- 7 significant concerns about that kind of a -- a statement
- 8 because it's so bound up with matters of ideological
- 9 controversy that -- that you'd want to exercise care,
- 10 but that's really quite different from what we have
- 11 here.
- 12 This is a pinpoint accuracy, a specific
- 13 verifiable factual claim about yourself, that you've won
- 14 a medal.
- 15 CHIEF JUSTICE ROBERTS: Could I -- I want to
- 16 follow up on Justice Scalia's question because I'm not
- 17 sure I understood. The Government's position is that
- 18 there is no First Amendment value in a false
- 19 representation of fact, by which I understand you to
- 20 mean not parody or something like that, but a statement
- 21 that's intended to be understood as true. There is no
- 22 First Amendment value in that statement. It may be
- 23 protected because of the "breathing space" argument, but
- in whatever context, in whatever guise, there's no
- 25 protection in that false representation as such.

Т	GENERAL VERRILLI. Well, that is the
2	position we've taken in this case, Your Honor, and the
3	reason we've taken it is because we read the Court's
4	precedents, Gertz and many others, Falwell v. Hustler,
5	as saying precisely that. In fact, Falwell goes a step
6	further and says false statements of fact are
7	affirmatively harmful to First Amendment interests
8	because they impede the the search for truth.
9	That's so, our our position is based
10	on the precise language of cases stretching back a half
11	a century. Garrison said calculated falsehood is a
12	category of speech that is no part of the expression of
13	ideas or the search for truth, and then it
14	cites Chaplinsky
15	JUSTICE KAGAN: General, what what about
16	these State statutes there are more of them than I
17	thought that there would be that say no demonstrable
18	falsehoods by a political candidate in a political race,
19	and prohibit demonstrable falsehoods by political
20	candidates? How would your analysis apply to those?
21	Would they come out the other end as constitutional?
22	GENERAL VERRILLI: I think that those kinds
23	of statutes are going to have a lot harder time getting

through the Court's "breathing space" analysis because

the context in which they arise is one that would create

24

- 1 a more significant risk of chill.
- JUSTICE KAGAN: Well, suppose it says
- 3 demonstrable falsehoods about yourself -- -
- 4 GENERAL VERRILLI: I think -- I think --
- 5 JUSTICE KAGAN: -- just about your
- 6 qualifications, about what you've done in your life,
- 7 your -- you know, whether you have a Medal of Honor,
- 8 whether you've been in military service, whether you've
- 9 been to college. So, any demonstrable statement that a
- 10 candidate, political candidate, makes about himself.
- 11 GENERAL VERRILLI: Yes. I think under the
- 12 Court's "breathing space" analysis, because of the
- 13 political candidate context, those statutes are going to
- 14 pose a particular risk of chill that this statute does
- 15 not pose because this is a statute about verifiable
- 16 factual falsehoods.
- 17 JUSTICE KAGAN: I quess I don't understand
- 18 why it would be more chilling in the one case than in
- 19 the other. They're the same kind of statement, and one
- 20 knows the same sorts of things about oneself.
- 21 GENERAL VERRILLI: Well, I think the idea
- 22 would be, in a situation like that one, the government's
- 23 power and authority is being trained specifically on the
- 24 political process and statements in the political
- 25 process. And this is -- this is quite different. This

- 1 is a statute that says --
- JUSTICE KAGAN: Well, I assume that that
- 3 would be, in the case of these State statutes, because
- 4 the State feels that it has a specially important
- 5 interest in maintaining the political sphere free of
- 6 lies.
- 7 GENERAL VERRILLI: But I -- what -- I guess
- 8 the chilling effect seems to me, at least, to be
- 9 materially different than in a situation like this one,
- 10 where what we're talking about is a very specific
- 11 pinpoint thing, one thing: Have you been awarded a
- 12 military honor or not? And a statement that is about
- 13 yourself only, not about somebody else, and that -- and
- 14 is supported by a quite strong particularized interest
- in ensuring the integrity of the military honors system.
- 16 JUSTICE SCALIA: I suppose that even in the
- 17 commercial context we allow a decent amount of lying,
- 18 don't we? It's called "puffing."
- 19 GENERAL VERRILLI: Well --
- 20 JUSTICE SCALIA: Although -- although, you
- 21 know, making false representations to sell a product is
- 22 -- is unlawful, we do allow puffing, don't we?
- 23 GENERAL VERRILLI: Well, certainly, and --
- JUSTICE SCALIA: You won't buy it cheaper
- 25 anywhere else, and --

- 1 GENERAL VERRILLI: That's -- that's
- 2 certainly right. But when we're -- and that is the line
- 3 that was --
- 4 JUSTICE SCALIA: So, maybe we allow a
- 5 certain amount of puffing in political speech as well.
- 6 GENERAL VERRILLI: And I do think that --
- 7 JUSTICE SCALIA: Nobody believes all that
- 8 stuff, right?
- 9 (Laughter.)
- 10 GENERAL VERRILLI: I do think the Court's --
- 11 I do think the Court's breathing space analysis would
- 12 call for that, I think that's true. But this is a
- 13 different context.
- 14 CHIEF JUSTICE ROBERTS: And I suppose it
- 15 might have something to do with -- I don't know whether
- 16 to call it collateral or not. I mean, I would think the
- 17 concern in the midst of a political campaign is you have
- 18 the U.S. attorney or the deputy district attorney
- 19 bringing a -- filing a prosecution of someone 2 weeks
- 20 before the election saying, well, you lied about this or
- 21 that. And maybe there'd have to be a deposition, or
- 22 maybe there'd have to be a trial. I don't -- nothing
- 23 like that's involved here.
- 24 GENERAL VERRILLI: Nothing at all, Your
- 25 Honor. And that is what I was trying to say --

- 1 JUSTICE KENNEDY: It seems to me your best
- 2 analogy is the trademark analogy, Olympics case,
- 3 et cetera. You put that in a rather minor -- not an
- 4 afterthought, but it's a secondary argument in your
- 5 brief. It seems to me it's the -- it's the strongest
- 6 one.
- 7 The whole breathing space thing almost has
- 8 it backwards. It presumes that the government is going
- 9 to have a ministry of truth and then -- and allow
- 10 breathing space around it. I just don't think that's
- 11 our tradition. On the other hand, I have to acknowledge
- 12 that this does diminish the medal in many respects.
- 13 GENERAL VERRILLI: Yes, and that's the
- 14 government's interest here, and we do think that that
- 15 kind of -- I think, Your Honor, that the reason that I
- 16 think our -- we have a lot of "slippery slope" type
- 17 questions here today, but the -- I would urge the Court
- 18 not to -- not to decline to make a sound decision about
- 19 this statute based on concern about not being able to
- 20 draw the line, because this statute is as narrow as you
- 21 can get --
- 22 JUSTICE SOTOMAYOR: General, but I have a
- 23 problem, which is it's not as narrow as it could get.
- 24 Wouldn't take much to do exactly what Congress said it
- 25 was doing, which was to protect against fraudulent

- 1 claims of receiving a medal, and the example it used was
- 2 someone who used a fraudulent claim of receiving a medal
- 3 to get money.
- What I'm trying to get to is what harm are
- 5 we protecting here? I thought that the core of the
- 6 First Amendment was to protect even against offensive
- 7 speech. We have a legion of cases that said your
- 8 emotional reaction to offensive speech is not enough.
- 9 If that is the core of our First Amendment, what I hear,
- 10 and that's what I think the court below said, is you
- 11 can't really believe that a war veteran thinks less of
- 12 the medal that he or she received because someone's
- 13 claiming fraudulently that they got one. They don't
- 14 think less of the medal. We're reacting to the fact
- 15 that we're offended by the thought that someone's
- 16 claiming an honor they didn't receive.
- So, outside of the emotional reaction,
- 18 where's the harm? And I'm not minimizing it. I too
- 19 take offense when people make these kinds of claims, but
- 20 I take offense when someone I'm dating makes a claim
- 21 that's not true.
- 22 (Laughter.)
- JUSTICE SOTOMAYOR: And -- and --
- 24 GENERAL VERRILLI: And as -- as the father
- of a 20-year-old daughter, so do I, Justice Sotomayor.

1 (Laughter.) 2 JUSTICE SOTOMAYOR: You know --3 GENERAL VERRILLI: But -- but if I could 4 take a minute on the interest, because I do think it's 5 quite important. 6 I mean, at some level, of course, it is true 7 that no soldier charges up Mount Suribachi thinking, 8 well, I'm going to do this because I'll get a medal if I 9 get to the top. That's not what the military honors 10 system is --11 JUSTICE SOTOMAYOR: Or I'm not going to do 12 this because the medal has been debased. 13 GENERAL VERRILLI: That's not -- well, 14 that's not what the honors system is about. The honors system is about identifying the attributes, the essence, 15 16 of what we want in our service men and women: Courage, 17 sacrifice, love of country, willingness to put your life 18 on the line for your comrades. And what the medals do 19 is say to the -- to our military this is what we care 20 about. It's what George Washington said in 1782, when 21 he set up the honors system. It's designed to 22 cherish -- it's designed to cherish a valorous ambition 23 in soldiers and to encourage every species of military 24 merit.

And I -- what I think with respect to the

- 1 government's interest here and why there is a harm to
- 2 that interest is that the point of these medals is that
- 3 it's a big deal. You get one for doing something very
- 4 important after a lot of scrutiny. And for the
- 5 government to say this is a really big deal and then to
- 6 stand idly by when one charlatan after another makes a
- 7 false claim to have won the medal does debase the value
- 8 of the medal in the eyes of the soldiers. It does do
- 9 that. That is the government's interest, we think that
- 10 is a real and substantial interest, and it's threatened
- 11 here --
- 12 JUSTICE SOTOMAYOR: But the reality is that
- 13 this gentleman was publicized, deriled for what he did.
- 14 His public position was compromised, as is the case with
- 15 almost everyone who's caught at lying.
- 16 GENERAL VERRILLI: But, given that this is a
- 17 category of calculated factual falsehood, we think the
- 18 government has the authority and the constitutional --
- 19 the constitutional space to try to deter this kind of
- 20 speech, as well as allow for private attorneys.
- 21 If I might --
- 22 JUSTICE GINSBURG: Did the military -- did
- 23 the military ask for this? You're claiming there's a
- 24 special interest in seeing that a military honor is not
- debased.

- 1 GENERAL VERRILLI: It did not, Justice
- 2 Ginsburg, but under Article I, section 8, Congress has
- 3 substantial authority to regulate our armed forces, gets
- 4 substantial deference. It's not unlike the statute that
- 5 the Court evaluated in the FAIR case in that regard,
- 6 which was not a statute that the military -- that the
- 7 military asked for, but Congress nevertheless was given
- 8 substantial deference.
- 9 If I --
- 10 JUSTICE SCALIA: Did the Commander in Chief
- 11 sign that -- that legislation?
- 12 GENERAL VERRILLI: Yes, he did, Your Honor.
- Thank you.
- 14 CHIEF JUSTICE ROBERTS: Thank you,
- 15 Mr. Verrilli.
- 16 Mr. Libby.
- 17 ORAL ARGUMENT OF JONATHAN D. LIBBY
- 18 ON BEHALF OF THE RESPONDENT
- 19 MR. LIBBY: Thank you, Mr. Chief Justice,
- 20 and may it please the Court:
- 21 The Stolen Valor Act criminalizes pure
- 22 speech in the form of bare falsity, a mere telling of a
- 23 lie. It doesn't matter whether the lie was told in a
- 24 public meeting or in a private conversation with a
- 25 friend or family member. And the law punishes false

- 1 claims to a military award regardless of whether harm
- 2 results or is -- even is likely to result in an
- 3 individual case.
- 4 CHIEF JUSTICE ROBERTS: What is -- what is
- 5 the First Amendment value in a lie, a pure lie?
- 6 MR. LIBBY: Just a pure lie? There can be a
- 7 number of values. There's the value of personal
- 8 autonomy.
- 9 CHIEF JUSTICE ROBERTS: The value of what?
- 10 MR. LIBBY: Personal autonomy, that we get
- 11 to --
- 12 CHIEF JUSTICE ROBERTS: What does that mean?
- MR. LIBBY: Well, that we get to -- we get
- 14 to exaggerate and create --
- 15 CHIEF JUSTICE ROBERTS: No, not
- 16 exaggerate -- lie.
- MR. LIBBY: Well, when we create our own
- 18 persona, we're often making up things about ourselves
- 19 that we want people to think about us, and that can be
- 20 valuable. Samuel Clemens creating Mark Twain. That was
- 21 creating a persona, and he made things up about
- 22 himself and --
- 23 CHIEF JUSTICE ROBERTS: Well, but that was
- 24 for literary purposes. No one is suggesting you can't
- 25 write a book or tell a story about somebody who earned a

- 1 Medal of Honor, and it's a fictional character; so, he
- 2 obviously didn't. It just seems to me very different.
- MR. LIBBY: Perhaps. But there are other
- 4 things, in addition to the fact that people tell lies
- 5 allows us to appreciate truth better.
- 6 JUSTICE ALITO: Do you really think that
- 7 there is -- that the First Amendment -- that there is
- 8 First Amendment value in a bald-faced lie about a purely
- 9 factual statement that a person makes about himself,
- 10 because that person would like to create a particular
- 11 persona? Gee, I won the Medal of Honor. I was a Rhodes
- 12 scholar. I won the Nobel Prize. There's a personal --
- 13 the First Amendment protects that?
- MR. LIBBY: Yes, Your Honor, so long as it
- 15 doesn't cause imminent harm to another person or
- 16 imminent harm to a government function.
- 17 JUSTICE BREYER: An obvious example that
- 18 used to be -- are there Jews hiding in the cellar? No.
- MR. LIBBY: Well, that's right, and that's
- 20 certainly a beneficial lie.
- 21 CHIEF JUSTICE ROBERTS: That's not a
- 22 statement about one's self. This is --
- MR. LIBBY: And now --
- 24 JUSTICE BREYER: Are you hiding Jews in the
- 25 cellar?

1	CHIEF JUSTICE ROBERTS: Excuse me. Sorry.									
2	(Laughter.)									
3	CHIEF JUSTICE ROBERTS: It seems to me that									
4	the Stolen Valor Act is more narrow than that. And I									
5	would say, in that situation, you would not describe									
6	what the individual in Justice Breyer's hypothetical was									
7	as simply telling a a false statement about himself.									
8	It is about whether there is someone hiding in the									
9	attic. It is not about himself.									
10	MR. LIBBY: Well, perhaps, just dealing with									
11	an example under the Stolen Valor Act, if a grandfather									
12	were to make up a story that he had won a medal in order									
13	to persuade a grandchild to									
14	CHIEF JUSTICE ROBERTS: In order to									
15	MR. LIBBY: to join the military									
16	CHIEF JUSTICE ROBERTS: It seems to me that									
17	that's missing the limitation that the Government has									
18	read into this statute: Not damage, not for parody, not									
19	to avoid the discovery of someone who should be hidden,									
20	not in order to do something with respect to one's									
21	grandson. It's just a purely false statement about									
22	oneself. What what is the First Amendment									
23	value in that, again?									
24	MR. LIBBY: Well, another value is the fact									

that the purpose of the First Amendment was a limit on

- 1 government power. It's -- it's -- our founders believed
- 2 that Congress, as a general principle, doesn't get to
- 3 tell us what we as individuals can and cannot say.
- 4 Now --
- 5 CHIEF JUSTICE ROBERTS: Well, of course,
- 6 they do in countless areas, the state does, whether
- 7 you're talking about defamation, trademark, perjury, all
- 8 sorts of things. You can't adopt that as a general
- 9 principle and apply it without regard to the situation.
- 10 MR. LIBBY: Well, that's right, Mr. Chief
- 11 Justice, but in all of those examples, those are
- 12 examples where we have harm attached to the falsehood.
- 13 JUSTICE SCALIA: Well, sometimes the harm is
- 14 just the impairment of governmental purposes, such as
- 15 section 1001, which criminalizes the making of a false
- 16 statement to any Federal agent, for Pete's sake. How do
- 17 you justify that? Because the making of the false
- 18 statement impairs a governmental investigation. And
- 19 what is being urged here is that the making of this type
- 20 of a false statement impairs the government's ability to
- 21 honor valorous members of the armed forces.
- MR. LIBBY: Well, we believe there's --
- 23 there's a difference there, Your Honor. With respect to
- 24 1001, there's the substantial risk of imminent harm to a
- 25 government investigation. Whether it in fact causes

- 1 that direct harm, there's still a significant risk of
- 2 imminent harm resulting from telling a lie to a
- 3 government investigator.
- 4 JUSTICE KAGAN: But, Mr. Libby, you've
- 5 suggested to us that we should apply strict scrutiny to
- 6 all of these cases. Now, almost nothing passes strict
- 7 scrutiny. Why should 1001 pass strict scrutiny? I
- 8 mean, it seems to me you're proposing a test that would
- 9 invalidate all of the laws on the books regarding false
- 10 statements.
- 11 MR. LIBBY: Well, no, Your Honor. What
- 12 we're suggesting is false statements -- false statements
- 13 laws do have a history in this country. And the Court
- 14 could recognize a historical category of -- of imminent
- 15 harm or potential risk of imminent harm to government
- 16 functions. And perjury certainly falls into that
- 17 category. 1001 very well may fit into that category.
- 18 Since the beginning of our nation, Congress has passed
- 19 these various false statement laws.
- JUSTICE SCALIA: And do we give some
- 21 deference to Congress as to whether there is a harm to
- 22 governmental purposes, or do we make it up ourselves?
- 23 When Congress passed this legislation, I assume it did
- 24 so because it thought that the value of the awards that
- 25 these courageous members of the armed forces were

- 1 receiving was being demeaned and diminished.
- 2 MR. LIBBY: Well --
- JUSTICE SCALIA: By charlatans. That's what
- 4 Congress thought.
- 5 MR. LIBBY: Well --
- 6 JUSTICE SCALIA: Is that utterly
- 7 unreasonable that we can't accept it?
- 8 MR. LIBBY: Justice Scalia, it's not
- 9 entirely clear what Congress thought here because
- 10 Congress held no hearings on this. It made a broad
- 11 general finding that false statements harm the
- 12 reputation --
- JUSTICE KENNEDY: Well, it's a matter --
- 14 it's a matter of common sense that it, it seems to me --
- 15 that it demeans the medal. Let me ask you this: What
- 16 do you do with the statute that prohibits the wearing of
- 17 a medal that has not been earned?
- MR. LIBBY: Wearing medals is a slightly
- 19 different category because there you're dealing with
- 20 conduct rather than content.
- JUSTICE KENNEDY: Well, I'm not so sure.
- 22 You know, the Tinker case with the arm band; it's purely
- 23 expressive speech, it seems to me. I think if you
- 24 prevail here that the wearing prohibition must also be
- 25 in serious doubt.

1	MR.	LIBBY:	Ιt	mav	be	or	it	mav	be	in	doubt

- 2 under certain situations where one is wearing a medal.
- 3 But certainly Congress has an interest in protecting
- 4 non-expressive purposes of wearing the medals.
- 5 JUSTICE KENNEDY: But I think it is, if the
- 6 whole purpose of the person who puts the medal on his
- 7 tuxedo that he didn't earn is an expressive purpose.
- 8 That's pure expression.
- 9 MR. LIBBY: It may be, Your Honor. But
- 10 again, we -- we view it under a different prism. We --
- 11 JUSTICE GINSBURG: Why? I mean, it's
- 12 expressive. One is I am speaking through conduct, and
- 13 the other is I'm speaking through words. You wear the
- 14 medal and you're saying I am a Medal of Honor winner.
- 15 MR. LIBBY: That's right. And as I said, it
- 16 may ultimately be the case that the Court finds that, if
- 17 in fact it's unconstitutional --
- JUSTICE GINSBURG: So, you think that the
- 19 wearing --
- 20 MR. LIBBY: -- in this provision, that it
- 21 could be.
- JUSTICE GINSBURG: -- that the wearing of a
- 23 military decoration that you haven't earned, that that's
- 24 also of questionable consistency with the First
- 25 Amendment?

- 1 MR. LIBBY: It may be. But, again, it would
- 2 depend on the circumstances.
- JUSTICE GINSBURG: No circumstances. Where
- 4 you go out in the street with the -- with the medal on
- 5 you for everybody to see.
- 6 MR. LIBBY: If -- if there's -- if Congress
- 7 does not have a non-speech purpose for prohibiting the
- 8 wearing of the medals, then if it's strictly an
- 9 expressive purpose, then, yes, there would be a
- 10 significant First Amendment problem.
- JUSTICE KENNEDY: Well, don't you think
- 12 that's the case? There's no non-expressive purpose that
- 13 I can think of.
- MR. LIBBY: Well -- and that very well may
- 15 be. What I can say is in this case what we're dealing
- 16 with is strictly a content-based regulation on speech.
- 17 JUSTICE ALITO: But you -- you acknowledge
- 18 that the First Amendment allows the prohibition or the
- 19 regulation of false speech if it causes at least certain
- 20 kinds of harms. And the problem I have with your
- 21 argument is determining which harms you think count and
- 22 which harms don't count.
- 23 Would you go as far as was suggested earlier
- 24 to say that only pecuniary harm counts? If you -- if
- 25 you say that, then the -- the classic case of

- 1 intentional infliction of emotional distress is
- 2 unconstitutional, going up to someone and saying falsely
- 3 your -- your child has just been run over by a bus. So,
- 4 how do we determine which harms are sufficient?
- 5 MR. LIBBY: I believe -- what we believe the
- 6 right way of looking at this is you -- you determine
- 7 whether or not there is imminent harm or a significant
- 8 risk of imminent harm to an individual or to a
- 9 government function that would result from the speech.
- 10 JUSTICE ALITO: When you say "imminent," you
- 11 mean -- what do you mean by that?
- 12 MR. LIBBY: I guess I'm suggesting the
- 13 Brandenburg standard, which is -- if --
- 14 JUSTICE ALITO: Well, if that's the
- 15 standard, then most of the prosecutions for making false
- 16 statements to a Federal law enforcement officer are not
- 17 going to survive, are they?
- 18 MR. LIBBY: Well, but the issue is what
- 19 about the law. And the issue with 1001 and those false
- 20 statement statutes is it's the substantial risk of
- 21 imminent harm to the government that could result from
- 22 the falsehood.
- So -- well, certainly, it may not result in
- 24 a particular case, but the substantial risk of imminent
- 25 harm is there.

- 1 JUSTICE ALITO: Well, then you're not really
- 2 talking about imminent harm, I don't think. You're just
- 3 talking about harm.
- 4 MR. LIBBY: Well, when one lies to a
- 5 government investigator, presumably you're doing it in
- 6 order to send them in the wrong direction, even if it
- 7 doesn't do that. So, the harm may not be there, but
- 8 there's certainly a significant risk of harm that the
- 9 government has the right to protect itself from. And
- 10 that's why we believe that's -- that's where you draw
- 11 the line. And that's where this Court appears to have
- 12 drawn the line in those categories of speech that it has
- 13 said are unprotected, such as --
- JUSTICE KAGAN: But Mr. Libby, let's suppose
- 15 that I agree with Gertz that there is no constitutional
- 16 value in a false statement of fact, and the reason why
- 17 we protect some false statements of fact is to protect
- 18 truthful speech.
- So, if -- if that's so, is -- how is it that
- 20 this statute will chill any truthful speech? What
- 21 truthful speech will this statute chill?
- MR. LIBBY: Your Honor, it's not clear that
- 23 it may necessarily chill any truthful speech. I mean,
- 24 it's -- we certainly concede that one typically knows
- 25 whether or not one has won a medal or not. We certainly

- 1 -- we concede that point.
- JUSTICE KAGAN: So, boy, I mean, that's a
- 3 big concession, Mr. Libby. Then you're saying you can
- 4 only win this case if this Court decides that the Gertz
- 5 statement was a kind of overstatement, an exaggeration,
- 6 puffery.
- 7 MR. LIBBY: Well, we do -- well, we do have
- 8 the situation where we believe the statute currently
- 9 does cover -- someone could be prosecuted for engaging
- 10 in parody or satire or exaggeration. Certainly, there's
- 11 nothing on the face of the statute to suggest that
- 12 those --
- 13 JUSTICE GINSBURG: But the Government has
- 14 said that's not how we read the statute. And the courts
- 15 read statutes to avoid a constitutional collision. So,
- 16 let's assume that we are not going to cover
- 17 performances, satire. It's just a bald-faced lie.
- 18 That's all that this covers.
- 19 MR. LIBBY: Then it's still our position
- 20 that it's still a -- that all speech is presumptively
- 21 protected unless we go back and it fits into one of the
- 22 historical categories of speech that this Court has
- 23 found historically is unprotected. And bare falsity
- 24 certainly has never previously been recognized by this
- 25 Court as being an unprotected category of speech.

Τ	JUSTICE SOTOMAYOR: Counsel, my
2	CHIEF JUSTICE ROBERTS: I don't understand
3	the Government to argue that the speech at issue here is
4	totally unprotected. I understand them to argue I
5	mean, is it's totally unprotected. I understand them
6	to argue that it can be limited under its "breathing
7	space" rationale. In other words, it's not within one
8	of the categories of totally unprotected speech. You do
9	have to analyze it under the First Amendment, and you
10	analyze it to determine if it chills protected speech.
11	MR. LIBBY: I suppose I read the
12	Government's argument differently. As I read the
13	Government's argument, it's that it's entitled to, at
14	most, limited protection. So, the Government seems to
15	start from the presumption that it's not fully protected
16	speech; whereas, of course, what we should be starting
17	with is the presumption that it is fully protected
18	speech unless this Court has previously said it's in one
19	of these historical categories of unprotected speech.
20	JUSTICE SOTOMAYOR: May I if I understood
21	your argument, you're saying historically we have not
22	protected false statements that cause harm. I think
23	that's your argument.
24	MR. LIBBY: That's correct. Yes, Your
25	Honor.

1	JUSTICE	SOTOMAYOR:	All	riaht.	Assuming	

- 2 so, it's -- we do protect false statements
- 3 presumptively, but the historical exception, like
- 4 defamation, are those that cause harm.
- 5 So, I go back to Justice Alito's question
- 6 because you really haven't answered his question.
- 7 You've dealt with the government process cases, although
- 8 I -- we could argue about whether that's protecting a
- 9 process or protecting a government right to truthful
- 10 information. That's a different issue.
- 11 But the question is how do you deal with the
- 12 intentional infliction of emotional distress? Because
- 13 damage -- we require injury, and it's defined under law
- 14 what kind of injury. So, tell me how you define harm in
- 15 the nongovernmental situation, number one, and then tell
- 16 me why that -- this situation doesn't fit that
- 17 definition.
- 18 MR. LIBBY: Well, in the situation with
- 19 intentional infliction of emotional distress, you are
- 20 dealing with an instantaneous harm, a mental distress
- 21 that results from the false statement. So, there --
- 22 there's imminent harm as a result of -- that results in
- 23 intentional infliction of emotional distress for
- 24 false-light --
- JUSTICE SOTOMAYOR: So, why isn't the

- 1 outrage that medal winners, legitimately entitled medal
- winners, experience in seeing fake people or hearing
- 3 fake people claim a medal -- why isn't that comparable?
- 4 MR. LIBBY: Well, I don't believe that fits
- 5 into the same category of -- of mental distress that we
- 6 look at in intentional infliction of emotional distress.
- 7 Certainly, people are entitled to be upset
- 8 by these false claims. I mean, I'm personally upset by
- 9 these false claims. But the fact that there is a
- 10 certain level of upset doesn't mean that you were --
- 11 you're harmed in the sense of the intentional infliction
- 12 of emotional stress tort. And so, what we're dealing
- 13 with here is simply a non-instantaneous harm.
- Now, what the Government has suggested is
- 15 that there's no harm that really results from a single
- 16 claim, that Mr. Alvarez's falsehood did not cause harm
- 17 to any individual.
- 18 JUSTICE ALITO: It seems to me what you're
- 19 -- what you're arguing is that we should determine that
- 20 there are certain harms that are sufficient to allow the
- 21 prohibition of a false statement and there are certain
- 22 harms that are not sufficient, irrespective of what
- 23 judgment Congress made about the significance of those
- 24 harms. Is that -- is that accurate?
- MR. LIBBY: That's certainly part of it. I

- 1 mean, we believe that there needs to be imminent harm,
- 2 that it needs to be targeted harm to an individual or
- 3 to -- to government function, that it can't be the type
- 4 of diffuse harm that the Government --
- JUSTICE BREYER: Why not?
- 6 MR. LIBBY: -- says took place here.
- JUSTICE BREYER: Why not? Because, after
- 8 all, we're willing to protect the Olympics Committee
- 9 when a false person saying he's the Olympics Committee
- 10 might deprive the Olympics Committee of a penny, while
- 11 here they're saying that to win this great medal, say,
- 12 the congressional Medal of Honor, the highest award in
- 13 the military the nation can give, you're deserving of
- 14 the most possible, grandest possible respect, and we
- 15 don't -- we don't even want you to have to think about
- 16 somebody having taken that name falsely; and so, we will
- 17 just criminalize it to discourage such activity that
- 18 undermines the very thought and purpose of giving the
- 19 medal. All right?
- So, I'm just saying in my mind there's real
- 21 harm. And there's real harm, and yet, I can think of
- 22 instances where we do want to protect false information.
- 23 And I want you to accept that as a given because that
- 24 isn't my question.
- 25 (Laughter.)

- 1 JUSTICE BREYER: My question is: If I'm
- 2 right that there are very good First Amendment reasons
- 3 sometimes for protecting false information, and if this
- 4 also would cause serious harm, what the government is
- 5 aiming after, are there less restrictive ways of going
- 6 about it? And, if so, what and why?
- 7 MR. LIBBY: There are. First of all, more
- 8 speech. There's time to fix the problem. If someone
- 9 tells a lie about having received an honor, there's time
- 10 for them to be exposed. And, in fact, that's
- 11 what typically happens--
- 12 JUSTICE SCALIA: The government is going to
- 13 hire people to follow, you know -- is that realistic?
- MR. LIBBY: Well, what --
- 15 JUSTICE SCALIA: I mean, there is a
- 16 sanction. You know, when there's a sanction in place,
- 17 you think twice before you tell the lie. But if there's
- 18 no sanction except you might be exposed, who's going to
- 19 expose you? That sanction already exists, and there are
- 20 a lot of people nonetheless who tell the lie. You
- 21 really expect the government to hire investigators to go
- 22 around the country outing people who falsely claim
- 23 military honors?
- MR. LIBBY: Well, Justice Scalia, isn't
- 25 that --

- 1 JUSTICE SCALIA: That's not going to happen.
- 2 MR. LIBBY: Isn't that exactly what's
- 3 happening right now with this law? Because the law is
- 4 on the books, the government is sending FBI agents out
- 5 to investigate these allegations. How do they find out
- 6 about it? It's because it's reported. Individuals hear
- 7 the statement, and they think it may be false. They
- 8 investigate it. And -- and conduct their own
- 9 investigations.
- So, that's what happens, and that's what's
- 11 supposed -- that's the whole idea of more speech.
- 12 JUSTICE BREYER: Is there anything else --
- 13 that the threat of criminal prosecution might discourage
- 14 from lying who would never be caught. So, at least as
- 15 to that set, exposure won't work. So, you have a less
- 16 restrictive alternative that helps some but not
- 17 completely. Are there others?
- 18 MR. LIBBY: Well, of course if you're never
- 19 caught, then under the Government's theory, then no one
- 20 has been harmed individually or in the --
- 21 JUSTICE BREYER: Not under my theory. My
- 22 theory is that it does hurt the medal, the purpose, the
- 23 objective, the honor, for people falsely to go around
- 24 saying that they have this medal when they don't. Okay?
- 25 So, I might be wrong about that. I just ask you to

- 1 assume that for purposes of argument because what I'm
- 2 trying to get to is I want as big a list as I can to
- 3 think about of what the less restrictive alternatives
- 4 are.
- 5 MR. LIBBY: Sure.
- JUSTICE BREYER: Or might be.
- 7 MR. LIBBY: The military can redouble its
- 8 efforts at honoring those who in fact are entitled to
- 9 the awards. There was a congressional hearing that
- 10 suggested that the military has been a little lax in
- 11 identifying true heroes and awarding them medals. So,
- 12 that could be done.
- The government could publicize the names of
- 14 true winners. It could create educational programs to
- 15 let the nation know what it takes to win these awards,
- 16 what these awards are, who has won them. All the heroic
- 17 acts that have --
- 18 JUSTICE SCALIA: How about giving a medal of
- 19 shame to those who have falsely claimed to have earned
- 20 the medal of valor?
- 21 (Laughter.)
- JUSTICE SCALIA: I think that would be a
- 23 good idea.
- 24 MR. LIBBY: Well, Your Honor, actually,
- 25 that's certainly something the government could do.

- 1 CHIEF JUSTICE ROBERTS: Well, not under your
- 2 theory, right? I mean, it -- I mean, it's still a
- 3 sanction for telling something that you say is protected
- 4 under the First Amendment, whether you get 6 months or a
- 5 medal of shame doesn't matter under your theory.
- 6 MR. LIBBY: Well, there is a significant
- 7 difference between a criminal sanction that puts someone
- 8 in prison versus simply exposing them for what they are,
- 9 which is a liar. And Mr. Alvarez -- whether or not he
- 10 in fact was sentenced to a crime, he still was exposed
- 11 for who he was, which was a liar.
- 12 JUSTICE GINSBURG: Suppose -- suppose the
- 13 statute were amended, as has been proposed, to require
- 14 an intent to obtain anything of value.
- 15 MR. LIBBY: That would turn the law into a
- 16 fraud statute. And, of course, fraud is an unprotected
- 17 category of speech. So, that certainly would be a
- 18 constitutional law.
- 19 JUSTICE GINSBURG: But that wouldn't -- that
- 20 wouldn't reach this speaker. Is that -- is that -- that
- 21 wouldn't reach Alvarez because he didn't obtain anything
- 22 of value.
- MR. LIBBY: Well, that's -- I mean, that's
- 24 not what we have here. What we do know is that
- 25 Mr. Alvarez did not obtain a thing of value.

- 1 CHIEF JUSTICE ROBERTS: How do we -- how do
- 2 we know that? He was politically active, right?
- 3 MR. LIBBY: Yes.
- 4 CHIEF JUSTICE ROBERTS: He was involved --
- 5 well, doesn't it help a politician to have a
- 6 congressional Medal of Honor?
- 7 MR. LIBBY: Perhaps, Your Honor. I mean,
- 8 for -- certainly, there are many people out there that
- 9 would consider that to be a great thing. There are also
- 10 a lot of people out there who don't know what it is.
- 11 And so, to them, it might not mean a whole lot.
- 12 CHIEF JUSTICE ROBERTS: But it seems to me
- 13 that your willingness to say that this statute is valid
- 14 so long as there's some benefit to the person who lies,
- 15 it's an awfully big concession.
- 16 MR. LIBBY: Well, it would -- if it --
- 17 again, if Congress were to amend the law to require that
- 18 it be done with the intent to obtain a thing of value,
- 19 again, it becomes fraud. And fraud is something that
- 20 the government does have the right to prosecute.
- 21 JUSTICE ALITO: So that would mean --
- 22 JUSTICE SCALIA: Something of value. It has
- 23 to be something of commercial value, right? It's --
- 24 doing it just to -- just to obtain praise and the higher
- 25 esteem of your fellow citizens, that's -- that's not

- 1 enough.
- 2 MR. LIBBY: Well, Your Honor, as I --
- 3 JUSTICE SCALIA: You have to get a penny out
- 4 of it, right?
- 5 MR. LIBBY: As I understand the proposed
- 6 amendment, it just says anything of a non-de minimis
- 7 value. How that is ultimately interpreted --
- 8 JUSTICE KENNEDY: That's just the basic
- 9 definition of fraud in the criminal law.
- 10 MR. LIBBY: That's right. Now, could it --
- 11 could it be a nonpecuniary thing of value? As it's
- 12 currently proposed, yes. But that's --
- 13 CHIEF JUSTICE ROBERTS: So, if he -- so, if
- 14 he makes this statement at a debate when he's running
- 15 for office, then you can prosecute him because getting
- 16 the office is presumably something of value. It
- 17 presumably has some pecuniary aspect to it.
- 18 MR. LIBBY: Perhaps, Your Honor. And,
- 19 again, it may come down to how the courts ultimately
- 20 interpret a thing of value. It's not clear that simply
- 21 trying to obtain a vote from somebody is necessarily a
- thing of value, would be considered a thing of value.
- 23 Obviously, if you promise to give up your votes in
- 24 office in return for support, that would be a little
- 25 different.

- 1 JUSTICE SCALIA: What if he just gets the
- 2 cheers of the crowd? He's up there. I'm
- 3 a congressional Medal of -- the crowd cheers, and they
- 4 give him a parade down Main Street. Is -- is that
- 5 something of value?
- 6 MR. LIBBY: It could be. Again, it -- it
- 7 will come down to, over time, how that ultimately
- 8 gets --
- 9 JUSTICE ALITO: But that's not -- the answer
- 10 is would the First Amendment permit that.
- 11 MR. LIBBY: That's a difficult question,
- 12 Your Honor.
- JUSTICE ALITO: Well, that's sort of the
- 14 question we have to answer here.
- MR. LIBBY: Sure.
- 16 (Laughter.)
- MR. LIBBY: And I get that.
- 18 (Laughter.)
- 19 JUSTICE ALITO: Suppose what the person gets
- 20 is -- is a date with a potential rich spouse. Would
- 21 that be enough?
- 22 MR. LIBBY: Your Honor, I think when it
- 23 comes -- when you get into the situation where you're
- 24 getting something like a date, I do not know that -- I
- 25 certainly wouldn't consider that a non-de minimis thing

- 1 of value.
 2 (Laughter.)
- 3 MR. LIBBY: But --
- 4 JUSTICE ALITO: Some people might have a
- 5 different opinion.
- 6 (Laughter.)
- 7 MR. LIBBY: Well, that -- that -- and that
- 8 may be, which is why, should that ultimately become the
- 9 law, courts will have to look at that very closely.
- JUSTICE BREYER: Well, how does it work in
- 11 the law now, where we have similar statutes, and there's
- 12 an additional requirement when you're imitating, say, a
- 13 Federal officer or somebody else you shouldn't, you have
- 14 to perform an overt act that asserts authority that the
- impersonator claims to have. What does that add?
- 16 Do you have to -- does it add enough to just
- 17 make it not pure speech, to limit -- to wall off the
- 18 things about -- the things that we're worried about in
- 19 the First Amendment? Or there's another one, you have to
- 20 falsely assume or exercise powers, duties, and
- 21 privileges. Those are ways statutes have of limiting
- 22 this thing. How does that work?
- MR. LIBBY: Well, when you get into the
- 24 issue of impersonation, then you're -- the Court perhaps
- 25 should be assessing it under the amount of -- of

- 1 imminent harm to an individual that can result.
- 2 JUSTICE BREYER: It has nothing to do with
- 3 harm. It's a way of walling off things that are of
- 4 concern under the First Amendment from those that
- 5 aren't. And what they use -- I read you what they use:
- 6 Performing -- you know -- you know the language. It's
- 7 written about in the briefs. And I just want to know
- 8 how you would think about a statute that imported that
- 9 kind of language, which is limiting language.
- 10 MR. LIBBY: It -- it would be important,
- 11 certainly in the First Amendment context, to limit the
- 12 language as much as possible. You want to make it as
- 13 narrow as possible because, again, we're supposed to
- 14 start from the presumption that we have the right to say
- 15 pretty much what we want to say, and then we start to
- 16 limit it where -- again -- and, I guess, it goes again
- 17 back to what this Court said in Stevens and
- 18 Entertainment Merchants, which is, is it one of these
- 19 historically unprotected types of speech that is not
- 20 entitled to constitutional protection?
- 21 Unless the Court has additional questions --
- 22 CHIEF JUSTICE ROBERTS: Thank you,
- 23 Mr. Libby.
- 24 General Verrilli, you have 3 minutes
- 25 remaining.

1	REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,
2	ON BEHALF OF THE PETITIONER
3	JUSTICE KENNEDY: My my only one of my
4	questions is the slippery slope problem, college degrees
5	and so forth.
6	Could you address that?
7	GENERAL VERRILLI: Yes, Your Honor. The
8	we think the "breathing space" analysis does a very
9	substantial degree of work in controlling the what
10	Your Honor is describing as a slippery slope problem.
11	The government's got to have a substantial interest
12	JUSTICE KENNEDY: But
13	GENERAL VERRILLI: the statute's got to
14	be narrowly drawn. It's got to meet all of those tests.
15	JUSTICE KENNEDY: College degrees.
16	GENERAL VERRILLI: Well, as I think I said
17	in my in my opening statement, that I actually
18	think that's a case in which you could argue that one
19	either way because there might be, if the government
20	articulated a substantial interest in protecting its
21	diplomas issued by its public
22	JUSTICE KAGAN: How about extramarital
23	affairs?
24	GENERAL VERRILLI: Excuse me, Your Honor. I
25	didn't hear the question.

- 1 JUSTICE KAGAN: The government has a strong
- 2 interest in the sanctity of the family, the stability of
- 3 the family; so, we're going to prevent everybody from
- 4 telling lies about their extramarital affairs.
- 5 GENERAL VERRILLI: In addition to the -- in
- 6 addition to the -- the governmental interest, Your
- 7 Honor, there's -- it's got to be tailored in a way that
- 8 avoids chill, and I think it would be very difficult in
- 9 that situation --
- 10 JUSTICE KAGAN: But this is something about
- 11 the person's own experience, that the person knows
- 12 everything about. You either had one or you didn't have
- 13 one.
- 14 GENERAL VERRILLI: That's right. And that's
- 15 a hard case, but I do think, with respect to the
- 16 chilling effect analysis, you -- you would, I think,
- 17 have a great deal of difficulty sustaining that statute.
- 18 But, of course, that's not the kind of statute that we
- 19 have here. This is a targeted statute that's designed
- 20 to deal with a particular harm.
- 21 JUSTICE BREYER: The trouble is that you can
- 22 think of 10,000 instances that meet your criteria that
- 23 one candidate or another could bring up in a political
- 24 campaign. And we don't know what will come up, but I
- 25 can easily think of examples. And then, if this is

- 1 lawful and constitutional, then you have people in
- 2 political campaigns suddenly worrying that the U.S.
- 3 attorney is going to come in and start indicting him.
- 4 Now, that's part of the chilling effect. And you've
- 5 assumed you can get around this chilling effect, but I'm
- 6 less certain.
- 7 GENERAL VERRILLI: Well, I think -- but
- 8 that's why I think the "breathing space" analysis
- 9 requires before a statute gets upheld that it -- that it
- 10 not have that kind of chilling effect.
- 11 JUSTICE BREYER: How do we know this
- 12 doesn't?
- 13 GENERAL VERRILLI: And this statute doesn't,
- 14 and that's the key here. This statute doesn't.
- 15 JUSTICE SOTOMAYOR: Counsel, it seems to me
- 16 that you're asking us to value the speech in context.
- 17 We're not talking about the effect of the speech and
- 18 whether you can regulate that. You're asking us to say,
- 19 you know, the guy who says he's a college graduate in a
- 20 political campaign, that could chill political speech.
- 21 So, in that lie in that context, you can't sanction, but
- 22 you can sanction that lie in a different context. On a
- 23 date.
- 24 GENERAL VERRILLI: Well --
- JUSTICE SOTOMAYOR: I don't know because, on

- 1 a date, it doesn't chill political speech, and it will
- 2 induce a young woman to date someone who she thinks is
- 3 more of a professional, because that harms the parents,
- 4 it harms the family.
- 5 GENERAL VERRILLI: May I answer, Mr. Chief
- 6 Justice?
- 7 CHIEF JUSTICE ROBERTS: Oh, yes.
- 8 GENERAL VERRILLI: Thank you.
- 9 The Respondent has conceded that this
- 10 statute chills nothing. That should be a sufficient
- 11 answer to Your Honor's concern that, with respect to
- 12 other statutes in the future, they can be evaluated to
- 13 determine whether or not they impose a -- a chill that
- 14 would lead as an instrumental matter to the conclusion
- 15 that they ought not to be found to satisfy the First
- 16 Amendment.
- 17 As Respondent concedes, there is no chill
- 18 here. So, this statute is constitutional.
- 19 Thank you.
- 20 CHIEF JUSTICE ROBERTS: Thank you, General,
- 21 counsel.
- The case is submitted.
- 23 (Whereupon, at 11:20 a.m., the case in the
- 24 above-entitled matter was submitted.)

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