

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4                                      Petitioner                                      :    No. 11-210

5 v. :

6 XAVIER ALVAREZ. :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, February 22, 2012

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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

17           Petitioner.

18 JONATHAN D. LIBBY, ESQ., Deputy Federal Public Defender,

19 Los Angeles, California; for Respondent.

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1 P R O C E E D I N G S

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  
10 may it please the Court:

11 Military honors play a vital role in  
12 inculcating and sustaining the core values of our  
13 nation's armed forces. The military applies exacting  
14 criteria in awarding honors, and Congress has a long  
15 tradition of legislating to protect the integrity of the  
16 honors system.

17 The Stolen Valor Act continues that  
18 tradition by prohibiting knowingly false statements that  
19 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.

19                  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 --

23                  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  
10 speech can injure. Defamation, Gertz -- page 12 of your  
11 brief, you make this point, and it's what Justice  
12 Sotomayor is indicating. You think there's no value to  
13 falsity.

14                  But I -- I simply can't find that in our  
15 cases, and I -- I think it's a sweeping proposition to  
16 say that there's no value to falsity. Falsity is a way  
17 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  
25 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.

3 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,  
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.

8 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.

24 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  
13   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.

17                  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.

17           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 --

20                   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  
11 intended to protect the right of the government to  
12 secure truthful information.

13 GENERAL VERRILLI: Rights --

14 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.

6 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 --

22 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 --

14 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 --

3 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 --

14 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  
24  in whatever context, in whatever guise, there's no  
25  protection in that false representation as such.

1                   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  
24 through the Court's "breathing space" analysis because  
25 the context in which they arise is one that would create

1 a more significant risk of chill.

2 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 guess 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 --

2 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  
15 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 --

24 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.

4                   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.

17                   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.)

23                   JUSTICE SOTOMAYOR: And -- and --

24                   GENERAL VERRILLI: And as -- as the father  
25 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  
15 system is about identifying the attributes, the essence,  
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.

25 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, derided 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  
25 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.

13                  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?

13 MR. LIBBY: Well, that we get to -- we get  
14 to exaggerate and create --

15 CHIEF JUSTICE ROBERTS: No, not  
16 exaggerate -- lie.

17 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.

3 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?

14 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.

19 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 --

23 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 -- what is the First Amendment  
23 value in that, again?

24 MR. LIBBY: Well, another value is the fact  
25 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.

22 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.

20 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 --

3 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 --

13 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?

18 MR. LIBBY: Wearing medals is a slightly  
19 different category because there you're dealing with  
20 conduct rather than content.

21 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: It may be or it may 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 --

18          JUSTICE GINSBURG: So, you think that the  
19 wearing --

20          MR. LIBBY: -- in this provision, that it  
21 could be.

22          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.

3                   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.

11                  JUSTICE KENNEDY: Well, don't you think  
12    that's the case? There's no non-expressive purpose that  
13    I can think of.

14                  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.

23 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 --

14 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.

19 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?

22 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.

2 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.

1 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 right. 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 --

25 JUSTICE SOTOMAYOR: So, why isn't the

1 outrage that medal winners, legitimately entitled medal  
2 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.

14 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?

25 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 --

5 JUSTICE BREYER: Why not?

6 MR. LIBBY: -- says took place here.

7 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?

20 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?

14 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?

24 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.

10 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.

6                     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.

13                    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.)

22                    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.

23 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  
22 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.

13 JUSTICE ALITO: Well, that's sort of the  
14 question we have to answer here.

15 MR. LIBBY: Sure.

16 (Laughter.)

17 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.

10 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  
15 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?

23 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 --

25 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.

22 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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