

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. **09-cr-00910-REB**

UNITED STATES OF AMERICA,
Plaintiff,

v.

RICK GLEN STRANDLOF,
a/k/a Rick Duncan,
Defendant.

***AMICUS CURIAE* BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO**

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INTRODUCTION

This Brief arises from the Court's call for supplemental briefing on the defendant's Motion to Dismiss. ("Order for Suppl. Briefing," Doc. #20, Dec. 18, 2009.) As the Court observed in its order, this case raises important questions regarding the constitutionality of the Stolen Valor Act of 2005, P.L. 109-437 (Dec. 20, 2006), 120 Stat. 3266, codified as applicable here at 18 U.S.C. § 704(b). *Amicus Curiae* ACLU argues here that the statute is unconstitutional under the First Amendment to the United States Constitution.

Section 704(b) purports to criminalize pure speech. Indeed, the statute seeks to impose criminal penalties for a species of speech based entirely on the content of the words spoken, apparently in a congressional effort to vindicate an interest that is directly related to the content of the speech, *i.e.*, the harm to the reputation of the nation's decorations for valor that purportedly arises from verbal or written representations indicating falsely that the speaker has been awarded such a decoration or medal. See 18 U.S.C. § 704(b) In that context, the Court is wise to consider carefully not only the sanctity of these medals, but also our national ideal that in the face of speech we abhor, "the remedy to be applied is more speech." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see also *Texas v. Johnson*, 491 U.S. 397, 419 (1989).

In this case, the Government argues forcefully that the speech made unlawful by Section 704(b) is simply outside the protections of the First Amendment. The Government contends that because the words that have here been criminalized are allegedly nothing more than "false statements of fact," there is no place for constitutional scrutiny of the statute.

This reasoning is plainly incorrect. As is discussed in more detail below, numerous cases have extended constitutional protection to false statements of fact – indeed, to knowingly false statements of fact, and even to intentionally malicious false statements of fact. Running the gamut from cases involving libel claims brought by the government for knowingly false statements of fact about the government, to suits for maliciously false statements about identifiable groups of people, our law is replete with the recognition that the First Amendment can indeed protect knowingly false statements of fact. Thus, the mere falsity of a statement of fact does not deprive that statement of its protection under the Constitution. And as a result, the more important analysis for the Court in this case must focus on what level of protection should be accorded to the speech that Congress seeks to censor, which is to say, what form of scrutiny should be applied to the statute, and then of course, can the Government meet its burden of proof under that degree of scrutiny.

The argument set out in this Brief resolves each of those discrete questions as follows:

- (1) The statements proscribed by the Stolen Valor Act do not fall outside the scope of constitutional protection because even false statements of fact are accorded some measure of protection under the Constitution.
- (2) The Act is subject to strict scrutiny under the First Amendment because it is a content-based regulation of speech.

(3) The Act cannot survive that scrutiny because (a) the Government cannot establish the logical premise for its asserted interest, *i.e.*, that the “reputation” of the specified military decorations is in fact harmed by false statements of receipt of such medals, and thus that the Government’s interest is “compelling”; and, (b) even if the interest were compelling, the means chosen by Congress to advance that interest are not “narrowly tailored” where less restrictive measures are available that would be equally effective in protecting the Government’s interest.

ARGUMENT

I. The Mere Falsity Of A Statement Of Fact Does Not Remove It From The Scope Of Constitutional Protection.

The repeated refrain of the Government’s argument is that Section 704(b) criminalizes only false statements of facts, and such statements have no protection under the First Amendment. See Amended Government’s Suppl. Br., at 6-12 (Doc. #27, Jan. 11, 2010). This argument misreads the cases upon which it is based and ignores wide swaths of case law wherein false statements of fact were found to be protected by the First Amendment. Moreover, the Government’s contention – that a proscription of a false statement of fact is of no moment whatsoever to the First Amendment – would open the doors to wholesale government regulation of all manner of speech that has historically been found to be protected by the First Amendment, and it would do so solely

on the basis that the proscribed statement was merely “a false statement of fact.” Such is not the law today.

To support its refrain, the Government points to the body of case law evaluating the extent to which the First Amendment imposes restrictions on state-law libel claims. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).¹ The Government has overlooked, however, that each of the cases it cites presents this proposition – that “knowingly false statements . . . do not enjoy constitutional protection” – in the context of a claim for defamation of a person’s reputation. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); *Herbert v. Lando*, 441 U.S. 153, 171 (1979); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990). Thus, these cases actually stand only for the proposition that a false statement of fact ***that is defamatory of a person’s reputation*** is “not worthy of constitutional protection.” *Gertz*, 418 U.S. at 340. It is this point that a libelous statement must necessarily be harmful to a specific individual’s reputation, not merely its falsity, that makes the proscription of such statements permissible under the First Amendment. *See New York*

¹ The Government’s reliance on the progeny of *New York Times Co. v. Sullivan* is particularly ironic in light of the following statement from that seminal case: “Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.” 376 U.S. 254, 269 (1964). In other words, ***any*** government regulation of speech, regardless of category, and even the category of libel, must be “measured by standards that satisfy the First Amendment.” *Id.* In virtually every context, it is simply not true that a particular category of pure speech is, *ab initio*, entirely outside the scope of First Amendment review. (The one exception that proves the rule is child pornography. *See New York v. Ferber*, 458 U.S. 747, 763-64 (1982).)

Times, 376 U.S. at 292 (holding that the First Amendment requires a showing that a critical statement is directly “of and concerning” an individual, rather than generically disparaging of the government, in order to be actionable.)

Similarly, although not discussed by the Government, the cases that have upheld the constitutionality of criminal penalties for false statements of fact made for the purpose of defrauding another fall outside the First Amendment, not because the statements are false, but because the false statements are material to another’s deceptive effort to obtain something of value from another under false pretenses. *See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) (holding that falsity alone is not enough to warrant a prosecution for fraud – “[f]alse statement alone does not subject a fundraiser to fraud liability” – but rather that the First Amendment requires a showing of knowing falsity as to a “material” fact, and an intent to mislead the listener); *cf. Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 502 & n.19 (1984) (noting the “kinship” between the *New York Times* actual malice standard and the “motivation that must be proved to support a common-law action for deceit”).²

² The Court here might otherwise be tempted to engraft a “saving construction” onto the language of Section 704(b) so as to require, as an element of the specified crime, a showing of a fraudulent intent by the defendant. Such a construction, however, may only be adopted if it is not “plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fla. Gulf Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994); *Apache Survival Coal. v. United States*, 21 F.3d 895, 904 (9th Cir. 1994). In context of Section 704(b), Congress clearly knew of and chose not to incorporate a fraud state of mind in its definition of the elements of the crime. *Compare* P.L. 109-437, 120 Stat. 3266, § 2 (1) (“Findings) (stating that the purpose of the statute was to prevent “fraudulent claims”), *with* 18 U.S.C. § 704(b) (omitting any requirement for a showing of fraudulent intent). Thus, a “saving construction” that incorporates a requirement to show a fraudulent state of mind would be

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In contrast, the Government has mysteriously overlooked entire areas of law that have extended constitutional protection for false statements of fact.

Thus, for example, in the case the Government relies upon, *New York Times v. Sullivan*, the Supreme Court discussed at length the First Amendment doctrine holding that no government entity may sue for harm to the government's reputation stemming from a false statement of fact. See 376 U.S. at 724 (citing *City of Chicago v. Tribune Co.*, 139 N.E. 86, 90 (Ill. 1923)). In that Illinois Supreme Court case from almost a century ago, the court made clear that intentionally false statements of fact about the government simply may not be punished by the government through a suit for libel. See *City of Chicago*, 139 N.E. at 91.³

This rule that the government may not prosecute a claim for libel based on a false statement of fact about the government itself, even a knowingly false statement, has

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plainly contrary to the intent of Congress, and therefore not available to this Court. See *ACLU v. Johnson*, 194 F.3d 1149, 1159 (10th Cir. 1999) (rejecting arguments to engraft a narrowing construction on a state statute because the proposed interpretation "amounts to a wholesale rewriting of the statute").

³ The words of Illinois Chief Justice Thompson in that case bear repeating here:

For the same reason that members of the Legislature, judges of the courts, and other persons engaged in certain fields of the public service or in the administration of justice are absolutely immune from actions, civil or criminal, for libel for words published in the discharge of such public duties, the individual citizen must be given a like privilege when he is acting in his sovereign capacity. This action is out of tune with the American spirit, and has no place in American jurisprudence.

City of Chicago v. Tribune Co., 139 N.E. 86, 91 (Ill. 1923).

been relied upon in numerous cases over the years. See, e.g., *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 919 F. Supp. 756, 760 (D.N.J. 1996) (“[T]he traditional rule is that a government agency may not maintain a libel or defamation action **regardless of the veracity of the statements or the existence of malice.**”) (emphasis added); *City of Philadelphia v. Washington Post Co.*, 482 F. Supp. 897, 898 (E.D. Pa.1979) (dismissing city's action against newspaper for allegedly false statements in an article about police brutality in Philadelphia; holding that the government may not bring an action for libel for even knowingly false statements about the government); *Progress Dev. Corp. v. Mitchell*, 219 F. Supp. 156, 163 (N.D. Ill. 1963) (dismissing, on the strength of *City of Chicago*, a libel counterclaim by a park district even when the false statements at issue were made by an economic competitor to the governmental entity).

Numerous state court decisions are in accord. See *Weymouth Township Bd. of Educ. v. Wolf*, 429 A.2d 431, 432-33 (N.J. Super. Ct. - Law Div. 1981) (dismissing school board's defamation action against taxpayers' association after finding that the board, as a governmental agency, could not maintain action for defamation in its own right, even where the statements challenged were concededly false); *Village of Grafton v. Am. Broad. Co.*, 435 N.E. 2d 1131, 1135-36 (Ohio Ct. App. 1980) (dismissing libel claim brought by a governmental body against television broadcaster for false statements regarding a chemical waste dump: “We believe that the *Chicago v. Tribune Co.* principle is sound and that it is broad enough to encompass, not just criticism of government in the sense of political discussion, but **any statements** about government or governmental entities. Like any per se rule, this may occasionally seem unfair in individual cases; yet,

if unfairness there must be, we deem it preferable that it should be on the side of freedom of speech.”) (emphasis added); *Capital Dist. Reg'l Off-Track Betting Corp. v. Ne. Harness Horsemen's Ass'n*, 92 Misc.2d 232, 399 N.Y.S.2d 597 (N.Y. S. Ct. 1977) (“[T]he rule is that a municipal corporation cannot maintain an action for libel against one who publishes malicious and false statements with the intent to destroy its credit and financial standing, even to the extent that the publication affects it in its proprietary capacity.”); *Johnson City v. Cowles Commc'ns, Inc.*, 477 S.W.2d 750, 753 (Tenn.1972) (dismissing libel suit by city government against local newspaper; concluding that “[g]overnment has no capacity to apply either criminal or civil sanctions to the speaker or writer, **without regard to the falsity or malice of the comment**, for such sanctions are forbidden under the First and Fourteenth Amendments.”) (emphasis added); *State v. Time Inc.*, 249 So. 2d 328, 331 (La. Ct. App. 1971) (“[W]e note that no American court which has dealt with the question of whether a government, be it state or local, has a cause of action for defamation, has reached a result contrary to that of *City of Chicago v. Tribune Co.*”); *City of Albany v. Meyer*, 279 P. 213, 215 (Cal. Ct. App. 1929) (“Falsity of the publication is not an abuse of the right of free speech, and the charge that the publication was malicious necessarily means that the respondent spoke with malice towards the municipal corporation and not with malice towards the administrative officers thereof.”).⁴

⁴ Of course, not only may a government entity not bring a civil cause of action for harm to its reputation from a false statement of fact, it also may not bring a criminal prosecution. See *New York Times*, 376 U.S. at 276. As the Court has made clear, the “verdict of history” is that the First Amendment prohibits a government from engaging in criminal prosecutions for seditious libel. See *id.* Thus, even a

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Similarly, there is no question today that a false statement of fact about a racial or ethnic group, or any other identifiable group, *i.e.*, a “group libel,” may not be proscribed. Thus, although the Supreme Court once affirmed a conviction under a group libel statute, “no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited.” *See Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 672 (7th Cir. 2008) (discussing *Beauharnais v. Illinois*, 343 U.S. 250 (1952), and noting that although *Beauharnais* has never been explicitly overruled, it has never been relied upon either); *see also Collin v. Smith*, 578 F.2d 1197, 1204 (7th Cir. 1978) (concluding that *Beauharnais* no longer is good law). There is simply no basis any longer to believe that a knowingly false statement about a group of people is without protection under the First Amendment. *See Abramson v. Pataki*, 278 F.3d 93, 102 (2d Cir. 2002) (“A defamation claim is insufficient if a statement merely makes reference to the plaintiff as a member of a group (the ‘group libel doctrine’).”); *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1200 (9th Cir. 1989) (noting that vile and maliciously false portrayals of feminists by a magazine cannot support a claim for group libel because the First Amendment does not tolerate such claims). Thus, mere false statements of fact about a group are protected under the First Amendment.

In addition, knowingly false statements of fact made in the context of election campaigns also have been found to be protected by the First Amendment. *See Mowles*

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maliciously false statement of fact intended to harm the reputation of the government may not be prosecuted as a crime.

v. Comm'n on Governmental Ethics & Elections Practices, 958 A.2d 897, 905 (Me. 2008) (striking down statute that prohibited a candidate from publishing a false statement concerning the candidate's endorsement by another); *Rickert v. Washington Pub. Disclosure Comm'n*, 168 P.3d 826, 831 (Wash. 2007) (striking down statute that penalized a candidate for sponsoring a political advertisement containing a knowingly false statement of fact). In these cases, the courts have conceded that the statutes at issue regulated intentionally false statements of fact, but even proof of intentional falsity was not enough to remove the First Amendment shield from such speech. See *Mowles*, 958 A.2d at 904 (holding that the interest in preserving the integrity of an election does **not** "provide the government with the authority to guard the public against any statement it determines might potentially be misleading"); *Rickert*, 168 P.3d at 829 (holding that the government's claim that it "may prohibit false statements of fact contained in political advertisements . . . 'presupposes [that] the State possesses an independent right to determine truth and falsity in political debate,' a proposition fundamentally at odds with the principles embodied in the First Amendment") (quoting *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 695 (Wash. 1998)).

In addition, as with false speech about the government, or a group, or a politician in an election, so also speech that defames a religion – even when the speech is knowingly and intentionally false – is not outside the protections of the First Amendment. See Harry Kalven, *A Worthy Tradition: Freedom Of Speech In America* 7 (Jamie Kalven ed., New York: Harper & Row 1988) ("In America, there is no heresy, no blasphemy."); Leonard Levy, *Treason Against God: A History of the Offense of Blasphemy* 337-38

(New York: Schocken 1981) (describing cases where attempts to prosecute charges of blasphemy in Delaware and Pennsylvania in the early 1970s were dropped in the face of First Amendment defenses). Were the Government's argument to be adopted, however, there would be no barrier under the First Amendment to criminal proscriptions of false statements of fact regarding matters of religion. Thus, a state might enact legislation criminalizing false statements of fact regarding religious leaders and then attempt to prosecute an individual who publishes screeds asserting that the Roman Catholic Church trains its priests to engage in pedophilia. The Government seems to suggest that because such speech is merely a "false statement of fact," there is no First Amendment protection for it.

The law is clear, however, that efforts to criminalize blasphemy are unenforceable under the First Amendment. *See, e.g., State v. West*, 263 A.2d 602, 605 (Md. Ct. App. 1970) (affirming dismissal of a charge of blasphemy under Maryland's more than 300-year-old blasphemy statute); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504-05 (1952) (striking down as unconstitutional under the First Amendment a licensing regime that prohibited licenses for films that were deemed by the government to be "sacrilegious"). The notion that the First Amendment does not protect "false statements of fact" concerning matters of religion is simply antithetical to the essential rationale for the First Amendment understood by its author James Madison. *See United States v. Roth*, 237 F.2d 796, 807 (2d Cir. 1957) (summarizing Madison's view that the core principle of the First Amendment is its protection of speech on matters religion), *aff'd*, 354 U.S. 476 (1957).

This understanding of the protection accorded by the First Amendment to false statements of fact about religion can be seen even in the workings today of individual prosecutorial decisions, where prosecutors understand that the mere falsity of a statement about religion is not sufficient take such speech outside the protection of the First Amendment. See, e.g. David Unze, *Cartoon Vandal Won't Be Charged*, ST. CLOUD TIMES (Jan. 8, 2010) (reporting on decisions by local authorities not to press charges under local ordinances prohibiting blasphemy against a man who displayed posters outside mosques in Minnesota depicting the Prophet Muhammad engaged in acts of bestiality), available at <http://www.sctimes.com/article/20100108/NEWS01/101070059/1/RSSTOP>.⁵

The First Amendment also protects a newspaper's repetition of another person's false statement, even when the publisher is well aware of the falsity, so long as the repetition is contained in a neutral report that describes the full circumstances of the false

⁵ This now well-settled proposition that blasphemy is protected by the First Amendment demonstrates just how unhelpful is the old chestnut from *Chaplinsky v. New Hampshire* that the Government has trotted out in this case. See 315 U.S. 568, 571-72 (1942) (holding that some "narrowly limited classes" of speech enjoy no First Amendment protection, and that these categories "include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"). As is the case with lewd speech, which **does** receive shelter under the First Amendment, see, e.g., *Sable Commc'ns, Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but is not obscene is protected by the First Amendment."), so too "profane" speech, i.e., speech that is blasphemous or sacrilegious, receives protection under the First Amendment. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 466-67 (2d Cir. 2007) (indicating that FCC regulation of "profane language" is subject to First Amendment constraints), *rev'd on other grounds*, ___ U.S. ___, 129 S. Ct. 1800 (2009); cf. *Cohen v. Calif.*, 403 U.S. 15, 24-25 (1971) (holding that the expletive "Fuck the draft" is speech protected by the First Amendment). Thus, the categorical approach set out in *Chaplinsky* is largely bankrupt today, with all forms of speech except child pornography subject to some measure of First Amendment protection.

statement. See *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977); *Coliniatis v. Dimas*, 965 F. Supp. 511, 520-21 (S.D.N.Y. 1997); *Levin v. McPhee*, 917 F. Supp. 230, 239 (S.D.N.Y. 1996), *aff'd*, 119 F.3d 189 (2d Cir. 1997). Thus, liability that would otherwise attach to the publisher for reprinting a knowing falsehood is defeated by First Amendment protection.⁶

Were the Government's argument to be correct, then mere falsity of a statement would be sufficient to allow its criminalization by Congress, without regard to any First Amendment scrutiny. Thus, Congress might enact a statute criminalizing a person's false statement of fact in an online profile in Facebook (www.facebook.com) or LinkedIn (www.linkedin.com). In that context, a person's false assertion in such a profile that he is a graduate of a particular university, or that she weighs fifty pounds less than she actually does, or that he has blond hair, or that she was a finalist on *American Idol*, all would be without First Amendment protection merely because they were false statements of fact made in the course of interstate commerce. So too might Congress, if the Government's argument here is correct, have no hindrance from the First Amendment in creating a private cause of action for damages against any person who knowingly distributes in interstate commerce a false statement of fact regarding an historical event. In such

⁶ Outside the First Amendment context, the Constitution's "speech and debate clause" extends immunity for knowingly false statements of fact by members of Congress, as do the state constitutional analogues to the provisions of Article I, clause 6 of the U.S. Constitution. See *Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979); see also *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (holding that state legislators have absolute immunity from claims under 42 U.S.C. § 1983 for their legislative conduct, including speech as a legislator).

circumstances, the Government's theory would eliminate any First Amendment defense to such a lawsuit for a person who publishes an article on the internet that asserts the U.S. government was responsible for the bombing of Pan Am Flight 103 over Lockerbie, Scotland, or that asserts that President Barack Obama is not a citizen of the United States.

As this extended discussion hopefully has established beyond dispute, the mere falsity of a statement is simply not sufficient to take that statement outside the scope of First Amendment protection. The constitutional admonition to "make no law . . . abridging the freedom of speech" necessarily imposes restrictions on all Congressional efforts to regulate speech, including false speech. The issue is not whether Congress' criminalization of a false statement of fact regarding receipt of a military decoration is subject to First Amendment review – it is.⁷ The far more important, and interesting, question is what level of review should be imposed upon such regulation.

⁷ It should also be noted that there is no vitality any longer in the contention that pure speech falls outside First Amendment protection because it is "conduct" rather than "speech." See, e.g., *United States v. Daly*, 756 F.2d 1076, 1082 (5th Cir.1985). Such arguments are of dubious persuasiveness in light of the Supreme Court's rejection of this approach when a government regulation aims to punish the expressive value, i.e., the meaning, of a person's speech. See *Texas v. Johnson*, 491 U.S. 397, 406 (1989); see also *Cmty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-23 (D.C. App. 1983) (Scalia, J., dissenting) ("A law **directed at** the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.") (emphasis in original), *rev'd sub nom. Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (adopting then-Judge Scalia's view). Thus, arguments based on a theory that the government may enjoin or punish speech because it is "conduct" rather than "expression" fail to appreciate that any such governmental sanction must first survive First Amendment review. See *Boos v. Barry*, 485 U.S. 312, 319-20 (1988) (holding that a local sign regulation in Washington, D.C., was subject to First Amendment review because its content-based applicability functioned as a regulation of the expressive value of a person's speech, not its manner of communication).

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II. Section 704(b) Of The Act Is Subject To Strict Scrutiny Because It Is A Content-Based Regulation Of Pure Speech.

As this Court acknowledged in its call for supplemental briefing, a law that imposes content-based restrictions on pure speech is subject to strict scrutiny. (Order, Doc. #20, at 3.) That recognition is extensively supported in the cases from the Supreme Court. *See, e.g., Ysursa v. Pocatello Educ. Ass'n*, ___ U.S. ___, 129 S. Ct. 1093, 1098 (2009) (“Restrictions on speech based on its content are ‘presumptively invalid’ and subject to strict scrutiny.”) (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007)); *see also Reno v. ACLU*, 521 U.S. 844, 849-57 (1997); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The Tenth Circuit’s cases are to the same effect. *See, e.g., Utah Educ. Ass’n v. Shurtleff*, 565 F.3d 1226, 1230 (10th Cir. 2009) (“When a state abridges speech based on content, we presume the restriction to be invalid and subject the action to strict scrutiny.”).

Although it appears there is no dispute that the Stolen Valor Act must be categorized as “content based,” (Order, Doc. #20, at 3), it is worth noting that such a categorization is well-supported in the cases. The Tenth Circuit has explained that “[c]ontent-based restrictions on speech are those which ‘suppress, disadvantage, or impose differential burdens upon speech because of its content.’” *Golan v. Gonzales*,

... continued from the preceding page.

Separately, the Court should bear in mind that perjury and false-statement statutes are constitutional under the First Amendment not so much because they prohibit false statements, but rather because the government has a compelling interest in receiving truthful information, and the statutory prohibitions against false statements to the government are narrowly tailored to achieve that compelling government interest. *Compare Borgeson v. United States*, 757 F.2d 1071, 1073 (10th Cir. 1985).

501 F.3d 1179, 1196 (10th Cir. 2007), quoting *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 657 (10th Cir.2006). The Tenth Circuit has added that “[c]ontent-based restrictions on protected speech that depend upon subjective impressions raise serious constitutional questions.” *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1221 (10th Cir. 2008); see also *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (“Listeners’ reaction to speech is not a content neutral basis for regulation.”).

In the related context of regulation of speech in public forum spaces, the Supreme Court has explained that a regulation may be deemed to be content neutral only if it serves purposes unrelated to the content of expression. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); cf. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). Government regulation of expressive activity is content neutral so long as it is “justified without reference to the content of the regulated speech.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); see also *Boos v. Barry*, 485 U.S. 312, 320-21 (1988); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981); *Abilene Retail No. 30, Inc. v. Bd. of Comm’rs of Dickinson County*, 492 F.3d 1164, 1171 (10th Cir. 2007) (“If the regulation serves purposes unrelated to the content of expression it is considered neutral, even if it has an incidental effect on some speakers or messages but not others.”), *cert. denied*, 128 S. Ct. 1762 (2008).

In light of this analytical framework, there can be no question that the Stolen Valor Act is a “content-based” regulation. The statute criminalizes mere speech, and it does so on the basis of the meaning of the words expressed. See 18 U.S.C. § 704(b). In

addition, the asserted purpose for the measure as described by Congress, *i.e.*, the need “to protect the reputation and meaning of military decorations and medals,” is entirely dependent on the content of the speech that the statute regulates. See P.L. 109-437, 120 Stat. 3266, § 2 (3) (“Findings). Indeed, the statute even runs afoul of the precept explained in *Forsyth County* for determining whether a regulation is content based because, in seeking to protect the “reputation” of a military decoration, Congress has justified this statute on the basis of “listeners’ reaction” to the prohibited speech. See 505 U.S. at 134.

As a result, Section 704(b) of the Stolen Valor Act is a content-based regulation of speech. See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 826 (2000) (“We cannot be influenced, moreover, by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly. It follows that all content-based restrictions on speech must give us more than a moment's pause.”) Thus, Section 704(b) is “subject to the most exacting scrutiny.” *Golan*, 501 F.3d at 1196.⁸

⁸ The Court should not be deflected by the Government’s arguments that the particular speech at issue in this case did not involve “core” political speech, and that as a result, the prosecution here is not subject to strict scrutiny review. First, in the context of a facial challenge to the constitutionality of the Act, this defendant’s particular speech is immaterial. Second, and more importantly, whether or not Mr. Strandlof’s false statements occurred in the context of political speech is immaterial because the strict scrutiny test applies independently to **both** content-based regulations and regulations that burden political speech. See *Mowles*, 958 A.2d at 901. Here, strict scrutiny applies because Section 704(b) is a content-based regulation of speech, not because the speech in question is political.

III. The Government Cannot Meet Its Burden Of Showing That Section 704(b) Of The Act Survives Strict Scrutiny.

The strict scrutiny test requires the Government to demonstrate that Section 704(b), in its proscription of false speech without regard to any fraudulent or deceitful intent, advances a “compelling” governmental interest and is “narrowly tailored” to serve that interest. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *Golan*, 501 F.3d at 1196; *see also Playboy Entm’t Group*, 529 U.S. at 816 (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”). Strict scrutiny is an exacting inquiry, such that “it is the rare case in which . . . a law survives strict scrutiny.” *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

A. The asserted interest in protecting the reputation of military decorations is not “compelling.”

As Circuit Judge Beam observed with some frustration in the Eighth Circuit’s *en banc* opinion in *Republican Party of Minn. v. White*, “[p]recisely what constitutes a ‘compelling interest’ is not easily defined.” 416 F.3d 738, 749 (8th Cir. 2005) (*en banc*). Indeed, this Court noted its own inability to locate any cases holding that the protection of the reputation of a military medal is a compelling governmental interest.⁹

⁹ The ACLU also has been unable to locate any reported case evaluating whether the protection of the reputation of a military medal is a compelling government interest. As the Court may be aware, the constitutionality of 18 U.S. C. § 704(b) is currently on appeal to the Ninth Circuit Court of Appeals in *United States v. Alvarez*, Case No. 08-50345, from an April 9, 2008 decision in the Central District of California in Case No. CR07-1035-RGK. (The lower court’s decision rejected the applicability of First Amendment review, and thus, the court made no finding as to whether the governmental interest in the reputation of the

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Judicial attempts to define what constitutes a “compelling interest” often become tautological, relying on superlatives, such as “interest of the highest order,” “overriding state interest,” “unusually important interest,” rather than engaging in a specific analytical framework. See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995); *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O’Connor, J., dissenting). As one academic has observed, “the Court’s treatment of governmental interests has become largely intuitive, a kind of ‘know it when I see it’ approach similar to Justice Stewart’s explanation of pornography.” Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. Rev. 917, 937 (1988); see also Richard H. Fallon

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Congressional Medal of Honor, at issue in that case, is compelling.) At this time, no decision has been issued by the Ninth Circuit in the *Alvarez* case.

The most closely related cases have been those examining restrictions on the wearing of military uniforms. See, e.g., *Schacht v. United States*, 398 U.S. 58, 63 (1970) (finding unconstitutional a provision of 10 U.S.C. § 772 that had the effect of prohibiting the wearing of a military uniform during a theatrical performance if the performance “tend[s] to discredit that armed force”); *United States v. McGuinn*, No. 07-Cr-471 2007 WL 3050502, at *3 (S.D.N.Y. Oct. 18, 2007) (upholding the constitutionality of 18 U.S.C. § 704(a) in the face of overbreadth and vagueness challenges). In *Schacht*, while the court struck down a provision of 10 U.S.C. § 772, the Court said only that the prohibition in 18 U.S.C. § 702 against the unauthorized wearing of a military uniform is constitutional in light of *United States v. O’Brien*, 391 U.S. 367 (1968) (upholding the defendant’s conviction for burning his draft card). See *Schacht*, 398 U.S. at 60. The Court never addressed the nature of the government interest at stake in the prohibition against the unauthorized wearing of a military uniform. See *id.* In *McGuinn*, the trial court concluded the governmental interest in preventing damage to the reputation and meaning of military medals is “legitimate,” but the opinion does not address whether this interest is “compelling.” See 2007 WL 3050502, at *3. In *O’Brien*, the Court concluded that the prohibition against destruction of a person’s draft card was a content-neutral regulation, and thus, the Court applied only intermediate scrutiny, not strict scrutiny, and explicitly declined to determine whether the interest at stake in that case was “compelling.” See 391 U.S. at 376-77.

Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. Rev.* 1267, 1321 (2007) (“[T]he Supreme Court has frequently adopted an astonishingly casual approach to identifying compelling interests.”).

Despite these difficulties, there can be no doubt that a governmental interest is not “compelling” if it is based on assumptions that have no basis in fact or logic. *See, e.g., Playboy Entm’t Group*, 529 U.S. at 825-26 (holding that the asserted governmental interest in protecting children from exposure to pornographic cable television programming was not sufficiently compelling when it was based on an untested assumption that parents would not take advantage of channel-blocking measures); *Spratt v. R.I. Dep’t of Corr.*, 482 F.3d 33, 38-41 (1st Cir. 2007) (holding that prison security is not a sufficiently “compelling interest” to justify regulations barring inmates from preaching when the interest was premised on an untested assumption that inmate preachers would present a threat to institutional safety); *Peterson v. Minidoka County Sch. Dist. No. 331*, 118 F.3d 1351, 1357 (9th Cir. 1997) (holding that a school district’s interest in the reputation of its educational program was not a sufficiently “compelling interest” to justify prohibiting a principal from having his children home-schooled for religious reasons when the district’s restriction was premised on an unproven assumption that parents would believe the principal’s decision with respect to his own children was a vote of no confidence in the schools).

In this case, the interest asserted by Congress is the need to protect the “reputation and meaning of military decorations and medals.” P.L. 109-437, 120 Stat. 3266, § 2 (3) (“Findings”). As stated, therefore, the premise underlying this statute is that

the mere false representation of receipt of a military decoration, without regard to any fraudulent or deceptive intent or scheme, is sufficient to harm the “reputation” and “meaning” of a military decoration. This premise, however, cannot withstand scrutiny.

When someone makes a false representation of receipt of a medal, as Mr. Strandlof is alleged to have done here, it is not the medal whose reputation has been harmed, but rather the speaker’s. Indeed, the penalty that American society imposes on a person who makes a false claim of military valor is ostracism. See, e.g., Michael Taylor, *Tracking Down False Heroes; Medal of Honor recipients go after impostors*, San Francisco Chronicle (May 31, 1999) (describing efforts to unmask Medal of Honor imposters), available at [http://www.mishalov.com/False MoH Recipients.html](http://www.mishalov.com/False_MoH_Recipients.html); Abigail Klingbeil, *FBI Agent Nails Medal of Honor Impostors*, The Saratogian (Saratoga Springs, N.Y.) (July 4, 1998), available at http://www.homeofheroes.com/a_homepage/community/imposters/cottone.html. In this social ostracism, Americans express revulsion not at the medal, but at the imposter. If anything, the reputation of the medal is enhanced, not diminished, in the case of a false claim of receipt because society is taught, once again, that the prestige of such decorations belongs only to the truly brave, only to those who have made a true sacrifice.

In fact, the effort to criminalize false claims of receipt of a military decoration can be seen as a lack of faith in the reputation of those medals, and a lack of faith in the wisdom of the American people. Who can doubt the valor of Marine Corps Corporal Jason L. Dunham, who saved the lives of the men he was leading, and gave up his own, when he smothered an exploding grenade with his own body during an action on April

14, 2004 in Karabilah, Iraq? See U.S. Army Center of Military History, *List of Medal of Honor Recipients – Iraq*, available at <http://www.history.army.mil/html/moh/iraq.html> (last updated Aug. 3, 2009). Corporal Dunham’s reputation, and the reputation of the Congressional Medal of Honor that he was posthumously awarded, stand on their own. As does the reputation of every other Medal of Honor awarded by a grateful nation. The medal’s reputation is in no way diminished by an imposter’s vanity in making a false claim of receipt.

B. The Stolen Valor Act is not “narrowly tailored” because other less restrictive means are available to protect the reputation of military decorations.

Even if this Court concludes that Section 704(b) of the Act serves a “compelling” government interest, the proscription in the statute still must be shown to be “narrowly tailored.” See *White*, 416 F.3d at 751. In this case, the Government cannot meet its burden on that issue either.

A narrowly tailored regulation is one that actually advances the governmental interest, does not sweep too broadly (*i.e.*, is not over-inclusive), and could be replaced by no other provision that could advance the interest as well with less infringement of speech (*i.e.*, is the least-restrictive alternative). See *Eu*, 489 U.S. at 226, 228-29; *Buckley v. Valeo*, 424 U.S. 1, 45-47 (1976); see also *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 (1991) (stating that a regulation is not narrowly tailored if it is over-inclusive). As discussed below, Section 704(b) is both over-inclusive and it is not the least-restrictive measure available to achieve the governmental interest.

Section 704(b) is over-inclusive because it is not explicitly limited by its terms to false claims of receipt of a military decoration for fraudulent purposes. (As noted above, *supra*, Footnote 2, Congress explicitly found that the need for the Stolen Valor Act arose from “fraudulent claims” surrounding receipt of military decorations. See P.L. 109-437, 120 Stat. 3266, § 2 (1) (“Findings”). Despite that finding, the element of a fraudulent intent was not included in the statute. See 18 U.S.C. § 704(b).) The over-inclusiveness of the statute can be seen in its applicability against an author who writes a fictional memoir that falsely portrays the author as having received a Purple Heart medal for wounds sustained in Iraq. The statute also would reach a contestant on the television “reality” show *Survivor* who, in a gambit to increase the intrigue between the other contestants and with the full knowledge of the show’s producers (who disclose the strategy when the show actually airs), falsely asserts to the other contestants that he received the Army’s Distinguished-Service Cross for gallantry in Afghanistan. The statute also would reach an investigator who falsely states he was the recipient of the Navy’s Silver Star medal when he attempts to infiltrate a charity scam that defrauds people of donations intended to benefit disabled veterans. All of these false representations would be illegal under Section 704(b) because the statute imposes no *mens rea* requirement as to a deceitful intent.

The statute is also not the least-restrictive means to achieve the Congressional goal of protecting the reputation of military decorations from false claims of receipt. The most efficient and effective mechanism for ensuring that false claims of valor are unmasked is the ready distribution of reliable information as to who is an actual recipient

of the medal in question. With respect to the Congressional Medal of Honor, such ready sources of information already exist. See U.S. Army Center of Military History, *Index of Citations of Medal of Honor Recipients* (reprinting every citation for every medal recipient since the Civil War), available at <http://www.history.army.mil/moh.html> (last updated Aug. 5, 2009); see also Congressional Medal of Honor Society, *Full Archive* (presenting biographical information on every medal recipient), available at <http://www.cmohs.org/recipient-archive.php> (last visited Jan. 19, 2010). Indeed, because so few Medal of Honor recipients are alive today – the current estimate today is just 91 – it is in fact easy to ascertain when a living person today makes a false claim of receipt of the medal. See Congressional Medal of Honor Society, *List of Living Recipients of Medal of Honor*, available at <http://www.cmohs.org/living-recipients.php> (last visited Jan. 19, 2010); see also Taylor, *supra*, *San Francisco Chronicle*.

Indeed, because a person's receipt of the military decorations specified in Section 704(b) is matter of public record, there is no barrier to Congress achieving the interest in preventing false claims of receipt of such medals simply by ensuring that accurate, timely information is made available to the public – as is the case regarding Medal of Honor recipients – for all the other military decorations that Congress wishes to protect. See, e.g., *Playboy Entertainment Group*, 529 U.S. at 816 (holding that the availability to the government of recourse to a campaign of publicizing information to the public – in that case, information regarding cable channel-blocking features – rendered unconstitutional the speech-restrictive provisions in the Telecommunications Act of 1996 because they were not “narrowly tailored”); cf. *Reno*, 521 U.S. at 879 (holding that the ready availability

of technological measures, such as internet filtering and website tagging, which enable individuals to engage in self-help protection, rendered unconstitutional the speech-restrictive provisions of the Communications Decency Act as being not “narrowly tailored”). Making publicly available a searchable database of information already in the military’s possession would transform the task of determining the truth of a claim of valor to one as simple as a quick internet search. Such readily available information would ensure that no person could escape the social stigma that inevitably follows any false claim of valor. The truth would be available for all to see.

The availability of such effective measures to protect the reputation of the nation’s medals of valor necessarily means that the criminal sanctions of Section 704(b) are not the least-restrictive means available to Congress to achieve its asserted interest. Thus, this provision of the statute cannot survive strict scrutiny under the First Amendment.

CONCLUSION

As Justice Brennan eloquently explained in *Johnson*, in the context of the Supreme Court’s review of Texas’ effort to criminalize flag burning, the First Amendment dictates that the necessary response to speech we detest is not to criminalize the speech, but to add our own: “We can imagine no more appropriate response to burning a flag than waving one’s own, no better way to counter a flag burner’s message than by saluting the flag that burns.” *Johnson*, 491 U.S. at 420, 109 S. Ct. at 2548.

So too here, the First Amendment mandates that our national response to the vain self-aggrandizement of false claims of valor is not the clanking wheels of the judicial

system, but rather, the disinfecting sunlight of free and easily accessible information. In the estimable effort to honor the sacrifices for freedom made by the women and men of our Armed Forces, the most effective – and in fact, the constitutionally required – remedy for falsity is truth. Truth that is free and available to all.

In light of the foregoing, Section 704(b) of the Stolen Valor Act is unconstitutional under the First Amendment. As such, it may not be enforced in this case.

Respectfully submitted this 19th day of January, 2010,

By: /s/ Christopher P. Beall

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CERTIFICATE OF SERVICE

Undersigned certifies that on this 19th day of January, 2010, this **MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS BY AMERICAN CIVIL LIBERTIES UNION OF COLORADO** was filed with the Court and served on the counsel of record listed below through the Court's ECF-CM electronic filing system:

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/s Christopher P. Beall