No. 11-210

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER ALVAREZ

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

REPLY BRIEF FOR THE UNITED STATES

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The court of appeals held that 18 U.S.C. 704(b) is facially unconstitutional based on the erroneous assumption that restrictions on knowingly false factual statements must be subjected to strict scrutiny. That holding departs from this Court's longstanding treatment of false factual statements as entitled, at most, only to limited First Amendment protection. This Court has repeatedly upheld content-based false-speech restrictions—for instance, on baseless lawsuits, invasion of privacy, defamation, and fraud—that are supported by an important government interest and provide adequate breathing space for fully protected speech. The Ninth Circuit should have upheld Section 704(b) under that framework. Because the court has erroneously invalidated an Act of Congress that serves a crucial purpose in safeguarding the military honors system, this Court's review is warranted.

Respondent argues that certiorari should be denied because the question presented is not of broad importance and the Ninth Circuit simply applied settled law. Contrary to these contentions, Section 704(b)'s constitutionality is an unsettled question of nationwide significance. The number of challenges to Section 704(b) currently pending before the lower courts is ample evidence of the broad importance of, and the need for certainty about, the question of Section 704(b)'s validity. Moreover, far from applying settled law, the Ninth Circuit broke new ground in invalidating a narrow prohibition on knowingly false factual representations about military honors, despite the compelling interests supporting the law and the ample breathing space for protected speech. The petition for a writ of certiorari should therefore be granted.

1. The decision below declares an Act of Congress unconstitutional on its face. Pet. App. 39a ("As presently drafted, the Act is facially invalid under the First Amendment."). Respondent agrees with that characterization of the Ninth Circuit's decision. Br. in Opp. 9. The court of appeals' decision warrants this Court's review for that reason alone.

Review is particularly appropriate in light of the Ninth Circuit's recent decision in *United States* v. *Perelman*, No. 10-10571 (Sept. 26, 2011), in which the court underscored that its decision in *Alvarez* was premised on the conclusion that Section 704(b) "lacks a scienter requirement to limit the Act's application." Slip op. 18,431 (distinguishing Section 704(b) from Section 704(a), which prohibits knowingly wearing a medal or a colorable imitation thereof without authorization) (internal quotation marks and citation omitted); see Pet. App. 22a-23a. The Ninth Circuit's interpretation of Section 704(b) as prohibiting unknowing falsehoods is not only contrary to Section 704(b)'s language, see Pet.

16-17; it also disregards the principles that criminal statutes presumptively require scienter, and that statutes should be interpreted to avoid constitutional doubt. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994). The Ninth Circuit's facial invalidation of Section 704(b) on the basis of its departure from well-established principles of statutory construction warrants this Court's review.

Respondent suggests (Br. in Opp. 11-12) that this Court should nonetheless deny review because no other court of appeals has yet ruled on Section 704(b)'s constitutionality. As the petition explains, however, four other courts of appeals are currently considering challenges to Section 704(b)'s constitutionality.[1] See Pet. 14-15. That fact demonstrates that the question is of nationwide importance. Moreover, the courts considering these challenges will either create a circuit conflict by upholding Section 704(b), or agree with the Ninth Circuit and strike the provision down, further limiting the enforcement of Section 704(b). Additional decisions therefore will only underscore the necessity for this Court's review. In addition, the Ninth Circuit's decision has cast a shadow over the statute, as other lower court decisions invalidating the statute have generally relied on the Ninth Circuit's reasoning. See, *e.g.*, Order, *United States* v. *Kepler*, Docket entry No. 28, No. 4:11-cr-17 (S.D. Iowa May 31, 2011); Mem. Op. and Order, *United States* v. *Lawless*, Docket entry No. 8, No. 11-mj-173 (D. Md. Aug. 29, 2011). In these circumstances, the decision

[1] Since the petition was filed in this case, an additional indictment has been dismissed by a magistrate judge on the ground that Section 704(b) is unconstitutional. See Mem. Op. and Order, *United States* v. *Lawless*, Docket entry No. 8, No. 11-mj-173 (D. Md. Aug. 29, 2011). The government is appealing that decision to the district court.

below should not be allowed to stand without plenary review.

Nor is there any reason to defer review until other courts have ruled. Contrary to respondent's argument (Br. in Opp. 12-13), further percolation would not materially aid this Court's consideration. This case gave rise to six opinions by five Ninth Circuit judges. Pet. App. 1a (Smith, J.); *id.* at 41a (Bybee, J., dissenting); *id.* at 91a (Smith, J., concurring in denial of rehearing en banc); *id.* at 107a (Kozinski, C.J., concurring in denial of rehearing en banc); *id.* at 116a (O'Scannlain, J., dissenting from denial of rehearing en banc); *id.* at 135a (Gould, J., dissenting from denial of rehearing en banc). Three of those opinions explained the court's reasons for invalidating Section 704(b), while the other three argued that Section 704(b) should be upheld in reliance on varying theories. In reviewing the Ninth Circuit's decision, then, this Court would have the benefit of thorough appellate consideration of arguments for and against the statute's validity.

2. Respondent next argues (Br. in Opp. 14) that review is unwarranted because Section 704(b) is "infrequently used." To the contrary, the government has regularly brought prosecutions under Section 704(b), as the number of pending cases demonstrates. The provision also serves the important purpose of deterring knowingly false claims to have won a military award: the Federal Bureau of Investigation addresses many reported instances of false claims simply by explaining to the claimant that Section 704(b) prohibits such misrepresentations. Section 704(b) is thus a key component of the military honors system, as it helps prevent false claims that dilute the efficacy of military awards. See Pet. 13-16.

In any event, this Court often has reviewed lower court decisions striking down Acts of Congress even when, unlike

here, prosecutions under the relevant federal law are relatively few in number. See, *e.g.*, *United States* v. *Stevens*, 130 S. Ct. 1577 (2010) (addressing constitutionality of rarely used federal statute prohibiting certain depictions of animal cruelty); *United States* v. *Williams*, 553 U.S. 285, 290-291 (2008) (addressing constitutionality of a federal statute criminalizing child pornography using virtual images, even though little evidence existed of prior trafficking in virtual child pornography). Although no jurisdictional statute currently requires this Court to grant certiorari whenever an Act of Congress has been declared unconstitutional, the Court's usual practice is to grant review in such cases.

3. Respondent observes (Br. in Opp. 10-11) that this Court does not invariably grant certiorari when an Act of Congress has been declared invalid, and he contends that this case is analogous to prior cases in which the Court has denied review of such a decision. But significant differences exist between this case and those on which he relies. In *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998), the government "d[id] not ask this Court to take up the underlying constitutional issue," Pet. at 12-13, *Valley Broad. Co.*, *supra* (97-1047). In *ACORN* v. *Edwards*, 81 F.3d 1387 (5th Cir. 1996), cert. denied, 521 U.S. 1129 (1997), the United States had declined to defend the constitutionality of the provision that was at issue in the private party's certiorari petition.[2] And in *ACLU* v. *Mukasey*, 534 F.3d 181 (3d Cir. 2008), cert. denied, 129 S. Ct. 1032 (2009), the Court had passed on the validity of the challenged statute (the Child Online Protection Act) on two prior occasions, see *id.* at 185-186. In con-

[2] In *Wilson* v. *NLRB*, 920 F.2d 1282 (6th Cir. 1990), cert. denied, 505 U.S. 1218 (1992), the government urged the Court to deny certiorari.

trast, this Court has never addressed the constitutionality of Section 704(b).

4. Petitioner next contends (Br. in Opp. 16-18) that because an amendment to the Act was introduced in the House of Representatives in May 2011, this Court's review is unwarranted. See H.R. 1775, 112th Cong.; 157 Cong. Rec. H3108 (daily ed. May 5, 2011); Pet. 7 n.1. The proposed bill's pendency does not diminish the need for this Court's review, however, because H.R. 1775 is not currently the law and the prospects that it will ever become law are at best uncertain. Cf. *Leal Garcia* v. *Texas*, 131 S. Ct. 2866, 2867 (2011) (per curiam) ("Our task is to rule on what the law is, not what it might eventually be."). The bill has been referred to the House Judiciary Committee and its Subcommittee on Crime, Terrorism, and Homeland Security, but no further action has been taken and no hearings have been scheduled. No comparable legislation has been introduced in the Senate.

In any event, the government has a strong interest in defending the validity of those prosecutions that it has brought, and the convictions it has obtained, under Section 704(b) as enacted. Moreover, unless and until Section 704(b) is amended, the government will continue to have an interest in prosecuting new violations of Section 704(b) in its current form, in order to ensure the integrity and efficacy of the military honors system. H.R. 1775's pendency therefore does not diminish the importance or urgency of the question whether Section 704(b) is constitutional.

5. Contrary to respondent's contention, the court of appeals' holding represents an innovation in constitutional law rather than simply an "application of well-settled First Amendment law." Br. in Opp. 10, 18-26. This Court has never considered whether knowingly false claims to have been awarded a military medal may be prohibited consis-

tently with the First Amendment. Nor has the Court suggested, more broadly, that all statutes that prohibit false factual statements—of which there are many, see Pet. App. 67a n.7—must survive strict scrutiny.

As respondent observes (Br. in Opp. 20), the types of false factual statements that the Court has described as historically unprotected by the First Amendment have involved specific legal contexts, such as defamation and fraud. See *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011); *Stevens*, 130 S. Ct. at 1584. Contrary to respondent's argument and the Ninth Circuit's decision, however, that fact does not mean that courts should subject other restrictions on false factual statements to strict scrutiny. The Court has repeatedly stated that false factual statements "are not protected by the First Amendment in the same manner as truthful statements." *Brown* v. *Hartlage*, 456 U.S. 45, 60-61 (1982) (citation omitted). It has accordingly permitted restrictions on false factual statements in a variety of contexts without applying strict scrutiny. Instead, the Court has considered whether the restriction is supported by a government interest and whether it accommodates that interest and First Amendment concerns by providing adequate "breathing space" for fully protected speech. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271-272 (1964).

Although respondent relies (Br. in Opp. 22) on the Court's statement in *New York Times Co.* that the First Amendment does not have "an exception for any test of truth," 376 U.S. at 271, 279 & n.19, *New York Times Co.* itself recognized that the State had a legitimate interest in preventing and punishing defamatory falsehoods. The Court therefore held that a defamation cause of action was constitutionally permissible so long as it contained a scien-

ter requirement to provide adequate "breathing space" to truthful speech and criticism of the government. *Id.* at 271-272, 279-280; see *Gertz*, 418 U.S. at 341. The Court has employed that analysis—rather than strict scrutiny—in other false-statement contexts, including fraud, liability for baseless lawsuits, false-light invasion of privacy, and intentional infliction of emotional distress through false statements. See *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 531 (2002); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388-389 (1967); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 53, 56 (1988).

Respondent is therefore incorrect in asserting that the Ninth Circuit followed this Court's precedents when it held that Section 704(b) should be subjected to strict scrutiny. The Ninth Circuit should have employed the "breathing space" analysis that this Court has applied to restrictions on false factual statements, and it should have concluded that Section 704(b) is constitutional. The provision serves a compelling interest in protecting the integrity of the military honors program, thereby preserving the medals' ability to foster morale and esprit de corps in the military. Pet. 23-26. It also provides ample breathing space to fully protected speech because it poses no danger of chilling effect and it extends no further than necessary.[3] See *Gertz*, 418 U.S. at 342; Pet. 26-28.

Respondent contends (Br. in Opp. 25) that Section 704(b) prohibits "libel on government," similarly to the stat-

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[3] For much the same reasons, Section 704(b) would survive strict scrutiny. But see Br. in Opp. 19 n.9. Contrary to the Ninth Circuit's view, the provision is narrowly tailored to the government's compelling interest because the aggregate effect of knowingly false claims is to dilute the value and meaning of military awards, and relying on counter-speech would be inadequate to prevent that harm. See Pet. 29-30.

utes prohibiting flag burning that were struck down in *Texas* v. *Johnson*, 491 U.S. 397 (1989), and *United States* v. *Eichman*, 496 U.S. 310 (1990). Unlike those statutes, however, Section 704(b) is not directed at criticism of a government symbol. Section 704(b) does not prevent anyone from criticizing medal recipients, the military awards system, military policy, or any official action. Nor does it prohibit desecration or destruction of medals in order to express a point of view. Rather, Section 704(b) prohibits only knowingly false claims to have been awarded a medal—in other words, claims that misappropriate the official honor and approbation that the medals signify, thereby diminishing their ability to serve their important purposes. See Pet. 27-28. Preventing misappropriation and dilution of military honors by means of knowing misrepresentations is a legitimate—and compelling—government interest that is entirely consistent with the First Amendment and entirely unrelated to the suppression of dissent. See *United Seniors Ass'n* v. *SSA*, 423 F.3d 397, 407 (4th Cir. 2005) (upholding statute prohibiting use of the words "social security" in a way that conveys false impression of government endorsement), cert. denied, 547 U.S. 1162 (2006); see also *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 531-535, 532 n.8 (1987).

Respondent also argues (Br. in Opp. 22) that the government may not establish itself as the arbiter of whether speech is truthful or false. Section 704(b) does not give rise to any such danger. Unlike the situations described in *Meyer* v. *Grant*, 486 U.S. 414, 419 (1988), see Br. in Opp. 22, this case does not involve a statute that restricts criticism of the government or that burdens a category of disfavored advocacy. Section 704(b) prohibits only a narrow category of knowing, verifiably false statements of fact about the speaker himself. Because the line between a knowingly

false award-related claim and all other statements—about military service, valorous acts, military policy, or the like—is well-defined and objective, the government would not be able to use Section 704(b) as a means of imposing its own view of "truth" or punishing criticism. Cf. *New York Times Co.*, 376 U.S. at 272.

Nor is respondent correct (Br. in Opp. 23-25) that Section 704(b) prohibits exaggerations in describing oneself or other means of self-expression that go beyond "the monotonous reporting of strictly accurate facts about oneself." Section 704(b) prohibits only those misrepresentations that are reasonably understood as assertions of fact, thereby preserving hyperbole, satire, and other expressive statements, and it sweeps no further than necessary to prevent the significant harm arising from deceptive claims. Upholding Section 704(b) on the basis of the government's compelling interest in the integrity of the military honors system and Section 704(b)'s provision of ample breathing space to fully protected speech would not suggest that the government may prohibit all forms of "embellish[ment]" or "tell-[ing] tall tales." *Id.* at 24.

6. Finally, respondent contends that the Court should not grant review because Section 704(b) is unconstitutional as applied to him. Respondent argues that because he made his false claims while introducing himself as an elected officer at a water district meeting, he was punished for political speech. The Ninth Circuit did not pass on this argument, and no judge suggested that the court could rule on the narrower ground that respondent was engaged in political speech. That is unsurprising. Respondent's knowingly false representation was not a "[d]iscussion[] of qualifications of political candidates," "governmental affairs," or "public issues," Br. in Opp. 27, nor did it assist in expressing any opinion on these issues. Under Section 704(b), re-

spondent was free to express his views on public office in any way he wished. He was not free, however, to knowingly misrepresent that he had been awarded the Nation's highest military honor. Moreover, respondent's making of his false claims during a political event does not immunize him from prosecution under an otherwise constitutional statute that prohibits a narrow category of knowing misrepresentations without regard to the context in which they are made—any more than the political context would immunize defamation or fraud. Section 704(b) does not "suppress ideas or opinions in the form of 'pure political speech,'" *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2723-2724 (2010), and it is not unconstitutional as applied to respondent.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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