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UNITED STATES, :

Petitioner : No. 11-210

v. :

XAVIER ALVAREZ :

Washington, D.C.

Wednesday, February 22, 2012

APPEARANCES:

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Department of Justice, Washington, D.C.; on behalf of
Petitioner.

JONATHAN D. LIBBY, ESQ., Deputy Federal Public Defender,
Los Angeles, California; on behalf of 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., ON
8 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 honor 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, indeed compelling, governmental interest,
23 and it chills no protected speech.

24 This Court has recognized --

25 JUSTICE SOTOMAYOR: General, may I pose a

1 hypothetical?

2 During the Vietnam War, a protester holds up
3 a sign that says, "I won a Purple Heart -- for killing
4 babies." 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 the 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 and it wouldn't be subject to liability.

16 JUSTICE SOTOMAYOR: Somewhat dangerous,
17 isn't it, to subject speech to the absolute rule of no
18 protection? Which is what you're advocating, I
19 understand, that there are no circumstances in which
20 this speech has value. I believe that's your bottom
21 line.

22 GENERAL VERRILLI: Well, what -- what I
23 would say with respect to that, Your Honor, is that this
24 Court has said in numerous contexts, numerous contexts,
25 that the calculated factual falsehood has no First

1 Amendment value for its own sake.

2 JUSTICE KENNEDY: Well, I'm -- I'm not sure
3 that that's quite correct. It has said it often, but
4 always in context where it is well understood that
5 speech can injure. Defamation, Gertz. At page 12 of
6 your brief, you make this point, and it's what Justice
7 Sotomayor is indicating. You think there's no value to
8 falsity.

9 But I -- I simply can't find that in our
10 cases, and I -- I think it's a sweeping proposition to
11 say that there's no value to falsity. Falsity is a way
12 in which we contrast what is false and what is true.

13 GENERAL VERRILLI: I want to be --

14 JUSTICE KENNEDY: And --

15 GENERAL VERRILLI: I want to respond with
16 precision, Justice Kennedy, that the -- I think what
17 this Court -- and Gertz is a good example -- has done is
18 to draw a line, and that line -- and I think it is Gertz
19 itself that contains this Court's statement that false
20 statements of fact have no First Amendment value. That
21 doesn't automatically mean that a false statement of
22 fact lacks First Amendment protection.

23 JUSTICE KENNEDY: But that's in the context
24 of a defamation case.

25 GENERAL VERRILLI: Yes.

1 JUSTICE KENNEDY: And you want to take the
2 Gertz case, where it's well understood that defamation
3 is actionable, and say that as a general matter, that
4 the government can inveigh against what's false.

5 GENERAL VERRILLI: The -- no, I'm trying to
6 say something much narrower than that, Justice Kennedy,
7 that, with respect to factually false statements, the
8 government has the authority, if it can meet the
9 "breathing space" principles that this Court's cases
10 have articulated, along with the recognition that
11 factually false statements have no intrinsic First
12 Amendment value -- those are substantial constraints.
13 But they are substantial constraints that are satisfied
14 in this case because the Stolen Valor Act regulates a
15 very narrowly drawn and specific category of calculated
16 factual falsehood, a verifiably false claim that an
17 individual has won a military honor, and that's
18 information that is within -- and only punishes speech
19 about yourself.

20 So it is speech that is uniquely within the
21 knowledge of the individual speaker.

22 JUSTICE GINSBURG: Suppose -- suppose,
23 General Verrilli, that the decorations were left out and
24 Congress had said: We don't like people saying that
25 they were in the Marine Corps for 25 years when they

1 never served for a single day in any armed force. So
2 they have a statute just like this one, but it is
3 directed to the false claim that one has served in the
4 armed forces.

5 I don't see in your argument that there is
6 something special about the decorations --

7 GENERAL VERRILLI: Well, I do think the
8 decorations matter, Justice Ginsburg. We -- we think
9 that that kind of a statute would be a harder case, and
10 under the Court's "breathing space" principles closer to
11 the line, because the category is much broader, much
12 harder to define, and it would depend on the interest.

13 JUSTICE SCALIA: Why is it much harder to
14 define? I don't -- why does the broadness have anything
15 to do with the breathing space? I mean, I suppose your
16 argument here is that there is harm, it's not just
17 falsehood, but it's falsehood conjoined with harm, just
18 as libel is.

19 GENERAL VERRILLI: That's -- that's exactly
20 our argument, Justice Scalia.

21 JUSTICE SCALIA: Okay. So -- and in the
22 example that Justice Ginsburg just gave, in your case
23 there's harm to those courageous men and women who
24 receive the decorations. In the -- in the example that
25 Justice Ginsburg gave, there's harm to the people who

1 honorably served in the armed forces.

2 GENERAL VERRILLI: Yes.

3 JUSTICE SCALIA: Why isn't that just as --

4 GENERAL VERRILLI: And if that -- and if
5 that is -- and that's what I was trying to get to,
6 Justice Scalia, is that --

7 JUSTICE SCALIA: Their service is demeaned
8 when everybody says, I served in the armed forces.

9 GENERAL VERRILLI: Congress -- under this
10 Court's "breathing space" principles, Congress would
11 need to articulate a substantial interest. We think
12 that would likely qualify. We just think that's
13 a harder case.

14 CHIEF JUSTICE ROBERTS: Well, where do you
15 stop? I mean, there are many things that people know
16 about themselves that are objectively verifiable where
17 Congress would have an interest in protecting. High
18 school diploma. It is a crime to state that you have a
19 high school diploma if you know that you don't. That's
20 something you can check pretty easily. And Congress can
21 say: We want people to finish high school. It's a big
22 thing to have a high school diploma. So we want to make
23 sure nobody goes around saying they do when they don't.

24 What about that case?

25 GENERAL VERRILLI: I think that that case,

1 Your Honor, I think if it's an objectively verifiable
2 fact -- it would seem more likely that a State
3 legislature might enact a law like that. If it were an
4 objectively verifiable fact and the State could
5 articulate a substantial interest of the kind that Your
6 Honor identified --

7 CHIEF JUSTICE ROBERTS: The substantial
8 interest is the one that I've just said.

9 GENERAL VERRILLI: States -- States do have
10 laws, some States do have laws respecting false claims
11 to have received a diploma from a public university.

12 JUSTICE KENNEDY: But that's for submitting
13 resumes. That's -- when -- that's fraud.

14 GENERAL VERRILLI: If I could get back to
15 Your Honor's point about the nature of the harm. It is
16 true that in Gertz you had the particularized harm, but
17 this Court -- the common characteristic that allowed
18 this Court to move from defamation to false light
19 privacy, to intentional infliction of emotional distress
20 in the Falwell case, then to baseless lawsuits, the sham
21 exception in Noerr-Pennington, the sham exception under
22 the National Labor Relations Act, the common
23 characteristic was not an analogy to the particularized
24 harm that existed in the defamation context. The common
25 characteristic that this Court's opinions identify is

1 the calculated factual falsehood.

2 It is true that the harm here is different.

3 JUSTICE KENNEDY: They were -- they were in
4 the context, though, of recognized torts, intentional
5 infliction for emotional distress. Here it does seem to
6 me that you can argue that this is something like a -- a
7 trademark, a medal in which the government and the armed
8 forces have a particular interest, and we could carve
9 out a narrow exception for that. I think we would have
10 to do that.

11 But just to say that the cases you mentioned
12 say that there is no value to false speech, I simply
13 cannot agree that they stand for that broad proposition.
14 They do in the particular context of a recognized tort
15 like intentional infliction of emotional distress.

16 GENERAL VERRILLI: That -- that is true.
17 And this -- this is a case in which one of the harms
18 that justifies this statute is the misappropriation of
19 the government-conferred honor and esteem, and that is a
20 real harm and a significant harm, and there is also the
21 particularized harm of the erosion of the -- of the
22 value of the military honors conferred -- conferred --
23 by our government; and those are particularized harms
24 that are real; and the kind of speech that this statute
25 regulates are a genuine threat to those harms in a way

1 that, looking backwards, looking and anchoring this
2 argument in the tradition of this Court's precedents,
3 this is a type of calculated factual falsehood.

4 JUSTICE SOTOMAYOR: Harms -- General, I
5 spent a lot of time going through the multiple cases
6 that you cited in your brief defining the various
7 statutes that basically impose penalties for
8 impersonation of some sort or another. And virtually in
9 every one of them, except perhaps one, there was either
10 an economic interest that was harmed by the
11 impersonation, either by the -- by the very face of the
12 statute or by the nature of the claim, a dilution of a
13 trademark, by taking on someone else's valuable property
14 rights.

15 And so I went back reading our cases, and
16 Justice Story many, many years ago said, look,
17 falsehoods have no value as such, but the "breathing
18 space" concept is defined by those falsehoods which
19 cause injury to rights that people possess, to -- to
20 pecuniary interests that they have, or to the reputation
21 of others. And almost every statute where we have
22 approved a harm concept as being permissible for
23 recovery has affected one of those three things.

24 So please tell me what's wrong with
25 Justice Story's view, number one; and, number two, how

1 does the definition of harm fit in that? What's the
2 harm here that fits within that descriptor.

3 GENERAL VERRILLI: Well, I think three
4 points. First, if I could just make a general point in
5 response to Your Honor's question. I think that one
6 reality here is that, as I read this Court's cases, this
7 Court has never held or even suggested in any context
8 when the government wants to regulate a properly defined
9 category of calculated factual falsehood, that it has to
10 meet strict scrutiny. That would be a real break and a
11 real change in the law that would subject --

12 JUSTICE SOTOMAYOR: I didn't mention --
13 neither did Justice Story.

14 GENERAL VERRILLI: And -- but -- and
15 again --

16 JUSTICE SOTOMAYOR: He said if you want to
17 regulate a falsehood, it has to cause a harm in this
18 way.

19 GENERAL VERRILLI: And that's why I want to
20 get to -- that's -- but I think it's relevant, Your
21 Honor, to the point about Justice Story in the following
22 way. The -- the -- there are a series of statutes, 18
23 U.S.C. 1001, 18 U.S.C. 962, the impersonating a Federal
24 officer statute, 1001 being the false statement statute;
25 perjury statutes; those are designed to protect the

1 integrity of the government processes. There isn't --

2 JUSTICE SOTOMAYOR: Not really. They are
3 intended to protect the right of the government to
4 secure truthful information.

5 GENERAL VERRILLI: Right.

6 JUSTICE SOTOMAYOR: The government has a
7 right to subpoena you at trial, subject you to oath, and
8 force you to tell the truth.

9 GENERAL VERRILLI: The statute --

10 JUSTICE SOTOMAYOR: So if you -- that's a
11 right. That fits within Story's definition.

12 GENERAL VERRILLI: But not a -- as -- as I
13 read what Justice Story is talking about, he was talking
14 about the rights of private citizens, and what I'm
15 saying is there is an additional category of long
16 recognized, well accepted government regulation of
17 factual -- calculated factual falsehood that serves
18 systemic interests. And, of course, with respect to the
19 Stolen Valor Act, the -- Congress -- Congress is
20 building in the Stolen Valor Act on a statute that
21 Congress enacted in 1923 which prohibited the -- the
22 wearing of medals without justification to wear the
23 medals.

24 And, of course, one of the reasons Congress
25 acted in 1923 to do that was out of concern that the

1 misappropriation of the government conferral of esteem
2 was going to cause substantial harm. That's been on the
3 books for the better part of a century, and --

4 JUSTICE ALITO: Is your argument limited to
5 statements that a person makes about himself or herself?

6 GENERAL VERRILLI: Yes. It is. That's the
7 category that the statute regulates. That is -- and it
8 seems to me in a situation in which the statute is
9 limited to factually verifiable information, the person
10 is speaking about himself or herself, and the category
11 of what's prescribed is clear.

12 JUSTICE ALITO: What's the principal reason
13 for drawing the line there? Suppose the statute also
14 made it a crime to represent falsely that someone else
15 was the recipient of a military medal, so that if
16 someone said falsely and knowingly that a spouse or a
17 parent or a child was a medal recipient, that would also
18 be covered?

19 GENERAL VERRILLI: I think --

20 JUSTICE ALITO: That would be protected by
21 the First Amendment?

22 GENERAL VERRILLI: I think that would be --
23 that would be a case in which under the "breathing
24 space" principles that this Court applies when we're
25 talking about calculated factual falsehood, you have to

1 answer a question, which is, how much risk is there of
2 chilling constitutionally protected speech, because when
3 you're talking about somebody else --

4 JUSTICE SCALIA: I don't see any difference
5 as far as that risk goes. I -- I hope that in your
6 earlier colloquy with Justice Kennedy, you -- you were
7 not retreating from what our cases have repeatedly said,
8 that there is no First Amendment value in falsehood.

9 GENERAL VERRILLI: And that only -- and
10 that --

11 JUSTICE SCALIA: Now this doesn't mean that
12 every falsehood can be punished, because in -- in
13 punishing some falsehoods you -- you risk deterring --
14 deterring truth.

15 GENERAL VERRILLI: And that's -- that was
16 what I was trying to say in response to Justice Alito's
17 question. You have --

18 JUSTICE SCALIA: I believe that there is no
19 First Amendment value in -- in falsehood.

20 GENERAL VERRILLI: You have to answer the
21 question in that case of whether there was a material
22 risk of deterring expression that's truthful because --
23 what -- who knows whether your grandfather was telling
24 the truth when he -- when he said he won the medal, and
25 so you -- it may be a more difficult case. But under

1 the Court's "breathing space" principles, that's the
2 question that one would have to answer.

3 JUSTICE KAGAN: General, is there --

4 JUSTICE GINSBURG: Well, the assumption --
5 the assumption is that it's false, that was -- and that
6 it's not so hard to find out if somebody claimed to have
7 the Medal of Honor and he doesn't. So that -- first you
8 answered yes, that it's only self, and now you said, no,
9 it can be -- or at least I think you said -- making a
10 false statement of fact. And the concern is -- and I
11 gave you the question of just in the service, leaving
12 out the decorations -- other statements of fact, false
13 statements like "I deny that the Holocaust ever
14 occurred." That's a statement, a false statement of
15 fact, isn't it?

16 GENERAL VERRILLI: Yes, it could be. I
17 think a statute seeking to regulate that, Justice
18 Ginsburg, would have viewpoint discrimination problems
19 of the kind that the Court identified in R.A.V., and I
20 think also under the Court's "breathing space" analysis
21 you would -- you'd have to look long and hard and have
22 significant concerns about that kind of a -- a
23 statement, because it's so bound up with matters of
24 ideological controversy that -- that you'd want to
25 exercise care, but that's really quite different from

1 what we have here.

2 This is a pinpoint accuracy, a specific
3 verifiable factual claim about yourself having won a
4 medal.

5 CHIEF JUSTICE ROBERTS: I want to follow up
6 on Justice Scalia's question, because I'm not sure I
7 understood. The government's position is that there is
8 no First Amendment value in a false representation of
9 fact, by which I understand you to mean not parody or
10 something like that, but a statement that's intended to
11 be understood as true. There is no First Amendment
12 value in that statement. It may be protected because of
13 the "breathing space" argument, but in whatever context,
14 in whatever guise, there is no protection in that false
15 representation as such.

16 GENERAL VERRILLI: Well, that is the
17 position we've taken in this case, Your Honor. The
18 reason we've taken it is because we read the Court's
19 precedents, Gertz and many others, Falwell v. Hustler,
20 as saying precisely that. In fact, Falwell goes a step
21 further and says false statements of fact are
22 affirmatively harmful to First Amendment interest
23 because they impede the -- the search for truth.

24 That's -- so our -- our position is based on
25 the precise language of cases stretching back a half a

1 century. Garrison said calculated falsehood is a
2 category of speech that is no part of the expression of
3 ideas of the search for truth, and then it
4 cites Chaplinsky --

5 JUSTICE KAGAN: General, what about these
6 State statutes -- there are more of them than I thought
7 that there would be -- that say no demonstrable
8 falsehoods by a political candidate in a political race,
9 and prohibit demonstrable falsehoods by political
10 candidates? How would your analysis apply to those?
11 Would they come out the other end as constitutional?

12 GENERAL VERRILLI: I think that those kinds
13 of statutes are going to have a lot harder time getting
14 through the Court's "breathing space" analysis because
15 the context in which they arise is one that would create
16 a more significant risk of chill --

17 JUSTICE KAGAN: Well, suppose it says
18 demonstrable falsehoods about yourself -- -

19 GENERAL VERRILLI: I think --

20 JUSTICE KAGAN: -- just about your
21 qualifications, about what you've done in your life,
22 your -- you know, whether you have a Medal of Honor,
23 whether you've been in military service, whether you've
24 been to college. So any demonstrable statement that a
25 candidate, political candidate, makes about himself.

1 GENERAL VERRILLI: Yeah. I think under the
2 Court's "breathing space" analysis, because of the
3 political candidate context, those statutes are going to
4 pose a particular risk of chill, that this statute does
5 not pose because this is a statute about
6 verifiable factual falsehoods.

7 JUSTICE KAGAN: I guess I don't understand
8 why it would be more chilling in the one case than in
9 the other. They are the same kind of statement. And
10 one knows the same sorts of things about oneself.

11 GENERAL VERRILLI: Well, I think the idea
12 would be, in a situation like that one, the government's
13 power and authority is being trained specifically on the
14 political process and statements in the political
15 process, and this is -- this is quite different. This
16 is a statute that says --

17 JUSTICE KAGAN: Well, I assume that that
18 would be in the case of the State statutes because the
19 State feels that it has a specially important interest
20 in maintaining the political sphere free of lies.

21 GENERAL VERRILLI: I guess the chilling
22 effect seems to me, at least, to be materially different
23 than in a situation like this one, where what we're
24 talking about is a very specific pinpoint thing, one
25 thing: Have you been awarded a military honor or not?

1 And a statement that is about yourself only, not about
2 somebody else, and is supported by a quite strong
3 particularized interest in ensuring the integrity of the
4 military honor.

5 JUSTICE SCALIA: I suppose that even in the
6 commercial context we allow a decent amount of lying,
7 don't we? It's called puffing.

8 GENERAL VERRILLI: Well --

9 JUSTICE SCALIA: Although -- although, you
10 know, making false representations to sell a product is
11 unlawful, we do allow puffing, don't we?

12 GENERAL VERRILLI: Well certainly.

13 JUSTICE SCALIA: You won't buy it cheaper
14 anywhere else.

15 GENERAL VERRILLI: That's -- that's
16 certainly right. But -- and that is the line --

17 JUSTICE SCALIA: So maybe we allow a certain
18 amount of puffing in political speech as well.

19 GENERAL VERRILLI: And I do think --

20 JUSTICE SCALIA: Nobody believes all that
21 stuff, right?

22 GENERAL VERRILLI: I do think the Court's --
23 I do think the Court's breathing space analysis would
24 call for that, I think that's true. But this is a
25 different concept.

1 CHIEF JUSTICE ROBERTS: I suppose it might
2 have something to do with, whether called collateral or
3 not, I mean, I would think the concern in the midst of a
4 political campaign is you have the U.S. attorney or the
5 deputy district attorney bringing a -- filing a
6 prosecution of someone 2 weeks before the election
7 saying, you lied about this or that and maybe there
8 would have to be a deposition or maybe there would have
9 to be a trial. Nothing like that is involved here.

10 GENERAL VERRILLI: Nothing at all, Your
11 Honor. And that is what I was trying to say --

12 JUSTICE KENNEDY: Well, it seems to me your
13 best analogy is the trademark analogy, Olympic case,
14 et cetera. You put that in a rather minor -- not as an
15 afterthought, but it's a secondary argument in your
16 brief . It seems to me it's the strongest one.

17 The whole breathing space thing almost has
18 it backwards. It presumes that the government is going
19 to have a ministry of truth and then allow breathing
20 space around it, and I just don't think that's our
21 tradition. On the other hand, I have to acknowledge
22 that this does diminish the medal in many respects.

23 GENERAL VERRILLI: Yes, and that's the
24 government's interest here, and we do think that that
25 kind of -- I think, Your Honor, that the reason that I

1 think our -- we have a lot of slippery slope type
2 questions here today, but I would urge the Court not
3 to -- not to decline to make a sound decision about this
4 statute based on concern about not being able to draw
5 the line, because this statute is as narrow as you can
6 get.

7 JUSTICE SOTOMAYOR: General, but I have a
8 problem, which is it's not as narrow as it could get.
9 Wouldn't take much to do exactly what Congress said it
10 was doing, which was to protect against fraudulent
11 claims of receiving a medal, and the example it used was
12 someone who used a fraudulent claim of receiving a medal
13 to get money.

14 What I'm trying to get to is, what harm are
15 we protecting here? I thought that the core of the
16 First Amendment was to protect even against offensive
17 speech. We have a legion of cases that said your
18 emotional reaction to offensive speech is not enough.
19 If that is the core of our First Amendment, what I hear,
20 and that's what I think the court below said, is you
21 can't really believe that a war veteran thinks less of
22 the medal that he or she receives because someone's
23 claiming fraudulently that they got one. They don't
24 think less of the medal. We're reacting to the fact
25 that we're offended by the thought that someone's

1 claiming an honor they didn't receive.

2 So outside of the emotional reaction,
3 where's the harm? And I'm not minimizing it. I too
4 take offense when people make these kinds of claims, but
5 I take offense when someone I'm dating makes a claim
6 that's not true.

7 GENERAL VERRILLI: As a father of a
8 20-year-old daughter, so do I, Justice Sotomayor. But
9 if I could take a minute on the interest, because I do
10 think it's quite important.

11 I mean, on some level of course it is true
12 that no soldier charges up Mount Suribachi thinking,
13 well, I'm going to do this because I'll get a medal if I
14 get to the top. That's not what the military honor
15 system --

16 JUSTICE SOTOMAYOR: Or I'm not going to do
17 this because the medal has been debased.

18 GENERAL VERRILLI: That's not -- well,
19 that's not what the honor system is about. The honor
20 system is about identifying the attributes, the essence,
21 of what we want in our service men and women -- courage,
22 sacrifice, love of country, willingness to put your life
23 on the line for your comrades. And what the medals do
24 is say to, to our military, this is what we care about.
25 It's what George Washington said in 1782 when he set up

1 the honor system. It's designed to cherish -- it's
2 designed to cherish a valorous ambition in soldiers and
3 to encourage every species of military merit.

4 And what I think with respect to the
5 government's interest here and why there is a harm to
6 that interest is that the point of these medals is that
7 it's a big deal. You get one for doing something very
8 important after a lot of scrutiny. And for the
9 government to say this is a really big deal and then to
10 stand idly by when one charlatan after another makes a
11 false claim to have won the medal does debase the value
12 of the medal in the eyes of the soldiers. It does do
13 that. That is the government's interest. We think that
14 is a real and substantial interest, and it's threatened
15 here --

16 JUSTICE SOTOMAYOR: But the reality here is
17 that this gentleman was publicized, derided for what he
18 did. His public position was compromised, as is the
19 case with almost everyone who's caught at lying.

20 GENERAL VERRILLI: But, given that this is a
21 category of calculated factual falsehood, we think the
22 government has the authority and the constitutional --
23 and the constitutional space to try to deter this kind
24 of speech, as well as allow for private attorneys.

25 If I might --

1 JUSTICE GINSBURG: Did the military -- did
2 the military act for this? You're claiming there's a
3 special interest in seeing that a military honor is not
4 debased.

5 GENERAL VERRILLI: It did not, Justice
6 Ginsburg, but under Article I, section 8, Congress has
7 substantial authority to regulate our armed forces, get
8 substantial deference. It's not unlike the statute that
9 the Court evaluated in the FAIR case in that regard,
10 which was not a statute that the military -- that the
11 military asked for, but Congress nevertheless was given
12 substantial deference.

13 JUSTICE SCALIA: Did the Commander in Chief
14 sign that, that legislation?

15 GENERAL VERRILLI: Yes, he did, Your Honor.
16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Verrilli.

19 Mr. Libby.

20 ORAL ARGUMENT OF JONATHAN D. LIBBY

21 ON BEHALF OF THE RESPONDENT

22 MR. LIBBY: Thank you, Mr. Chief Justice,
23 and may it please the Court:

24 The Stolen Valor Act criminalizes pure
25 speech in the form of bare falsity, a mere telling of a

1 lie. It doesn't matter whether the lie was told in a
2 public meeting or in a private conversation with a
3 friend or family member. And the law punishes false
4 claims to a military award regardless of whether harm
5 results or even is likely to result in an individual
6 case.

7 CHIEF JUSTICE ROBERTS: What is -- what is
8 the First Amendment value in a lie, pure lie?

9 MR. LIBBY: Just a pure lie? There can be a
10 number of values. There is the value of personal
11 autonomy.

12 CHIEF JUSTICE ROBERTS: The value of what?

13 MR. LIBBY: Personal autonomy.

14 CHIEF JUSTICE ROBERTS: What does that mean?

15 MR. LIBBY: Well, that we get to -- we get
16 to exaggerate and create --

17 CHIEF JUSTICE ROBERTS: No, not
18 exaggerate -- lie.

19 MR. LIBBY: Well, when we create our own
20 persona, we're often making up things about ourselves
21 that we want people to think about us, and that can be
22 valuable. Samuel Clemens creating Mark Twain. That was
23 creating a persona, and he made things up about
24 himself --

25 CHIEF JUSTICE ROBERTS: Well, but that was

1 for literary purposes. No one is suggesting you can't
2 write a book or tell a story about somebody who earned a
3 Medal of Honor and it's a fictional character, so he
4 obviously didn't. It just seems to me very different.

5 MR. LIBBY: Perhaps. But there are other
6 things. In addition to the fact that people tell lies
7 allows us to appreciate truth better.

8 JUSTICE ALITO: Do you really think that
9 there is -- that the First Amendment -- that there is
10 First Amendment value in a bald-faced lie about a purely
11 factual statement that a person makes about himself,
12 because that person would like to create a particular
13 persona? Gee, I won the Medal of Honor. I was a Rhodes
14 scholar, I won the Nobel Prize. There's a personal --
15 the First Amendment protects that?

16 MR. LIBBY: Yes, Your Honor, so long as it
17 doesn't cause imminent harm to another person or
18 imminent harm to a government function.

19 JUSTICE BREYER: Obvious example. Are there
20 Jews hiding in the cellar? No.

21 MR. LIBBY: Well, that's right.

22 CHIEF JUSTICE ROBERTS: That's not a
23 statement about one's self. This is --

24 MR. LIBBY: And that's --

25 JUSTICE BREYER: Are you hiding Jews in the

1 cellar?

2 CHIEF JUSTICE ROBERTS: Excuse me. Sorry.

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: Seems to me that the
5 Stolen Valor Act is more narrow than that. And I would
6 say, in that situation, you would not describe what the
7 individual in Justice Breyer's hypothetical was as
8 simply telling a false statement about himself. It is
9 about whether there is someone hiding in the attic. It
10 is not about himself.

11 MR. LIBBY: Well, perhaps, just dealing with
12 an example under the Stolen Valor Act, if a grandfather
13 were to make up a story that he had won a medal in order
14 to persuade a grandchild to --

15 CHIEF JUSTICE ROBERTS: In order to --

16 MR. LIBBY: -- to join the military --

17 CHIEF JUSTICE ROBERTS: It seems to me that
18 that's missing the limitation that the government has
19 read into this statute: Not damage, not for parody, not
20 to avoid the discovery of someone who should be hidden,
21 not in order to do something with respect to one's
22 grandson. It's just a purely false statement about
23 one's self. What -- what -- what is the First Amendment
24 value in that, again?

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

1 that the purpose of the First Amendment was a limit on
2 government power. It's -- it's -- our founders believed
3 that Congress as a general principle doesn't get to tell
4 us what we as individuals can and cannot say.

5 CHIEF JUSTICE ROBERTS: Well, of course they
6 do in countless areas, the state does, whether you're
7 talking about defamation, trademark, perjury, all sorts
8 of things. You can't adopt that as a general principle
9 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 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 is a
23 difference there, Your Honor. With respect to 1001,
24 there's the substantial risk of imminent harm to a
25 government investigation. Whether it in fact causes

1 that direct harm, there is 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 imminent harm
15 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: Do we give some deference
21 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. Is that utterly unreasonable, that we
5 can't accept it?

6 MR. LIBBY: Justice Scalia, it's not
7 entirely clear what Congress thought here because
8 Congress held no hearings on this. It made a broad
9 general finding that false statements -- on the
10 reputation --

11 JUSTICE KENNEDY: Well, it's a matter --
12 it's a matter of common sense that it seems to me that
13 it demeans the medal. Let me ask you this: What do you
14 do with the statute that prohibits the wearing of a
15 medal that has not been earned?

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

19 JUSTICE KENNEDY: Well, I'm not so sure.
20 You know, the Tinker case with the arm band; it's purely
21 expressive speech, it seems to me. I think if you
22 prevail here that the wearing prohibition must also be
23 in serious doubt.

24 MR. LIBBY: It may be or it may be in doubt
25 under certain situations where one is wearing a medal.

1 But certainly Congress has an interest in protecting
2 non-expressive purposes of wearing the medals.

3 JUSTICE KENNEDY: I think it is, the whole
4 purpose of the person who puts the medal on his tuxedo
5 that he didn't earn is an expressive purpose. That's
6 pure expression.

7 MR. LIBBY: It may be, Your Honor. But
8 again, we view it under a different prism.

9 JUSTICE GINSBURG: Why? I mean, it's
10 expressive. One is I am speaking through conduct and
11 the other is I'm speaking through words. You wear the
12 medal and you are saying, I am a Medal of Honor winner.

13 MR. LIBBY: That's right. And as I said, it
14 may ultimately be the case that the Court finds that, if
15 in fact it's unconstitutional --

16 JUSTICE GINSBURG: So you think wearing --

17 MR. LIBBY: -- this provision, that it could
18 be.

19 JUSTICE GINSBURG: -- that the wearing of a
20 military decoration that you haven't earned, that that's
21 also of questionable consistency with the First
22 Amendment?

23 MR. LIBBY: It may be. But, again, it would
24 depend on the circumstances.

25 JUSTICE GINSBURG: No circumstances. You go

1 out in the street with the medal on you for everybody to
2 see.

3 MR. LIBBY: If -- if there is -- if Congress
4 does not have a non-speech purpose for prohibiting the
5 wearing of the medals, then if it's strictly an
6 expressive purpose, then, yes, there would be a
7 significant First Amendment problem.

8 JUSTICE KENNEDY: Well, don't you think
9 that's the case? There is no non-expressive purpose
10 that I can think of.

11 MR. LIBBY: Well -- and that very well may
12 be. What I can say is in this case what we're dealing
13 with is strictly a content-based regulation on speech.

14 JUSTICE ALITO: You acknowledge that the
15 First Amendment allows the prohibition or the regulation
16 of false speech if it causes at least certain kinds of
17 harms. And the problem I have with your argument is
18 determining which harms you think count and which harms
19 don't count.

20 Would you go as far as was suggested earlier
21 to say that only pecuniary harm counts? If you -- if
22 you say that, then the -- the classic case of
23 intentional infliction of emotional distress is
24 unconstitutional, going up to someone and saying
25 falsely, your -- your child has just been run over by a

1 bus. So how do we determine which harms are sufficient?

2 MR. LIBBY: I believe -- what we believe the
3 right way of looking at this is you -- you determine
4 whether or not there is imminent harm or a significant
5 risk of imminent harm to an individual or to a
6 government function that would result from the speech.

7 JUSTICE ALITO: When you say imminent, you
8 mean -- what do you mean by that?

9 MR. LIBBY: I guess I'm suggesting the
10 Brandenburg standard, which is --

11 JUSTICE ALITO: Well, if that's the standard
12 then most of the prosecutions for making false
13 statements to a Federal law enforcement officer are not
14 going to survive, are they?

15 MR. LIBBY: Well, but the issue is what
16 about the law. And the issue with 1001 and those false
17 statement statutes is the substantial risk of imminent
18 harm to the government that could result from the
19 falsehood.

20 So while certainly it may not result in a
21 particular case, but the substantial risk of imminent
22 harm --

23 JUSTICE ALITO: Well, then you're not really
24 talking about imminent harm, I don't think. You're just
25 talking about harm.

1 MR. LIBBY: Well, when one lies to a
2 government investigator, presumably you're doing it in
3 order to send them in the wrong direction, even if it
4 doesn't do that. So the harm may not be there, but
5 there is certainly a significant risk of harm that the
6 government has the right to protect itself from. And
7 that's why we believe that's where you draw the line.
8 And that's where this Court appears to have drawn the
9 line in those categories of speech that it has said are
10 unprotected, such as --

11 JUSTICE KAGAN: Mr. Libby, let's suppose
12 that I agree with Gertz that there is no constitutional
13 value in a false statement of fact, and the reason why
14 we protect some false statements of fact is to protect
15 truthful speech.

16 So if, if that's so, is -- how is it that
17 this statute will chill any truthful speech? What
18 truthful speech will this statute chill?

19 MR. LIBBY: Your Honor, it's not that it may
20 necessarily chill any truthful speech. I mean, it's --
21 we certainly concede that one typically knows whether or
22 not one has won a medal or not. We certainly -- we
23 concede that point.

24 JUSTICE KAGAN: So, boy, I mean, that's a
25 big concession, Mr. Libby. Then you're saying, you can

1 only win this case if this Court decides that the Gertz
2 statement was a kind of overstatement, an exaggeration,
3 puffery.

4 MR. LIBBY: Well -- we do -- well, we do
5 have the situation where we believe the statute
6 currently does cover: Someone could be prosecuted for
7 engaging in parody or satire or exaggeration. Certainly
8 there is nothing on the face of the statute to suggest
9 that those --

10 JUSTICE GINSBURG: But the government has
11 said: That's not how we read the statute, and the
12 courts read statutes to avoid a constitutional
13 collision. So let's assume that we are not going to
14 cover performances, satire; it's just a bald- faced lie.
15 That's all that this covers.

16 MR. LIBBY: Then it's still our position
17 that it's still a -- that all speech is presumptively
18 protected unless we go back and it fits into one of the
19 historical categories of speech that this Court has
20 found historically is unprotected. And there falsity
21 certainly has never previously been recognized by this
22 Court as being an unprotected category of speech.

23 JUSTICE SOTOMAYOR: Counselor, it might --

24 CHIEF JUSTICE ROBERTS: I don't understand
25 the government to argue that the speech at issue here is

1 totally unprotected. I understand them to argue -- I
2 mean, it is totally unprotected. I understand them to
3 argue that it can be limited under its "breathing space"
4 rationale. In other words, it's not within one of the
5 categories of totally unprotected speech. You do have
6 to analyze it under the First Amendment and you analyze
7 it to determine if it chills protected speech.

8 MR. LIBBY: I suppose I read the
9 government's argument differently. As I read the
10 government's argument, it's that it's entitled to, at
11 most, limited protection. So the government seems to
12 start from the presumption that it's not fully protected
13 speech, whereas, of course, what we should be starting
14 with is the presumption that it is fully protected
15 speech unless this Court has previously said it's in one
16 of these historical categories of unprotected speech.

17 JUSTICE SOTOMAYOR: May I -- if I understood
18 your argument, you're saying historically we have not
19 protected false statements that cause harm. I think
20 that's your argument.

21 MR. LIBBY: That's correct, yes, Your Honor.

22 JUSTICE SOTOMAYOR: All right. Assuming --
23 so it's -- we do protect false statements presumptively,
24 but the historical exceptions, like defamation, are
25 those that cause harm.

1 So I go back to Justice Alito's question,
2 because you really haven't answered his question.
3 You've dealt with the government process cases, although
4 we could argue about whether that's protecting a process
5 or protecting a government right to truthful
6 information. That's a different issue.

7 But the question is how do you deal with the
8 intentional infliction of emotional distress? Because
9 damage, we require injury, and it's defined under law
10 what kind of injury. So tell me how you define harm in
11 the nongovernmental situation, number one, and then tell
12 me why that -- this situation doesn't fit that
13 definition.

14 MR. LIBBY: Well, in the situation with
15 intentional infliction of emotional distress, you're
16 arguing with an instantaneous harm, a mental distress
17 that results from the false statement. So there --
18 there's imminent harm as a result of -- that results in
19 intentional infliction of emotional distress, a false
20 light false --

21 JUSTICE SOTOMAYOR: So why isn't the outrage
22 that medal winners, legitimately entitled medal winners,
23 experience in seeing fake people, hearing fake people
24 claim a medal, why isn't that comparable?

25 MR. LIBBY: Well, I don't believe that fits

1 into the same category of mental distress that we look
2 at in intentional infliction of emotional distress.

3 Certainly people are entitled to be upset by
4 these false claims. I mean, I'm personally upset by
5 these false claims. But the fact that there is a
6 certain level of upset doesn't mean that you're harmed
7 in the sense of, of the intentional infliction of
8 emotional stress tort, and so what we're dealing with
9 here is simply a non-instantaneous harm.

10 Now what the government has suggested is
11 that there is no harm that really results from a single
12 claim; that Mr. Alvarez's falsehood did not cause harm
13 to any individuals.

14 JUSTICE ALITO: It seems to me what you're
15 arguing is that we should determine that there are
16 certain harms that are sufficient to allow the
17 prohibition of a false statement and there are certain
18 harms that are not sufficient, irrespective of what
19 judgment Congress made about the significance of those
20 harms. Is that -- is that accurate?

21 MR. LIBBY: That's certainly part of it. I
22 mean, we believe that there needs to be imminent harm,
23 that it needs to be targeted harm to an individual or
24 to -- to government function, that it can't be the type
25 of diffuse harm that the government goes to place

1 here --

2 JUSTICE BREYER: Why not? Because, after
3 all, we're willing to protect the Olympics Committee
4 when a false person saying he's the Olympics Committee
5 might deprive the Olympics Committee of a penny, while
6 here they are saying that to win this great medal, say
7 the Congressional Medal of Honor, the highest award in
8 the military the nation can give, you're deserving of
9 the most possible, grandest possible respect, and we
10 don't even want you to have to think about somebody
11 having taken that name falsely, and so we will just
12 criminalize it to discourage such activity that
13 undermines the very thought and purpose of giving the
14 medal.

15 All right. So I'm just saying in my mind
16 there is real harm, and there is real harm and yet I can
17 think of instances where we do want to protect false
18 information. And I want you to accept that as a given
19 because that isn't my question.

20 My question is: If I'm right that there are
21 very good First Amendment reasons sometimes for
22 protecting false information, and if this also would
23 cause serious harm that the government is aiming after,
24 are there less restrictive ways of going about it? And,
25 if so, what and why?

1 MR. LIBBY: There are. First of all, more
2 speech. There is time to fix the problem. If someone
3 tells a lie about having received an honor, there is
4 time for them to be exposed. And in fact that's
5 what typically happens--

6 JUSTICE SCALIA: The government is going to
7 hire people to follow, you know -- is that realistic?

8 MR. LIBBY: Well, what--

9 JUSTICE SCALIA: I mean, there is a
10 sanction. You know when there is a sanction in place
11 you think twice before you tell the lie. But if there
12 is no sanction except you might be exposed, who's going
13 to expose you? That sanction already exists, and there
14 are a lot of people nonetheless who tell the lie. You
15 really expect the government to hire investigators to go
16 around the country outing people who falsely claim
17 military honors? That's not going to happen.

18 MR. LIBBY: Well, Justice Scalia, isn't that
19 exactly what's happening right now with this law?
20 Because the law is on the books, the law is sending FBI
21 agents out to investigate these allegations. How do
22 they find out about it? It's because it's recorded.
23 Individuals hear the statement and they think it may be
24 false. They investigate it. And -- and, and conduct
25 their own investigations.

1 So that's what happens. And that's what's
2 supposed -- that's -- that's the whole idea of more
3 speech.

4 JUSTICE BREYER: Is there anything else --
5 under that circumstance, that the threat of criminal
6 prosecution might discourage from lying, who would never
7 be caught. So at least as to that set, exposure won't
8 work. So you have a less restrictive alternative that
9 helps some but not completely. Are there others?

10 MR. LIBBY: Well, of course if you're never
11 caught, then under the government's theory, then no one
12 has been harmed individually or --

13 JUSTICE BREYER: Not under my theory. My
14 theory is that it does hurt the Medal, the purpose, the
15 objective, the honor, for people falsely to go around
16 saying that they have this medal when they don't. Okay?
17 So I might be wrong about that. I just ask you to
18 assume that for purposes of argument, because what I'm
19 trying to get to is I want as big a list as I can to
20 think about of what the less restrictive alternatives
21 are, or might be.

22 MR. LIBBY: Sure. The military can redouble
23 its efforts at honoring those who are in fact entitled
24 to the awards. There was a Congressional hearing that
25 suggested that the military has been a little lax in

1 identifying true heroes and awarding them medals. So
2 that can be done.

3 The government can publicize the names of
4 true winners. It could create educational programs to
5 let the nation know what it takes to win these awards,
6 what these awards are, who has won them. All the heroic
7 activities --

8 JUSTICE SCALIA: How about giving a Medal of
9 Shame to those who have falsely claimed to have earned
10 the Medal of Valor?

11 (Laughter.)

12 JUSTICE SCALIA: I think that would be good.

13 MR. LIBBY: Well, Your Honor -- actually,
14 that's certainly something the government could do.

15 CHIEF JUSTICE ROBERTS: Well, not under your
16 theory, right? I mean, it's still a sanction for
17 telling something that you say is protected under the
18 First Amendment, whether you get 6 months or a Medal of
19 Shame doesn't matter under your theory.

20 MR. LIBBY: Well, there is a significant
21 difference between a criminal sanction that puts someone
22 in prison versus simply exposing them for what they are,
23 which is a liar. And Mr. Alvarez, whether or not he in
24 fact was sentenced to a crime, he still was exposed for
25 who he was, which was a liar.

1 JUSTICE GINSBURG: Suppose -- suppose the
2 statute were amended, as has been proposed, to require
3 an intent to obtain anything of value.

4 MR. LIBBY: That would turn the law into a
5 fraud statute. And of course, fraud is an unprotected
6 category of speech. So that certainly would be a
7 constitutional law.

8 JUSTICE GINSBURG: But that wouldn't -- that
9 wouldn't reach this speaker. Is that -- that wouldn't
10 reach Alvarez, because he didn't obtain anything of
11 value.

12 MR. LIBBY: Well, that's -- I mean, that's
13 not what we have here. What we do know is that
14 Mr. Alvarez did not obtain a thing of value.

15 CHIEF JUSTICE ROBERTS: How do we -- how do
16 we know that? He was politically active, right?

17 MR. LIBBY: Yes.

18 CHIEF JUSTICE ROBERTS: Doesn't it help a
19 politician to have a Congressional Medal of Honor?

20 MR. LIBBY: Perhaps, Your Honor. I mean,
21 for -- certainly there are many people out there that
22 would consider that to be a great thing. There are also
23 a lot of people out there who don't know what it is.
24 And so to them, it might not mean a whole lot.

25 CHIEF JUSTICE ROBERTS: But it seems to me

1 that your willingness to say that this statute is valid
2 so long as there's some benefit to the person who lies,
3 it's an awfully big concession.

4 MR. LIBBY: Well, it would -- if it --
5 again, if Congress were to amend the law to require that
6 it be done with the intent to obtain a thing of value,
7 again, it becomes fraud. And fraud is something that
8 the government does have the right to prosecute.

9 JUSTICE SCALIA: So a thing of value, it has
10 to be something of commercial value, right? Just to
11 obtain praise and the higher esteem of your fellow
12 citizens, that's -- that's not enough.

13 MR. LIBBY: Well, Your Honor --

14 JUSTICE SCALIA: You have to get a penny out
15 of it, right?

16 MR. LIBBY: As I understand the proposed
17 amendment, it just says anything of a non de minimis
18 value. How that is ultimately interpreted --

19 JUSTICE KENNEDY: Just a basic definition of
20 fraud in the criminal law.

21 MR. LIBBY: That's right. Now, could it --
22 could it be a nonpecuniary thing of value? As it's
23 currently proposed, yes.

24 CHIEF JUSTICE ROBERTS: So if he -- so if he
25 makes this statement at a debate when he's running for

1 office, then you can prosecute him, because getting the
2 office is presumably something of value. It presumably
3 has some pecuniary aspect to it.

4 MR. LIBBY: Perhaps, Your Honor. And,
5 again, it may come down to how the courts ultimately
6 interpret a thing of value. It's not clear that simply
7 trying to obtain a vote from somebody is necessarily a
8 thing of value, would be considered a thing of value.
9 Obviously, if you promise to give up your votes in
10 office in return for support, that would be a little
11 different.

12 JUSTICE SCALIA: What if he just gets the
13 cheers of the crowd, he's up there. I'm a Congressional
14 Medal of -- the crowd cheers and they give him a parade
15 down Main Street. Is -- is that something of value?

16 MR. LIBBY: It -- it could be. Again, it --
17 it will come down to over time, how that ultimately
18 gets --

19 JUSTICE ALITO: But that's not -- the answer
20 is would the First Amendment permit that.

21 MR. LIBBY: That's a difficult question,
22 Your Honor.

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

25 (Laughter.)

1 MR. LIBBY: Sure. I get that.

2 JUSTICE ALITO: Suppose what the person gets
3 is -- is a date with a potential rich spouse. Would
4 that be enough?

5 MR. LIBBY: Your Honor, I think when it
6 comes -- when you get into the situation where you're
7 getting something like a date, I do not know that -- I
8 certainly wouldn't consider that a non de minimis thing
9 of value, but --

10 JUSTICE ALITO: Some people might have a
11 different opinion.

12 (Laughter.)

13 MR. LIBBY: Well, that -- that -- and that
14 may be, which is why, should that ultimately become the
15 law, courts would have to look at that very closely.

16 JUSTICE BREYER: Well, how would it work in
17 the law now, where we have similar statutes, and there's
18 an additional requirement when you're imitating, say, a
19 Federal officer or somebody else you shouldn't, you have
20 to perform an overt act that asserts authority that the
21 impersonator claims to have. What does that add?

22 Does it add enough to just make it not pure
23 speech, to limit -- to wall off the things about -- the
24 things that we're worried about in the First Amendment.
25 Or there's another one, you have to falsely assume or

1 exercise powers, duties and privileges. Those are ways
2 statutes have of limiting this thing. How does that
3 work?

4 MR. LIBBY: Well, when you get into the
5 issue of impersonation, then you're -- the Court perhaps
6 would be assessing it under the amount of imminent harm
7 to an individual that can --

8 JUSTICE BREYER: Nothing to do with harm.
9 It's a way of walling off things that are of concern
10 under the First Amendment from those that aren't. And
11 what they use -- I read you what they use --
12 performing -- you know -- you know the language; it's
13 written about in the briefs. I just want to know how
14 you would think about a statute that imported that kind
15 of language, which is limiting language.

16 MR. LIBBY: It would be important, certainly
17 in the First Amendment context, to limit the language as
18 much as possible. You want to make it as narrow as
19 possible, because, again, we're supposed to start from
20 the presumption that we -- we have the right to say
21 pretty much what we want to say, and then we start to
22 limit it there.

23 Again -- and, I guess, it goes again back to
24 what this Court said in *Stevens and Entertainment*
25 *Merchants*, which is, is it one of these historically

1 unprotected types of speech that is not entitled to
2 constitutional protection?

3 Unless the Court has additional questions --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Libby.

6 General Verrilli, you have 3 minutes
7 remaining.

8 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,
9 ON BEHALF OF THE PETITIONER

10 JUSTICE KENNEDY: My -- my only -- one of my
11 questions is the slippery slope problem, college degrees
12 and so forth.

13 Could you address that?

14 GENERAL VERRILLI: Yes, Your Honor. The --
15 we think the "breathing space" analysis does a very
16 substantial degree of work in controlling what Your
17 Honor is describing as a slippery slope problem. The
18 government's got to have a substantial interest --

19 JUSTICE KENNEDY: But --

20 GENERAL VERRILLI: -- the statute's got to
21 be narrowly drawn. It's got to meet all of those --

22 JUSTICE KENNEDY: College degrees.

23 GENERAL VERRILLI: Well, as I think I said
24 in my -- in my opening statement, that -- I actually
25 think that's a case in which you could argue that one

1 either way, because there might be, if the government
2 articulated a substantial interest in protecting its --

3 JUSTICE KAGAN: How about extramarital
4 affairs?

5 GENERAL VERRILLI: Excuse me, Your Honor?

6 JUSTICE KAGAN: The government has a strong
7 interest in the sanctity of the family, the stability of
8 the family, so we're going to prevent everybody from
9 telling lies about their extramarital affairs.

10 GENERAL VERRILLI: In addition to the -- in
11 addition to the governmental interests, Your Honor,
12 there's -- it's got to be tailored in a way that avoids
13 chill, and I think it would be very difficult in that
14 situation --

15 JUSTICE KAGAN: This isn't about the
16 person's own experience, that the person knows
17 everything about; you either had one or you didn't have
18 one.

19 GENERAL VERRILLI: That's right. And that's
20 a hard case. But I do think, with respect to the
21 chilling effect analysis, you -- you would, I think,
22 have a great deal of difficulty sustaining that statute.
23 But of course, that's not the kind of statute that we
24 have here. This is a targeted statute that's designed
25 to deal with a particular --

1 JUSTICE BREYER: The trouble is you can
2 think of 10,000 instances that meet your criteria that
3 one candidate or another could bring up in a political
4 campaign -- and we don't know what will come up, but I
5 can easily think of examples. And then if this is
6 lawful and constitutional, then you have people in
7 political campaigns suddenly worrying that the U.S.
8 attorney is going to come in and start indicting him.
9 That's part of the chilling effect. And you've assumed
10 you can get around this chilling effect, but I'm less
11 certain.

12 GENERAL VERRILLI: Well, I think -- but
13 that's where I think the "breathing space" analysis
14 requires before a statute gets upheld that it not have
15 that kind of chilling effect.

16 JUSTICE SCALIA: You have to --

17 GENERAL VERRILLI: -- this statute doesn't
18 and that's the key here. This statute doesn't.

19 JUSTICE SOTOMAYOR: Counsel, it seems to me
20 that you're asking us to value the speech in context.
21 We're not talking about the effect of the speech and
22 whether you can regulate that. You're asking us to say,
23 you know, the guy who says he's a college graduate in a
24 political campaign, that could chill political speech.
25 So in that lie in that context, you can't sanction. But

1 you can sanction that lie in a different context. On a
2 date. I don't know, because on a date, it doesn't chill
3 political speech, and it will induce a young woman to
4 date someone who she thinks is more of a professional,
5 because that harms the parents, it harms the family.

6 GENERAL VERRILLI: May I answer, Mr. Chief
7 Justice?

8 CHIEF JUSTICE ROBERTS: Oh, yes.

9 GENERAL VERRILLI: Thank you.

10 The Respondent has conceded that this
11 statute chills nothing. That should be a sufficient
12 answer to Your Honor's concern that with respect to
13 other statutes in the future, they can be evaluated to
14 determine whether or not they impose a -- a chill that
15 would lead as an instrumental matter to the conclusion
16 that they ought not to be found to satisfy the First
17 Amendment.

18 As Respondent concedes, there is no chill
19 here, so this statute is constitutional.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, General,
22 counsel.

23 The case is submitted.

24 (Whereupon, at 11:20 a.m., the case in the
25 above-entitled matter was submitted.)

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