USCA No. 11-35796
USDC No. CV 09-55-BLW
(District of Idaho)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff/Appellee,	)
	)
vs.	)
	)
ELVEN JOE SWISHER,	)
	)
Defendant/Appellant.	)

APPELLANT'S PETITION FOR REHEARING EN BANC

Appeal from the United States District Court
for the District of Idaho
Boise Division
Honorable B. Lynn Winmill, District Court Judge

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I. INTRODUCTION

The question certified in this appeal is whether the United States Supreme Court's holding in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), regarding the Stolen Valor Act, 18 U.S.C. § 704(b) and (c), entitles Elven Joe Swisher to relief from his conviction under the Stolen Valor Act, 18 U.S.C. § 704(a). At trial a jury found Elven Swisher wore military medals without authority to a Marine Corps League event and was convicted of violating 18 U.S.C. § 704(a). The record contains only one photograph of that event. No evidence suggests that Swisher wore the medals in any other context, and no evidence connects Swisher's wearing of the medals to his scheme wrongfully to obtain benefits from the Department of Veterans Affairs or its predecessor the Veterans Administration, or any other fraudulent scheme.

In response to Swisher's appeal of the denial of his motion under 28 U.S.C § 2255 motion, the three-judge panel determined they were bound by the Ninth Circuit's decision in *United States v. Perelman* and 18 U.S.C. § 704(a), "regardless of the strength of Swisher's arguments" and Swisher's

conviction should be upheld as 18 U.S.C. § 704(a), "can be constitutionally applied to Swisher's conduct," and "there is no violation of the Constitution or laws of the United States." *United States v. Swisher*, No. 11-35796 (9th Cir. decided October 29, 2014).

A rehearing en banc is appropriate as this matter involves a question of exceptional importance, that is, the fundamental First Amendment concepts of freedom of expression in relation to the honorable service of the men and women of the military. Further, as Judge Tashima in his concurrence clearly states, Perelman was wrongly decided and is in conflict with the Supreme Court's Decision in *Alvarez*. *Id.* at 21. Although 18 U.S.C. § 704(a) has since been amended to no longer criminalize the intentionally false wearing on military medals, the decisions in *Perelman* and *Swisher* implicate a rule of national application of false expressive conduct in which there is an overriding need for national uniformity. Mr. Swisher could not be convicted of that crime were he charged today and it is noteworthy that Congress removed the "wears" terminology and added "with intent to obtain, money, property of other tangible benefit", as Congress was concerned such was

unconstitutional under the First Amendment. (H.R, 133-084-Stolen Valor Act of 2013).

II. REASONS FOR REHEARING EN BANC

A. This Proceeding Involves a Question of the Application of the Fundamental Constitutional Principle of Freedom of False Expression under the First Amendment in the Context of Protecting the Honorable Service of United States Military Members

The prohibition of an individual wearing decorations or medals and other items noting military valor in former 18 U.S.C. § 704(a) implicates both the First Amendment as well as the honor our nation bestows on the men and women who sacrifice so much during military service. Such issues are of exceptional importance. "As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U. S. 564, 573 (2002) (internal quotation marks omitted). As a result, the Constitution, "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." *Id.* at 660.

While, "the First Amendment literally forbids the abridgment only of "speech," we have long recognized that its protection does not end at the spoken or written word." *Spence v. Washington*, 418 U.S. 405, 409 (1974). Further, while the Supreme Court has rejected the view that there is an apparent limitless variety of conduct that can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea, the Supreme Court has acknowledged that such speech may "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L. Ed. 2d 672 (1968). "One fundamental concern of the First Amendment is to protect the individual's interest in self-expression." *Citizens United v. FEC*, [558] U.S. [310], 130 S.Ct. 876, 972, 175 L.Ed.2d 753 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 534 n. 2, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980)) (second alteration in original).

The United States Supreme Court has found that false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation and the First Amendment seeks to guarantee

expression and, "the erroneous statement is inevitable in free debate". *United States v. Alvarez*, 132 S.Ct. 2537(2012). "

The Ninth Circuit has also addressed the value of protecting false statements of fact under the First Amendment. *United States v. Alvarez*, 638 F.3d 666, 673 (9th Cir. 2011). Judge Kozinski in his concurrence to the Denial of Rehearing and Rehearing En Banc states, "If false factual statements are unprotected, then the government can prosecute not only the man who tells tall tales of winning the Congressional Medal of Honor, but also the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a bit." *Alvarez* at. 673 (9th Cir. 2011, Kozinski, A., concurring in the Judgment). Judge Kozinski continues on, "Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as "rational basis review." *Id.*

Although Judge Kozinksi does state Alvarez was convicted of "pure speech", he does evolve the argument into the value of false conduct as self-expression by stating, "We don't just talk the talk, we walk the walk, as

reflected by the popularity of plastic surgery, elevator shoes, wood veneer paneling, cubic zirconia, toupees, artificial turf and cross-dressing. Last year, Americans spent $40 billion on cosmetics—an industry devoted almost entirely to helping people deceive each other about their appearance. It doesn't matter whether we think that such lies are despicable or cause more harm than good. An important aspect of personal autonomy is the right to shape one's public and private persona by choosing when to tell the truth about oneself, when to conceal and when to deceive." *Id*. at 675.

As pointed out, the issued posed in this matter not only touches the brave service of military members, but will have broader application across statutes that criminalize nearly limitless false conduct. The Ninth Circuit in *Perelman* and *Swisher* ostensibly find that false expressive conduct is presumptively unprotected as with false expressive conduct the individual has "proof of the lie". *Perelman*, 695 F.3d at 871. The Supreme Court has not found that "proof of the lie" to be a valid basis for the Government prohibiting false expressive conduct. Those who dress up with military medals in theatrical performances, for Halloween or the like have "proof of the lie". If those individuals fail to "break character" in time or want the

audience to really believe the character, they are subject to prosecution can. A rehearing en banc is necessary under Fed. R. APP. P. 35 and 40 for further analysis of the criminalization of false conduct to comply with the protections of the First Amendment in regard to shaping one's public and private persona. As such, the subject proceeding involves a question of exceptional importance requiring en banc rehearing.

B. The Panel's Decisions in *Swisher* and *Perelman* Directly Conflict with the Supreme Court's Decision in *United States v. Alvarez* and Substantially Affect a Rule of National Application in which there is an Overriding Need for National Uniformity

"The Stolen Valor Act…targets falsity and nothing more". *Alvarez*, 132 S.Ct. at 2545. *Alvarez* clearly holds if one merely speaks a lie about having a military medal he cannot be prosecuted. *Id.* However under *Swisher* and *Perelman*, if the same individual simultaneously reaches into his pocket and places a medal on his lapel he in now guilty of violating 18 U.S.C §704 (a). Not only is this result logically absurd it conflicts with the Supreme Court's holding in *Alvarez*.

The Ninth Circuit recently addressed false conduct in the context of feigned acts of biological terrorism where an individual mailed packets of sugar labeled "Anthrax". *United States v. Keyser*, 704 F.3d 631 (9th Cir. 2012). The Ninth Circuit labeled this false conduct as "hoax speech" and determined it was not protected under the First Amendment as it was not a "simple lie" because it incites, "a tangible negative response" namely law enforcement and emergency workers, "arriving with hazardous materials units, evacuating buildings, sending samples off to a laboratory for tests and devoting resources to investigating the source of the mailings". *Id.* at 639-640. The Ninth Circuit cites to Justice Breyer's concurring opinion in *Alvarez* to support its conclusion that, "Statutes prohibiting false claims of terrorist attacks, or other lies about the commission of crimes or catastrophes, require proof that substantial public harm be directly foreseeable, or, if not, involve false statements that are very likely to bring about that harm." *Id. citing Alvarez*, 132 S.Ct. at 2554 (Breyer, J., concurring). Neither *Perelman* or *Swisher* follow the analysis employed in *Alvarez* or *Keyser* that require substantial public harm that is directly foreseeable or that the false statement tare very likely to bring about that

harm. Rather, the harm that was targeted under 18 U.S.C. § 704 (a) was the deception itself which clearly the Supreme Court has stated is not appropriate under the First Amendment.

This conflict was clear to Judge Tashima in his concurrence in *Swisher*. Judge Tashima states, "While the majority faithfully applies *Perelman*, *Perelman* itself ignores the teaching of *United States v. Alvarez*, 132 S. Ct. 2537 (2012), and sanctions the punishment of pure speech, solely because that speech is a falsehood." *United States v. Swisher*, No. 11-35796 (9th Cir. decided October 29, 2014, Tashima, W., concurring in judgment under compulsion of *United States v. Perelman*, 695 F.3d 866 (9th Cir. 2012), cert. denied, 133 S. Ct. 2382 (2013). Judge Tashima continues, "more importantly Perelman and the majority's application of it in this as-applied challenge, are contrary to the Supreme Court's teaching in Alvarez". *Swisher* at 21.

Judge Tashima meticulously identifies how the majority in *Swisher* and *Perelman* are both incorrect and in conflict with Alvarez. "As the majority reads Perelman, it allows a general, "threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of a lie in

contexts where harm is unlikely or the need for a prohibition small." *Id. citing Alvarez*, 132 S. Ct. at 2555 (Bryer, J., concurring in the judgment). "It simply sweeps too broadly in terms of the First Amendment. It ignores that cases that condone the criminalization of false speech involve some sort of 'legally cognizable harm associated with [the] false statement.'" *Id.* at 21, citing *Keyser at* 640. It fails to understand § 704(a), "with the commands of the First Amendment clearly in mind." *United States v. Bagdasarian*, 652 F.3d 1113, 1116 (9th Cir 2011) (quoting Watts v. United).

Judge Tashima further states that the statute cannot be saved by requiring an intent to deceive which is inadequate as a narrowing construction of the statute as he states, "As construed by the majority, Perelman's "intent to deceive" is nothing more than the intent to tell a lie. *Id.*

Judge Tashima harkens back to the Ninth Circuit's reasoning for overturning the conviction in *Alvarez,* "We are aware of no authority holding that the government may, through a criminal law, prohibit speech simply because it is knowingly factually false." *Id.* citing *United States v. Alvarez, 671 F.3d 1198, 1213 (9th Cir. 2010).* "We presumptively protect all speech against government interference, leaving it to the government to

demonstrate, either through a well-crafted statute or case-specific application, the historical basis for a compelling need to remove some speech from protection . . . for some reason other than the mere fact that it is a lie. *Id.* at 20. Judge Tashima continued by providing passages from *Alvarez* to illustrate how the panel's in Perelman and Swisher have failed to follow the Supreme Court's decision in Alvarez. These are as follows:

- Absent from those few categories where the law allows content-based regulations of speech is any general exception to the First Amendment for false statement. *Alvarez*, 132 S. Ct. at 2544 (Kennedy, J., plurality opinion).
- The court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. *Id*. at 2545.
- [O]ur law and tradition . . . reject[] the notion that false speech should be in a general category that is presumptively unprotected. *Id*. at 2546–47.
- The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis. *Id*. at 2547.

- Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in the Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom. *Id* at 2547–48.
- [T]he [Stolen Valor] Act conflicts with free speech principles. *Id.* at 2548.

Judge Tashima continues, "Finally, Perelman's limiting effort – the addition of "intent to deceive" as an element of § 704(a) – was not even necessary and is incomplete. Perelman holds that "[b]ecause the statute requires an intent to deceive, the examples listed above do not fall within the scope of the statute." *Id.* citing 695 F.3d at 871. But no one ever contended that the Stolen Valor Act reached such examples – movies, theatrical productions, school children, Halloween costumes, and parades. See *id.* at 870 (listing examples). In fact, the *Alvarez* plurality assumed "that [the

Stolen Valor Act] would not apply to, say, a theatrical performance." 132 S. Ct. at 2547 (citing *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 20 (1990)).

Judge Tashima states that *Perelman* and the majority in *Swisher* fail to require a showing or proof of injury which Justice Breyer in *Alvarez* states is necessary to narrow the evil of freely roaming liability for criminal punishment for a lie:

> Few statutes, if any simply prohibit without limitation the telling of a lie, even a lie about one particular matter. Instead, in virtually all these instances limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur. The limitations help to make certain that the statute does not allow its threats of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small. *Swisher* at. 23.

The Stolen Valor Act and specifically the term "wears" in 18 U.S.C §704 lacks any such limiting features. Citing Justice Breyer again, Judge Tashima states the statute, "may be construed to prohibit only knowing and intentional acts of deception about readily verifiable facts within the personal knowledge of the speaker, thus reducing the risk that valuable speech is chilled. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm. As written, it

applies in family, social, or other private contexts, where lies will often cause little harm. It also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high. . . . And so the prohibition may be applied where it should not be applied, for example to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like. These considerations lead me to believe that the statute as written risks significant First Amendment harm." *Swisher* at 23-24 citing *Alvarez*. at 2555 (Bryer, J., concurring in the judgment).

Judge Tashima notes that the majority in *Swisher* recognizes an "inherent tension" between *Perelman* and the Supreme Court's precedent in *Alvarez. Id.* He states, "Even accepting Perelman on its own terms that, unlike § 704(b)'s content-based restriction on speech, § 704(a) is aimed at suppressing conduct, the majority recognizes the inherent tension between Perelman and Supreme Court precedent, noting that "[i]n certain circumstances, the Supreme Court has recognized similar symbolic conduct as inherently expressive and therefore deserving of heightened First Amendment protection." Maj. Op. at 17 (citing Texas v. Johnson, 491 U.S.

397, 404–06 (1989) (holding that burning the American flag was expressive conduct protected by the First Amendment); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 313 U.S. 503,506 (1969) (holding that wearing black armbands to protest Vietnam War was "the type of symbolic act that is within the Free Speech Clause" and "was clearly akin to 'pure speech' which, [the Court has] repeatedly held, is entitled to comprehensive protection under the First Amendment")). *Id.* Judge Tashima concludes that, "No conduct can be more "inherently expressive and therefore deserving of heightened First Amendment protection" than the wearing of a military medal at a Marine Corps League event." *Id.*

CONCLUSION

Based on the above arguments, Elven Joseph Swisher respectfully requests that the Ninth Circuit grant this petition for rehearing en banc.

Dated this 10th day of December, 2014.

/s/ *Joseph T. Horras*
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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2014 I electronically filed the foregoing with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF. Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: December 10, 2014.

/s/ *Joseph T. Horras*
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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rules 35-1 and 40-1, that attached Petition for Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more, and contains 3,454 words.

/s/ *Joseph T. Horras*
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No. 11-35796

In the
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

ELVEN JOE SWISHER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RESPONSE OF THE UNITED STATES TO APPELLANT'S PETITION FOR REHEARING EN BANC

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STATEMENT

In *United States v. Perelman*, 695 F.3d 866 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2383 (2013), this Court held that the prohibition against the unauthorized wearing of military medals, as set forth in 18 U.S.C. § 704(a) (2008), did not violate the First Amendment. Applying *Perelman*, a panel of this Court upheld Defendant Elven Swisher's conviction under Section 704(a). *United States v. Swisher*, 771 F.3d 514 (9th Cir. 2014). Swisher requests that this Court grant rehearing en banc to reconsider *Perelman*. As ordered by the Court, the government submits this response.

Swisher's petition should be denied. Section 704(a) was amended in 2013 and no longer contains the wearing prohibition that was upheld in *Perelman* and that is at issue in this case. Rehearing en banc to decide whether that prohibition violates the First Amendment would therefore be an academic exercise with no real-world consequences. Accordingly, this case simply does not present a "question of exceptional importance" that warrants en banc review. Fed. R. App. P. 35(a).

Congress's amendment of Section 704(a) alone obviates the need for rehearing en banc. In addition, however, *Perelman* was correctly decided under Supreme Court precedent and does not conflict with authority from another court of appeals. Section 704(a) is analogous to those statutes prohibiting false

statements that the Supreme Court has acknowledged are constitutional. Section 704(a) is also sufficiently tailored to address a compelling governmental interest.

1. At the time of the relevant offense conduct in this case, Section 704(a) provided that "[w]hoever knowingly wears, purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barters, or exchanges for anything of value any" military medal, "except when authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both." 18 U.S.C. § 704(a) (2002). Section 704(a) existed in materially similar form since 1923, when Congress enacted a statute prohibiting the unauthorized "wearing, manufacture, or sale" of certain medals and "colorable imitations thereof." *See* Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286. Congress passed the statute as part of its efforts to protect the integrity of the military honors system by preventing the widespread distribution of counterfeit medals and submission of false applications for medals. Senate Comm. on Veterans' Affairs, 93d Cong., 1st Sess., Medal of Honor Recipients 1861-1973, at 4-7 (Comm. Print 1973).

Congress amended Section 704(a) in 2013, after the Supreme Court's decision in *United States v. Alvarez*, 132 S. Ct. 2537 (2012). Specifically,

Congress "removed the word 'wears' from the list of prohibited actions." *Swisher*, 771 F.3d at 521 n.4; *see* Pub. L. No. 113-12, § 2, 127 Stat. 448 (2013).

a. In *Alvarez*, *supra*, the Supreme Court struck down the Stolen Valor Act of 2005 as facially invalid under the First Amendment, affirming this Court's decision in *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010). The Court specifically struck down the provision of the Act that prohibited anyone from "falsely represent[ing] himself or herself, verbally or in writing, to have been awarded" a military medal. 18 U.S.C. § 704(b) (2008).

The four-Justice plurality in *Alvarez* acknowledged that in some "instances," such as fraud, "false speech may be prohibited even if analogous true speech could not be," but concluded that outside of these instances false speech is not "presumptively unprotected." *Id.* at 2547. The plurality therefore applied "exacting scrutiny." *Id.* Although the plurality concluded that the government's interest in protecting the integrity of the military honors system was compelling, it emphasized that the breadth of the Act's prohibition on pure speech was "quite unprecedented." *Id.* That "sweeping" breadth, *id.*, the plurality explained, was "not actually necessary to achieve the Government's stated interest," *id.* at 2549. In particular, the plurality believed, counterspeech, such as a government database of medal winners, could ameliorate the harmful effects of false claims to have won a medal. *Id.*

Justice Breyer, joined by Justice Kagan, declined to adopt the plurality's "strict categorical analysis" and concurred in the judgment on narrower grounds. 132 S. Ct. at 2551. In the concurring Justices' view, a prohibition on "false statements about easily verifiable facts that do not concern" politics, history, and the like should be subject to "intermediate scrutiny." *Id.* at 2552. In other words, the proper question was whether "the statute works speech-related harm that is out of proportion to its justifications." *Id.* at 2551. Like the plurality, the concurring Justices observed that many statutes permissibly prohibit false speech in contexts in which "specific harm is more likely to occur," but they concluded that the Stolen Valor Act's prohibition on pure speech "lacks any such limiting features." *Id.* at 2555. The concurring Justices therefore concluded that although the government's interest in protecting military honors from dilution was substantial, that objective could have been achieved through a "more finely tailored statute," such as one that focused on lies that were "likely to cause harm." *Id.* at 2556.

b. After the Supreme Court decided *Alvarez*, this Court held in *Perelman*, *supra*, that Section 704(a)'s prohibition on wearing military medals without authorization does not violate the First Amendment.

The Court adopted a limiting construction of Section 704(a), concluding it required that an individual knowingly wear a military medal with the intent

to deceive. 695 F.3d at 870-71. The Court accordingly distinguished Section 704(a) from the Stolen Valor Act, which the Supreme Court had characterized as a "sweeping" and "unprecedented" prohibition on "pure speech." *Id.* at 871-72 (quoting *Alvarez*, 132 S. Ct. at 2543-44, 2547 (plurality opinion)). Unlike the Stolen Valor Act, the Court concluded, Section 704(a)'s wearing prohibition "criminalizes not pure speech, but instead the harmful conduct of wearing a medal without authorization and with intent to deceive." *Id.* at 871. That act "goes beyond mere speech and suggests that the wearer has proof of the lie, or government endorsement of it." *Id.* The Court further explained that "[e]ven if we assume that the intentionally deceptive wearing of a medal contains an expressive element—the false statement that 'I received a medal'—the distinction between pure speech and conduct that has an expressive element separates this case from *Alvarez*." *Id.* In particular, the Court reasoned, Section 704(a)'s prohibition on wearing an unauthorized medal with intent to deceive was comparable to the "narrow range of conduct . . . prohibited by impersonation statutes." *Id.* Such statutes, which prohibit impersonating a federal officer, were described by the *Alvarez* Court as permissible regulations of "speech integral to criminal conduct." *Id.* at 871-72 (citing *Alvarez*, 132 S. Ct. at 2546 (plurality opinion)). The Court concluded that Section 704(a)'s wearing prohibition "falls within that same category." *Id.* at 872.

The Court also observed that the Supreme Court had suggested in *Schacht v. United States*, 398 U.S. 58 (1970), that 18 U.S.C. § 702, which "make[s] it an offense to wear our military uniforms without authority," would be subject, at most, to intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968). *Perelman*, 695 F.3d at 872 (quoting *Schacht*, 398 U.S. at 61). Because Section 704(a) prohibited analogous conduct, the Court concluded that *O'Brien* and *Schacht* "[l]ikewise" indicated that Section 704(a) was constitutional. *Id.* Applying intermediate scrutiny, the Court explained that "the government has a compelling interest in preserving the integrity of its system of honoring our military men and women," and "in preventing the intentionally deceptive wearing of medals." *Id.* (internal quotation marks and citation omitted). The Court next concluded that "[t]hose interests are unrelated to the suppression of free expression because . . . § 704(a) does not prevent the expression of any particular message or viewpoint" but rather "bar[s] fraudulent conduct." *Id.* Finally, the Court held that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [the government's] interest." *Id.* at 872-73 (citation omitted).

2. Swisher enlisted in the United States Marine Corps in 1954 and was honorably discharged into the reserves in 1957. In 2001, Swisher falsely

claimed, in an application for disability benefits from the former Veterans Administration (VA), that he had participated in a secret combat mission in North Korea in 1955 and in connection with that mission was awarded several military medals and suffered from Post-Traumatic Stress Disorder (PTSD). Swisher forged documents to substantiate those false claims and was ultimately granted $2,366 per month in benefits. Although Swisher had never been awarded any military medals, he was photographed in a Marine Corps League uniform wearing the Silver Star, the Navy and Marine Corps Ribbon, the Purple Heart, the Navy and Marine Corps Commendation Medal with a Bronze "V," and the UMC Expeditionary Medal. *Swisher*, 771 F.3d at 517-19.

After a jury trial, Swisher was convicted of (1) wearing unauthorized military medals, in violation of 18 U.S.C. § 704(a); (2) making false statements to the VA in an effort to obtain benefits, in violation of 18 U.S.C. § 1001(a)(2); (3) forging or altering documents in an effort to obtain benefits, in violation of 18 U.S.C. § 1001(a)(3); and (4) theft of government funds, in violation of 18 U.S.C. § 641. *Swisher*, 771 F.3d at 518-19. He was sentenced to 12 months and a day of imprisonment for the fraud and theft convictions and a concurrent term of six months of imprisonment for the violation of Section 704(a), to be followed by three years of supervised release.

This Court affirmed Swisher's conviction on direct appeal, *United States v. Swisher*, 360 Fed. Appx. 784 (9th Cir. 2009) (unpublished), and he filed a motion for postconviction relief under 28 U.S.C. § 2255. The district court denied the motion but granted a certificate of appealability on whether Swisher's conviction under Section 704(a) violated the First Amendment, a claim that Swisher had not previously raised at trial or on direct appeal. *United States v. Swisher*, 790 F. Supp. 2d 1215, 1243-46 (D. Idaho 2011).

3. A panel of this Court affirmed, applying *Perelman* to reject Swisher's argument that "the application of § 704(a) to him violated his First Amendment rights." *United States v. Swisher*, 771 F.3d 514, 522 (9th Cir. 2014). Judge Tashima concurred. *Id.* at 524-27. He agreed that "the majority faithfully applies *Perelman*" but concluded that "*Perelman* itself ignores the teaching of [*Alvarez*] and sanctions the punishment of pure speech, solely because that speech is a falsehood." *Id.* at 524; *see id.* at 527 ("[T]here is, at the least, substantial doubt as to whether *Perelman* was correctly decided").

ARGUMENT

I. This Case Does Not Present an Issue of Exceptional Importance That Justifies Rehearing En Banc

The limited holding of *Perelman*—and therefore the panel decision in this case—will have little if any ongoing significance. *Perelman* "interpret[ed] only

the 'knowingly wears' portion of § 704(a)" and did "not address the other actions criminalized by the statute, such as the unauthorized importing, selling, or manufacturing of medals." 695 F.3d at 869 n.1. But Congress removed the wearing prohibition from Section 704(a) when it amended the statute in 2013. *Swisher*, 771 F.3d at 521 n.4.[1] Because the prohibition *Perelman* upheld is no longer operative, rehearing en banc would be a waste of judicial resources. There is no pressing need to reconsider the constitutionality of a law that Congress has revoked. *Cf. United States v. Drury*, 396 F.3d 1143, 1144 (11th Cir. 2005) (en banc) (vacating order to rehear case en banc in light of statutory amendment that "resolve[d] definitely [the] precise question" at issue).

Moreover, nothing particular to this case creates an issue of exceptional importance that justifies rehearing en banc. The 6-month incarceratory sentence Swisher received for violating Section 704(a)'s wearing prohibition was ordered to run concurrently with the 12 months of imprisonment he received for his fraud and theft convictions. The validity of Swisher's convictions for violating 18 U.S.C. § 1001 and 18 U.S.C. § 641 are not at issue and would not be affected by a ruling that Swisher's Section 704(a) conviction

[1] Congress also amended Section 704(b), which now makes it unlawful to "fraudulently hold oneself out to be a recipient" of a military medal "with intent to obtain money, property, or other tangible benefit." 18 U.S.C. § 704(b) (2013).

is unconstitutional. In addition, according to the Bureau of Prisons, Swisher was released from prison on January 15, 2010, and therefore has served his term of imprisonment and his three-year term of supervised release.

Rehearing en banc is also not warranted to resolve an intra- or inter-circuit conflict or a conflict with authority from the Supreme Court. *See* Fed. R. App. P. 35(a), (b). As discussed below, *Perelman* was correctly decided in light of *Alvarez*, and no court of appeals has reached a different result. To the contrary, the Fourth Circuit also upheld the "knowingly wears" prohibition of Section 704(a) in *United States v. Hamilton*, 699 F.3d 356 (4th Cir. 2012).

II. *Perelman* Was Correctly Decided

Perelman correctly concluded that the wearing prohibition of Section 704(a) is constitutional. The statute is analogous to those statutes prohibiting false statements that the Supreme Court recognized as constitutional in *Alvarez*. The statute also survives intermediate scrutiny.

1. All members of the Supreme Court in *Alvarez* recognized contexts in which prohibitions on false statements are generally permissible. 132 S. Ct. at 2545-47; *id.* at 2553-54 (Breyer, J., concurring in the judgment); *id.* at 2562 (Alito, J., dissenting). The Justices agreed that statutes that prohibit fraudulently posing as a government representative or that otherwise protect the integrity of government processes, "quite apart from merely restricting false

speech," are generally permissible. *Id.* at 2546; *see id.* at 2554 (Breyer, J., concurring in the judgment). For example, statutes that prohibit the "unauthorized use of the names of federal agencies . . . in a manner calculated to convey that the communication is approved," *id.* at 2546 (citing 18 U.S.C. § 709), and statutes that prohibit impersonating a federal officer, *see* 18 U.S.C. § 912, focus on speech that accompanies conduct that threatens the integrity of governmental processes, 132 S. Ct. at 1546. These statutes permissibly "focus on acts of impersonation, not mere speech." *Id.* at 2554 (Breyer, J., concurring in the judgment). Unlike the Stolen Valor Act, these statutes do not "prohibit without limitation the telling of a lie," but instead narrow the prohibition "to a subset of lies where specific harm is more likely to occur." *Id.* at 2555.

Perelman correctly concluded, *see* 695 F.3d at 871-72, that Section 704(a)'s wearing prohibition is analogous to the federal-official impersonation and false-government-endorsement statutes approved in *Alvarez*, in that the prohibition is directed narrowly to false expression that is intertwined with harmful conduct, *see Alvarez*, 132 S. Ct. at 2546 (plurality opinion). The "wearing" prohibition contained within Section 704(a) forbids knowingly wearing a military medal with the intent to deceive. *Perelman*, 695 F.3d at 870-71; *see Hamilton*, 699 F.3d at 367-68. That prohibition therefore requires an act of deceit, "not mere speech." *Alvarez*, 132 S. Ct. at 2556 (Breyer, J., concurring

in the judgment). An individual who deceitfully wears a military medal cloaks himself with a visible, tangible sign of government commendation. That conduct differs markedly from mere false speech. Moreover, Section 704(a) also prohibits, among other things, manufacturing, purchasing, importing, or selling military medals without authorization. 18 U.S.C. § 704(a). The military has promulgated a regulatory scheme to ensure the quality of military medals and protect the integrity of the military honors system of which they are a part. *See* 32 C.F.R. § 507; Army Regulation 672-8. The prohibition on unauthorized wearing of a military medal with the intent to deceive is a component of these broader regulations and therefore "protect[s] the integrity of Government processes, quite apart from merely restricting false speech." *Alvarez*, 132 S. Ct. at 2546 (plurality opinion). Section 704(a) therefore "focus[es] its coverage on lies most likely to be harmful." 132 S. Ct. at 2556 (Breyer, J., concurring in the judgment).

2. Section 704(a) is also constitutional even if scrutinized anew rather than by comparison to other statutes already recognized as constitutional. With respect to the level of scrutiny that applies, Justice Breyer's concurring opinion in *Alvarez* represents the "holding of the Court" because it reflects the "position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation

omitted). Although the plurality applied exacting scrutiny to the Stolen Valor Act, the concurring Justices concluded that intermediate scrutiny applies to prohibitions on "false statements about easily verifiable facts." 132 S. Ct. at 2551-2552. Because Section 704(a)'s wearing prohibition similarly addresses false statements about an objectively verifiable fact—whether the wearer has been awarded a military honor—the provision's constitutionality turns on whether it has substantial justification and the government's objectives cannot be achieved in less burdensome ways. *Id.*

Perelman correctly concluded that Section 704(a) survives intermediate scrutiny. *See United States v. Tomsha-Miguel*, 766 F.3d 1041, 1048 (9th Cir. 2014) (stating that *Perelman* "appl[ied] intermediate scrutiny to 18 U.S.C. § 704(a)"). To begin with, the statute serves compelling government interests. Section 704(a) furthers the same interest as the Stolen Valor Act—namely, the interest in protecting the integrity of the military honors system. The military awards system fosters morale within the military and recognizes and expresses gratitude for acts of heroism and sacrifice in military service. All members of the *Alvarez* Court concluded that this interest is compelling. *See* 132 S. Ct. at 2548-49 (plurality opinion); *id.* at 2555 (Breyer, J., concurring in the judgment); *id.* at 2557-59 (Alito, J., dissenting).

The interests supporting the wearing prohibition cannot be achieved in less burdensome ways. As an initial matter, the wearing prohibition of Section 704(a) is much more narrowly tailored than the Stolen Valor Act's "sweeping" and "unprecedented" prohibition on "pure speech." *Alvarez*, 132 S. Ct. at 2543-44, 2547 (plurality opinion). A violation of Section 704(a) requires an intentionally deceptive act—wearing a medal that the wearer knows he has not earned. Thus, in contrast to the Stolen Valor Act, Section 704(a)'s wearing prohibition focuses on deceitful conduct, "not mere speech," and therefore applies to false statements "that are particularly likely to produce harm." *Alvarez*, 132 S. Ct. at 2554 (Breyer, J., concurring in the judgment). Preventing the harm that results from deceitfully wearing a military medal requires a prohibition of the offending conduct.

Counterspeech is not an effective alternative. The false impression created on an audience may not be corrected by counterspeech, as "the actual appearance of . . . military medals more strongly conveys the impression that the wearer has earned the honors displayed than when a person merely states that he has earned such honors." *Hamilton*, 699 F.3d at 373. In other words, "speech may not effectively counter that which a person sees." *Id.* Viewers may also be "less likely to seek out confirmation of the truth of the military honor" when they have received apparent visual confirmation. *Id.* at 374 n.19.

For these same reasons, Section 704(a)'s wearing prohibition would satisfy the "exacting scrutiny" employed by the *Alvarez* plurality. *See Hamilton*, 699 F.3d at 371 (assuming that "exacting scrutiny" applies and concluding that Section 704(a) is constitutional under that standard). As described above, however, the holding of *Alvarez*—as set forth in the concurring opinion—requires application of intermediate scrutiny. *Perelman* correctly applied intermediate scrutiny and upheld Section 704(a)'s wearing provision under that standard.

CONCLUSION

For the foregoing reasons, Swisher's petition should be denied.

Respectfully submitted,

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February 25, 2015

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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USCA No. 11-35796
USDC No. CV 09-55-BLW
(District of Idaho)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

ELVEN JOE SWISHER,

Defendant/Appellant.

SUPPLEMENTALBRIEF OF APPELLANT

Appeal from the United States District
Court for the District of Idaho
Boise Division
Honorable B. Lynn Winmill, District Court Judge

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INTRODUCTION

On May 19, 2015 upon a vote of a majority of non-recused active judges, this matter was ordered to be reheard en banc pursuant to Federal Rule of Appellate Procedure 35 (a) and Circuit Rule 35-3. On June 12, 2105 this Court ordered the parties to file supplemental briefs of no more than 7,000 words on or before July 31, 2015. According to the Government's unopposed motion for leave to file supplemental briefs, the purpose of the supplemental briefing is to further discuss the constitutionality of Mr. Swisher's conviction under 18 U.S.C. § 704(a) (2002). Specifically this supplemental brief submitted by Defendant-Appellant provides the analysis and reasoning for this Court to overturn the holding in *United States v. Perelman*, 695 F.3d 866, 868 (9th Cir. 2012) which found that 18 U.S.C. § 704(a) (2002) is constitutional. Should this Court overturn the holding in *Perelman,* then it is free to accept Swisher's argument that 18 U.S.C. § 704(a) is unconstitutional and overturn the Idaho District Court's denial of Swisher's 28 U.S.C. § 2255 motion.

SUMMARY OF ARGUMENT

Swisher respectfully requests that this Court overturn the holding in *Perelman.* Swisher first argues for a different analysis than that utilized by the Panel in *Perelman* (hereinafter "The Panel") in upholding 18 U.S.C. § 704(a) (2002) and finding that statute was not constitutionally overbroad. The Panel properly concluded that it should first construe the statute to determine what the statute covers. *United States v. Williams*, 553 U.S. 285, 293 (2008).

A statute is facially invalid if it prohibits a substantial amount of protected speech. *Id.* This doctrine seeks to strike a balance between competing social costs. *Virginia v. Hicks*, 539 U.S. 113, 119-120, 123 S.Ct. The Panel construed the "knowingly wears" provision of 18 USC 704 (a) as an intent to deceive and as such the statute did not prohibit the innocent conduct of simply wearing a military medal. This construction of the statute, however, is in direct conflict with the Supreme Court's holding in the United States v. Alvarez as a per se ban on false expression is inappropriate. The statute has no limiting force allowing prosecutions for those who falsely wear military medals in public or in the privacy of his or her own home and is therefore facially invalid.

Additionally the statute does not pass muster under the most exacting scrutiny standard. Swisher respectfully argues that the panel in Perelman erred in using the four-part intermediate scrutiny test under *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The Court should have rather utilized exacting scrutiny analysis under *Texas v. Johnson* to analyze Perelman's expressive conduct. The "most exacting scrutiny" standard requires the government to establish that the, "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos v. Barry*, 485 U.S. 312, 321-22 (1988) (cited in Johnson, 491 U.S. at 412, 109 S.Ct. 2533). There is no debate whether the government's interests underlying the insignia statutes are compelling. Military medals are institutional symbols of honor and prestige, which enhance military morale

and recognize the accomplishment of difficult missions by members of the armed services. Additionally, military medals publicly promote the integrity of the military system by honoring members of our military for their service and their sacrifices. However, the Government, as illustrated by plurality and concurrence in *Alvarez*, failed to narrowly draw the statute to achieve the compelling interests and there are less restrictive means of achieving the interests other than criminalizing the false expressive conduct.

FACTUAL BACKGROUND OF *PERELMAN* AND *SWISHER*

David M. Perelman served in Vietnam for approximately three months in 1971. *United States v. Perelman*, 695 F.3d 866, 868 (9th Cir. 2012). Twenty years later, he accidentally shot himself in the right thigh. *Id.* He later claimed that the self-inflicted gunshot wound was a shrapnel injury sustained during his service in Vietnam. *Id.* The United States Air Force awarded him a Purple Heart and other medals in 1994. *Id.* Because of his receipt of the Purple Heart and other medals, the Veterans Administration gave Defendant more than $180,000 in disability benefits. The government alleged that Defendant wore a Purple Heart to a national convention of the Military Order of the Purple Heart in Las Vegas, Nevada. *Id.* After the government discovered the fraud, it indicted Perelman on two counts. *Id.* Count One alleged that Perelman stole from the Veterans Administration by obtaining disability benefits under false pretenses, in violation of 18 U.S.C. § 641. Count Two alleged that Defendant wore the Purple Heart "without authorization under regulations made pursuant to law," in violation of 18

U.S.C. § 704(a). *Id.*

The factual allegations in the present matter are substantially the same as those in the *Perelman* case. Elven Joe Swisher served with the United States Marine Corps on active duty from August 4, 1954 until August 3, 1957 when he was discharged into the reserves. AER Vol. 1, 9. During his service in the Marines, Swisher was stationed at Middle Camp Fuji, Japan. Swisher spent a little over a year in Japan. While in Middle Camp Fuji in August of 1955, Swisher and at least 130 other Marines, plus three (3) Navy Corpsmen, were called to a closed door meeting in the Middle Camp Fuji Base Theater. AER Vol. 2, 178-180. Swisher and the other Marines were flown to North Korea where they engaged in combat and suffered many casualties. Swisher received numerous injuries including a shoulder injury, fractured right leg, gunshot wounds, and shrapnel wounds over a large portion of his body, the scars of which are visible today. AER Vol. 2, 181-183. At the hospital, Swisher was visited by a Marine Captain who advised Swisher he was entitled to wear the Purple Heart, National Defense Medal, Korean War Service Medal, and Korean War U.N. Service Medals and Ribbons. AER Vol. 2, 184-185. Swisher stated that after leaving the hospital, he received the Silver Star Medal and Navy Commendation Ribbon with Bronze "V". AER Vol. 2, 184-185. The Government alleged, that although Swisher did serve, his stories

about the secret mission, suffering injury and being awarded the commendations were all part of a scam to gain Post Traumatic Stress Disorder ("PTSD") benefits through the Veteran's Administration. *See* AER Vol. 3, 560-64 and AER Vol. 3, 553, Pg. 650. ln. 1-5. The Government alleged Swisher, "in an effort to obtain 100-percent disability and approximately $2,500 tax-free a month" submitted a forged DD-214 and letter supporting its existence and presented that letter to the VA and was wrongfully awarded PTSD benefits. AER Vol. 3, 553, Pg. 649, ln. 1-5. The Government also alleged that to further aid in this deception, Swisher would wear a Purple Heart, Silver Star Medal, Navy and Marine Corps Medal (Gold Star in lieu of the Second Award), and Marine Corps Commendation Medal with Combat "V". At trial the Government introduced *Exhibit 67* which was a photograph showing Swisher in Marine Corps League uniforms. In the photograph, Swisher is wearing several military medals and awards. Lt. Col. Henson testified that the photograph showed Swisher wearing the Silver Star, the Navy and Marine Corps Ribbon, Purple Heart, Navy and Marine Corps Commendation Medal with a Bronze V, and the UMC Expeditionary Medal. Like Perelman the Government alleged Swisher knowingly wore military medals, "without authorization under regulations made pursuant to law," in violation of 18 U.S.C. § 704(a).

ARGUMENT

I. *Perelman* Should be Overturned as 18 U.S.C. § 704(a) is Facially Overbroad

The limiting construction the Panel gives 18 U.S.C. § 704(a), requiring an intent to deceive, does not save the statute from being facially overbroad. The first step in determining whether a statute is overbroad is to first determine what the statute covers. *United States v. Williams*, 553 U.S. 285, 293 (2008). "It is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Id.* at *293*. A statute is facially invalid if it prohibits a substantial amount of protected speech. *Id.* The doctrine seeks to strike a balance between competing social costs. *Virginia v. Hicks*, 539 U.S. 113, 119-120 (2003). As a "cardinal principle" of statutory interpretation, these constitutional concerns may be avoided if the court can, "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (citation and internal quotation marks omitted). Thus, when, "an otherwise acceptable construction of a statute would raise serious constitutional problems, courts may construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v.*

Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

The Panel followed this approach in upholding *Perelman's* conviction under 18 USC § 704(a). *Perelman* at 869. Perelman and amicus argued that the 18 USC §704 (a) reaches a wide range of innocent conduct rendering the statute overbroad under the "second type of facial challenge" recognized by the Supreme Court in the First Amendment context. *Id.* at 870. Perelman argued that the statute prohibited expansive innocent conduct including, but not limited to:

> Actors who have worn military medals (or colorable imitations) in films or other theatrical productions; schoolchildren who have worn medals given to them by soldiers; grieving spouses or parents who have worn medals at military funerals; grandchildren who have worn their grandparents' medals in Veterans Day parades; children and adults who have worn medals (or colorable imitations) to Halloween costume parties; others who may have worn medals as part of other artistic expression, such as a hypothetical band called " The Purple Hearts" ; others who have worn them simply as a fashion statement or because they like the way the medals look; a metal-worker who created a replica of a Silver Star in the privacy of his workshop, put it on, and then immediately melted it down; and a protestor who has dressed up like a Guantanamo prisoner and, to make a political statement, wore a friend's medal. *Id.*

The Panel rejected Perelman's reading of the statute in that it was too expansive and the statute can be construed to require the Government to prove an intent to deceive. *Id*. at 871. The Panel found the intent to deceive springs from the language in the act where an individual can only be convicted if he or she, "knowingly wears, purchases or attempts to purchase . . . any

decoration or medal authorized by Congress for the armed forced of the United States . . . or any colorable imitation thereof, except when authorized under regulations made pursuant to law." *Id.* citing 18 U.S.C. § 704(a).

The Panel found, "that Congress sought to prevent the deceptive use of military medals . . . deception was its targeted harm." *Id.* at 870-71 (citing *United States v. Goeltz*, 513 F.2d 193, 197 (10th Cir. 1975)). The Panel explained that the application to protected speech offered by Perelman could be avoided as, "Congress intended to criminalize the unauthorized wearing of medals only when the wearer intends to deceive stating the use of a physical object goes beyond mere speech and suggests that the wearer has proof of the lie, or government endorsement of it." *Id.* at 871.

Despite the construction offered by the Panel in *Perelman*, reading a scienter requirement into the statute still fails at limiting or narrowing the statute to the point where it no longer limits protected expression. Proof of "intent to deceive" is directly aimed at eradicating the false expression of wearing a military medal one has not earned. This false expression is precisely the type of expression the Supreme Court in *Alvarez* found is deserving of protection. *United States v. Alvarez*, 132 S.Ct. 2537 (2012). The Court in *Alvarez* invalidated 18 U.S.C §704 (b) which holds, "Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both." *Id.* at 2544. Just as §704 (b) in *Alvarez*, §704

(a) applies to the false expression without regard made to time, place, or person. The Court in *Alvarez* found that the Government is unable to show that false statements should constitute a new category of unprotected speech. *Id.* at 2547. The plurality in *Alvarez* did not engage in statutory construction, as did the Panel in *Perelman,* but rather assumed that §704 (b) would not apply to, say, a theatrical performance. *Id*. at 2547. Rather the plurality took dead aim at whether the Government can prohibit false speech.

However, assuming that the Panel was correct in reading a scienter requirement into §704 (a), that statute is still broad, sweeping and has unprecedented reach which puts it in conflict with the First Amendment just as §704 (b) did. Just like *Alvarez* it was alleged that Perelman and Swisher's false expression was made in public. *Perelman*, 695 F.3d 866, 868; AER Vol. 3, 553, Pg. 649. However §704 (a) would apply with equal force to a person within his or her home and seeks to control and suppress any and all wearing of military medals with an intent to deceive in almost limitless times and settings. As the both the plurality and Justice Bryer point out in *Alvarez*, §704 (b) could be applied whether "shouted from the rooftops" or made in barely audible whisper, and further can a be applied to family, social or private contexts and can be applied to, "bar stool braggadocio." *Alvarez* at 2547, 2555 (Bryer, J., concurring in the judgment). These considerations led the plurality and the concurrence to find that §704 (b) as written risks significant First Amendment harm. *Id.* The application could be the same for the expressive conduct in *Perelman* and *Swisher.* Just as there was no

limiting principle for §704 (b) there is no limiting principle for §704 (a). One making a grand false verbal announcement of his medals on the state house steps or in a YouTube video with a million views would not be prosecuted whereas another individual could be prosecuted for falsely wearing a medal in his own home to impress a houseguest. The application of §704 (a) post-*Alvarez* produces uneven and possibly absurd results. For example, a person at a Halloween party may be adorned in military medals as part of his costume having no intent to deceive for which he would not face criminal prosecution under the Panel's holding in *Perelman*. He could subsequently seconds later remove the medals and then inform the party goers that he in-fact is a medal recipient intending to deceive them and face no prosecution under *Alvarez*. If he were then to place the medals back upon his person, he would now be subject to prosecution under the holding in *Perelman* unless he informed the party goers, prior to putting the medals on, that his constitutionally protected false statement about earning the medals was in reality false. Drawing a distinction between the speech and the expressive conduct would lead to a series of absurd results and bizarre calculi of whether or not, and when, did the individual have the requisite intent. Such illustrates that again §704 (a) contains no limiting force required by the First Amendment.

Justice Bryer continues to describe the First Amendment harm in his concurrence stating, "Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence

that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Id.* at 2547, 2548.

II. 18 USC §704 (a) Fails Under the Exacting Scrutiny analysis

Should this En Banc panel determine that 18 USC §704 (a) survives a facial constitutional challenge, the En Banc Panel must use the exacting scrutiny analysis identified in *Texas v. Johnson* rather than the intermediate scrutiny test identified in the *United States v. O'Brien*. Again §704 (a) is unconstitutional as analyzed under *Texas v. Johnson*.

A. The Most Exacting Scrutiny Test is Appropriate in Analyzing §704(a) as it is Relates to the Suppression of False Expression

The Panel in Perelman employed the four-part *O'Brien* test in affirming Perelman's conviction under § 704(a) for wearing a Congressional Medal of Honor he had not earned. *Perelman*, 695 F.3d 866. The Panel reasoned that the insignia statute's prohibition on wearing an unearned medal is aimed solely at "conduct, or, perhaps, merely at speech that is integral to criminal conduct." *Id.*at 872. Under the *O'Brien* intermediate scrutiny test, a government regulation, "is sufficiently justified" if it "is within the

constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

Swisher respectfully argues that the *O'Brien* test is not appropriate in analyzing whether §704 (a) is overbroad. At steps three and four of the *O'Brien* analysis it must be determined whether, "the governmental interest in the underlying the statute is unrelated to the suppression of free expression, and whether the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* The Government, by enacting §704 (a), was attempting to criminalize expressive, albeit false, conduct of wearing military medals that one has not earned. As stated above, the Panel found that the conduct itself only violates the statute if it is coupled with the knowing intent to deceive. *Id*. at 871. As such, both steps three and four must be answered in the negative. §704 (a) is aimed at suppression of false expression and is not incidental, but clearly calculated to prohibit, not just the conduct of wearing a military medal without authority, but the false expression that the wearer is making that he actually earned the medal. By wearing the medals, both Swisher and Perelman were expressing to the public that that they displayed courage and valor in their military past military. The Government then in turn prosecuted Swisher and Perelman not simply for wearing the medals, but to suppress the purported false expression.

As such the *O'Brien* test is not appropriate.

The level of scrutiny for the First Amendment analysis of this expressive conduct should be the same as found in *Texas v. Johnson*. In *Johnson*, the Supreme Court declined to apply the *O'Brien* test in considering the constitutionality of a Texas statute that prohibited the desecration of certain "venerated objects." *Texas v. Johnson*, 491 U.S. 397, 400, 407- 10, 412 (1989). The defendant in *Johnson* was prosecuted under Texas law for burning a flag, which he did in a public place as a means of political protest. *Id*. at 399. In assessing the defendant's First Amendment challenge in Johnson, the Court held that the *O'Brien* standard was inapplicable because it is a "relatively lenient standard" applied in cases in which the governmental interest is "unrelated to the suppression of free expression." *Id*. at 407 (citation omitted). The Court further explained that, "[i]n order to decide whether *O'Brien 's* test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression." *Id.* The Court held that Texas' only proffered interest implicated by the facts of the case was its interest in preserving the flag as a symbol of national unity, an interest that the Court determined was related to the suppression of free expression. *Id.* at 407-10. The Court found that, "[w]e are thus outside of *O'Brien* 's test altogether" and held the that the Texas statute was subject to "the most exacting scrutiny." *Id.* at 410, 412. The deciding point as found by the Supreme Court's decisions in *O'Brien* and *Johnson* that determines whether the court applies the "relatively lenient" test

employed in *O'Brien*, or the "most exacting scrutiny" standard set forth in *Johnson*, is whether the statute being reviewed is related to the suppression of free expression. *Id.* The "most exacting scrutiny" standard requires the government to establish that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos v. Barry*, 485 U.S. 312, 321-22 (1988) (cited in *Johnson*, 491 U.S. at 412).

B. 18 U.S.C §704(a) is Not Narrowly Drawn to Achieve the Interest of the Government

As stated, the *Johnson* analysis requires the court to determine whether the government's interests underlying the insignia statutes are compelling. *Id.* at 412. In *Alvarez* the Supreme Court echoed the Government in finding the Government had a compelling interest in protecting military medals. The Court found military medals, "serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service, and fostering, morale, mission accomplishment and esprit de corps' among service members." *Alvarez*, 132 S.Ct. at 2548 (citing *Brief for United States* 37, 38).

However both §704 (b) and §704 (a) fail the second prong of the exacting scrutiny analysis as neither of the statutes are narrowly drawn to achieve that end and there are less restrictive means available. The Supreme Court in *Alvarez* found, "these interests do not satisfy the Government's heavy burden when it seeks to regulate protected speech". *Id.* at 2549 (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000)).

Similar to statements uttered by Alvarez, the medals worn by Swisher and Perelman indicated they served valiantly and received recognition. The end deception is the same and it is immaterial whether the deception is by spoken or written word or by the wearer of false military medals using the medal to speak for him or her.

In *Alvarez* the Court states, "The Government can point to no evidence to support its claim that the public's general perception of military awards is diluted by false claims". *Id.* at 2549. As in *Alvarez*, the Government in *Perelman* and *Swisher* will be unable to point to evidence to support its claim that the public's general perception of military awards is diluted by false claims. Further the Court in *Alvarez* states, "counterspeech, and refutation can overcome a lie and our society is capable to grand and wide counterspeech." *Id.* at 2551. The plurality in *Alvarez* concluded that § 704(b) was not sufficiently tailored to the government's interests as, "[t]he Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest.... [T]he dynamics of free speech, of counterspeech, of refutation, can overcome the lie.... The remedy for speech that is false is speech that is true." *Id.* at 2549-50.

This same logic should be extended to falsely wearing medals. Counterspeech and refutation can overcome and ultimately debunk the lie whether an individual verbally lies about military medals or lies through expressive conduct of wearing medals. The Supreme Courts states, "It is a fair assumption that any true holders of the Medal who had heard of Alvarez's

false claims would have been fully vindicated by the community's expression of outrage, showing as it did the Nation's high regard for the Medal. The American people do not need the assistance of a government prosecution to express their high regard for the special place that military heroes hold in our tradition. Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication." *Alvarez*, at 2550-51. Congress could have furthered its interests by less restrictive means, such as by publicizing the names of the legitimate recipients of military honors or the names of those who have falsely claimed to receive such honors. *Alvarez*, 132 S.Ct. at 2551 (plurality opinion); *Id.* at 2556 (Breyer, J., concurring in judgment). Finally the plurality and concurrence in *Alvarez* concluded that the government in that case could have achieved its interests underlying 18 U.S.C. § 704(b) by other less restrictive means, by creating and maintaining a database listing all individuals who have been awarded the Congressional Medal of Honor.[1] Such would also be available in combating fraudulent wearing of medals.

The Government is likely to argue that publicizing the names of those who have earned medals, counter speech or a database cannot properly combat the fraudulent wearing of medals as the according to the Panel in

[1] The Concurrence in *Alvarez* disagreed with the plurality and used the "intermediate scrutiny". However the concurrence still found that § 704(b) did not pass constitutional muster under that more lenient test. *Alvarez*, 132 S.Ct. 2537, 255-256 (Breyer, J concurrence).

Perelman, "[t]he use of a physical object goes beyond mere speech and suggests that the wearer has proof of the lie, or government endorsement of it." *Perelman,* 695 F.3d at 871. Although possessing the physical object may offer some proof of the lie, Americans are savvy enough in the digital and manufacturing age to understand objects can be fakes or phonies. The physical medal itself gives those who doubt its authenticity more hard evidence to confirm whether the medal is genuine or not as opposed to a fleeting verbal statement. Just as in the *Perelman* and *Swisher* cases, the Defendants were seen or photographed with the medals. Any individual that doubts the authenticity could search the database proposed by the plurality in *Alvarez* or request such information from the Department of Defense referencing a depiction of the medal to determine whether the individual wearing the medal was an actual recipient. Armed with proof that the fraudster actually wore the medal and documented proof from the Government that such was not earned, any individual would be in a position to expose the fraudster to others in his or her community, in the media or online.

III. 18 U.S.C § 704(a) is Distinguishable from Impersonation Statutes

The Panel in Perelman draws a parallel between impersonation statutes to bolster the argument the §704(a) survives First Amendment scrutiny. *Perelman*, at 872. First, the Panel finds §704 (a) to be in the same category as

the impersonation statutes listed in *Alvarez* in that they all, " implicate fraud or speech integral to criminal conduct." *Id.* The plurality in *Alvarez* found statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech. "Even if that statute may not require proving an [actual financial or property loss] resulting from the deception the statute is itself confined to [maintaining the general good repute and dignity of . . . government . . . service itself]." *Alvarez*, 132 S.Ct. at 2546 (citing *United States v. Lepowitch*, 318 U.S. 702 (1943), internal quotation marks omitted). The *Alvarez* Court then found that the, "same can be said for prohibitions on the unauthorized use of the names of federal agencies such as the Federal Bureau of Investigation in a manner calculated to convey that the communication is approved, see §709, or using words such as "Federal" or "United States" in the collection of private debts in order to convey that the communication has official authorization, see §712." *Id.* The Court found that the listed, "examples, to the extent that they implicate fraud or speech integral to criminal conduct, are inapplicable here." *Id.* Impersonation statutes aim to stop one from impersonating a Government officer and from representing that he or she is speaking on behalf of the Government in an effort to protect the integrity and functioning of the Government processes. *Id.* Statutes forbidding impersonation of a public official typically focus on acts of impersonation, not mere speech, and may require a showing that, for

example, someone was deceived into following a "course [of action] he would not have pursued but for the deceitful conduct." *Alvarez at 2554 (*Breyer, J. concurring and citing to *United States v. Lepowitch*, 318 U.S. 702, 704).

Knowingly wearing military medals without authority can be distinguished from impersonation and is much more in the realm of the false speech analyzed in *Alvarez*. Impersonation statutes are designed to protect the integrity and function of the government process. *Id.* §704 (a) was not tailored to apply to one knowingly wearing and presenting such medals in a way that inhibited or hindered governmental functioning. Rather the false nature of the display carries the same attributes of one making false statements about possessing the medals.

As stated above, the Governmental interest in *Alvarez* is the same interest in the present case as both regulations attempt to reflect that, "public recognition of valor and noble sacrifice by men and women in uniform reinforces the pride and national resolve that the military relies upon to fulfill its mission" and "protecting the integrity of the military honors system and the restricting the false claims of liars". *Id.* §704 (a) does not implicate the functioning of the Government or force an individual to take action based on the fraudulent wearing of the military medal. As such §704 (a) is outside the categorical analysis of the impersonation statutes.

The panel also cites to *Schacht v. United States* stating the Supreme Court addressed a constitutional challenge to 18 U.S.C. § 702 which, in combination with 10 U.S.C §772 (f) allows military uniforms to be worn by

actors in theatrical production as long the actors do not "tend to discredit the military. *Perelman*, 695 F.3d at 872 (citing *Schacht v. United States*, 398 U.S. 58 (1970). In *Schacht* Supreme Court held that the implementing regulation that permitted actors to wear uniforms only if they did not criticize the government was unconstitutional. *Schacht* at 63. The Panel in *Perelman* however utilizes the Supreme Court's statement in *Schacht* to argue that such holding is precedent in its analysis of §704 (a). The Panel states, "Our previous cases would seem to make it clear that 18 U.S.C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face. *Perelman*, at 872. The Panel concluded that as 18 U.S.C. § 702 survived scrutiny it is likely so should § 704 (a) also survives First Amendment scrutiny. *Id*.

Respectfully, the dicta referenced in *Schacht* from forty-five years-ago does little to add to or clarify the debate before us regarding false expressive conduct. Post-*Alvarez*, false speech enjoys constitutional protection not considered in 1970. The Court in *Schacht* conducted little analysis regarding how false expressive conduct should be analyzed what interests are implicated, whether they are compelling or whether the Governmental regulations are narrowly drawn or other alternatives available. Further the *Schacht* court made no inquiry into whether 18 U.S.C §702 contains an intent to deceive element. Although §702 and §704 (a) are similar statutes we can gain little from the dicta in *Schacht*.

CONCLUSION

For the above reasons, Elven Joe Swisher respectfully requests that this En Banc Court overturn the holding in *U.S. v. Perelman* holding that 18 U.S.C 704 (a) is constitutional. This then gives the Court authority to find Mr. Swisher's conviction for that same offense should be overturned and he is entitled to a new trial on the remaining counts.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief with the type-volume limitation of Fed. R. App. P. 32 (a) (7) (B) and the Order for Supplemental Briefing as the attached supplemental brief is proportionately spaced, has a typeface of 14 points or more, and the body of the argument contains 5,792 words.

Dated: July 31st, 2015.

/s/ Joseph T. Horras
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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2015 I electronically filed the foregoing with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF. No additional Excerpts of Record were necessary. Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: July 31st, 2015.

/s/ Joseph T. Horras
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Attorney for Appellant

No. 11-35796

In the
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

ELVEN JOE SWISHER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

GOVERNMENT'S SUPPLEMENTAL BRIEF ON REHEARING EN BANC

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INTRODUCTION

The defendant Elven Swisher falsely claimed that he had been awarded several prestigious military honors for meritorious and valorous conduct during his service in the U.S. Marine Corps. He made those claims in written submissions to the United States government and also went further and obtained real medals or colorable imitations and wore them at a function with other veterans. Swisher's conviction for wearing a military medal without authorization and with the intent to deceive, in violation of 18 U.S.C. § 704(a), comports with the First Amendment and should be upheld.

STATEMENT

1. Background: The Military Honor System

The United States military honor system dates back to the Revolutionary War, when General George Washington ordered the creation of several decorations recognizing military service and a valor award honoring "singularly meritorious action[s]" of "unusual gallantry," "extraordinary fidelity," or "essential service." *General Orders of George Washington Issued at Newburgh on the Hudson*, 1782-1783, at 35 (Edward C. Boynton ed., 1883; reprint 1909) (*General Orders*). The United States to this day maintains a system of military decorations and honors that shares its essential characteristics with the first awards authorized by General Washington. The highest military

honors are established by statute or executive order and have rigorous eligibility criteria; they include the Medal of Honor, 10 U.S.C. § 6241; Navy Cross, 10 U.S.C. § 6242; Silver Star, 10 U.S.C. § 6244; Navy and Marine Corps Medal, 10 U.S.C. § 6246; and Purple Heart, 10 U.S.C. § 1129.

Congress has closely regulated the creation, awarding, and wearing of military medals. The Institute of Heraldry has oversight over the design and manufacture of military medals. 32 C.F.R. § 507.4(b); *see* Institute of Heraldry, *History of the Institute of Heraldry*, http://www.tioh.hqda.pentagon.mil/AboutUs/History.aspx (last visited July 28, 2015). Only manufacturers certified by the Institute of Heraldry may produce military medals. 32 C.F.R. § 507.6(a). Manufacturers must use "Government furnished tools or cartoons," 32 C.F.R. § 507.14; adhere to precise specifications, 32 C.F.R. §§ 507.6(a)(1), 507.8(a); and submit a preproduction sample, 32 C.F.R. § 507.6(c). Manufacturers may produce a medal only if the preproduction sample "meets quality assurance standards" and the Institute of Heraldry issues a letter of certification. 32 C.F.R. § 507.6(c); *see* 32 C.F.R. § 507.15. Each medal must bear the particular hallmark assigned to the manufacturer by the Institute of Heraldry. 32 C.F.R.

§ 507.6(a)(3). Only medals produced through this process may be sold or purchased. 32 C.F.R. §§ 507.7, 507.17(b); *see* 18 U.S.C. § 704(a).[1]

The Department of Defense and the armed services branches have detailed guidelines for the award of medals. *See* U.S. Dep't of Defense, *Manual of Military Decorations and Awards*, No. 1348.33-V1 (2015) (*Awards Manual*); Marine Corps Order 1650.19J (Feb. 5, 2001); SECNAV Instruction 1650.1H (Aug. 22, 2006); Army Reg. 600-8-22 (Dec. 11, 2006); Air Force Policy Directive 36-28 (Aug. 1, 1997). These guidelines specify the extensive criteria for an award; the number and necessary content of eyewitness statements; the standard of proof; and the necessary approvals that the recommendation must garner within the chain of command. *See, e.g.*, *Awards Manual*, *supra*, at 15-58; SECNAV Instruction 1650.1H, at 2-1 to 2-34; Marine Corps Order 1650.19J Encl. 1, at 3-4; Encl. 2, at 1-3.

Prohibitions against falsely passing oneself off as having earned a military honor also date back to the Revolutionary War, when General Washington stated that "[s]hould anyone who are not entitled to the honors, have the insolence to assume the badges of them, they shall be severely punished." *General Orders*, *supra*, at 34. In 1923, Congress prohibited knowingly

[1] The Medal of Honor, the highest military honor, is manufactured outside of this process. *See* 32 C.F.R. § 507.4.

wearing, manufacturing, or selling a military medal without authorization. *See* Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286. The prohibition against wearing a military medal without authorization was most recently codified at 18 U.S.C. § 704(a), which made it an offense to "knowingly wear[]" a military decoration or medal, "or any colorable imitation thereof, except when authorized under regulations made pursuant to law." 18 U.S.C. § 704(a) (2005). Under applicable regulations, "[m]ere possession" of a military medal or decoration is permissible, 32 C.F.R. § 507.12(b), but "[t]he wearing of any" medal or decoration "by any person not properly authorized to wear such" medal or decoration "is prohibited," as is the "use" of any medal or decoration "to misrepresent the identification or status of the person by whom such is worn," 32 C.F.R. § 507.12(a). Congress augmented these prohibitions in the Stolen Valor Act of 2005, which made it an offense when anyone "falsely represent[ed] himself or herself, verbally or in writing, to have been awarded" a military decoration or medal. 18 U.S.C. § 704(b) (2006).

2. Swisher's Conviction

Swisher served in the United States Marine Corps in the 1950s. *United States v. Swisher*, 771 F.3d 514, 517 (9th Cir. 2014). In 2001, in an application for disability benefits, Swisher falsely claimed that he had participated in a combat mission in North Korea in 1955 and had been awarded several military

medals. *Id.* at 517-18. He submitted forged documents falsely stating that he had been awarded, among other honors, the Silver Star and the Purple Heart. *Id.* at 518. Swisher was also photographed in public in a Marine Corps League uniform wearing the Silver Star, the Navy and Marine Corps Ribbon, the Purple Heart, the Navy and Marine Corps Commendation Medal with a Bronze "V," and the Marine Corps Expeditionary Medal. *Id.* at 519.

After a jury trial, Swisher was convicted of wearing military medals without authorization, in violation of 18 U.S.C. § 704(a); making materially false statements to the Veterans Administration, in violation of 18 U.S.C. § 1001(a)(2); making and using a false document provided to the Veterans Administration, in violation of 18 U.S.C. § 1001(a)(3); and theft of government funds, in violation of 18 U.S.C. § 641. *Swisher*, 771 F.3d at 518-19.

3. Swisher's Section 2255 Motion

After Swisher's conviction became final, *see United States v. Swisher*, 360 Fed. Appx. 784 (9th Cir. 2009) (unpublished), this Court found unconstitutional under the First Amendment the provision of the Stolen Valor Act of 2005 that prohibited anyone from falsely representing verbally or in writing that he or she had been awarded a military decoration or medal. *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010). Swisher subsequently filed a motion for postconviction relief under 28 U.S.C. § 2255 claiming, for the first

time, that his conviction under the separate wearing provision of 18 U.S.C. § 704(a) also violated the First Amendment. Supplemental Excerpts of Record 170-76; *see United States v. Swisher*, 790 F. Supp. 2d 1215, 1242-43 (D. Idaho 2011). The district court declined to address whether Swisher's claim was procedurally defaulted and instead concluded that it failed on the merits. *Id.* at 1243-45. The court granted a certificate of appealability. *Id.* at 1245-46.

4. The *Alvarez* Decision

While Swisher's appeal was pending, the Supreme Court affirmed this Court's judgment in *Alvarez*. *United States v. Alvarez*, 132 S. Ct. 2537 (2012). The four-Justice plurality acknowledged that in some "instances," such as fraud, "false speech may be prohibited even if analogous true speech could not be," but concluded that outside of these instances false speech is not "presumptively unprotected." *Id.* at 2547. The plurality therefore applied "exacting scrutiny." *Id.* Although the plurality concluded that the government's interest in protecting the integrity of the military honors system was compelling, it emphasized that the breadth of the Act's prohibition on pure speech was "quite unprecedented." *Id.* That "sweeping" breadth, *id.*, the plurality explained, was "not actually necessary to achieve the Government's stated interest," *id.* at 2549. In particular, the plurality believed, counterspeech,

such as a government database of medal winners, could be an effective alternative. *Id.*

Justice Breyer, joined by Justice Kagan, declined to adopt the plurality's "strict categorical analysis" and concurred in the judgment on narrower grounds. 132 S. Ct. at 2551. In the concurring Justices' view, a prohibition on "false statements about easily verifiable facts that do not concern" politics, history, and the like should be subject to "intermediate scrutiny." *Id.* at 2552. In other words, the proper question was whether "the statute works speech-related harm that is out of proportion to its justifications." *Id.* at 2551. Like the plurality, the concurring Justices observed that many statutes permissibly prohibit false speech. *Id.* at 2554-55. Those statutes "tend to be narrower than the" Stolen Valor Act, however, and typically limit their reach to "a subset of lies where specific harm is more likely to occur," *id.* at 2554. In contrast, the Stolen Valor Act's prohibition on pure speech "ranges very broadly" and "lacks any such limiting features." *Id.* at 2555. The concurring Justices accordingly concluded that although the government's interest in protecting military honors from dilution was substantial, that objective could have been achieved through a "more finely tailored statute," such as one limited to lies about specific military awards or a statute that focused on lies in contexts where they are "most likely to cause harm." *Id.* at 2556.

After *Alvarez*, Congress amended 18 U.S.C. § 704(b). The statute now makes it unlawful to "fraudulently hold oneself out to be a recipient" of a military decoration or medal "with intent to obtain money, property, or other tangible benefit." 18 U.S.C. § 704(b) (2013). At the same time, Congress removed the word "wears" from the list of prohibited actions in 18 U.S.C. § 704(a). Pub. L. No. 113-12, § 2, 127 Stat. 448 (2013).[2] Members of Congress apparently believed that *Alvarez* called into question the constitutionality of the wearing prohibition based on statements made during oral argument in the Supreme Court. *See* H.R. Rep. No. 113-84, at 4 (2013).

5. The *Perelman* Decision

In *United States v. Perelman*, 695 F.3d 866 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2383 (2013), this Court upheld the constitutionality of the wearing prohibition in 18 U.S.C. § 704(a) in light of *Alvarez*.

The Court first adopted a limiting construction of the wearing prohibition, concluding that it required an individual to knowingly wear a military medal with the intent to deceive. *Id.* at 870-71. In contrast to the Stolen Valor Act's "sweeping" and "unprecedented" prohibition on "pure

[2] Except where noted, citations to 18 U.S.C. § 704(a) refer to the version in effect prior to removal of the word "wears." We also refer to the statute in the present tense even though the wearing provision is no longer operative.

speech," the Court concluded, Section 704(a) prohibits "the harmful *conduct* of wearing a medal without authorization and with intent to deceive." *Id.* at 871. That conduct "goes beyond mere speech and suggests that the wearer has proof of the lie, or government endorsement of it." *Id.*

The Court concluded that "[e]ven if we assume that the intentionally deceptive wearing of a medal contains an expressive element—the false statement that 'I received a medal'—the distinction between pure speech and conduct that has an expressive element separates this case from *Alvarez*." *Id.* In particular, the Court reasoned, Section 704(a)'s wearing prohibition is comparable to the "narrow range of conduct . . . prohibited by impersonation statutes," which were recognized as constitutional by the *Alvarez* plurality. *Id.* at 871-72. The Court concluded that "wearing a military medal with the intent to deceive falls within that same category." *Id.* at 872.

The Court also observed that the Supreme Court had suggested in *Schacht v. United States*, 398 U.S. 58 (1970), that 18 U.S.C. § 702, which "make[s] it an offense to wear our military uniforms without authority," would be subject, at most, to intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968). *Perelman*, 695 F.3d at 872 (quoting *Schacht*). Because Section 704(a) prohibits analogous conduct, the Court concluded that *O'Brien* and *Schacht* "[l]ikewise" indicate that Section 704(a) is constitutional. *Id.* Applying

intermediate scrutiny, the Court observed that Section 704(a) serves compelling government interests "unrelated to the suppression of free expression," namely "preserving the integrity of its system of honoring our military men and women" and "preventing the intentionally deceptive wearing of medals," and any "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [the government's] interest." *Id.* at 872-73 (citations omitted).

6. The Panel Decision

A panel of this Court subsequently affirmed the denial of Swisher's Section 2255 motion. *Swisher*, 771 F.3d at 524. As relevant here, the panel held that *Perelman* controlled. *Id.* at 523. Judge Tashima concurred in the judgment, agreeing that the majority "faithfully applie[d] *Perelman*" but disagreeing "with *Perelman's* reasoning." *Id.* at 524.

ARGUMENT

Military medals convey government speech, in particular the message that the recipient has served the military efforts of the United States with valor, exceptional duty, or achievement worthy of commendation. The government may therefore prohibit wearing military medals without authorization and with the intent to deceive in order to prevent misappropriation and distortion of that message. Even if the wearing prohibition of 18 U.S.C. § 704(a) were

deemed a restriction on private (not government) speech, it nonetheless survives First Amendment scrutiny. The statute's restrictions are proportional to the substantial government interests they advance. Comparison with similar statutes recognized as constitutional confirms this point.

I. The Wearing Prohibition Is Not Subject To First Amendment Scrutiny Because Military Medals Convey Government Speech

The government is entitled, through "government statements" or "government actions and programs that take the form of speech," to "promote a program, to espouse a policy, or to take a position." *Walker v. Texas Dep't of Motor Vehicles Bd.*, 135 S. Ct. 2239, 2245-46 (2015). "[T]he Government's own speech . . . is exempt from First Amendment scrutiny." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005). "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009). The government may "say what it wishes" and "select the views that it wants to express." *Id.* at 467-68 (internal citations omitted).

Military medals "'are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.'" *Walker*, 135 S. Ct. at 2250 (quoting *Summum*, 555 U.S. at 472). A military medal communicates at a general level the message that the recipient has served the

military efforts of the United States with distinction. Specific medals also convey a more focused message. *Compare, e.g.*, 10 U.S.C. § 3741 (Medal of Honor criteria), *with* 10 U.S.C. § 3746 (Silver Star); *see generally* SECNAV Instruction 1650.1H, at 2-21 to 2-34 (Navy and Marine Corps award criteria). Each medal communicates a unique message about the degree and type of valor, sacrifice, dedication, or skill involved and its relation to military tradition.

Military medals possess at a minimum the attributes of the Texas specialty license plates that rendered those plates government speech not subject to First Amendment scrutiny. *See Walker*, 135 S. Ct. at 2248-50. Military medals, which date back to the Revolutionary War, "long have communicated messages from" the government. *Id.* at 2248. The medals are "identified in the public mind" with the government and on "their faces" make clear their "governmental nature." *Id.* (internal citation omitted). The government also "maintains direct control over the messages conveyed," *id.* at 2249, through the establishment of specific criteria for awarding each medal and strict controls over their appearance and manufacture, *see supra* pp. 1-3.

The Purple Heart, for example, has its origins in the Revolutionary War. *See* David F. Burrelli, Cong. Research Serv., R42704, *The Purple Heart: Background and Issues for Congress* 2 (2012). It contains the profile of General

George Washington, the Washington Coat of Arms, and the words "FOR MILITARY MERIT."[3] Award of the Purple Heart is authorized by statute and regulation to those wounded or killed as a result of enemy action. 10 U.S.C. § 1129; SECNAV Instruction 1650.1H, at 2-27 to 2-28; *Award Manual* 23-26. The wound must have been of such severity that it required treatment by a medical officer. *Id.* Only manufacturers certified by the Institute of Heraldry may manufacture the Purple Heart, *see supra* pp. 2-3, and the Institute has established precise criteria for the medal's design and appearance, including criteria for color and size, *see Institute of Heraldry, Purple Heart*, *supra*. As a result, the medal conveys the government message that the recipient was wounded in action while advancing the military efforts of the United States and is therefore worthy of government commendation.

Section 704(a)'s prohibition against wearing military medals without authorization and with the intent to deceive is therefore a permissible regulation of government speech that is not subject to First Amendment scrutiny. That prohibition does not prevent individuals from voicing their views about the military, military valor, or military medals. The wearing

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[3] *See* Institute of Heraldry, *Purple Heart*, http://www.tioh.hqda.pentagon.mil/Catalog/Heraldry.aspx?HeraldryId=15254&CategoryId=3&grp=4&menu=Decorations%20and%20Medals&ps=24&p=0 (last visited July 28, 2015) (*Institute of Heraldry, Purple Heart*).

prohibition does not even prevent individuals from falsely claiming that they have been awarded a medal, so long as in doing so they do not wear a medal or colorable imitation with the intent to deceive. The wearing provision merely prevents conduct that undermines or misrepresents the government message conveyed by the medals. In fact, it is precisely because of their value in conveying a government message that individuals wear military medals. *See Walker*, 135 S. Ct. at 2249. When the government conveys its message through a private speaker, "it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995).

II. The Wearing Prohibition Is Constitutional Even If It Implicates The Free Speech Rights Of Private Individuals

Even if the wearing provision of 18 U.S.C. § 704(a) restricts expression by private individuals in a manner that implicates the Free Speech Clause, it survives First Amendment scrutiny.

A. The Wearing Prohibition Is Subject To Intermediate Scrutiny

Content-based restrictions on speech generally receive strict scrutiny, except for certain historically unprotected classes of speech, such as fraud, defamation, and obscenity. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733, 2738 (2011). But "not all laws that burden First Amendment rights are

subject to strict scrutiny." *Doe v. Reed*, 586 F.3d 671, 678 (9th Cir. 2009). To the extent it restricts free speech rights, the wearing prohibition should receive intermediate scrutiny.

1. The concurring Justices in *Alvarez* eschewed the "strict categorical analysis" of the plurality to focus more narrowly on "false statements about easily verifiable facts," concluding that intermediate scrutiny applies to prohibitions on that subcategory of false statements, even though strict scrutiny would likely apply to statutes "restricting false statements about philosophy, religion, history," and similar topics. 132 S. Ct. at 2551-52. The concurring opinion in *Alvarez* represents the holding of the Court. *United States v. Chappell*, 691 F.3d 388, 399 (4th Cir. 2012); *281 Care Comm. v. Arneson*, No. 08-CV-5215, 2013 WL 308901, at *6 (D. Minn. Jan. 25, 2013), *rev'd on other grounds*, 766 F.3d 774 (8th Cir. 2014). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal citation and quotations omitted); *see United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006). The *Alvarez* concurrence represents the "narrower holding, as it would find fewer statutes

unconstitutional while always enjoying the support of the majority." *281 Care Comm.*, 2013 WL 308901, at *6.

Alvarez accordingly requires that the wearing provision be evaluated under intermediate scrutiny. The wearing provision, to the extent it restricts speech, addresses false statements about an objectively verifiable fact—whether the wearer has been awarded a military honor.

2. The wearing provision is subject to intermediate scrutiny for a second reason as well. "The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S. 397, 406 (1989). Intermediate scrutiny applies to regulations that limit expressive conduct but are directed at advancing a governmental interest unrelated to the suppression of free speech. *Compare United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (applying intermediate scrutiny to regulation prohibiting the burning of a draft card), *and United States v. Tomsha-Miguel*, 766 F.3d 1041, 1048-49 (9th Cir. 2014) (intermediate scrutiny applied to false impersonation statute), *with Johnson*, 491 U.S. at 403 (applying strict scrutiny to prohibition on flag burning that is offensive to witnesses).

Any restrictions on speech that follow from the wearing prohibition of 18 U.S.C. § 704(a) are incidental to its primary purpose of protecting the

integrity of military medals and the military honor system. *Perelman*, 695 F.3d at 872-73. The wearing provision therefore should be subject to intermediate scrutiny under the reasoning of *O'Brien*. *Cf. San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 536-37 (1987) (intermediate scrutiny under *O'Brien* applied to statute restricting use of the word "Olympic").

In any event, under Justice Breyer's controlling concurrence in *Alvarez*, all prohibitions on false statements about objectively verifiable facts trigger intermediate scrutiny, whether those prohibitions restrict pure speech (as in *Alvarez*) or expressive conduct. This Court therefore need not undertake the "often difficult" task, *Porter v. Bowen*, 496 F.3d 1009, 1021, 1025 (9th Cir. 2007), of discerning whether the wearing prohibition is a restriction on expressive conduct of the type subject to intermediate scrutiny under *O'Brien*.[4]

B. The Wearing Prohibition Survives Intermediate Scrutiny

A court applying intermediate scrutiny must evaluate "the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the

[4] In *United States v. Hamilton*, 699 F.3d 356 (4th Cir. 2012), the Fourth Circuit concluded that the wearing provision of 18 U.S.C. § 704(a) survives strict scrutiny and therefore did not resolve whether the statute is a restriction on expressive conduct subject to intermediate scrutiny. *Id.* at 368-71. *Hamilton* did not address whether the *Alvarez* concurrence contains the Court's holding.

provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so." *Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring). The court ultimately must "determine whether the statute works speech-related harm that is out of proportion to its justifications." *Id.* A statute survives intermediate scrutiny if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 67 (2006) (internal citation omitted).

The wearing provision is substantially different from the Stolen Valor Act and therefore, in contrast, survives intermediate scrutiny. Its prohibitions are much narrower and work fewer (if any) speech-related harms; it serves governmental interests beyond those served by the Stolen Valor Act; and a closer fit exists between the statutory restriction and the governmental interests advanced.

1. The Wearing Prohibition Is Narrow And Works Minimal Speech-Related Harm

The "first step" in First Amendment analysis is "to construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). The wearing provision provides that anyone who "knowingly wears" a military honor or medal, "or any colorable imitation thereof, except when authorized

under regulations made pursuant to law," is subject to fine and imprisonment. 18 U.S.C. § 704(a). Several components of the statute substantially limit its reach.

First, the statute applies only to the act of "wearing" a military decoration or medal. To wear means "to bear or have on the person"; "to use habitually for clothing, adornment, or assistance"; "to carry on the person." *Merriam-Webster's Collegiate Dictionary* 1417 (11th ed. 2003). The statute therefore does not extend to someone who merely makes a false claim to have earned a medal orally or in writing. Nor does it even extend to someone who displays a medal in some manner to a third party but does not wear it.

Second, the statute applies only to the act of wearing a bona fide military medal or "any colorable imitation." 18 U.S.C. § 704(a). A colorable imitation is one that is "seemingly valid or genuine" or "intended to deceive." *Merriam-Webster's Collegiate Dictionary* 245 (11th ed. 2003); *cf.* 15 U.S.C. § 1127 (defining "colorable imitation" in trademark law as "any mark which so resembles a registered mark as to be likely to cause confusion or mistake or to deceive"). The statute therefore does not reach someone who falsely claims to have been awarded military honors but wears an obviously fake medal.

Third, the statute applies only when the wearer intends to deceive. *Perelman*, 695 F.3d at 870; *Hamilton*, 699 F.3d at 367-68. Although the statute

does not explicitly mention an intent to deceive, the text strongly supports that requirement. The statute reaches only those who act "knowingly" and covers wearing a "colorable imitation," which by definition contains a deceptive element. *See Merriam-Webster's Collegiate Dictionary*, *supra*, at 245. Congress therefore "made clear that deception was its targeted harm." *Perelman*, 695 F.3d at 870-71. Moreover, it is a "cardinal principle of statutory interpretation" that a statute should be construed to avoid serious doubts as to its constitutionality if such a construction is "fairly possible." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *see also Tomsha-Miguel*, 766 F.3d at 1049 (18 U.S.C. § 912 limited to impersonating a federal official or employee with the "intent to deceive"); *United States v. Karaouni*, 379 F.3d 1139, 1142 & n.7 (2004) (18 U.S.C. § 911 limited to false claims of U.S. citizenship "conveyed to someone with good reason to inquire into [defendant's] citizenship status"). The intent-to-deceive requirement in 18 U.S.C. § 704(a) follows "as a matter of pure statutory interpretation, constitutional avoidance, or both." *Perelman*, 695 F.3d at 870. A conviction for violating the wearing provision of 18 U.S.C. § 704(a) accordingly requires proof that the defendant intended to "make a third party believe something that was not true," *Swisher*, 771 F.3d at 522, and does not extend, for example, to a grieving spouse or parent wearing a medal at a

military funeral or an actor wearing a medal (or colorable imitation) on stage or screen, *Perelman*, 695 F.3d at 870.

As a result of these limitations, the wearing prohibition of 18 U.S.C. § 704(a) works minimal speech-related harm and is much narrower than the provision of the Stolen Valor Act struck down as unconstitutional in *Alvarez*. That provision reached anyone who "falsely represent[ed] himself or herself, verbally or in writing, to have been awarded" a military decoration or medal. 18 U.S.C. § 704(b) (2006). It proscribed "the *mere utterance or writing*" of a false statement, *Alvarez*, 617 F.3d at 1200, and therefore regulated "only words," *id.* at 1202 (citation omitted). That "sweeping" prohibition extended to private and personal statements made "in a barely audible whisper," *Alvarez*, 132 S. Ct. at 2547 (plurality opinion), as well as an off-the-cuff false statement, such as one made during an episode of "bar stool braggadocio," *id.* at 2555 (Breyer, J., concurring). In contrast, Section 704(a) requires that a defendant obtain an actual medal or a colorable imitation and then complete the affirmative act of affixing it to his or her person in a manner intended to deceive another. That use of a physical object requires concerted action and goes far beyond the type of private or personal conversations and extemporaneous false statements covered by the Stolen Valor Act.

2. The Wearing Prohibition Advances Compelling Government Interests

All members of the *Alvarez* Court concluded that the government has a compelling interest in preserving the integrity of the military honors system. *See* 132 S. Ct. at 2548-49 (plurality opinion); *id.* at 2555 (Breyer, J., concurring); *id.* at 2557-59 (Alito, J., dissenting). Military honors serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service. They convey to the public the high regard in which the government holds the individuals who have sacrificed in service to the Nation. Military honors also foster morale, mission accomplishment, and esprit de corps among service members.

False claims of receiving military honors tend to devalue and undermine those awards, and as a result, at a broad level, the wearing provision of 18 U.S.C. § 704(a) serves the government's interests in the same manner as the Stolen Valor Act. The wearing prohibition, however, accomplishes more. A military medal is the visual and tangible symbol of a military honor awarded to a service member. When individuals wear a military medal without authorization and with the intent to deceive, they cloak themselves with that sign of government commendation. In so doing, they corrupt the message the government intends to convey through the medal and undermine the medal's

communicative value. *Cf. Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 903-04 (9th Cir. 2002) (discussing dilution in trademark law). That conduct is more harmful than mere false speech.

The wearing provision also advances broader government interests in another respect. The wearing provision is one component of the larger regulatory scheme governing the award, design, manufacture, and sale of military medals. *See supra* pp. 2-4. Those regulations ensure that only medals of quality commensurate with their significance in the military honor system are produced and that those medals carry a particular message. The wearing prohibition of 18 U.S.C. § 704(a) prevents the dilution of the message that occurs when medals are worn without authorization and with the intent to deceive. The statute also reduces the secondary market for unlawfully-manufactured medals by prohibiting the deceptive use of colorable imitations. In this way, the wearing prohibition protects the integrity of the government processes for the award, design, manufacture, and sale of military medals.

3. There Is A Close Fit Between The Wearing Prohibition And The Government Interests Advanced

The wearing provision is narrowly targeted to the governmental interests it is intended to serve. As noted, those who wear a military medal or a colorable imitation with the intent to deceive distort and misappropriate the government message the medal is intended to convey. The perpetrator enjoys

the fruits of the government's substantial efforts to ensure that the medal effectively conveys the government's message. This conduct undermines that government regulatory scheme and at the same time undermines and dilutes the value of all medals. The wearing provision is therefore fully congruent with the harm that it is intended to remedy.

Alternative remedies would be substantially less effective in serving these interests. In *Alvarez*, the plurality focused on a government database of medal winners as a viable alternative to the Stolen Valor Act. 132 S. Ct. at 2551. Such a database, however, would not be effective in advancing the governmental interests served by the wearing provision. Once an individual wears a military medal or a colorable imitation with the intent to deceive, the harm is accomplished. Even if the deceit is uncovered at a later point, or even contemporaneously, the ability of a military medal to convey the government message as intended has been compromised. If individuals are free to wear a military medal for purposes of deceit, the public no longer can trust a medal as a symbol of government commendation, whether or not there exists a database of actual award recipients.

III. Comparison With Other Statutes Recognized As Constitutional Confirms The Constitutionality Of The Wearing Prohibition

The wearing prohibition of 18 U.S.C. § 704(a) is substantially similar to statutes that the Supreme Court and this Court have recognized as

constitutional. Comparison with those statutes confirms that the government may lawfully prevent individuals from using its valued symbols to convey a fraudulent impression to others.

A. Trademark Protections And Similar Laws

The Lanham Act proscribes the use of words or symbols in a manner likely to deceive or cause confusion with respect to affiliation or association with another person or the source, origin, or approval of goods or services. *See* 15 U.S.C. §§ 1114, 1125; *see Multi Time Machine, Inc. v. Amazon.com*, No. 13-55575, 2015 WL 4068877, at *3 (9th Cir. July 6, 2015). The statute is well recognized as constitutional, although given a limiting construction when applied to artistic works. *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008).

Congress has also enacted separate statutes proscribing the use of particular words, phrases, or symbols. *See San Francisco Arts & Athletics, Inc.*, 483 U.S. at 532 n.8 (citing statutes); *American Legion v. Matthew*, 144 F.3d 498, 499-500 (7th Cir. 1998) (same). The United States Olympic Committee, for example, has been granted the exclusive right to use the word "Olympic" and the five-ring Olympic symbol, 36 U.S.C. § 220506(a), and may prevent their use "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition," 36

U.S.C. § 220506(c)(1). The names and emblems of the Social Security Administration and Medicare similarly may not be used in a manner that conveys the false impression of approval or authorization. 42 U.S.C. § 1320b-10(a)(1). Similarly, it is a crime to use the names of federal agencies, such as "Federal Bureau of Investigation" or "Drug Enforcement Agency," "in a manner reasonably calculated to convey the impression" of approval, endorsement, or authorization, 18 U.S.C. § 709; to display a government seal, such as the great seal of the United States or the seal of the President, "for the purpose of conveying, or in a manner reasonably calculated to convey, a false impression of sponsorship or approval by the Government of the United States," 18 U.S.C. § 713; or to use the sign of the Red Cross for purposes of deception, 18 U.S.C. § 706.

To the extent courts have evaluated the constitutionality of these statutes, they have been upheld. Applying intermediate scrutiny, the Supreme Court upheld restrictions on use of the word "Olympic" for commercial and promotional activities, even when the use does not tend to cause confusion. *San Francisco Arts & Athletics, Inc.*, 483 U.S. at 532-41. The Court concluded that the restrictions are sufficiently tailored to serve the government's substantial interest in supporting the important activities of the U.S. Olympic Committee. *Id.* at 536-41. In *Alvarez*, the plurality cited with approval the

prohibition on unauthorized use of federal agency names, 18 U.S.C. § 709, suggesting that the statute is constitutional because it maintains the general good repute and dignity of government service and "protect[s] the integrity of Government processes." 132 S.Ct. at 2546; *see Chappell*, 691 F.3d at 397. The courts of appeals also have upheld the prohibition against using the words "Social Security" in a manner that the speaker knows or should know would convey the false impression of governmental endorsement, approval, or authorization. *United Seniors Ass'n, Inc. v. Soc. Sec. Admin.*, 423 F.3d 397, 407 (4th Cir. 2005); *Nat'l Taxpayers Union v. Soc. Sec. Admin.*, 302 Fed. Appx. 115, 118-20 (3d Cir. 2008) (unpublished).

The wearing prohibition of 18 U.S.C. § 704(a) functions similarly to these laws and is constitutional for the same reasons. Like the prohibitions against using the names of government agencies and programs in a deceptive manner, the wearing provision prevents misappropriation of governmental approbation and maintains the integrity of government processes, namely the extensive government procedures for awarding, designing, and manufacturing the quality of military medals. And like trademark law and the prohibitions on using the word "Olympic," the wearing provision ensures that the government receives the benefit of its own efforts in creating medals that convey specific meaning, so that the medals continue to serve the important purposes of the

military honor system. The wearing provision in effect protects the government's "legitimate property right" in the medals. *San Francisco Arts & Athletics, Inc.*, 483 U.S. at 541.

The concurring Justices in *Alvarez* recognized that "[s]tatutes prohibiting trademark infringement present, perhaps, the closest analogy to" the Stolen Valor Act. 132 S. Ct. at 2554. Just as trademark infringement "causes harm by causing confusion among potential customers (about the source) and thereby diluting the value of the mark to its owner, to consumers, and to the economy," a "false claim of possession of a medal or other honor creates confusion about who is entitled to wear it, thus diluting its value to those who have earned it, to their families, and to their country." *Id.* Yet the concurring Justices concluded that trademark statutes were not sufficiently analogous to the Stolen Valor Act because they are "focused on commercial and promotional *activities* that are likely to dilute the value of the mark" and "typically require a showing of likely confusion." *Id.* (emphasis added).

The wearing provision of 18 U.S.C. § 704(a), however, shares the attributes of trademark law missing from the Stolen Valor Act. Just as trademark law proscribes certain uses of symbols that "identify and distinguish the services of one person" from those of another or "indicat[e] membership in . . . an association, or other organization," 15 U.S.C. § 1127, *see* 15 U.S.C.

§ 1114(1)(a), the wearing provision likewise prohibits use of a symbol that identifies those who are part of a select group the government has deemed worthy of recognition. Thus, in contrast to the Stolen Valor Act's focus on written or verbal speech, the wearing provision focuses on activity (wearing) likely to dilute the value of the medal. The wearing provision also applies only in contexts where there is a likelihood of confusion; the defendant must possess an intent to deceive and wear either a bona fide medal or a "colorable imitation." In fact the very term "colorable imitation" is used in and echoes trademark law. 15 U.S.C. §§ 1114(1)(b), 1127. If a statute that supports the activities of the U.S. Olympic Committee through restrictions on use of the word "Olympic" survives intermediate scrutiny, then so too must a statute that serves the military efforts of the United States through restrictions on wearing military medals with the intent to deceive.

B. False Impersonation Statutes

A number of federal (and state) statutes criminalize false impersonation. *See Chappell*, 691 F.3d at 397-98 (citing statutes in rejecting constitutional challenge to Virginia false impersonation statute). It is unlawful, for example, to "falsely assume[] or pretend[] to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and act[] as such." 18 U.S.C. § 912. A "financial or property loss" need not be

proved to establish a violation of 18 U.S.C. § 912. *United States v. Lepowitch*, 318 U.S. 702, 704 (1943) (citation omitted).

All nine Justices recognized the constitutionality of 18 U.S.C. § 912 in *Alvarez*. 132 S.Ct. at 2546-47 (plurality); *id.* at 2554 (Breyer, J., concurring); *id.* at 2561–62 (Alito, J., dissenting); *see Chappell*, 691 F.3d at 397. The plurality emphasized that Section 912 "protect[s] the integrity of Government processes" and is "confined to 'maintain[ing] the general good repute and dignity of . . . government . . . service itself.'" 132 S. Ct. at 2546 (quoting *Lepowitch*, 318 U.S. at 704). The concurring Justices observed that "[s]tatutes forbidding impersonation of a public official typically focus on *acts* of impersonation, not mere speech, and may require a showing" of deception. *Id.* at 2554.

This Court subsequently made clear that 18 U.S.C. § 912 is constitutional. *Tomsha-Miguel*, 766 F.3d at 1048-49 & n.3. The Court held that the statute "survives intermediate scrutiny" because it "promotes the goals of governmental integrity and maintaining the good repute of governmental service by prohibiting the false impersonation of government officials." *Id.* at 1049. The Court further concluded that the statute would also survive strict scrutiny, because "it is justified by a compelling governmental interest in the

integrity of government processes and it is narrowly tailored to address only intentionally deceptive conduct." *Id.* at 1049 n.3.

The wearing provision of 18 U.S.C. § 704(a) serves similar ends and is likewise constitutional. In fact, in *Alvarez,* this Court concluded that the Stolen Valor Act would likely survive First Amendment scrutiny if it were "redraft[ed] . . . to target actual impersonation." 617 F.3d at 1217. The wearing provision does just that, in effect prohibiting the impersonation of a medal recipient.

C. Restrictions On Wearing Governmental Uniforms

Under federal law, it is unlawful to wear the uniform of any of the armed forces "without authority." 18 U.S.C. § 702; *see also* 18 U.S.C. § 703 (deceptive wearing of foreign uniforms). In *Schacht v. United States*, 398 U.S. 58 (1970), the Supreme Court noted that its "previous cases would seem to make it clear that 18 U.S.C. § 702 . . . is, standing alone, a valid statute on its face." *Id.* at 61. In support of that conclusion, the Court cited *United States v. O'Brien*, 391 U.S. 367 (1968), which applied intermediate scrutiny and upheld a law that prohibited destroying or mutilating a draft card.

The recognized constitutionality of 18 U.S.C. § 702 strongly supports the conclusion that the wearing provision of 18 U.S.C. § 704(a) also is constitutional. *See Alvarez*, 132 S. Ct. at 2558 (Alito, J., dissenting) ("Although

this Court has never opined on the constitutionality of [18 U.S.C. § 704(a)], we have said that § 702 . . . is 'a valid statute on its face.'") (quoting *Schacht*); *Perelman*, 695 F.3d at 872 ("The Supreme Court's dictum concerning § 702 strongly suggests that, like that statute, § 704(a) 'is, standing alone, a valid statute on its face.'") (quoting *Schacht*). In fact, the Fourth Circuit has addressed the constitutionality of both Section 702 and Section 704(a), referring to them collectively as "the insignia statutes," and concluded that many of the same considerations support the constitutionality of both statutes, even under "the most exacting scrutiny." *Hamilton*, 699 F.3d at 371-74 & n.20.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH REQUIREMENTS

1. On June 12, 2015, the Court granted the parties leave to file supplemental briefs of no more than 7,000 words. This brief contains 6,977 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced, 14-point serif typeface using Microsoft Office Word 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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