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Stare What: The Fourth Circuit's Questionable Holding in U.S. v. Hamilton

Alice K. Womack

NOTE

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ALICE K. WOMACK[1]

INTRODUCTION

By the end of 2010, United States military personnel totaled 1.42 million, representing both active duty and reservists currently serving.[2] For the same year, the Department of Veterans Affairs projected 22.7 million total living veterans of the age of 17 years and older.[3] As a single demographic, active duty military personnel and veterans represented 7.8% of the U.S. population in 2010.[4] In an effort to protect the honor of military service, Congress passed the Stolen Valor Act of 2005 ("the Act") in late 2006.[5] President Bush signed the law into effect on December 20, 2006.[6]

Section (a) of the Act outlawed, among other things, "wear[ing] . . . any decoration or medal authorized by Congress for the armed forces of the United States, . . . except when authorized under regulations made pursuant to law[.]"[7] Section (b) of the Act made it a crime to "falsely represent[ ] . . . verbally or in writing, to have been awarded any decoration or medal[.]"[8]

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1. The author is a law student at North Carolina Central School of Law and lives in Raleigh, North Carolina with her long-suffering and supportive husband. The author would like to thank the North Carolina Central Law Review staff for their assistance with this article.

2. U.S. Dep't of Def., Population Representation in the Military Services (2010) [hereinafter Military Population Report], *available at* http://prhome.defense.gov/RFM/MPP/ACCESSION%20POLICY/PopRep2010/summary/Sect_I.pdf.

3. Nat'l Ctr. for Veterans Analysis & Statistics, Veteran Population Projections: FY2000 to FY2036 (U.S. Dep't of Veterans Affairs, Dec. 2010), *available at* http://www.va.gov/VETDATA/docs/QuickFacts/population-slideshow.pdf [hereinafter Veteran Population Projections].

4. *See* U.S. Census (2010), Military Population Report, *supra* note 2, and Veteran Population Projections, *supra* note 3.

5. Library of Cong., Major Congressional Actions, *available at* http://thomas.loc.gov (follow "Advanced Search" hyperlink; then follow "109" hyperlink for the 109th Congress; then follow "Search Bill Summary and Status" hyperlink; then search "S. 1998" in the keyword search; then follow "Major Congressional Actions" hyperlink).

6. Library of Cong., *supra* note 5; *See also* 18 U.S.C.A. § 704 (West 2012).

7. 18 U.S.C.A. § 704(a) (West 2012).

8. 18 U.S.C.A. § 704(b) (West 2012).

In June 2012, the United States Supreme Court decided the case of *U.S. v. Alvarez* – a constitutional attack on Section (b) of the Act.[9] In *Alvarez*, the Court determined that Section (b) unconstitutionally proscribed speech and infringed on the First Amendment rights of Respondent Alvarez.[10] The Court ruled that Section (b), therefore, was invalid.[11]

Subsequent to the *Alvarez* decision, the United States Court of Appeals for the Fourth Circuit issued its decision in *United States v. Hamilton*.[12] *Hamilton* was, in part, a constitutional attack on Section (a) of the Act.[13] The Fourth Circuit ruled that Section (a) of the Act did not unconstitutionally infringe on the First Amendment rights of Appellant Hamilton.[14] Thus, the Fourth Circuit upheld the validity of Section (a) of the Act.[15]

This Comment argues that the Fourth Circuit's decision in *Hamilton* was inconsistent with the Supreme Court's decision in *Alvarez*. Because the *Alvarez* decision analyzed Section (b) of the Act, the Court in *Hamilton* narrowly applied the ruling in *Alvarez* to only apply to "speech-related prohibitions" and not "the conduct-related prohibitions" as described in Section (a) of the Act. In so doing, the Fourth Circuit: (1) contorted the reasoning underlying the Supreme Court's opinion, thus misapplying the traditional free speech analysis; and (2) patently ignored addressing significant inconsistencies within its own opinion.

Part I of this Comment explains the factual and procedural background of *U.S. v. Hamilton*. Part II then explains the legal background which existed at the time the Fourth Circuit decided *Hamilton*. Finally, Part III analyzes the Fourth Circuit's opinion in *Hamilton* using the Supreme Court's rationale in *Alvarez* as binding precedent.

I. FACTUAL AND PROCEDURAL BACKGROUND OF *U.S. V. HAMILTON*

The Court began its decision "by describing Hamilton's military career, which provide[d] the factual context for the . . . charges against him."[16] "In July 1961, Hamilton enlisted in the United States Marine Corps."[17] In 1962, Hamilton injured his hand and had portions of two

9. U.S. v. Alvarez, 132 S. Ct. 2537, 2537-39 (2012).
10. *Id.* at 2542-43.
11. *Id.* at 2543.
12. United States v. Hamilton, 699 F.3d 356 (4th Cir. 2012).
13. *Id.* at 358, 366.
14. *Id.* at 374.
15. *Id.*
16. *Id.* at 359.
17. *Id.*

of his fingers amputated.[18] Subsequently, he was "honorably discharged with the rank of private first class. . . Hamilton served a total of nine months and twelve days of active duty."[19] "During his active duty, Hamilton did not serve in combat or receive any awards, was not commissioned as an officer, and was not deployed outside the United States."[20]

"The facts underlying Hamilton's [Section (a)] conviction[ ] relate to his appearance at a Vietnam Veterans' Recognition Ceremony . . . . organized by a local chapter of the Vietnam Veterans' Association of America."[21] Hamilton contacted the organizer of the ceremony and "offered to help in performing any tasks associated with the ceremony. During this conversation, Hamilton discussed his fictitious service in Vietnam and the military awards he purportedly had received."[22] Subsequently, the guest speaker scheduled for the ceremony cancelled his appearance.[23] The organizer then asked Hamilton if he would like to speak at the ceremony, in lieu of the guest speaker.[24] At that time, the organizer explained to Hamilton that the "'uniform of the day' was 'service dress blue.'"[25] At the ceremony, Hamilton wore "the uniform of a United States Marine colonel, including an officer's sword and belt, and white gloves. The uniform Hamilton wore was adorned with many medals, ribbons, stars, and rank insignia. Hamilton had not been awarded any of the military medals he displayed, which included two Navy Crosses, four Silver Stars, one Bronze Star, and seven Purple Hearts[.]"[26]

At trial, Hamilton was convicted by a jury of "wearing military medals and other insignia . . . without authorization, in violation of 18 U.S.C. § 704(a) and (d)."[27] Section (a) of the Act "provides that '[w]hoever knowingly wears . . . any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces . . . or any colorable imitation thereof, except when authorized under regulations made pursuant to law,' is subject to a monetary fine or to a term of imprisonment not exceeding six months."[28] Section (d) of the Act establishes enhanced penalties of imprisonment not exceeding

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 365.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 358.
28. *Id.* at 367 (citing 18 U.S.C. § 704(a)).

one year if certain insignia (including the Purple Hearts, Navy Crosses, and Silver Stars worn by Hamilton) are worn in contravention of Section (a).[29]

Following his conviction, Hamilton appealed to the Fourth Circuit Court of Appeals claiming, among other things, that Section (a) of the Stolen Valor Act unconstitutionally infringed on his First Amendment rights.[30] The Fourth Circuit upheld Hamilton's conviction.[31] In its decision, the Fourth Circuit followed the traditional free speech framework outlined in Part II of this Comment and seemingly applied the Supreme Court's decision in *Alvarez* (decided less than five months earlier). Part III of this Comment, however, analyzes the Fourth Circuit's decision and argues that the Court misapplied the Supreme Court's analysis regarding the Government's burden and also contradicted its own logic in zealously upholding Section (a) of the Stolen Valor Act.

II. BACKGROUND

A. *Free Speech Framework*

"Congress shall make no law . . . abridging the freedom of speech[.]"[32] These ten words, memorialized in the First Amendment of the United States Constitution, have been the subject of inestimable volumes of scholarly and judicial writing since the First Amendment went into effect in 1791. Over time, the Supreme Court developed a framework for courts to employ in determining whether an act of Congress infringes on the rights guaranteed by the First Amendment.[33] In order to analyze the Fourth Circuit's decision in *Hamilton*, it is important to first understand the framework employed by the courts in any free speech analysis.

At the outset, it is important to understand the distinctions between "pure speech" and "expressive conduct." *Black's Law Dictionary* defines "pure speech" as "[w]ords or conduct limited in form to what is necessary to convey the idea."[34] Laws which proscribe "pure speech" are reviewed by the court with the most exacting scrutiny because those laws are typically manifested as "content-based" restrictions on speech.[35] On the other hand, expressive conduct or "symbolic

29. 18 U.S.C.A. § 704(d) (West 2012).
30. *Hamilton* at 358.
31. *Id.* at 376.
32. U.S. CONST. amend. I.
33. *See, e.g.*, U.S. v. O'Brien, 391 U.S. 367 (1968); Texas v. Johnson, 491 U.S. 397 (1989); Tinker v. Des Moines, 393 U.S. 503 (1969); and *Alvarez*, 132 S. Ct. 2537 (2012).
34. BLACK'S LAW DICTIONARY 1529 (9th ed. 2009).
35. See, *e.g.*, Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622 (1994); *Tinker*, 393 U.S. 503 (1969).

speech" is typically an action done by an individual that expresses a thought or idea.[36] The difficulty, of course, is in determining when proscribed conduct is truly expressive and when it is just conduct. For example, littering is an act done by an individual. If a person throws a piece of trash on his neighbor's yard, has that person expressed a thought? Probably not. If, however, a person dumps an entire trash can full of trash on the yard of the Director of Waste Management, the conduct was likely undertaken to communicate an idea. While the Supreme Court has applied the strictest of scrutiny to laws that infringe on "pure speech," the Court has applied a different test to "expressive conduct" because often the laws were designed to proscribe the conduct, itself, and not the content of the message.[37]

The first step, therefore, is for the court to determine whether the law proscribes pure speech or expressive conduct. Next, the court determines whether to review the law with the most exacting scrutiny or whether to review the law with the more lenient intermediate scrutiny set out by the Supreme Court in its *United States v. O'Brien* decision.[38] Exacting scrutiny "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality."[39]

In *O'Brien*, the Supreme Court rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[40] Under the *O'Brien* framework, a law that proscribes expressive conduct is valid "[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[41] In essence, the *O'Brien* decision allowed for laws that proscribed conduct, so long as the government had a substantial interest in controlling that conduct and the government's interest was not related to the expression of ideas. When, however, the court determines that the law was designed to be a restriction on expression, then the law is scrutinized as a proscription of "pure speech" and the government must "bear the burden of showing [the

36. *See, e.g., O'Brien*, 391 U.S. 367 (1968) (draft card burned to protest the Vietnam War and Selective Service); *see also Johnson*, 491 U.S. 397 (1989) (burning of the American flag during a protest rally).

37. *See, e.g., O'Brien*, 391 U.S. 367 (1968).

38. *Id.* at 367-77.

39. Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) (internal citations omitted).

40. *O'Brien*, 391 U.S. at 376.

41. *Id.* at 377.

law's] constitutionality."[42][43] Applying the *O'Brien* analysis to the littering example above, the government's laws proscribing littering on the lawns of others would be valid so long as the government did not pass those laws, for example, in order to stop citizens from expressing their dislike of the Director of Waste Management.

Proving the law's constitutionality is the final step in the analysis. The burden at this phase is on the Government.[44] The Government has two possible options to prove the constitutionality of the law: (1) the Government can argue that the law fits into one of the established exceptions to free speech embraced by traditional jurisprudence; or (2) the Government can establish compelling proof that the law is "actually necessary" to achieve the Government's compelling interest and is the "least restrictive means" by which to protect such interest.[45] "Among [the established exceptions] . . . are advocacy intended, and likely to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent."[46] These exceptions "have a historical foundation in the Court's free speech tradition" and the government is entitled to reasonable proscription of speech that falls within one of these categories.[47]

The second option for the Government is to establish that the Government has a compelling interest and that the law enacted is "actually necessary" to achieve its interest.[48] "There must be a direct causal link between the restriction imposed and the injury to be prevented."[49] If the law restricts pure speech and the government is unable to prove that the law falls within one of the above-mentioned exceptions or is "actually necessary" to achieve a compelling interest, then the court must deem the law an unconstitutional infringement on the First Amendment.[50]

It is under this general framework of free speech jurisprudence that the Supreme Court ruled in *Alvarez*. The next section, therefore, will analyze the Court's decision in *Alvarez* to determine: (1) whether the

42. *Ashcroft*, 542 U.S. at 660 (internal citations omitted).

43. *See, e.g.,* Tinker v. Des Moines, 393 U.S. 503 (1969); Texas v. Johnson, 491 U.S. 397 (1989); U.S. v. Alvarez, 132 S. Ct. 2537 (2012).

44. *Ashcroft*, 542 U.S. at 660 ("content-based restrictions on speech [are] presumed invalid, and [ ] the Government bear[s] the burden of showing their constitutionality.") (internal citations omitted).

45. *See Alvarez*, 132 S. Ct. 2537 (2012).

46. *Id.* at 2544 (internal citations and punctuation omitted).

47. *Id.*

48. *Id.* at 2549 (citing Brown v. Entertainment Merchants Ass., 564 U.S. —, —, 131 S.Ct. 2729, 2738 (2011).

49. *Id.*

50. *See, e.g., Alvarez*, 132 S. Ct. 2537 (2012).

Court deviated from the traditional framework; and (2) if so, the decision's impact on the free speech analysis moving forward.

B. United States v. Alvarez

In 2007, Xavier Alvarez "attended [a] . . . public meeting as a board member of the Three Valley Water District Board."[51] At the meeting, Alvarez claimed he was "a retired marine of 25 years" and had been awarded the Congressional Medal of Honor for being "wounded many times by the same guy."[52] These statements were not true; and Alvarez "was indicted under the Stolen Valor Act for lying about the Congressional Medal of Honor at the meeting."[53] Because the lie involved the Congressional Medal of Honor, Alvarez was subject to an enhanced penalty under Section (c) of the Act.[54] Alvarez disputed the constitutionality of Section (b) of the Act and the District Court for the Central District of California rejected his claim.[55] Thereafter, Alvarez "pleaded guilty to one count, reserving the right to appeal on his First Amendment claim."[56] The Ninth Circuit Court of Appeals agreed with Alvarez that the law was unconstitutional and reversed his conviction.[57] The Supreme Court issued its decision on June 28, 2012 and ruled that the Act was an unconstitutional restriction on free speech.[58]

Because Section (b) of the Act makes it illegal to "falsely represent[ ] . . . verbally or in writing, to have been awarded any decoration or medal," the Court determined the act was a proscription on "pure speech."[59] As a restriction on "pure speech," the Government "bear[s] the burden of showing [its] constitutionality."[60] To meet this burden, the Government contended, "false statements have no value and hence no First Amendment protection."[61] To support its conclusion, the Government cited language from several Supreme Court cases that shed some doubt on whether false statements are afforded the same protection as truthful statements.[62]

The Supreme Court disagreed with the Government, however, and explained that there is a "common understanding that some false

51. *Id.* at 2542.
52. *Id.* (citing U.S. v. Alvarez, 617 F.3d 1198, 1201 –1202 (C.A. 2010)).
53. *Id.*
54. *Id.* at 2543.
55. *Id.* at 2542.
56. *Id.*
57. *Id.* (citing *Alvarez*, 617 F.3d at 1218).
58. *Id.* at 2543.
59. *Id.* (citing 18 U.S.C. § 704(b)).
60. *Id.* at 2544 (internal citations omitted).
61. *Id.*
62. *Id.* at 2544-45.

statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[63] Likewise, the Court pointed out that the quotations relied upon by the Government "all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation."[64] The statements made by Alvarez, however, did not "seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal."[65] The Court categorically refused to accept the Government's contention that all false statements are capable of restriction and should be included in the list of proscriptive exceptions.[66]

Without false statements being included in the categories capable of being proscribed, the Government had the burden of establishing a compelling governmental interest and proving the Act was "actually necessary" to achieve that interest.[67] The Government contended "military medals 'serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service,' and also 'foste[r] morale, mission accomplishment and esprit de corps' among service members.'"[68] While the Government conceded "that 'an isolated misrepresentation by itself would not tarnish the meaning of military honors,'" the Government argued that "it is 'common sense that false representations have the tendency to dilute the value and meaning of military awards.'"[69] The Court agreed that the Government had a compelling interest in protecting the military honors system.[70] The Government then had the burden to show "the Government's chosen restriction on the speech at issue [was] 'actually necessary' to achieve its interest."[71]

The Court did not accept that proscribing speech was "actually necessary" to protect the military honors system.[72] The Court accepted that "the lie might harm the Government by demeaning the high purpose of the award, diminishing the honor it confirms and creating the appearance that the [Congressional Medal of Honor] is awarded more

63. *Id.* at 2544.
64. *Id.* at 2545.
65. *Id.* at 2542.
66. *Id.* at 2546-47.
67. *Id.* at 2549 (citing Brown v. Entertainment Merchants Ass., 564 U.S. —, —, 131 S.Ct. 2729, 2738 (2011)).
68. *Id.* at 2548 (quoting Brief for United States at 37, 38).
69. *Id.* at 2549 (quoting Brief for United States at 49, 54).
70. *Id.*
71. *Id.* (citing Entertainment Merchants Ass., 564 U.S., at —, 131 S.Ct. at 2738).
72. *Id.*

often than is true." The Court, however, determined that "these interests do not satisfy the Government's heavy burden when it seeks to regulate protected speech. The Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez."[73] Therefore, the Court ruled that the necessary causal link between the Act and the interest the Government wished to protect was lacking.[74] As such, the Act was an invalid infringement on the First Amendment rights of Alvarez.[75]

The decision of the Court did not end there. The Court pointed to other ways that the Government's interest could be protected without proscribing speech in the Stolen Valor Act.[76] First, the Court suggested that counterspeech would be sufficient to "overcome the lie."[77] "The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest . . . . Once the lie was made public, [Alvarez] was ridiculed online, his actions were reported in the press, and a fellow board member called for his resignation. There is good reason to believe that a similar fate would befall other false claimants."[78] Second, the Court suggested that the Government create a database, which "could list Congressional Medal of Honor winners."[79] This, in the Court's view, would be a "less . . . restrictive means by which the Government could likely protect the integrity of the military awards system."[80] Despite potential criticisms of the two suggestions by the Government, the Court held that "there has been no clear showing of the necessity of the statute, the necessity required by exacting scrutiny[ ]" and upheld the decision of the Court of Appeals, invalidating Section (b) of the Stolen Valor Act of 2005.[81]

In *Alvarez*, the Court relied exclusively on the traditional free speech framework outlined in Subsection (a) hereinabove. The Court first concluded that "pure speech" was impacted by the Act.[82] Next, the Court shifted the burden to the Government to prove either: (1) the Act fell into one of the historical categories which allow for proscription; or (2) the Stolen Valor Act was "actually necessary" to protect the Government's "compelling interest."[83] The Court concluded

73. *Id.* (internal citations omitted)
74. *Id.* at 2549.
75. *Id.* at 2549-51.
76. *Id.* at 2549-51.
77. *Id.* at 2549.
78. *Id.* at 2549-50 (internal citations omitted).
79. *Id.* at 2551.
80. *Id.*
81. *Id.*
82. *Id.* at 2543.
83. *Id.* at 2544-49.

that the Government was unable to meet its burden and found that Section (b) of the Act was invalid as an unconstitutional infringement on the First Amendment.[84] Furthermore, the Court emphasized that false speech was afforded the same protections as truthful speech and that "the First Amendment . . . protects the speech we detest as well as the speech we embrace."[85] With this analysis and the Court's legal conclusions in mind, this Comment now turns to an analysis of the Fourth Circuit's decision in *United States v. Hamilton*.

III. ANALYSIS

The Fourth Circuit started its analysis in *Hamilton* by considering "the range of conduct covered by the statute[ ]."[86] Within this portion of the decision, the Fourth Circuit explained that "[t]he government acknowledges that a broad reading of the insignia statute[ ] could 'raise serious constitutional concerns,' because such a reading would prohibit anyone from wearing a military medal who did not validly receive it . . . . [F]or example, it would be unlawful for grandchildren to wear their grandparents' medals during a Veterans Day parade[.]"[87] Therefore, the Court applied a "limiting construction" to Section (a) of the Act, creating "a criminal offense prohibiting the unauthorized wearing of military medals only when the wearer 'has the intent to deceive.'"[88] Such a limiting construction, the Court held, upheld Congress's "intent that application of the statute be restricted to avoid absurd results."[89]

The Court then determined which level of scrutiny to apply to the Act.[90] The Court acknowledged that the Supreme Court had applied exacting scrutiny in *Alvarez*.[91] Given, however, that *Alvarez* involved "pure speech" and *Hamilton* involves "expressive conduct," the Court had to start its scrutiny determination with a discussion of the *O'Brien* framework.[92] Applying the *O'Brien* framework, the Court encountered a conundrum.[93] If the Act was designed by Congress to proscribe *the conduct* of wearing a military medal without authorization, then Section (a) of the Act could surely withstand the more lenient scrutiny outlined in *O'Brien*. If, however, the Act was designed to stop people from wearing a medal, without authorization, *with an in-*

84. *Id.* at 2544-51.
85. *Id.* at 2545, 2551.
86. U.S. v. Hamilton, 699 F.3d 356, 367 (2012).
87. *Id.*
88. *Id.* at 368 (quoting United States v. Perelman, 658 F.3d 1134, 1137 38 (9th Cir. 2011)).
89. *Id.* at 368.
90. *Id.*
91. *Id.* (citing U.S. v. Alvarez, 132 S.Ct 2537, 2548 (2012)).
92. *Id.* at 369.
93. *Id.* at 370.

tent to deceive, then the conduct itself was not proscribed, but the untruthful message communicated by the conduct. "Thus, in applying the insignia statute[ ] only to intentionally deceptive conduct based on the limiting construction[,] . . . [this] statute[ ] could reach conduct that solely involves free expression[.]"[94] The Court determined that it could uphold the statute regardless of which level of scrutiny to apply, so the Fourth Circuit decided to apply the "most exacting scrutiny" standard, while refusing to resolve which standard would be most appropriate.[95]

Herein lies the first problem in the Fourth Circuit's decision. The Court acknowledges the difficulty caused by its own statutory interpretation;[96] however, the Court refuses to decide which level of scrutiny should be applied in its analysis to Section (a) of the Act.[97] Instead, the Court applies the strictest level without determining if it is truly the correct application,[98] in order, it appears, to avoid a potential issue for appeal. In so doing, the Court has unnecessarily muddied the waters. The Fourth Circuit recognized that by giving the limiting construction to the statute, it interpreted the statute to be a restriction on free expression.[99] Statutes are only given the more lenient standard in *O'Brien* "if the governmental interest is unrelated to the suppression of free expression[.]"[100] The Court's limiting construction forced the Fourth Circuit to admit that the statute was "necessarily . . . related to the suppression of free expression."[101] Therefore, only the most exacting scrutiny should be applied and the Court should have resolved the scrutiny standard in its analysis.

Next, the Court determined "whether the government's interests underlying the insignia statute[ ] are 'compelling.'"[102] The Court determined that "[t]he intentionally deceptive wearing of . . . military medals . . . could diminish the symbolic value of these items. Deceptive actions of this nature also frustrate the government's efforts to ensure that members of the military and the general public perceive military honors as being awarded only to a limited number of deserving recipients."[103] The Fourth Circuit acknowledged the Supreme Court's opinion in *Alvarez* and noted that the Supreme Court found "that the government's interest in 'protecting the integrity of the

94. *Id.* at 370-71.
95. *Id.* at 371.
96. *Id.* at 370.
97. *Id.* at 371.
98. *Id.*
99. *Id.* at 370.
100. U.S. v. O'Brien, 391 U.S. 367, 377 (1968).
101. *Hamilton*, 699 F.3d at 370.
102. *Id.* at 371.
103. *Id.*

Medal of Honor is beyond question'" and characterized "that interest as 'compelling.'"[104] Therefore, both the Supreme Court in *Alvarez* and the Fourth Circuit in *Hamilton* agreed that the government has a compelling interest in protecting the military honors system.

The next step in the analysis, however, is whether Section (a) of the Act is "actually necessary" to protect the government's compelling interest. It is in this section of the opinion that the Fourth Circuit went awry. In *Alvarez*, the Supreme Court determined that the Government could produce no evidence that "the public's general perception of military awards is diluted by false claims[.]"[105] The Court in *Hamilton* did not require the government to produce any evidence of its claim that the military honor system was diluted when people wore military medals. Instead, the Fourth Circuit relied entirely on the assumption that such dilution is a fact.[106] To overcome this gaping hole in its decision, the Court instead explained how the two suggestions and by the Supreme Court in *Alvarez* – counterspeech and an online database of military honors – would not be sufficient in *Hamilton*'s expressive conduct case.[107]

First, the Fourth Circuit determined that "the wearing of an unearned medal . . . is more convincing evidence of such actual attainment than words alone, by constituting ostensible, visual 'confirmation' that the wearer earned such honors. As expressed by a familiar adage, 'seeing is believing.'"[108] The Fourth Circuit points to no evidence to support its conclusion, except to state that "the remedy of 'counterspeech' discussed in *Alvarez* would be much less effective in the present context . . . . Although speech may effectively counter other matters that a person hears, speech may not effectively counter that which a person sees."[109] If the Fourth Circuit's logic is to be believed, then children would never outgrow their belief in Santa Claus. After all, most children, by the time they learn that Santa does not exist, have encountered him at the mall or ringing a bell for the Salvation Army. In essence, these children have received "visual confirmation" that Santa Claus exists. And yet, at some point, children hear counterspeech from other children or from their parents that Santa Claus does not exist. It is entirely because counterspeech is so effective – even to counter "visual confirmations" – that children do outgrow their belief in Santa Claus. The Fourth Circuit, in order to discredit the Supreme Court's counterspeech suggestion in *Alvarez*,

104. *Id.* at 372 (quoting U.S. v. Alvarez, 132 S.Ct 2537, 2549 (2012)).
105. *Alvarez*, 132 S. Ct. at 2549.
106. *Hamilton*, 699 F.3d at 372.
107. *Id.* at 373.
108. *Id.*
109. *Id.*

relied entirely on its own assumption that counterspeech is less effective at combating expressive conduct. The Fourth Circuit did not point to any actual evidence in the record or in precedent to support this assumption.

Second, the Fourth Circuit acknowledged the Supreme Court's suggestion that the Government could have achieved its interest in *Alvarez* "in a less restrictive way, by creating and maintaining a database listing all individuals who have been awarded the Congressional Medal of Honor."[110] The Fourth Circuit, however, concluded that "such a database for all honors ever awarded to military personnel" was likely unworkable.[111] It is during this portion of the Fourth Circuit's analysis that inconsistencies within the Court's own opinion are truly brought to light. On one hand, the Court claimed that people deceptively wearing medals would dilute the importance of the military honors system.[112] The Court's logic stemmed from the assumption that the pool of people who have received those honors is relatively small.[113] On the other hand, the Court contended the vast number of people having received military honors is too large to possibly manage within a single database.[114] The two contentions, taken together, are completely incongruous. Furthermore, following the Supreme Court's decision in *Alvarez*, the Department of Defense launched a website devoted to the Military Awards of Valor for each of the service branches.[115] The site lists all the recipients of the Medal of Honor, the Navy Cross, and the Silver Star.[116] Therefore, the Court's contention that such a database would likely be unworkable is pure conjecture and not based on either the Court's own assumptions regarding the number of people having received honors or any actual evidence from the Government that such a database is impossible.

As a result of the Fourth Circuit's conclusions regarding the less restrictive means of protecting the government's interests suggested by the Supreme Court, the Fourth Circuit upheld the District Court conviction of Hamilton and upheld the constitutionality of Section (a) of the Stolen Valor Act.[117] The Fourth Circuit refused to consider any other potential less-restrictive means by which the government could protect its interests.[118] Further, the Court plainly ignored the reason-

110. *Id.*
111. *Id.*
112. *Id.* at 372.
113. *Id.*
114. *Id.* at 373.
115. *See* U.S. Dep't of Def., *Military Awards for Valor – Top 3*, http://valor.defense.gov (last visited Jan. 19, 2013).
116. *Id.*
117. *Hamilton*, 699 F.3d at 374.
118. *Id.* at 373-74.

ing employed by the Supreme Court in *Alvarez* – the Government must not only prove it has a "compelling interest," but also that the restriction on speech is "actually necessary" to protect that interest. In fact, the Court did not even cite the "actually necessary" requirement employed by the Supreme Court in *Alvarez*. The Court, instead, implied that it was Hamilton's duty to suggest a less-restrictive means by which to protect the Government's interest.[119] Such implication is clearly contrary to the fundamental requirements of exacting scrutiny that the regulation at issue is presumed invalid, unless the Government overcomes its burden of proving constitutionality.[120]

The Fourth Circuit appears to have concluded that it is sufficient for the Government to prove a compelling interest and then prove the statute is *just one way* to protect that interest. This is a clear deviation from the traditional free speech framework, is contrary to the precedent set by the Supreme Court in *Alvarez*, and is a dangerous precedent to set regarding the fundamental rights granted by the First Amendment. "Permitting the government to decree this speech to be a criminal offense . . . . casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."[121]

CONCLUSION

The First Amendment guarantees "that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[122] When Congress passed the Stolen Valor Act of 2005, lawmakers manifested their intent to protect the integrity of the military honors system. Unfortunately, in so doing, Congress ran afoul of the freedoms granted by the First Amendment. In *U.S. v. Alvarez*, the United States Supreme Court respected and acknowledged the substantial governmental interest in protecting the military honors system, while still holding that Section (b) of the Stolen Valor Act unconstitutionally infringed on the freedom of speech. Unfortunately, the Fourth Circuit did not follow the Supreme Court's lead. In upholding Section (a) of the Stolen Valor Act, the Fourth Circuit respected the military honors system at the expense of the Constitution's guarantee of free expression.

119. *Id.* at 373.
120. U.S. v. Alvarez, 132 S. Ct. 2537, 2544 (2012).
121. *Id.* at 2547-48 (internal citations omitted).
122. Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 65, 103 S.Ct. 2875, 77 L.E.2d 469 (1983)).