FIRST AMENDMENT — DECEPTIVE EXPRESSION — FOURTH CIRCUIT HOLDS THAT STATUTES PROHIBITING THE UNAUTHORIZED WEARING OF A MILITARY UNIFORM OR MILITARY MEDALS DO NOT VIOLATE THE FIRST AMENDMENT. — *United States v. Hamilton*, 699 F.3d 356 (4th Cir. 2012).

While the First Amendment guarantees freedom of speech, certain categories of expression have long been deemed outside the scope of the Amendment.[1] Various types of fraudulent speech — including perjury, impersonation of a government officer, and deceptive advertising — do not receive constitutional protection.[2] Before the Supreme Court's 2012 decision in *United States v. Alvarez*,[3] however, the "general constitutional status of false statements of fact" remained "murky at best."[4] The Court took a step toward resolving this uncertainty in *Alvarez*, where a plurality of the Justices declared the absence of "any general exception to the First Amendment for false statements."[5] Recently, in *United States v. Hamilton*,[6] the Fourth Circuit upheld against First Amendment challenge two federal laws (the "insignia statutes"[7]) that criminalize the unauthorized wearing of military uniforms and medals. While the court appropriately concluded that the statutes survive strict scrutiny, it departed from Supreme Court prece-

---

[1] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ." (footnote omitted)).

[2] *See* Nat Stern, *Implications of Libel Doctrine for Nondefamatory Falsehoods Under the First Amendment*, 10 FIRST AMEND. L. REV. 465, 465 (2012) ("Calculated falsehoods long forbidden [by law] include perjury, false advertising, misrepresentation of material facts to the government, misrepresentation of material facts in connection with the sale or purchase of securities, and defamation." (footnotes omitted)); Jonathan D. Varat, Lecture, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1113 (2006).

[3] 132 S. Ct. 2537 (2012).

[4] David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 78 (2012); *see also* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 915 n.101 (2010) (characterizing First Amendment doctrine regarding noncommercial factually false statements as marked by a "lack of total clarity . . . [resulting from] the absence of any case directly on point").

[5] *Alvarez*, 132 S. Ct. at 2544 (plurality opinion); *see also id.* at 2545 (distinguishing "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," from "falsity and nothing more").

[6] 699 F.3d 356 (4th Cir. 2012).

[7] *Id.* at 366. Under 18 U.S.C. § 702, any individual who wears a military uniform without authorization may be subject to criminal sanction, while § 704(a) penalizes an individual who knowingly wears without authorization a medal or award authorized by Congress for the armed forces or any of the service medals or badges awarded to members of the armed forces, "or any colorable imitation thereof." 18 U.S.C. § 704(a) (2006). In addition, § 704(a) bans transactions relating to the transfer or exchange of such items, including the unauthorized sale, purchase, or manufacture of military uniforms and medals. *Id.*

dent by justifying the laws in part on the basis of the persuasiveness of deceptive expression, threatening to complicate further a thorny area of First Amendment law.

Several months after Michael Delos Hamilton enlisted in the U.S. Marine Corps in 1961, he sustained a hand injury that resulted in his discharge and an award of monthly disability benefits by the Veterans Administration (now known as the U.S. Department of Veterans Affairs) (VA).[8] In 2010, Hamilton lied about his military service after he volunteered to help with a Vietnam Veterans' Recognition Ceremony, claiming to be a combat veteran.[9] At the event, Hamilton delivered a speech dressed in the uniform of a U.S. Marine colonel, decorated with rank insignia and a number of awards and medals, none of which he had earned.[10] As a result of his appearance at the ceremony, Hamilton was charged with wearing a uniform without authorization in violation of 18 U.S.C. § 702 and with wearing military medals and other insignia without authorization in violation of 18 U.S.C. § 704(a) and (d).[11] After a jury returned a conviction, the district court sentenced Hamilton to sixteen months in prison.[12] Hamilton appealed.[13]

The Fourth Circuit affirmed. Writing for the panel, Judge Keenan[14] addressed Hamilton's "insignia convictions" for unauthorized wearing of a military uniform and medals,[15] reviewing de novo Hamilton's claim that 18 U.S.C. § 702 and § 704(a) facially violate the First Amendment.[16] Judge Keenan first addressed the scope of the insignia statutes, grouping the two laws together in her analysis. She

---

[8] *Hamilton*, 699 F.3d at 359. Hamilton's brief military career did not include combat service or awards. *Id.* In 2009, the VA increased Hamilton's benefits on the basis of a psychological evaluation during which he described fictitious combat experiences and falsely claimed to be suffering from posttraumatic stress disorder. *Id.* at 360–61. On account of his fabricated benefits claim, Hamilton was convicted of making false statements in support of a claim for service-related compensation in violation of 18 U.S.C. § 1001(a)(2) and stealing more than $30,000 in property belonging to the VA in violation of 18 U.S.C. § 641. *Id.* at 358.

[9] *Id.* at 365.

[10] *Id.* Hamilton was not compensated for his involvement in the ceremony. *Id.*

[11] *Id.* at 366 & n.6.

[12] *Id.* at 358. Hamilton was sentenced to four concurrent terms, including two sixteen-month terms for the false statement and theft convictions, a six-month term for wearing a military uniform without authorization, and a twelve-month term for wearing military medals without authorization. In addition, the court ordered Hamilton to pay $37,635 in restitution to the VA. *Id.*

[13] *Id.*

[14] Judge Keenan was joined by Judge Davis and District Judge Spencer, sitting by designation.

[15] *Hamilton*, 699 F.3d at 365.

[16] *Id.* at 366. Before turning to the First Amendment claim, Judge Keenan rejected Hamilton's argument that the evidence was insufficient to support his convictions for making a false statement to a government agency and for stealing from the VA. *Id.* at 363, 365. The court held that substantial evidence supported Hamilton's conviction for knowingly and willfully misrepresenting the nature of his military service and service-related disabilities to VA personnel, and that these falsehoods materially influenced the VA's decision to increase Hamilton's benefits. *Id.* at 363.

noted that a broad reading of the statutes, which would criminalize the unauthorized wearing of military uniforms or medals "under *any* circumstances,"[17] could pose a constitutional issue as applied to, for example, individuals who wear a military uniform as a Halloween costume or in a theatrical production.[18] The panel therefore applied the constitutional avoidance canon and construed the insignia statutes as prohibiting unauthorized wearing of military uniforms and medals only if the wearer had an intent to deceive.[19]

Next, the panel considered which level of scrutiny to apply to the challenged laws.[20] Judge Keenan observed that the government has more leeway to regulate expressive conduct — for example, burning military draft cards in antiwar protest[21] — than oral or written speech, so long as the suppression of free expression is not the government's purpose.[22] But where the governmental interest in regulating conduct is aimed at the suppression of expression, strict scrutiny — under which a statute must be necessary to serve a compelling state interest — applies.[23] She acknowledged that under the court's "intent to deceive" limiting construction, intentionally deceptive unauthorized wearing may involve expressing the false message that the individual actually earned the rank or medals displayed.[24] Where the wearer intends to communicate this fiction, Judge Keenan reasoned, criminalization of such conduct aims to restrict expression.[25] Nevertheless, the court determined that it did not need to decide the relevant level of scrutiny because the statutes are facially constitutional even under the most exacting scrutiny.[26]

In upholding the statutes, Judge Keenan identified a compelling state interest in protecting the symbolic value of both military uni-

---

[17] *Id.* at 367.

[18] *Id.*

[19] *Id.* at 368. The constitutional avoidance canon is a principle of statutory interpretation that applies "when an otherwise acceptable construction of a statute would raise serious constitutional problems." *Id.* at 367 (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)) (internal quotation mark omitted). Faced with this dilemma, courts "construe the statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Id.* (quoting *DeBartolo*, 485 U.S. at 575) (internal quotation mark omitted).

[20] *Id.* at 368.

[21] *See* United States v. O'Brien, 391 U.S. 367, 382 (1968) (upholding against First Amendment challenge a law banning the destruction of draft cards, where the governmental interest was aimed at ensuring "the continuing availability of issued Selective Service certificates").

[22] *See Hamilton*, 699 F.3d at 370.

[23] *Id.* (citing Texas v. Johnson, 491 U.S. 397, 407 (1989)); *see also id.* at 370 n.12 ("The Supreme Court has equated the phrase 'most exacting scrutiny' with its frequently-used term 'strict scrutiny.'").

[24] *Id.* at 370.

[25] *Id.* at 370–71.

[26] *Id.* at 371.

forms, which "convey information about the rank and accomplishments of the wearer," and medals, which serve as "institutional symbols of honor and prestige."[27] Rejecting Hamilton's claim that Congress could have protected these interests through less restrictive means, the court distinguished *United States v. Alvarez*, in which the Supreme Court invalidated 18 U.S.C. § 704(b)[28] on First Amendment grounds.[29] In *Alvarez*, a majority of the Justices agreed that false claims of military honors without any attempt to gain material advantage are protected by the First Amendment.[30]

The *Hamilton* court concluded that the alternatives to criminalization discussed in *Alvarez*, including publicizing the identities of legitimate award recipients through an online database and exposing false claimants, "are less applicable to the [state's] interests" in *Hamilton*.[31] Judge Keenan explained that "the wearing of an unearned medal or uniform . . . 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.'"[32] As such, the panel reasoned, "the government's interests are more greatly affected" in *Hamilton* than they were in *Alvarez*.[33] Moreover, whereas *Alvarez* suggested publicly identifying true Congressional Medal of Honor recipients in lieu of criminalizing false claims, a government database listing recipients of every kind of military award or the rank of every individual that has ever served in the military would be less feasible.[34] Judge Keenan determined that the other state interests underlying § 702 and § 704(a), including preserving the effective operation of the military chain of command and eliminating a "secondary market" for military insignia, would not be served by the alternatives suggested in *Alvarez*.[35]

Judge Davis concurred, writing separately to elaborate on the court's decision to apply strict scrutiny.[36] He emphasized that protecting "the individual interest in 'self-expression'" constitutes "a particu-

---

[27] *Id.*

[28] Section 704(b), known as the Stolen Valor Act, criminalized false written or oral claims regarding the receipt of military honors. *See* 18 U.S.C. § 704(b) (2006).

[29] 132 S. Ct. 2537 (2012).

[30] *Id.* at 2547–48 (plurality opinion); *see also id.* at 2555 (Breyer, J., concurring in the judgment).

[31] *Hamilton*, 699 F.3d at 373.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 374. The Fourth Circuit also dismissed Hamilton's as-applied constitutional challenge to his insignia convictions on the ground that "Hamilton d[id] not identify any unique facet of his conviction that would distinguish it from any other conviction that could be obtained under the insignia statutes." *Id.*

[36] *Id.* at 376 (Davis, J., concurring).

larly important First Amendment purpose,"[37] even when such expression includes false speech. Yet he agreed that § 702 and § 704(a) survived strict scrutiny, because the absence of less restrictive alternatives to criminalization rendered the statutes facially valid.[38]

Although the Fourth Circuit validly determined the constitutionality of § 702 and § 704(a), it could have restricted its analysis to the lack of less speech-restrictive alternatives rather than discuss the persuasive power of deceptive speech as a partial justification for the statutes. In distinguishing the insignia statutes from the Stolen Valor Act invalidated in *Alvarez*, the court invoked the "seeing is believing" rationale to explain why "the actual appearance of the military uniform and military medals more strongly conveys the impression that the wearer has earned the honors displayed" and thus more directly threatens the government's interests than would oral or written lies.[39] First Amendment doctrine, however, does not suggest that the believability of deceptive expression bears on the degree of constitutional protection such expression receives.

Prior to the Supreme Court's decision in *Alvarez*, intentional falsehoods told about oneself represented "an important but largely unexplored issue surrounding our understanding of the First Amendment."[40] *Alvarez* itself did not directly address the constitutional significance of a lie's persuasiveness. Moreover, the Supreme Court's well-developed defamation jurisprudence — perhaps the only "comprehensive First Amendment framework to govern falsehoods"[41] — does not turn on the persuasiveness of libelous speech. While the Court has required a showing of actual malice before allowing recovery for defamation in some contexts, it has never required a showing that the defamatory falsehood was credible or convincing as a condition of recovery.[42] Though defamation concerns false speech about

---

[37] *Id.* (quoting United States v. Alvarez, 638 F.3d 666, 674 (9th Cir. 2011) (Kozinski, J., concurring in the denial of rehearing en banc)).

[38] *Id.* at 379–80.

[39] *Id.* at 373 (majority opinion).

[40] Han, *supra* note 4, at 72.

[41] Stern, *supra* note 2, at 466 ("The Supreme Court's defamation doctrine thus provides the principal guide to government's ability to bar other types of false expression."); *see also* Han, *supra* note 4, at 74 (describing the landmark defamation cases New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), as having "particular significance" with respect to "the constitutional status of false statements of fact").

[42] *See Gertz*, 418 U.S. at 349 (requiring showing of actual malice for private individual to recover presumed or punitive damages against publisher or broadcaster of defamatory falsehoods); *New York Times*, 376 U.S. at 283 (holding that public officials can recover actual damages for libel relating to their official conduct only if they prove that the false statements were made with actual malice). In neither of these cases did the likely credibility of the alleged defamatory statement in any way factor into the Court's analysis. Moreover, many of the harms that can support recovery for defamation, such as "impairment of reputation and standing in the community, personal

another individual, rather than a self-aggrandizing lie about oneself, the Court's jurisprudence in this area suggests that the persuasiveness of a falsehood is irrelevant in determining its degree of constitutional protection.[43]

The *Hamilton* court's "seeing is believing" rationale departed not only from Supreme Court precedent on deceptive speech in the defamation context but also from the reasoning in *Alvarez*. The credibility of Alvarez's false claim of a military honor did not affect whether his speech received First Amendment protection. The *Alvarez* plurality did not suggest that the defendant's false self-identification as a Congressional Medal of Honor recipient was entitled to First Amendment protection on the ground that such speech was unpersuasive or unlikely to be believed. Instead, the plurality assumed that Alvarez's lie would be accepted and that "the dynamics of free speech, of counterspeech, of refutation, can overcome the lie."[44]

Indeed, the false speech at issue in *Alvarez* received First Amendment protection not on the basis that it would fail to convince listeners, but rather because the state had less speech-restrictive, alternative means through which it could protect its interests. The *Alvarez* Court determined that § 704(b) failed strict scrutiny because the government (1) had not adduced sufficient evidence in support of its argument that false claims to military awards actually undermine the public's appreciation of military honors[45] and (2) failed to show why counterspeech

---

humiliation, and mental anguish and suffering," may occur even if the libelous statements were not believed. Stern, *supra* note 2, at 478 (quoting *Gertz*, 418 U.S. at 350) (internal quotation marks omitted).

[43] *See* Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 579 (2004) (arguing that the First Amendment does not permit the government to restrict speech "because it doubts the ability of an audience to evaluate the information" therein); Varat, *supra* note 2, at 1113 (observing that while "it is precisely the communicative impact — the persuasive influence — of deceptive speech that is the source of its potential harm[,] . . . this alone will not justify outlawing all deception, which necessarily operates by persuasion"); *cf.* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991) (theorizing the existence of a "persuasion principle" in First Amendment doctrine, under which the state "may not suppress speech on the ground that it is too persuasive," though excluding deceptive expression from this analysis on the ground that it does not appeal to rational mental processes).

[44] *Alvarez*, 132 S. Ct. 2537, 2549 (2012) (plurality opinion); *see also id.* at 2547–48 ("Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, . . . it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition."); *id.* at 2550 ("The remedy for speech that is false is speech that is true. . . . [S]uppression of speech by the government can make exposure of falsity more difficult, not less so.").

[45] *Id.* at 2549, 2550. Although the *Alvarez* plurality did observe that "[t]he acclaim that recipients of the Congressional Medal of Honor receive also casts doubt on the proposition that the public will be misled by the claims of charlatans," *id.* at 2550, the plurality concluded that even if Alvarez's claim had been accepted, "there is nothing that charlatans such as Xavier Alvarez can do to stain [the Medal winners'] honor," *id.* at 2549 (alteration in original) (quoting Brief for Vet-

would not protect its interests.[46] The counterspeech alternatives discussed in *Alvarez* were insufficient to protect the state's interests in *Hamilton* not because, as the court reasoned, the physical display of a uniform or medals deceives more convincingly than a written or spoken lie, but rather because the feasibility of counterspeech strategies declines once the government must respond to false claims of every military rank or award in existence.[47]

By elevating the strength of the government's interests through its "seeing is believing" rationale, the *Hamilton* court made the narrow tailoring requirement less vital to the constitutional calculus and raised the possibility that its analysis regarding the persuasiveness of unauthorized wearing was part of its holding. The Fourth Circuit advanced a tenable argument for why the less restrictive forms of counterspeech identified in *Alvarez* would not serve the state interests underlying § 702 and § 704(b) — namely, no evidence suggests that the state could construct a database listing "all honors ever awarded to military personnel, much less one listing the rank of every individual who has served in [the] armed forces."[48] Moreover, counterspeech does not necessarily serve the government's interests in preserving the unimpeded operation of the military chain of command[49]: even if the state later exposed the impostor, interference with the administration of military command could result as soon as a servicemember mistook an unauthorized wearer for a member of the military and took action on the basis of that misperception.[50] Similarly, counterspeech may not protect the state's interest in suppressing the illegal market for military

---

erans of Foreign Wars of the U.S. et al. as Amici Curiae Supporting Petitioner at 1, *Alvarez*, 132 S. Ct. 2537 (No. 11-210)) (internal quotation marks omitted).

[46] *Id.* at 2550.

[47] *See Hamilton*, 699 F.3d at 373; *see also id.* at 373 n.18 ("Hamilton wore about 20 different types of military medals or ribbons on his uniform during his speech. By contrast, only . . . the Congressional Medal of Honor[] was at issue in *Alvarez*."). Yet while the *Alvarez* defendant lied only about the Congressional Medal of Honor, *Alvarez* invalidated the entirety of § 704(b), which prohibited false claims concerning any military decoration, medal, or badge. *See* 18 U.S.C. § 704(b) (2006); *Alvarez*, 132 S. Ct. at 2543. For this reason, the attempt to distinguish *Hamilton* based on the greater number of awards at issue in this case may be less apposite. However, the *Hamilton* court accurately observed that *Alvarez* did not concern false claims of military rank.

[48] *Hamilton*, 699 F.3d at 373 (footnote omitted). Evidence does suggest, however, that a database listing the recipients of at least a subset of awards is possible. *See* Beth F. Lloyd-Jones, *The Stolen Valor Conundrum: How to Honor the Military While Protecting Free Speech*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 153, 171 (2012) (describing the Hall of Valor database created by Vietnam veteran Doug Sterner listing more than 120,000 valor-medal recipients that have been verified through official award citations or National Archives records). *But see* Robert J. Juge III, *Heroism, Valor, and Deceit: False Claims of Military Awards and the First Amendment*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 267, 294 (2012) (noting certain difficulties with the database remedy: namely, that some award recipients may be averse to public exposure and that a list of all military award recipients "would be unwieldy and inefficient to use").

[49] *Hamilton*, 699 F.3d at 374.

[50] *See id.* at 372 & n.17.

insignia,[51] as merely publicizing the identities of some unauthorized wearers may insufficiently deter others from engaging in the trade of uniforms and medals.[52] Because strict scrutiny requires that a statute be narrowly tailored to a compelling state interest,[53] the inadequacy of the database method of counterspeech discussed in *Alvarez* and the lack of readily identifiable, less speech-burdensome alternatives rendered the insignia statutes sufficiently narrowly drawn to survive strict scrutiny. The court should have focused on this lack of alternatives in justifying the insignia statutes, rather than relying on the unsupported assertion that "speech may not effectively counter that which a person sees."[54]

Because the Fourth Circuit did not clearly establish whether its discussion of the persuasive power of deceptive conduct was dicta or part of its holding, the court not only included a doctrinally questionable basis for the constitutionality of the insignia statutes but also left the import of this analysis undefined for district courts in the circuit. While *Alvarez*'s three-way splintering[55] indicated the Supreme Court's lack of cohesion with respect to First Amendment protection for false speech, *Hamilton* added the Fourth Circuit's voice to a divisive area of First Amendment law[56] by focusing on the heightened danger of deceptive expression — a criterion with no established relevance in First Amendment doctrine. Although the court reasonably concluded that the insignia statutes satisfy strict scrutiny given the lack of less burdensome alternatives, its claim that "seeing is believing" in the deception context threatens to undermine further the coherence of First Amendment doctrine regarding false speech.

---

[51] *Id.* at 372.

[52] *See id.* at 372–73.

[53] *Id.* at 372 ("[W]e must examine whether the [insignia] statutes are 'narrowly drawn to achieve' [the government's compelling] interests." (quoting Boos v. Barry, 485 U.S. 312, 321 (1988))).

[54] *Id.* at 373.

[55] Justice Kennedy wrote a four-Justice plurality opinion; Justice Breyer, joined by Justice Kagan, concurred in the judgment; and Justice Alito authored a three-Justice dissent.

[56] In *United States v. Perelman*, the Ninth Circuit upheld the insignia statutes on the ground that unauthorized wearing with intent to deceive amounts to "fraud or speech integral to criminal conduct." 695 F.3d 866, 872 (9th Cir. 2012) (quoting *Alvarez*, 132 S. Ct. 2537, 2546 (2012) (plurality opinion)) (internal quotation mark omitted).