The health care decision was not the only important opinion that the Supreme Court handed down on the last day of the 2011 Term. In *United States v. Alvarez*, the Court invalidated the Stolen Valor Act, which made it a crime to lie about having received the Congressional Medal of Honor or other military awards. The case is the latest in which the Court refused to recognize a new category of speech as falling outside the scope of the First Amendment’s protection.

Although the decision ultimately struck down a federal law restricting unpopular speech, *Alvarez* may be significantly less protective of speech than this result suggests. Six justices agreed that the law violated the First Amendment, but the case did not generate a majority opinion. In a plurality opinion authored by Justice Anthony Kennedy, four justices found the law did not survive “exact- ing scrutiny.” In a separate opinion concurring only in the judgment, Justices Stephen G. Breyer and Elena Kagan departed from precedent to find the law invalid under the less demanding standard of “intermediate scrutiny.” Thus, although these opinions make clear that false statements are entitled to some constitutional protection, the split in reasoning leaves open the standard under which restrictions on such statements will be judged.

**The Plurality and the Dissent: Applications of Stevens and Brown**

Both the plurality opinion and the dissent analyzed the Stolen Valor Act under the standard established in *United States v. Stevens* and *Brown v. Entertainment Merchants Association*. In both of these earlier cases, the Court refused to recognize new categories of speech—depictions of animal cruelty and violent video games for children, respectively—as outside of the scope of the First Amendment. The Court held in *Stevens*, and reiterated in *Brown*, that the application of the First Amendment does not depend upon any balancing test that weighs the relevant costs and benefits to society of the type of speech in question. Rather, the question is whether that type of speech is one that historically has not been recognized as entitled to pro-
tection, such as defamation, obscenity, fighting words, true threats, and fraud. In both *Stevens* and *Brown*, the Court held that the government had failed to demonstrate that the challenged category of speech was one that historically had been denied First Amendment protection.

The Court had never included false statements in any of its lists of unprotected categories of speech. The Court in *Stevens* and *Brown* did acknowledge that there may be other categories of speech that “have been historically unprotected” but have not yet been specifically identified as such in the Court’s decisions. In *Alvarez*, the government tried to draw upon language from defamation, commercial speech, and other First Amendment cases to argue that false statements traditionally have not been protected, and that the First Amendment protects such statements only to the extent necessary to prevent the “chilling” of more valuable forms of speech. The government argued that the Stolen Valor Act provided more valuable forms of speech with adequate “breathing space”—meaning that the act’s prohibitions were clear enough and narrow enough not to deter speakers from engaging in protected speech for fear of prosecution under the act—and that, accordingly, the act did not raise constitutional concerns.

Justice Kennedy’s plurality opinion, joined by Chief Justice John G. Roberts and Justices Ruth Bader Ginsburg and Sonia Sotomayor, found the act invalid under the *Stevens* and *Brown* framework. The plurality acknowledged that some restrictions on false speech, such as laws criminalizing perjury and fraud, do not raise First Amendment issues. The plurality emphasized, however, that the Court never has held categorically that all false statements of fact fall outside the First Amendment, and further noted that such a holding would authorize the government to criminalize vast amounts of speech. The plurality concluded that, because the First Amendment has not been read as excluding protection for false statements of fact, and because the Stolen Valor Act is a content-based restriction on speech, the government must show that the law is “actually necessary” to further a compelling government interest. Applying this test, Justice Kennedy and the other members of the plurality found that the government had failed to meet its burden. Among other things, the government had cited no evidence that the public’s general perception of military awards is diluted by false claims, and the government could not show why counter-speech, such as the ridicule respondent received online and in the press, would not achieve the interest in protecting the integrity of military honors.

The dissent, written by Justice Samuel A. Alito and joined by Justices Antonin Scalia and Clarence Thomas, agreed with the government that false factual statements have no First Amendment value in and of themselves. The dissenters argued that the Constitution protects false factual statements only to the extent necessary to prevent the chilling of other forms of speech. The first section of the dissenting opinion emphasized the harms caused by false claims of military valor and the absence of less restrictive alternatives, suggesting at first that the dissenting justices might agree with the plurality that strict scrutiny applies. The dissent went on, however, to opine that the Stolen Valor Act should have been upheld as constitutional not because it survived strict scrutiny but rather because it prohibited speech that falls entirely outside of the scope of the First Amendment. As the dissenters explained: “The lies covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection unless their prohibition would chill other expression that falls within the Amendment’s scope.” Next, the dissenters found that the act gave speech protected by the First Amendment adequate breathing space, noting that, at oral argument, counsel for Alvarez could not point to any truthful speech that the act would chill.

**Justice Breyer’s Concurrence Applying Intermediate Scrutiny**

Justice Breyer’s concurrence, joined by Justice Kagan, took a fundamentally different approach. Rejecting a “strict categorical” analysis, Justice Breyer asserted that the Stolen Valor Act should be subjected only to intermediate
Justice Breyer’s analysis departs from the Court’s traditional approach. Under current precedent, content-based restrictions on pure, noncommercial speech generally are subject to strict scrutiny. Although Justice Kennedy used the term *exacting* rather than *strict*, his plurality opinion essentially follows the Court’s precedent, concluding that the Stolen Valor Act was not necessary to achieve a compelling government interest. Departing from this approach, Justice Breyer did not ask whether the act was a content-based or content-neutral restriction on speech. Instead, he suggested a “proportionality” review whenever a statute adversely affects First Amendment interests but warrants neither automatic condemnation nor automatic approval. He cited cases in which the Court has applied a standard more lenient than strict scrutiny but more exacting than rational basis to review certain laws regulating speech—most notably content-neutral laws or laws regulating categories of speech that traditionally have received reduced constitutional protection, such as commercial speech, expressive conduct, or speech by government employees. In line with those cases, Justice Breyer’s approach in *Alvarez* would require the Court to examine the fit between the ends and the means of a particular statute, taking into account the seriousness of the speech-related harm that the provision likely will cause, the nature and importance of the law, the extent to which the law actually will achieve its objectives, and whether less restrictive means are available.

Like the plurality, Justice Breyer found that the breadth of the Stolen Valor Act and the availability of less restrictive means for achieving the government’s goals rendered the law unconstitutional. Specifically, Justice Breyer noted that the statute applies even in private contexts where lies would cause little harm. He also noted that a publicly searchable database of all legitimate medal winners could allow the government to achieve its objectives without restricting speech at all. But unlike the plurality, Justice Breyer explicitly left the door open for a more narrowly drawn statute—including one that requires a showing of materiality or specific harm—that might survive constitutional scrutiny.

**Looking Ahead**

Because Justices Breyer and Kagan supplied the votes necessary for a majority, their opinion may influence future challenges to laws regulating false factual statements. If the three dissenting justices continue to view false statements as outside the protection of the First Amendment and continue to apply only a “breathing space” analysis to laws regulating false factual statements, and if the four justices in the plurality continue to apply strict scrutiny, the outcome of future cases could depend on the outcome of Justice Breyer’s proportionality review. Indeed, a lower court might assume on the one hand that if a statute regulating false statements passes the intermediate scrutiny test, it should be upheld, because it would have the sup-
port of Justices Breyer and Kagan (applying intermediate scrutiny), as well as the three dissenting justices (applying only a “breathing room” test). On the other hand, a lower court might assume that if the statute failed intermediate scrutiny, it would also fail strict scrutiny and should therefore be invalidated—because Justices Breyer and Kagan and the Alvarez plurality would all vote to strike it down.

Such predictions, however, are rough, even as to future cases involving statutes regulating false statements. And in cases involving other statutes, it is difficult to predict whether Justice Breyer would argue that intermediate scrutiny should apply at all. His principal guidepost—when a statute merits neither automatic condemnation nor approval—provides little practical guidance.

In sum, the Court’s holding in Alvarez creates a significant precedent for the proposition that false statements of fact do not fall categorically outside the protection of the First Amendment. But the fractured opinions on what test should govern leave the full impact of that holding to be determined in future cases.

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Note
1. We thank Allyson Bennett, a summer associate with Munger, Tolles & Olson, for her contributions to this column. We also note that Munger, Tolles & Olson filed an amicus brief on behalf of UCLA law professor Jonathan Varat in support of the respondent in United States v. Alvarez.