COURTSIDE

BY PAUL M. SMITH, JULIE CARPENTER, KATHERINE FALLOW, AND CHRISTOPHER DEAL

The Right to Utter Falsehoods

The U.S. Supreme Court has a second, very interesting First Amendment case on its docket for this Term, in addition to the much-ballyhooed *FCC v. Fox Television Stations, Inc.* case about how the Constitution applies to fleeting expletives and occasional mild nudity on broadcast television. On October 17, 2011, the Supreme Court agreed to hear *United States v. Alvarez*, No. 11-210, which involves a First Amendment challenge to the Stolen Valor Act, a federal statute that makes it a crime to "falsely represent[] . . . verbally or in writing, to have been awarded" any congressionally authorized military award or medal. 18 U.S.C. § 704(b). The case presents fundamental questions about how the Constitution applies to intentionally false statements.

In July 2007, Xavier Alvarez, a newly seated director of a local water district board, introduced himself at a joint meeting with a neighboring board as "a retired marine of 25 years" who had been "awarded the Congressional Medal of Honor" in 1987 after having been "wounded many times by the same guy." *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010). This was all totally false.

Alvarez moved to dismiss the subsequent indictment on First Amendment grounds but entered a conditional guilty plea when the district court denied his motion. A divided panel of the Ninth Circuit reversed, holding that merely false factual speech is entitled to First Amendment protection. Accordingly, the panel majority subjected the statute to strict scrutiny review and struck it down. The full Ninth Circuit denied rehearing en banc over the vote of seven dissenters.

Outside of a few "well-defined and narrowly limited classes of speech," content-based restrictions on speech are presumptively invalid under the First Amendment. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (internal quotation marks omitted). The basic dispute in the Ninth Circuit was whether knowingly false statements like Alvarez's Medal of Honor assertions are among those types of speech categorically unprotected by the First Amendment. The panel majority reasoned that false statements per se had never been held to be unprotected speech. Rather, the majority explained, such statements had been found unprotected only when accompanied by either actual injury or a specific intent to harm, as in laws regulating defamation, fraud, perjury, and fraudulent administrative filings. The panel dissent and the dissent from the denial of rehearing en banc disagreed, arguing that the Supreme Court had long characterized false statements as lacking First Amendment value and concluded that such speech was presumptively unprotected by the First Amendment absent a showing that protection was necessary to safeguard other worthwhile speech. Concurring in the denial of rehearing en banc, Chief Judge Kozinski prophesied the potential for a "terrifying" dystopia of government-mandated truth telling were the dissenters' vision adopted.

In its petition for certiorari, the United States took a slightly different tack. In light of the Court's rejection of claims to expand the classes of unprotected speech to include depictions of animal cruelty, *Stevens,* 130 S. Ct. at 1584, and violent video games, *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2734 (2011), the United States conceded that factually false statements as a class have not been recognized as unprotected speech. Nevertheless, pointing to cases involving defamation, fraud, and similar regulations of false speech, the United States claimed that factually false statements may be subject to content-based restrictions supported by a government interest as long as the restrictions provide adequate breathing space for fully protected speech.

Paul M. Smith, Julie Carpenter, and Katherine Fallow are partners and Christopher Deal is an associate in the Washington, DC, office of Jenner & Block LLP.

Published in *Communications Lawyer,* Volume 28, Number 4, January 2012.