FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. XAVIER ALVAREZ, AKA Javier Alvarez, *Defendant-Appellant.*	No. 08-50345 D.C. No. 2:07-cr-01035-RGK-1 Central District of California, Los Angeles ORDER DENYING PETITION FOR PANEL REHEARING AND REHEARING EN BANC; CONCURRENCES IN THE ORDER; DISSENTS TO THE ORDER

Filed March 21, 2011

Before: Thomas G. Nelson, Jay S. Bybee, and Milan D. Smith, Jr., Circuit Judges.

Order;
Concurrence by Judge M. Smith;
Concurrence by Chief Judge Kozinski;
Dissent by Judge O'Scannlain;
Dissent by Judge Gould

ment, and was unconstitutionally applied to make a criminal out of a man who was proven to be nothing more than a liar, without more." *Alvarez*, 617 F.3d at 1217 (emphasis added).

The Dissenters rely on the unsupportable doctrinal premise that false speech is categorically subject to government regulation and prohibition. For the reasons outlined *supra* and in my majority opinion, I respectfully disagree.

Chief Judge KOZINSKI, concurring in the denial of rehearing en banc:

According to our dissenting colleagues, "non-satirical and non-theatrical[ ] knowingly false statements of fact are *always* unprotected" by the First Amendment. *United States* v. *Alvarez*, 617 F.3d 1198, 1224 (9th Cir. 2010) (Bybee, J., dissenting); *see also* O'Scannlain dissent at 3764; *cf.* Gould dissent at 3780. Not "often," not "sometimes," but always. Not "if the government has an important interest" nor "if someone's harmed" nor "if it's made in public," but *always*. "Always" is a deliciously dangerous word, often eaten with a side of crow.

So what, exactly, does the dissenters' ever-truthful utopia look like? In a word: terrifying. 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. Phrases such as "I'm working late tonight, hunny," "I got stuck in traffic" and "I didn't inhale" could all be made into crimes. 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."

What the dissenters seem to forget is that Alvarez was convicted for pure speech. And when it comes to pure speech, truth is not the sine qua non of First Amendment protection. *See Meyer* v. *Grant*, 486 U.S. 414, 419 (1988) ("The First Amendment is a value-free provision whose protection is not dependent on the truth, popularity or social utility of the ideas and beliefs which are offered." (internal quotation marks omitted)). That the government can constitutionally regulate some narrow categories of false speech—such as false advertising, defamation and fraud—doesn't mean that all such speech falls outside the First Amendment's bounds. As the Supreme Court has cautioned, "In this field every person must be his own watchman for the truth, because the forefathers did not trust any government to separate the true from the false for us." *Id.* at 419-20 (internal quotation mark omitted); *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). Yet the regime the dissenters agitate for today—one that criminalizes pure speech simply because it's false—leaves wide areas of public discourse to the mercies of the truth police.

Alvarez's conviction is especially troubling because he is being punished for speaking about himself, the kind of speech that is intimately bound up with a particularly important First Amendment purpose: human self-expression. As Justice Marshall explained:

> The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's self worth and dignity.

Procunier v. *Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring). Accordingly, the Court has recognized that "[o]ne fundamental concern of the First Amendment is to

'protec[t] the individual's interest in self-expression.' " *Citizens United* v. *FEC*, 130 S. Ct. 876, 972 (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 (1980)) (second alteration in original). Speaking about oneself is precisely when people are most likely to exaggerate, obfuscate, embellish, omit key facts or tell tall tales. Self-expression that risks prison if it strays from the monotonous reporting of strictly accurate facts about oneself is no expression at all.

Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy ("No, I don't live around here"); to avoid hurt feelings ("Friday is my study night"); to make others feel better ("Gee you've gotten skinny"); to avoid recriminations ("I only lost $10 at poker"); to prevent grief ("The doc says you're getting better"); to maintain domestic tranquility ("She's just a friend"); to avoid social stigma ("I just haven't met the right woman"); for career advancement ("I'm sooo lucky to have a smart boss like you"); to avoid being lonely ("I love opera"); to eliminate a rival ("He has a boyfriend"); to achieve an objective ("But I love you *so* much"); to defeat an objective ("I'm allergic to latex"); to make an exit ("It's not you, it's me"); to delay the inevitable ("The check is in the mail"); to communicate displeasure ("There's nothing wrong"); to get someone off your back ("I'll call you about lunch"); to escape a nudnik ("My mother's on the other line"); to namedrop ("We go way back"); to set up a surprise party ("I need help moving the piano"); to buy time ("I'm on my way"); to keep up appearances ("We're not talking divorce"); to avoid taking out the trash ("My back hurts"); to duck an obligation ("I've got a headache"); to maintain a public image ("I go to church every Sunday"); to make a point ("Ich bin ein Berliner"); to save face ("I had too much to drink"); to humor ("Correct as usual, King Friday"); to avoid embarrassment ("That wasn't me"); to curry favor ("I've read all your books"); to get a clerkship ("You're the greatest living jurist"); to save a dollar ("I gave

at the office"); or to maintain innocence ("There are eight tiny reindeer on the rooftop").

And 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. Of course, lies are often disbelieved or discovered, and that too is part of the pull and tug of social intercourse. But it's critical to leave such interactions in private hands, so that we can make choices about who we are. How can you develop a reputation as a straight shooter if lying is not an option?

Even if untruthful speech were not valuable for its own sake, its protection is clearly required to give breathing room to truthful self-expression, which is unequivocally protected by the First Amendment. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271-72 (1964). Americans tell somewhere between two and fifty lies each day. *See* Jochen Mecke, *Cultures of Lying* 8 (2007). If all untruthful speech is unprotected, as the dissenters claim, we could all be made into criminals, depending on which lies those making the laws find offensive. And we would have to censor our speech to avoid the risk of prosecution for saying something that turns out to be false. The First Amendment does not tolerate giving the government such power.

Judge O'Scannlain tells us not to worry, because to say "[t]hat false statements of fact are always *unprotected* in themselves is not to say that such statements are always *subject to prohibition*." O'Scannlain dissent at 3779. This is dou-

ble talk. If a statement is "always unprotected" by the First Amendment then it's presumptively subject to regulation. That it may enjoy derivative protection by osmosis from "other speech that matters" is cold comfort to those who have no way of knowing in advance whether two judges of this court will recognize that relationship in any particular instance.

But it gets worse. Confronted with some of the many ways in which false speech permeates our discourse, Judge O'Scannlain comes up with new categories of exceptions to his regime—"expressions of emotion or sensation," "predictions or plans," "exaggerations" and "playful fancy." *Id.* at 3778-79. "Such statements," we are told, "are not even implicated" by the dissenters' analysis because they are not "falsifiable." *Id.* But this is patently not true. If you tell a girl you love her in the evening and then tell your roommate she's a bimbo the next morning, and the two compare notes, someone's going to call you a liar. And if you tell the Social Security Commissioner, "I have disabling back pain," and are then discovered jogging, golfing and jet-skiing, it will be no defense that you were merely expressing a "sensation" that is "non-falsifiable." Judge O'Scannlain also turns a tin ear to the complexity of human communication. "I just haven't met the right woman," could be a statement of opinion, as my colleague suggests, but more likely is a false affirmation of heterosexuality. And where, exactly, is the dividing line between an "exaggeration"—which Judge O'Scannlain seems to think always gets constitutional protection—and a lie, which never does?

The dissent dismisses these difficulties by creating a doctrine that is so complex, ad hoc and subjective that no one but the author can say with assurance what side of the line particular speech falls on. This not only runs smack up against the Supreme Court's admonition against taking an " 'ad hoc,' 'freewheeling,' 'case-by-case' approach" in the First Amendment area, Smith concurrence at 3755, but results in the

"courts themselves . . . becom[ing] inadvertent censors." *Snyder* v. *Phelps*, No. 09-751, 2011 WL 709517, at *6 (U.S. Mar. 2, 2011). And, as Judge Smith elegantly demonstrates, Judge O'Scannlain's approach compounds the danger of arbitrariness by "invert[ing] the ordinary First Amendment burden" in requiring the *speaker*—even in the case of a criminal defendant—to prove that his speech deserves protection. Smith concurrence at 3746. Free speech simply cannot survive the kind of subjective and unpredictable regime envisioned by the dissenters.

Judge O'Scannlain is right that the scenario I describe is "far removed from the one in which we actually live," O'Scannlain dissent at 3780, but only because the dissenters didn't prevail. Had they done so, we may very well have come to live in a world more like a Hollywood horror film than the country we know and adore.

Perhaps sensing the danger of the absolutist approach, Judge Gould proposes a narrower rule, one that would carve away First Amendment protections for speech concerning (1) some (2) military matters (3) where the interest of the speaker is low. Judge Gould's dissent illustrates the dangers of announcing a hypothetical rule without the need to apply it to a concrete case. As I show below, all three legs supporting Judge Gould's theory buckle as soon as weight is placed on them.

Before I get to that, however, let me point out just how wrong it would be to convene an en banc court in order to adopt a rule such as that proposed by our colleague. En bancs are generally appropriate to correct a conflict with the law of our own circuit, another circuit or the Supreme Court. The enterprise Judge Gould proposes would serve none of these purposes. Instead, he would have the en banc court adopt a rule no other court has ever adopted and the Supreme Court has never hinted at. This strikes me as an unwise use of en banc resources.

But on to the rule Judge Gould proposes. He first posits that "the power of Congress [in dealing with military matters] is necessarily strong," but Congress has strong powers in many areas, including immigration and naturalization, U.S. Const. art. I, § 8, cl. 4; foreign relations, *id.* cl. 3; copyright and patent, *id.* cl. 8; bankruptcy, *id.* cl. 4; interstate commerce, *id.* cl. 3; tax, *id.* cl. 1; Native Americans, *id.* cl. 3; and the District of Columbia, *id.* cl. 17. Judge Gould doesn't explain why congressional power vis-a-vis the military is so much more important than these other strong congressional powers, so as to merit its own First Amendment hall pass. Or, perhaps Judge Gould means to suggest that there should be a similar exception for, say, lying about being an immigrant or a bankrupt—which would make his exception far broader than he acknowledges.

Second, as Judge Gould recognizes, not all speech concerning military matters is unprotected by the First Amendment, else Congress could pretty much have banned the entire Vietnam protest movement—and no doubt would have. Lying about being a military hero is despicable and may have some impact on the government's ability to recruit genuine heroes, but it's hard to understand why it's so much worse than burning an American flag, displaying a profane word in court, rubbing salt into the fresh wounds of the families of fallen war heroes, suggesting that a revered religious leader commits incest with his mother in an outhouse or publishing military secrets in time of war. *See New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *cf.* Charlie Savage, *U.S. Prosecutors Study WikiLeaks Prosecution*, N.Y. Times, Dec. 8, 2010, at A10. Exceptions to categorical rules, once created, are difficult to cabin; the logic of the new rule, like water, finds its own level, and it's hard to keep it from covering far more than anticipated. Because Judge Gould is vague about the rule he proposes, he doesn't deal with this difficulty.

Finally, Judge Gould would limit his rule to situations where the speaker and society "lack [a] substantial interest"

in the untruthful statement. But how are we to tell which statements do and which ones do not have social utility? The one guiding light of our First Amendment law is that government officials, and courts in particular, are not allowed to make judgments about the value of speech. Pornography is an odd exception, but it's the only one I'm aware of, and even there judgments are made on a case-by-case basis. I am aware of no context where the legislature is allowed to decide that entire categories of speech can be banned because they are socially useless. This strikes me as an awesome power to confer on government officials, one quite antithetical to the core values of the First Amendment. Judge Gould does not explain why a rule such as the one he proposes would not sound the death knell for the First Amendment as we know it.

* * *

Political and self expression lie at the very heart of the First Amendment. If the First Amendment is to mean anything at all, it must mean that people are free to speak about themselves and their country as they see fit without the heavy hand of government to keep them on the straight and narrow. The Stolen Valor Act was enacted with the noble goal of protecting the highest honors given to the men and women of our military, but the freedoms for which they fight include the freedom of speech. The ability to speak openly about yourself, your beliefs and your country is the hallmark of a free nation. Our decision not to rehear this case en banc ensures the First Amendment will retain its vitality for another day—and, hopefully, for always.

O'SCANNLAIN, Circuit Judge, joined by GOULD, BYBEE, CALLAHAN, BEA, IKUTA, and N.R. SMITH, Circuit Judges, dissenting from the denial of rehearing en banc:

In this case, our court invalidates the Stolen Valor Act of 2005—a federal statute that criminalizes the act of lying about