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Constitutional Law - In Protecting One's Right to Speak, the First Amendment Also Protects One's Right to Lie - 281 Care Committee v. Arneson, 638 F.3D 621 (8th Cir. 2011)

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CONSTITUTIONAL LAW—IN PROTECTING ONE'S RIGHT TO SPEAK, THE FIRST AMENDMENT ALSO PROTECTS ONE'S RIGHT TO LIE—*281 CARE COMMITTEE V. ARNESON*, 638 F.3D 621 (8TH CIR. 2011)

The First Amendment to the United States Constitution prohibits the making of any law which "abridg[es] the freedom of speech."[1] While content-based speech regulations have been viewed as presumptively invalid, certain categories of content-based speech are deemed to fall outside the "freedom of speech" protections.[2] The categories that have been explicitly excluded are fighting words, obscenity, defamation, fraud, child pornography, and speech integral to criminal conduct.[3] In *281 Care Committee v. Arneson*,[4] the Eighth Circuit considered whether a state may enact a statute restricting knowingly or recklessly false campaign speech, without demonstrating the First Amendment protections' requirement that the enacted statute be narrowly tailored to a compelling state interest.[5] The court held that knowingly false campaign speech falls within the protections of the First Amendment right to free speech, and, therefore, any such statute regulating it must withstand the test of strict scrutiny.[6]

The suit at issue arose from three Minnesota-based grass-roots-advocacy organizations that were founded to oppose school-funding ballot

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[1] U.S. CONST. amend. I. This protection prevents the government from "proscribing speech" or "expressive conduct" because it disapproves of the ideas expressed. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (laying out First Amendment protections).

[2] *See R.A.V.*, 505 U.S. at 382-88 (stating content-based speech restrictions are generally prohibited, but recognizing exceptions have been carved out).

[3] *See id.*; *see also* United States v. Stevens, 130 S. Ct. 1577, 1580 (2010) (adding "fraud, incitement, and speech integral to criminal conduct"). If a category of speech is exempt from First Amendment protection, then any law that is created that prohibits that speech does not need to withstand strict scrutiny analysis; rather, the law is presumptively valid. *R.A.V.*, 505 U.S. at 382-88. Strict scrutiny demands that a law be narrowly tailored to meet a compelling state interest. *See infra* note 19 (setting forth strict scrutiny test).

[4] 638 F.3d 621 (8th Cir. 2011).

[5] *See id.* at 626 (stating issue before the court); *see also* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) (stating content-based speech restrictions must withstand strict scrutiny test).

[6] *See 281 Care Comm.*, 638 F.3d at 636. The court, agreeing with the Ninth Circuit, stated that it "presumptively protect[s] all speech, including false statements," to ensure that "clearly protected speech may flower in the shelter of the First Amendment." *Id.* (quoting United States v. Alvarez, 617 F.3d 1198, 1217 (9th Cir. 2010)) (internal quotation mark omitted).

initiatives.[7] These organizations and their respective leaders claimed that a provision of the Minnesota Fair Campaign Practices Act ("FCPA") inhibits their ability to protest freely against such ballot initiatives, thereby violating the First Amendment.[8] The FCPA provides, in relevant part:

> A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material . . . with respect to the effect of a ballot question, that is designed or tends to . . . promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.[9]

Although Minnesota criminalized defamatory campaign speech in 1893, its regulation of knowingly false campaign speech is fairly recent.[10] Whereas between 1988 and 2004 the only enforcement mechanism for this law was criminal prosecution, it now provides that violations of section 211B.06 will first be remedied through civil complaints.[11] This revised version allows any person, organization, or agency to file a complaint with the Office of Administrative Hearings ("OAH"), and then county attorneys are given discretion to decide if the situation warrants criminal charges in addition to the civil proceeding.[12]

In 2007, 281 Care Committee and its leader, Ron Stoffel, opposed a Robbinsdale Public School District's ballot initiative.[13] After the

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[7] *Id.* at 625. Minnesota law authorizes individual school boards to propose these ballot initiatives. *Id.* The initiatives request citizens to approve "bond hikes" or "tax levies," which would ultimately increase funding in local school districts. *Id.*

[8] *See id.* (denoting plaintiff's arguments). The advocacy organizations and their leaders are the plaintiffs in this suit, while four Minnesota county attorneys and the Minnesota attorney general are the defendants. *Id.* All of these attorneys were sued in their capacities as governmental officials. *Id.*

[9] MINN. STAT. § 211B.06, subd. 1 (2008) (providing text of FCPA).

[10] *See 281 Care Comm.*, 638 F.3d at 625 (describing statutory history).

[11] *See id.* (noting changes to the statute effective in 2004).

[12] *See id.* (detailing new version of FCPA).

[13] *See id.* (laying foundation for suit at issue). The ballot initiative and opposition immediately followed one that allegedly violated section 211B.06 of the FCPA the year before. *Id.* at 625-26. In 2006, a citizen group called the "B.U.I.L.D. Citizen Committee" held a campaign where it advocated for a school-funding initiative in Howard Lake, Waverly-Winsted Independent School District. *Id.* at 625. The W.I.S.E. Citizen Committee and its chairperson, Victor Niska, campaigned against the initiative. *Id.* at 625-26. The B.U.I.L.D. committee filed a complaint with the OAH under section 211B.06 of the FCPA, alleging that W.I.S.E. and Niska circulated campaign materials that both W.I.S.E. and Niska knew contained false information. *Id.*

initiative was rejected, the superintendent of the school district informed the media that officials were investigating 281 Care Committee about the "false" information it spread during its opposition.[14] Following these allegations, plaintiffs filed suit in federal district court, claiming that section 211B.06 violates the First Amendment.[15] The plaintiffs moved for summary judgment, while the defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim.[16] The district court granted the defendants' motion to dismiss, holding that the plaintiffs lacked standing and ripeness, while also noting that it would have alternatively dismissed for failure to state a claim.[17] The Eighth Circuit reversed, holding that the district court erred in dismissing the complaint for lack of subject matter jurisdiction and, therefore, that it also erred in upholding section 211B.06 without conducting a strict-scrutiny analysis.[18]

Generally, content-based speech restrictions must meet the test of strict scrutiny; however, certain classes of speech are exempt from this rule because their prevention and punishment have never been considered as raising constitutional issues.[19] These categories include fighting words, obscenity, defamation, fraud, child pornography, and speech integral to criminal conduct.[20] Historically, courts have disagreed on the issue of

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at 626. Following an evidentiary hearing, an OAH panel dismissed B.U.I.L.D.'s complaint. *Id.*

[14] *Id.* Stoffel claimed that he interpreted the superintendent's statement to be a warning that litigation would follow if 281 Care Committee continued to invoke these opposition tactics. *Id.*

[15] *See 281 Care Comm.*, 638 F.3d at 626 (explaining commencement of lawsuit); *see also supra* note 9 and accompanying text (quoting text of section 211B.06).

[16] *See 281 Care Comm.*, 638 F.3d at 626 (describing procedural history).

[17] *See id.* (explaining district court's holding). The district court's holding that it would have dismissed for failure to state a claim implies that the section of the FCPA at issue falls outside the protections of the First Amendment and, thus, does not require the strict scrutiny analysis that applies to those statutes which fall within the protections of the First Amendment. *Id.* at 633.

[18] *See id.* at 633, 636 (stating holding).

[19] *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) (reiterating standard of review for content-based speech restrictions); *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (noting First Amendment right not absolute). The Supreme Court reasoned that these limited exempted areas are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. To withstand strict scrutiny analysis, a facially content-based statute must be *necessary* to serve a *compelling* governmental interest. *See* Burson v. Freeman, 504 U.S. 191, 199 (1992).

[20] *See supra* note 3 and accompanying text (listing categories of speech explicitly exempted from First Amendment protections). While these categories of speech are, in fact, content-based, the United States Supreme Court has held that the First Amendment is inapplicable to them because "their expressive content is worthless or of *de minimis* value to society." R.A.V. v. City of St. Paul, 505 U.S. 377, 400 (1992) (citing *Chaplinsky*, 315 U.S. at 571-72). In its holding that the First Amendment is inapplicable to these categories of speech, the Supreme Court implied that these categories of speech "can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are

whether knowingly false speech is considered to be one of these types of speech that is categorically exempt from First Amendment protection.[21] In *Garrison v. Louisiana*,[22] the United States Supreme Court explained that knowingly false speech is valueless and, thus, a type of speech that is categorically exempt from First Amendment protection.[23] However, *Garrison* concerned defamatory speech, which is already exempt from protection.[24] In *United States v. Alvarez*,[25] the Ninth Circuit disagreed with *Garrison*, holding that decisions that declare knowingly false speech as "valueless" do not answer the question of whether it is categorically exempt from First Amendment protection.[26]

Although the defendants in the present case interpreted the categorical exemption of defamatory speech as an exemption of all

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categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *R.A.V.*, 505 U.S. at 383-84. To exemplify this statement, the Supreme Court explains that while the government can lawfully prohibit libel, it cannot prohibit libel that only criticizes the government. *See id.* at 384-86 (clarifying distinction between entire category of content-based speech and limited category).

[21] *See infra* notes 23-26, 28-34 (detailing decisions for and against categorically excluding false speech from First Amendment protection).

[22] 379 U.S. 64 (1964).

[23] *See id.* at 75 (stating holding of case). The court noted that "even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any *except the knowing or reckless falsehood*." *Id.* at 73 (emphasis added).

[24] *See id.* at 65-66 (setting forth factual history where defendant was convicted of criminal defamation); *see also R.A.V.*, 505 U.S. at 383 (assigning defamation as category explicitly excluded from First Amendment protection).

[25] 617 F.3d 1198 (9th Cir. 2010).

[26] *See id.* at 1200 (declaring Stolen Valor Act unconstitutional). The Stolen Valor Act made it a crime to make false statements about one's own military service. *Id.* at 1119 & n.1. The court looked to *Schenck v. United States*, 249 U.S. 47 (1919), in an effort to ascertain a formula that proscribes what areas of false factual speech, beyond defamation and fraud, may be explicitly exempt from First Amendment protection. *Alvarez*, 617 F.3d at 1214. In *Schenck*, the Supreme Court set forth a requirement that in order to be restricted, the speech must be "uttered under circumstances likely to be the proximate cause of an imminent harm within the scope of Congress' legitimate reach." *Id.* at 1215 (citing *Schenck*, 249 U.S. at 52). The Ninth Circuit opined that the *Schenck* rule is "highly relevant" to the identified exempted classes of speech (i.e., defamation and fraud), as well as other classes of speech that have been held to be "unworthy of constitutional protection." *See id.* at 1214-15 (looking for formula to determine which areas of speech are unprotected). The other classes of speech that are not given constitutional protection are threats that are made with the intent of placing a victim in fear of bodily harm or death, speech that is directed to incite or produce imminent lawless action, and words spoken in public places that are likely to cause a breach of the peace. *See* Virginia v. Black, 538 U.S. 343, 359-60 (2003) (restricting threats made with intent to place victim in fear of bodily harm or death); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (prohibiting speech which incites or produces lawless action); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (prohibiting speech in a public place which may cause breach of peace).

knowingly false speech, the two are distinguishable.[27] Namely, defamation involves important private interests that political speech does not.[28] Noting this important distinction, the Ninth Circuit explained its reluctance to extend defamatory statements into a new context in order to create another exception to the First Amendment protections.[29] Another concern is that ballot initiatives are considered to be prototypical political speech, which is one of the primary matters the First Amendment protects.[30] Thus, courts must take into account that the First Amendment serves to "constrai[n] the collective authority of temporary political majorities to exercise their power by determining for everyone what is true and false, as well as what is right and wrong."[31]

Despite these distinctions and concerns, in his dissenting opinion of *Alvarez*, Judge Bybee emphasized the explicit words of the Supreme Court that false statements of fact "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[32] Judge Bybee combines this quote with two others from the Supreme Court to support his argument that false statements of fact should not be given First Amendment protection: that "the erroneous statement of fact is not worthy of constitutional protection,"

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[27] *See infra* note 28 and accompanying text (explaining distinction).

[28] *See* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992) (reasoning defamation is an actionable wrong because it vindicates private rights invoked on private individuals); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) (explaining defamation is punishable because of damage to individual's reputation). Furthermore, the Supreme Court has pointed out that the private interests that defamation law seeks to protect are not at issue in political speech because governmental entities cannot bring actions for libel or defamation. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 291 (1964) (explaining why criminal prosecutions for libel on government have no place in American jurisprudence).

[29] *See Alvarez*, 617 F.3d at 1208 ("[W]e are not eager to extend a statement (often quoted, but often qualified) made in the complicated area of defamation jurisprudence into a new context in order to justify an unprecedented and vast exception to First Amendment guarantees.").

[30] *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) (noting "universal agreement" that First Amendment was meant to protect free discussion of politics). The underlying concern regarding political speech is the danger of governmental oppression. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992) (noting "danger of censorship" as reason for strict scrutiny requirement (quoting Leathers v. Medlock, 499 U.S. 439, 448 (1991)) (internal quotation marks omitted)); *see also* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1109 (2006) (stating unlimited governmental power to prohibit deception would infringe "personal and political self-rule").

[31] *See* Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 3 (2008) (expressing concerns regarding restricting political speech).

[32] *Alvarez*, 617 F.3d at 1218 (Bybee, J., dissenting) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)) (internal quotation marks omitted).

and that "both inside and outside of the defamation context . . . false statements of fact are valueless and generally not within the protection of the First Amendment."[33] Therefore, contrary to the holdings of the Eighth and Ninth Circuits, Judge Bybee interprets the general rule as "false statements of fact are not protected by the First Amendment," excepting those situations where protecting a false statement is necessary to "protect speech that matters."[34] While the Eighth and Ninth Circuits have expressed their opinion that knowingly false speech is not categorically exempt from First Amendment protections, not all prior decisions and courts agree with this line of reasoning.[35]

In *281 Care Committee v. Arneson*,[36] the United States Court of Appeals for the Eighth Circuit considered the fundamental question of whether a state may enact a statute that restricts knowingly or recklessly false political speech without first demonstrating that the statute is narrowly tailored to a compelling state interest.[37] After concluding that the district court's approach was erroneous, the court remanded the case to allow the district court to perform the proper strict scrutiny analysis required of statutes that infringe upon fundamental constitutional rights.[38] The court discussed the issue by laying forth the general rule that content-based speech restrictions infringe upon First Amendment protections, and, therefore, must withstand strict scrutiny analysis in order to be upheld.[39] While acknowledging the well-established exceptions to First Amendment protections, the Eight Circuit disagreed with the district court's holding because the Supreme Court "has never placed knowingly false campaign

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[33] *See Alvarez*, 617 F.3d at 1220 (Bybee, J., dissenting) (explaining why some categories of false statements of fact should not be protected); *see also, e.g.*, BE & K Constr. Co. v. NLRB, 536 U.S. 516, 531 (2002) (noting false statements not protected "for their own sake"); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) (declaring false statements valueless and disruptive of truth-seeking purpose of public information); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983) (declaring false statements not "immunized" by First Amendment); Herbert v. Lando, 441 U.S. 153, 171 (1979) (explaining spreading false information carries "no First Amendment credentials").

[34] *See Alvarez*, 617 F.3d at 1219-21 (Bybee, J., dissenting) (quoting *Gertz*, 418 U.S. at 341) (internal quotation mark omitted) (rejecting general rule that all speech is presumptively protected).

[35] *See supra* notes 18, 26 and accompanying text (stating holdings of Eighth and Ninth Circuits); *see also supra* notes 32-34 and accompanying text (laying out opposing argument).

[36] 638 F.3d 621 (8th Cir. 2011).

[37] *Id.* at 626.

[38] *See id.* at 633 (summarizing holding). The district court determined that the knowingly or recklessly false campaign speech at issue falls outside the protections of the First Amendment, thus concluding that a strict scrutiny analysis was unnecessary. *Id.* at 633-34.

[39] *See id.* at 634-35 (recognizing history of question before court).

speech categorically outside the protection of the First Amendment."[40]

The Eight Circuit struck down the district court's reliance on decisions that deem knowingly false speech "valueless" and, thus, "categorically exempt from First Amendment protection," because the cases from which that language is derived involved fraudulent or defamatory speech.[41] Based on this determination, the court declared that it would follow the lead of the Ninth Circuit, which had concluded that the dicta from these cases do not answer the question of whether knowingly false speech is categorically exempt from constitutional protection.[42] The Eighth Circuit further criticized the district court's decision by pointing out the distinction between exempting all defamatory speech, as opposed to exempting all knowingly false speech.[43] While conceding that knowingly false speech is often valueless, the decision emphasized that it is not the responsibility of the appellate courts to determine which categories of speech are wholly exempted from First Amendment protection.[44] As further justification for this finding, the Eighth Circuit emphasized that courts must be careful not to encroach upon the right of individuals to freely discuss and criticize political affairs.[45] Based upon the foregoing reasons, the Eighth Circuit reaffirmed its decision to adopt the general rule that courts presumptively protect all speech, including speech that is knowingly false.[46]

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[40] *See id.* at 633-34 (discussing well-defined exclusions from First Amendment protection and rejecting district court's holding).

[41] *See 281 Care Comm.*, 638 F.3d at 634 (noting faults in district court's decision). These types of speech are already exempted from protection. *Id.*; *see also supra* note 23 and accompanying text (summarizing *Garrison* decision which held valueless speech does not enjoy constitutional protection).

[42] *See 281 Care Comm.*, 638 F.3d at 634-35 (adopting reasoning of Ninth Circuit's *Alvarez* decision); *see also supra* note 26 and accompanying text (outlining Ninth Circuit's holding and reasoning).

[43] *See 281 Care Comm.*, 638 F.3d at 634 (distinguishing defamatory speech and knowingly false speech); *see also supra* note 28 and accompanying text (explaining distinction).

[44] *See 281 Care Committee*, 638 F.3d at 635 (declining to establish knowingly false speech as new category of speech exempt from First Amendment). In articulating this point, the Eighth Circuit reasoned that prior decisions that have exempted categories of speech from protection are "descriptive not prescriptive." *Id.* Expanding upon this, the court explained that these previous decisions detail the type of speech exempted, but that they do not provide a formula for determining which other types of speech are exempted. *Id.*; *see also supra* note 26 and accompanying text (detailing Ninth Circuit's attempt to ascertain formula for excluded types of speech).

[45] *See 281 Care Comm.*, 638 F.3d at 635-36 (noting particular unwillingness to create new exception where speech at issue is political in nature). In its reasoning, the court recognizes that political speech is "at the heart of the protections of the First Amendment." *Id.* at 635 (citing Mills v. Alabama, 384 U.S. 214, 218 (1966)).

[46] *See id.* at 636 (stating holding and basis for same). It is important to note that this holding

In *281 Care Committee v. Arneson*, the Eighth Circuit maintained that knowingly false speech is not categorically exempt from First Amendment protection.[47] The Ninth Circuit's decision in *Alvarez* provided the court with a reasonable basis for this conclusion; namely, that knowingly false speech has not yet been categorically exempted from protection, and those areas that have been categorically exempted are distinguishable from all knowingly false speech.[48] As a result, the court bolstered the reasoning behind why knowingly false speech is not categorically exempt from protection, while also providing an analytical approach to determining why other categories of speech, which have been exempted, are applicable only to those specific areas of speech.[49] While making these clarifications and providing a basis for how these problems should be approached, the Eighth Circuit appropriately acknowledges and maintains its position as an appellate court by explicitly declining to declare a new category of speech as falling outside the protections of the First Amendment.[50] In actually approaching the merits of the issue, the court tactfully acknowledges the concerns that arise with protecting knowingly false speech, thereby demonstrating its empathy for the ears upon which such false information falls.[51] Furthermore, by explaining that political speech is of the utmost importance for First Amendment considerations, the court appropriately solidifies its basis for which to conclude that it is particularly important to protect the speech in the instant case.[52]

Despite the Eighth Circuit's well reasoned analysis of the issue, Judge Bybee's dissenting opinion in *Alvarez* resonates with readers from a policy perspective.[53] In criticizing the majority opinion in *Alvarez*, Judge Bybee points out the inconsistency whereby the majority quotes from the

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does not imply that a state may never restrict knowingly false speech; rather, it may only do so after it has established that such a restriction is narrowly tailored to meet a compelling state interest. *Id.*

[47] *See supra* note 6 and accompanying text (stating holding of case).

[48] *See supra* notes 26, 28 and accompanying text (explaining which areas have been exempted and which have not, and distinguishing between them).

[49] *See supra* notes 41-43 and accompanying text (detailing reasons why knowingly false speech not exempt); *see also supra* note 44 (explaining difference between "descriptive" and "proscriptive" decisions).

[50] *See supra* note 44 and accompanying text (noting it is not position of the courts of appeals to make this determination).

[51] *See* 281 Care Comm. v. Arneson, 638 F.3d 621, 635 (8th Cir. 2011) (conceding that false speech is often valueless).

[52] *See supra* note 45 and accompanying text (noting political speech is of utmost importance for First Amendment purposes).

[53] *See supra* notes 32-34 and accompanying text (articulating Judge Bybee's arguments).

Supreme Court's statement in *Garrison* that "the *knowingly* false statement . . . do[es] not enjoy constitutional protection," while holding that Alvarez's knowingly false statement is entitled to *full* constitutional protection.[54] Thus, on its face, it appears that both the Eighth and Ninth Circuits have preserved their stance, notwithstanding explicit language from the Supreme Court that has exempted false statements of fact from constitutional protection.[55] Despite these concerns, the Ninth Circuit notes an important problem with Judge Bybee's rule that false statements of fact are not protected: if this were the rule, states would be permitted to criminalize "lying about one's height, weight, age, or financial status on Match.com or Facebook."[56] Although it seems far-fetched that a state would enact laws prohibiting such types of speech, the Ninth Circuit elucidates an important consideration to rebut the general rule that Judge Bybee proffers in his dissent.[57]

Although the Eighth Circuit is correct in its notion that the First Amendment's mainstay function is protecting free discussion, including the criticism of political matters, it seems appropriate in this context to delve further into this function and apply it to the case at bar.[58] As noted, the First Amendment is designed to protect the public from oppression and censorship.[59] However, in *281 Care Committee v. Arneson*, a *political organization* is seeking to protect *its* speech.[60] Thus, it seems that an important interest to protect is the right of the citizens upon which the false

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[54] *See* United States v. Alvarez, 617 F.3d 1198, 1219 (9th Cir. 2010) (Bybee, J. dissenting) (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964)) (criticizing discrepancy in majority opinion).

[55] *See supra* notes 29, 46 and accompanying text (stating holdings of Eighth and Ninth Circuits); *see also Garrison*, 379 U.S. at 75 (stating First Amendment is inapplicable to false statements because content is worthless); *supra* note 33 and accompanying text (summarizing Supreme Court decisions that hold false statements are unprotected). Also noteworthy is the fact that, while *Garrison* is written in the context of defamation, there is no language which qualifies the Supreme Court's statement that the knowingly false statement does not enjoy constitutional protection as being applicable only to defamatory statements. *See Garrison*, 379 U.S. at 75 ("Hence, the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.").

[56] *See Alvarez*, 617 F.3d at 1200 (noting court's problem with Judge Bybee's analysis). The court went on to say that it would also permit states to create laws prohibiting individuals from lying to one's parents about smoking, drinking, speeding, or being a virgin. *Id.*

[57] *See id.* (explaining faults in Judge Bybee's analysis).

[58] *See supra* note 45 and accompanying text (justifying holding based on fact that speech at issue is political in nature).

[59] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992) (explaining danger of censorship requires strict scrutiny analysis).

[60] *See supra* note 45 and accompanying text (reasoning political speech invokes special considerations); *see also supra* note 15 and accompanying text (stating political organization, 281 Care Committee, filed suit to challenge constitutionality of FCPA).

information is directed.[61] Indeed, it is in fact those citizens who will be voting on whether to approve such a ballot initiative, and it seems contrary to public policy to allow politicians the ability to distort information so as to induce misinformed citizens to vote in their favor.[62] This may, however, be a consideration in the district court's strict scrutiny analysis, which the Eighth Circuit rightfully orders in its decision.[63]

In *281 Care Committee v. Arneson*, the United States Court of Appeals for the Eighth Circuit considered whether knowingly false speech is categorically exempt from First Amendment protection, thereby making it impermissible irrespective of strict scrutiny review. The court appropriately acknowledged that the Ninth Circuit has afforded a decision that explains that no court has explicitly exempted knowingly false speech from protection. Also accurate is the notion that false speech is generally of little value, and thus a concern with regard to First Amendment protection. However, greater deference should be afforded to the dicta in *Garrison* and its progeny, in which the United States Supreme Court explicitly asserted that false statements of fact "do not enjoy constitutional protection." While emphasizing the importance of protecting the freedom of political speech, this decision fails to consider that the false political speech at issue is that of *political organizations*, rather than citizens, which could potentially result in the very censorship and oppression that the United States Constitution seeks to prevent.

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[61] *See supra* note 7, 28-31 and accompanying text (explaining ballot initiative opposition materials are speech at issue).

[62] *See supra* note 7 and accompanying text (stating purpose of organization is to oppose ballot initiatives). This could lead to the very censorship and oppression which the First Amendment seeks to prevent. *See supra* notes 30, 59 and accompanying text (expressing concerns with censorship and oppression when false political speech is protected).

[63] *See supra* note 38 and accompanying text (remanding case for strict scrutiny analysis).