United States Court of Appeals
For the Eighth Circuit

No. 19-1364

Animal Legal Defense Fund; Iowa Citizens for Community Improvement; Bailing Out Benji; People for The Ethical Treatment of Animals, Inc.; Center for Food Safety,

Plaintiffs - Appellees,

v.

Kimberly Reynolds; Tom Miller, Attorney General of Iowa; Drew B. Swanson, Montgomery County Attorney,

Defendants - Appellants.

Brooke Kroeger; Ted Conover; Iowa Federation of Labor, AFL-CIO; Scholars of First Amendment and Information Law; Iowa Freedom of Information Council; United Farm Workers of America; Erwin Chemerinsky; 23 Media Organizations and Associations,

Amici on Behalf of Appellee(s).

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: September 22, 2020
Filed: August 10, 2021

Before COLLOTON, GRUENDER, and GRASZ, Circuit Judges.

COLLOTON, Circuit Judge.

In this appeal, we consider whether an Iowa statute prohibiting accessing agricultural production facilities by false pretenses and making false statements as part of an employment application to an agricultural production facility violates the First Amendment. The district court ruled that both provisions are unconstitutional and enjoined their enforcement. We affirm in part and reverse in part.

I.

In 2012, the Iowa General Assembly passed a bill entitled "Agricultural Production Facility Fraud." The statute states, in relevant part:

> A person is guilty of agricultural production facility fraud if the person willfully does any of the following:
>
> a. Obtains access to an agricultural production facility by false pretenses.
>
> b. Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.

Iowa Code § 717A.3A(1)(a)-(b) (2012). A first conviction under the statute constitutes a serious misdemeanor, and any subsequent conviction constitutes an aggravated misdemeanor. *Id*. § 717A.3A(2)(a)-(b).

Several organizations sued three Iowa officials in their official capacities: Governor Kimberly Reynolds, Attorney General Tom Miller, and Montgomery County Attorney Drew Swanson. The plaintiffs asserted, among other things, that the statute abridged their freedom of speech in violation of the First and Fourteenth Amendments. Specifically, they alleged that but for the statute, they and their investigators would assume "false pretenses" and make "false statements" in the course of obtaining access to, or employment with, agricultural production facilities for the purpose of publicizing the treatment of animals at these facilities.

The district court granted summary judgment for the plaintiffs after concluding that both Iowa Code § 717A.3A(1)(a) (the "Access Provision") and § 717A.3A(1)(b) (the "Employment Provision") violate the First Amendment. The court entered an injunction against enforcement of the entire statute, § 717A.3A, including its punishment provisions in § 717A.3A(2)-(3). The State appeals, arguing that both disputed provisions are constitutional.

II.

The First Amendment, incorporated against the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." As a general matter, this "means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 121 (2011) (internal quotation omitted). "Content-based laws" are "those that target speech based on its communicative content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In general, content-based laws "are subject to strict scrutiny" and "are presumptively unconstitutional." *Id.* at 163-64.

Both the Access Provision and the Employment Provision constitute direct regulations of speech. The Access Provision targets false "pretenses," Iowa Code

§ 717A.3A(1)(a), and the Employment Provision targets false "statement[s]," *id.* § 717A.3A(1)(b). Pretenses may consist of nonverbal conduct, but that conduct constitutes "pretenses" only because it expresses information. "A law directed at the communicative nature of conduct" is treated like "a law directed at speech itself." *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (emphasis and internal quotation omitted). Thus, the Access Provision's regulation of "pretenses," like the regulation of "statements," constitutes a direct regulation of speech. Both provisions also target expression for restriction on the basis of its content. Each prohibits expression that is "false," and an observer must examine the content of the speech to determine whether it is prohibited. *See Reed*, 576 U.S. at 163-64; *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984).

In debating the constitutionality of the statute, the parties focus on *United States v. Alvarez*, 567 U.S. 709 (2012). *Alvarez* analyzed whether the Stolen Valor Act of 2005 violated the First Amendment by making it a crime for a person to "falsely represent[] himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces." *Id*. at 715-16 (plurality opinion); *see* Pub. L. No. 109-437, § 3, 120 Stat. 3266, 3266 (2006) (current version at 18 U.S.C. § 704(b)-(c) (2018)). The Supreme Court declared the Act unconstitutional, but there is no opinion of the Court that sets forth a guiding rationale.

A plurality concluded that false speech is not in a general category that is presumptively unprotected. The plurality explained that where false claims are made knowingly or recklessly "to effect a fraud or secure moneys or other valuable considerations, say, offers of employment," then it is well established that the government may restrict speech without violating the First Amendment. *Alvarez*, 567 U.S. at 723. Citing prior decisions, the plurality also acknowledged that false speech is not protected in certain cases involving "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." *Id.* at 719. But the plurality concluded that the Stolen Valor Act targeted "falsity and nothing more," and that it was subject to "exacting scrutiny" as a content-based restriction on speech. *Id.* at 715, 719. Applying what has also been described as "strict scrutiny," *see Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442-43 (2015), the plurality determined that the government failed to show that the Act's restriction on false speech was "actually necessary" to achieve a compelling interest, or that the restriction was the "least restrictive means among available, effective alternatives." *Alvarez*, 567 U.S. at 726, 729 (internal quotation omitted). Accordingly, the Stolen Valor Act "infringe[d] upon speech protected by the First Amendment." *Id.* at 730.

An opinion concurring in the judgment concluded that the Stolen Valor Act violated the First Amendment for a different reason. Applying "intermediate scrutiny" to a law that proscribed false statements about "easily verifiable facts," the concurrence determined that the breadth of the prohibition created a significant risk of First Amendment harm, and that it was possible substantially to achieve the government's objectives in less burdensome ways. *Id.* at 732, 736-38 (Breyer, J., concurring in the judgment). Because the government did not convincingly explain why a more finely tailored statute would not work, the Act violated the First Amendment. *Id.* at 739.

When the Supreme Court is splintered, we attempt to apply the rule of *Marks v. United States*, 430 U.S. 188 (1977), to determine the controlling rule. But where a concurring opinion is not a logical subset of the plurality's rationale, or vice-versa, it is not possible to discern a holding in the case. *United States v. Bailey*, 571 F.3d 791, 798 (8th Cir. 2009); *King v. Palmer*, 950 F.2d 771, 781-82 (D.C. Cir. 1991) (en banc). That is the situation here. The *Alvarez* concurrence is arguably narrower than the plurality opinion because it applied intermediate scrutiny rather than exacting scrutiny. Yet the concurrence suggested more broadly that all false factual statements receive *some* protection under the First Amendment, while the plurality indicated that

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