Supreme Court Addresses Campaign Finance, Adult Businesses, and the Web

PAUL M. SMITH, JULIE M. CARPENTER, AND SAM HIRSCH

Campaign Finance Is Argued

On September 8, 2003, the U.S. Supreme Court returned from its summer recess a month early to hear oral argument in *McConnell v. Federal Election Commission*, which promises to be the most important campaign-finance decision since *Buckley v. Valeo* was decided more than a quarter century ago. In *Buckley*, the Court upheld some provisions of the Federal Election Campaign Act of 1971 and struck down others, leaving behind a patchwork statute that bore only a vague resemblance to Congress's original design. In *McConnell*, where nearly two dozen separate provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), commonly known as the McCain-Feingold bill, are under review, a similarly disjointed outcome may well ensue.

At oral argument, two aspects of BCRA took center stage. In the morning, argument focused on BCRA's ban on certain so-called soft money contributions. These were contributions that, under the prior law, could exceed the caps on direct contributions to federal candidates because they were given to state political parties for "party-building" activities such as Get Out The Vote (GOTV) efforts. In reality, soft money had proven to be an effective loophole for evading any meaningful constraint on the size of political contributions. But restricting soft money raises tricky questions regarding federalism and the First Amendment.

The afternoon argument in *McConnell* focused on BCRA's issue advocacy rules, which were designed to plug a loophole associated with the magic-words test. A key footnote in *Buckley v. Valeo* stated that political broadcast advertising was covered by the federal election laws only if it used magic words, such as "Vote for Candidate X" or "Vote Against Candidate Y." Thus, to avoid federal constraints, organizations increasingly wrote ads that said things like "Call Congressman Z and tell him his votes against Medicare are disastrous for our senior citizens." By avoiding the magic words and thus not expressly calling for voters to cast their ballots one way or the other, these ads were left largely unregulated. BCRA redefines the scope of issue advocacy ads in an effort to close this loophole. So the Court is faced with the question whether the new legal rules violate the First Amendment.

The soft-money and issue-advocacy aspects of BCRA are just two of the many pieces of the *McConnell* litigation. When the Court decides each of these issues, several practical questions will remain. How will the patchwork of provisions left standing interact? Will that patchwork serve the policy objectives that Congress set out to attain, or will it merely stimulate further legislative reform efforts in 2004 and beyond? How will political parties and candidates negotiate the transition from the full-fledged BCRA regime, which has been in force since the day after the 2002 midterm elections, to the partial BCRA regime that will presumably take hold sometime this autumn or winter? And, most important, how will the new regime alter our democratic processes and the marketplace of ideas on which those processes depend?

Licensing Adult Businesses

As many watchers expected, the Court granted certioriari in the case of *Z.J. Gifts v. City of Littleton* to resolve an issue left hanging last Term when another case raising this issue became moot after oral argument. The issue, on which the circuts are evenly split, is whether the First Amendment's requirement of prompt judicial review for those denied a license to operate an adult business requires a prompt judicial decision as to whether the denial was valid, or whether a government need only provide prompt access to the courts for a decision. The Littleton ordinance at issue in the case provides only assurances of access.

The split in the circuit courts mirrors the fractured views of the Supreme Court Justices. The Court had previously established three procedural safeguards required of administrative prior restraints: (1) the burden of going to court and the burden of proof is on the censor; (2) any restraint prior to judicial review must be brief and only to preserve the status quo; and (3) a prompt final judicial determination must be assured.

But when the Court was faced with the question of whether those safeguards applied to licensing schemes for adult businesses, it did not issue a majority opinion. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 2215 (1990). Three Justices who concurred in the decision to reverse the lower court concluded that all three safeguards applied to licensing systems for adult businesses. Three other Justices concluded that the first safeguard was unnecessary since the content of the speech was not at issue in licensing, and noted that "the possibility of prompt judicial review" was necessary.

Relying largely on that change in language, and on the differences between licensing cases and censorship cases, the Eleventh, Fifth, Seventh, and First Circuits have held that the *FW/PBS* Court relaxed the judicial review requirement so that access to prompt judicial review is all that is required for a valid licensing scheme. Noting that access to a court is always available anyway, the Tenth Circuit joined the Fourth, Sixth, and Ninth Circuits to hold that where an adult-business license is denied, the business is entitled to a prompt final decision regarding the validity of the denial. Noting that "[a]dult businesses are controversial, and the possibility exists that licensing officials might allow their

Paul M. Smith (psmith@jenner.com), Julie M. Carpenter (jcarpenter@jenner.com), and Sam Hirsch (shirsch@jenner.com) are partners in the Washington, D.C., office of Jenner & Block, LLC.

personal views on the morality of sexually explicit entertainment to sway a decision on an application," the court concluded a final decision was necessary to prevent the possibility of such licensing schemes being used as a "subterfuge for censorship." 311 F.3d 1220, 1238 (10th Cir. 2003).

On the merits, the Court will need to determine whether licensing of adult businesses is more like censorship, which requires the protection of a quick judicial decision to prevent the chilling effect of delay in overturning a decision preventing expression, or more like a ministerial decision based on licensing qualifications, which requires only prompt access to judicial review to protect speech.

Regulating Speech on the Web

On October 14, as expected, the Supreme Court granted review in *Ashcroft v. ACLU*, the case challenging the constitutionality of the Child Online Protection Act (COPA). That federal Act makes it illegal for any commercial website to include material that is "harmful to minors" but then creates affirmative defenses for sites that require a credit card or electronic adult ID to obtain access to the harmful material. The law was designed to remedy the flaws in the somewhat broader Communications Decency Act held unconstitutional by the Court in 1997. *Reno v. ACLU*, 521 U.S. 844 (1997).

The district court preliminarily enjoined implementation of COPA in 1999 and the Third Circuit affirmed the next year. 217 F.3d 162 (3d Cir. 2000). The court of appeals focused narrowly on the fact that the statute called for application of community standards in deciding which sexually explicit material is harmful to minors. The court held that it was unconstitutional to subject all Web users to the standards of the most conservative community.

The Supreme Court reversed and remanded in 2002, 122 S. Ct. 1700 (2002), in a set of fractured opinions that stand solely for the holding that the application of community standards in COPA does not, by itself, render the statute unconstitutional. On remand, last spring, the Third Circuit reaffirmed its affirmance of the district court's injunction. 322 F.3d 240 (2003). It held that the statute is not sufficiently narrowly tailored to the goal of protecting minors from harmful material.

The Third Circuit focused on several factors. First, the court said that webpages almost certainly would be considered in isolation (because of the problems ascertaining where a larger "work" begins and ends on the Internet) and thus an image that might have been intended to be part of a larger presentation with redeeming social value might be penalized. Second, the court read the statute as allowing a penalty for presentation of material inappropriate for very young minors—rejecting the interpretation that the touchstone-is-what is appropriate for sixteen year olds. Third, the limitation to speech with commercial purposes is still quite broad. Finally, the need to require credit cards or adult IDs would deter a great deal of speech to adults.

In addition, the court of appeals held that voluntary use of blocking software by parents is a more effective and less restrictive option. Finally, it held that the statute is overbroad in its impact of protected speech.