COURTSIDE

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The current U.S. Supreme Court Term has included an unusually high concentration of First Amendment cases. As this issue goes into production, decisions in the first four have issued.

Legal Services Corp. v. Velazquez

Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, held that *Rust v. Sullivan*[1] does not shield a Legal Services Corporation (LSC) restriction that prohibits LSC-funded lawyers from participating in litigation in which the validity of a welfare statute or administrative rule is challenged. Thus, LSC funds are available for representing disappointed welfare applicants, but the lawyers are limited as to the arguments they may make on behalf of their clients. Further, if applicants obtain independent co-counsel to raise such an argument, the LSC-funded lawyer must withdraw. The Court held that the LSC restriction was distinguishable from the prohibition on abortion counseling upheld in *Rust*, characterizing the Title X program in *Rust* as a subsidy intended to promulgate a specific message through private actors. In contrast, the Court viewed LSC funding as intended to encourage private speakers to promulgate their own messages because LSC lawyers speak on behalf of their clients.

The Court held that the government's freedom to discriminate against a specific viewpoint, as in the Title X program, applies only when the government itself is speaking or using private actors to speak for it. Finding its limited public forum cases instructive, the Court held that the government does not have the freedom to discriminate against a particular viewpoint when using its power to grant subsidies to encourage private actors to disseminate their own messages. The Court held that the LSC restriction violated this constraint, describing the rule as designed to insulate the government's interpretation of the Constitution from legitimate judicial challenge and suppress ideas inimical to its interests. Justice Scalia, joined by the Chief Justice, and Justices O'Connor and Thomas, wrote a heated dissent, arguing that *Rust*'s restriction on doctors is indistinguishable from the LSC restriction on lawyers.

Cook v. Gralike

Missouri's placement of pejorative labels on election ballots next to the names of candidates who did not support, or pledge to support, term limits was held invalid under the Elections Clause of the U.S. Constitution. With respect to the First Amendment arguments pressed by each side, the Court rejected the state's claim that its law was a valid time, manner, place regulation by questioning the doctrine's applicability and did not reach the challenger's compelled speech claim. Chief Justice Rehnquist, joined by Justice O'Connor, wrote separately to concur in the judgment, but to argue that the First Amendment time, manner, place doctrine was applicable, but that Missouri's law did not meet the test. The Chief Justice explained that the law was not content-neutral, or even viewpoint-neutral, and that placing the labels on ballots left candidates with no alternative to respond before voters cast their votes.

Brentwood Academy v. TSSAA

In *Brentwood Academy*, a slim majority held that the Tennessee Secondary School Athletic Association (TSSAA) is a state actor because it is so entwined with the state that its actions should be governed by the constitutional constraints on government. TSSAA regulates interscholastic athletic competition for both public and private high schools in Tennessee. Brentwood Academy, a private high school punished for violating the association's rule against using undue influence in recruiting athletes, sued TSSAA claiming that enforcement of the rule violated the First and Fourteenth Amendments.

The Supreme Court did not apply the public function test or the government coercion or encouragement test, explaining that there are no simple criteria for determining whether seemingly private behavior may fairly be treated as state action. The Court found sufficient public entwinement because the association's members are schools, of which 84 percent are public schools; those serving on the association's legislative council and board, and the representatives selecting them, are administrators or faculty at these schools; the sports regulated by the association play an integral role in the public education plan; association employees may join the state retirement system; and members of the state board of education serve ex officio on the association's council and board.

Justice Thomas's dissent, joined by the Chief Justice, and Justices Scalia and Kennedy, argued that the decision pushed the state action doctrine beyond prior bounds, and that the doctrine should apply only when an organization performs a public function; was created, coerced, or encouraged by the government; or acts in a symbiotic relationship with the government. The dissent saw no symbiotic relationship between TSSAA and the state. Regarding TSSAA as a government contractor that organizes athletic tournaments in return for member dues and gate fees, the dissent argued that "public entwinement" represented an entirely new formulation of law.

City News and Novelty Inc. v. Waukesha

After briefing and argument, the Court has dismissed the grant of certiorari in *City News.* The Court granted certiorari to resolve a question that has divided lower courts since *FW/PBS, Inc. v. Dallas.*[2] *FW/PBS* had held that the First Amendment imposes procedural requirements when governments deny licenses to sexually oriented businesses, including "an avenue for prompt judicial review."[3] Some courts have held that prompt access to court review is sufficient; others have held that a prompt judicial determination is re-

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quired. The Court dismissed the case after discovering that this question was not actually presented by the case and that the case was moot because City News had closed its business and withdrawn its application for a license in response to new competition. The Court explained that the question it intended to resolve had not been presented because City News was not a disappointed applicant whose speech was silenced absent a judicial resolution in its favor. City News had a license to conduct its business and was challenging a stop order. It therefore had stay procedures available as a means of maintaining its status as an adult business. In drawing the distinction, the Court suggested that the procedural safeguards required in *Freedman v. Maryland*[4] and its progeny, and in *FW/PBS,* apply when a would-be speaker will not be permitted to speak unless a court overturns the status quo. The Court expressly declined to address whether stay orders are constitutionally required to preserve the status quo when that would enable speech to continue pending administrative or judicial resolution.

Tobacco Advertising Restrictions

The Court has granted certiorari to review a First Circuit decision rejecting both First Amendment and preemption challenges to an advertising restriction on tobacco products intended to protect minors.[5] *Lorillard Tobacco Co. v. Reilly,* No. 00–596, and *Altadis U.S.A. Inc. v. Reilly,* No. 00–597. The regulation prohibits advertising of tobacco products outdoors, in an enclosed stadium, or inside a store that is visible from the sidewalk, if it is within 1,000 feet of a public playground, a playground area in a public park, or an elementary or high school. The petitioners claim that strict scrutiny should have been applied, rather than intermediate scrutiny under *Central Hudson*[6] and that the regulation does not even pass the *Central Hudson* test.

Child Pornography Prevention Act of 1996

The Court has also granted certiorari to review a Ninth Circuit decision invalidating two provisions of the Child Pornography Prevention Act of 1996 that proscribe using computer technology to produce pornography containing images that look like children.[7] *Reno v. Free Speech Coalition,* No. 00–795. The provisions apply the statute's terms to any sexually explicit image that "appears to be" a minor or "conveys the impression" that it portrays a minor. The Ninth Circuit held that, unlike earlier child pornography laws, these provisions could not be justified on the grounds that they were needed to protect children from being abused during the production of the materials, or by disseminating a record of that abuse, because it extended to materials that were produced without the involvement of any children.

Endnotes

1. 500 U.S. 173 (1991) (upholding Congress's rule that family counseling programs receiving Title X government funding could not provide abortion counseling).
2. 493 U.S. 215 (1990).
3. *Id.* at 229.
4. 380 U.S. 51 (1965).
5. Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000).
6. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).
7. Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999).