COURTSIDE

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The Supreme Court closed October Term 2008 by avoiding an immediate ruling on a key First Amendment case but seemingly promised a major decision early next Term.

Supreme Court Seems Poised to Invalidate a Key Campaign Finance Law

The Supreme Court ended the 2008 Term in June 2009 by ordering reargument in a closely watched case concerning the application of campaign finance restrictions to a movie that was highly critical of Hillary Clinton. *Citizens United v. Federal Election Commission* involves a ninety-minute movie that was scheduled for distribution right before federal primary elections in which Clinton was a candidate. Under § 203 of the Bipartisan Campaign Reform Act (BCRA) of 2002, corporations and unions are barred from engaging in "electioneering" communications during the thirty days in advance of a federal primary or sixty days in advance of a federal general election. The Supreme Court upheld that restriction in *McConnell v. Federal Election Commission*,[1] on the theory that it serves to buttress the limits on campaign contributions by corporations and unions. But more recently, in *Federal Election Commission v. Wisconsin Right to Life*,[2] the Court narrowed the restriction by ruling that it could not constitutionally be applied to issue ads that made negative statements about the performance of incumbent candidates but did not expressly advocate any candidate's defeat.

Then, in *Citizens United*, the question arose whether *Hillary: The Movie* would constitute a form of prohibited electioneering communication if the film were distributed via video-on-demand services during the Democratic primary season. The petitioner group accepts corporate money to fund its operations and thus must abide by the BCRA limits on corporate speech. A three-judge federal district court held that the movie qualified as electioneering communication. In the court's words, "*The Movie* is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her."[3]

In the Supeme Court, Citizens United argued for the Court to overrule the relevant portion of *McConnell* along *Austin v. Michigan Chamber of Commerce*,[4] in which the Court upheld state limits on spending from general corporate treasuries to support or oppose candidates in elections. Although the case might have been resolved on narrow grounds, the Court now seems poised to rule very broadly. Rather than issue a decision at the end of the Term in June, the Court issued an order that the case will be reargued in September. In the meantime, the parties are to file briefs on the question whether *McConnell* and *Austin* should be overruled. There is good reason to think a majority of the justices will say yes.

The Fleeting Expletives Decision

The Court decided *FCC v. Fox Television Stations, Inc.*, the so-called fleeting expletives case, on narrow administrative law grounds, leaving for another day the major constitutional questions that were included in some of the briefing. As readers will recall, this case involves a challenge to the FCC's change of course, in applying its indecency policies to broadcasters, from a posture of toleration of occasional isolated uses of expletives to a posture of punishing even one such utterance. The Second Circuit ruled that this change was arbitrary and capricious in violation of the Administrative Procedure Act (APA) because it was insufficiently explained, especially taking into account the constitutional concerns raised by the new policy.

The Supreme Court, in an opinion by Justice Scalia, reversed. Focusing solely on the APA issues, the Court held that there is no basis for requiring a heightened level of justification for an agency action just because it is a change of course by the agency. It also rejected the notion that agency actions require greater justification if they "implicate" First Amendment rights. Judged by these standards, the Court said that it was reasonable for the FCC to decide to punish even isolated uses of offensive words that referred to sexual and excretory functions, regardless of whether they were intended to have their literal meaning in the context in which they were uttered. Justice Scalia said that the harmful effects of such words on children were sufficiently clear to be a valid justification. And he also saw no reason to object to the FCC policy of applying its single-expletive policy selectively, depending on the type of programming involved.

Justice Thomas wrote an interesting concurrence, saying that while he agreed with the Court's analysis of administrative law, he questioned the continued validity of the cases (*Red Lion Broadcasting Co. v. FCC*[5] and *FCC v. Pacifica Foundation*[6]) that form the basis of the FCC's heightened authority to regulate broadcasting. He argued that spectrum scarcity can no longer be a rationale underlying the FCC's authority, and that broadcast television and radio can no longer be seen as "uniquely pervasive."

Justice Breyer, joined by Justices Stevens, Ginsburg and Souter, authored the primary dissent. He argued that the FCC had insufficiently explained why the Commission no longer was concerned that punishing a single fleeting expletive might go too far as a constitutional matter, and also had failed to justify the potential burden imposed by such a policy on coverage of local events, especially by smaller independent broadcasters. Justice Ginsburg wrote separately to say that in her view a policy of punishing fleeting expletives does violate the First Amendment, regardless of whether *Pacifica* itself remains good law.

Court to Consider a First Amendment Exception for Portrayals of Animal Cruelty

On April 20, 2009, the Supreme Court granted *certiorari* to review the

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constitutionality of 18 U.S.C. § 48, a criminal statute prohibiting the creation, sale, or possession of depictions of animal cruelty with intention of placing such depictions in interstate commerce. As we noted in our March 2009 *Courtside* column, which described the U.S. Solicitor General's petition for *certiorari* in the case, *United States v. Stevens*, No. 08-769, the Third Circuit had ruled that the statute violated the First Amendment and overturned the defendant's conviction for distributing videos containing depictions of dog fighting, among other things.

In its merits brief filed on June 8, 2009, the United States vigorously defends the statute's constitutionality. In particular, the government asks the Court to recognize depictions of animal cruelty as a new category of speech that is outside the protection of the First Amendment. According to the Solicitor General's brief, the Court should employ a "categorical balancing analysis" to determine whether "the First Amendment value of the speech is clearly outweighed by its societal costs."[7]

The Solicitor General gives four reasons why 18 U.S.C § 48 criminalizes "only a limited class of harmful material with little or no social utility."[8] First, the Solicitor General argues that the statute criminalizes only cruelty involving "a real, living animal," not simulated depictions of animal cruelty.[9] Second, the statute applies only to depictions of conduct that is illegal at the time and place that the depiction was created, sold, or possessed.[10] Third, the statute includes a "knowing" requirement that "limits the statute's reach to those traffickers who know that the depictions are images of real animals being tortured or killed."[11] Fourth, the statute contains an exceptions clause for any material with "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[12] The government claims that because the statute's reach is narrowly limited by these four restrictions, the "material reached by the statute is leagues distant from the free dissemination of ideas of social and political significance that lie at the core of the First Amendment."[13]

In urging the Court to reverse the Third Circuit, the United States also argues that even if 18 U.S.C § 48 is unconstitutional as applied to some speech, the statute is not "substantially overbroad" and should not have been invalidated on its face. The government maintains that at a minimum the statute is constitutional when applied to the videos of dog fighting at issue in this case or to so-called crush videos, which are filmed for a sexual subculture that is aroused by watching women crush small animals to death.[14] The Solicitor General argues that the Third Circuit should have employed a "case-by-case analysis" of the particular depictions at issue instead of invaliding the statute on its face based on constitutional problems that may arise in "isolated hypothetical" situations. Given the government's arguments about facial challenges, this case presents a potential vehicle for the Supreme Court to limit litigants' ability to challenge laws and regulations on their face under the First Amendment—or to reiterate that facial challenges play an important role in preventing the chilling of protected expression.

Endnotes

1. 540 U.S. 93 (2003).
2. 551 U.S. 449 (2007).
3. Citizens United v. Fed. Election Comm'n, 530 F. Supp. 2d 274, 279 (D.D.C. 2008).
4. 494 U.S. 652 (1990).
5. 395 U.S. 367 (1969).
6. 438 U.S. 726 (1978).
7. Gov't Brief at 12, United States v. Stevens (No. 08-769) (internal quotation marks omitted).
8. *Id.* at 14 (internal quotation marks omitted).
9. *Id*.
10. *Id.* at 15
11. *Id*.
12. 18 U.S.C. § 48(b).
13. Gov't Brief at 22, United States v. Stevens (No. 08-769) (internal quotation marks omitted).
14. *Id.* at 43, 45.