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Court Hears Argument in Fleeting Expletives Case

The Supreme Court on November 4, 2008, heard argument in No. 07-582, *FCC v. Fox Television Stations, Inc. et al.*, the so-called fleeting expletives case. The argument revealed some interesting splits among the Justices.

The Second Circuit had itself divided two-to-one in this case, which involves challenges to the FCC's changed policy that a single four-letter expletive during a show on broadcast television can, depending on the context, constitute improper indecency. The FCC made the policy change in the context of considering fines against two major networks for broadcasting single spontaneous expletives uttered by celebrities during live awards shows. The Second Circuit majority had held that this change of policy was not sufficiently justified and was therefore arbitrary and capricious, under the Administrative Procedure Act (APA). In so doing, the majority in the court of appeals expressed serious concerns about, but did not directly rule on, the constitutionality of the FCC policy under the First Amendment. Judge Leval dissented, arguing that the policy change was sufficiently explained for APA purposes. He did not address the First Amendment issue.

The FCC sought review in the Supreme Court. At oral argument, Solicitor General Garre tried to convince the Court to follow the lead of Judge Leval and reverse on the APA issue without addressing the First Amendment. This argument appeared to find a receptive audience in the Chief Justice, Justice Scalia, and possibly Justice Souter.

Other Justices, however, were more concerned about the actual burdens imposed on the broadcasters by the FCC's policy of judging individual expletives

based on the context of the particular show in which they occur. Justice Breyer asked repeated questions about the feasibility of using tape delay and bleeping technology. Justice Ginsburg suggested that the lines drawn by the Commission in practice—for example, permitting the expletives in *Saving Private Ryan* but not in a documentary on blue musicians—show “no rhyme or reason.” Justice Stevens asked questions suggesting some doubt that use of fleeting expletives in a manner divorced from their literal meaning could be considered indecent within the meaning of the Communications Act and the governing decision in *FCC v. Pacifica Foundation*.¹

Court Considers Arguments Concerning Public Forums and Monuments in the Park

Pleasant Grove City v. Summum, No. 07-665, presents the issue of whether a municipal government violates the free speech rights of a private group by refusing to place the group's monument alongside other privately donated monuments in a public park. Founded in 1975, Summum is a Salt Lake City-based religious organization. The principles of Summum's philosophy are contained within the Seven Aphorisms, teachings that followers believe were intended to complement the Ten Commandments. In 2003, Summum asked Pleasant Grove City, Utah, for permission to erect a monument of the Seven Aphorisms in a city park alongside an existing monument of the Ten Commandments donated by a local organization. The city denied the request on the grounds that the monument was neither relevant to local history nor donated by a group with longstanding ties to the community, the criteria that the city uses to determine the composition of permanent public displays.

Summum filed suit in federal district court, asserting that the denial violated the Free Speech Clause of the First Amendment, and sought a preliminary injunction allowing it to display the Seven Aphorisms monument pending resolution of the dispute. The district court denied the injunction, but a Tenth Circuit panel

reversed the lower court decision, holding that a city park is a traditional public forum historically associated with the free exchange of ideas. Noting that government restrictions on speech within such public forums are presumptively invalid and subject to strict scrutiny, the court found that the city failed to offer any reason why its historical criteria qualified as a compelling interest.²

The city petitioned the Tenth Circuit to rehear the case en banc, contending that the original panel erred in categorizing the park's donated monuments as private speech rather than as government speech. Rehearing was denied by an equally divided vote of six-to-six.³ In an opinion dissenting from the denial, Judge Lucero asserted that while a public park may be a traditional public forum for temporary speech and assembly, it cannot be considered one for the installation of permanent displays.⁴ Judge McConnell, also dissenting, argued that although the park's existing monuments were privately donated, the city embraced their messages as its own by accepting and displaying them, transforming them into government speech subject to a lower degree of scrutiny.⁵

Following the denial of rehearing en banc, the city petitioned for certiorari, which the Court granted on March 31, 2008. In its opening brief to the Supreme Court, Pleasant Grove City echoes the arguments of the dissenting judges on the Tenth Circuit. The city challenges the notion that private involvement in the creation or donation of a monument prevents such speech from being characterized as government speech, asserting that it is the government's editorial decision to display the monument that is the speech at issue. Pleasant Grove also contends that although a city park may be a public forum for transient speech, such as leaflets or oral presentations, there is no similar tradition allowing private parties to deposit permanent unattended monuments on government-owned land. As a final point, the city urges the Court to consider the practical consequences of upholding the Tenth Circuit's decision, expressing concern over the possibility

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that public land will either become cluttered by private monuments, or empty of even well-known historical structures.

In its brief in opposition, *Summum* asserts that government speech requires either active government participation in creating the message conveyed or formal adoption of that message, neither of which is present with regard to the Ten Commandments monument in Pleasant Grove City. *Summum* cautions that if either a municipality's ownership of a monument or exercise of editorial discretion in choosing to display it were sufficient to transform the monument into government speech, this would allow the government to provide preferential access to public forums by simply taking title to items of speech expressing messages with which it agrees. *Summum* also criticizes Pleasant Grove's attempt to divide a city park into public and nonpublic forums depending on the manner in which speech is expressed, referring to *Capitol Square Review & Advisory Board v. Pinette*, an Establishment Clause case in which the Court treated a town square as a traditional public forum despite the fact that the speech at issue was a permanent unattended display.⁶

The Court heard argument in *Pleasant Grove City v. Summum* on November 12, 2008. The resulting decision is certain to affect—and hopefully will clarify—the criteria used in identifying the fora at issue in First Amendment cases and provide a means of distinguishing between private and government speech in the increasingly common scenarios in which they intersect.

Court Hears Argument on the Right of Nonmembers of Unions to Resist Paying Fees

In the continuing debate over when unions can assess fees on nonmembers

without compelling speech in violation the First Amendment rights of those nonmembers, the Court recently heard argument in No. 07–610, *Locke v. Karass*. The question there is whether a public sector union may impose on nonmembers a service fee that includes litigation costs funded through pooling arrangements with other unions. Twenty state executives who were not members of the Maine State Employees Association, but who were covered by its collective bargaining agreement, challenged the assessment on them of a service fee, one component of which was an “affiliation fee” to the national union that included litigation costs related to collective bargaining. The executives argued that the fee required them to pay for “extra-unit” litigation that would benefit other local units or national affiliates but not their own local unit. And that result, they argued, violated their First Amendment protection against compelled speech as articulated in *Ellis v. Brotherhood of Railway Clerks*.⁷ *Ellis* held that litigation costs are germane—and therefore chargeable to nonmembers—only when those costs relate to the bargaining process for that particular unit. The First Circuit disagreed. It held that *Lehnert v. Ferris Faculty Association*⁸ controlled, rather than *Ellis*, because *Lehnert* applied to nondirect sources like the pooling arrangements at issue here. Applying *Lehnert*'s expanded notion of germaneness, which included activities that would “ultimately inure to the benefit of the members of the local union,” the court held that the extra-unit litigation was chargeable to nonmembers because it was germane to collective bargaining activity.

In the Supreme Court, petitioners have argued that the *Lehnert* test is unworkable and confusing. They seek a

bright-line rule that would limit chargeable expenditures to those relating to the individual bargaining unit. They also argue that imposing extra-unit litigation costs on nonmembers compels speech and therefore must be subject to strict scrutiny. Respondents urge the Court to maintain the *Lehnert* standard, in part because the pooling arrangements allow the local units to keep their costs down to the benefit of members and nonmembers alike. At oral argument, the Court probed whether the pooling arrangement was essentially an insurance scheme, which would not be constitutionally forbidden; whether litigation about a collective bargaining agreement is germane to that agreement in the same way that negotiation of it is germane; and whether the public nature of litigation made it compelled speech. Given that *Lehnert* left open whether extra-unit litigation could be charged to nonmembers as part of a pooling arrangement, the Court will likely answer that question. But whether the test that emerges is a bright-line one, or one that requires evaluating several factors depends on whether this Court tries to reconcile *Ellis* and *Lehnert* or decides to fashion a new test of germaneness. 

Endnotes

1. 438 U.S. 726 (1978).
2. 483 F.3d 1044 (10th Cir. 2007).
3. 499 F.3d 1170 (10th Cir. 2007).
4. *Id.* at 1173–74 (Lucero, J., dissenting).
5. *Id.* at 1177 (McConnell, J., dissenting).
6. 515 U.S. 753 (1995) (holding that a state government did not violate the Establishment Clause by allowing a private group, the Ku Klux Klan, to display an unattended cross in a public square containing other privately donated religious monuments).
7. 466 U.S. 435 (1984).
8. 500 U.S. 507 (1991).