Free Speech and Election Law

Supreme Court Update: 2003 2nd Quarter

*by Todd Overman**

The following cases, each with free speech or election law implication, were decided by the Court since April 2003.

FEC v. Beaumont, 123 S. Ct. 2200 (2003). ***Cert. Granted: November 18, 2002. Oral Argument: March 25, 2003. Decided: June 16, 2003.***

Since 1907, corporations have been prohibited from contributing directly to candidates in federal elections. *See* 2 U.S.C. Section 441b(a)-(b) (2002). However, corporations are free to establish and administer political action committees ("PACs") that can make contributions and expenditures in connection with federal elections. 441b(b)(2)(C). A nonprofit advocacy corporation, North Carolina Right to Life, Inc. ("NCRL"), sued the Federal Election Commission ("FEC") challenging the constitutionality of Section 441b and its implementing regulations. NCRL is a 501(c)(4) corporation and provides counseling to pregnant women and advocates alternatives to abortion. It is funded primarily by individual contributions, but NCRL does receive some contributions from business corporations. In accordance with the prohibition on corporation contributions, NCRL established a PAC to contribute directly to federal candidates. The District Court granted summary judgment to NCRL and held Section 441b unconstitutional as applied to the corporation, as to both direct contributions to federal candidates and independent expenditures in connection with federal elections. A divided Fourth Circuit Court of Appeals affirmed, treating NCRL as materially indistinguishable from the nonprofit advocacy corporation at issue in the Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). The Fourth Circuit reasoned that "[t]he rationale utilized by the Court in [*Massachusetts Citizens for Life*] to declare prohibitions on independent expenditures unconstitutional as applied to [the advocacy corporation involved there] is equally applicable in the context of direct contributions." 278 F.3d 261, 282 (2002). Interestingly, the FEC petitioned for *certiorari* only on the issue of the constitutionality of the ban on direct contributions.

Justice Souter began the majority opinion (vote of 7-2) reflecting on the prohibition of direct corporate political contributions throughout the twentieth century. Citing the need to combat the corruptive influence of corporation contributions, Souter explained that the "first federal campaign finance law" in 1907 acted on President Theodore Roosevelt's call for an outright ban, not half measures. Souter stated that not only has the ban endured, but the original rationales for the law are still present today. Specifically, "[i]n barring corporate earnings from conversion into political 'war chests,' the ban was and is intended to 'prevent corruption or the appearance of corruption.'" 123 S. Ct. at 2206. Justice Souter also reasoned that another basis for regulating corporate electoral involvement is to hedge against their use as conduits for circumvention of valid contribution limits. *Id.* at 2207. In the area of campaign contributions, the Court noted the deference afforded to Congress to regulate the "plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages." *Id.*

In the present case, Justice Souter indicated that the Court's decision in *FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982) all but decided the issue against NCRL's position. *National Right to Work* held as constitutional Section 441b(b)(4)(A)'s restriction barring a corporation from soliciting contributions to a PAC established by the corporation, except from stockholders or other specified categories of persons. In that case, the Court specifically rejected the argument made by NCRL that deference to congressional judgments about proper limits on corporate contributions should turn on the wealth of particular corporations or the details of corporate form. *Id.* at 2208. Justice Souter distinguished *Massachusetts Citizens for Life* as holding that Section 441b's prohibition on independent expenditures, not contributions, was unconstitutional as applied to a nonprofit advocacy corporation. Here, the "concern about the corrupting potential underlying the corporate ban may indeed be implicated by advocacy corporations." *Id.* at 2209. Souter pointed to such 501(c)(4) corporations as the AARP, the NRA, and the Sierra Club, as examples of nonprofit advocacy corporations with substantial influence and ability to amass political war chests. Lastly, Justice Souter rejected NCRL's argument that the application of the corporate contribution ban should be subject to a strict level of scrutiny, as Section 441b does not merely limit contributions, but bans them on the basis of their source. Citing *Buckley v. Valeo*, 424 U.S. 1 (1976), Souter explained the distinction between the level of scrutiny applied to contributions and expenditures, and suggested that NCRL was wrong in characterizing Section 441b as a complete ban. In an endorsement for PACs, Justice Souter concluded by stating that Section 441b allows corporations and unions to make political contributions "without the temptation to use corporate funds for political influence . . . and it lets government regulate campaign activity through registration and disclosure . . . without jeopardizing the associational rights of advocacy organizations' members." *Id.* at 2211.

Virginia v. Hicks, 123 S. Ct. 2191 (2003). ***Cert. Granted: January 24, 2003. Oral Argument: April 30, 2003. Decided: June 16, 2003.***

In 1997, the Richmond City Council privatized the streets of Whitcomb Court, a low-income housing development, and conveyed the streets to the Richmond Redevelopment and Housing Authority ("RRHA"). In accordance with the conveyance, and in line with Richmond's overall goal of combating crime and drug dealing, the RRHA enacted a policy authorizing the Richmond police to serve notice on any person lacking "a legitimate business or social purpose" for being on the property and to arrest for trespassing any person who remains or returns after having been so notified. The RRHA posted "No Trespassing. Private Property" signs on each apartment building and along the streets of Whitcomb Court. The RRHA policy went beyond policies of other public housing units by barring unwanted visitors from the grounds and buildings, and also formerly public streets and sidewalks. Respondent Kevin Hicks, a nonresident of Whitcomb Court, was given written notice barring him from Whitcomb Court. Subsequently, Hicks sought permission on two occasions to enter the property, and was twice denied by the property manager. In January of 1999, Hicks trespassed again, and was arrested and convicted.

The issue presented to the Court was whether the RRHA's trespass policy was facially invalid under the First Amendment's overbreadth doctrine. The Virginia Supreme Court concluded that the RRHA policy was unconstitutionally overbroad. The Court granted the Commonwealth's petition for *certiorari*, and Justice Scalia delivered the opinion for a unanimous Court. Initially, Justice Scalia noted that Hicks was not contending that he was engaged in constitutionally protected speech, but rather that the RRHA policy barring him from Whitcomb Court was overbroad and could not be applied to him or anyone else. The Virginia Supreme Court found that the policy provided the property manager "unfettered discretion" in determining who may use RRHA's property, and specifically faulted an "unwritten rule" that required persons wishing to hand out fliers to obtain the property manager's permission. *Id.* at 2196. Based upon this objection, the Virginia Supreme Court declared the *entire* RRHA trespass policy overbroad and void – including the written rule that those who return after receiving notice are subject to arrest. However, the Court stated that under the overbreadth doctrine, the trespass policy, *taken as a whole,* must be substantially overbroad judged in relation to its plainly legitimate sweep. *Id.* at 2198 (emphasis added). The Court reasoned that Hicks failed to carry the burden of demonstrating that any First Amendment activity fell outside the "legitimate business or social purpose" that permitted entry. Furthermore, in this case, it was Hicks' nonexpressive conduct – his entry in violation of the notice-barment rule - not his speech, for which he was punished as a trespasser. The Court concluded by noting that "[R]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Id.* at 2199. Here, even assuming the invalidity of the unwritten rule, Hicks did not show "that the RHHA trespass policy as a whole prohibits a 'substantial' amount of protected speech in relation to its many legitimate applications." *Id.*

Interestingly, Justice Scalia's opinion left open the possibility that the policy could be challenged on other grounds upon remand. *Id.* For instance, the Court suggested that the policy could be challenged by someone who has been prevented from picketing or otherwise engaging in constitutionally protected expression. Nonetheless, supporters of the decision stated that the Court's ruling sent a message that would bolster the efforts of public housing authorities to protect their property and residents through policies designed to keep unwanted visitors away.

Nike, Inc. v. Kasky, 123 S. Ct. 2554 (2003). ***Cert. Granted: January 10, 2003. Oral Argument: April 23, 2003. Dismissed: June 26, 2003.***

On the last day of 2002-03 term, the Court dismissed by a 6-3 vote Nike's appeal of the California Supreme Court's decision that the lawsuit brought by Marc Kasky in 1998 could proceed to trial. The dismissal disappointed many legal analysts who were hoping for the Court to produce a major ruling clarifying what type of statements amount to commercial speech. Justices Stevens, Ginsburg, and Souter issued a separate opinion explaining why they thought the Court's decision dismissing the case was justified. Justice Stevens indicated that the factors supporting a dismissal were that the California Supreme Court never entered a final judgment, that neither party could invoke federal court jurisdiction, and that the lack of a full factual record developed at trial limited the Court's ability to effectively decide such important constitutional issues. Justice Kennedy filed a dissent, as did Justice Breyer, with whom Justice O'Connor joined. Justice Breyer disagreed with the reasons put forth by Justice Stevens for dismissing the case and argued that the case was ripe for review.

On September 12, 2003, the parties announced that they had agreed to settle the lawsuit. As part of the settlement, Nike agreed to make additional workplace-related program investments totaling $1.5 million. Nike's contribution will go to the Washington D.C. based Fair Labor Association for program operations and worker development programs focused on education and economic opportunity. Free speech proponents were obviously disappointed that the settlement ended the lawsuit without resolving the important First Amendment applications to corporate speech.

U.S. v. American Library Association, Inc., 123 S. Ct. 2297 (2003). ***Probable Jurisdiction Noted: November 12, 2002. Oral Argument: March 5, 2003. Decided: June 23, 2003.***

To combat the growing problem of children's access to internet pornography in public libraries, Congress

enacted the Children's Internet Protection Act ("CIPA"). Under CIPA, a public library may not receive federal assistance to provide Internet access unless it installs filtering software to block images that constitute obscenity or child pornography. In 2002, the two assistance programs, E-rate and LSTA, provided $58.5 million and $149 million, respectively, to assist 95% of the nation's libraries in providing public Internet access. CIPA also permits the library to disable the filter "to enable access for bona fide research or other lawful purposes." 20 U.S.C. Section 9134(f)(3); 47 U.S.C. Section 254(h)(6)(D). After a trial, a three-judge panel from the Eastern District of Pennsylvania ruled that CIPA was facially unconstitutional and enjoined the withholding of federal assistance for failure comply with CIPA. Specifically, the district court held that the filtering software was a content-based restriction on access to a public forum, and was therefore subject to strict scrutiny. The court then determined that the use of software filters was not narrowly tailored to further the government's compelling interest of protecting minors from obscenity and child pornography. Justice Rehnquist, writing for the plurality, reversed the court's decision.

Framing the analysis under the framework of *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), Justice Rehnquist stated that "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." 123 S. Ct. at 2303. However, Congress may not "induce" the recipient "to engage in activities that would themselves be unconstitutional." *Id.* (citing *Dole*, 483 U.S. at 210). After examining the traditional functions served by public libraries, Rehnquist concluded that Internet access in public libraries was neither a "traditional" nor a "designated" public forum. *Id.* at 2304. The Court reasoned that libraries provide Internet access for the "same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." *Id.* at 2305. Therefore, the requirement of filtering software was not held to the heightened standard of strict scrutiny. In response to the dissent's concern of the filtering software's tendency to "overblock" constitutionally protected speech, the plurality noted the relative ease by which a library patron can request to have the filter disabled. Lastly, the Court rejected the appellees unconstitutional condition claim on the basis that Congress may insist that "public funds be spent for the purposes for which they were authorized. Especially because public libraries have traditionally excluded pornographic material from their other collection, Congress could reasonably impose a parallel limitation on its Internet assistance programs. As the use of filtering software helps to carry out these programs, it is a permissible condition under *Rust.*" *Id.* at 2308. Justice Rehnquist also noted that if public libraries wish to offer unfiltered Internet access, they are free to do so without federal assistance.

Looking Ahead to 2003-2004 Term

- On June 5, the Supreme Court set oral arguments in *McConnell v. FEC* for September 8, 2003. In a one-paragraph order, the Court also announced that said arguments would last for four hours. The expedited schedule could allow the Court to issue a ruling before the first presidential caucuses and primaries – the first being January 19, 2004 in Iowa.

- On April 30, 2003, a petition for *certiorari* was filed by the Department of Justice and the Elk Grove Unified School District in **Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003).** In an unusual move, Mr. Newdow also filed a petition for *certiorari* in order to provide the Court with subject matter jurisdiction to review the constitutionality of the Pledge of Allegiance. In *Newdow*, a divided Ninth Circuit ruled that the phrase "under God" in the Pledge of Allegiance was an endorsement of God, and that the Constitution forbids public schools or other governmental entities from endorsing religion. In February, the Ninth Circuit panel denied the government's petition for rehearing and petition for rehearing *en banc*, and set the stage for eventual Supreme Court review.

FEC News & Notes

- The FEC held a hearing on the generally secret methods it uses to investigate candidates and political organizations accused of violating campaign finance laws. Among the topics under review were guidelines for including respondents in a complaint, confidentiality rules, and motions before the commission. Commissioner Bradley Smith summed up the purpose of the hearing by saying, "we should not mistake secrecy and unfairness for robust enforcement."

- In a 5-0 vote, the FEC said Nevada Sen. Harry Reid's son, Rory Reid, could raise hard money for his father's campaign and soft money for the Nevada Democratic Party. Despite the ban on raising "soft money" by agents of federal campaigns, the commission found that Reid would not be acting as an agent of his father's campaign when raising for the state party, and that his status as the senator's son would not be enough on its own for him to be considered an agent of the senator's campaign. Rory Reid is a Clark County commissioner in Nevada and former chairman of the Nevada's Democratic Party.

- Senators McCain and Feingold introduced the Federal Election Administration Act of 2003. The Act would abolish the FEC and replace it with a new agency, entitled the Federal Election Administration (FEA). Under the proposal, the FEA would be comprised of three members – a chairman and two members – each appointed by the president with the advice and consent of the Senate. The Chairman

would serve a term of ten years and have broad authority to manage the agency, and the members would serve six year terms and could not be from the same political party. In addition, enforcement proceedings would be conducted before administrative law judges, where the ALJs would have the authority to make findings of fact and reach conclusions of law.

State Items of Interest

- The Massachusetts Legislature repealed the state's Clean Elections Law as part of a compromise budget plan reached in conference committee. The House voted 118 to 37, and the Senate 32 to 6, on the budget compromise that repealed a law that voters overwhelmingly approved in 1998. If Gov. Mitt Romney chooses not to veto the budget provision, then only two states, Arizona and Maine, will have Clean Elections Laws that apply to state office holders.

- Free speech battles are brewing at college campuses across the country. Assisted by the Philadelphia-based, Foundation for Individual Rights in Education ("FIRE"), censored students are filing lawsuits challenging unconstitutional speech codes at their universities. For instance, students are challenging as too broad or vague Pennsylvania's Shippensburg University's speech codes that declare words or actions that are "inflammatory, demeaning or harmful to others" as undeserving of protection. Also, at Texas Tech University, students have filed a lawsuit challenging the school's speech codes and policy quarantining free speech to a small gazebo. Similar "free speech zones" have appeared at the University of Houston, University of Maryland, and Florida State University. Once challenged, schools appear to back down, as West Virginia University and the University of Texas-Austin recently declared the entire campus a free speech zone.

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