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***FCC v. Fox Television Stations* (07-582)**

Appealed from the U.S. Court of Appeals for the Second Circuit (June 4, 2007)

Oral argument: Nov. 4, 2008

From 1978 to 2003, the Federal Communications Commission (FCC) enforced its authority to regulate indecency in broadcast media with a standard that did not define as indecent the broadcast of a single, fleeting expletive. In 2003, the FCC departed from its past policy, stating that fleeting expletives could be found indecent. The issue in this case is whether an expletive must be repeated in order for the FCC to be able to find it “indecent.” Fox Television, NBC, ABC, CBS, and the Center for Creative Voices argue that repetition should be required for the broadcast to be found indecent and that the FCC’s change in policy is arbitrary and capricious and violates the First Amendment. The U.S. Court of Appeals for the Second Circuit agreed with the networks that the new FCC standard is arbitrary and capricious, but the court did not rule on whether the new policy violates the First Amendment. The Supreme Court’s ruling in this case will be important, because it is the first time the Supreme Court will rule on the issue of indecency in broadcasting since its 1978 ruling in *FCC v. Pacifica Foundation*, in which the Court ruled that the FCC had the authority to regulate indecency in broadcast media.

The FCC began to tighten enforcement of indecent material after a broadcast of the 2003 Golden Globe Awards, in which award recipient Bono said, “This is really, really f***ing brilliant. Really, really great!” After receiving complaints about Bono’s statement, the FCC held that “the ‘F-Word’” was presumptively indecent, even if it was not

repeated. The FCC put broadcasters on notice that they could be fined for any broadcast of the “F-Word,” overruling the commission’s previous position.

In 2006, the FCC addressed complaints regarding two Billboard Music Awards programs that Fox had broadcast. During her acceptance speech at the 2002 Billboard Music Awards, Cher stated, “People have been telling me I’m on the way out every year, right? So f*** ’em.” In addition, at the 2003 Billboard Music Awards, presenter Nicole Richie said, “Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***ing simple.” In its Omnibus Order, the FCC found the two Billboard Music Awards incidents indecent and profane and reaffirmed that any use of the word “f***” is presumptively indecent. The FCC also decided that any use of the word “s***” is presumptively indecent.

After the FCC issued the Omnibus Order, Fox and CBS petitioned the U.S. Court of Appeals for the Second Circuit for a review of the order. The Second Circuit granted the petitions and consolidated a petition filed by ABC with the others. The Second Circuit found that the FCC’s indecency policy was invalid under the Administrative Procedure Act (APA) and remanded the matter to the FCC for further proceedings. After the Second Circuit’s decision, the FCC petitioned the U.S. Supreme Court for certiorari, which was granted.

Implications of the Case: The End of Live Television Broadcasts?

This case turns on administrative and constitutional questions that could ultimately alter the availability of live broadcasting and the extent to which children are exposed to offensive content on television. Respondent Fox ar-

gues that the FCC did not sufficiently explain the reasoning behind the change in its indecency policy, which makes one fleeting use of “f***” or “s***” indecent, and that the policy is unconstitutional under the First Amendment because it restricts free speech. The FCC, on the other hand, contends that it thoroughly explained the reasoning behind its indecency policy and that the policy avoids two unacceptable extremes: a likely unconstitutional blanket prohibition on expletives and unlimited use of expletives by broadcasters.

Respondent broadcasters argue that the Supreme Court’s decision could endanger live programming if the Court approves of the FCC’s indecency policy. The *Washington Post* reports that, because one use of profanity can cost as much as \$325,000, broadcasters may have a fiduciary duty to their shareholders to limit live broadcasting or stop it. Furthermore, the American Civil Liberties Union (ACLU) argues that small broadcasters may not be able to afford even one fine resulting from a slip during a live broadcast. Public broadcasters, including PBS and NPR, point out that a single expletive broadcast on all 356 PBS stations could result in a fine of \$115 million. As a result, the public broadcasters argue, the FCC’s policy could prompt broadcasters to self-censor any conceivably offensive material, which could prevent a full and fair presentation of material that is broadcast.

Broadcasters also argue that a ruling in favor of the FCC’s policy would make it impossible to predict what might be indecent. The ACLU notes that the FCC sometimes allows expletives when they are essential to artistic expression or when they are stated as part of a news program, but the FCC’s unpredictable methods of determining what merits artistic or journalistic exemption could lead to unconstitutional censorship by the government. The ACLU further argues that, if the Supreme Court rules in favor of the FCC, the FCC’s determination of what constitutes artistic necessity may unintentionally further cultural stereotypes. For example, the FCC found the use of “f***” and “s***” to be indecent in “The Blues,” a PBS documentary portraying African-

American blues musicians, but found the more frequent use of “f***” and “s***” in the mainstream movie “Saving Private Ryan” to be an artistic element that was essential to the movie.

FCC’s amici, Parents Television Council, however, argues that, if the Supreme Court rules in favor of the broadcasters, 18 U.S.C. § 1464—the statute that authorizes the FCC to punish the broadcasting of indecent language—will become nothing more than a “polite fiction.” In addition, the Center for Constitutional Jurisprudence argues that, if the Supreme Court decides in favor of the broadcasters, the FCC might not be able to respond to the increasing frequency with which indecent material is broadcast. Indeed, the National Religious Broadcasters (NRB) argue that a decision in favor of the broadcasters could force the FCC to evaluate the decency of broadcast material with a rigid rule that does not account for the nuances that many artistic programs present.

Furthermore, *Morality in Media* emphasizes that a decision in favor of the FCC is crucial to the development of children, whose vocabularies can instantly expand after hearing a single use of an expletive. *Morality in Media* offers anecdotal evidence from newspaper articles to show that children’s use of foul language can lead to negative school environments in which students may show little respect for their peers as well as their educators. NRB also argues a Supreme Court decision in favor of the broadcasters will have a negative effect on children, because hearing a single use of an expletive could make it harder for them to understand the fine line that can divide lawful and unlawful use of expletives directed at other people.

The Supreme Court’s decision either way will adjust the balance between the interests of broadcasters, artists, and journalists who claim that the FCC’s indecency policy restricts free speech and the interests of parental and religious advocacy groups who believe that the FCC’s indecency policy helps protect children from harmful exposure to offensive material.

Did the FCC Provide a Reasonable Explanation for Changing its Policy?

According to 5 U.S.C. 706(2)(A) or

the Administrative Procedure Act, a reviewing court shall hold unlawful and set aside any agency actions, findings, and conclusions that are found to be arbitrary and capricious. The FCC argues that this statute mandates an appellate court to affirm an administrative agency’s change in policy as long as the agency provides a reasonable explanation for the change. The FCC asserts that it satisfied the APA’s requirements because it provided a reasonable explanation for the change in its enforcement of 18 U.S.C. § 1464.

The FCC’s explanation for the change in its enforcement policy is that “categorically requiring repeated use of expletives in order to find material indecent is inconsistent” with the commission’s “general approach to indecency enforcement, which stresses the critical nature of context.” The FCC argues that its explanation, “by itself, is sufficient to satisfy the APA’s requirement that an agency explain a change in policy.” As a result, the FCC contends, the Second Circuit erred in “second-guessing” the FCC’s choice to change its policies with regard to enforcing § 1464.

Respondent Fox, on the other hand, argues that the FCC’s change in policy was “arbitrary and capricious” and lacked a reasonable explanation. Fox acknowledges that the FCC provides three reasons as an explanation for its change in policy: (1) that the change replaces a per se rule with a contextual, case-by-case method of ruling on fleeting expletives; (2) that the change protects listeners from the “first blow” of offensive words; and (3) that the change prevents the risk that broadcasters will air isolated expletives more frequently. However, Fox challenges the reasonableness of these explanations, alleging that a per se rule on fleeting expletives never existed and that the FCC failed to explain “what harms its new policy is meant to address.” Fox claims that there is no evidentiary support for the FCC’s concern that a policy that allows a single utterance of a vulgarity increases the risk that broadcasters will air isolated expletives more frequently.

In addition to Fox’s arguments, the Center for Creative Voices argues that the FCC’s enforcement of its policy leaves artists “confused as to what constitutes

indecent and profane programming.” The center argues that the FCC’s changed policy is “chilling speech and stifling creative expression.” In addition, the center argues, the possibility of incurring fines for indecent programming forces artists to err on the side of caution.

Conclusion

The Court’s decision in this case will be the first time that it rules on the FCC’s policy regarding indecent broadcasts since 1978, when it upheld the FCC’s authority to regulate indecency. In this case, the Court will decide the issue of whether an isolated expletive can merit sanction. Legally, the Court’s decision could have administrative and constitutional repercussions on the limits on the amount of deference due to an administrative agency and the extent to which 18 U.S.C. § 1464 limits the right to free speech under the First Amendment. In practical terms, the Court’s ruling may affect the network television programming to which viewers have access. **TFL**

Prepared by Lucienne Pierre and Kaci White. Edited by Hana Bae.

Wyeth v. Levine (06-1249)

Appealed from the Supreme Court of Vermont (Jan. 18, 2008)

Oral argument: Nov. 3, 2008

In 2000, Diana Levine was treated with Phenergan[®] to relieve nausea caused by a migraine headache. The drug was incorrectly administered into Levine’s vein, causing gangrene that ultimately led to the amputation of part of her arm. Levine sued Wyeth, Phenergan’s manufacturer, in Vermont Superior Court and the Supreme Court of Vermont on claims of negligence and product liability, arguing that Phenergan’s label was inadequate in the way it warned consumers about its possible risks. Wyeth, on the other hand, argued that federal law pre-empted Levine’s state law claims, because state law directly conflicts with the requirements of the federal Food, Drug and Cosmetics Act (FDCA). With both lower courts having ruled in favor of Wyeth, this

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case gives the U.S. Supreme Court an opportunity to define the federal pre-emption doctrine further by clarifying whether a drug manufacturer can be liable under state law after complying with the labeling requirements issued by the Food and Drug Administration (FDA). Stakeholders on both sides argue that the outcome of this case will have a direct impact on the kind of information included on drug labels and, as such, will have serious implications for patients' safety and public health.

This case will determine whether drug manufacturers or the federal government is ultimately responsible for the adequacy of drug labeling. According to Wyeth, the petitioner, the FDCA gives the FDA complete control over the content of drug labels and thus exempts drug manufacturers from liability under state law for claims related to the adequacy of labels. In contrast, Levine, the respondent, argues against federal pre-emption on grounds that the FDA establishes only minimum labeling requirements and leaves manufacturers free to modify labels as necessary to comply with state product liability laws. According to the 30 amicus briefs in this case, the outcome will have a serious impact on public health and safety.

Who is Ultimately Responsible for Decisions About Drug Labeling?

A matter of great concern to the parties and the stakeholders in this case is who is ultimately responsible for determining the adequacy of drug labels. The decision of what to include on drug labels involves a careful balance of the risks and benefits to a patient of using a certain drug. Amici in support of Wyeth, such as the U.S. Chamber of Commerce, urge the Supreme Court to give the FDA almost exclusive control over this balancing process because of the level of expertise required to make decisions that promote patients' safety and public health. In addition, according to an amicus, the United States, the FDA's expertise in evaluating the risks and benefits of various labeling requirements would be undermined if drug manufacturers were allowed to modify labels without FDA approval. Furthermore, pharmaceutical compa-

nies warn that by allowing state product liability claims juries—not the FDA—end up determining the adequacy of drug labels. According to other amici, including the Generic Pharmaceutical Association, juries are not equipped to engage in the kind of technical balancing required in cases involving injury resulting from a drug, and juries are more inclined to focus on the plight of the individual plaintiffs rather than on the overall impact of labeling decisions on public health.

In contrast, former FDA commissioners argue that public health is best protected by making drug manufacturers—not just the FDA—responsible for changing drug labels as necessary for patients' safety. These former commissioners argue that exposing drug manufacturers to state law liability promotes health and safety by supplementing the FDA's approval process and providing additional incentives for drug companies to disclose all risks related to the use of a drug. Similarly, AARP and other patient advocacy organizations argue that the FDA alone cannot provide adequate protection to the public with respect to drug safety.

What Impact Will the Outcome of This Case Have on Public Health?

Stakeholders involved in this case argue that a favorable outcome for their side is critical to protecting public health. The California Medical Association argues that federal pre-emption in drug labeling cases threatens public health by decreasing incentives for drug manufacturers to disclose safety information or to alter labels as additional information about drug risks becomes available. Similarly, the *New England Journal of Medicine* argues that the threat of state tort liability is sometimes necessary to get drug companies to disclose newly discovered dangers associated with certain drugs. In addition, 47 states joined in filing an amicus brief arguing that pre-emption in cases like this would undermine states' important responsibility to safeguard the public health.

Conversely, amici in support of Wyeth argue that exposing drug manufacturers to liability in state courts will threaten public health by bringing

about "overwarning" on drug labels. Specifically, Pharmaceutical Research and Manufacturers of America (PhRMA) argues that "the threat of liability under state law encourages manufacturers to warn physicians and patients about risks that are speculative and scientifically unsupported," and this threat can undermine the credibility of drug warnings, delay research on new drugs, and discourage patients and health care providers from using otherwise beneficial drugs. Furthermore, the Washington Legal Foundation and the American College of Emergency Physicians cite cases in which overwarning has led to negative health outcomes for the public, including outbreaks caused by excessive warnings related to vaccines.

According to a recent report in the *New York Times*, "[f]ederal pre-emption is the fiercest battle in products liability law today," and, with this decision, the Supreme Court will take another step in clarifying this complex doctrine. See Adam Liptak, "Drug Label, Maimed Patient and Crucial Test for Justices," *N.Y. Times*, Sept. 19, 2008. Because this case deals with pre-emption doctrine generally, the Court's decision may affect the "potentially billions of dollars" at stake in product liability lawsuits covering a wide range of products.

Possible Basis of Pre-emption: Conflict Between State Law and Federal Law

As an initial matter, Wyeth bases its reasoning on the premise that federal law pre-empts Levine's state law claims. The Supremacy Clause of the U.S. Constitution states that federal law is the "supreme law of the land." Wyeth argues that in practice, the Supremacy Clause means that, if state law conflicts with federal law, then that state law is pre-empted by the federal law. Wyeth contends that in cases such as this one in which when federal law pre-empts state law, it is impossible to comply with both federal and state laws.

Specifically, Wyeth argues that federal law pre-empts Levine's state law claims in two distinct ways. Wyeth claims that, had it changed the label on Phenergan, Wyeth's action would have conflicted with the FDCA. Wyeth claims that the label of a prescrip-

tion drug cannot be changed without FDA approval, and that the Vermont Supreme Court erred when it held that Wyeth could have made changes without FDA approval. Because a manufacturer can only change a drug label if it acquires new information, and because Wyeth did not acquire any new information about the risks of Phenergan, Wyeth argues that it would have had no authorization to change the drug's label without FDA approval.

In response, Levine argues initially that there is a presumption against pre-emption—that is, Wyeth must show that there is “clear congressional intent” to have federal law pre-empt state law in this situation. Here, Levine argues, neither the FDCA nor its amendments contain an express provision for pre-emption for cases involving prescription drugs. In addition, Levine points to other cases involving medical devices to support her argument that Congress would have stated explicitly if it wanted pre-emption to apply in this case. Indeed, Levine argues that the absence of an explicit provision “strongly signals [Congress’] intent to preserve state-law remedies against pharmaceutical manufacturers.”

Moreover, Levine argues that it would not have been impossible for Wyeth to comply with both federal and state law simultaneously. Levine argues that Wyeth could have strengthened the warning on Phenergan's label without incurring federal liability. Levine argues that there were two points at which Wyeth could have strengthened or added to Phenergan's warning label. First, Levine argues, Wyeth could have changed the label after it had submitted the New Drug Application for Phenergan to the FDA, but before the FDA had approved it. Then, the FDA would still have been able to approve all aspects of the label; the FDCA has no provision that forbids changing the labeling at that point in the process. Alternatively, Levine argues that Wyeth could have changed the label after the FDA approved it, as long as the changes were consistent with FDA regulations.

Conclusion

This case will resolve whether a drug manufacturer that has complied with the Food and Drug Administra-

tion's drug labeling requirements can still be liable under a state product liability law claim on the ground that the label was inadequate. The Supreme Court's decision is important, because the Court has the opportunity to clarify federal pre-emption doctrine. In addition, the outcome is relevant to public health, because the decision will clarify the scope of drug manufacturers' responsibilities to patients and doctors. **TFL**

Prepared by Katy Hansen and Zsaleb Harivandi. Edited by Hana Bae.

Bell v. Kelly (07-1223)

Appealed from the U.S. Court of Appeals for the Fourth Circuit (Jan. 4, 2008)

Oral argument: Nov. 12, 2008

Petitioner Edward Bell claims that he is entitled to habeas relief from his death sentence for the murder of a police officer, because Bell's Sixth Amendment right to effective counsel was violated. Bell's court-appointed attorneys did not introduce mitigating evidence to show that he did not pose a threat of future violent acts. Bell sought habeas relief in the Supreme Court of Virginia, which denied both an evidentiary hearing and habeas relief. Upon Bell's petition for habeas corpus at the federal level, the district court granted an evidentiary hearing and held that Bell's counsel had acted unreasonably but that this action had not prejudiced Bell. On appeal, the U.S. Court of Appeals for the Fourth Circuit found that § 2254(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA) required deference to Virginia's summary rejection of Bell's claim of ineffective assistance of counsel, even though certain evidence supporting Bell's claim was introduced for the first time in his federal habeas proceeding. This case could clarify the boundaries of deference toward claims “adjudicated on the merits” under the AEDPA. Full text is available at www.law.cornell.edu/supct/cert/07-1223.html. **TFL**

Prepared by Tom Kurland and Joe Rancour. Edited by Courtney Zanolocco.

Carcieri v. Kempthorne (07-526)

Appealed from the U.S. Court of Appeals for the First Circuit (July 20, 2007)

Oral argument: Nov. 3, 2008

In 1978, Rhode Island and the Narragansett Indian Tribe settled a dispute concerning land ownership. In exchange for 1,800 acres of land, the Narragansett Tribe surrendered other claims to title and agreed that Rhode Island law would apply to the 1,800 acres. The tribe later purchased a 31-acre parcel of land. The secretary of the interior took the land into federal trust under the Indian Reorganization Act (IRA), thereby removing the land from Rhode Island's jurisdiction. Rhode Island fought the secretary's actions, leading to the present case. By its own language, the IRA applies to “tribe[s] now under Federal jurisdiction.” Interpreting “now” to mean the time of the IRA's passage, Rhode Island argues that the IRA would not apply to the Narragansett Tribe, which was recognized after the act was passed. The secretary of the interior argues that “now” means when the statute is used and that therefore the Narragansett Tribe falls within the scope of the IRA. Rhode Island also argues that the settlement with the Narragansett Tribe precludes the secretary from taking the land into federal trust. This case will affect state sovereignty and the power of the federal government under the Indian Reorganization Act. Full text is available at www.law.cornell.edu/supct/cert/07-526.html. **TFL**

Prepared by Kathryn Worthington and James McConnell. Edited by Joe Hashmall.

Chambers v. United States (06-11206)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (Jan. 9, 2007)

Oral argument: Nov. 10, 2008

In *United States v. Chambers*, 473 F.3d 724, 725 (7th Cir. 2007), the Seventh Circuit held that failure to report to a penal institution constitutes a violent

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crime under the Armed Career Criminals Act (ACCA). The petitioner, Deondery Chambers, pleaded guilty to being a felon in possession of a firearm and was sentenced to 188 months in jail under the ACCA because of his prior conviction for failing to report on schedule to a penal institution. Without the additional punishment mandated by the act, the range of Chambers' sentence would have been 130 to 162 months. In this case, the U.S. Supreme Court will consider whether or not a defendant's failure to report for confinement involves conduct that presents a serious potential risk of physical injury to another person such that the failure to report constitutes a violent felony under the Armed Career Criminals Act. Full text is available at www.law.cornell.edu/supct/cert/06-11206.html. **TFL**

Prepared by Bill Kennedy and Michael Selss. Edited by Carrie Evans.

Jimenez v. Quarterman (07-6984)

Appealed from the U.S. Court of Appeals for the Fifth Circuit (May 25, 2007)

Oral argument: Nov. 4, 2008

Carlos Jimenez was convicted of burglary and, because of a prior felony conviction, received an enhanced sentence. Jimenez appealed his case to Texas' Third Court of Appeals but, through no fault of his own, was unaware that his appeal had been denied until after the expiration of the statute of limitations for his further appeal. In order to remedy this, the Texas Court of Criminal Appeals granted Jimenez a reinstated appeal, which waived the statute of limitations for state court purposes. After exhausting all state remedies, the U.S. Court of Appeals for the Fifth Circuit denied Jimenez's federal petition for habeas corpus, stating that, for purposes of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. 2244(d)(1)(A), "direct review" ended when Jimenez initially failed to appeal the Third Court of Appeals' decision in time, not when his reinstated appeal was exhausted. The U.S. Supreme Court will decide whether the reinstated appeal tolled the statute of

limitations until the completion of the reinstated direct review for purposes of 28 U.S.C. 2244(d)(1)(A). Full text is available at www.law.cornell.edu/supct/cert/07-6984.html. **TFL**

Prepared by Isaac Lindbloom and Kelly Terranova. Edited by Carrie Evans.

Melendez-Diaz v. Massachusetts (07-591)

Appealed from the Appeals Court of Massachusetts (July 31, 2007)

Oral argument: Nov. 10, 2008

This case involves the application of the Confrontation Clause of the Sixth Amendment to reports provided by police laboratories. Luis Melendez-Diaz was convicted of distributing and trafficking in cocaine. On appeal, Melendez-Diaz argues that laboratory reports that were admitted in court as evidence against him were "testimonial" in nature and that, therefore, the Confrontation Clause required that he be allowed to cross-examine the analysts who had prepared the reports. Massachusetts argues that the drug analysis reports were not testimonial within the meaning of the Confrontation Clause. If the Supreme Court finds that lab reports are "testimonial," analysts will be required to give in-court testimony about the weight and composition of drugs used as evidence in criminal trials. This requirement has the potential to create substantial costs for courts and testing facilities that are already struggling with limited resources, but requiring such testimony might also increase the reliability of scientific evidence presented in criminal trials. Full text is available at www.law.cornell.edu/supct/cert/07-591.html. **TFL**

Prepared by Sun Kim and Joe Tucci. Edited by Joe Hashmall.

Negusie v. Mukasey (07-499)

Appealed from the U.S. Court of Appeals for the Fifth Circuit (May 15, 2007)

Oral argument: Nov. 5, 2008

Daniel Negusie was forcibly conscripted into the Eritrean military

but refused to fight. After two years of imprisonment in an Eritrean military camp, he spent four years serving as a guard at the camp, without freedom to leave. Eventually, Negusie escaped to the United States, where an immigration judge denied his application for protection from deportation. The judge held that, under the "persecutor bar" of the Immigration and Nationality Act (INA), Negusie's role in the persecution of others made him ineligible for refugee status, notwithstanding his probable torture if he returned to Eritrea. The Board of Immigration Appeals and the Fifth Circuit affirmed the decision. On certiorari, Negusie argues that the INA's persecutor bar does not apply to individuals who involuntarily took part in the persecution of others. Attorney General Mukasey responds that the bar contains no requirement that the action be voluntary. The Court's decision will clarify whether the attorney general has the discretion to consider an individual's degree of moral culpability before granting or denying him or her refuge. Full text is available at www.law.cornell.edu/supct/cert/07-499.html. **TFL**

Prepared by Lara Haddad and Courtney Bennigson. Edited by Allison Condon.

Pleasant Grove City v. Summum (07-665)

Appealed from the U.S. Court of Appeals for the Tenth Circuit (Aug. 24, 2007)

Oral argument: Nov. 12, 2008

Summum, a religious organization, seeks to place a monument containing the Seven Aphorisms of Summum among other historical and cultural artifacts displayed in Pioneer Park in Pleasant Grove, Utah. The organization brought suit, alleging that the city of Pleasant Grove had abridged the group's First Amendment freedom of speech rights in denying the request but had approved placing other similar monuments. The district court denied Summum's motion for a preliminary injunction, but the Tenth Circuit reversed the ruling and granted the injunction, finding that any privately donated monument retained its character

as private speech. The city contends that it did not violate Summum's First Amendment rights, because the display constitutes government speech. Pleasant Grove fears that the Tenth Circuit's ruling would chill free speech for both private parties and the government, because the ruling would require the city to either display any monument at the request of a private party or ban all displays in public parks. Summum argues that categorizing such displays as government speech would allow the city to engage in viewpoint discrimination. Full text is available at www.law.cornell.edu/supct/cert/07-665.html. **TFL**

Prepared by Brian Chung and Jennelle Menendez. Edited by Lauren Buechner.

United States v. Eurodif S.A. et al. (07-1059); USEC, Inc. et al. v. Eurodif S.A. et al. (07-1078)

Appealed from the U.S. Court of Appeals for the Federal Circuit (Sept. 9, 2005)

Oral argument: Nov. 4, 2008

The antidumping statute requires the Department of Commerce to impose a duty on "foreign merchandise ... sold in the United States at less than its fair value." Nuclear utilities in the United States contracted with Eurodif S.A., a French company, to produce low enriched uranium (LEU) for uranium. The utilities supplied Eurodif with uranium and paid Eurodif to produce LEU from the uranium. The Commerce Department taxed the LEU under the anti-dumping statute, because it understood such agreements to be contracts for the sales of merchandise. The Court of International Trade (CIT) reversed the decision, holding that the agreements were contracts for the sale of services, and the U.S. Court of Appeals for the Federal Circuit upheld the CIT's reversal. In these consolidated cases, the U.S. Supreme Court takes up the question of whether the Federal Circuit was required to defer to the Department of Commerce's interpretation of the anti-dumping statute. Full text is available at www.law.cornell.edu/supct/cert/07-1059.html. **TFL**

Prepared by Lauren Jones and Sarah Soloveichik. Edited by Courtney Zanocco.

United States v. Hayes (07-608)

Appealed from the U.S. Court of Appeals for the Fourth Circuit (Apr. 16, 2007)

Oral argument: Nov. 10, 2008

In 1994, Randy Edward Hayes pled guilty to a misdemeanor offense under West Virginia law for the battery of his then-wife, Mary Ann Hayes. Ten years later, police arrested Hayes and charged and convicted him under 18 U.S.C. § 921(a)(33)(A) for possessing a firearm after having been convicted of a misdemeanor crime of domestic violence. Hayes challenged the charge, alleging that since the West Virginia statute under which he was originally convicted did not have a domestic relationship between offender and victim as an element, he could not later be prosecuted under § 921(a)(33)(A), which, he argues, requires a domestic relationship between offender and victim as an element. The government contends that a domestic relationship is not an element of the predicate offense of a violent misdemeanor in § 921(a)(33)(A). Hayes argues that the government's interpretation of the statute illegitimately broadens it beyond its intended meaning. He says that the Fourth Circuit, which overturned his conviction, was correct in reading the statute's definition of a "misdemeanor crime of domestic violence" to include a domestic relationship element in the predicate offense. Full text is available at www.law.cornell.edu/supct/cert/07-608.html. **TFL**

Prepared by Conrad Daly and Rebecca Vernon. Edited by Carrie Evans.

Van de Kamp v. Goldstein (07-854)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Mar. 28, 2007)

Oral argument: Nov. 5, 2008

After being wrongfully convicted of a murder based on the perjury of a jailhouse informant, Thomas Lee Goldstein brought a § 1983 suit against the chief prosecutors at the Los Angeles County district attorney's office. Goldstein alleges that the prosecutors failed to establish a system to share informa-

tion about benefits given to informants, with the caused Goldstein not to receive information that was constitutionally entitled. The prosecutors claimed absolute immunity from civil suit, based on the Supreme Court's decision in *Imbler v. Pachtman*. The Ninth Circuit, however, held that because their alleged failures were administrative, not prosecutorial, in nature, the prosecutors were not entitled to absolute immunity. The Supreme Court's decision will affect the amount of protection from personal liability prosecutors can have, as well as the potential remedies available to criminal defendants who were wrongfully convicted based on prosecutorial misconduct. Full text is available at www.law.cornell.edu/supct/cert/07-854.html. **TFL**

Prepared by Katie Higgins. Edited by Hana Bae.

Ysursa v. Pocatello Education Association (07-869)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Jan. 3, 2008)

Oral argument: Nov. 3, 2008

In 2003, the Idaho state legislature passed the Voluntary Contributions Act, which prevents a state's political subdivisions from making payroll deductions for employees' political activities. The Pocatello Education Association challenged the constitutionality of the statute, arguing that it burdens free speech. The U.S. Court of Appeals for the Ninth Circuit found that the state does not exercise sufficient control of local governments to allow it to regulate speech through state systems. The court therefore found the statute unconstitutional. In this case, the Supreme Court will decide whether a state exercises sufficient control over local governments to allow it to regulate speech through state systems. This decision will have an impact on whether the Court evaluates state government regulation of local governments using strict scrutiny or a "reasonableness" standard of review. Full text is available at www.law.cornell.edu/supct/cert/07-869.html. **TFL**

Prepared by Evan Ennis and Gary Liao. Edited by Lauren Buechner.