CARLTON FIELDS

Top 10 First Amendment Cases of the Supreme Court Term

June 30, 2022

The Supreme Court term that ended today once again showed the power of the First Amendment to shape American life. The court invoked the First Amendment in cases regulating social media platforms, prayer at public schools, state funding of religious schools, campaign finance restrictions, billboard advertisements, and religious exemptions to COVID-19 vaccine mandates.

The court decided three "government speech" cases, holding that a Christian flag flown outside Boston's City Hall and a coach's public prayers on the 50-yard line after high school football games represented private, not government, speech. In a unanimous decision, the court also held that an elected official had no First Amendment retaliation claim against a government board for censuring him. The board's censure was not a penalty, but its own protected speech.

In two cases, the court also elevated religious liberty rights under the free exercise clause over concerns about the separation of church and state under the establishment clause of the First Amendment. It held that Maine could not discriminate against religious schools by excluding them from a tuition assistance program open to nonsectarian schools. It also abandoned the *Lemon* test, holding that public schools do not offend the establishment clause by permitting school employees to engage in private, publicly visible prayer on campus.

At the same time, the court signaled that some members were open to weakening First Amendment protections for the media. Three justices would have preliminarily let a Texas law go into effect regulating the content of social media platforms. The court will likely hear a test case of the Texas law and a similar Florida law next term. The court also turned away a challenge to its landmark defamation decision, *New York Times Co. v. Sullivan*, but Justice Thomas continued to press the court to revisit the precedent.

The court's decisions continue to show the tension between incremental change and more decisive reversals of precedent. The court, for example, declined to recognize an implied claim against federal officials for damages for First Amendment retaliation under *Bivens*. But it did not join Justice Gorsuch's call to overturn *Bivens* altogether.

The justices also continue to struggle with how to frame tests to evaluate whether government action violates the First Amendment. The court unanimously ruled against the city of Boston for excluding a Christian flag from a flag-flying program at City Hall, but it split 6–3 on the test for evaluating whether speech constitutes government speech. Three justices also dissented from a case holding that an off-premise billboard ordinance was not a "content-based" regulation. The three justices argued that the court had retreated from a stricter, bright-line test for content-based laws set out in *Reed v. Town of Gilbert* just seven years ago.

Here are summaries of the Supreme Court's major First Amendment decisions this term:

1. *NetChoice LLC v. Paxton*

The Supreme Court agreed to keep a preliminary injunction of Texas' social media law in place, preventing the law from going into effect pending a full review of the law's constitutionality. The law would prohibit platforms from censoring users based on viewpoint, require procedures for users to appeal content removal, and require disclosures of the social media companies' policies.

Three justices, including Justice Kagan, would have let the law take effect now. Justice Alito wrote that the case "concerns issues of great importance that will plainly merit this Court's review" but concluded that whether the First Amendment challenge is "likely to succeed under existing law is quite unclear."

2. *Kennedy v. Bremerton School District*

In a 6–3 opinion written by Justice Gorsuch, the court held that the First Amendment's free speech and free exercise clauses protect a high school football coach's right to pray on the 50-yard line of the school football field after a game in a quiet, publicly visible religious observance.

The case arose when high school football coach Joseph Kennedy refused a directive from the Bremerton School District to stop publicly praying with students after games. The school district placed Kennedy on administrative leave and did not renew his contract when he continued to pray after games, and Kennedy sued. The court described Kennedy as engaging in a "quiet prayer of thanks" while "his students were otherwise occupied." But the dissent by Justice Sotomayor included photographs of Kennedy praying with a crowd of students and adults, and described his history of inviting students from the opposing team to pray, leading vocal religious motivational speeches to students after games, and praying in the locker room with the team.

The court held that the school district had violated both his free speech and religious liberty rights by suspending him. The coach was engaged in private speech, not government speech in his capacity

as a school employee, by leading the prayers on the 50-yard line after games. The court also held that the school district's tolerance of Kennedy's prayers did not violate the establishment clause, and cast aside the court's *Lemon* test for evaluating whether government acts appear to endorse religion. Instead, Justice Gorsuch wrote that the court should look to historical practices and understandings to evaluate whether conduct offends the establishment clause.

Justice Sotomayor accused the majority of setting aside years of establishment clause precedents and ignoring the coercive effect of the coach's public prayers on students, who may feel social pressure to participate in the coach's prayer circle. "[T]he Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights handing in the balance," Justice Sotomayor wrote. "As much as the court protests otherwise, today's decision is no victory for religious liberty."

3. *Carson v. Makin*

In a 6–3 decision, Chief Justice Roberts wrote that the free exercise clause prohibited Maine from discriminating against religious schools by excluding those schools from a tuition assistance program open to nonsectarian schools in rural areas without free-standing public schools.

Because the Maine Constitution requires that every town provide children with free public education, the state offered tuition assistance to private, nonsectarian schools in rural Maine towns lacking the funds and population to support a free public school. Two families who wanted to use the state tuition payments to send their children to Christian schools sued when the state refused to provide the state tuition assistance to the schools.

The court held that Maine had discriminated against religious schools by excluding them from the program. Chief Justice Roberts wrote that Maine could not promote "stricter separation of church and state than the Federal Constitution requires" while penalizing parents for the free exercise of their religion by denying them tuition payments available to every other parent.

Justice Breyer dissented, explaining that states needed leeway to balance the purpose of the establishment clause to prevent a state religious orthodoxy with the individual religious rights protected by the free exercise clause. Justice Sotomayor was blunter: "This Court continues to dismantle the wall of separation between church and state that the Framers fought to build."

4. *Shurtleff v. City of Boston*

The court unanimously held that the city of Boston did not engage in government speech when it let groups raise a flag of their choosing on a city flagpole outside City Hall during community events.

Because the city was not itself speaking by letting groups fly flags outside City Hall, it could not discriminate against a "Christian flag" based on the flag's religious viewpoint.

The case arose when the city refused to let a group called Camp Constitution fly a "Christian flag" as part of an event, involving local clergy, to recognize the contributions of the Christian community in Boston. For years, the city had allowed private groups to fly a flag of their choosing on a flagpole during community events and had never denied a group use of the flagpole or even closely reviewed the flags flown.

Although the court ruled unanimously for the challengers, it split 6–3 on the proper test to determine whether expression constituted government speech. Writing for the court, Justice Breyer applied a three-part test considering the speech's history, the public's likely perception about who was speaking, and the extent of government control of the speech. The last two factors favored the view that the Christian flag represented private, not government, speech.

Justice Alito disagreed, arguing that the court's test "obscures the real question in government-speech cases: whether the government is *speaking* instead of regulating private expression." He proposed a two-part test. First, Alito would look at whether the speech involved purposeful community of a government message by a person acting within his or her powers to speak for the government. Second, Alito would require the government to establish that it had not abridged the speech of persons acting in a private capacity.

5. *Coral Ridge Ministries Media v. Southern Poverty Law Center*

With only Justice Thomas dissenting, the court denied certiorari in a case brought to overturn or limit the Supreme Court's landmark decision in *New York Times v. Sullivan*. *Sullivan* protects speech about public figures and officials from defamation lawsuits without proof of "actual malice."

Coral Ridge Ministries sued the Southern Poverty Law Center for designating the evangelical Christian group as an "anti-LGBT hate group" because, among other things, it described homosexuality as "lawless," "an abomination," and "against nature." The Eleventh Circuit held that Coral Ridge had failed to plead "actual malice" in its lawsuit and affirmed the case's dismissal.

Coral Ridge came to the Supreme Court last year, asking the justices to either reconsider the "actual malice" standard or limit it to public officials. But the justices turned down that request. Justice Thomas dissented. "*New York Times* and the court's decisions extending it were policy-driven decisions masquerading as constitutional law," he wrote.

6. *Federal Election Commission v. Cruz for Senate*

The court invalidated a federal law and FEC regulation that prohibited a campaign from using more than $250,000 in contributions made after election night to repay a candidate's personal campaign loan. Sen. Ted Cruz loaned his reelection campaign $260,000 and sued when the campaign could not repay him more than $250,000 from post-election contributions.

Chief Justice Roberts wrote that the First Amendment offers the fullest and most urgent protection to political campaigns and that the restrictions inhibited candidates from loaning money to their campaigns, burdening political speech. The court also doubted the government's rationale for the restrictions, claiming it had not proven quid pro quo corruption and that campaign contribution limits already worked to prevent corruption.

Justice Kagan dissented, writing that the court had overstated the law's First Amendment burdens and understated the law's value to prevent corruption value. The law regulated loans, not campaign spending. And the government did not need to prove corruption to regulate "what everyone knows to be true — people (including politicians) will often do things for money."

7. *City of Austin v. Reagan National Advertising of Texas Inc.*

The court upheld Austin's off-premise billboard ordinance and receded from a bright-line rule for content-based restrictions set out in *Reed v. Town of Gilbert.* Justice Sotomayor wrote that though the billboard ordinance required a person to read the billboard's content to determine whether the billboard advertised an on-premise or off-premise business, the ordinance was actually "agnostic as to content." A sign's location, rather than its content, mattered most.

Justice Breyer concurred but favored a balancing test weighing a regulation's "First Amendment harms against the regulatory objectives that it serves."

Justice Thomas wrote a bitter dissent, joined by Justices Gorsuch and Barrett, warning that the court had replaced *Reed*'s bright-line rule with "an incoherent and malleable standard" that was results-driven and created "the potential for invidious discrimination of disfavored subjects."

8. *Houston Community College System v. Wilson*

The court unanimously held that the First Amendment permits a government board to censure a member for his or her actions and that the censure does not create a claim for First Amendment retaliation.

The case arose after the Houston Community College System censured an elected trustee, Dave Wilson, for disrespecting members after Wilson criticized and campaigned against his colleagues, sued the board, and hired a private investigator to look into one of his fellow trustees.

The board's censure constituted the government's own speech, equally protected by the First Amendment as Wilson's speech, Justice Gorsuch wrote for the court.

9. *Egbert v. Boule*

The court unanimously held that the Constitution does not permit a person to bring a First Amendment retaliation claim for damages against a federal official under *Bivens v. Six Unknown Federal Narcotics Agents*. Justice Thomas wrote that the court would not enlarge implied constitutional torts where "there is any reason to think that Congress might be better equipped to create a damages remedy."

The case occurred after Robert Boule, the owner of the Smuggler's Inn on the Canadian border in Washington state, complained that a Border Patrol agent had thrown him to the ground after demanding to see the papers of a Turkish national at the inn. In response, the agent contacted the IRS, triggering an audit, and notified the state that Boule's license plate, "SMUGLER," referenced illegal activity. Boule sued for First Amendment retaliation under *Bivens*.

The court did not recognize a *Bivens* claim for First Amendment retaliation but held back from overruling *Bivens* entirely, as Justice Gorsuch urged the court to do in a concurrence that no other justice joined. "I would only take the next step and acknowledge explicitly what the court leaves barely implicit," Justice Gorsuch wrote. "[W]e should exercise the truer modesty of ceding an ill-gotten gain, and forthrightly return the power to create new causes of action to the people's representatives in Congress."

10. COVID-19 Vaccine Mandate Cases

Last term, after Justice Amy Coney Barrett joined the court, the court, in a series of orders on the emergency or "shadow" docket, prevented California and New York from enforcing limits on, among other things, the size of religious services and indoor gatherings. The court sided with challengers seeking to block lockdown restrictions to slow the spread of COVID-19.

But this term, a majority of the court voted for the government in emergency applications involving religious challenges to COVID-19 vaccine mandates.

In two New York cases, *We the Patriots USA Inc. v. Hochul* and *Dr. A v. Hochul*, the court declined to enjoin a regulation requiring all health care workers to get the COVID-19 vaccine regardless of religious objections.

The challengers asserted they could not receive the vaccines, which they said were developed with decades-old aborted fetal cells, without violating their religious beliefs. A different group also challenged the rule for allowing a medical exemption, but not a religious exemption. Justices Thomas, Alito, and Gorsuch would have granted injunctive relief in both cases.

In *Austin v. U.S. Navy Seals 1-26*, the court blocked an injunction against a Department of Defense rule requiring all active-duty personnel to get the COVID-19 vaccine. A group of Navy Seals challenged the rule on religious grounds. Justices Thomas, Alito, and Gorsuch would have allowed the injunction against the regulation to go into effect.

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