

Court Rules on Fee Enhancements, First Amendment

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The U.S. Supreme Court released two decisions in cases we've been following. While they dealt with two very different subject areas, both had a common thread— a very narrow approach to the law.

In the First Amendment case, *U.S. v. Stevens*, 2010 WL 1540082 (U.S. April 20, 2010), the Court was being asked to recognize a new category of unprotected speech, speech dealing with depictions of cruelty to animals. This the Court declined to do, noting that, while the First Amendment "permitted restrictions upon the content of speech in a few limited areas," it had never "include[d] a freedom to disregard these traditional limitations." At issue was a federal law, 18 U.S.C. § 48, which criminalized the commercial creation, sale, or possession of specified depictions of animal cruelty (but exempted depictions that had "serious religious, political, scientific, educational, journalistic, historical, or artistic value"). The purpose of the legislation was so-called "crush" videos (depictions of women inflicting torture on small animals by stepping on them — a "very specific sexual fetish"), and it addressed only the portrayals of these acts, and not the underlying conduct. The underlying conduct was already prohibited by state and local animal cruelty laws but, as crush videos rarely disclosed the crusher's identity, § 48 sought to criminalize the traffic in these images and depictions.

Robert Stevens, who had compiled and advertised dog-fighting and dog hunting-related videos and merchandise for sale, was charged and convicted of violating the statute. His case was the first prosecution under § 48 to proceed to trial, and he unsuccessfully applied to dismiss the indictment based on his assertion that the provision abridged his First Amendment right to freedom of speech. Although the government conceded that § 48 constituted a content-based restriction on speech, it argued that the type of speech regulated fell outside of First Amendment protection, comparing the depiction of animal cruelty to the depiction of child pornography. The U.S. Court of Appeals for the Third Circuit disagreed, stating "[t]hat attempt siply cannot carry the day. ... No matter how appealing the cause of animal protection is to our sensibilities, we hesitate – in the First Amendment context – to elevate it to the status of a compelling interest." It ruled the statute was could not survive strict scrutiny as a content-based regulation of protected speech, adding, in a footnote, that it might also be unconstitutionally overbroad.

In an 8-1 majority (with Justice Alito dissenting), the Supreme Court held that the legislation was substantially overbroad and, therefore, invalid under the First Amendment. Chief Justice John Roberts Jr., writing the majority opinion, found, first, that the law was presumptively invalid as it "explicitly regulate[d] expression based on content;" second, although the "prohibition of animal cruelty itself ha[d] a long history in American law," there was no tradition of excluding such *depictions* from the freedom of speech protected by the First Amendment. He flatly rejected the Government's proposed test for the categorical exclusion of certain kinds of speech based on the minimal societal value of the speech: the "First Amendment's guarantee of free speech does not extend only to categories of speech that survive an *ad hoc* balancing of relative social costs and benefits." While the very limited kinds of speech that were recognized as unprotected did all have a slight social value, this was less a test than a description based on precedent. Dealing with the facial challenge, the majority viewed § 48 as creating "a criminal prohibition of alarming breadth." Any depiction of an animal being illegally wounded or killed came within the scope of the criminal prohibition; thus, the "humane slaughter of a stolen cow" or a poached deer could be included. Further, a depiction of entirely lawful conduct in one jurisdiction (hunting) could attract prosecution if the depiction was sold in a locality where the conduct was banned (hunting in D.C.). This case itself was "evidence of the danger in putting faith in government representations of prosecutorial restraint" or discretion, since the Executive Branch had at the onset announced that it would interpret § 48 as covering only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex."

The second case, *Perdue v. Kenny A. ex rel. Winn*, 2010 WL 1558980 (U.S. April 21, 2010) (No. 08-970), involved the issue of attorneys' fees and fee enhancement in civil rights cases. Although the Court allowed enhancements for attorneys' fees based on superior performance, it held that such an increase would be permitted only in "extraordinary circumstances."

The plaintiffs had launched a Section 1983 class-action lawsuit on behalf of foster children in the custody of the Georgia Department of Human Resources (DHR). They sued the state, the DHR, and various counties and their staff, alleging systemic deficiencies in the counties' foster care systems. The claim was resolved by way of a settlement that stated: "Plaintiff Class is entitled to recover its expenses of litigation, including reasonable attorneys' fees and nontaxable costs, pursuant to 42 U.S.C. § 1988...." (Section 1988 provides that the prevailing party in certain civil rights actions

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may recover reasonable attorneys' fees as part of the costs.) If the parties could not reach an agreement, the amount was to be determined by the court, which is what happened. Counsel sought a total of $14,342,860 in fees, about half of which was an enhancement of the fee award for a job well done. Over the defendants' objections, the district court awarded a basic "lodestar" fee (the number of hours the attorneys and their employees worked multiplied by the hourly rates prevailing in the community) of just over $6 million, and allowed the enhancement, noting that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." The defendants appealed, and the plaintiffs, "convinced that the district court was not generous enough," cross-appealed, insisting that they "deserve[d] even more" than the $10.5 million in fees awarded them. The Eleventh Circuit declined to interfere with the award and denied rehearing *en banc*, but pointed out the "perverse irony" in the "seven figure, court ordered gratuity," in that it reduced the amount of state funds available to care for foster children, the very group in issue and described as some of Georgia's "most vulnerable citizens."

In a 5-4 decision, the majority of the Supreme Court overturned the award and remanded, on the basis that the district court's enhancement, by 75 percent, of the lodestar as the award of reasonable attorneys' fees under § 1988, was essentially arbitrary. Reviewing the "six important rules" established by prior decisions on the federal fee-shifting statutes —including that an enhancement of a lodestar amount for performance could be awarded in rare and exceptional circumstances, as established by the applicant—the Court held that the district court failed to provide proper justification and a "reasonably specific explanation" for the large enhancement. There was nothing in the record tying the 75% amount to what would be appropriate hourly rates in the relevant market, or to a calculation of the cost to counsel of any extraordinary and unwarranted delay. By relying solely (it seems) on an "impressionistic" comparison of the performance here against "the performance of counsel in unnamed prior cases, the District Court did not employ a methodology that permitted meaningful appellate review." Echoing the Eleventh Circuit, the Alito opinion noted that allowing a huge enhancement, not supported by any discernible methodology, was particularly unwarranted where the fees awarded were paid, in effect, by state and local taxpayers, as "state and local governments have limited budgets, [and] money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services." **ML**

Ordinances

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The space permitted in this column just skims the surface of a cutting-edge and ever-deepening topic. Your citizenry are looking for information using countless number of modalities, and Web 2.0 and its future iterations will play a key role in information distribution. Web 2.0 will play a key role, also, in personnel and litigation issues, and as a local government attorney, you must be well-versed in this emerging and growing area. You can be confident that IMLA will provide the timely educational opportunities to help guide you through this ever-changing landscape.

Notes

1. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985). (internal citations committed).
2. Fairfax County Facebook Comments Policy, http://www.fairfaxcounty.gov/opa/getfairfax/facebook-comments-policy.htm (last visited April 30, 2010).
3. *Id.*
4. *Id.*
5. Robert Brownstone, *Workplace Privacy Policies*, white paper presented at the National Employment Law Institute (August 28, 2009), available at http://fenwick.com/docstore/publications/EIM/eWorkplace_Policies_Materials_Public_Sector_EEO_8-28-09.pdf.
6. Subscribe to the CityAttorneyTech Group on Yahoo Groups at http://groups.yahoo.com/group/ CityAttorneyTech. **ML**



Correction

Please note that an inadvertent error in the numbering of IMLA's magazine appears in the March/April 2010 issue of the *Municipal Lawyer*. The correct designation should read: **"March/ April 2010, Volume 51, No. 2."** We apologize for any inconvenience and ask that you correct your records.