

Highlights of the Coming Term

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The United States Supreme Court has a number of interesting cases scheduled for oral argument in the coming weeks.

On October 06, the Court hears oral argument in a First Amendment case, *U.S v. Stevens*, 533 F.3d 218, *cert. granted*, 129 S. Ct. 1984 (U.S. Apr. 20, 2009) (No. 08-769), where the Court is being asked to recognize a new category of unprotected speech – speech dealing with depictions of cruelty to animals. Stevens, who had compiled and advertised dog-fighting and hunting videos and merchandise for sale, was charged and convicted of violating a statute, 18 U.S.C. § 48. This prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value. Stevens' 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. The purpose of the legislation was to target so-called "crush" videos (depictions of women inflicting torture on small animals by stepping on them – a "very specific sexual fetish"). 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 simply 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."

On October 07, the case of *Salazar v.Buono*, 527 F.3d 758 (9th Cir. 2008), *cert. granted*, 129 S.Ct. 1313 (U.S. Feb. 23, 2009) (No. 08-472) comes before the Court. The case involves a cross erected on federal land – on what used to be part of the Mojave National Preserve – by private citizens as a memorial to the "Dead of All Wars." Subsequently, in light of an Establishment Clause challenge, Congress enacted legislation ordering the Secretary of the Interior to convey a one-acre parcel of land that included the monument to a veterans' group, in exchange for a parcel of privately-owned land of equal value, with the federal government retaining a reversionary interest in the event the memorial use lapsed. However, the statute did not mandate that a cross remain as part of the memorial. The respondent had no objection to the public display of a cross, but was offended that the public land on which the cross was located was not an open forum on which other persons could display symbols. The Ninth Circuit determined that the presence of a cross on federal land violated the Establishment Clause. Following the transfer, it held that the government continued to impermissibly endorse religion despite the divestiture, by allegedly retaining control and oversight over the land, and by continuing to endorse religion by permitting a cross at the site. Assuming the respondent has standing to bring the action, the question before the Supreme Court is whether the Ninth Circuit erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

Oral arguments in *Alvarez v. Smith*, 524 F.3d 834 (7th Cir. 2008), *cert. granted*, 129 S.Ct. 1401 (U.S. Feb. 23, 2009) (No. 08-351) are scheduled for October 14. The case raises questions about the forfeiture of personal property and whether the Due Process Clause requires a local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding; if so, when such a hearing must take place. The plaintiffs were all persons whose property had been seized by Chicago police officers pursuant to the Illinois Drug Asset Forfeiture Procedure Act (DAFPA). Forfeiture proceedings had to be instituted once the appropriate notice was given, but for property worth more than $20,000, 97 days could elapse between the seizure and the filing of judicial forfeiture proceedings; for property worth less than $20,000, it could be a maximum of 187 days. The plaintiffs claimed that due process required that they be given a prompt, post-seizure, probable cause hearing, even though the DAFPA did not require such hearings. The Seventh Circuit agreed, noting that, "given the length of time which can result between the seizure of property and the opportunity for an owner to contest the seizure under the DAFPA, some sort of mechanism to test the validity of the retention of the property is required." The Supreme Court is being asked to decide the question of entitlement to a post-seizure probable cause hearing, and the applicable standard that courts should apply (the "speedy trial" test or the three-part due process analysis in *Mathews v. Eldridge*).

On November 04, *Pottawattamie County v. McGhee*, 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (U.S. Apr. 20, 2009) (No. 08-1065) comes before the Court on the question of a prosecutor's liability for arranging false testimony. In 1978, McGhee and another man, H., were convicted

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25. *See, e.g.*, In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896, 908 (3d Cir. 1995).
26. Law Enforcement Labor Serv., Inc. v. County of Mower, 483 N.W. 2d 696, 701 (Minn. 1992).
27. Navlet v. Port of Seattle, 194 P.3d 221, 231 (Wash. 2008).
28. Jeannot v. N. H. Personnel Comm'n, 392 A.2d 1193, 1195 (N.H. 1978); Thorning v. Hollister Sch. Dist., 11 Cal. App. 4th 1598 (Cal. Ct. App. 1992); Opinion of the Justices, 303 N.E.2d 320 (Mass. 1973).
29. *See, e.g.*, *Navlet*, 194 P.3d at 238; City of Anchorage v. Gentile, 922 P.2d 248, 260 (Alaska 1996).
30. *See, e.g.*, Hous. and Redev. Auth. of Chisholm v. Norman, 696 N.W.2d 329 (Minn. 2005); Beggs v. City of Portales, 210 P.3d 798 (N.M. 2009).
31. Poole v. City of Waterbury, 831 A.2d 211, 234 (Conn. 2003).
32. *Id.* at 233-34.
33. *Id.* at 235.
34. 11 U.S.C. § 901, *et seq.* (West 2009).
35. 11 U.S.C. § 365 (West 2009). This, in general, provides that the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
36. U.S. CONST. art. 6, cl. 2.
37. In re City of Vallejo, 403 B.R. 72 (Bankr. E.D. Cal. 2009). ML

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8. Indiana, Nebraska, West Virginia.
9. Illinois.
10. Missouri.
11. Texas.
12. S.1536, §3.
13. Tara Morgan, *Since New Virginia Texting While Driving Law, Five People Ticketed*, NBC12News, July 31, 2009, at http://www.nbc12.com/Global/story.asp?S=10823369.
14. Theresa Gutierrez, *Quinn Signs Texting Ban Bill*, abc7chicago.com, Aug. 6, 2009, at http://abclocal.go.com/wls/story?section=news/local&id=6951218.
15. Kristyn Soltis, *Cleveland Bans Texting While Driving*, kentnewsnet.com, July 8, 2009, at http://media.www.kentnewsnet.com.
16. Press Release, Dept. of Transportation, *DOT Secretary Ray LaHood Announces Distracted Driving Summit* (Aug. 4, 2009) (on file with author). ML

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of murder. The primary witness relied upon in bringing charges was a teenager who continuously changed his story and claimed he was pressured to implicate McGhee and H. (The witness later recanted and admitted he lied in hopes of getting a proffered reward and to avoid being personally charged with the murder.) In 2002, a court vacated or reversed the convictions, and both men brought civil rights actions against the County and the former prosecutors and officers involved in the initial investigation and prosecution, alleging they had used perjured and fabricated testimony and improperly withheld evidence. Richter, the County Attorney at the time, and Hrvol, an Assistant County Attorney, moved for and were denied qualified, absolute, and sovereign immunity. The Eighth Circuit held that "immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not 'a distinctly prosecutorial function.'" The question for the Supreme Court is whether a prosecutor can be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial. ML

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29. *Id.*
30. Foster v. United States, 922 F. Supp. 642 (D.D.C. 1996); Idylwoods Assocs. v. Mader Capital, Inc., 915 F. Supp. 1290 (W.D.N.Y. 1996).
31. EPA, *Questions and Answers Regarding Federal Brownfields Property Liability* 4 (Nov. 2003) (emphasis added), *available at* http://www.epa.gov/NE/brownfields/pdfs/qa6FINAL.pdf.
32. City of Toledo v. Beazer Materials & Servs. Inc., 923 F. Supp. 1013 (N.D. Ohio 1996).
33. *Id.* at 1020-21.
34. City of Emeryville v. Elementis Pigments, Inc., No. 99-03719, 2001 WL 964230 (N.D. Cal. Mar. 06, 2001).
35. *Id.* at *8.
36. 42 U.S.C. § 9607(r) (2002).
37. Pub. L. No. 107-118, 115 stat. 2356 (2002).
38. A BFPP is not liable under CERCLA for cleanup costs at a site. However, if the EPA has unrecovered response costs incurred in cleaning up that property and the EPA response action increases the fair market value of the property, the EPA may have a windfall lien on the property. *See* EPA & U.S. Department of Justice, *Interim Enforcement Discretion Policy Concerning "Windfall Liens" under Section 107(r) of CERCLA (2003), available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf.
39. Innocent Landowners, Standards for Conducting All Appropriate Inquiries, Final Rule: 40 C.F.R. Pt. 312.
40. 42 U.S.C. § 9607(r) (2002).
41. *See* EPA, *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability* (2003), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf. ML

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to department safety and efficiency was insufficient: "We have never held that a simple reference to government functioning automatically qualifies as speech on a matter of public concern." The plain language of the grievances catalogued a strained working relationship due to personality flaws, rather than incidents of incompetence or malfeasance. As a result, Desrochers and Lowes failed to meet their burden of demonstrating that their speech involved a matter of public concern. *Desrochers v. City of San Bernardino*, F. 3d (9th Cir. 2009). ML