

First Amendment & Media Litigation

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American Bar Association, First Amendment and Media Litigation Committee

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Supreme Court Round Up: The 2005-06 Term First Amendment Cases

By: Nicholas Boski

I. FREEDOM OF RELIGION

A. THE FREE EXERCISE CLAUSE

In *Gonzales v. O Centro Espírita Beneficente Uniã do Vegetal* (“UDV”), 126 S. Ct. 1211 (2006), the Supreme Court unanimously¹ upheld an application of the Religious Freedom Restoration Act of 1993 (“RFRA”) in the face of a government challenge based on the Controlled Substances Act.² Under RFRA, the United States Government may not “substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” except in cases where the federal government “demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest.”³ 42 U.S.C. § 2000bb-1(b) (2006).

O Centro Espírita Beneficente Uniã do Vegetal (“UDV”) is a religion based in Brazil with approximately 130 members residing in the United States. As part of their religious practice, UDV members take communion using hoasca, “a sacramental tea made from two plants unique to the Amazon region,” one of which contains the hallucinogen di-

methyltryptamine (“DMT”). *UDV*, 126 S. Ct. at 1217. DMT, however, and “any material, compound, mixture, or preparation, which contains any quantity of [DMT],” is a Schedule I drug and therefore banned by the Controlled Substances Act. 21 U.S.C. § 812(c), Schedule I(c) (2006).

When the United States Government seized a shipment of hoasca bound for American UDV members and threatened them with prosecution under the Controlled Substances Act, they sought declaratory and injunctive relief under RFRA. While conceding that enforcement of the Controlled Substances Act would substantially burden the free exercise of the UDV religion, the Government argued “that this burden did not violate RFRA because applying the Controlled Substances Act in this case was the least restrictive means of advancing three compelling governmental interests: protecting the health and safety of UDV members, preventing the diversion of hoasca from the church to recreational users, and complying with the 1971 United Nations Convention on Psychotropic Sub-

stances” *UDV*, 126 S. Ct. at 1217-18. Wary of the validity of the Government’s arguments, the federal district court entered a preliminary injunction “prohibiting the Government from enforcing the Controlled Substances Act with respect to the UDV’s importation and use of hoasca.” *Id.* At 1218. On appeal by the Government, a panel of the United States Court of Appeals for the Tenth Circuit and the Tenth Circuit sitting en banc upheld the preliminary injunction.

As to the first two compelling interests proffered by the Government, hoasca’s potential for harm and its possible diversion from UDV, the district court had found “that the evidence sub-

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Letter from the Co-Chairs

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Dear Members,

A happy, successful and fun-filled New Year to all!

As we begin the new year, we wish all our members the best of luck and fortune personally and professionally, and we hope to work toward making it a good year for our Committee and the First Amendment bar as well. Indeed, from the point of view of media lawyers, it probably can't help but be an improvement over 2006, a year that saw the media victimized by subpoenas, threatened for writing about national security issues and, beyond the legal spectrum, imploding under the economic pressure of the Internet and Wall Street.

To start on a somewhat optimistic note, Congress is beginning a new session, with a new Democratic majority after the eye-opening results of last November. This should present new hope for the proposed Federal Shield Law, a project this Committee has helped foster. As you will recall, your Committee's leadership introduced a resolution supporting Federal Shield law legislation at the beginning of 2006; in remarkably rapid steps, it was approved by the Litigation Section in April and then by the big ABA in August. We have worked together with ABA lobbyists to amass support among Congressmen in Washington, and we will continue to do so in 2007.

While the future of the bill, which likely will be introduced in virtually the same form in this new session, is not guaranteed, we believe the changes in the Congress will have the result of making passage more likely. While in the Senate, Republican Arlen Specter has been a vigorous promoter of Shield Law legislation - and an occasional visitor of Judy Miller when she was languishing in jail - we hope and expect that the new Senate Judiciary Committee Chairman Patrick Leahy of Vermont will be an equally strong advocate. More important, on the House side the new chairman will be Democrat John Conyers of Michigan, probably a vast improvement from a Shield Law advocate's point-of-view to the former

Republican chairman James Sensenbrenner, one of the leaders of the Clinton impeachment effort.

Obviously, even within the more friendly confines of Congress, this bill has a long road to hoe. We are sure, especially with Justice Department opposition, there will be many attempts to water it down in return for passage, but we do believe both in the current context of the relative lack of judicial support for the reporters' privilege and in the hopeful expectation that we will not let the bill get significantly weaker than its current form, passage will greatly improve the ability of journalists to report. It will enable the public to have access to a broader spectrum of news, especially including the views of the powerless, the whistleblower and the government critic, who without confidence that a reporter will not be coerced into identifying him, might not come forward in the first place.

On the subject of the reporters' privilege, we are very pleased to announce that the Litigation Section has accepted our proposal that the Committee present a program on that topic at the annual ABA convention in San Francisco in August, probably to be scheduled on August 10. Given the site of the conference, our focus will be on the BALCO case in which two San Francisco Chronicle reporters have been held in contempt, pending appeal to the U.S. Court of Appeals for the Ninth Circuit, for not identifying their sources of grand jury transcripts. Not only should August be about the time the Ninth Circuit rules on their freedom or incarceration, it should also be the time that the real antagonist in the case, Barry Bonds, will be shooting for his record-breaking 756th home run in the beautiful ballpark just a few blocks down from the convention center. (The Giants will host the Pittsburgh Pirates the weekend of our program.)

A good reason to travel to the left coast this summer and engage in some conventioning and baseball, if not steroids. Subpoenas on report-

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If you would like to submit an article, e-mail the proposal to one of the Co-Chairs or Co-Editors or, better still, feel free to pick up the telephone and call.

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Letter from the Co-Chairs - continued from page 2

ers to identify government leakers of classified national security information may, at least, have some, however misguided, rationale. However, balancing of the advantages of disclosure about the BALCO case - which led to congressional hearings and reforms in major league baseball - against the ills of the disclosure seems totally one-sided - other than violations of technical grand jury and discovery rules, the only problem I saw was the fear that the controversy might put Jason Giambi into a slump at the time of the October playoffs, something that became irrelevant given the Yankees unbecomingly short playoff life. The Committee is currently lining up speakers for this program, and we are sure it will be an interesting one, warranting your attendance.

On the conference front, we hope you are getting this issue few days or weeks before the conference we co-sponsor with the Forum on Communications Law, commonly known as the "Boca" conference, which this winter will be in Key Largo, Florida on February 8-10. So pack up your bathing suits, and head to warmer climes.

The reporters' privilege subject will again be the topic of one plenary session, but with a different twist. Rather than discussing the cases, Branzberg, and other more academic issues surrounding the reporters' privilege, this session will focus on the nitty-gritty: what, as a very practical matter should a journalist do to minimize his risk of being subpoenaed or of ultimately being held in contempt for not disclosing the identity of the source. Should reporters treat sources differently than in the pre-Judy Miller/Matt Cooper era? Should a reporter keep or not keep notes in a different way to minimize pressure on him, or at least, his company? Should, as our old colleague Bob Sack wrote in dissent in the phone records case, a reporter use tactics more akin to how a drug dealer works in order to maximize his ability to stay free?

The keynote session at Key Largo will be a retrospective on the 25th anniversary of the *Tavoulares v. The Washington Post* trial, with a classic collection of old-timers from that trial present to discuss it, including adversary lawyers David Kendall and John Walsh, reporter Patrick Tyler

and former Mobile Oil spokesman Herb Schmertz.

The third plenary session will be on the publication of classified national security information during the War on Terror, focusing on last year's articles about the NSA domestic eavesdropping program and secret prison camps in Eastern Europe. Commentary writer Gabriel Schoenfeld, who wrote "Has The New York Times Violated the Espionage Act," will be on the program, as will Times Managing Editor Jill Abramson and Floyd Abrams. In addition to these programs and workshops on seven different topics, the conference will again be a social and athletic nirvana, with a constant diet of eating, drinking, tennis and golf and, in addition, a special scuba and snorkeling trip into the Florida Keys. Especially if you are new to the media bar, this unique mixture of the social and professional is a great way to meet other practitioners and get involved outside the office in important issues in our field.

Finally, in this column we must both happily and sadly note a transition on our Committee. Landis Best has stepped down after three years of dedicated service as a co-chair. As in everything she does, Landis' participation came with her typical grace, smarts, enthusiasm and dedication. In addition, she was a first-class tennis partner who enabled the Committee's team (along with George) to win countless doubles tournament at various ABA meetings. In her place, the Section appointed Laura Prather as your new co-chair. We are confident that Laura will ably stand in Landis' shoes and be a worthy successor and equal in all of Landis' other traits as well.

As you all know, Laura practices in Austin, Texas and is one of the leading media lawyers in that state. She is currently with the Sedgwick firm, having practiced before that at Jackson Walker. Laura has already logged long hours for the ABA, having been on the Litigation Section's Litigation Magazine for years. How she manages to run a media practice, teach an occasional course at the University of Texas, be an active member of the ABA and other professional organizations, all the while raising two small children, is beyond us, but Kelli and I both look forward to working with her in the future.

And to all, a good year.

SUPREME COURT ROUND UP / The Free Exercise Clause

Continued from page 1

mitted on these issues was evenly balanced” and therefore “the Government had failed to demonstrate a compelling interest justifying what it acknowledged was a substantial burden on the UDV’s sincere religious exercise.” *Id.* On appeal, the Government argued “that such evidentiary equipoise [was] an insufficient basis for issuing a preliminary injunction against enforcement of the Controlled Substances Act.” *Id.* At 1218-19. According to the Government, because “it would bear the burden of demonstrating a compelling interest as part of its affirmative defense at trial on the merits, the UDV should have borne the burden of disproving the asserted compelling interests at the hearing on the preliminary injunction.” *Id.* At 1219. The Supreme Court, however, disagreed. According to the Court, “Congress’ express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test, including at the preliminary injunction stage.” *Id.* At 1220. Therefore, “the burdens at the preliminary injunction stage track[ed] the burdens at trial” and the Government was obligated to show a likelihood of success under the compelling interest test, which it had failed to do here. *Id.*

According to the Government, “the regulatory regime established by the [Controlled Substances] Act – a closed system that prohibits all use of controlled substances except as authorized by the Act itself [-] cannot function with its necessary rigor and comprehensiveness if subjected to judicial exceptions.”

UDV, 126 S. Ct. at 1220 (internal quotations omitted). In other words, “there [was] no need to assess the particulars of the UDV’s use or weigh the impact of an exemption for that specific use, because the Controlled Substances Act serves a compelling purpose and simply admits of no exceptions.” *Id.* The Supreme Court, however, disagreed. First, “RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’ – the particular claimant whose sincere exercise of religion is being substantially burdened.” *Id.* Therefore, the Court “look[s] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted harm of granting specific exemptions to particular claim-

“Congress’ express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test, . . .”

ants.” *Id.* According to the Court, “Congress’ determination that DMT should be listed under Schedule I simply [did] not provide a categorical answer that relieve[d] the Government of the obligation to shoulder its burden under RFRA.” *Id.* At 1221. Furthermore, the fact that the Controlled Substances Act itself “contemplates exempting certain people from its requirements . . . indicates that congressional findings with respect to Schedule I substances should not carry the determinative

weight, for RFRA purposes, that the Government would ascribe to them.” *Id.* Second, the Court was influenced by the fact that an exception to the Controlled Substances Act had already been made for the use of peyote, a Schedule I substance, by the Native American Church. In the eyes of the Court, the peyote exception “fatally undermine[d] the Government’s broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA.” *UDV*, 126 S. Ct. at 1222. As such, “[t]he Government’s argument echoe[d] the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.” *Id.* At 1223. RFRA, however, “operates by mandating consideration, under the compelling interest test, of exceptions to ‘rule[s] of general applicability.’” *Id.*

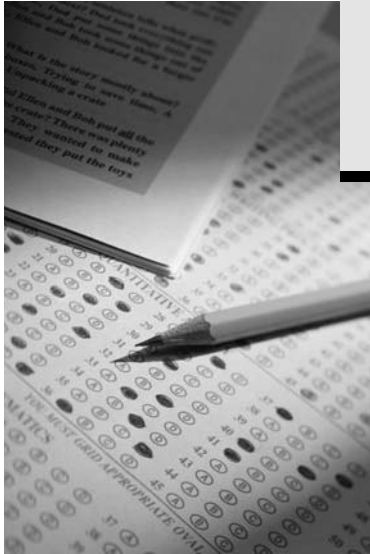
As to the Government’s argument that it “has a compelling interest in meeting its international obligations by complying with [the 1971 United Nations] Convention [on Psychotropic Substances],” which calls on its signatories to prohibit the use of hallucinogenic drugs, including hoasca, such argument “[did] not automatically mean that the Government had demonstrated a compelling interest in applying the Controlled Substances Act, which implements the Convention, to the UDV’s sacramental use of the tea.” *Id.* At 1224-25. The Supreme Court believed that this was particularly the case when “the Government did not even submit evidence addressing the international consequences of granting an exemption for the UDV.” *Id.* At 1225.

The Supreme Court therefore concluded that, under the compelling interest test dictated by RFRA, “the courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV’s sacramental use of hoasca.” *Id.*

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Media and The Law

☒ Test Yourself ☒



1. A Post reporter found on a dirt road in Iraq some maps and documents created by the U.S. military relating to military action in the war. Because the Post is a responsible newspaper, it calls and asks a high-ranking military commander to explain the materials and put them into context. The next day, the Government goes to court to keep the Post from

publishing the documents.

- What is the legal name for what the Government is seeking?
- What is the standard the judge will use to determine if the Government will succeed?
- Where does this standard come from?

2. The Post is doing an article on the difficulty of making it as a classical musician in New York. In the course of the Post's reporting on the story, an agent for a young promising violinist, in an interview with a Post reporter, says that another unknown violinist, Bea String, who is also trying to make it in the business, routinely gets drunk before her auditions. The reporter puts the agent's direct quote in the Post, naming the agent and quoting his statement accurately. The article says that String, when asked to respond, had no comment.

Assuming Bea String did not routinely drink, could the Post be trouble for this reporting? Why?

3. Delta Airlines is based in Atlanta, in the heart of Bush country. The Company implements a rule that if, while at work, an employee discusses the 2000 election or the case of *Gore v. Bush*, or even criticizes President Bush, that employee can be disciplined. An employee, Spike Freely, is suspended without pay for 2 months for talking to his colleagues at work about the unfairness of the Supreme Court's decision which, in effect, made Bush the president. Spike Freely sues. How strong is the First Amendment argument which Spike Freely makes? Why?

4. A state statute says it is a crime to distribute or publish the name of a juvenile defendant in a youth court proceeding. A 17-year-old student, I.M. Hip, has been accused of a murder at a high school and is about to go on trial. A state prosecutor leaks to a Post reporter I.M. Hip's name and the reporter promptly publishes a Post article on the case mentioning his name.

I.M. Hip sues the Post for publishing his name in violation of the statute. What is the likely result? What is the test the court will use (and the names or types of cases it will use as precedent)? What jeopardy exists for the Post reporter?

5. The Assistant Secretary of Defense (an appointed, not elected, post) has been defamed in a Post article. The false statement in the article, which hurt the reputation of the Assistant Secretary, was completely caused by a Post reporter carelessly mis-

reading a document. (In addition, many years ago the Assistant Secretary and the reporter had been in college together, and the Assistant Secretary had stolen the reporter's girlfriend.)

Focusing on the issue of fault, what is the likely outcome of the libel case? Why?

6. What is the holding of the Shulman case you read in today's assignment? That is, how did the California Supreme Court analyze the two branches of privacy law it discusses?

7. Jay Leno has been described in a Post article as often snorting some cocaine before his show. (a) The article includes his denial of this charge; (b) The Post a few days later runs a retraction admitting the facts were wrong; (c) in his complaint Leno was not even able to allege that he lost any money as a result of the false statement (in fact, more people than ever watched his show in the days after the article.)

Discussing (a), (b) and (c), (and assuming that actual malice could be proven), is the Post in trouble in a possible libel lawsuit?

8. In a restaurant review, the Post discusses a new restaurant "Top of the Alps" which was on top of the mountain on which the Olympic downhill ski race was recently run. The review (correctly) said that the meat at the restaurant had a 30% fat content and (correctly) said that the vegetables were canned, not fresh. It concluded that the food at the restaurant tasted like a rusty, old ski boot. After the review comes out, the restaurant starts losing customers.

Is the Post in trouble? Give 3 arguments to support your answer (other than that the reported facts are true).

9. A confidential source, the secretary of the NYU Dean of Students, tells the Post that the Dean is using some of the money that comes into his office for personal purposes. The secretary is telling the Post this on a confidential basis because she truly believes his behavior is immoral and will hurt the school, but, of course, needs confidentiality for otherwise she will be quickly fired. The Post reporter determines (correctly) that she is in a good position to know, has no bias, and has been successfully relied on as a source before. He agrees to grant her confidentiality and publishes the article.

If the Dean sues the Post for libel, is the Post in trouble? Why?

10. According to Anthony Lewis' book (a) what was the main point and historical significance of the famous dissents of Justices Oliver Wendell Holmes and Louis Brandeis? (b) In their Supreme Court papers in *New York Times v. Sullivan*, what old law did The Times lawyers attack, and how did that contribute to their central argument?

Test your media law knowledge! Answers will appear in our next issue, meaning you can tally your score in the privacy of your own office. This is an undergraduate journalism department mid-year — we hope it won't embarrass any practitioners...

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Divorce Proceedings and Records Are Subject to First Amendment Right of Access

By: Susan E. Seager

A media coalition has won a key court access decision in California, capping a 17-month battle to preserve the state's century-old tradition of open divorce proceedings and records. The Court of Appeal decision, *Burkle v. Burkle*, 135 Cal. App. 4th 1045, 37 Cal. Rptr. 3d 805 (2006), provides support for media attorneys contemplating challenges to other court secrecy statutes, both in family court and in other court proceedings and records. But the fight over divorce court secrecy is not likely to end soon.

Over 1 million Americans file for divorce each year, according to the U.S. Census. Like most states, California historically has allowed public and press access to ordinary divorce court proceedings and records. The nation's tradition of openness has allowed public scrutiny of the shifting rights of men and women as legislatures and courts develop new rules for dividing financial assets, ordering child support, and deciding parental rights and child custody issues. As with other court proceedings, public oversight helps ensure that the laws are being fairly applied.

But in mid-2004, the California Legislature sought to reverse this openness by unanimously enacting a new statute on an "urgency" basis. Family Code § 2024.6 required a court, upon an *ex parte* request, to automatically seal any court "pleading" in its entirety if the pleading mentioned a party's financial asset or liability, even if the only "asset" mentioned was a party's home address. The statute ostensibly was designed to protect litigants from identity theft and kidnappings, although the Legislature was not presented any evidence that these crimes had ever been linked to open divorce court records. The California Newspaper Publishers Association opposed the bill on

the grounds that it would allow "economically, politically, and legally powerful litigants" to win automatic sealing of their pleadings, and that the mandatory sealing provision was "impossible to square with the First Amendment and the many U.S. Supreme Court and California Supreme Court decisions that establish a presumptive right of access to court records."

Supermarket billionaire Ronald W. Burkle – a prolific political donor and fundraiser who recently made headlines by alleging that he had been the victim of an "extortion" plot by a New York tabloid reporter while at the same time bidding for several Knight-Ridder newspapers – used the new statute to obtain court orders sealing virtually all of his divorce court records in late 2005.

Lawyers for his ex-wife, Janet Burkle, dubbed the new statute the "Burkle bill" because it repeated the

ciation intervened in the *Burkle* divorce action and opposed Mr. Burkle's blanket sealing requests. They argued that adequate protections were already in place, noting that before the bill passed, Mr. Burkle won the redaction of his bank account numbers, Social Security numbers, and information about the couple's minor child, based on a court rule allowing narrow redaction orders.

On Feb. 28, 2005, Los Angeles County Superior Court Judge Roy L. Paul ordered Mr. Burkle's divorce court records unsealed, holding that Family Code § 2024.6 was unconstitutional because it was "not narrowly tailored" to protect against identity theft and kidnapping. *Burkle*, 2005 WL 497446 at *4-*5 (Cal. Sup. Ct. Feb. 28, 2005). Judge Paul observed that the statute required a court to seal "a 100 page pleading filled with legal argument of genuine public interest ... if a party's home address appears even in a footnote." *Id.* Mr. Burkle appealed.

"The same First Amendment right of access applicable in 'ordinary civil cases' applies to divorce proceedings."

* * *

"No meaningful distinction may be drawn between the right of access to court proceedings and the right of access to court records."

same fear-of-identity-theft-and-kidnapping arguments made by Mr. Burkle before the statute was written, and because he donated over \$140,000 to state Democrats and Republicans shortly before the bill became law.

Attorneys for the Los Angeles Times, The Associated Press, and the California Newspaper Publishers Asso-

On January 1, 2006, the Court of Appeal (Second District) unanimously affirmed. *Burkle*, 135 Cal. App. 4th at 1071. Relying on California's tradition of open divorce court proceedings and records and two key First Amendment court access decisions, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609-611 (1982), and *NBC Subsidi-*

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Divorce Proceedings and Records Access

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ary (*KNBC-TV*), *Inc. v. Superior Court*, 20 Cal. 4th 1178, 1187, 1217-1218, 86 Cal. Rptr. 2d 778 (1999), Judge Paul Boland held that:

- “The same First Amendment right of access applicable in ‘ordinary civil cases’ applies to divorce proceedings.” *Burkle*, 135 Cal. App. 4th at 1054, 37 Cal. Rptr. 3d at 812.
- “No meaningful distinction may be drawn between the right of access to court proceedings and the right of access to court records.” *Id.* at 1061, 37 Cal. Rptr. 3d at 819.
- The divorce court secrecy statute was not “narrowly tailored” to guard against identity theft because it required a court, upon request, to seal “routine pleadings” in their entirety, including “a motion for summary judgment” and “discovery motions” containing purely legal arguments, even though the arguments “may be completely unrelated to the asserted statutory goal of preventing identity theft and financial crimes.” *Id.* at 1065, 37 Cal. Rptr. 3d at 823.
- The statute’s bar on case-by-case evaluations of the need for secrecy “is not, we are confident, the kind of particularized determination contemplated by” the United States Supreme Court in *Globe Newspaper*, 457 U.S. at 609-611 (1982). *Burkle*, 135 Cal. App. 4th at 1066, 37 Cal. Rptr. 3d at 824.
- “[S]tate constitutional privacy rights [protecting financial privacy] do not automatically ‘trump’ the First Amendment right of access under the United States Constitution.” *Id.* at 1059, 37 Cal. Rptr. 3d at 818.

- However, a statute mandating the sealing of “limited items of identifying information, such as account numbers, for ‘automatic’ or mandatory redaction,” would “survive constitutional scrutiny.” *Id.* at 1070 n.30, 37 Cal. Rptr. 3d at 827 n.30. The court did *not* say that a statute mandating the redaction of financial assets would be constitutional.

The Court of Appeal also relied on a similar divorce court access decision, *Associated Press v. State of New Hampshire*, 888 A.2d 1236 (N.H. 2005), where The AP challenged the constitutionality of a new divorce court secrecy statute. In that case, the New Hampshire Supreme Court concluded that a portion of the statute automatically sealing financial affidavits filed in divorce cases was unconstitutional because “it placed the burden of proof upon the proponent of disclosure, rather than the proponent of non-disclosure, and because ‘abrogated entirely the public right of access to a class of court records’ and was not narrowly tailored to serve the allegedly compelling interest in protecting its citizens from identity theft.” *Burkle*, 135 Cal. App. 4th at 1057 n.16, 37 Cal. Rptr. 3d at 816 n.16, citing *Associated Press*, 888 A.2d at 1257-1258.

Mr. Burkle petitioned the California Supreme Court to review the Court of Appeal’s decision in *Burkle v. Burkle*, but the Court denied his petition on May 17. The courts unsealed thousands of pages of *Burkle* court records.

But the battle over divorce court secrecy continued in California. After Mr. Burkle lost the Court of Appeal decision, the California Legislature once again considered a new “urgency” version of Family Code § 2024.6 also dubbed the “Burkle bill.” At a recent deposition, Mr. Burkle was instructed by his attor-

ney not to answer a question about his business ties to the lobbyist for the bill.

Although more narrowly tailored than the unconstitutional bill, the new bill still would require automatic redactions of key financial information in court records, preventing the public and press from determining how courts divide financial assets or decide child support. The California Newspaper Publishers Association again opposed the bill and various newspapers published editorials slamming the bill as favoring the rich. Women’s groups also objected, citing fears that automatic redaction would make it easier for one spouse to hide assets, which would typically favor the husband and make it harder to identify biased or unfair judges. Members of the Legislative Women’s Caucus forced the sponsor to table the bill. But the bill has had many lives, and may be reintroduced again.

The media coalition has been represented by Kelli L. Sager, Alonzo Wickers IV, and Susan E. Seager of the Los Angeles office of Davis Wright Tremaine, and Karlene W. Goller, deputy general counsel of the Los Angeles Times. Dave Tomlin, assistant general counsel of The Associated Press, and Tom Newton, general counsel of the California Newspaper Publishers Association, also assisted in the litigation.

Susan Seager is an associate in the Los Angeles office of Davis Wright Tremaine. Ms. Seager received her J.D. degree from the Yale University School of Law.

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B. TAXPAYER STANDING AND THE ESTABLISHMENT CLAUSE

In *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006), the Supreme Court declined to establish an exception to the general rule against taxpayer standing⁴ under the Commerce Clause as it had previously done under the Establishment Clause in *Flast v. Cohen*, 392 U.S. 83 (1968).

In *Flast*, the Supreme Court held that because “the Establishment Clause . . . specifically limit[s] the taxing and spending power conferred by Art. I, § 8, . . . a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause” violates the Establishment Clause. *Id.* at 105-06. And while the court left open the possibility that it might, in the future, find other exceptions to the general rule against taxpayer standing, it has so far found none. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (“Although we have considered the problem of standing and Article III limitations on federal jurisdiction many times since [*Flast*], we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing . . .”).

Here, the city of Toledo and the State of Ohio offered DaimlerChrysler local and state tax benefits to encourage it to expand its local Jeep operation. Disgruntled local residents sued in response, “alleging that their local and state tax burdens were increased by the tax breaks for DaimlerChrysler, tax breaks that they asserted violated the Commerce Clause.” *DaimlerChrysler*, 126 S. Ct. at 1859. Specifically, the plaintiff’s “claimed that they were injured because the tax breaks for DaimlerChrysler diminished the funds

available to the city and state, imposing a ‘disproportionate burden’ on [them].” *Id.* The Supreme Court, however, would only address the merits of the case once it determined that the plaintiffs “ha[d] standing to address their complaint in federal court.” *Id.*

In an opinion by Chief Justice Roberts that was joined by seven justices,⁵ the Supreme Court held that “state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers.” *Id.* at 1864. In doing so, the Court explained that, with the exception of *Flast*, it had historically rejected claims to standing based solely on a citizen’s role as a federal or state taxpayer. *See, e.g., Frothingham v. Mellon*, 262 U.S. 447 (1923); *Doremus v. Board of Education of Hawthorne*,

“affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as ‘virtually continuing monitors of the wisdom and soundness’ of state fiscal administration, contrary to the more modest role Article III envisions for federal courts.” *Id.* at 1864 (*quoting Allen v. Wright*, 468 U.S. 737, 760 (1984) (internal quotation marks omitted)).

Though it was to no avail, the plaintiffs urged the Supreme Court to grant a Commerce Clause exception to the prohibition against taxpayer standing similar to the Establishment Clause exception it granted in *Flast v. Cohen*. According to the Court, “[w]hatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to ‘contribute [money] . . . for the support

of any one [religious] establishment.” *Id.* at 1865 (*quoting Flast*, 392 U.S. at 103 (internal quotation marks omitted)). The Court also believed that the “plaintiffs compare[d] the Establishment Clause to the Commerce Clause at such a high level of generality that almost any constitutional con-

In an opinion by Chief Justice Roberts that was joined by seven justices, the Supreme Court held that “state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers.”

342 U.S. 429 (1952). Not only are “the interests of a taxpayer in the moneys of the . . . treasury . . . too indeterminable, remote, uncertain and indirect’ to support standing,” but “the [taxpayer] must be able to show . . . that he has sustained . . . some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.” *DaimlerChrysler*, 126 S. Ct. at 1863 (*quoting Doremus*, 342 U.S. at 433-34). The Court also cautioned that

constraint on government power would ‘specifically limit’ a State’s taxing and spending power for *Flast* purposes.” *Id.* Furthermore, “such a broad application of *Flast*’s exception to the general prohibition on taxpayer standing would be quite at odds with its narrow application in [the Court’s] precedent and *Flast*’s own promise that it would not transform federal courts into forums for taxpayers’ ‘generalized grievances.’” *Id.* (*quoting Flast*, 392 U.S. at 106).

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II. FREEDOM OF SPEECH

A. COMPELLED SPEECH, EXPRESSIVE CONDUCT, AND THE FREEDOM OF ASSOCIATION

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006), the Supreme Court unanimously upheld a First Amendment challenge to the Solomon Amendment,^{6/} which provides that any institution of higher education that denies military recruiters equal access to that provided to other recruiters will lose certain federal funds. 10 U.S.C. § 983(b) (2006).

Alleging that “the Solomon Amendment was unconstitutional because it forced law schools to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter’s message, and ensuring the validity of federal funding for [its member] universities,” the Forum for Academic and Institutional Rights (“FAIR”), an association of law schools and law school faculties that “object[s] to the policy that Congress has adopted with respect to homosexuals in the military,”^{7/} asked the United States District Court for a preliminary injunction against the Solomon Amendment’s enforcement. *Rumsfeld*, 126 S. Ct. at 1302-03. After the district court denied FAIR’s request “on the ground that it failed to establish a likelihood of success on the merits of its First Amendment Claim,” the United States Court of Appeals for the Third Circuit reversed, finding that “the Solomon Amendment violated the unconstitutional conditions doctrine^{8/} because it forced a law school to choose between surrendering First Amendment rights and losing federal funding for its university.” *Id.* At 1303-04.

On appeal, the Supreme Court first

rejected an amicus argument made by certain law school professors that “the Solomon Amendment’s equal-access requirement is satisfied when an institution applies to military recruiters the same policy it applies to all other recruiters.” *Id.* At 1305 Under this argument, “a school excluding military recruiters would comply with the Solomon Amendment so long as it excluded any other employer that violates its non-discrimination policy.” *Id.* The Court, however, disagreed. Because the Solomon Amendment “does not focus on the content of a school’s recruiting policy,” and instead “looks to the result achieved by the policy and compares the ‘access . . . provided’ military recruiters to that provided other recruiters,” law schools must give military recruiters “the same access as recruiters who comply with the policy.” *Id.* At 1305-06.

Finding no violation of the law schools’ First Amendment rights to freedom of speech and freedom of association, the Supreme Court then held that “[b]ecause the First Amendment would not prevent Congress from directly imposing the Solomon Amendment’s access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.” *Id.* At 1307.

As to freedom of speech, the Supreme Court generally believed that the Solomon Amendment regulated conduct, not speech, and therefore “affect [ed] what law schools must do — afford equal access to military recruiters — not what they may or may not say.” *Rumsfeld*, 126 S. Ct. at 1307. This aside, the Court provided three additional reasons as to why the Solomon Amendment did not impose an impermissible burden on the freedom of speech.

First, this was not a case of unconstitutionally compelled speech like that at issue in *West Virginia Board of Education v. Barnette*^{9/} or *Wooley v. May-*

nard.^{10/} According to the Court, “[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to display the motto ‘Live Free or Die,’ and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.” *Id.*

Second, this was not a situation where the Court should “limit[] the government’s ability to force one speaker to host or accommodate another speaker’s message” as was the case in *Hurley v. Irish American, Gay, Lesbian and Bisexual Group of Boston, Inc.*^{11/} *Id.* At 1309. Unlike *Hurley*, where the compelled speech violation “resulted from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate,” the military’s message at issue here “does not affect the law schools’ speech, because the schools are not speaking when they host interviews and recruiting receptions.” *Id.* The accommodation required by the Solomon Amendment, therefore, “does not sufficiently interfere with any message of the school.” *Id.* At 1310. Furthermore, “nothing in the Solomon Amendment restricts what the law schools may say about the military’s policies.” *Id.*

Third, the Supreme Court rejected the argument that the Solomon Amendment regulates expressive conduct protected by the First Amendment and *United States v. O’Brien*.^{12/} According to the Court, *O’Brien* only protects conduct that is “inherently expressive” and requiring laws schools to accommodate military recruiters is not inherently expressive. *Rumsfeld*, 126 S. Ct. at 1310. Instead, the Court believed that “[t]he expressive component of a law school’s actions is not created by the conduct itself but by the speech the accompanies it” and is therefore “strong evidence that

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the conduct at issue here is not inherently expressive that warrants protection under *O'Brien*.” *Id.* At 1311. Furthermore, even if the Solomon Amendment did regulate expressive conduct it would still pass muster under *O'Brien* because “an incidental burden on speech” that “is no greater than essential” is permissible so long as it is a “neutral regulation” that “promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Id.* (internal quotation marks omitted). Here, “[m]ilitary recruiting promotes the substantial Government interest in raising and supporting the Armed Forces — an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers.” *Id.*

The Supreme Court also held that “[a] military recruiter’s mere presence on campus does not violate a law school’s right to associate, regardless of how repugnant the law school considers the recruiter’s message.” *Id.* At 1313. While the Court had, in cases such as *Boy Scouts of America v. Dale*,¹³ “recognized a First Amendment right to associate for the purpose of speaking which [it has] termed a ‘right of expressive association,’” the Solomon Amendment “does not similarly affect a law school’s associational rights.” *Id.* At 1312. While laws schools may interact with military recruiters, the recruiters “are not part of the law school.” *Rumsfeld*, 126 S. Ct. at 1312. Furthermore, and “[u]nlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school to accept members it does not desire.” *Id.* (internal quotations marks omitted). Instead, “[s]tudents and faculty are free to associate to voice their disapproval of the military’s message” and “nothing about the statute affects the composition of the group by making group membership less desirable.” *Id.* At 1313.

B. PUBLIC EMPLOYEE SPEECH

In *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), the Supreme Court addressed the question of “whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee’s official duties.” *Id.* at 1955. In a 5-4 majority opinion written by Justice Kennedy, the Court held “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and [therefore] the Constitution does not insulate their communications from employer discipline.” *Id.* at 1960.

Richard Ceballos is a deputy district attorney for Los Angeles County and, before this case, was a calendar deputy having supervisory responsibilities over other lawyers. Ceballos determined that an affidavit used in a pending criminal case contained “serious misrepresentations” and recommended dismissal of the case in a disposition memorandum to his supervisors. *Id.* at 1955-56. After heated discussions concerning the legitimacy of the affidavit, Ceballos’ supervisors decided, against his recommendation, to proceed with prosecuting the case. Ceballos claimed that, shortly thereafter, he was subjected to a series of retaliatory actions for recommending that the case be dismissed, including “reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion.” *Id.* at 1956. After his employment grievance was denied, Ceballos brought a claim in federal court under 42 U.S.C. § 1983, alleging that his supervisors “violated the

First and Fourteenth Amendment by retaliating against him based on his” recommendation that the case be dismissed. *Id.* Ceballos’ supervisors responded that “no retaliatory actions were taken against [him] and that all the actions of which he complained were explained by legitimate reasons such as staffing needs.” *Garcetti*, 126 S. Ct. at 1956. Furthermore, they contended that Ceballos’ memorandum recommending that the criminal case be dismissed “was not protected speech under the First Amendment.” *Id.*

The Supreme Court began its discussion by noting that while “Government employers, like private employers, need a significant degree of control over their employees’ words and actions,” the First Amendment still “limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally,

... the First Amendment still “limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.”

the liberties employees enjoy in their capacities as private citizens.” *Id.* at 1958. Therefore, “[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and

effectively.” *Id.* Accordingly, the Court’s decisions in *Pickering v. Bd. of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983) identify two inquiries to guide interpretation of the constitutional pro-

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tections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. . . . If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. . . . If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. . . .

This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restriction it imposes must be directed at speech that has some potential to affect the entity's operations.

Garcetti, 126 S. Ct. at 1958 (internal citations omitted).

Holding that Ceballos' "allegation of unconstitutional retaliation must fail," the Supreme Court noted that "the controlling factor . . . [was] that his expressions were made pursuant to his duties as calendar deputy," not that he "expressed his views inside his office, rather than publicly," or that his "memo concerned the subject matter of [his] employment." *Id.* at 1959-61. According to the Court, "the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case . . . distinguish[ed] [his] case from those in which the First Amendment provides protection against discipline." *Id.* at 1960. The Court believed that "[r]estricting speech that owes its existence to a public employee's profes-

sional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* Instead, "[i]t simply reflects the exercise

Justice Stevens dissented on the ground that "[t]he notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment [was] quite wrong." . . . According to Stevens, it was "senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description."

of employer control over what the employer has itself commissioned or created." *Id.* Here, "Ceballos acted as a government employee," and "[t]he fact that his duties sometimes required him to speak or write [did] not mean his supervisors were prohibited from evaluating his performance." *Id.* Furthermore, because government "[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity," supervisors must be able to "ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Garcetti*, 126 S. Ct. at 1960.

In closing, the Court noted that, were it to hold otherwise, "would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principals of federalism and the separation of powers." *Id.* at 1961. Furthermore, should "[a] public employer . . . wish[] to encourage its employees to voice concerns privately," it "retains the option of instituting internal policies and procedures that are receptive to employee criticism." *Id.*

Three separate dissents were written in response to the Supreme Court's

majority opinion. Justice Stevens dissented on the ground that "[t]he notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment [was] quite wrong." *Garcetti*, 126 S. Ct. at 1963 (Stevens, J., dissenting). According to Stevens, it was "senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description." *Id.* The Court's majority opinion responded to this criticism by rejecting "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." *Id.* at 1961.

Justice Souter dissented in an opinion that was joined by Justices Stevens and Ginsburg. While Souter "agreed with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, . . . [he] would [have held] that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection." *Garcetti*, 126 S. Ct. at 1963 (Souter, J., dissenting). According to Souter, "the risks to the government are great enough for [the Court] to hold from the outset that an employee commenting on subjects in the course of duty should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it." *Id.* at 1967. Accordingly, "only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor." *Id.*

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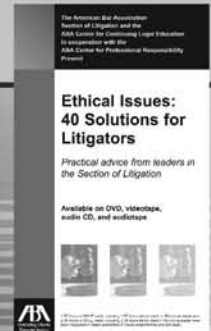
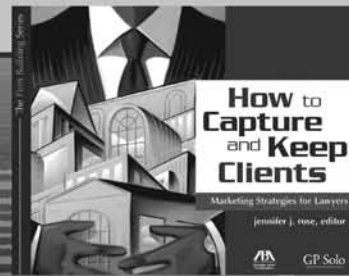
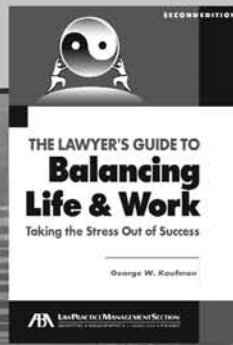
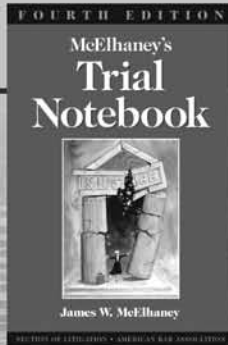
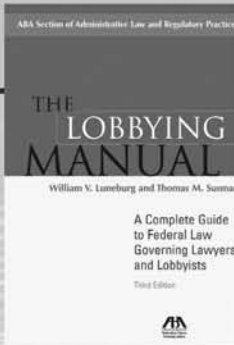
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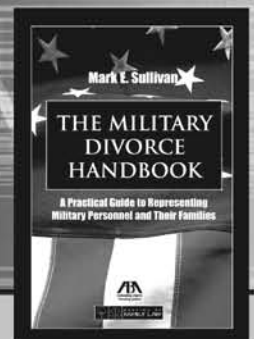
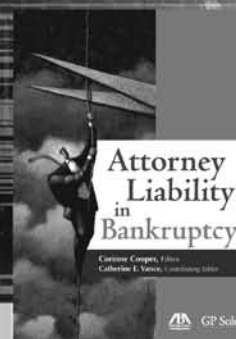
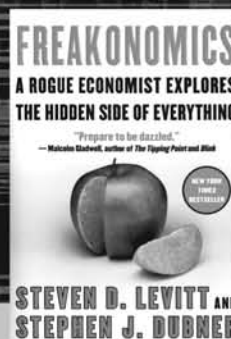
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Justice Breyer authored the third dissent, arguing that “the First Amendment sometimes does authorize judicial actions based upon a government employee’s speech that both (1) involves a matter of public concern and also (2) takes place in the course of ordinary job-related duties.” *Garcetti*, 126 S. Ct. at 1976 (Breyer, J., dissenting). However, “it does so only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference and governmental management of the public’s affairs.” *Id.* According to Breyer, “these conditions [were] met” here and “*Pickering* balancing [was] consequently appropriate.” *Id.*

C. PRISONERS’ FIRST AMENDMENT RIGHTS

While the Supreme Court has long held that First Amendment protects the right to distribute, the right to receive, and the right to read, *see, e.g., Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), the Court held in *Beard v. Banks*, 126 S. Ct. 2572 (2006), that “a Pennsylvania prison policy that ‘denies newspapers, magazines, and photographs’ to a group of specially dangerous and recalcitrant inmates” does not violate the First Amendment as a matter of law. *Id.* at 2575.

In a plurality opinion authored by Justice Breyer and joined by Chief Justice Roberts and Justices Kennedy and Souter, the Supreme Court noted that the Constitution permits some restriction of First Amendment rights in a prison that it would not allow elsewhere. Under this policy, “courts owe ‘substantial deference to the professional judgment of prison administrators.’” *Id.* at 2578 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)). Therefore, “restrictive prison regulations are permissible if they are ‘reasonably related to legitimate pe-

nological interests,’ . . . and are not an ‘exaggerated response’ to such objectives.” *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 87 (1987)). In *Turner*, the Court outlined four factors a court should consider when determining the reasonableness of any given prison regulation:

First, is there a “‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it”? . . . Second, are there “‘alternative means of exercising the right that remain open to prison inmates’”? . . . Third, what “‘impact’ will “‘accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally’”? And fourth, are “‘ready alternatives’ for furthering the governmental interest available?

Id. (internal citations omitted).

The regulation at issue in *Beard* applies to prisoners housed in Pennsylvania’s Long Term Segregation Unit (“LTSU”), “the most restrictive” of prison units that Pennsylvania maintains for the “‘worst of the worse’” — “those who ‘have proven by the history of their behavior in prison, the necessity of holding them in the rigorous regime of confinement’ of the LTSU.” *Id.* at 2576, 2579. Divided into two levels, “[p]risoners at level 2 of the LTSU face the most severe form of . . . restrictions,” including “no access to newspapers, magazines, or personal photographs.” *Beard*, 126 S. Ct. at 2576. Ronald Banks, a Pennsylvania state prisoner confined to level 2 of the LTSU, brought suit in federal court claiming that the regulation “[bore] no reasonable relation to any legitimate penological objective and consequently violate[d] the First Amendment.” *Id.* at 2577.

After discovery, Secretary of the Department of Corrections Jeffrey A.

Beard filed a motion for summary judgment “set[ting] forth several justifications for the prison’s policy, including the need to motivate better behavior on the part of particularly difficult prisoners, the need to minimize the amount of property they control in their cells, and the need to assure prison safety, by, for example, diminishing the amount of material a prisoner might use to start a cell fire.” *Id.* at 2578. In response, Banks filed no opposition to Secretary Beard’s motion, but instead “filed his own cross-motion for summary judgment in which he claimed that the [regulation at issue] . . . was ‘unreasonable as a matter of law,’” but which the Supreme Court believed failed to place any significant facts in dispute. *Id.* at 2581.

Going no further than Beard’s first justification for the policy at issue, the Supreme Court found that, on the basis of the record before it, the need to motivate better behavior on the part of particularly difficult prisoners was adequate justification for a policy restricting their First Amendment rights, therefore warranting summary judgment in Secretary Beard’s favor. As to the first *Turner* factor, “[t]he articulated connections between newspapers and magazines, the deprivation of virtually the last privilege left to an inmate, and a significant incentive to improve behavior are logical ones,” therefore, “the first factor support[ed] the Policy’s ‘reasonableness.’” *Id.* at 2579. As to the second, third, and fourth *Turner* factors, the Court believed that, because they were “logically related to the Policy itself, . . . [they] add[ed] little, one way or another, to the first factor’s basic logic rationale.” *Id.* at 2580. Therefore, “[t]he real task . . . [was] not balancing these factors, but rather determining whether the Secretary show[ed] more than simply a logical relation, that is, whether he show[ed] a *reasonable* relation.” *Beard*, 126 S. Ct. at 2580. Not only was this a case where “prison officials, relying on their professional judg-

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ment, reached an experience-based conclusion that the polic[y] helped to further legitimate prison objectives," but the material presented by Secretary Beard in support of his motion for summary judgment provided sufficient justification for the policy, thereby leading the Court to conclude that the policy at issue was indeed reasonable. *Id.*

Believing that "the prison regulations at issue . . . [were] permissible under the approach [he previously] explained in *Overton*," Justice Thomas concurred in the judgment of the Supreme Court and was joined by Justice Scalia. *Beard*, 126 S. Ct. at 2585 (Thomas, J., concurring). In that case, Thomas stated that "*Turner* and its progeny 'rest on the unstated (and erroneous) presumption that the Constitution contains an implicit definition of incarceration.'" *Id.* at 2582 (quoting *Overton*, 539 U.S. at 139). However, "[b]ecause the Constitution contains no such definition, . . . 'States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations — provided only that those deprivations are consistent with the Eighth Amendment.'" *Id.* at 2582-83 (quoting *Overton*, 539 U.S. at 139). Because Banks had "not challenged Pennsylvania's prison policy as a violation of the Eighth Amendment, . . . the sole inquiry in the case [was] whether [Banks'] sentence deprived him of the rights he [sought] to exercise." *Id.* at 2583. Though Pennsylvania remained "'free to alter its definition of incarceration to include the retention' of unfettered access to magazines, newspapers, and photographs, it appear[ed] that the Commonwealth instead sentenced [Banks] against the backdrop of its traditional conception of imprisonment, which afford[ed] no such privileges." *Id.* at 2584 (quoting *Overton*, 539 U.S. at 144-45). Therefore, Thomas concluded,

Banks' "challenge to Pennsylvania's prison regulations must fail." *Id.*

Believing that "a full trial [was] necessary before forming a definitive judgment on whether the challenged regulation [was] reasonably related to [Pennsylvania's] valid interests in security and rehabilitation," Justice Stevens dissented and was joined by Justice Ginsburg. *Beard*, 126 S. Ct. at 2591 (Stevens, J., dissenting). As to the security rationale, Stevens believed that Secretary Beard "ha[d] failed to demonstrate that the prohibition on newspapers, magazines, and photographs [was] likely to have any marginal effect on security." *Id.* at 2586. With respect to the rehabilitation rationale, Stevens believed that the justification that "[a]ny deprivation of something a prisoner desires gives him an added incentive to approve his behavior" had no limiting principle. *Id.* at 2588. Taken to its logical extreme, such justification "would provide a 'rational basis' for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior." *Id.* Stevens was also influenced by that fact that "if [the Court] consider[ed] the severity of the other conditions of confinement in LTSU-2, it be[came] obvious that inmates ha[d] a powerful motivation to escape those conditions irrespective of the ban on newspapers, magazines, and personal photographs." *Id.* at 2589. Furthermore, "[t]he indefinite nature of LTSU-2 confinement, and the fact that . . . a significant majority of inmates confined at LTSU-2 had remained there since the inception of the program over two years earlier, suggest[ed] that the prohibition on newspapers, magazines, and personal photographs [was] an exaggerated response to the prison's legitimate interest in rehabilitation." *Id.* at 2590.

D. REGULATION OF CAMPAIGN FINANCING

- *Randall v. Sorrell* -

In *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), the Supreme Court struck down Vermont's Act 64, a state law that limited both campaign expenditures and contributions. Justice Breyer announced the judgment of the Court and delivered a plurality opinion that was joined by Chief Justice Roberts and partially-joined by Justice Alito.

In ruling that Act 64's expenditure limits violated the First Amendment, the plurality declined to overrule that portion of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), that held that the prevention of corruption and its appearance was not a sufficient governmental interest to justify the restriction of political expression imposed by expenditure limits. According to the plurality, there was no "strong justification" to ignore the importance of stare decisis and overrule "well established" precedent such as *Buckley*. *Randall*, 126 S. Ct. at 2490. Not only were Act 64's "expenditure limits . . . not substantially different from those at issue in *Buckley*," neither was "Vermont's primary justification for imposing its expenditure limits significantly different from Congress' rationale for the *Buckley* limits: preventing corruption and its appearance." *Id.* The plurality also declined to distinguish the fact that *Buckley* did not consider whether expenditure "limits help to protect candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters." *Id.* at 2489. According to the plurality, "it [was] highly unlikely that fuller consideration of [the] time protection [argument] would have changed *Buckley*'s result" because "[t]he *Buckley* Court was aware of the connection between expenditure limits and a reduction in fundraising time." *Id.*

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Unlike expenditure limits, “contribution limits ‘involv[e] little direct restraint on’ the contributor’s speech” because they “‘permi[t] the symbolic expression of support evidenced by a contribution,’ and . . . do ‘not in any way infringe the contributor’s freedom to discuss candidates and issues.’” *Id.* at 2491 (quoting *Buckley*, 424 U.S. at 21, 24). Therefore, “contribution limitations are permissible so long as the Government demonstrates that the limits are ‘closely drawn’ to match a ‘sufficiently important interest,’” such as preventing corruption and its appearance. *Id.* (quoting *Buckley*, 424 U.S. at 25). And while *Buckley* and subsequent Supreme Court decisions have found contribution limits to pass constitutional muster, “contribution limits that are too low can . . . harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.” *Randall*, 126 S. Ct. at 2492. Because Vermont’s “contribution limits [were] substantially lower than both the limits [the Court had] previously upheld and comparable limits in other States,” the plurality believed that they were “danger signs that . . . the contribution limits may fall outside tolerable First Amendment limits.”¹⁴ *Id.* at 2494. Therefore, the plurality felt obligated to “examine the record independently and carefully to determine whether . . . [the] contribution limits [were] ‘closely drawn’ to match the State’s interests.” *Id.*

Five factors, when taken together, led the plurality to conclude that Vermont’s contribution limits were not narrowly tailored and therefore unjustifiably “burden[ed] First Amendment inter-

ests in a manner that [was] disproportionate to the public purposes they were enacted to advance.” *Id.* at 2500. “First, the record suggest[ed], though it [did] not conclusively prove, that . . . [the] contribution limits [would] significantly restrict the amount of funding available for challengers to run competitive campaigns.” *Id.* at 2495.

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“Second, Act 64’s insistence that political parties abide by *exactly* the same low contribution limits that appl[ied] to other contributors threaten[ed] harm to a particularly important political right, the right to associate in a political party.” *Id.* at 2496. Furthermore, because the contribution limits effectively prevented “a political party from using contributions by small donors to provide meaningful assistance to any individual candidate,” the plurality believed they “‘would reduce the voice of political parties’ in Vermont to a ‘whisper.’” *Randall*, 126 S. Ct. at 2498 (quoting *Landell v. Sorrell*, 118 F.Supp.2d 459, 487 (D. Vt. 2000)). Third, because Act 64’s definition of “contribution” excluded from its definition the services of volunteers, but not the expenses they incurred in the course of campaign ac-

tivities, the plurality believed that these expenses might count “against the volunteer’s contribution limit, at least where the spending was facilitated or approved by campaign officials.” *Id.* According to the plurality, because Vermont’s contribution limits were already so low, Act 64’s broad definition of “contribution” might “impede a campaign’s ability effectively to use volunteers, thereby making it more difficult for individuals to associate in this way.” *Id.* at 2499. “Fourth, unlike the contribution limits [the Court] upheld in [*Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000)], . . . Act 64’s contribution limits [were] not adjusted for inflation.” *Id.* Therefore, contribution “limits which [were] already suspiciously low, . . . [would] almost inevitably become too low over time.” *Id.* Furthermore, the plurality was concerned that “incumbent legislators may not diligently police the need for changes in limit levels to assure the adequate financing of electoral challenges.” *Id.* Fifth, nowhere in the record was there “any special justification that might warrant a contribution limit so low or so restrictive as to bring about . . . serious associational and expressive problems . . .” *Randall*, 126 S. Ct. at 2499. For example, there was “no indication that . . . corruption (or its appearance) in Vermont [was] significantly more serious a matter than elsewhere.” *Id.*

Justice Alito concurred in part and concurred in the judgment. According to Alito, because those supporting Vermont’s campaign finance law, “fail[ed] to explain why it would be appropriate to reexamine only one part of the holding in *Buckley*” (the part holding campaign expenditure limits to strict scrutiny), it was “unnecessary to reach the issue.” *Randall*, 126 S. Ct. at 2500-01 (Alito, J., concurring).

Justice Kennedy believed that both Vermont’s expenditure and contribution limits violated the First Amendment.

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However, due to his belief that “[t]he universe of campaign finance regulation may cause more problems than it solves,” he concurred only in the judgment. *Randall*, 126 S. Ct. at 2501 (Kennedy, J., concurring).

Justice Thomas concurred in the judgment and was joined by Justice Scalia. Not only does Thomas “continue to believe that *Buckley* provides insufficient protection to political speech,” but that its illegitimacy “is further underscored by the continuing inability of the Court . . . to apply *Buckley* in a coherent and principled fashion.” *Randall*, 126 S. Ct. at 2502 (Thomas, J., concurring). Thomas, therefore, “would [have] overrule[d] *Buckley* and subject [ed] both the contribution and expenditure restrictions of Act 64 to strict scrutiny, which they would [have] fail[ed].” *Id.*

Justice Souter dissented and was joined by Justice Ginsburg and partially-joined by Justice Stevens. Because “the *Buckley* Court did not categorically foreclose the possibility that some spending limit might comport with the First Amendment,” Souter “would not [have] pass[ed] upon the constitutionality of Vermont’s expenditure limits prior to further enquiry into their fit with the problem of fundraising demands on candidates” *Randall*, 126 S. Ct. at 2512 (Souter, J., dissenting). Furthermore, Souter did “not see the contribution limits as depressed to the level of political inaudibility” because “[t]he limits set by Vermont [were] not remarkable departures either from those previously upheld by [the] Court or from those lately adopted by other States.” *Id.* at 2512, 2516. Also influencing Souter was the fact that the law’s opponents “offered, and the plurality invoke[d], no evidence that the risk of a pro-incumbent advantage [had] been realized” *Id.* at 2514. Instead, “the record evidence [ran] the other way, as the plurality [had] concede[d].” *Id.*

Justice Stevens also dissented, believing that “*Buckley*’s holding on expenditure limits [was] wrong, and that the

time ha[d] come to overrule it.” *Randall*, 126 S. Ct. at 2506 (Stevens, J., dissenting). According to Stevens, Vermont’s “limits on expenditures [were] far more akin to time, place, and manner restrictions than to restrictions on the content of speech” *Id.* at 2508. He would have, therefore, “up[held] them ‘so long as the purposes they serve[d] [were] legitimate and sufficiently substantial.’” *Id.* (quoting *Buckley*, 424 U.S. at 264). Because “fundraising devours the time and attention of political leaders, leaving them too busy to handle their public responsibilities effectively,” Stevens believed that “[t]he interest in freeing candidates from the fundraising straight-jacket [was] . . . compelling” *Id.* at 2509. Furthermore, there was solid evidence that the important interests favoring expenditure limits were “fronts for incumbency protection.” *Id.* at 2510. Stevens therefore “agree[d] with Justice Souter that it would be entirely appropriate to allow further proceedings on expenditure limits to go forward” *Id.* at 2511. Stevens also agreed with Justice Souter’s assessment that Act 64’s contribution limits were constitutional and joined that portion of his opinion as well.

- *Wisconsin Right to Life v. Federal Election Commission* -

In *Wisconsin Right to Life v. Federal Election Commission* (“*WRTL*”), 126 S. Ct. 1016 (2006) (per curiam), the Supreme Court interpreted footnote 73 of its landmark campaign finance reform decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

According to the Bipartisan Campaign Reform Act of 2002 (“BCRA”), it is unlawful for a corporation to make contributions or expenditures for any “electioneering communication.” 2 U.S.C. § 441b(b)(2) (2006). In addition to its primary definition of “electioneering communication,”^{15/} BCRA provides a “backup” definition that becomes effective should the primary definition be held unconstitutional by a court of law.^{16/} In footnote 73 of the *McConnell* decision,

the Supreme Court upheld “all applications of the primary definition and accordingly [had] no occasion to discuss the backup definition.” *McConnell*, 540 U.S. at 190.

Here, Wisconsin Right to Life, Inc. (“*WRTL*”) sought “a judgment declaring BCRA unconstitutional as applied to several broadcast advertisements that it intended to run during the 2004 election.” *WRTL*, 126 S. Ct. at 1017. *WRTL* also asked the three-judge district court for “a preliminary injunction barring the FEC from enforcing BCRA against those advertisements.” *Id.* While “*WRTL* [did] not dispute that its advertisements [were] covered by BCRA’s definition of prohibited electioneering communications,” it argued that BCRA could not “be constitutionally applied to its particular communications because they constitute[d] ‘grass-roots lobbying advertisements.’” *Id.*

In denying *WRTL*’s motion for a preliminary injunction and dismissing its complaint, the district court interpreted footnote 73 of the Supreme Court’s decision in *McConnell* “as foreclosing any ‘as-applied’ challenges to the prohibition on electioneering communications.” *Id.* 1018. The Supreme Court disagreed, however, stating that district court “misinterpreted” the footnote. *Id.* According to the Court, footnote 73 “merely notes that because [the Supreme Court] found BCRA’s primary definition of ‘electioneering communication’ facially valid when used with regard to BCRA’s disclosure and funding requirements, it was unnecessary to consider the constitutionality of the backup definition Congress provided.” *Id.* Therefore, “[i]n upholding [BCRA’s] prohibition against corporate contributions or expenditures for any electioneering communication] against a facial challenge, [the Supreme Court] did not purport to resolve future as-applied challenges.” *WRTL*, 126 S. Ct. at 1018. Accordingly, the Court “vacate[d] the judgment and remand[ed] the case for the District Court to consider the merits of *WRTL*’s as-applied challenge in the first instance.” *Id.*

SUPREME COURT ROUND UP / Endnotes

- 1 Justice Alito took no part in the consideration or decision of this case.
- 2 The Controlled Substances Act “regulates the importation, manufacture, distribution, and use of psychotropic substances.” *UDV*, 126 S. Ct. at 1217; *see also* 21 U.S.C. § 801 *et seq.* (2006). Subject to very limited exceptions, psychotropic substances listed in Section I of the Act are subject to an outright ban on all importation and use. *See* 21 U.S.C. §§ 823, 960 (2006).
- 3 RFRA was adopted by Congress in response to the Supreme Court’s ruling that the Free Exercise Clause “does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *See Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (*quoting United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).
- 4 “If a dispute is not a proper case or controversy [under Article III of the U.S. Constitution], the [federal] courts have no business deciding it, or expounding the law in the course of doing so.” *DaimlerChrysler*, 126 S. Ct. at 1860-61. A key component of the case or controversy requirement is that “a litigant have standing to invoke the authority of federal court” *Id.* at 1861. More specifically, “[a] plaintiff must allege injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Id.* (*quoting Allen v. Wright*, 468 U.S. 737, 751 (1984)).
- 5 Justices Stevens, Scalia, Kennedy, Souter, Thomas, Breyer and Alito all joined Chief Justice Robert’s opinion. Justice Ginsburg filed an opinion concurring in part and concurring in the judgment.
- 6 Justice Alito took no part in the consideration or decision of this case.
- 7 According to this policy, “a person generally may not serve in the Armed Forces if he has engaged in homosexual acts, stated that he is homosexual, or married a person of the same sex.” *Rumsfeld*, 126 S. Ct. at 1302 n.1; *see also* 10 U.S.C. § 654(b) (2006).
- 8 Under the unconstitutional conditions doctrine, “the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.” *Rumsfeld*, 126 S. Ct. at 1307.
- 9 In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), the Supreme Court held unconstitutional a state law requiring school children to recite the Pledge of Allegiance and salute the flag. *Id.* at 642.
- 10 In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Supreme Court held unconstitutional a state law that required New Hampshire motorists to display the state motto (“Live Free or Die”) on their license plates. *Id.* at 717.
- 11 In *Hurley v. Irish American, Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the Supreme Court held that a state law cannot require a parade to include a group whose message the parade organizer does not wish to send. *Id.* at 566.
- 12 In *United States v. O’Brien*, 391 U.S. 367 (1968), the Supreme Court held that some forms of “symbolic speech” (i.e., expressive conduct) are entitled to First Amendment protection. *Id.* at 376.
- 13 In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Supreme Court held that New Jersey’s public accommodations law, which had been interpreted to require the Boy Scouts of America to admit an adult who was an avowed homosexual and gay rights activist, “violate[d] the Boy Scouts’ First Amendment right of expressive association.” *Id.* at 644.
- 14 “The amount any single individual [could] contribute to the campaign of a candidate for state office during a ‘two-year general election cycle’ [was] limited as follows: governor, lieutenant governor, and other statewide office, \$400; state senator, \$300; and state representative, \$200.” *Randall*, 126 S. Ct. at 2486.
- 15 According to BCRA, “electioneering communication” refers to “any broadcast, cable or satellite communication” that
 - (I) refers to a clearly identified candidate for Federal office;
 - (II) is made within --
 - (aa) 60 days before a general, special, or runoff election for high office sought by the candidate; or
 - (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
 - (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.2 U.S.C. § 434(f)(3)(A)(i) (2006).
- 16 According to BCRA, the alternative definition of “electioneering communication” means “any broadcast, cable, or satellite communication which promotes or supports a candidate for office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.” 2 U.S.C. § 434(f)(3)(A)(ii) (2006).

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