Supreme Court: Provision In AIDS Law Violates Free Speech

By Nina Totenberg – June 20, 2013

The U.S. Supreme Court, headed into its final days of the term, left all of its marquee cases undecided on Thursday. Still being hashed out in private by the justices are two same-sex-marriage cases, plus major tests of affirmative action in higher education and the Voting Rights Act. No more decisions are expected this week.

Thursday's court session produced important business and First Amendment decisions, nonetheless. On the First Amendment front, the court ruled that the government cannot force private health organizations to denounce prostitution to get money to fight HIV/AIDS overseas.

A 2003 federal law provided billions of dollars to private nongovernmental organizations to fight AIDS, particularly in areas where it has become pandemic — sub-Saharan Africa and the Caribbean. But the NGOs must essentially promise to explicitly oppose prostitution. Since many of these organizations work with prostitutes to get them to use safe-sex practices, the organizations figured that explicitly condemning prostitution would make their work more difficult, and they challenged the law in court. They contended that the 2003 law unconstitutionally compelled them to do the government's bidding outside the confines of their programs.

, Chief Justice John Roberts observed that the government clearly can put conditions on how the money it gives out is spent.

"As a general matter, if a party objects to those limits, its recourse is to decline the funds," Roberts wrote. "However, in some cases, a funding condition can result in an unconstitutional burden on First Amendment rights."

And that was the case here, the court decided. Congress had gone too far by seeking to impose conditions outside the confines of the grant itself.

"By requiring [grant] recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient," Roberts wrote.

Paying The Piper

Generally, under the Constitution's Spending Clause, the rule is: He who pays the piper calls the tune.

"The question is: What more besides the tune does the payer get to control?" noted Eugene Volokh of the University of California, Los Angeles, law school.

He summarized the government's position in this case this way: "Look, if you want to be the piper, not only do you have to play the tunes that we ask you to play; you also have to sign a pledge saying that you do not endorse rap music," Volokh said. "And that, the Supreme Court says, that's not permissible."

Here, it wasn't rap music the government wanted a grantee to condemn; it was prostitution. And the court said that was a violation of the First Amendment right to free speech.

In his opinion for the majority, Roberts drove home the point that requiring organizations to "pledge allegiance to the Government's policy of eradicating prostitution" would run afoul of the Constitution by quoting Justice Robert Jackson's famous 1943 flag salute decision. That ruling struck down a state law requiring public school students to pledge allegiance to the flag.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," Jackson wrote 70 years ago.

'A Middle Ground'

Dissenting from Thursday's decision were Justices Antonin Scalia and Clarence Thomas. Writing for the two, Scalia said that the First Amendment "does not mandate a viewpoint-neutral government" and "may enlist the assistance of those who believe in its ideas to carry them to fruition."

The ruling has implications for every sort of government contractor, according to the Cato Institute's Ilya Shapiro. Thus, he says, if the government has a program for treatment of drug abuse, it now will be unable to bar the people doing the treatment from advocating for legalization of drugs, as long as they do so on their own time or when using private money. Similarly, Shapiro said, "if the government has a contractor running an adoption agency, well, you can run an adoption agency whether you're pro-choice or pro-life. And if this case had gone the other way, then the government could have started imposing these sorts of compelled-speech provisions."

But some groups, like the Coalition Against Trafficking in Women, disagreed strongly with the court's decision. Norma Ramos, executive director of the group, called the decision "extremely disturbing" and "a defeat for human rights."

The dozens of groups that get federal money to fight AIDS, however, were relieved.

"Just because you're receiving some government money, you're doing business with the government, or you're partnering with the U.S. government, doesn't mean that you forfeit your First Amendment rights," said David Bowker, who represented the groups in the Supreme Court.

Stanford Law School's Michael McConnell sees the court ruling as sensible.

"This is actually kind of a middle ground," McConnell said. "It gives the government a lot of authority, and I think rightly so, to make sure that its funded projects are done in accordance with government policy — but no more than that."

A Ruling On Arbitration

On the business front Thursday, the court limited the rights of merchants to bring class-action claims in arbitration courts.

By a 5-3 vote, that businesses must go through arbitration individually instead of joining together to litigate a common claim when resolving disputes with American Express and other large corporations.

Small businesses had tried to collectively arbitrate a claim against American Express, arguing that the company violated federal antitrust laws by using its monopoly in the credit card market to charge inflated fees. The retailers argued that since each merchant only lost a few thousand dollars, and since proving an antitrust claim costs hundreds of thousands of dollars in expert testimony and studies, it made no sense to bring individual claims, and a class action was the only way to go.

But in the latest Supreme Court decision supporting arbitration clauses, the court majority said the Federal Arbitration Act "does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."

Advocates for small businesses, consumers and employees denounced the ruling.

"Now that the Supreme Court has ruled that those clauses are enforceable, there appears to be no way for the claims to go forward, and the merchants will have no chance to obtain compensation for the millions of dollars in damages that they say American Express inflicted on them as a group," said Scott Nelson of Public Citizen.

Mary Alice McLarty, president of the American Association for Justice, said the decision hands big corporate entities "fine print ... licenses to steal and violate the law." She called on Congress to pass legislation that would undo many of the court's recent decisions on "forced arbitration" for small businesses, consumers and employees. Without congressional action, she said, "all federal and state civil rights, employment, antitrust and consumer protections are at risk of being wiped away by the fine print" in contracts that deny signers the right to court and require all disputes to be resolved by individual arbitrations.

But Dallas lawyer Christopher D. Kratovil said the decision "is hardly surprising, as the court has long held that arbitration agreements are contractual in nature and that, as such, their terms will be rigorously enforced absent a contrary congressional command.

"The majority found that there is no contrary congressional command here, as no federal law mandates that arbitration must be inexpensive or that class action-type procedures must be available in arbitration," he said. "Stated simply, the Supreme Court once again held that the parties get what they contracted for in their arbitration agreement — nothing more and nothing less."

Still, Brian Fitzpatrick, a law professor at Vanderbilt University, characterized the ruling as "another big step" toward companies' being able to "insulate themselves from class-action liability."

"Two years ago, the court held companies could do this for state law claims; today, it held companies could do so for federal law claims. The case today involved federal antitrust claims, and it is possible it will not apply to more recently enacted federal statutes in the labor and employment discrimination area, but I would not hold my breath," he said. "The writing is on the wall now more clearly than ever: There is little future for consumer and employment class actions, and even shareholder class actions may not survive."