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## Supreme Court faces wave of free-speech cases from conservatives

**Once embraced by liberals, 1st Amendment arguments are now being applied to contest campaign contribution limits, union dues and no-protest zones at abortion clinics.**

By: David Savage

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WASHINGTON — For decades, liberals wielded the 1st Amendment to protect antiwar activists, civil rights protesters and government whistle-blowers.

These days, however, the Constitution's protection for free speech and religious liberty has become the weapon of choice for conservatives.

This year's Supreme Court term features an unusual array of potentially powerful 1st Amendment claims, all of them coming from groups on the right.

And in nearly every case, liberal groups — often in alliance with the Obama administration — are taking the opposing side, supporting state and federal laws that have come under attack for infringing upon the rights of conservatives.

The free-speech challenges include cases on campaign contribution limits, no-protest zones in front of abortion clinics and mandatory union dues for public employees.

At the same time, devout Christian employers are claiming their religious liberty should entitle them to an exemption from a provision in President Obama's healthcare law requiring that full contraceptive coverage be offered to female employees.

And waiting on deck is a free-speech appeal from a Christian photography company challenging a New Mexico state law that bars businesses from discriminating against gays and lesbians.

Conservatives and libertarians say the role reversal at the high court reflects a larger shift in political alliances and attitudes toward government.

"The progressive mind-set sees government as a force for good," said Ilya Shapiro, a lawyer for the libertarian Cato Institute. So, increasingly, "the energy behind those who are battling with the government" comes from libertarians and conservatives.

"This is a real trend over several years," said Washington attorney Michael Carvin, a staunch conservative who led the constitutional challenge to the Affordable Care Act. "The liberals are in favor of an expansive federal government, and the conservatives are making the arguments for individual autonomy on speech and religion."

Citing the campaign funding case, which seeks to knock out aggregate limits on how much wealthy donors can give congressional candidates and political parties, Carvin accused liberals of abandoning "the idea of assuring all voices can participate freely because they don't like rich people and corporations."

Defenders of existing campaign funding limits counter that their aim is to prevent those with great wealth, including corporations, from dominating the airwaves during election season.

The trend may also reflect the shifting ideological leanings of the high court. Five of the nine justices are Republican appointees, and conservatives are betting that they will be more receptive to appeals from the right, especially on matters of free speech.

"This court has been very protective of the 1st Amendment in a whole range of cases," Shapiro said. "So activists and lawyers know that if they can frame the challenge as a free-speech claim, they are more likely to succeed. If you are appealing to Justice [Anthony M.] Kennedy, you have a much better chance if you are making a libertarian argument."

Leading liberal advocates say conservatives, including some on the court, are using the 1st Amendment to pursue ideological goals.

"This is more about conservative ideology than about speech," said Erwin Chemerinsky, dean of the UC Irvine School of Law. "This is an ideologically conservative court that is pro-business and hostile to unions."

A key test of the court's leanings will come Friday, when the justices meet behind closed doors to decide whether to hear a challenge to New Mexico's law forbidding discrimination based on sexual orientation.

The case began when Elaine and Jonathan Huguenin, the owners of Elane Photography, refused a request to photograph a wedding of two women. Elaine Huguenin said she did only "traditional weddings," explaining that to do otherwise would violate her religious beliefs.

In response to a complaint, the state Human Rights Commission charged Elane Photography with violating the state's antidiscrimination law. The photographers appealed and lost before the state Supreme Court.

In November, the Alliance Defending Freedom, an Arizona-based legal group that advocates for religious liberty, appealed on the photographers' behalf to the Supreme Court. The group asked the justices to decide whether it violated the 1st Amendment for a state to "require a photographer to create expressions, images and picture books conveying messages that conflict with her religious beliefs."

"This is a case about compelled speech," said Jordan Lorence, a Washington lawyer for the group. "The bigger principle here is about pushing back against the government because those in power tend to suppress those who do not share the orthodox views."

If four or more justices vote to decide the issue, the case will be heard in the fall.

Chemerinsky questioned whether the New Mexico photography case was really about free speech.

"The conservatives are dressing up their opposition to marriage equality as [being] about freedom of religion or speech," he said. Having lost the battles on gay rights and same-sex marriage, he said, conservatives are repackaging their legal arguments as 1st Amendment challenges.

Another widely-watched dispute this term is the campaign funding case, launched by the Republican National Committee and heard in October. The case is a follow-up to the court's 1st Amendment ruling in *Citizens United*, which freed corporate groups and unions to spend unlimited sums on independent lobbying campaigns related to political issues or candidates.

And anti-union groups are hoping the court's conservatives will overturn a previous ruling that allows unions to collect mandatory fees from public employees, even those who do not support the union. Several justices said these forced fees violated free-speech rights.

Free speech is not always a winning argument at the high court.

In December, Chemerinsky tried to make a classic 1st Amendment claim that had worked for liberals in the past. He was defending an antiwar activist from Santa Barbara who was convicted of illegally protesting on a public street on land owned by Vandenberg Air Force Base.

But when the UC Irvine professor cited the 1st Amendment, justices shut him down, ruling unanimously but narrowly that because the street was military property, the base commander had the authority to kick out a protester. Free speech was not at issue, they decided.

Conservatives hoping for landmark victories this term may be disappointed. During the recent arguments on campaign funding, public employee unions and "buffer zones" outside abortion clinics, one or more of the court's conservatives sounded notes of caution.

Chief Justice John G. Roberts Jr. usually leans to the right, but he often prefers narrow rulings. He may well have a busy spring.