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Provocative docket raises hackles over animals, religion

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09.29.09

WASHINGTON — Fighting for the First Amendment often makes for odd bedfellows. In pending cases for the coming Supreme Court term, free-speech advocates find themselves on the side of corporations seeking to influence elections, creators of videos depicting animal cruelty and, oh, yes, bankruptcy lawyers. All in a day's work.

Also on the Court's short but provocative First Amendment docket for the fall is a case asking whether an establishment-clause problem created by a Christian cross displayed on federal Mojave Desert land can be cured by Congress' selling the land on which it stands to private owners — and who has standing to challenge the move.

The most controversial First Amendment case on the docket, *United States v. Stevens,* is a challenge to a 1999 federal law criminalizing the depiction of animal cruelty, as well as the sale or possession of those depictions. Even though the law contains an exemption for journalistic or educational depictions, First Amendment advocates — as well as a range of organizations for nature photographers and for fishing, hunting and outdoor enthusiasts — say the law sweeps too broadly and would create the first major new exception to freedom of expression in 25 years.

"Opposing this law is not popular," said David Horowitz of the Media Coalition, who has coordinated some of the friend-of-the-court briefs supporting the challenge to the statute. "The First Amendment is most necessary when unpopular speech is at issue."

Some of the briefs target the solicitor general's strongly worded brief supporting the law, which spells out a balancing test that critics say could lead to other legislation banning unpopular speech. "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs," wrote Solicitor General Elena Kagan, drawing on language from the Court's 1942 decision *Chaplinsky v. New Hampshire.*

In its brief, the Cato Institute argues that such a content-based test, as well as other language in the government brief, could open a "Pandora's box" of legislation to ban all kinds of depictions of illegal or unpopular activities. Among them: defamation of religion, race-based hate speech, depictions of violence by or against U.S. troops, and depictions of illegal acts — whether by Cheech and Chong or on television shows like "Law and Order." Those examples, Cato said, demonstrate "the breadth and absurdity of the government's radical approach to the categorical suppression of speech."

Supporters of the law are equally adamant. The Humane Society of the United States argues that the kind of animal-cruelty videos at issue in the case are not merely analogous to obscenity; they actually are obscenity. "There is no persuasive basis for singling out sexually obscene materials as entitled to no First Amendment protection — while treating the appalling videos proscribed by [the law] as the constitutional equivalent of the Lincoln-Douglas debates."

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But the law's definitions are broad enough to have "an enormous chilling effect" that could shut down hunting and fishing magazines for fear of crossing the line, said Laurie Lee Dovey of the Professional Outdoor Media Association.

In a preview of the case for the American Bar Association, Thomas Baker of Florida International University College of Law offers a history of the law at issue that lends some support to the "slippery slope" argument made by its critics. In a 1999 signing statement, President Bill Clinton said his administration would interpret the law to apply narrowly to depictions that appealed to prurient sexual interests. The Bush administration applied the law more broadly, to dog-fighting videos which, though violent, were not prurient. And now the Obama administration is defending that broader interpretation. "It will be up to the Supreme Court to determine, once and for all, if the broader interpretation is constitutional," said Baker.

The animal-cruelty case will be argued Oct. 6.

The next day the justices will consider another First Amendment case that has garnered wide attention: *Salazar v. Buono,* the Mojave Desert cross case. First placed by the Veterans of Foreign Wars on an outcropping in federally owned desert land in 1934 as a war memorial, the cross stood unchallenged until 2000, when the American Civil Liberties Union questioned it in a letter to the National Parks Service. Congress acted quickly to stave off the dispute, enacting a law to bar the use of federal funds to remove the cross, to establish it as a national memorial, and then in 2003, while the challenge was pending, to sell the land surrounding the cross to the VFW.

The ACLU, which represents the person challenging the cross, claims that all those legislative machinations, far from curing the establishment-clause violation, prove that Congress showed favoritism toward a sectarian religious symbol. Congress even retained an interest in the land, stipulating that if the memorial was not maintained, the land would revert to the government. Besides, the ACLU brief states, government "may not use private parties to accomplish what it is forbidden to achieve."

But many analysts think the Court may decide the case not on the merits of whether the cross violates the First Amendment but on the question of whether Frank Buono, who challenged the cross, has the standing or right to do so.

The government brief points out that Buono, a former assistant superintendent of the desert preserve, lives in Oregon and is Roman Catholic, both facts helping to make his objections insufficient to establish an "injury in fact" required before someone can bring such a case to court. Buono said he was offended by the fact that other religions would be unable to put their symbols in the same location, and said the presence of the cross would deter him from visiting the area.

The ACLU replied that Buono does have sufficient standing, and rejected the idea that Buono's Catholic faith disqualified him from objecting to a Christian cross. It noted that in *Lee v. Weisman,* the family that objected to a rabbi's giving a graduation prayer was Jewish.

Veterans' groups are especially concerned about the Mojave cross case. A ruling that would require taking down the cross, says Kelly Shackelford of Liberty Legal Institute, would cause "incredible havoc around the country" by threatening a broad range of government memorials. Shackelford filed a brief for the VFW and several other veterans' groups. Jim Sims of the Military Order of the Purple Heart

worries that "if the plaintiffs are so offended by this cross," they may be equally offended – and ready to sue – "when they go by Arlington Cemetery."

Still looming over the Court is a case from last term, *Citizens United v. Federal Election Commission,* which was reargued before the justices on Sept. 9. As it now stands, the case could challenge the underpinnings of campaign-finance law if it results in a ruling that strikes down the ban on corporate independent spending in political campaigns. Comments by several justices during the Court's unusual September session suggested the Court was ready to take that step, though it has several narrower options as well.

Then there is the case of the bankruptcy lawyers, set for argument on Dec. 1. In *Milavetz, Gallop & Milavetz v. United States,* the Court will decide whether lawyers fit the definition of "debt-relief agencies" that are barred by a federal law, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, from giving certain kinds of advice to individuals – and whether the law violates freedom of expression.

The lawyers assert that the statute, by barring certain expressions to clients, is overbroad and not narrowly tailored, and is "vastly disproportionate to any harm the Government seeks to redress." The government defends the law as an appropriate safeguard for consumers who should not be misled about bankruptcy.

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