

COURTSIDE

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We report in this issue on the first two First Amendment cases for which the Supreme Court has granted certiorari and a related student speech case that is still pending.

State Limits on Political Activities Funded by Fees from Union Nonmembers

On January 10, 2007, the Supreme Court will consider limitations on organized labor's political activities when it hears consolidated cases *Davenport v. Washington Education Ass'n*, No. 05-1589, and *Washington v. Washington Education Ass'n*, No. 05-1657. These cases address the constitutionality of Section 760 of Washington's Fair Campaign Practices Act, which prohibits unions from using nonmember agency shop fees "to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual."¹

The Washington Education Association (WEA) is the exclusive bargaining agent for Washington state educational employees, and, thus, both members, through dues, and nonmembers, through equivalent agency shop fees, shoulder the costs related to collective bargaining. While some portion of these funds goes toward collective bargaining, some other portion—often referred to as "nonchargeable"—supports ideological endeavors. The constitutionality of such an arrangement is well established, as long as the rights of dissenting nonmembers are adequately protected. Indeed, to comply with the Court's mandate in *Chicago Teachers*

Union v. Hudson,² WEA sends a so-called *Hudson* packet twice a year to nonmembers, offering them an opportunity to object to its nonchargeable expenditures and receive rebates of those funds. The State of Washington and a group of nonmember educational employees challenged this procedure in state court as a violation of Section 760's affirmative authorization requirement; the WEA countered that the authorization requirement was unconstitutional.

In a six-three decision, the Washington Supreme Court held for the WEA in both actions.³ The court held that the opt-in requirement is unconstitutional because it upsets the carefully constructed balance struck between members' and nonmembers' First Amendment rights. In particular, the court held that the affirmative authorization provision protects dissenting nonmembers at the expense of members, who face a heavier administrative burden, and supporting nonmembers, who face an additional burden on "their right to associate themselves with the union on political issues."⁴ Moreover, the court concluded under *Boy Scouts v. Dale*⁵ that Section 760 "significantly burdens the union's right of expressive association,"⁶ and does not pass constitutional muster because, as evidenced by *Hudson's* opt-out procedures, it is not the least restrictive means available to protect dissenters' rights.

The dissent vigorously disagreed.⁷ It noted first that, because the union's right to have employers withhold agency fees is statutory, the entire scheme could be repealed without violating any constitutional rights. Section 760's lesser limitation, the dissent reasoned, could not be constitutionally barred. The dissent also characterized *Hudson's* familiar opt-out procedure as a constitutional floor protecting dissenters' rights, not a ceiling limiting them. Finally, it took issue with the majority's expressive association holding, arguing that Section 760 could not impinge on any associational freedom because it deals solely with nonmem-

bers—individuals who have affirmatively chosen not to associate with the union.

Echoing the dissent's concerns, the petitions for certiorari, along with four amicus briefs filed in support, urged the Court to clarify this area of First Amendment law as well as to resolve conflicting federal court decisions. The cases provide an opportunity for the Court to sharpen the fuzzy contours of First Amendment doctrine in the union dues context. Not only must the Court take the next step in this line of cases and address whether *Hudson's* mandate represents a constitutional maximum or minimum standard, it will likely also address the extent of organized labor's right to associate as well as of dissenters' rights not to engage in political speech. The Court's opinion could have widespread ramifications for several similar state laws and federal limits on union-funded political activity.

Student Speech Rights

The scope of free expression at school is the subject of a recent grant of certiorari by the Supreme Court and the subject of another high profile petition. Both cases, which are from the Ninth Circuit, raise interesting questions about the leeway that administrators have to restrict messages that they believe are harmful to other students or to the school's mission.

*Frederick v. Morse*⁸

In *Morse*, Joseph Frederick, an Alaskan high school senior unfurled a large banner that read "BONG HITS 4 JESUS" at a televised school rally held to celebrate the carrying of the Olympic torch past the school. When the school's principal, Deborah Morse, saw the sign, she told Frederick, who was across the street from the school, to take down the banner. Frederick responded "What about the Bill of Rights and freedom of speech?" At that point, Morse took the banner and said it had to come down because it was in violation of the school's policy banning the display of material

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that promoted the use of illegal drugs. Frederick received a ten-day suspension.

Frederick then filed suit against Morse and the school board in federal court under § 1983. The district court granted summary judgment on the ground that his rights were not violated and because Morse was entitled to qualified immunity. The Ninth Circuit, per Judge Kleinfeld, reversed, finding both that Morse had violated Frederick's First Amendment rights, and that the violation was sufficiently clear that she was not entitled to qualified immunity.

The court noted that Morse defended her actions not on the ground that the banner would cause disruption, but that "its message would be understood as advocating or promoting illegal drug use." It found that as a result, "the question comes down to whether a school may, in the absence of concern about disruption of educational activities, punish and censor non-disruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school."

Reviewing *Tinker v. Des Moines Community Independent School District*⁹ and other school free expression cases, the court found that where the expression was not lewd, school-sponsored, or disruptive, a school could not restrict student speech merely because it disagreed with the message. The court conceded that the school might have had more authority to restrict speech "likely to interfere with the school's core educational mission" had it been displayed in the classroom, but it found the nonclassroom setting of the banner "did not interfere with the school's basic educational mission." It then concluded that its precedents were sufficiently clear to foreclose qualified immunity.

Morse and the school board petitioned for certiorari, which was granted on December 1, 2006, after the Supreme Court held the case over for four consecutive conferences.

Harper v. Poway Unified School District¹⁰
In *Poway*, Tyler Harper, a high school student, wore a T-shirt to school that said "BE ASHAMED, OUR SCHOOL HAS EMBRACED WHAT GOD HAS

CONDEMNED" on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back. Harper wore the shirt, and one with a similar message, on two consecutive days, one of which was the Day of Silence held by the school's Gay-Straight Alliance in what it described as an effort to increase tolerance.

On the second day Harper wore the shirt, he was given a dress code violation by a teacher and told to speak to an administrator. After speaking with the principal, Harper refused to remove the shirt and was told that he had to remain in the school's front office for the remainder of the day. Harper was not suspended or otherwise reprimanded.

Harper filed suit in federal court. The district court denied his motion for a preliminary injunction, and the Ninth Circuit, per Judge Reinhardt, affirmed over a vigorous dissent by Judge Kozinski. In affirming, the court found that the school had the authority to regulate Harper's speech as speech that "intrudes upon . . . the rights of other students" or "colli[des] with the rights of other students to be secure and to be let alone" under *Tinker*. The court stressed the minority status of homosexual students and contended that Harper's speech was "detrimental not only to their psychological health and well-being, but also to their educational development." It found that "[t]hose who administer our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development."

While the court recognized that there was political disagreement in the country over the status of homosexuals, it found that disagreement no different than past disagreement about whether "blacks or Jews should be permitted to attend private universities and prep schools." The court stressed that not all messages critical of a group could be restricted, noting that messages critical of "Young Republicans" or "Young Democrats . . . would certainly not be sufficiently damaging to the individual or the educational process to warrant limitation on the wearer's First Amendment rights." Finally, the court

noted that although the school's actions amounted to viewpoint discrimination, such restrictions could be appropriate in the school environment where vulnerable students were at risk.

Judge Kozinski, writing in dissent, found the case "difficult and troubling," but concluded that no precedent supported the proposition that a mere T-shirt could be considered an "invasion of the rights of others" within the meaning of *Tinker*. The dissent noted that Harper's T-shirt was not worn in isolation but in response to the Gay-Straight Alliance's Day of Silence, and thus should have been seen as part of "a political give-and-take" rather than a "campaign to demean or embarrass other students." According to the dissent, even if a T-shirt could be found sufficiently invasive, there was no basis for limiting the court's rule to students of minority status. "Students may well have their self-esteem bruised by being demeaned for being white or Christian, or having bad acne or weight problems, or being poor or stupid or any one of the infinite number of characteristics that will not qualify them for minority status."

After en banc review was denied over a dissent by five judges, Harper sought review in the Supreme Court. Harper stressed that Ninth Circuit had departed from the precedent of other circuits in finding that negative speech alone could interfere with the rights of other students, and in finding that schools could restrict student speech on one side of a political debate. In a procedural wrinkle stemming from Harper's graduation from high school, Harper's sister has filed a motion to intervene with the Court claiming the same First Amendment interests as her brother. Harper argues that if the Court does not grant the motion, his appeal of the preliminary injunction would be moot and that the Court should vacate the injunction entered against him so that his claim for damages can proceed. The school district's opposition to the petition is due at the end of December.

The two cases, *Harper* and *Frederick*, highlight the complexities of applying First Amendment law at school. In *Harper*, a T-shirt was found to be sufficiently offensive to a minori-

ty group to warrant restriction. In *Frederick*, the same court found the law sufficiently clear to deny qualified immunity to a school official who required a student to remove a pro-drug message that was described as contrary to the school's core educational mission. With the grant in *Frederick* and the possibility of a grant in *Harper*, the Supreme Court now has an opportunity to clarify this difficult area of the law.

Endnotes

1. WASH. REV. CODE § 42.17.760.
2. 475 U.S. 292 (1986).
3. 130 P.3d 352 (2006).
4. *Id.* at 360.
5. 530 U.S. 640 (2000).
6. 130 P.3d at 364.
7. *Id.* at 365 (Sanders, J., dissenting).
8. 439 F.3d 1114 (9th Cir. 2006)
9. 393 U.S. 503 (1969).
10. 445 F.3d 1166 (9th Cir. 2006).