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## *United States v. Williams*

On May 19, 2008, the Supreme Court issued a decision in *United States v. Williams*,<sup>1</sup> which involved a facial overbreadth and vagueness challenge to Section 2252A(a)(3)(B) of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (the PROTECT Act). That Act penalizes any person who “knowingly . . . advertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains” either “an obscene visual depiction of a minor engaging in sexually explicit conduct” or a “visual depiction of an actual minor engaging in sexually explicit conduct.”<sup>2</sup> Thus, unlike the PROTECT Act’s precursor, the Child Pornography Prevention Act of 1996 (CPPA), provisions of which were held to be unconstitutional in the Supreme Court’s *Ashcroft v. Free Speech Coalition* decision,<sup>3</sup> Section 2252A(a)(3)(B) is aimed at speech regarding purportedly pornographic materials, rather than the materials themselves.

In an opinion written by Justice Scalia and joined by the Chief Justice and Justices Stevens, Kennedy, Thomas, and Breyer, the Court found that Section 2252A(a)(3)(B) was not substantially overbroad by construing it quite narrowly. The Court found that the statute (a) included a scienter requirement; (b) was clearly aimed solely at “penaliz[ing] speech that accompanies or seeks to induce a transfer of child pornography”; and (c) required for prosecution either that (1) the defendant both subjectively believe that the material to be transferred is actual child pornography and that the speech that accompanies the transfer “must

objectively manifest a belief that the material is [actual] child pornography” or (2) the defendant must intend his speech to cause another to believe that the material to be transferred is actual child pornography.<sup>4</sup>

The Court was clear that Section 2252A(a)(3)(B) did not prohibit the advocacy of child pornography, but only “offers to provide or requests to obtain” child obscenity and child pornography, and that this prohibition was constitutional because “offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.”<sup>5</sup> Nor, according to the Court, does the statute ensnare movie distributors because it would be “implausible” that a movie distributor would believe that simulated movie sex contains actual children engaging in actual or simulated sex, or that the distributor would intend its customers to believe such.

The Court saw no basis for concern that Section 2252A(a)(3)(B) could ensnare those who transfer material and “mistakenly believe[] that material is [actual] child pornography,” stating that “[o]ffers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the offers is mistaken about the factual predicate of his offer.”<sup>6</sup> The Court found Section 2252A(a)(3)(B)’s “pandering and solicitation” provision to be an inchoate crime, an act that looks toward the commission of another crime, and as such, was punishable, like conspiracy and attempt, even if there was no ultimate crime committed. Yet the Court was clear that the statute did not apply to persons who share nonpornographic material, such as a “harmless picture of a child in the bathtub,” even if the defendant mistakenly believed such material was lascivious in nature.<sup>7</sup> In such cases, the Court held that the “statute has no application.”<sup>8</sup> Thus, the Court’s construction punishes those who mistakenly believe the material they send is actual child pornography, but only if that belief is reasonable.

The Court dismissed the dissent’s concern that its opinion would make

“an end-run around the First Amendment’s protection of virtual child pornography.”<sup>9</sup> The Court was clear that simulated child pornography “will be as available as ever, so long as it is offered and sought *as such*.”<sup>10</sup> The Court did concede one example, however, wherein the statute may ensnare otherwise-constitutionally-protected speech – where documentary footage of atrocities such as child rape is filmed and then transferred to someone else. The Court reasoned that one exception did not establish that Section 2252A(a)(3)(B) was *substantially* overbroad and stated that defendants were still free to challenge the statute on an “as applied” basis.

With respect to vagueness, the Court found clear the statute’s requirement “that the defendant hold, and make a statement that reflects, the belief that the material is child pornography; or that he communicate in a manner intended to cause another so to believe.” The Court stated that this requirement was not indeterminate nor subjective, such as a statute that prohibits “annoying” or “indecent” behavior.<sup>11</sup>

Justices Stevens and Breyer wrote separately, concurring in the judgment but asserting that Section 2252A(a)(3)(B) should be further limited to require an element of lasciviousness in the scienter requirement. Justices Souter and Ginsburg dissented on the ground that the statute was overbroad in that it criminalized speech about material that was constitutionally protected – virtual and simulated child pornography. “In failing to confront the tension between ostensibly protecting the material pandered while approving prosecution of the pandering of that same material,” the dissent believed that the Court was undermining its decisions in both *New York v. Ferber*,<sup>12</sup> and *Free Speech Coalition*.<sup>13</sup> Specifically, Justices Souter and Ginsburg were concerned that, after the Court’s decision in *Williams*, the government would cease prosecuting defendants for selling child pornography, which requires the government to prove that a real child is pictured, and would instead “prosecute for merely proposing a pornography transaction

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manifesting or inducing the belief that a photo is real child pornography, free of any need to demonstrate that any extant underlying photo does show a real child,” thus eliminating the “real-child requirement” established by *Free Speech Coalition*.<sup>14</sup>

### The First Amendment and Elections

The Supreme Court this past Term addressed four cases on the merits in which plaintiffs challenged features of state or federal election law, relying at least in part on the First Amendment. In keeping with recent trends, the only law that was struck down was one regulating campaign contributions.

In *Davis v. Federal Election Comm’n* (No. 07–320), the Court rejected the so-called “Millionaire’s Amendment” provision in the Bipartisan Campaign Reform Act of 2002. That provision was designed to help level the playing field between candidates for the House of Representatives who are wealthy and may spend unlimited amounts of their own money and opposing candidates who are relying on contributions from others. It allowed candidates to receive contributions up to three times larger per person if an opponent’s expenditures on his or her own behalf exceeded \$350,000.

The Court, in a 5–4 decision written by Justice Alito and joined by the Chief Justice and Justices Scalia, Kennedy and Thomas, held this provision unconstitutional because it raised the contribution limits only for the non-self-financing candidate, meaning that the two campaigns would be subject to disparate legal regimes. Justice Alito reasoned that this disparity operated as a penalty imposed on candidates who chose to exercise their constitutional right, recognized in *Buckley v. Valeo*,<sup>15</sup> to spend large sums of money on their own behalf. The Court therefore applied strict scrutiny, demanding a showing that the law furthers a compelling state interest, and held that the law failed such scrutiny. It held that the law in no way serves any anticorruption purpose, and held that the goal of equalizing electoral opportunities between the rich and the less affluent is not even a legitimate governmental purpose. Justice Stevens dissented, in an opinion joined by Justices Souter, Ginsburg and Breyer, arguing that the law was a legitimate and valid effort by Congress to address

the pernicious effects of allowing unlimited self-financing while regulating contributions from others.

But in three other cases challenging features of state election law not involving contribution limits, the Court rejected the challenges. In two of those, *Washington State Grange v. Washington State Republican Party*,<sup>16</sup> and *Crawford v. Marion County Election Board*,<sup>17</sup> the Court focused on the distinction between facial and as-applied challenges, refusing to hold the laws at issue facially unconstitutional in the absence of compelling evidence of pernicious effects. *Washington State Grange* involved Washington’s new open primary system, under which all candidates for an office appear on a single primary ballot, under whatever party label they may choose, and the top two then run in the general election. The law was said to violate the associational rights of political parties by creating the appearance that they had nominated candidates who chose to identify themselves with a given party label. *Crawford* involved Indiana’s new voter ID law generally requiring voters to show state-issued photo identification at the polls. This law was challenged on the ground that it will deter some voters from participating while serving very little practical purpose.

In each case, the Court emphasized the high burden facing those who bring facial challenges, finding the claimed burdens on constitutional rights insufficient in the absence of direct evidence of how the laws work in practice. For example, Justice Stevens’ plurality opinion for three Justices in *Crawford* expressed great skepticism about a constitutional challenge to a law that may burden voting by a small percentage of voters but imposes little burden on everyone else. Justice Scalia’s opinion for three more Justices went even further, arguing that the burdens on voting created by a given law must be assessed in general terms, without regard to the particular burdens felt by a portion of the electorate.

In the fourth case, *New York State Board of Elections v. Lopez Torres*,<sup>18</sup> the plaintiffs challenged New York’s system for nominating state trial judges, involving election of delegates to a one-day nomination convention just for that office, on the ground that it effectively allowed party bosses to hand-pick the nominees. The Court held that the

Constitution is not violated where state law effectively gives practical control of the nomination process to the leadership of a given party.

### Fleeting Expletives

The comedian George Carlin passed away in June at the age of 71, but the debate he sparked about “indecent” words on the airwaves still goes on – and is back in the Supreme Court for the first time in 30 years. At issue in *Federal Communications Commission v. Fox Television Stations, Inc.*, No. 07–582, is the FCC’s authority to regulate the broadcast of so-called “fleeting expletives” in broadcast media. Three decades ago in *FCC v. Pacifica Foundation*,<sup>19</sup> a closely divided Supreme Court upheld the FCC’s indecency finding against a radio station that aired, at two in the afternoon, Carlin’s “Filthy Words,” a twelve-minute monologue full of expletives. But the question now is whether the FCC can find programming indecent when the expletives are not repeated at all.

Prior to and for a period of time following the *Pacifica* decision, the FCC specifically disclaimed enforcement of its indecency regulations against broadcasts containing “fleeting” expletives that were not repeated. But beginning in 2004, the FCC announced that it was reversing its previous policy. In response to a complaint that the singer Bono had used the “F-Word” during NBC’s live broadcast of the Golden Globe Awards, the FCC found the broadcast “indecent” and “profane,” and announced that it would begin finding broadcasters liable for violations of the FCC’s indecency and profanity prohibitions upon broadcast of even isolated expletives. A later decision found that Fox’s broadcasts of the 2002 and 2003 Billboard Music Awards – during which Cher and Nicole Richie each used the “F-Word” once – were indecent under the revised indecency policy.

The Billboard Music Awards decisions were appealed to the Second Circuit, and that court reversed in the decision under review, *Fox Television Stations, Inc. v. FCC*.<sup>20</sup> Before the Second Circuit, the parties presented various arguments relating to the extent of First Amendment restrictions on regulation of non-obscene but indecent speech in broadcasting – echoing the arguments made to the Supreme Court in *Pacifica* years ago. A divided panel of the Second Circuit sidestepped the First Amendment issues,

however, concluding instead that the FCC had failed to provide a reasoned analysis under the Administrative Procedure Act (APA) for its change in policy on fleeting expletives. The Supreme Court granted review of that decision on March 17, 2008.

The narrow issue framed by the Second Circuit is whether FCC's rationale for changing its policy can survive the deferential review that courts traditionally give to regulatory agencies under the APA. Among other things, the Second Circuit concluded that the FCC's position that a single expletive may be sufficiently harmful to viewers as to be "indecent" in some contexts, but not others, was irrational. Judge Leval, dissenting, concluded that the emphasis on the context of the expletive was not irrational, but rather "an attempt on the part of the Commission over the years to reconcile conflicting values through standards which take account of context."<sup>21</sup> Indeed, the FCC argued that the context in which the single expletive is uttered is a legitimate basis for regulation grounded

in the *Pacifica* holding itself.

Lurking behind this dispute are substantial First Amendment questions. In *Pacifica*, the Court narrowly held that indecent speech that is not obscene under First Amendment jurisprudence may be regulated in the context of broadcasting – and subsequent cases have made clear that this rule applies to broadcast media alone among other media, in part because it is "uniquely pervasive" and accessible to children.<sup>22</sup> The Second Circuit's opinion includes extensive dicta suggesting that *Pacifica's* rationale for permitting regulation of indecency in broadcasting has been eroded, or at least cannot be extended beyond regulation of Carlin's twelve minutes of "Filthy Words" to allow regulation of merely fleeting words. But whether the Supreme Court will address the First Amendment in this case is unclear – even if the FCC prevails, it is arguable that the Supreme Court could remand for further consideration of the First Amendment question. *FCC v. Fox Television* may not be the last word in the

continuing debate over "filthy" words. 

## Endnotes

1. 128 S.Ct. 1830 (2008).
2. 18 U.S.C. § 2252A(a)(3)(B).
3. 535 U.S. 234 (2002).
4. 128 S.Ct. at 1839–1840.
5. *Id.* at 1842.
6. *Id.* at 1842–43.
7. *Id.* at 1843.
8. *Id.*
9. *Id.* at 1844.
10. *Id.*
11. *Id.* at 1846.
12. 458 U.S. 747 (1982).
13. *Id.* at 1849 (Souter, J., dissenting).
14. *Id.* at 1853 (Souter, J., dissenting).
15. 424 U.S. 1 (1976) (*per curiam*).
16. 128 S.Ct. 1184 (2008).
17. 128 S.Ct. 1610 (2008).
18. 128 S.Ct. 791 (2008).
19. 438 U.S. 726 (1978).
20. 489 F.3d 444 (2d Cir. 2007).
21. *Id.* at 471 (Leval, J., dissenting).
22. *Pacifica*, 438 U.S. at 748.