

The Supreme Court decided two major First Amendment cases during the 2008-2009 Term. In addition, it has sought reargument in a major case involving the permissibility of government restrictions on corporate speech incident to the electoral process.

First, in *Pleasant Grove City v. Summum*, 77 U.S.L.W. 4136 (February 25, 2009), the Supreme Court declared that the Free Speech Clause of the First Amendment did not require a city to permit a religious group, Summum, to erect permanently a stone monument festooned with the “Seven Aphorisms of SUMMUM” in Pioneer Park, a public park owned and operated by the city. *Id.* at 4137. Writing for the majority, Justice Alito explained that the permanent placement of a monument in the park constituted a form of government speech; thus, the prior acceptance and placement of a monument featuring the Ten Commandments was not private speech in Pioneer Park, but rather the city’s own speech:

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech. . . . In this case, it is clear that the monuments in Pleasant Grove’s Pioneer Park represent government speech.

Id. at 4139.

In so holding, the Supreme Court reject the Tenth Circuit’s view that by selecting some privately provided monuments for display, while rejecting others (including the proposed Summum monument), the city had engaged in unlawful content and viewpoint discrimination in traditional public forum. *Id.* at 4141-42. The Justices did not consider whether, as government speech, the monument might constitute an Establishment Clause violation. *See Van Orden v. Perry*, 545 U.S. 677 (2005).

The second major case, *Federal Communications Commission v. Fox Television Stations, Inc.*, 77 U.S.L.W. 4337 (April 28, 2009), overturned a Second Circuit decision that invalidated a revised FCC policy on “fleeting expletives” that imposed stricter liability rules on broadcasters for profane utterances contained in live broadcasts. Applying *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983), Justice Scalia, writing for the majority, found that “the Commission’s new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious.” *FCC v. Fox Television Stations, Inc.*, 77 U.S.L.W. at 4341.

Significantly, however, the majority did not consider First Amendment objections to the revised policy because the Second Circuit had not reached these questions:

The Second Circuit did not definitively rule on the constitutionality of the Commission’s orders, but respondents nonetheless ask us to decide their

validity under the First Amendment. This Court, however, is one of final review, “not of first view.”

Id. at 4345. Accordingly, the Supreme Court did not consider whether *Red Lion* reduced free speech and free press protections remain the governing standard of federal broadcast regulations. Justice Thomas, however, in a concurring opinion, indicated his view that television and radio are no longer “uniquely pervasive” and that the factual predicates for the *Red Lion* rule no longer exist (if they ever really did). *See id.* at 4345-4347 (Thomas, J., concurring).

Depending on whether the new Obama Administration seeks to enforce the Bush Administration’s policies on broadcast indecency (including the fines against Fox Television Stations), it is possible that this case could return to the Supreme Court. Should that happen, the Justices might then revisit the continuing validity of the reduced *Red Lion* protection afforded television and radio broadcasters.

Finally, the Supreme Court declined to reach the merits in *Citizens United v. FCC*, a case challenging the production and distribution of *Hillary: The Movie* (a documentary opposing the election of then-Senator Hillary Clinton as president) as a violation of federal election laws limiting corporate and union speech advocating or opposing candidates for federal office. Instead of reaching the merits before the close of the current term, the Justices have ordered reargument of the case on September 9, 2009, with the parties directed to address whether or not *Austin v. Michigan Chamber of Commerce* and *McConnell v. Federal Elections Commission* should be overruled insofar as both sustained limitations on corporate and union political speech aimed at supporting or opposing a candidate for public office. *See* Adam Liptak, *High Court Poised to Rewrite Spending Rules*, N.Y. TIMES, June 29, 2009, at A1. If the Supreme Court overrules its prior precedents prohibiting direct corporate expenditures to support or oppose candidates for public office, this would represent a major erosion of the post-*Buckley* principle that the First Amendment permits government to regulate corporate political speech based on the assumption that direct forms of corporate participation in contested elections do more harm than good to the electoral process and have an intrinsically corrupting effect.

Citizens United could prove to be a landmark case on the scope of permissible government regulation of corporate and union political speech. The case bears close watching and could effectively replace the standards set forth in *McConnell* and *Austin*.